

**COMPLAINANT-CENTRED JUSTICE?**  
**A CRITICAL ANALYSIS OF SEXUAL ASSAULT AND THE MEANING**  
**OF 'SEXUAL' UNDER THE SEXUAL OFFENCES ACT 2003**

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## **Abstract**

The Sexual Offences Act 2003 radically reformed the law on sex offences with the aim of providing coherent and clear sex offences that protect individuals. This thesis assesses the extent to which the new offence of sexual assault is sufficiently complainant-centred. The law on indecent assault was unclear in its scope and this thesis examines the conceptual and practical difficulties in designating 'inherently' indecent contact with another. Analysing closely the decision in *R v Court* [1989] AC 28 and highlighting the 'context-dependent' nature of sexual assault, this part of the inquiry aims to provide a comparison against which the offence of sexual assault in s.3 of the SOA 2003 can be evaluated. The essential problem the law has to deal with is how to respond to those, probably rare, cases in which the 'sexual' nature of an act is disputed or ambiguous. In attempting to protect members of society from unwanted sexual touching, the law has never adequately acknowledged or included complainants' experiences. This thesis identifies and evaluates five possible legal approaches to the meaning of 'sexual', which draw on existing theories of criminal responsibility. The definition of 'sexual' in s.78 of the SOA 2003 will be criticised for being unclear, ambiguous and insufficiently complainant-centred: the complainant's interpretation of the touching is not a legally defined 'circumstance' to be considered in designating the conduct as 'sexual'. Some aspects of the *mens rea* of sexual assault are unclear and controversial, and could be modified to make the law more 'complainant-centred'. In particular, s.3 should be amended to include conviction of unintentional, yet culpable, sexual touchings. Whilst highlighting the insufficiently complainant-centred nature of s.3, this thesis acknowledges that there is a limit to how far the law on sexual assault can be complainant-centred if fundamental criminal law principles are to be upheld.

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## Introductory Chapter

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### 1.1 INTRODUCTION

Sexual offences and the fear of sexual offences have a profound and damaging effect on individuals and communities. The Sexual Offences Act 2003<sup>1</sup> (SOA 2003) in force from 1<sup>st</sup> May 2004<sup>2</sup> has radically reformed the law on sex offences, with the aim of providing clear and coherent offences that protect individuals. The Act abolishes some and re-defines other of the pre-2003 sexual offences, whilst introducing many new, often overlapping, offences concerning invasions of sexual autonomy. One of the most striking characteristics of academic research and commentary in the field of sexual violence is that it is primarily focused on the crime of rape, the protection of vulnerable victims and the definition of consent.<sup>3</sup> Rape is arguably the most controversial and publicised sexual offence and potentially the worst act committed by one person on another aside from murder. However, to date there is little research considering the scope and practical application of many of the new offences created by the SOA 2003, for example sexual assault under s.3 of the Act.

Sexual assault is an important offence because it prohibits any non-consensual sexual touching, even through clothing, and therefore covers a wide range of offending behaviour. The wrongfulness of sexual assault derives from the fact that the victim has a

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<sup>1</sup> Hereinafter 'SOA 2003' or 'the Act'.

<sup>2</sup> The Sexual Offences Act 2003 (Commencement Order) 2004. Sections 138 and 141 to 143 came into force on Royal Assent.

<sup>3</sup> See for example: J. Temkin, *Rape and the Legal Process*, 2<sup>nd</sup> edn (Oxford University Press, Oxford, 2002); J. Temkin & B. Krahe, *Sexual Assault and the Justice Gap: A Question of Attitude* (Hart Publishing, Oxford, 2008); E. Finch & V.E. Munro, 'The Sexual Offences Act 2003: Intoxicated Consent and Drug Assisted Rape Revisited', (2004) *Crim L R* 789; V. Munro & E. Finch, 'The Demon Drink and The Demonised Woman: Socio-Sexual Stereotypes and Responsibility Attribution in Rape Trials Involving Intoxicants' (2007) 16 *Social and Legal Studies* 591; J. Spencer, 'The Sexual Offences Act 2003: Child and Family Offences' [2004] *Crim L R* 347; J. Temkin & A. Ashworth, 'The Sexual Offences Act 2003: (1) Rape, Sexual Assaults and the Problems of Consent' [2004] *Crim L R* 328; L. Kelly, J. Lovett & L. Regan. *A Gap or a Chasm: Attrition in reported rape cases*. Home Office Research Study 293 (HMSO, London, 2005).

proprietary right over her own body. It is her body, she owns it, nobody else may use it without her saying so.<sup>4</sup> Sexuality is an intrinsic part of one's personality, it is one mode of expressing that personality in relation to others, and it is therefore fundamental that one should be able to choose whether to express oneself in this way. Even where a sexual assault involves no significant physical force, it constitutes harm in the sense that it invades a deeply personal zone, gaining non-consensually that which should only be shared consensually. The right of sexual autonomy provides that people have the right to decide with whom to have sexual relations.<sup>5</sup> Much of our personal identity is tied to our gender and sexual expression and hence to our sexual self-determination. Sexual assault is a form of being subjected to another's dominion. In sexual interactions, unlike in other interactions, it is even more important that we are able to control whom we are intimate with, since sexual relationships expose us more than other relationships and thereby make us more vulnerable. This is a reason why non-consensual sexual touching, even as a 'joke' is offensive. It makes the recipient merely a sexual being, vulnerable and exposed.

Section 3 of the SOA 2003 also has practical significance for the courts: in 2008, 246 people were tried at the Crown Court for sexual assault on a male and 2,109 for sexual assault on a female;<sup>6</sup> in the same year 19 people were proceeded against at magistrates' Courts for sexual assault on a male and 219 for sexual assault on a female.<sup>7</sup> However, section 3 was barely discussed in Parliamentary debate on the SOA 2003 and the

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<sup>4</sup> J. Gardner. & S. Shute, 'The Wrongness of Rape' in J. Horder (ed.), *Oxford Essays in Jurisprudence* (4<sup>th</sup> series) (OUP, Oxford, 2000) p.205.

<sup>5</sup> The leading proponent of this view is S. Schulhofer, *Unwanted Sex: The Culture of Intimidation and the Failure of Law* (Harvard University Press, London, 1998). See also J. Larson, 'Women Understand so Little, They Call My Good Nature "Deceit": A Feminist Rethinking of Seduction' (1993) *Columbia Law Review* 93.

<sup>6</sup> See *Criminal Statistics Supplementary Tables*, Vol.2, Table S 2.1(A) 'Defendants Tried And / Or Sentenced At The Crown Court By Offences, Sex And Result' (HMSO, London, 2008). In comparison, in 2008, 108 people were tried at the Crown Court for rape of a male and 1,714 for rape of a female.

<sup>7</sup> See *Criminal Statistics Supplementary Tables*, Vol.1, Table S1.1 (F) 'Persons aged 18 and under 20 Proceeded Against at magistrates' Courts by Offence, Sex and Result' (HMSO, London, 2008). In comparison, in 2008, 20 people were proceeded against at magistrates' Courts for rape of a male and 238 for rape of a female.

consideration of sexual assault, if at all, in most modern criminal law textbooks, is limited to a paragraph(s) merely describing the relevant legal test.<sup>8</sup> Even those textbooks that focus specifically on sexual offences confine their analysis to a few pages.<sup>9</sup> This thesis attempts to bridge that gap, analysing doctrinal and theoretical approaches to sexual assault: how could the offence be defined, how is the offence defined and how should it be defined? It examines critically the case for a more 'complainant-centred' approach to sexual assault and argues that there are certain aspects of the definition that could be clarified and/or modified to render the offence more complainant-centred. Defining offences in a complainant-centred way is advantageous in placing complainants' experiences at the heart of criminal law and widening the scope of behaviour amenable to prosecution. However, such approaches also bear significant problems and dangers for criminal justice: they might lead to 'net widening'; they might lead to uncertainty and no fair warning; and they might result in unfair labelling.

During the 1980s and 1990s, the proportion of cases reported as rape and indecent assault that did not lead to a successful conviction rose dramatically.<sup>10</sup> This provided impetus for a thorough review of the sexual offences law. In July 2000, the Home Office published a consultation paper, *Setting the Boundaries: Reforming the law on Sexual Offences*,<sup>11</sup> seeking opinions on proposals to reform the whole law of sexual offences. This thesis will evaluate the modernisation process, scrutinizing the decision to abolish

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<sup>8</sup> For example: A. Ashworth, *Principles of Criminal Law*, 6<sup>th</sup> edn (Oxford University Press, Oxford, 2009) describes the offence in 2 pages; D. Ormerod, *Smith and Hogan Criminal Law*, 12<sup>th</sup> edn (OUP, Oxford, 2008) in just over 1 page; M.J.Allen, *Textbook on Criminal Law*, 10<sup>th</sup> edn (OUP, Oxford, 2009) in 2 and a half pages.

<sup>9</sup> For example: R. Card, A. Gillespie & M. Hirst, *Sexual Offences* (Jordan Publishing Limited, Bristol, 2008) analyses sexual assault in just over 3 pages; P. Rook & R. Ward, *Rook and Ward on Sexual Offences Law & Practice* (Sweet & Maxwell, London, 2008) in 8 pages; K. Stevenson, A. Davies & M. Gunn, *Blackstone's Guide to the Sexual Offences Act 2003* (Oxford University Press, Oxford, 2004) in just under 6 pages.

<sup>10</sup> See the *Report of the Joint Investigation into the Investigation and Prosecution of Cases Involving Allegations of Rape* (HMCPSI, 2002).

<sup>11</sup> *Setting the Boundaries: Reforming the law on sex offences Vol. 1* (Home Office Communications Directorate, London, 2000).

the offence of indecent assault and introduce offences of assault by penetration (s.2) and sexual assault (s.3). Prior to the SOA 2003 the offence of indecent assault<sup>12</sup> prohibited an assault or battery perpetrated in 'circumstances of indecency'. In *Court*,<sup>13</sup> the House of Lords gave detailed guidance on how the question of indecency should be left to the jury or magistrates. Lord Ackner suggested that matters might be clarified for the jury if they were to be asked whether they thought 'right-minded persons would consider the conduct indecent or not'. It was in the context of this question that the House of Lords identified a tripartite categorisation of conduct: (a) conduct that was inherently decent; (b) conduct that was inherently indecent; and (c) conduct that may or may not be indecent. Designating certain conduct as inherently decent or indecent proved problematic and these same problems plague the definition of 'sexual' under s.78.

The legal definition of sexual assault provides the normative framework for judging allegations, specifying the criteria that need to be met to find a defendant guilty. Sexual assault prohibits any unwanted sexual touching, ostensibly promoting the basic value of respect for sexual autonomy and highlighting how this value is so significant as to justify criminalization. Section 3(1) of the SOA 2003 provides as follows:

- 'A person (A) commits an offence if-
- (a) he intentionally touches another person (B),
  - (b) the touching is sexual,
  - (c) B does not consent to the touching, and
  - (d) A does not reasonably believe that B consents.'

Unlike section 1, which clearly defines all behaviour prohibited by the crime of rape (thereby limiting it to the non-consensual penetration of the vagina, anus or mouth with the penis) section 3 does not list those types of touching that constitute sexual assault. Sexual assault covers a broad range of unacceptable behaviour of varying

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<sup>12</sup> Sexual Offences Act 1956, ss. 14-15.

<sup>13</sup> [1989] AC 28.

seriousness. At the more serious end of the spectrum, sexual assault prohibits contact between the naked genitalia of the offender and the naked genitalia, face or mouth of the victim. At the lesser serious end of the continuum sexual assault also forbids any sexual contact between part of the offender's body (other than the genitalia) with part of the victim's body (other than the genitalia). The SOA 2003 therefore introduces a wide offence with ambiguity stemming from the broad definition of the central elements of 'touching' and 'sexual'. Touching is defined in s.79(8) to include 'touching- (a) with any part of the body, (b) with anything else, (c) through anything, and in particular includes touching amounting to penetration'. Touching is a very broad term, which has no *de minimis* exception and can therefore be described as a complainant-centred provision. Sexual assault is however a narrower offence than indecent assault because it does not extend to situations where D intentionally or recklessly causes C to fear an immediate, unlawful sexual touching.

Often, as with several other criminal offences, sexual assault appears to be an 'I know it when I see it' crime; in the sense that there is an innate quality that makes certain touching 'sexual' and that this will be obvious to a reasonable observer. However, when one delves deeper into the possible meaning and interpretations of 'sexual' it becomes apparent that it is far more complex than first thought. How, for example, do we distinguish conceptually and in practice between a 'sexual' kiss and a 'non-sexual' kiss? As Moulton remarks, 'Some kissing is sexual, some is not. Sometimes looking is sexual; sometimes *not* looking is sexual.'<sup>14</sup> The term 'sexual' does not have an essential quality, but is socially and historically contingent. It is difficult to identify a dominant or mainstream sexual standard (in the sense of a common consensus on appropriate sexual behaviour) in modern British society and thus to establish the scope of an offence of sexual assault, thereby distinguishing it from common assault. The law on sexual assault has to set out standards of behaviour in a complex cultural situation where the

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<sup>14</sup> J. Moulton, 'Sexual Behaviour: Another Position' in *The Philosophy of Sex: Contemporary Readings*, 4th edn. (eds) A. Soble & N. Power (Rowman and Littlefield, Totowa, 1980) p.45.



boundaries of acceptable sexual behaviour are unclear. Parliament has indicated that the element of sexuality makes an assault potentially much more serious than a non-sexual assault: the maximum penalty on indictment for sexual assault is ten years' imprisonment and six months imprisonment or a fine not exceeding the statutory maximum (currently £5000)<sup>15</sup> or both on summary conviction,<sup>16</sup> whereas common assault and battery are triable summarily only with a maximum penalty of six months' imprisonment, or a fine, or both.<sup>17</sup>

The legal meaning of the term 'sexual' could be judged from several different perspectives. This thesis identifies the possible normative choices that the term 'sexual' raises, analyzing the approaches against the fundamental aims and principles of criminal law. Sexual assault could be defined as an assault that involves the touching of certain body parts, basing proscription on a list of areas that have certain anatomical qualities. Alternatively, a circular formula may be employed, whereby an action or touching is 'sexual' if a reasonable person would consider it 'sexual'. This might involve consideration of the circumstances and purpose of the action or whether the action is 'objectively' 'sexual'. Other possibilities include an approach that focuses on the defendant's attitude to the 'sexual' nature of the touching, a definition that invokes a kind of typical complainant's perspective or a definition that emphasises the perspective of the individual complainant. This thesis argues that there are cogent arguments for adopting a complainant-centred approach to defining 'sexual', while acknowledging the importance of orthodox subjectivist approaches to liability.

Section 78 defines 'sexual' in the following terms:

'For the purposes of this Part (except section 71), penetration, touching or any other activity is sexual if a reasonable person would consider that-

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<sup>15</sup> Criminal Justice Act 1982, s.74, as read with the Magistrates' Courts Act 1980 s.32(9).

<sup>16</sup> s.3(4).

<sup>17</sup> Criminal Justice Act 1988, s.39.

- (a) whatever its circumstances or any person's purpose in relation to it, it is because of its nature sexual, or
- (b) because of its nature it may be sexual and because of its circumstances or the purpose of any person in relation to it (or both) it is sexual.'

Arguably, s.78 sets out an approach to, rather than a definition of the meaning of 'sexual'. Section 78 is tautological and assumes the reader already has an understanding of the meaning of 'sexual'. It also mistakenly suggests that some actions are because of their nature 'sexual', failing to take account of the context-dependent nature of the term 'sexual'. Section 78 also refers to 'circumstances' and the 'purpose of any person' without providing any further indication of what these terms mean. Section 78 is unduly complex and fails to make any explicit reference to the complainant's experience of the action as a circumstance to be taken into consideration by the jury or magistrates. It is likely that most cases of sexual assault will be unproblematic, involving touching of the genitalia or female breasts. However, ambiguous cases will arise. The concern of this thesis is with those ambiguous cases at the fringes of liability, where the 'sexual' nature of the conduct is in dispute.

The fault element of a crime attempts to ensure that only those who are morally culpable will be punished by the criminal courts. The *mens rea* of sexual assault requires that D must 'intentionally' touch another person and must 'not reasonably believe' that the other person consents to the touching. This thesis will examine three issues in respect of sexual assaults fault element: (1) D's attitude to the likelihood of touching; (2) D's attitude to the 'sexual' of the touching; and (3) D's attitude to consent. This thesis will argue for the definition of sexual assault to be extended to include liability for reckless or careless touchings that are culpable. The law is unclear as to whether the defendant must appreciate the 'sexual' nature of the touching. This is one aspect of the definition that ought to be resolved to make the offence more complainant-centred; requiring that the defendant be aware of the 'sexual' nature of the touching might deflect the court's attention away from the invasion of sexual autonomy. The law on

consent allows for the reasonableness of a belief to be determined in light of the defendant's characteristics and it will be argued that this is inappropriate because it might result in juries responding to the reasonable belief test in divergent ways and might further reinforce stereotypes and value judgments about 'appropriate' sexual behaviour. Accordingly, the law is significant for not only what it does say but also for what it does not say.

One key issue in contemporary criminal justice is the extent to which victims' rights and interests can be accommodated within criminal procedure, evidence law and substantive offence definitions. In recent years, academic and political interest in victims of crime has continued to grow.<sup>18</sup> Around the world, there have been numerous 'victim-centred' reforms in criminal law and procedure concerning financial, psychological, medical and justice needs resulting from the crime, as well as the criminal justice response to crime. Various pro-victim initiatives and the advent of forms of restorative justice is evidence of a shift in criminal justice policy towards acknowledging that complainants have needs and interests and that the criminal justice system could and should acknowledge and respond to them. Academic evaluation of 'victims' rights' has been dominated thus far by procedural issues (including participation in sentencing), but substantive law has been a somewhat neglected area.<sup>19</sup> This thesis addresses the specific debate about the extent to which complainants' perspectives and interests can and should be the focus of substantive criminal offences, most notably sexual assault.

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<sup>18</sup> See J. Goodey, *Victims and Victimology: Research, Policy and Practice* (Pearson Education Limited, Harlow, 2005); A. Crawford & J. Goodey, *Integrating a Victim Perspective within Criminal Justice*. (Ashgate, Dartmouth, 2000); Home Office, *Justice for All* (Cmnd 5563), July 2002; D. Miers, 'The Responsibilities and Rights of Victims of Crime' (1992) 55 *MLR* 482.

<sup>19</sup> See for example: E. Erez, 'Who's Afraid of the Big Bad Victim? Victim Impact Statements as Victim Empowerment and Enforcement of Justice [1999] *Crim L R* 545; A. Ashworth 'Victims' Rights, Defendants' Rights and Criminal Procedure' in A. Crawford & J. Goodey, *Integrating a Victim Perspective within Criminal Justice*. (Ashgate, Dartmouth, 2000); J. Doak, 'The victim and the criminal process: an analysis of recent trends in regional and international tribunals (2003) 23 *LS J* 1; I. Edwards, 'An ambiguous participant: the crime victim and Criminal Justice Decision-Making' (2004) 44 *Brit J of Crim* 967.

Prior to the implementation of the SOA 2003, there persisted a commonly held view that the law on rape and other sexual offences, in terms of the legal definition *per se*, procedure and evidence was biased in favour of the male defendant and against the complainant who was predominantly female.<sup>20</sup> Until fairly recently criminal lawyers and criminologists have focused on the defendant and assessments of his or her liability, leaving the complainant as a vague figure on the sidelines of justice. This thesis analyses the extent to which sexual assault, as defined under s.3 is sufficiently complainant-centred. The focus is on one specific offence, sexual assault, and its substantive definition. Namely, this thesis is an inquiry into the ultimate question of what the definition of sexual assault is and should be.

#### 1.1.1 The nature and scope of victims' and defendants' 'rights'

The Government has committed itself to 'redressing the balance' between victims' and defendants' rights and putting victims 'at the heart' of the criminal justice system on the basis that criminal justice has been unfairly weighted towards defendants for too long.<sup>21</sup> This section will consider what we mean when we speak of such 'rights' and why victims and defendants need 'rights' at all. The following is not intended to constitute an exhaustive analysis of the 'rights' of victims and defendants in the criminal justice system and whether the two are incompatible, because other writers have explored the tensions in detail.<sup>22</sup> Nevertheless, before outlining the criteria that this thesis will employ to evaluate the complainant-centred nature of sexual assault, it is worth setting

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<sup>20</sup> See L. Kelly & J. Radford, 'The Problem of men: feminist perspectives on sexual violence' in P. Scraton (ed) *Law, Order and the Authoritarian State* (OUP, Oxford, 1987); S. Edwards, *Sex and Gender in the Legal Process* (Blackstone Press, London, 1996); K. Stevenson, 'Observations on the Law Relating to Sexual Offences: the Historic Scandal of Women's Silence' [1999] 4 *Web JCLI*; C. Conley 'Rape and Justice' (1986) 29 *Victorian Studies* 519.

<sup>21</sup> Home Office, *Justice for All*, Cm. 5563 (2002) at para 0.2.

<sup>22</sup> See J. Doak, *Victims' Rights, Human Rights and Criminal Justice: Reconceiving the Role of Third Parties* (Hart Publishing, Oxford, 2008); A. Bottoms & J. Roberts, *Hearing the Victim: Adversarial justice, crime victims and the state* (Willan, Cullompton, 2010).

the scene in order to contextualise discussion about the role and rights of victims in the criminal law.

#### (a) Victims' rights

Traditionally the idea of a crime is that it is something that requires the intervention of the State and the tensions in the criminal process were presented by academics diametrically as those between the defendant and the state. Recent political and academic interest in the crime victim has attempted to challenge orthodox conceptions of criminal justice, positing the crime victim as a stakeholder with individual rights and needs. Over the last 30 years, the idea of 'victims' rights' has featured prominently in political, criminological and legal discourse.<sup>23</sup> However, there is considerable ambiguity as to the origin and substances of 'victims' rights'. There are a number of key rights, which legally binding and non-legally binding international instruments suggest that victims ought to be entitled to.<sup>24</sup> These include, amongst others: compassion and respect; information on proceedings and rights; presentation of victims' views; legal aid; swift case processing; protection of privacy and identity and compensation from the offender and the State. Since the Labour Government first expressed its interest in victims in its 1997 election manifesto<sup>25</sup> there has been a succession of policies and legislative changes presented as addressing the needs of victims. These reforms have been backed up by lists of service standards in the form of the Prosecutors' Pledge<sup>26</sup> and the Victims' Code of Practice.<sup>27</sup>

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<sup>23</sup> J. Shapland, J. Willmore & P. Duff, *Victims in the Criminal Justice System* (Gower, Aldershot, 1985); M. Maguire & J. Pointing, *Victims of Crime: A New Deal?* (Open University Press, Milton Keynes, 1988).

<sup>24</sup> UN General Assembly, *Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power* (1985); Council of Europe's, *Recommendation on the Position of the Victim in the Framework of Criminal Law and Procedure* (1986); Home Office, *Victims' Charter* (1996); EU Council's, *Framework Decision on Victims' Standing in Criminal Proceedings* (2001).

<sup>25</sup> New Labour, *New Labour, New Life for Britain* (1997) p.1.

<sup>26</sup> [http://www.cps.gov.uk/publications/prosecution/prosecutor\\_pledge.html](http://www.cps.gov.uk/publications/prosecution/prosecutor_pledge.html) [Online] (Accessed: March 2, 2011)

<sup>27</sup> Home Office, *The Code of Practice for Victims of Crime* (2005).

The concept of 'victims' rights' is frequently invoked in relation to two categories of rights: 'service rights' and 'procedural rights'.<sup>28</sup> 'Service rights' include the right to be kept informed about the progress of the case, the provision of facilities and the right to counselling and other types of support. 'Service rights' have little effect on the position of defendants, but often require additional resources to be effective. More controversial than 'service rights' is the idea that victims ought to be able to exercise a right of participation within the criminal justice system. 'Procedural rights' or what might be labelled 'participation rights' refer to rights in relation to the trial process itself and have the potential to undermine the rights of defendants. Procedural rights might include victims being 'encouraged, permitted, required or entitled to have input into criminal justice decision-making processes'.<sup>29</sup>

The issue of victim participation in criminal justice is contentious and does not feature at all in any of the Council of Europe's recommendations.<sup>30</sup> International standards give us little indication of the extent to which victims ought to be able to participate, or how far their decisions should hold sway. Hall presents two reasons to explain the lack of certainty of the 'right to participation'. First, he argues that 'different legal traditions conceptualise participation and the normative role of victims in vastly different ways'.<sup>31</sup> The second reason arises from the lack of consensus as to what 'participation' actually entails. Edwards advocates four types of victim participation: control, consultation, information-provision and expression.<sup>32</sup> The first type of participation would require victims to have control over a particular decision. There would be an obligation on the

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<sup>28</sup> E.g. A. Ashworth, *The Criminal Process: an Evaluative Study*, 2<sup>nd</sup> edn (OUP, Oxford, 1998) p.34; I. Edwards, 'An Ambiguous Participant: The Crime Victim and Criminal Justice Decision-Making' (2004) 44 *Brit.J.Criminol*, 967.

<sup>29</sup> Edwards, *ibid* at 968.

<sup>30</sup> See the Council of Europe's, *Recommendation No. R(85) 11 on the Position of the Victim in the Framework of Criminal Law and Procedure* (1985) and *Recommendation No. R(87) 21 on Assistance to Victims and the Prevention of Victimization* (1987). These regulations concerning the situation of victims of crime dealt respectively with, protecting victims of crime and safeguarding their interests at each stage of the criminal procedure and developing an aid and support system for victims. Neither document discussed the issue of victim participation in criminal justice.

<sup>31</sup> Doak, *op cit*, n22 at p.157.

<sup>32</sup> Edwards, *op cit*, n 27 at 974.

criminal justice decision-maker to seek and apply the victim's preference and such input would be determinative. The three other forms of participation Edwards categorises as 'non-dispositive'. In each, the victim is not the decision-maker, but his input might influence the decision. The second type of participation, consultation, means the 'process of ascertaining and considering opinions about the appropriate policy to be formulated or decision to be taken'.<sup>33</sup> The third type of participation is to seek and consider victim information. For example, Victim Personal Statements (VPS) provide a formal opportunity for the victim to explain in their own words how the crime has affected them physically, emotionally and financially. The fourth type of participation is expression, which consists of the optional supply of information, and/or expression of emotion. The introduction of the VPS scheme and, more recently, victim advocates, does indicate that opportunities for participation in the criminal justice system are slowly improving. However, such rights are most common in the area of sentencing and whether victim participation at the trial stage of proceedings can be facilitated, whilst at the same time preserving core due process values is a challenge that adversarial jurisdictions will have to confront.

This thesis will consider a third possible category of victims' rights, which will be referred to as 'substantive rights'. These are the 'rights', or what might more appropriately be labelled the 'interests', of victims in substantive criminal law. The idea here is that victims' interests should be respected and their experiences taken into account in substantive law. These are not formal rights but interests that should be respected by the criminal law. This will be labelled a 'complainant-centred' approach to justice. Thus, the concern of this thesis is not complainant's rights in relation to criminal procedure but the extent to which the definition of substantive criminal offences, most notably sexual assault, could and should acknowledge or take account of the complainant's experience of an action.

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<sup>33</sup> *Ibid.*

### (b) Meaning of 'complainant-centred'

Orthodox subjectivist theory, which is traditionally applied in mainstream English criminal law, is concerned with the defendant and his blameworthiness. Orthodox subjectivists argue that the criminal law is about the just allocation of blame and responsibility, reserving the criminal sanction only for those who deserve it.<sup>34</sup> A 'complainant-centred' offence is one in which the complainant's experience of the alleged act has a prominent place in determining whether and for what offence the defendant is liable. This may involve a lack of correspondence between D's advertence and C's experience, in the sense that C's experience may have been unforeseen by D. A 'complainant-centred' approach to substantive criminal law emphasises the conduct prohibited by the law and evaluates that conduct from the complainant's perspective. A 'complainant-centred' approach focuses on the interests of complainants that have been violated by the defendant and denotes an awareness of the centrality of the complainant and their rights and interests in the criminal justice system. A 'complainant-centred' offence is one in which the law appropriately labels conduct and communicates the nature of the offender's transgression to the complainant's satisfaction.

'Complainant-centred' offences are a species of constructive liability: they reduce 'rule of law' protections and respect for autonomy by rendering D liable for harm caused irrespective of D's foresight of that harm;<sup>35</sup> and to that extent conviction turns on the chance element of whether or not the more serious (unintended and unforeseen) harm results.<sup>36</sup> Arguments for constructive liability posit that anyone who decides to transgress the criminal law should be held liable for all the consequences that ensue, even if they are more serious than expected. Gardner argues that, by intentionally attacking another, D changes his normative position, 'so that certain adverse

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<sup>34</sup> See chapter 7.

<sup>35</sup> Unlawful act manslaughter is a 'complainant-centred' offence because the law's focus is on the victim's experience (i.e. death) rather than the defendant's cognitive experience. Although D does need to satisfy the *mens rea* of the unlawful act.

<sup>36</sup> See V. Tadros, *Criminal Responsibility* (Oxford University Press, Oxford, 2005) pp. 93-8.



consequences and circumstances that would not have counted against one but for one's original assault now count against one automatically, and add to one's crime.'<sup>37</sup> The existing law of offences against the person, stemming from the Offences Against the Person Act 1861 (OAPA 1861) is replete with examples of constructive liability, and the offences of murder and manslaughter are perhaps the best-known instances in English law. In 2006, there was much controversy over the creation of new offences of causing death by careless or inconsiderate driving<sup>38</sup> and causing death by driving whilst disqualified, unlicensed or uninsured,<sup>39</sup> for which the fault element is much lower than the tragic result.<sup>40</sup>

The strictest version of a complainant-centred offence would be an offence in which C's experience of an action or omission is determinative and there is no fault element required; an offence of strict liability. That is not what I am advocating in this thesis: a strict liability offence of sexual assault would be too broad and potentially unfair to defendants. The aim of this thesis is to evaluate the extent to which the substantive offence definition is and could be complainant-centred. The crucial issue for this thesis is identifying the criteria to be used in evaluating whether the substantive offence of sexual assault is complainant-centred. It is not easy to define what it means for an offence to be complainant-centred and it is from the ambiguity of this phrase that the interesting discussion arises. This section will delineate two criteria that will be employed in this thesis to evaluate the extent to which the reform process was, and the definition of sexual assault is, complainant-centred.

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<sup>37</sup> J. Gardner, 'Rationality and the Rule of Law in Offences Against the Person' (1994) 53 *Camb L J* 502, 509. Ashworth is unconvinced of the notion of 'change of normative position' as a justification for additional liability, see A. Ashworth, 'A Change of Normative Position: Determining the contours of culpability in criminal law [2008] 11 *New Crim L Rev* 232.

<sup>38</sup> Road Safety Act 2006, s.20, inserting s.2B into the Road Traffic Act 1988.

<sup>39</sup> Road Safety Act 2006, s.21, inserting s.3ZB into the Road Traffic Act 1988.

<sup>40</sup> See S. Cunningham, 'Punishing Drivers Who Kill: Putting Road Safety First?' (2007) 27 *LS* 288.

*Criteria 1: to what extent is the definition experience-focused rather than fault-based?*

The first criterion that could be employed in evaluating the complainant-centred nature of an offence is whether the definition acknowledges or takes into account complainant's experiences. This involves consideration of whether the offence definition focuses on the direct effects on the victim and the extent to which complainant's are accorded the status of 'privileged speaker'. A 'defendant-centred' offence, or what will be labelled in chapter 7 as a 'defendant-subjective' approach to criminal law, is concerned with culpability and thereby justice to the individual accused. Although this must be a part of any fair and just system of criminal law, it fails to take sufficient account of how the complainant experienced the act. A 'complainant-centred' approach prioritises social protection over justice to the individual accused.

One possible element of a complainant-centred offence is that one or more components of the *actus reus* are defined in terms of the complainant's experience of the act. This will be referred to as a 'complainant-subjective' approach. Chapter 8 will analyse the different approaches to liability that build in 'complainant-subjectivity', highlighting how the differences arise when we consider the relationship between C's experience and D's fault. Each policy option is 'complainant-subjective' in that C's experience is an important part of the offence definition, but with each option, the weight given to C's experience lessens.

A further element for evaluation is whether the definition of the offence rests on a consensual view of what constitutes the unacceptable behaviour in question rather than the experience of the particular individual complainant. This highlights what philosophers label the ontological problems in defining conduct. Do such acts ever have an inherent value or meaning or do they only acquire such meaning when others experience or respond to them? Context-dependent offences (crimes where the tribunal of fact need to consider the totality of the circumstances of the act because the conduct prohibited by the law is non-essentialist) give rise to the possibility of different

interpretations, one of which is complainant-centred. The relevance of complainant's experiences is therefore particularly relevant where the offence is a context-dependent one or contains a context-dependent term. In relation to context-dependent offences, the complainant's experience is an important aspect in understanding the nature and seriousness of the act.

Another issue for consideration under this first criteria is whether the offence requires *mens rea* in relation to every element of *actus reus*? The correspondence principle<sup>41</sup> concerns the relationship between *actus reus* and *mens rea*, requiring intention or recklessness as to all the elements in the *actus reus*. However, the principle places too much emphasis on culpability as it ensures that a defendant is punished only for causing a harm or circumstance that he chose to risk or bring about. It also applies less easily to context-dependent terms. The presumption in favour of *mens rea* focuses the court's attention on D's reason for acting and deflects attention from the complainant's affective response to the action.

### *Criteria 2: offence labelling*

The second criterion is whether the offence label sufficiently represents the nature and seriousness of the harm done to the victim. Fair labelling is a normative principle of criminal liability that attempts to ensure that offences are subdivided and labelled to represent fairly the nature and magnitude of the law breaking.<sup>42</sup> For an offence to be complainant-centred the criteria is not that the offence is labelled 'fairly' but that it is labelled so as to reflect the complainant's experience and interests. This criterion therefore follows from criteria 1: does the offence reflect the complainant's experience?

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<sup>41</sup> The Law Commission Report, *Legislating the Criminal Code: Involuntary Manslaughter* (Law Com No. 237, 1996) identifies three principles as inherent in a (defendant) subjective basis for liability. The first of these is the '*mens rea* principle', which imposes liability only for those outcomes which were intended or knowingly risked by the alleged wrongdoer. This ensures that 'the act is attributable to the defendant'. The second principle, the 'belief principle', judges a defendant according only to what she believed she was doing or risking. The third principle is the 'principle of correspondence'.

<sup>42</sup> See J. Chalmers & C. Leverick, 'Fair Labelling in Criminal Law' (2008) 71 *MLR* 217.

Offence labels ought to be fair to victims so that the legal record accords with their own perceptions of the nature and seriousness of the harm done to them. An accurately labelled offence demonstrates that society is showing solidarity with the victim and appropriately condemning the defendant's actions. The symbolic function of the offence name has been cited as a reason why it is appropriate to distinguish between a variety of criminal offences. For example, fair labelling has been used as an argument against the merging of the separate offences of murder and manslaughter as was suggested by Lord Kilbrandon in *Hyam*.<sup>43</sup> In 1985, the Criminal Law Revision Committee quite clearly stated that the label 'murder' should be retained. They suggested that this label, like many others, carries a certain stigma and they were concerned that anyone convicted of murder ought on moral grounds to be deserving of the stigma.<sup>44</sup> Problems also arise when offence labels are 'morally neutral', employ inaccurate terminology or contain ambiguous and context-dependent terms that can be interpreted in divergent ways. The question in this context is therefore whether the sexual assault label properly represents the wrongdoing suffered by the victim to the public at large.

### (c) Defendants' rights

One recurrent theme throughout this thesis is whether complainant-centred justice impinges on defendant's rights. Defendants' rights can usefully be broken down into two categories, legal rights and basic human rights.<sup>45</sup> The former shall be dealt with here and human rights implications will be analysed below. The need to avoid wrongful convictions requires the criminal justice system to assume that the accused is innocent until proven guilty, and to insist that the burden of proving his or her guilt or fault falls

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<sup>43</sup> [1975] AC 55, 98.

<sup>44</sup> Criminal Law Revision Committee of England and Wales, *Offences Against the Person*, Cmnd 7844, (1980) para.19. In *A New Homicide Act for England and Wales?* (CP No 177, 2005) para 2.31, the Law Commission expressed the same view, stating that it would be wrong to merge murder and manslaughter into a single offence because '[it] would very likely be seen as a signal that the law did not regard murder as a specially significant or uniquely grave crime. It is wrong to give out such a signal.'

<sup>45</sup> Human rights might also be considered legal rights but the categorisation acknowledges the distinction between natural rights (unalienable rights which are universally applicable) and legal rights (statutory rights bestowed by a particular government to the governed people).

on the prosecution. Due process insists that the government must respect all of the legal rights that are owed to a person according to the law.

The principle of legality or what is frequently rendered in England in terms of the 'rule of law' is a fundamental principle, with both procedural and substantive implications. It expresses respect for the principle of autonomy: criminal offences should be clearly enough defined to enable people who wish to be law abiding to live their lives confident that they will not be breaking the law. The principle of legality is so wide-ranging it can be usefully be divided into three distinct principles- the principle of non-retroactivity (which shall be analysed below), the principle of maximum certainty, and the principle of strict construction of penal statutes.

The principle of maximum certainty in defining offences embodies what is termed the 'fair warning' principle. The essence of the principle seems to be that the citizen is entitled to specificity so that he knows which acts will result in criminal liability. It directs attention to the defendant's awareness of the existence and extent of the offence: 'respect for the citizen as a rational, autonomous individual and as a person with social and political duties requires fair warning of the criminal law's provisions and no undue difficulty in ascertaining them.'<sup>46</sup> There is a related issue here concerning statutes that require the doing of an act in terms so vague that citizens have to guess at its meaning and differ as to its application. Some overly broad offences<sup>47</sup> are tolerated in the belief that prosecutorial discretion is a more reliable means of identifying truly criminal incidents than legal definition. This flies in the face of maximum certainty and has implications for the consistent application of the criminal law. The principle of strict construction appears to state that any doubt in the meaning of a statutory provision should, by strict construction, be resolved in favour of the defendant. One justification for this might be fair warning: 'where a person acts on the apparent meaning of a

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<sup>46</sup> A. Ashworth, *Principles of Criminal Law*, 3<sup>rd</sup> edn (Oxford University Press, Oxford, 1999) p.77.

<sup>47</sup> Such as some of the 'public order' offences and even theft.

statute but the court gives it a wider meaning, it is unfair to convict that person because that would amount to retroactive lawmaking.<sup>48</sup>

#### (d) Human rights implications

Any discussion of victims' rights and defendants' rights cannot take place without consideration of human rights treaties and standards. The incorporation of the European Convention on Human Rights (ECHR) into English law has affirmed the importance of the right to a fair trial and has had some impact in protecting the rights of defendants.<sup>49</sup> Thus, it is necessary to highlight the possible human rights implications of a greater 'complainant-centred' approach, in particular, balancing the approach with Article 6 (right to a fair trial) and Article 7 (retrospectivity).

Article 6 of the ECHR concerns the right to a fair trial and states that everybody has the right to a 'fair and public hearing within a reasonable time by an independent and impartial tribunal established by law'.<sup>50</sup> The right to a fair trial may include a right to Legal Aid where this is necessary to ensure the defendant receives a fair trial.<sup>51</sup> Article 6(2) provides that a person 'charged with a criminal offence shall be presumed innocent until proven guilty according to the law'. The effect of the presumption is that in any criminal trial the prosecution bear the burden of proving (beyond a reasonable doubt) that the defendant performed the relevant *actus reus* with the requisite *mens rea* in the crime alleged. Article 6(3) includes several additional requirements in respect of criminal cases. These include the right: to have the case against the accused explained to him in a way that he understands; for the accused to question witnesses giving evidence

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<sup>48</sup> Ashworth, *op cit* n 43 at p.80.

<sup>49</sup> For a comprehensive and systematic analysis of the impact of UK human rights law on both the substantive criminal law and criminal procedure see B. Emmerson & A. Ashworth, *Human Rights and Criminal Justice* (Sweet & Maxwell, London, 2007).

<sup>50</sup> Article 6(1).

<sup>51</sup> Article 6(3)(c).

against him and to be able to call his own witnesses. Article 6 may impact on the use of strict liability offences,<sup>52</sup> which shall be considered in 8.1.1 below.

Article 7 of the ECHR, which is commonly known in academic literature as the ‘non-retroactivity principle’, proscribes retrospective criminalization, including a prohibition on criminal laws which are too vague and uncertain. Article 7 states that there must be no punishment without law and provides:

‘(1) No one shall be held guilty of any offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed.

(2) This article shall not prejudice the trial and punishment of any person for any act or omission which, at the time it was committed, was criminal according to the general principles of law recognized by civilized nations.

The essence of the principle is that no one can be found guilty of an offence if what they did was not a criminal offence at the time of its commission. It prevents Parliament passing laws that make criminal offences of things done in the past. Article 7 requires that the law must be clear so that people know whether what they are doing is against the law. The Court looks to whether the individual can know from the wording of the relevant provision and, if need be, with the assistance of the court’s interpretation of it, which acts and omissions will make him criminally liable.<sup>53</sup> Article 7 also protects defendants’ against any increase in the possible sentence for an offence that has taken place because of the law changing since the date of their action.

In relation to sexual assault, the non-retroactivity principle might arise in relation to the possible interpretations of the meaning of ‘sexual’. If ‘sexual’ were to be defined from a ‘complainant-subjective’ perspective, as will be outlined in chapter 8, then sexual

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<sup>52</sup> Issues arising under Article 6 are thoroughly analysed in evidence textbooks. See C. Tapper, *Cross and Tapper on Evidence*, 11<sup>th</sup> edn (OUP, Oxford, 2007) Ch III.

<sup>53</sup> See *Kokkinakis v Greece* 25 May 1993 (Series A No 260-A), *SW v United Kingdom* [1995] 21 EHRR 363.

assault would become an experience-centred offence, which focuses on the complainant's affective response to the touching i.e. did C experience the touching as 'sexual'. Non-consensual sexual touching would only result in criminal liability once C has interpreted it as an offence. Accordingly, when D committed the act it was not an offence. This promotes uncertainty in the law and one might argue that it violates the 'non-retroactivity principle'. However, there are other offences in English criminal law where the conduct element of the offence is defined from a 'complainant-subjective' perspective. For example, the definition of harassment in s.1(1) of the Protection from Harassment Act 1997<sup>54</sup> and the element of 'racial hostility' that applies to racially or religiously aggravated assaults<sup>55</sup> are both defined from a 'complainant-subjective' approach. Nonetheless, the European Court of Human Rights has not declared such offences incompatible with the Convention. To date, the English Courts have taken a very narrow view of the protection afforded by Article 7 and have not yet held that common law crimes such as manslaughter by gross negligence<sup>56</sup> and public nuisance<sup>57</sup> are incompatible with Article 7 on the grounds of their vagueness.

### 1.1.2 Methodology

Given the nature of the research questions, which evaluate the sufficiently complainant-centred nature of sexual assault, the main method employed in this thesis is the examination and analysis of primary and secondary documentary material. The primary material includes a thorough review and critique of the Sexual Offences Bill, policy documents, Parliamentary debate and the Sexual Offences Act 2003, along with an examination of the relevant cases on indecent assault, in particular *R v Court*,<sup>58</sup> and the limited cases on sexual assault since 2003. The secondary material includes academic literature in disciplines of law, philosophy, psychology, sociology and political theory. In

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<sup>54</sup> The definition of harassment in the context of stalking will be used as an example of a 'complainant-subjective' offence in chapter 8.

<sup>55</sup> Crime and Disorder Act 1998, s.28(1).

<sup>56</sup> *Misra* [2004] EWCA Crim 2375.

<sup>57</sup> *Rimmington* [2006] UKHL 63.

<sup>58</sup> [1989] AC 28.



particular, this thesis will draw on Jaconelli's concept of 'context-dependency'<sup>59</sup> to underpin my critique of the insufficiently complainant-centred nature of sexual assault. The research will also employ Duff's notion of 'practical indifference'<sup>60</sup> to legal norms to justify liability for reckless, yet culpable sexual touching. The thesis will demonstrate how a defendant who fails to notice the risk that his action may be perceived by the complainant or a reasonable person to be 'sexual' is not as blameworthy as one who does avert to it, but betrays a qualitatively different but also culpable contempt for the values protected by the criminal law sufficient to justify punishment.

### 1.1.3 Thesis overview

This thesis systematically critiques the theoretical underpinnings and practical application of sexual assault as a distinct and individual sexual offence. It analyses the extent to which the offence is complainant-centred both in terms of its substantive definition, the offence label and at sentencing. Its aim is to discuss the tensions in criminal law between the rights of complainants and the rights of defendants, in light of one particular offence and make recommendations for a more complainant-centred offence of sexual assault. The jurisdictional scope is limited to the law of England and Wales.<sup>61</sup> The thesis is divided into thirteen chapters.

Chapter 2 analyses the extent to which indecent assault was a complainant-centred offence. This is an appropriate starting point as it sets the offence of sexual assault in its historical context and provides a point of comparison for evaluating the extent to which sexual assault is, and should be, complainant-centred. Chapter 2 will demonstrate how indecent assault was a widely and ill-defined offence which caught all non-consensual sexual behaviour (commonly referred to before the SOA 2003 as 'sexual assaults') falling outside the scope of rape. The *actus reus* of indecent assault required an assault or

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<sup>59</sup> J. Jaconelli, 'Context-Dependent Crime' [1995] *Crim L R* 771.

<sup>60</sup> R.A. Duff, *Intention, Agency and Criminal Liability* (Blackwell, Oxford, 1990) ch.7.

<sup>61</sup> Any reference to 'English law' is to be read as a reference to the law of England and Wales.

battery, perpetrated in ‘circumstances of indecency’. Analysing closely the decision in *Court*, chapter 2 will highlight the problems of defining the ‘inherent’ nature of conduct as indecent or decent. The chapter will consider the merits of a ‘genital proximity’ test, which suggested that an action or touching was ‘indecent’ if it was proximate to an indecent event, for example an exposed sexual organ. It will further demonstrate how with regard to indecent assault, the complainant’s experience of the ‘indecent’ nature of the act was not a factor to be taken into consideration by decision-makers and in this respect, the complainant was sidelined by the criminal justice system. The *mens rea* of indecent assault required an intention to touch and an ‘indecent intention’. Although by their very nature most archetypal indecent assaults were intentional, an issue arose as to whether voluntarily intoxicated defendants were capable of forming the necessary intention to touch and whether indecent assault was an offence of basic or specific intent. The chapter finds that the requirement that D had an indecent intention considerably narrowed the scope of the offence. Chapter 2 concludes that indecent assault was an insufficiently complainant-centred offence.

Chapter 3 investigates the justifications for creating a new offence of ‘sexual assault’ under s.3 of the SOA 2003. The chapter analyses a proposal, prior to the SOA 2003 for an offence of sexual assault, which would have criminalised any assault which of itself was ‘grossly sexually offensive to a person of ordinary sensitivity’. It is submitted that this proposed offence would have been more complainant-centred as the ‘bystander-objective’ test of ‘indecency’ would have been supplemented by a ‘complainant-subjective’ test, which would have focused on the complainant’s affective response to the assault. In 1997, the newly elected Labour Government pledged to help victims of sexual offences obtain justice, commencing in a detailed and lengthy review process in 1999, the Sexual Offences Review.<sup>62</sup> The chapter assesses the extent to which the various committees and reports dealing with the sexual offences reform adopted a sufficiently complainant-centred approach. Sexual assault is one of many new, often

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<sup>62</sup>*Setting the Boundaries, op cit*, n 11.

overlapping, offences that deal with invasions of sexual autonomy. Chapter 3 will situate s.3 in the context of the other sexual offences and highlight the controversies with the new broad structure. The chapter concludes that s.3 is ill-defined, ambiguous and over-inclusive in potentially overlapping with rape and assault by penetration.

Chapter 4 analyses two elements of the *actus reus* required for a conviction of sexual assault: the requirement that D touches another person and the requirement that C does not consent to the touching. S.3 introduces a wide offence with ambiguous limits stemming from the broad definition of 'touching': touching is broadly defined in s.79(8) to include 'touching with any part of the body, with anything else or through anything and in particular includes touching amounting to penetration.' Sexual assault is limited to 'touching' and does not extend to cases where the complainant is put in fear of being touched, highlighting one respect in which the offence is less complainant-centred than indecent assault. Section 3 ought to extend to situations where the complainant apprehends immediate and unlawful sexual touching for the sake of clarity and consistency in the criminal law. The law fails to label a psychic touching appropriately, because the label does not sufficiently represent the nature and seriousness of the harm done to the complainant. The chapter proceeds to demonstrate how consent was one aspect of the law that required clarification and how the new provision on consent is more complainant-centred. Sexual assault had as its underlying objective the protection of men, women and children from unwanted sexual touching, but the chapter concludes that s.3 is a widely drawn provision that is under-inclusive and inappropriately vague.

Chapter 5 evaluates the need for a context-dependent approach to the meaning of 'sexual'. Legislation and research in the field of sexual offences, often refers to the 'sexual nature' of conduct. However, the meaning of 'sexual' is socially and historically constructed, rather than having an innate quality and as such, there are numerous methods of distinguishing 'sexual' and 'non-sexual acts'. The chapter examines the concept of context-dependency and seeks to demonstrate that sexual assault is a

context-dependent offence. The analysis will be limited to one aspect of context-dependency; offences which are defined, at least in part, by the complainant's experience of an act or omission. Chapter 5 proposes that no touching is intrinsically 'sexual'; it only becomes so when someone experiences and defines it as such. The chapter concludes by outlining the range of contexts, circumstances and perspectives that we need to appreciate in order to define an act as 'sexual', or identify the contested nature of an act.

Chapter 6 analyses three possible perspectives from which the meaning of 'sexual' could be viewed and defined, critiquing the approaches against the fundamental aims and principles of criminal law. It starts with consideration of a non-interpretive approach. This would involve defining 'sexual' according to the body parts involved and devoid of any reference to the defendant's knowledge or awareness of the act's nature or the complainant's experience of the touching. Whilst adhering strictly to criminal law principles of certainty and fair warning it is argued that a non-interpretive approach would not have the flexibility necessary for an offence of sexual assault, in particular failing to take account of the context in which the action occurred. The chapter proceeds to scrutinise two objectivist approaches to the meaning of 'sexual'. It explores what is meant by 'objectivism', demonstrating that an objective approach to the meaning of 'sexual' would require interpretation by a 'reasonable person'. A 'bystander-objective' approach would arguably be the fairest approach as it would require an evaluation of the action that is neither defendant- nor complainant-centred. However, it is criticised for implying that there exists social consensus on appropriate standards of sexual touching. Under a 'defendant-objective' approach, the reasonable person is in the same position as and is credited with the knowledge of the defendant. The chapter concludes that these three approaches are insufficiently complainant-centred.

Chapter 7 continues the evaluation of possible perspectives from which 'sexual' can be viewed and defined. It analyses a 'defendant-subjective' approach to defining 'sexual'

that would be dependent on the defendant's knowledge and awareness of the act's nature. In requiring that the defendant had knowledge of or appreciated the 'sexual' nature of the touching this approach would adhere most clearly to the core principles of criminal liability; that you must prove a guilty mind in an accused before you can convict. A 'defendant-subjective' approach is criticised for failing to take account of how the complainant experienced the act, restricting the ambit of the criminal law and failing to acknowledge that a defendant is able to exercise control through his behaviour.

Chapter 8 scrutinizes a 'complainant-subjective' approach to the meaning of 'sexual'. This approach would focus entirely on the individual complainant and enable her to define the parameters of her sexual and bodily autonomy. The chapter discusses how the crime victim has been, until recently, the 'forgotten player' in the criminal process. It demonstrates how the complainant's perspective is an important and relevant factor in assessing the 'sexual' nature of conduct. There is precedent in English law for offences to be defined, if only partially, in terms of the complainant's experience of an act and the prohibition of harassment under s.1 of the Protection from Harassment Act 1997 and the definition of anti-social behaviour under s.1 of the Crime and Disorder Act 1998 will be used as a case-studies. The chapter concludes that whilst a 'complainant-subjective' approach to the meaning of 'sexual' is desirable it would carry with it significant problems, most notably that a defendant could be liable for an act which nobody other than the complainant considered to be 'sexual', violating the principle of fair warning. However, a 'complainant-subjective' approach is a preferable test because the complainant's perspective is an important and relevant factor in assessing the sexual nature of conduct.

Chapter 9 investigates the extent to which s.78 SOA 2003, the provision that defines 'sexual', is sufficiently complainant-centred. Analysis of the provision itself and the post-2003 case-law demonstrates that s.78 is vague, insufficiently precise and does not provide clear guidance on what constitutes 'sexual'. s.78(a) provides that some acts may

be 'indisputably' 'sexual' but these are limited in number. S.78(b) gives juries and magistrates wide discretion to decide what other actions are 'sexual' and the chapter explores the processes by which they might make that decision through six different hypothetical situations. The chapter suggests that the lack of clarity and certainty that arises as a result of the s.78 definition is undesirable for complainants because juries and magistrates are not explicitly instructed to consider C's experience as one aspect of an act's circumstances and this may deter some from pursuing a complaint. The chapter concludes that s.78 is ambiguous and might therefore lead to inconsistent decisions.

Chapter 10 analyses the requirement that D must 'intentionally' touch another person, considering the circumstances in which a defendant is responsible for a 'sexual' touching and arguing that liability should extend to reckless, yet culpable sexual touching. Reckless sexual touchings may be culpable and deserving of the label sexual assault because D has manifested an attitude of 'practice indifference' as to whether touching takes place. Chapter 10 further examines the relevance of involuntary and voluntary intoxication to a charge of sexual assault. It finds that the recent decision in *Heard*<sup>63</sup> is complainant-centred in holding that s.3 is a basic intent crime, even though it appears to be a specific intent crime. This is complainant-centred because it means that voluntary intoxication cannot be used as a defence to sexual assault. However, the decision in *Heard* also formalizes the inherent failure of s.3 to recognise that some unintentional touchings are culpable and therefore worthy of a criminal response. The chapter concludes that some elements of the *mens rea* of sexual assault are unclear and controversial and these could be modified to make the law more 'complainant-centred'.

Chapter 11 analyses the reasonable belief in consent test. The chapter finds that the test is 'defendant-objective' and that this is inappropriate because it allows the jury to consider personal characteristics of the defendant in deciding the reasonableness of his conduct and therefore still leaves much scope for interpretation by judges and juries in individual cases. It further questions whether appeal courts are likely to read in to s.3 a

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<sup>63</sup> [2007] EWCA Crim 125.

presumption of *mens rea*, namely that in order to be guilty D must either know the act is 'sexual', know that reasonable people would consider the act 'sexual', be aware of the possibility of the touching being 'sexual', or be aware that reasonable people might label the touching 'sexual'. This is one aspect of the definition that ought to be resolved so as to make the offence more complainant-centred; requiring that D be aware of the 'sexual' nature of the touching might deflect the court's attention away from the invasion of C's sexual autonomy and fail to communicate law's symbolic condemnation of acts interfering adversely with sexual self-determination.

Chapter 12 examines the degree to which the law should and does reflect the *individualised* experiences of victims, as opposed to *typical* experiences, at sentencing. It highlights the problems of determining the seriousness of a sexual assault based on standard harm and culpability. It further draws attention to the problems of complainant-centred sentencing, most notably that it may undermine a subjectivist approach to criminal liability. Chapter 12 proceeds to examine the actual place of victims' experiences in sentencing for sexual assault, considering the relevant provisions of the Criminal Justice Act 2003, the Sentencing Guideline Council's (SGC's) guidelines on sexual assault and the scope for individual experiences to be factored in through Victim Personal Statements and treating victim harm as an aggravating factor. It discusses whether sexual assault is primarily a personal rather than public offence and argues that in determining offence seriousness the individual victim's experience should determine the harm component of the harm/culpability dyad. The SGC's guidelines on *Sexual Offences* are welcome but, in the context of sexual assault, are flawed in focusing on the specific nature of the physical contact involved. The chapter concludes that the law on sentencing is more complainant-centred since 2003 than the respective provisions that existed for sentencing indecent assault, but that the actual place of victims' experiences in sentencing is still somewhat ambiguous.

Chapter 13 discusses the thesis' main conclusions and identifies further avenues for research. The overall argument of the thesis is that the substantive offence of sexual assault is insufficiently complainant-centred and that certain areas of the definition in s.3 could be clarified and/or amended to make it more complainant-centred. There is also a need to increase public awareness about the nature and scope of the offence of sexual assault and how it differs from rape and assault by penetration. In order to analyse sufficiently the practical application of the new law it would be necessary to conduct empirical research into how sexual assault cases are investigated, tried and sentenced. Sexual assault is an important and yet broadly defined offence which is predominantly 'over-shadowed' in theoretical commentary and empirical research by the crime of rape.

#### 1.1.4 A note on terminology

In England and Wales there are two terms that refer to the person against whom a crime has been, or may have been, committed. The more technical term 'complainant' is used to indicate the person who alleges that an offence has been committed against him or her. The word is neutral in respect of whether any crime has been committed against that person and therefore does not assume that another person, especially the accused in a trial committed the crime. Strictly speaking, a complainant does not become a victim unless and until the accused is convicted. In contrast, in everyday language the term victim is not restricted to persons in this situation. A person can be a victim even though no one is ever charged or prosecuted.<sup>64</sup> Generally in this thesis, the more technical term 'complainant' will be used, given that the research comprises an evaluation of the substantive offence of sexual assault. In chapter, 12 the term 'victim' will be used as this analysis considers the sentencing of a defendant post-conviction.

Throughout this thesis, I will predominantly refer to sexual assault in terms of its most frequently occurring dyad, male defendant and female complainant. There were 15,510

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<sup>64</sup> Goodey, *op cit*, n 17.



sexual assaults on a female aged 13 or over recorded by the police in 2008/09, compared with 1,154 on a male aged 13 or over.<sup>65</sup> Based on the British Crime Survey self-completion module on intimate violence, 2.3 per cent of women aged 16 to 59 and 0.4 per cent of men (of the same age) had experienced a less serious sexual assault (unwanted sexual touching) in the previous 12 months. It is acknowledged that sexual assault occurs between other dyads but for the sake of clarity and consistency, this thesis will refer primarily to the male defendant-female complainant relationship. At times, the defendant will be referred to as 'D' and the complainant as 'C'.

The thesis is based on the law as of 1<sup>st</sup> January 2010.

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<sup>65</sup> A. Walker *et al*, 'Crime in England and Wales 2008/09: Volume 1 Findings from the British Crime Survey and police recorded crime' (Home Office, July 2009) Table 3.11.

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## A Critical Analysis of the Extent to which Indecent Assault was Sufficiently Complainant-centred

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Indecent assault was a broad offence, which, based on the 'ladder'<sup>1</sup> of offences, came beneath rape and attempted rape. The offence, which was originally set out in sections 52 and 62 of the Offences Against the Person Act 1861 (OAPA 1861), then sections 14 and 15 of the Sexual Offences Act 1956 (SOA 1956), was repealed by the SOA 2003 and replaced by a number of alternative offences, separating one offence into several based on the types of assault and the categories of complainant. Sexual assault, set out in section 3 of the SOA 2003 is one such new offence. This chapter will analyse the old offence of indecent assault, consider its practical application and limitations, and thereby provide criteria against which the complainant-centred aspects of sexual assault will be evaluated.

Three issues in particular proved problematic under ss.14 and 15 SOA 1956. First, the statute referred to assault, implying that the offence would be satisfied by causing C to fear being touched. Secondly, the concept of indecency was ambiguous and uncertain. In *R v Court*<sup>2</sup> the House of Lords adopted the approach that indecency involved a contravention of standards of decent behaviour in regard 'to sexual modesty and privacy', but debate continued over whether D's state of mind could be taken into account in determining whether an activity should be regarded as indecent. Thirdly, the decision in *Olugboja*,<sup>3</sup> which held that consent was a question of fact for the jury, created uncertainty about when a person consents.

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<sup>1</sup> A. Ashworth, *Principles of Criminal Law*, 3<sup>rd</sup> edn (Oxford University Press, Oxford, 1999) p.362.

<sup>2</sup> [1989] AC 28.

<sup>3</sup> [1982] QB 320.

Part 1 will examine the history of indecent assault, acknowledging that it essentially penalised non-consensual sexual activity falling outside the scope of rape and considering the reasons for the vastly different maximum sentences for indecent assaults committed on males and females.

Part 2 will analyse the *actus reus* of indecent assault highlighting how the offence required only the 'causing of fear' that C would be touched, rather than a physical assault and arguing that this is an important complainant-centred aspect of the offence that no longer features in the definition of sexual assault. It further examines the ambiguity of indecency as a concept and analyses the decision in *Court* where Lord Ackner introduced a tripartite categorisation of gestures: (a) conduct that was inherently decent; (b) conduct that was inherently indecent; and (c) conduct that may or may not be indecent. The decision will be criticised for failing to explain what made an act 'inherently decent' or 'inherently indecent' and assuming that there existed a consensual view of what constitutes indecent conduct. Part 2 also highlights how the requirement that C did not consent to the activity was not an element of the offence definition but that the approach favoured in *Olugboja* was applied to indecent assault in *McAllister*.<sup>4</sup> However, the issue of consent remained at least partly unresolved in those situations where D exercised a deception in order to carry out an indecent assault.

Part 3 will examine the *mens rea* of indecent assault, demonstrating how the requirement that the assault must have been committed 'intentionally' excluded reckless assaults and was therefore under-inclusive and insufficiently complainant-centred. It will discuss whether the voluntarily intoxicated defendant was capable of forming the necessary intent to touch and whether indecent assault was an offence of basic or specific intent. It further analyses the decision of the House of Lords in *Court* requiring the prosecution to prove an 'indecent intention' on the part of the defendant. I will argue that this expression is capable of many different interpretations and

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<sup>4</sup> [1997] Crim L R 233.

demonstrate how it caused much confusion for future courts. I will further contend that a defendant's indecent or sexual motivation was an irrelevant consideration in determining whether his conduct was indecent.

The *actus reus* of indecent assault required only the 'causing of fear' that C would be touched, rather than a physical assault and this is an important complainant-centred aspect of the law, which no longer forms part of the definition of sexual assault. However, the chapter concludes that indecent assault was insufficiently complainant-centred in three important respects. First, indecent assault was a widely drawn provision that prohibited both a psychic or physical assault and therefore contravened the principle of fair labelling, as the label did not represent fairly the nature and severity of the conduct. The definition of indecent assault also prevented conviction of a reckless yet culpable indecent assault. Secondly, Lord Ackner's categorisation of certain acts as incapable of indecency implied that the complainant was denied the status of 'privileged speaker': the complainant's experience or perception of the act was not a factor to be considered in determining the 'indecent' nature of the act. Thirdly, the obligation on the prosecution to prove an indecent intention where the conduct itself was ambiguous further limited the reach of the offence.

## 2.1 HISTORY OF INDECENT ASSAULT

Until the seventeenth century there were very little in the way of pleas, verdicts and judgments on sexual violence.<sup>5</sup> The OAPA 1861 was the first statute to expressly prohibit indecent assault, creating two separate offences of indecent assaults committed on a male and indecent assault committed on a female with vastly different maximum sentences. The SOA 1956 consolidated the law on sexual offences, retaining the distinction between indecent assault committed on a man and indecent assault

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<sup>5</sup> See B.A. Hanawalt, *Crime and Conflict in English Communities, 1300-1348* (Harvard University Press, Cambridge, Mass, 1979) p.66; J.A. Sharpe, *Crime in Early Modern England* (Longman, London, 1984) p.49.

committed on a woman. Prior to the SOA 2003, indecent assault was essentially a 'catch-all' offence covering all other non-consensual sexual acts falling outside the definition of penile penetration of the anus or vagina.

### 2.1.1 Offences Against the Person Act 1861

The OAPA 1861 consolidated the previously complex mixture of common law and statute law into a single Act designed to deal with all offences of violence, detailing some fifty crimes where 'the person' could be harmed or endangered. It created offences of rape (s.48), indecent assault upon a female (s.52), forcible abduction of any woman with intent to marry or carnally know her (s.53), buggery (s.61) and indecent assault upon a male (s.62). Section 48 provided that '[w]hosoever shall be convicted of the Crime of Rape shall be guilty of Felony' and sentenced to penal servitude for life or not less than three years. The section was silent as to the elements to be proved, leaving the substantive framework of the offence to be developed through the common law as 'unlawful carnal knowledge of a woman without her consent by fear, force or fraud'.<sup>6</sup> Serious penetrative and non-penetrative assaults that did not come within the scope of rape could be prosecuted only as indecent assault, which was originally governed by s.52 OAPA 1861:

'Whoever shall be convicted of any indecent Assault upon any Female, or of any Attempt to have carnal Knowledge of any Girl under Twelve Years of Age, shall be liable, at the Discretion of the Court, to be imprisoned for any Term not exceeding Two Years, with or without Hard Labour.'

Section 62 prohibited 'Unnatural Offences' committed upon men including 'any Indecent Assault upon Any Male Person' with a maximum sentence of ten years 'penal servitude'. Sections 52 and 62 did not define the conduct they prohibited and omitted to stipulate any *actus reus* or *mens rea* requirements. No consideration was given to the possible range and severity of violations that sections 52 and 62 proscribed. It was unclear whether slipping a hand up a skirt or penetrative assaults with objects other

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<sup>6</sup> 1 East PC 434.

than the penis, that were more recently classified as 'indecent assault', were banned under the OAPA 1861. However, it is important to be aware of judging Victorian society according to contemporary standards of unacceptable sexual behaviour. Whilst certain behaviour, such as putting a hand up a skirt might nowadays be classified as indecent or sexual assault, during the Victorian era it might have been just 'harmless fun' or 'what men do'.

In omitting to stipulate the elements of *mens rea* required for rape and indecent assault the OAPA 1861 failed to acknowledge and emphasise masculine responsibility for such actions. The Act perpetuated the debate about whether rape was a property crime, infringing a man's rights over a woman's sexuality, a physical crime of violation or a moral crime undermining female sexual chastity.<sup>7</sup> The exclusion from any statutory definition of rape or indecent assault of any reference to women's sexual autonomy for example in terms of lack consent shows that the legislation upheld and enshrined the Victorian belief in female passivity. Indecent assault had an even vaguer legal definition than rape. Lord Justice Brett in 1875 explained to one jury that, 'I cannot lay down the law as to what is or is not an indecent assault beyond saying that it is what all right-minded men, men of sound and wholesome feelings would say was indecent'.<sup>8</sup> This reinforced the position that any interpretation of what action constituted indecent assault was in purely masculine terms. This is not surprising, given that it was only men who sat on juries and worked as magistrates.

It was possible to charge defendants with both indecent assault and common assault allowing the jury to convict on the lesser charge if a 'clear' sexual intention could not be proven. In 1867, the Home Office was forced to seek guidance from the law officers concerning the most appropriate charge under the OAPA 1861 where an indecent

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<sup>7</sup> K. Stevenson, 'Observations on the Law Relating to Sexual Offences: the Historic Scandal of Women's Silence' [1999] 4 *Web JCLI*.

<sup>8</sup> *R v Baker*, *The Times*, 31 July and 3 August 1875.

assault was committed, but no great violence used or actual bodily injury occurred.<sup>9</sup> The Attorney General and Solicitor General advised that such assaults could properly be dealt with as aggravated assaults, presumably to avoid the necessary expense of a full committal.<sup>10</sup> However, charging non-violent indecent assaults as aggravated assaults failed to acknowledge the sexual context of such assaults and a number of reported cases in *The Times* between 1861 and 1870 confirm that although the initial allegation was one of indecent assault the defendant was subsequently convicted of common assault.<sup>11</sup> One might argue that this not only misrepresents the nature and extent of sexual violence in Victorian Britain, but also minimises the sexual aspect of the violation, indicating that complainants' sexual autonomy was not being sufficiently respected. However, an alternative interpretation might be that some defendants were being inappropriately charged with indecent assault in the first place, and juries or magistrates were upholding the rights of defendants not to be found guilty of an offence for which there was insufficient evidence.<sup>12</sup>

Often, as now, the main issue in most indecent assault trials was the perceived character of the complainant versus the perceived character of the accused. When a Maidstone policeman admitted entering a woman's home at night and indecently assaulting her, the magistrate dismissed the charge because 'the complainant had not borne a particularly moral character, and it was further contended that nothing but a little harmless fun had passed between the two'.<sup>13</sup> An editorial published after two 'respectable men' were convicted and fined for indecent assault reveals the firm conviction that such charges against 'respectable men' were inconceivable: 'A public

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<sup>9</sup> The options available included to treat it as indecent assault (s.52), a common assault carrying 2 months imprisonment (s.42), or an aggravated assault against women or boys under 14 (s.43).

<sup>10</sup> PRO HO119/18.

<sup>11</sup> K. Stevenson, 'Ingenuities of the Female Mind: Legal and Public Perceptions of Sexual Violence in Victorian England 1850-1890' in S. D'Cruze, *Unguarded Passions: Gender, Class and Everyday Violence in Britain c.1850-1950* (Longmans, Harlow, 2000).

<sup>12</sup> One would need to undertake further research in this context, comprising of a detailed analysis of the individual cases to come to a more insightful conclusion.

<sup>13</sup> *M & K Jml*, 30 December 1872, p.7.

officer whose business is to protect the public and a gentleman who was able to bring forward the most respectable witnesses are not the persons we should be inclined to suspect of such acts.’<sup>14</sup> Even conviction for indecent assault did not necessarily cost a man his respectability. This provides some evidence that ‘yielding to temptation’ was perceived by newspaper editors, journalists, magistrates and politicians as normal behaviour for a man.<sup>15</sup>

### 2.1.2 Indecent assault 1956-2004

The SOA 1956 consolidated the law on sexual offences. Under sections 14 and 15 it was an offence ‘for a person to make an indecent assault on a woman’ and a man respectively.<sup>16</sup> The wording of the two sections was virtually identical, apart from a specific provision dealing with the effect of an invalid marriage to a girl under the age of 16.<sup>17</sup> Indecent assault was considered the second most serious type of sexual offence, after rape.<sup>18</sup> Rape became a statutory offence by virtue of s.1(1) SOA 1956, which simply provided that ‘It is an offence for a man to rape a woman’ and was later defined by statute in 1976. The Sexual Offences (Amendment) Act 1976 provided a definition of rape that codified the common law as laid down by the House of Lords in *DPP v Morgan*.<sup>19</sup> That provision was replaced by the Criminal Justice and Public Order 1994, s.142 which extended the definition to include non-consensual anal intercourse upon a male or female: a man committed rape if ‘he [had] sexual intercourse with a person (whether vaginal or anal) who at the time of the intercourse [did] not consent to it’. Sexual intercourse was defined as the penetration by the penis of the vagina or anus.<sup>20</sup>

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<sup>14</sup> *Gravesend and Dartford Reporter*, 7<sup>th</sup> May 1870, p.2.

<sup>15</sup> C. Conley, ‘Rape and Justice’ (1986) 29 *Victorian Studies* 519.

<sup>16</sup> For the full sections see Appendix 1.

<sup>17</sup> s.14(3).

<sup>18</sup> R. Stone, *Offences Against the Person* (Cavendish, London, 1999) p.157.

<sup>19</sup> [1975] 2 All ER 347.

<sup>20</sup> SOA 1956, s.44. The slightest penetration would suffice and ejaculation was not required.



Rape was narrowly defined in its scope and indecent assault was essentially a 'catch-all' offence covering all other non-consensual sexual acts falling outside the definition of penile penetration of the anus or vagina. Forced acts of oral sex and penetration by objects or other parts of the body remained collectively subsumed under the heading of indecent assault. Indecent assault was therefore widely defined, covering a multitude of activities of varying seriousness, without the gradation of offences that existed in relation to non-indecent assaults. Broadly speaking it covered any indecent touching of a person without consent and also fear of being touched, both of which will be explored below. The label on conviction did not differentiate between the vastly different forms of conduct and their disparate gravity. Temkin suggested that the indecent assault label was 'mindless', by which is presumably meant that it did not describe the essence of the wrongdoing, particularly in serious cases.<sup>21</sup>

In 1954, the Wolfenden Committee was appointed by the government to consider 'the law and practice relating to homosexual offences and the treatment of persons convicted of such offences by the courts'. This culminated in the publication in 1957 of the *Wolfenden Report*,<sup>22</sup> which concluded that homosexual behaviour between consenting adults in private should not be subject to criminal sanction. The meaning of 'homosexuality' was an immediate and enduring problem for the Wolfenden Committee. The Wolfenden Committee addressed the matter by way of a consideration of the meaning of 'homosexual offences' and formulated a list of offences that included amongst other acts indecent assault on a male by a male, indecent assault on a female by a female and gross indecency.<sup>23</sup> The offences of indecent assault and gross indecency were frequently used to deal with homosexual behaviour, even though in a significant number of cases the actions were consensual. This demonstrates the victimization of gay men and women by legislators, the police and judges. However, the Wolfenden

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<sup>21</sup> J. Temkin, 'Getting it right: sexual offences law reform' (2000) 150 *NLJ* 1169 at p.1170.

<sup>22</sup> Report of the Committee on Homosexual Offences and Prostitution (Her Majesty's Stationary Office, London, 1957)

<sup>23</sup> See L. Moran, *The Homosexual(ity) of Law* (Routledge, London, 1996) ch 5.

Report did conclude that '[i]n practice, where homosexual offences [were] concerned, most cases of indecent assault relate[d] to offences against boys under sixteen'.<sup>24</sup> It further confirmed the relatively rare nature of prosecutions for indecent assaults committed by a female on a female: 'We have, however, found no case in which a female has been convicted of an act with another female which exhibits the libidinous features that characterise sexual acts between males'.<sup>25</sup> This suggests that there was little evidence of indecent assaults committed by women on women and that women did not engage in such activities. Another interpretation is that it demonstrates a commonly held belief in the nineteenth century of the sexual passivity of women.<sup>26</sup>

Until 1985, the maximum penalty for indecent assault on a female was two years imprisonment,<sup>27</sup> compared with ten years for indecent assault on a male.<sup>28</sup> Ashworth suggests this was 'a legacy of the horror with which society viewed homosexuality and the undervaluing of female sexual and physical autonomy'.<sup>29</sup> The result of this was that a degrading sexual attack on a woman where the defendant forced her to commit fellatio or inserted objects into her body was not even an arrestable offence, as this required a maximum penalty of five years' imprisonment. The Indecency with Children Act 1960 increased the penalty to five years where the offence was committed on a female under 13, so stated as such in the indictment, but where the victim was over 13 the maximum remained at two years. This left a number of inconsistencies. If a male touched the external genitalia of a female, he faced a maximum sentence of five years' imprisonment if she was under 13. If she was over 13 but under 16 even if she consented,<sup>30</sup> he faced two years' imprisonment. If he touched a male of any age in an identical manner the maximum penalty was 10 years. It was not until the passing of the

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<sup>24</sup> *Op cit*, n 22, at 101.

<sup>25</sup> *Ibid*, at 103.

<sup>26</sup> See S. Edwards, *Female Sexuality and the Law* (Martin Robertson, Oxford, 1981) pp.43-45.

<sup>27</sup> SOA 1956, s.37 and Sch 2(17).

<sup>28</sup> SOA 1956, s.37(3) and Sch 2(18).

<sup>29</sup> Ashworth, *op cit*, n 1 at p. 362.

<sup>30</sup> Under s.142(2) a person under 16 could not consent.

Sexual Offences Act 1985, that parity of sentencing was achieved and the seriousness of the offence on females was appreciated: under s.3 (3), both indecent assaults on men and women attracted the same maximum sentence of 10 years.<sup>31</sup> This was in comparison with the maximum penalty of life imprisonment for rape of a female<sup>32</sup> and ten years imprisonment for rape of a male (buggery).<sup>33</sup> Although rape victims were given anonymity in 1976, victims of other offences within the Sexual Offences Act 1956, such as indecent assaults, were not given anonymity until the passing of the Sexual Offences (Amendment) Act 1992.

## 2.2 ACTUS REUS OF INDECENT ASSAULT

The *actus reus* of indecent assault required only the 'causing of fear' that C would be touched, rather than a physical assault and this is an important complainant-centred aspect of the offence that no longer features in the definition of sexual assault. However, the assault was also required to be perpetrated in 'circumstances of indecency' and the ambiguity of indecency as a concept caused problems for the courts. In *Court*, Lord Ackner introduced a tripartite categorisation of gestures but failed sufficiently to explain what made an act 'inherently decent' or 'inherently indecent', mistakenly assuming that there existed a consensual view of what constitutes indecent conduct. The judgment in *Court* further highlighted how the power to determine the indecent was allotted to 'certain privileged speakers',<sup>34</sup> and emphasised the insufficiently complainant-centred nature of the offence as the complainants' experience or perception of the act was not a factor to be considered in determining the 'indecent' nature of the act.

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<sup>31</sup> In 1997, of those sentenced to unsuspended imprisonment for indecent assault, the average sentence length was 26 months for a male convicted of the offence in the Crown Court. 14 males received sentences of over 7 and up to ten years. In the Magistrates Court the most common sentences was a probation order. 88 males were fined. Only 14% received sentences of immediate imprisonment (Criminal Statistics Supplementary Tables, 1997).

<sup>32</sup> SOA 1956, s.37.

<sup>33</sup> SOA 1967, ss.3 and 10. After 1994, a rape charge was appropriate and the offence of buggery was extinguished by the passing of the SOA 2003.

<sup>34</sup> L. Moran. 'Indecent Assault: What is Indecency?' [1989] 11 *Liverpool Law Review* 99, at 108.

### 2.2.1 Assault or battery

Indecent assault was a more serious form of offence than common assault, but similarly required an assault (or battery) as a precondition for its completion. In 1952, Lord Goddard CJ explained that:

‘an assault can be committed without touching a person. One always thinks of an assault as the giving of a blow to somebody, but that is not necessary. An assault may be constituted by a threat or a hostile act committed towards a person.’<sup>35</sup>

The later case of *Faulkner* showed that the act needed not to be hostile.<sup>36</sup> An assault in this sense was any act committed intentionally or recklessly, which caused another to apprehend immediate unlawful personal violence.<sup>37</sup> Prior to the SOA 2003, the term ‘assault’ in statutes was used both in a strict sense (‘sometimes called psychic assault’)<sup>38</sup> and in a broad sense to include a battery, i.e. any act which intentionally or recklessly inflicted unlawful personal violence on another (sometimes called ‘physical assault’).<sup>39</sup> Indecent assault could be classified as either a psychic or a physical assault, although in practice most indecent assaults involved a battery, characteristically taking a direct and immediate form e.g. deliberately groping breasts,<sup>40</sup> striking someone on the buttocks,<sup>41</sup> kissing.<sup>42</sup> If the assault had taken the form of a battery, it was not necessary for the complainant to be aware of the touching or of the circumstances of indecency. It was quite possible to indecently assault a person whilst he or she was sleeping.<sup>43</sup>

On occasion, the offence was capable of being committed with a psychic assault; as in *Rolfe*,<sup>44</sup> where D moved towards C with his penis exposed.<sup>45</sup> The Lord Chief Justice commented that:

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<sup>35</sup> *R v Rolfe* (1952) 36 Cr App R 4.

<sup>36</sup> *Faulkner v Talbot* [1981] 3 All ER 468.

<sup>37</sup> *R v Ireland* [1998] AC 147.

<sup>38</sup> G. Williams, *Textbook of Criminal Law*, 2<sup>nd</sup> edn (Sweet & Maxwell, London, 1983).

<sup>39</sup> *Ibid.*

<sup>40</sup> *R v Naveed Tabassum* [2000] 2 Cr App R 328.

<sup>41</sup> *R v Court* [1989] AC 28.

<sup>42</sup> *R v Leeson* (1968) 52 Cr App R 185.

<sup>43</sup> [1989] AC 28, at 42.

<sup>44</sup> *Op cit*, n 35.

‘an assault may be constituted by a threat or a hostile act committed towards a person, and if a man indecently exposes himself and walks towards a woman with his person exposed and makes an indecent suggestion to her that, in the opinion of this court, can amount to an assault.’<sup>46</sup>

An invitation from D for C to touch him intimately did not constitute an indecent assault on D’s part unless his conduct put C in fear of D’s touching her.<sup>47</sup> In respect of a psychic indecent assault, the complainant must have been shown to be aware both of the assault and of the circumstances of indecency.<sup>48</sup> The complainant’s perception of the incident therefore gained some significance, as the offence required only the ‘causing of fear’ that the C would be touched, rather than a physical assault. The reasoning in *Rolfe* and *Beal v Kelly*<sup>49</sup> was taken a step further in *Sargeant*.<sup>50</sup> There the defendant had grabbed the complainant, a 16-year-old youth, had wielded a stick in a threatening manner and had forced the youth to masturbate into a condom. The appeal against conviction for indecent assault, on the basis that where there was no actual touching of the complainant by the defendant the threat must be one of indecent touching, was dismissed by the Court of Appeal. The decision confirmed that there did not even have to be the threat of indecent touching. Instead, it sufficed to prove that there existed the coincidence of an assault and the necessary accompanying circumstances of indecency. This is an important complainant-centred aspect of the law. As we shall see in chapter 3, under s.3 SOA 2003 D must *intentionally* touch C, precluding conviction of a D who commits a psychic sexual assault<sup>51</sup> or where there exists the coincidence of an assault and the necessary accompanying sexual circumstances. Thus, sexual assault is more narrowly defined than indecent assault. This is an important consideration in assessing

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<sup>45</sup> The decision in *Ireland* [1998] AC 147 holding that silent phone calls may, in principle, cause fear of immediate harm, together with *dicta* from that case holding that words may constitute an assault, broadened the scope of indecent assault. Obscene telephone calls were capable of constituting indecent assault, provided C was placed in fear of an immediate act of indecency.

<sup>46</sup> *Ibid*, at 6.

<sup>47</sup> *Fairclough v Whipp* [1951] 2 All ER 834.

<sup>48</sup> *R v Court* [1989] AC 28.

<sup>49</sup> (1951) 35 Cr App R 128. Discussed in section 2.2.2.

<sup>50</sup> [1997] Crim LR 50.

<sup>51</sup> A defendant who commits a psychic assault similar to that in *Sargeant* could now be charged under SOA 2003, s.4, with causing a person to engage in sexual activity without consent. See chapter 3, section 3.4.

the extent to which s.3 is complainant-centred as will be demonstrated in chapter 4, section 4.2.

In *Ananthanarayanan*,<sup>52</sup> the Court of Appeal stated that ‘there is no room in this area of the law for any ‘*de minimis*’ exception’. The defence counsel submitted that the ‘evidence of indecent touching by the appellant disclosed such trivial acts as not, in law, to amount to indecent assault at all’, which would have amounted to saying that so far as the law is concerned women have to put up with minor indecent assaults. The Court of Appeal held that:

‘...there may be cases where the circumstances of an alleged indecent assault are such that a real question arises whether the public interest requires prosecution, but in principle there should be no doubt that under the modern law any deliberate and non-consensual touching accompanied by circumstances of indecency constitutes the criminal offence of indecent assault.’

This demonstrates an important complainant-centred aspect of the law on indecent assault. Female complainants were protected from the objection that some indecent assaults were ‘too trivial’ to be the subject of legal control.

### 2.2.2 ‘Circumstances of indecency’

The assault was required to be perpetrated in ‘circumstances of indecency’.<sup>53</sup> Until 1951, there was no English criminal case in the law reports in which the question of the meaning of indecent assault had been considered. Back in 1867, however, an Australian appellate court held that ‘indecent assault is nothing more than a common assault with circumstances of indecency on the part of the offender’.<sup>54</sup> In *Beal v Kelley*,<sup>55</sup> Lord Goddard expressed his preference for the definition given in Archbold’s *Criminal Pleading Evidence and Practice*: ‘An assault accompanied with circumstances of

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<sup>52</sup> (1994) 98 Cr App R 1 at p.5. The indecent assaults included the defendant touching the breasts and between the legs of a number of women whom he worked with.

<sup>53</sup> Archbold’s *Criminal Pleading, Evidence and Practice* 32<sup>nd</sup> edn, p.1067.

<sup>54</sup> *Messenger*, 4 WW & A’B (L) 253.

<sup>55</sup> (1951) 35 Cr App R 128.

indecent on the part of the prisoner'. In many cases, of course, there was no problem of categorising the assault as indecent e.g. where D touched C's sexual organs. However, what of D who puts his hand on C's thigh or around her shoulders? Was it relevant whether D acted out of a sexual motive? Could activities such as D washing C's feet or cutting her hair for purposes of sexual gratification constitute indecent assault?

The adoption of the word 'indecent' in this context, as opposed to sexual, suggests, as repeated on several occasions by the House of Lords in *Court*, that the original criterion was infringement of 'contemporary standards of modesty and privacy'.<sup>56</sup> The element of indecent distinguished indecent assault from common assault (a summary offence with a maximum term of six months' imprisonment) and made it a more serious offence carrying a maximum term of ten years imprisonment and a far greater social stigma. Professor Glanville Williams suggested that touching a woman's breasts and stripping a woman in public without sexual motive were acts not 'sufficiently serious'<sup>57</sup> to command the title indecent assault or penalties severer than those for common assault.<sup>58</sup> According to Williams, the courts should have insisted that an indecent assault must relate to the normal erogenous zones, 'the genital organ and its approaches'.<sup>59</sup> Williams suggested that a man who slaps or pinches the bottom of a fully clad female 'takes a liberty' and commits a common assault.<sup>60</sup> Although the assault was sexually motivated, there were in fact no aggravating sexual features about it, and therefore it should not be made an indecent assault. This would have devalued a woman's sexual autonomy and trivialised what may be a very traumatic and psychologically harmful

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<sup>56</sup> [1989] AC 28, at 41, 44, & 52.

<sup>57</sup> Although see the examples given by Pritchard to demonstrate indecent/sexual conduct committed without a sexual motive: (1) a gang of racist youths who strip a heavily veiled Muslim woman as a gesture of provocative humiliation; (2) a male homosexual who strips a woman to humiliate her as punishment for attracting away his bisexual lover; (3) a man who strips a girl who has become drenched and semi-unconscious and requiring urgent assistance against the cold. A.M. Prichard, 'Indecent Assault: Another View' (1987) 137 *NLJ* 1130. Williams' characterisation of stripping in public as not 'sufficiently serious' seems inappropriate in light of these examples.

<sup>58</sup> G. Williams, 'What is an Indecent Assault?' [1987] 137 *NLJ* 870.

<sup>59</sup> *Ibid*, at 871.

<sup>60</sup> *Ibid*, at 871.

experience for the complainant. The phrase ‘takes a liberty’ would also have raised more questions about when conduct is acceptable. In contemporary society, where the impact of sexual offending on complainants is well documented, we should strive to highlight the wrong of unwanted sexual touching, and not de-value the ‘sexual’ aspect of a violation.

A further failure of Williams’ characterisation is that indecent assaults would normally engender very different reactions in the mind of the complainant than common assaults. A woman even lightly molested by a breast fondling may well ‘quite reasonably feel not just an entirely justified revulsion as a depersonalised object of one-sided pleasure, but also a very real fear of what might be coming next’<sup>61</sup> i.e. that the offender might decide to rape her. Prichard suggested that if courts had characterised the fondling of a woman’s breasts as *not* indecent, this would have created a hybrid offence of ‘indecent common assault’.<sup>62</sup> This would have disregarded the distress peculiarly inflicted by the ‘indecent’ nature of the act, equating the fondling with a light tap on the shoulder.

#### (a) The ambiguity of indecency

The word ‘indecency’ can be related to a list of similarly ambiguous terms: decency, intimacy, privacy, modesty, immodesty, sexuality. Moran suggests that these terms may be associated with two general discourses through which a ‘discipline of the body is written and through which social hierarchies are initiated and managed.’<sup>63</sup> The first theme is ‘civility’ (covering decency, indecency, intimacy, immodesty, privacy) and is categorised by Moran as having a concern for manners and described as a ‘medium through which both individuals and groups define themselves within social space’.<sup>64</sup> The vagueness of the term ‘civility’ and its relationship with morals is problematic. Decency

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<sup>61</sup> *Op cit*, Prichard, n 57.

<sup>62</sup> *Ibid.*

<sup>63</sup> Moran, *Op cit*, n 34.

<sup>64</sup> *Ibid.*



refers to an individual's adherence to social standards of appropriate speech and conduct. Indecency is therefore a socially and culturally constructed and historically contingent concept. Moran's classification of the indecent within the theme of civility demonstrates that indecency is essentially a moral judgment and therefore context-dependent, rather than having an essential quality.

The second theme is 'sexuality' which emerged as an idea in the eighteenth century and whose social origin Moran suggests is more 'closely associated with science, hygiene and sanitary government.'<sup>65</sup> Foucault's *History of Sexuality Volume 1*<sup>66</sup> now stands out as the key text in the historiography of sexuality.<sup>67</sup> Foucault was not interested in sexuality itself so much as he was interested in how it became an 'object for knowledge'. Whilst other cultures treated sex as an object of knowledge, as an *ars erotica*, or art of sensual pleasure, our culture was distinct in treating sex as an object of distanced, scientific investigation. Foucault identified four major focus points: the hysterical woman, the masturbating child, the socialization of procreative behaviour and the sexually 'perverse'. Whilst these themes persist today, new concerns have emerged including incest and child abuse. Foucault wrote that the concept of which activities and sensations are 'sexual' is historically determined and therefore part of a changing discourse.<sup>68</sup> It is suggested that questions of regulating sexuality bring into focus the liberal view of a world split between public and private.<sup>69</sup> Should practices such as prostitution, incest, sexual intercourse with children and homosexuality lie on the public or private side of the divide? The boundary between these two areas of life shifts over time and according to dominant beliefs, and therefore the dilemma continually presents

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<sup>65</sup> *Ibid.* See also L.J. Jordanova, 'Natural facts: a historical perspective on science and sexuality' in C. MacCormack & M. Srathern, *Nature, Culture and Gender* (Cambridge University Press, Cambridge, 1980).

<sup>66</sup> M. Foucault, *The History of Sexuality Volume 1* (trans. Robert Hurley, Random House, New York, 1978).

<sup>67</sup> S. Garton, *Histories of Sexuality: Antiquity to Sexual Revolution* (Equinox Publishing Ltd, London, 2004).

<sup>68</sup> Foucault, *op cit*, n 66.

<sup>69</sup> K. O'Donovan, *Sexual Divisions in Law* (Weidenfield and Nicholson, London, 1985) p.99.

itself.<sup>70</sup> Later in this thesis, I will consider the co-existence and management of these two discourses in the contemporary idea of defining an offence as 'sexual' rather than 'indecent' and in the face of possible differences and conflicts.

Williams defined indecent as 'overtly sexual'.<sup>71</sup> He thus highlighted what he perceived as the inter-relationship between sexuality and civility, putting the two regimes into a hierarchical relationship. The definition suggests that in law the body is now to be written through the signifying practice of sexuality: the indecent is to be defined as the sexual.<sup>72</sup> Sexuality is thereby the ascendant of civility. Nevertheless, how are we to define sexuality? One possible approach is that there is a necessary relation between genitality and sexuality. However, this thesis will argue that the 'sexual' is not only a single necessary relation (genital/sexual) but also an assignable relation: no action or touching is intrinsically 'sexual' it only becomes so when someone experiences and defines it as such. Ultimately the problematic aspect of both indecent and sexual assault is meanings and thereby the ambiguity of gesture. How do you define an act as 'indecent' or 'sexual' when it is capable of many meanings?<sup>73</sup> It will be argued in chapter 5 that sexual assault is a context-dependent crime, as the polysemic quality of the act often requires consideration of the relationship between the gesture and its meanings. The focus of this chapter is the courts' approach to the meaning of 'indecent' in light of the two lexicons mentioned above and given that it was left undefined by the SOA 1956.

#### (b) Indecency pre- *R v Court*: genital proximity

A test of actual genital proximity or the suggestion of genital proximity became a practice through which the ambiguity of the indecent gesture could be controlled by

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<sup>70</sup> *Ibid.*

<sup>71</sup> Williams, *op cit*, n 38.

<sup>72</sup> It is noteworthy that in 1983 in Canada indecent assault was abolished and replaced with an offence of sexual assault (s. 246.1 Canadian Criminal Code).

<sup>73</sup> For example, the act of spanking a child on the bottom is capable of many different meanings. It may be a disciplinary measure, but it may also be carried out to obtain sexual gratification.

judges and juries. Lord Goddard, in *Beal v Kelley*,<sup>74</sup> concluded that where a hostile act (for example, the touching of a shoulder without consent) is proximate to an indecent event (an exposed sexual organ, for example, the erect penis) then the assault is an indecent assault. In *R v Leeson*,<sup>75</sup> the Court of Appeal concluded that where the kissing of a girl against her will is 'accompanied by suggestions that sexual intercourse should take place or that sex play should take place between them, the assault is an indecent one'. These precedents demonstrate one way in which the problem of ambiguity may be resolved.<sup>76</sup> The genital proximity test was referred to and given further support by Lord Justice Gibson on behalf of the Court of Appeal in *Court*,<sup>77</sup> but Lord Ackner attempted to resolve the problem of the ambiguity of 'indecent' by introducing a tripartite categorisation of gestures.

#### (c) The decision in *R v Court*

In *Court*, D, a shop assistant, placed a 12-year-old girl visitor, fully clothed, across his knees and struck her 12 times on her buttocks. When questioned by the police as to why he replied, 'I don't know why- buttock fetish'. He pleaded guilty to assault but denied that it was indecent. His counsel argued that the evidence of the secret motive should be excluded on the basis that it could not make indecent an assault that by reference to the overt circumstances was not 'indecent'. This argument was central to the appeal before both the Court of Appeal and the House of Lords. The House of Lords dismissed D's appeal against conviction. Where a charge of indecent assault contrary to section 14(1) of the SOA 1956 was founded on facts capable of being given an innocent as well as an 'indecent' interpretation, it was necessary for the prosecution to prove not only that the accused intentionally assaulted the complainant but that in doing so he intended to commit an assault which right-minded persons would think was

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<sup>74</sup> [1951] 2 All ER 763, at 764.

<sup>75</sup> (1968) 52 Cr App R 185.

<sup>76</sup> A non-interpretive approach to the meaning of 'sexual' will be analysed in chapter 5, section 5.1.

<sup>77</sup> He referenced an observation made by the trial court judge which stated that buttock spanking was an indecent assault as it was the repeated physical contact in an area immediately adjacent to the private parts [1987] 1 All E R 120, at 126.

indecent. Evidence as to the accused's motive tending to explain the cause of his conduct was admissible to establish not only whether he intended to commit an assault, but an *indecent* assault. It was held *per curiam*<sup>78</sup> that if the circumstances of an assault were incapable of being regarded as indecent by the trial judge or jury, the undisclosed intention of the accused could not make the assault an indecent one.

The first issue arising from this case is how 'indecent' was determined. D's motive may have been indecent but the act or its circumstances may not have appeared to be indecent to an objective observer, or vice versa. The House of Lords gave detailed guidance on how the question of indecency should be left to the jury. Lord Ackner suggested that matters might be clarified for the jury if they were to be asked whether they thought 'right-minded persons would consider the conduct indecent or not'. It was in the context of this question that the House of Lords identified three categories of activity: (a) conduct that was inherently decent; (b) conduct that was inherently indecent; and (c) conduct that may or may not be indecent.

#### *Category 1: inherently decent conduct*

This category included conduct that was decent by its very nature. If an act was inherently decent, the act could not constitute an indecent assault even if D's motive in perpetrating the act was a sexual motive. Lord Ackner with the concurrence on this point of all the other Lords said, 'The Prosecution must prove...that the assault, or the assault and the circumstances accompanying it, are capable of being considered by right-minded persons as indecent.'<sup>79</sup> At another point he added, 'it is for the jury to decide whether what occurred was so offensive to contemporary standards of modesty and privacy as to be indecent.'<sup>80</sup> One weakness of the decision in *Court* is the lack of examples given to demonstrate the conduct falling into the three categories. There was

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<sup>78</sup> A *per curiam* opinion is a ruling issued by the court acting collectively and anonymously.

<sup>79</sup> [1989] AC 28, at 45.

<sup>80</sup> [1989] AC 28, at 42.

no explanation as to what made an act 'inherently decent' and it appeared to be decided on a case-by-case basis. Taking a shoe,<sup>81</sup> or touching C's skirt<sup>82</sup> were considered by the courts to be inherently decent and therefore outside the scope of indecent assault, notwithstanding that they were done for sexual reasons.

### *Category 2: inherently indecent conduct*

This category included conduct that was indecent by its very nature, regardless of whether D engaged in the conduct for sexual or other reasons. An inherently indecent assault occurred where an objective observer would be sure that he was witnessing an act that was indecent. An example of this type of conduct in *Court* was of a man who removed a woman's clothing in public against her will. According to Lord Ackner, 'those very facts, *devoid of any explanation*, would give rise to the irresistible inference that the defendant intended to assault his victim in a manner which right-minded persons would clearly think was indecent.'<sup>83</sup> Situations where D might have a legitimate explanation include where D, a doctor, strips an unconscious woman lying in the road in order to resuscitate her. A *prima facie* indecent act would not have been considered indecent if it was committed by a medical professional for medical purposes. This analysis demonstrates how it was difficult to separate the *actus reus* from the *mens rea* of the offence. If the motive of D was a relevant issue in deciding whether an assault was indecent, this suggested that the two elements were not capable of being distinguished.

A further example of inherently indecent conduct given in *Court* was the intimate examination of a woman. If consent was given, no offence had taken place. Where D, a

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<sup>81</sup> *R v George* [1956] Crim LR 52, where the defendant had on two occasions tried to remove shoes off girls' feet, an action that gave him a kind of perverted sexual gratification, Mr Justice Streatfield held that neither of the assaults amounted to an indecent assault.

<sup>82</sup> *R v Thomas* (1985) 81 Cr App R 331, where D touched the bottom of a 12-year-old girl's skirt, rubbed it, and when pushed had walked away. It was held that the circumstances of the offence might be an assault but did not have the necessary ingredient of indecency.

<sup>83</sup> [1989] AC 28, at 43. Original emphasis.

doctor took a vaginal sample from C under the guise of diagnosis, but in reality, took the sample for the purposes of some research he was undertaking, the offence of indecent assault was committed. Lord Ackner, speaking for the majority in *Court*, considered that if the assault or circumstances associated with the assault were inherently indecent by the standards of right-thinking people, establishing indecent assault need not involve proof that the assault was sexually motivated.

One problematic aspect of the Lords categorisation of inherently decent and inherently indecent conduct is the meaning attached to the terms 'inherently' and 'decency'. It is not clear from *Court* what the Lords meant by the term 'inherently', but they seem to have assumed that there are some categories of conduct that *all* people would agree are inherently decent or indecent. This highlights what philosophers label the ontological problems in defining conduct. Do such acts ever have an inherent value or meaning, or do they only acquire such meaning when others experience or respond to them? There is an assumption in the judgement that all jurors are 'right-minded people', but given the multiplicity of perspectives on sexuality in contemporary British society, it is very difficult to maintain that view. The decision in *Court* therefore appeared to rest on a consensual view of what constitutes indecent conduct; but that in itself included a significant value judgment. The difficulty of distinguishing an inherently decent act from an inherently indecent act is illustrated by the difference of opinion in cases on forcible kissing.<sup>84</sup> In the Scottish case *Boyle v Ritchie*<sup>85</sup> the High Court held that a kiss might be perfectly decent in an open social setting but indecent in a 'lewd and libidinous setting'.

### *Category 3: conduct which may or may not be indecent*

This category included conduct that may be rendered 'indecent' by the accompanying circumstances or D's motive. The facts of *Court* itself fell within this category. Lord Griffith suggested that spanking a girl's bottom is an 'equivocal' action. The buttocks are

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<sup>84</sup> See Chapter 5, section 5.2.1.

<sup>85</sup> [1999] SCCR 278.

an intimate part of the body in close proximity to the sexual organs and non-consensual touching of this part of the body is certainly capable of being indecent.<sup>86</sup> Lord Ackner further stated:

‘The conduct of the appellant in assaulting the girl by spanking her was only *capable* of being an indecent assault. To decide whether or not right-minded persons might think that the assault was indecent, the following factors were clearly relevant: the relationship of the defendant to this victim (were they relatives, friends or virtually complete strangers?), how had the defendant come to embark on this conduct and why was he behaving in this way?’<sup>87</sup>

In *Court*, if D had been C’s father administering discipline, this would not have been an indecent assault. Nevertheless, the buttocks are an erogenous zone, and the use of spanking in a sexual context is well established not only in pornography, but also in popular culture<sup>88</sup> and even in serious literature.<sup>89</sup> In *Court*, as D was acting for sexual gratification, his motive made an incident *capable* of being considered indecent *actually* indecent. D’s motive was therefore a relevant circumstance in cases falling within this category.

The Court of Appeal had adopted the approach that conduct may be rendered ‘indecent’ by the accompanying circumstances or D’s motive in cases heard prior to the *Court* decision. For example, in *Leeson*,<sup>90</sup> the defendant had assaulted a girl by grabbing her and kissing her against her will. The Court of Appeal held that this constituted an indecent assault, due to the defendant’s accompanying suggestions that she should also submit to sexual intercourse. However, it was not in all cases that surrounding circumstances would suffice to turn an assault into an indecent assault. In *Thomas*,<sup>91</sup> the defendant touched and rubbed the bottom of a girl’s skirt. On a number of

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<sup>86</sup> [1989] AC 28, at 35.

<sup>87</sup> *Ibid*, at 43.

<sup>88</sup> See, e.g. the musical *Kiss me Kate*, or the films starring John Wayne, such as *Donovan’s Reef*, and *McClintock*, where a woman is spanked by a man in a situation where there is sexual tension between them.

<sup>89</sup> E.g. Robert Coover, *Spanking the Maid* (Heinemann, London, 1987).

<sup>90</sup> (1968) 52 Cr App R 185.

<sup>91</sup> (1985) 81 Cr App R 331.

occasions some months before, he had asked the girl to kiss him. The Court of Appeal held that whilst there may have been an assault on the facts, it was neither inherently indecent nor rendered so by the accompanying circumstances.<sup>92</sup> The Court of Appeal in *Thomas* did not mention the *Leeson* decision, but it appears that the cases could be distinguished on the basis of proximity. In *Thomas*, the Court of Appeal held that ‘the girl was not simultaneously coupling the touching of her skirt with the request by the caretaker for a kiss’,<sup>93</sup> whereas in *Leeson* the suggestion of sexual intercourse accompanied the touching.

One consideration was whether D’s cutting of C’s hair, or washing C’s feet would have been capable of being an affront to C’s modesty or privacy? One might argue that even if D experienced sexual gratification from the act, it was merely an assault, not an indecent assault and that there was insufficient affront to C’s modesty or privacy to move it into the ambiguous category. If C treated the washing of her hair simply as part of her haircut, then the fact that D acted from a secret motive should not have altered the nature of the assault charge. However, arguably such an action should have been capable of constituting indecent assault, where C was aware of D’s purpose or experienced the action as indecent.

The reference in *Court* to ‘contemporary standards’ acknowledged that what is considered indecent may change over time. This meant that it was possible for certain behaviour to come to be recognised as indecent and therefore possibly to move into the category of being capable of being indecent. The practice of toe sucking might therefore have become a practice that could be charged as indecent assault. However, the fact that the standards were to be determined by ‘right-thinking’ persons meant that only those standards that had general acceptance within society as a whole would have been

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<sup>92</sup> The CA suggested that the touching of the girl’s skirt may well have been an assault; ‘There could be no dispute that if you touch a person’s clothes whilst he is wearing them that is equivalent to touching him’. *Ibid*, at 334.

<sup>93</sup> *Ibid*, at 333.



applied. Thus, the fact that D and C were members of a religious group who regard it as indecent for a man and woman to hold hands in public, would not have turned D's holding of the C's hand in the street against her will into an indecent assault. Nor would the fact that, for example, the complainant was a strict follower of the Islamic religion, which required her to be fully veiled in public, mean that she would have been indecently assaulted by a defendant who pulled aside her veil, revealing her face. D will have assaulted her, but whether the assault would have been considered indecent would have been for the jury to decide, according to contemporary standards of 'right-thinking' people.

#### (d) Court and the genital proximity test

In *Court*, the Court of Appeal expressed some support for the genital proximity test by reference to an observation made by the trial court judge that stated that buttock spanking was an indecent assault as it was the repeated physical contact in an area immediately adjacent to the private parts.<sup>94</sup> The introduction of the tripartite distinction, however, raised questions about the continuing significance of the genital proximity test. Lord Ackner in *Court* drew attention to the fact that genital proximity may not in itself be sufficient to sustain a finding of indecency and thus appeared to subsume the genital proximity test within category 3, conduct which may or may not be indecent. He suggested that whilst the act has the capacity to be indecent, the indecent quality of the act might also depend upon other factors. These he describes as the relationship of the defendant to his complainant, the method used to initiate the event and finally, evidence of the defendant's reason for acting.<sup>95</sup> These additional requirements did not imply that the genital proximity test had been rejected, but highlighted again the problematic nature of the idea that there is a necessary relation between genitality and sexuality.

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<sup>94</sup> [1987] 1 All E R 120, at 126.

<sup>95</sup> [1989] AC 28, at 43.

(e) *Court* and the concept of ‘privileged speakers’

The judgment in *Court* further highlighted how the power to determine the indecent was allotted to ‘certain privileged speakers’.<sup>96</sup> The initial determination that the act of the defendant was indecent was not made by the complainant: ‘The girl went home and told her mother that the appellant had spanked her for no reason and scared her.’<sup>97</sup> The father made the initial determination of indecency, to the exclusion of the complainant.<sup>98</sup> Evidence that this exclusion was not idiosyncratic was found in the rule that it was not necessary in order to prove indecent assault to show that the complainant was aware of the circumstances of indecency or apprehended the indecency.<sup>99</sup> Lord Ackner’s idea that an act may be inherently indecent or incapable of indecency suggested that the defendant might also be denied the status of privileged speaker. Where the act was judged by reasonable people to be inherently indecent, the defendant’s perception of the behaviour and appreciation of the indecent nature of the conduct was not a matter to be considered by the court.

It became apparent that in general the privileged speakers were external to the event: the father, mother, social worker, police, jury and judge were all given a voice in determining the ‘indecency’. When the action was merely capable of indecency, the voice of the defendant may have been privileged in that evidence of the reason for the behaviour would be allowed which may have negated a determination by others that the act is indecent.<sup>100</sup> However, the judge and jury retained the right to determine the ultimate significance of the defendant’s assertion. The complainants’ experience or perception of the act was not a factor to be considered in determining the ‘indecent’ nature of the act. The test of indecency should have involved looking at contemporary standards, the motivation of D and the experience of C. This goes beyond the decision in

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<sup>96</sup> Moran, *op cit*, n 34.

<sup>97</sup> [1987] 1 All ER 120, at 121j.

<sup>98</sup> [1988] 2 All ER 221, at 230a-b.

<sup>99</sup> *Ibid*, at 229j.

<sup>100</sup> *Ibid*, at 232d-e.

*Court*, but it does not directly conflict with it, and there are clear advantages in adding C's perception into the analysis. Since the offence was primarily concerned with the level of assault which C had suffered, rather than maintaining public standards of decency, evidence as to C's view of the nature of the assault should have been relevant. This is not to suggest that there should only have been an indecent assault where C, at the time, regarded it as being indecent. This would have excluded assaults on C's who were sleeping, or otherwise unconscious: but, C's view as to whether or not the assault had an indecent element should have been taken into account. Where C was not conscious of the assault at the time, her subsequent attitude, on becoming aware of what D had done, would have provided the relevant test. This approach would have the effect of giving appropriate recognition to the infringement of C's right to bodily and sexual autonomy. It would not have meant that any assault that C regarded as indecent would have led to D being guilty of indecent assault. D would still have to have the required state of mind to be guilty and C's evidence would only be relevant in relation to the 'indecent' nature of the act.

### 2.2.3 Lack of consent

Although the complainant's lack of consent was not an element of the definition of indecent assault, as absence of consent was an essential ingredient of assault *per se* it followed that there was no indecent assault if D touched C indecently when C had consented to that touching. The approach to consent favoured in *Olugboja*<sup>101</sup> was specifically applied to indecent assault in *McAllister*.<sup>102</sup> *Olugboja* left the decision on consent as a question of fact for the jury who had to decide what was in the complainant's mind at the time of the offence. The Court of Appeal suggested that 'real consent' is a different 'state of mind' from 'mere submission',<sup>103</sup> and that the difference between these two is a matter of degree.<sup>104</sup> According to the Court, a clear case of 'real

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<sup>101</sup> [1982] QB 320.

<sup>102</sup> [1997] Crim L R 233.

<sup>103</sup> *Ibid*, at 332B-E.

<sup>104</sup> *Ibid*.

consent' is that of the woman who agrees to intercourse out of love or desire for the man and who understands what she is doing. The Court suggested that there comes a point at which the woman's state of mind will be so different from the ideal that she can no longer be said to give 'real consent', but must be described as 'merely submitting'. The Court left to the jury the task of fixing that point, 'applying their combined good sense, experience and knowledge of human behaviour and modern behaviour to all the relevant facts of the case'.<sup>105</sup> This seemed to indicate that every case should be decided on its facts but without a framework of what was meant by consent and when effective consent was absent.

Academic commentators responded in different ways to the *Olugboja* decision. Smith and Hogan stated that the distinction between consent and submission was 'so vague that both judges and juries may have quite different ideas as to its application'.<sup>106</sup> Gardner, on the other hand, hailed the decision as a considerable breakthrough in advancing the legal protection of sexual autonomy.<sup>107</sup> He argued that depicting consent as the state of mind of the individual complainant permitted the jury to decide in each case whether consent was present.<sup>108</sup> Temkin contradicted this view, arguing that *Olugboja* 'does little to increase the protection of sexual autonomy'.<sup>109</sup> She suggested that in transforming issues of law into issues of fact for the jury, the decision created 'uncertainty' and might have resulted in 'oppressive behaviour going unpunished'.<sup>110</sup> Arguably, Temkin was concerned that the common assumptions of rape as 'forcible violation' would undermine the likelihood that defendants whose actions did not subscribe to the police's, prosecutors' or jurors' common (mis)understandings would be charged and convicted.

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<sup>105</sup> *Ibid.*

<sup>106</sup> J. Smith & B. Hogan, *Criminal Law* (Butterworths, London, 1999) p. 459.

<sup>107</sup> S. Gardner, 'Appreciating *Olugboja*' (1996) 16 *LS* 275.

<sup>108</sup> *Ibid.*

<sup>109</sup> J. Temkin, *Rape and the Legal Process*, 2<sup>nd</sup> ed. (Oxford University Press, Oxford, 2002) p. 93.

<sup>110</sup> *Ibid.*

In determining whether an indecent assault had taken place, any consent given by a boy or girl under the age of 16 was to be disregarded.<sup>111</sup> Williams justified this stating that:

‘even when a youngster does not realise the significance of what is being done to him or her, and does not suffer harm, the law has to consider the alarm and annoyance caused to the parents’.<sup>112</sup>

Consent given by a ‘defective’ was also to be disregarded provided D knew or had reason to think that C was a ‘defective’.<sup>113</sup> If a woman were to have sexual intercourse with a boy under 16, this would have been the offence of indecent assault by the woman even if the boy consented to, or instigated, the act.<sup>114</sup> As in the case of rape, consent exacted by force, fear or fraud as to the nature of the action, or as to identity was not a defence. In *Tabassum*,<sup>115</sup> D, who was not medically qualified, persuaded women to allow him to measure their breasts by representing that he was doing so for the purpose of a database he was preparing for doctors. His convictions for indecent assault were upheld because the women would not have consented to these acts if they had not believed that he had medical qualifications (even though they were fully aware of the nature of the acts to be done) and D knew that this was so.<sup>116</sup> Though C was aware of the nature of the act, her consent may have been negated if she was mistaken as to its ‘quality’.

This chapter has so far demonstrated that in relation to the *actus reus* of indecent assault the offence had considerable merit: it included psychic assaults, which considerably widened the behaviour amenable to prosecution. However, the offence was also insufficiently complainant-centred in two significant respects. First, indecent assault was a widely drawn provision that prohibited both a psychic or physical assault

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<sup>111</sup> SOA 1956, ss.14(2), 15(2). See J. Hall, ‘Can Children Consent to Indecent Assault?’ [1996] *Crim L R*, Mar, 184-188 which discusses the problems arising from the courts’ interpretation of a statutory bar on consent as only applying to inherently indecent acts in *R v Sutton* [1977] 1 WLR 1086.

<sup>112</sup> Williams, *op cit*, n 38 at p.228.

<sup>113</sup> SOA 1956 ss.14(4), 15(3).

<sup>114</sup> SOA 1956, ss 14 & 15; *Faulkner v Talbot* (1982) 74 Cr App R 1.

<sup>115</sup> [2000] 2 Cr App Rep 328.

<sup>116</sup> See also *Pike* [1996] 1 Cr App Rep 4.

and therefore contravened the principle of fair labelling, as the label on conviction did not differentiate between the vastly different forms of conduct and their disparate gravity. Secondly, the requirement that the assault be perpetrated in 'circumstances of indecency' created an offence of ambiguity and uncertainty. Lord Ackner introduced a tripartite categorisation of gestures, but failed adequately to explain what made an act 'inherently decent' or 'inherently indecent' and inappropriately assumed that there existed a consensual view of what constitutes indecent conduct. No reference was made to the complainant's experience or perception of the act as a factor to be considered in determining the 'indecent' nature of the act. We now turn our attention to the elements of *mens rea* required for a conviction of indecent assault.

### 2.3 MENS REA OF INDECENT ASSAULT

The *mens rea* of indecent assault required both an 'intention to touch' and an 'indecent intention'. The requirement that the assault must have been committed 'intentionally' and excluding conviction of a reckless, yet culpable indecent assault was under-inclusive and insufficiently complainant-centred. There was also confusion as to whether the offence was one of basic or specific intent and the relevance of intoxication to a charge of indecent assault. The House of Lords in *Court* also required the prosecution to prove an 'indecent intention' on the part of the defendant. This was an unnecessary addition to the definition of indecent assault, which was capable of different interpretations and might have caused much confusion for courts.

Table 2.1: The different possible mens rea requirements for indecent assault

| Contact                | Circumstances        | D's knowledge of the indecent nature of the act |                    |
|------------------------|----------------------|---|--------------------|
|                        |                      | D knows   | D does not know    |
| Intentional            | Objectively decent   | <sup>1</sup><br>X                               | <sup>2</sup><br>X  |
|                        | Objectively indecent | <sup>3</sup><br>✓                               | <sup>4</sup><br>✓  |
|                        | Ambiguous            | <sup>5</sup><br>✓                               | <sup>6</sup><br>X  |
| Reckless or accidental | Objectively decent   | <sup>7</sup><br>X                               | <sup>8</sup><br>X  |
|                        | Objectively indecent | <sup>9</sup><br>✓                               | <sup>10</sup><br>✓ |
|                        | Ambiguous            | <sup>11</sup><br>X                              | <sup>12</sup><br>X |

### 2.3.1 Intent to touch

Although most aggravated assaults may have been committed intentionally or recklessly,<sup>117</sup> for the purposes of the offence of indecent assault, the assault must have been committed intentionally.<sup>118</sup> Thus in table 2.1 we see that liability may have been found for indecent assault in situations 3, 4 and 5 where the contact is intentional. Indecent assault would also have been possible in situations 9 and 10, where the conduct is reckless or accidental, however this is a separate intoxication issue that will be dealt with below. In *Court* Lord Ackner, for the majority, described the *mens rea* for indecent assault in the following terms:

‘On a charge of indecent assault the prosecution must prove (1) that the accused intentionally assaulted the victim, (2) that the assault, or the circumstances

<sup>117</sup> E.g. assault occasioning actual bodily harm, s.47 OAPA 1861; racially or religiously aggravated assaults, s.29 Crime and Disorder Act 1998. See *Savage v Parmenter* (1991) 4 All ER 698.

<sup>118</sup> [1989] AC 28, at 46.

accompanying it, are capable of being considered by right-minded persons as indecent, (3) that the accused intended to commit such an assault as is referred to in (2) above.’<sup>119</sup> According to these criteria, the only situations that would constitute indecent assault in the table above would have been 3 and 5. Lord Ackner defined the *mens rea* element to be ‘intent’ and not ‘intent or recklessness’. Therefore, indecent assault could not have been found in situations 7- 12 above (excluding situations 9 and 10 that deal with intoxication). Lord Ackner stated that ‘it cannot in my judgment, have been the intention of Parliament, that an assault can, by a mere mistake or mischance, be converted into an indecent assault, with all the opprobrium which a conviction for such an offence carries’.<sup>120</sup> The offence could not be committed accidentally as for example by ripping a woman’s clothing whilst attempting to force an exit from a tube train, which would come under situation 12. Nor could the offence have been committed recklessly, as where a man brushed past a buxom woman in a packed nightclub. He is aware that his chest might touch her chest but hopes that he has left enough room, which he has not.<sup>121</sup> He acknowledged the risk of touching the woman, but continued. The definition of indecent assault laid out in *Court* excluded conviction of a reckless, yet culpable indecent assault. This demonstrates an insufficiently complainant-centred aspect of the offence. It mistakenly assumed that a D who was reckless and unintentionally touched C had not chosen his actions and should therefore not be liable. However, I will argue in chapter 10 that reckless sexual touchings may be culpable and deserving of the label sexual assault because D has manifested an attitude of ‘practical indifference’<sup>122</sup> as to whether touching takes place.

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<sup>119</sup> *Ibid.*

<sup>120</sup> [1989] AC 28, at 41.

<sup>121</sup> One might differentiate cases in which D really does not want to touch C and hopes he has left enough room, from those in which D might hope he has left enough room, but secretly hopes that some contact will be made. I will discuss this issue in chapter 10 when I put forward a case for the definition of sexual assault to be extended to include liability for reckless, yet culpable sexual touching.

<sup>122</sup> R.A. Duff, *Intention, Agency and Criminal Liability* (Blackwell, Oxford, 1990) ch.7.



### (a) Intoxication

Limiting the *mens rea* to intent did not seriously inhibit the range of application of the offence as the typical indecent assaults, which courts dealt with involved intentional touchings by defendants aware of the 'indecent' nature of the act. One important exception to this was the case of the voluntarily intoxicated defendant. Was the voluntarily intoxicated D capable of forming the necessary intent to touch? If indecent assault was exclusively a crime of intent then it followed that it was a crime of specific intent for the purposes of the rules relating to intoxicated defendants.<sup>123</sup> In *DPP v Majewski*,<sup>124</sup> the House of Lords held that the authority which had been relied upon for the last half century was the speech of Lord Birkenhead in *DPP v Beard*,<sup>125</sup> where he said that the cases:

'establish that where a specific intent is an essential element in the offence, evidence of a state of drunkenness rendering the accused incapable of forming such an intent should be taken into consideration in order to determine whether he had in fact formed the intent necessary to constitute the particular crime. If he was so drunk that he was incapable of forming the intent required he could not be convicted of a crime which was committed only if the intent was proved.'

The decision in *Court* that the *mens rea* of indecent assault was limited to intentional touching was modified by subsequent interpretation. In *C*,<sup>126</sup> D placed his fingers in C's vagina. He claimed that he was so drunk as not to know what he was doing and that it followed from *Court* that the prosecution must establish a specific intent on his part. The Court of Appeal, confirming D's conviction for indecent assault, emphasised that in *C* D's conduct was inherently indecent. When commission of the offence took that form, in relation to the 'indecent' nature of the touching, it could be regarded as a crime of intent or recklessness and therefore a crime of basic intent within the meaning settled in *Majewski*. Thus, liability for indecent assault could have been found in situations 9

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<sup>123</sup> *DPP v Majewski* [1977] AC 443.

<sup>124</sup> *Ibid.*

<sup>125</sup> [1920] AC 479, at 449.

<sup>126</sup> [1992] Crim LR 642.

and 10 in table 2.1. The recklessness is of the *Cunningham*<sup>127</sup> variety and accordingly, D must have foreseen the possibility that he might cause C to apprehend unlawful personal violence or he might unlawfully touch C in circumstances which right-minded people would consider indecent. Both the assault and its circumstances must be foreseen by D. In *C*, the Court of Appeal was effectively importing new *mens rea* requirements into indecent assault: where the conduct was inherently indecent, the crime was one of basic intent. By contrast, the act in *Court* was an 'equivocal act' and a sexual purpose had to be proved in order to constitute an indecent act. In that form, the offence becomes an offence of specific intent. The relevance of intoxication to a conviction of sexual assault, under s.3 SOA 2003, has also produced controversies, raising similar issues in defining sexual assault as a crime of basic or specific intent. In 2007, the Court of Appeal held in *R v Heard*,<sup>128</sup> that sexual assault is a crime of basic intent and that therefore voluntary intoxication is unavailable as a defence to a charge under s.3. This decision will be analysed in chapter 10.

### 2.3.2 Indecent intention

The House of Lords in *Court* imposed a requirement upon the prosecution of proving an 'indecent intention' on the part of the defendant.<sup>129</sup> This expression is capable of many different meanings. Lord Griffith highlighted the distinction in criminal law between motive and intent.<sup>130</sup> In the context of indecent assault, the necessary intent is to commit an assault that the jury as right-thinking people consider indecent. The motive for such an act will usually be to obtain sexual gratification but it need not necessarily be so. One problematic aspect of the decision in *Court* is that Lord Ackner framed the third aspect of the *mens rea* in terms of 'the accused intended to commit such an assault as is referred to in (2)'<sup>131</sup> (i.e. an assault capable of being considered by right-minded persons

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<sup>127</sup> [1957] 2 QB 396.

<sup>128</sup> [2007] EWCA Crim 125.

<sup>129</sup> [1989] AC 28, at 46.

<sup>130</sup> *Ibid*, at 35.

<sup>131</sup> See full quote above at page 46.

as indecent). This implies that the defendant intended to do an act that was in fact indecent when arguably he was saying that the third requisite aspect is that the defendant knew that the assault would be viewed by right-minded people as indecent. It has already been demonstrated above how the House of Lords in *Court* distinguished between three situations for the purpose of establishing the necessary ingredient of indecency. The effect of the decision is to create a parallel three situations in respect of establishing the defendant's *mens rea*.

*Category 1: inherently decent conduct*

If the circumstances of the assault were incapable of being regarded as indecent, then the undisclosed intention of the accused could not make the assault an indecent one. Thus we see in situation 1 that if the circumstances of the assault were objectively decent, an indecent motivation would not result in liability for indecent assault. Indecency must be manifested in conduct, at least to the extent that 'right-minded persons' would consider, without reference to any communicated or uncommunicated motive of the defendant, that the conduct in question might involve indecency. In *George*,<sup>132</sup> the removal of a girl's shoes from her foot in order to gain sexual gratification was not an indecent assault, there being no circumstances of indecency. Similarly, in *Thomas*,<sup>133</sup> the touching and rubbing of a girl's skirt did not constitute indecent assault, as it was neither inherently indecent nor rendered so by the accompanying circumstances.

*Category 2: inherently indecent conduct*

Lord Ackner, speaking for the majority in *Court*, considered that if the assault or circumstances associated with the assault were inherently indecent by the standards of right-thinking people, establishing indecent assault need not involve proof that the assault was sexually motivated. Where the assault was either inherently indecent, or

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<sup>132</sup> [1956] Crim LR 52.

<sup>133</sup> (1985) 81 Cr App R 331.

rendered so by the surrounding circumstances, then provided the defendant was aware of those circumstances at the time, and intended to commit an indecent assault (i.e. an assault which right-minded persons would think was indecent) he possessed the necessary *mens rea*. This was so even where the defendant had no intention to obtain sexual gratification from his act. Lord Ackner gave the example of a defendant who removes a woman's clothing against her will<sup>134</sup> and suggested that whether he did so for his own personal gratification, through a desire to humiliate or embarrass his victim, or for any reason, is irrelevant. A primary consideration in disavowing sexual motivation as a prerequisite was to ensure the conviction of persons for indecent assault who exposed their victims to a sexual form of humiliation, such as stripping them in public, for reasons of misogyny or cruelty rather than in pursuit of sexual gratification.<sup>135</sup> This appeared to be a more complainant-centred approach: the stipulation that D's motive was irrelevant and that the focus was on what right-minded persons would think was indecent seemed a more complainant-centred (or at least a more objective) approach than one that gave prominence to D's reason for acting.

Sullivan suggested that the decision to exclude a requirement of proof of sexual motivation gave rise to the prospect of convictions for indecent assault for conduct undeserving of the 'opprobrium' that sexual offending attracts.<sup>136</sup> He further suggested that a 'measure of uncertainty' was introduced as certain kinds of non-sexual motive could prevent conviction for indecent assault, even in cases of inherently indecent conduct, whereas other 'chaste' reasons for action would no longer be afforded a defence. Sullivan drew attention to the example of the intimate examination of a woman patient by a male doctor that featured in Lord Ackner's judgment. According to Sullivan, the doctor will commit an indecent assault if he fraudulently induces a woman to submit to an unnecessary examination for the purposes of his own sexual

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<sup>134</sup> See n 57 for examples.

<sup>135</sup> [1989] AC 28, at 35.

<sup>136</sup> G.R. Sullivan, 'The need for a crime of sexual assault' [1989] *Crim L R* 331.

gratification. Nevertheless, on Sullivan's interpretation of the *Court* decision, if an intimate examination were medically appropriate, a doctor would not have been convicted albeit that he received sexual gratification from carrying out the procedure. However, if the procedure were unnecessary in medical terms, a sexual motivation, though sufficient to establish indecency, would not have been a necessary condition of conviction. Sullivan held the view that a doctor stood to be convicted even though his uncommunicated motivation was non-indecent (such as scientific research) because, without a treatment justification, the procedure was 'so offensive to contemporary standards of modesty or privacy as to be indecent'.<sup>137</sup>

Sullivan's concern that *Court* led to unfair labelling was based on a misapplication of Lord Ackner's three categories and a misunderstanding of the relevance of C's lack of effective consent. First, the intimate examination of a woman patient by a male doctor is not by its nature 'indecent' and therefore should not have fallen within the inherently indecent category. The intimate examination of a patient is conduct that may or may not be indecent, depending on D's purpose(s), and therefore should have appropriately fallen within category 3, allowing the prosecution to adduce evidence of D's 'indecent motive'. Secondly, a patient who allows an intimate examination in the belief that it is necessary for treatment has not given an effective consent to an examination for the purposes of D's own sexual gratification,<sup>138</sup> being misled as to the nature as opposed to the mere quality of the act. Thus, what Sullivan viewed as an issue concerning the circumstances of indecency, was actually an issue concerning C's effective consent to the procedure.

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<sup>137</sup> [1989] AC 28, at 44.

<sup>138</sup> Nor would C have given effective consent where D fraudulently induced her to submit to an unnecessary examination for the purposes of his own scientific research. Under the SOA 2003 D's false medical examinations for purposes of sexual gratification or medical research would suffice to trigger the conclusive presumption on s.76(2)(a).

### *Category 3: conduct which may or may not be indecent*

Where an assault, viewed objectively, was at most capable of being indecent, then the prosecution could adduce evidence to show, not merely that the assault was indecent, but also that the defendant committed it with an 'indecent intent'. The obvious example of such a situation is *Court* itself. The delivery of chastisement to the buttocks of a child is not necessarily indicative of an intention to touch indecently. Knowing that the defendant is acting for the purpose of sexual gratification resolves any ambiguity about the nature of the act. As a result, liability can be found in situation 5.

If the prosecution were allowed to adduce evidence of 'indecent motive' then it was only reasonable that the defence should be able to counter that with evidence of a 'decent motive'. In *Court*, Lord Ackner cited with approval the decision in *Pratt*.<sup>139</sup> The case involved two thirteen year-old-boys who were engaged in night fishing. They found themselves suddenly threatened with a gun by a man. As each boy was forced to undress, the other was obliged to shine a torch on him. The man concerned stood some distance and touched neither of the boys. The trial judge ruled that the prosecution had to prove an 'indecent intent' and consequently, he allowed the defence to adduce evidence of the defendant's 'non-indecent motive', namely that he was searching the boys for cannabis, which he believed they had taken from him the previous afternoon. The trial judge's direction was approved by Lord Ackner in the following terms:

'The defendant was entitled to put before the jury his explanation of his strange conduct in order to contend that the prosecution had not established that he intended to commit an assault which was indecent'.<sup>140</sup>

However, given the House of Lords' own categorisation of indecent assault it is not easy to reconcile the principles established in *Court* with the actual decision in *Pratt*. It appeared that what D did in *Pratt* was inherently indecent, as it would have offended contemporary standards of modesty and decency. However, this draws attention to the

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<sup>139</sup> [1984] *Crim L R* 41.

<sup>140</sup> [1989] AC 28, at 44.

context-dependent nature of terms such as ‘indecent’ and, as we shall see in chapter 5, ‘sexual’. There was an obvious difference in this case between what D thought of what he was doing, how the boys may have experienced the situation and how it would have appeared to an objective observer. It may have offended standards of modesty and decency (depending on the context) and in such circumstances, whether his motive was sexual or otherwise was irrelevant. D’s evidence might refute a contention that he made the boys perform these acts for his sexual gratification; this is irrelevant however, to the issue of whether he knew that right-minded persons would regard such an incident as indecent. Whilst D might have argued that he did not think that ordinary right-minded people would regard his conduct as indecent, it is unlikely that such an argument would have been believed by the jury or magistrates.

The decision in *Court* appeared to suggest that in cases where the act is ‘inherently indecent’, the court can infer an intention to commit the act knowing that it is indecent, relieving the prosecution of the burden of proving indecent intention. Only in cases where the decency of the act is ambiguous does the prosecution need to show that D intended to commit an act knowing that right-minded people would think it indecent. Bentil argued that, following the decision in *Court*, jurors might have been tempted to equate an accused person’s motive or purpose of obtaining sexual gratification from his assault, with his intention to commit the assault itself.<sup>141</sup> This is a very subtle distinction that many jurors might have struggled with. If the circumstances of the contact were objectively decent or ambiguous and the motivation was non-indecent, there could be no liability for indecent assault. Thus in situations 2 and 6, D will not have been found guilty of indecent assault, but may have been liable for common assault<sup>142</sup> or assault occasioning actual bodily harm.<sup>143</sup>

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<sup>141</sup> J. Kodwo Bentil, ‘Nature of Offence of Indecent Assault Now Rendered Somehow Problematic’ (1989) 153 *Justice of the Peace* 116.

<sup>142</sup> Criminal Justice Act 1988, s.39.

<sup>143</sup> OAPA 1861, s.47.

(a) Lord Goff's dissent in *Court*

Lord Goff, dissenting, rejected the characterisation that the defendant's motive was admissible in evidence, on the ground that the majority had confused *mens rea* with *actus reus*. He suggested that a 'so-called "indecent intention" has never formed an ingredient of the offence, and that it would be wrong now to introduce any such requirement'.<sup>144</sup> The defendant's sexual motivation was something purely in his mind, and according to Lord Goff, it should not be considered when determining whether his conduct was indecent. Lord Goff agreed with the submission of defence counsel that 'to introduce a requirement of indecent motive would be undesirable in that it would create complications' in what had so far been 'treated as a relatively simple and straightforward offence'. He felt that the term 'indecent intention' was capable of bearing different meanings such as: (1) that an accused person intended to do an act which was, in fact, indecent; or (2) that an accused person intended to do an act for an indecent purpose of any kind; or (3) that an accused person acted with a particular indecent purpose, viz., with the motive of obtaining sexual gratification from his act.<sup>145</sup> Lord Goff inferred that the judge intended to attribute the last of those three meanings to the expression 'indecent intention' highlighting how this was not explained to the jury. Arguably, there is a fourth meaning which can be attributed to the term 'indecent intention'; that D knew that the assault would be viewed by right-minded people as indecent.

According to Lord Goff, a requirement that the defendant must have acted from a sexual motive would exclude from indecent assault cases where a man undressed a woman in public but did so not from the motive of obtaining sexual gratification, but because he was a misogynist, or because he wanted to cause the woman embarrassment, or out of sheer mischief. He suggested that it is the fact that the assault is objectively indecent which constitutes the gravamen of the offence, which is to be

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<sup>144</sup> [1989] AC 28, at 46.

<sup>145</sup> *Ibid*, at 49.



found in the 'affront to modesty'<sup>146</sup> of the complainant: 'If a man gives a young woman a good spanking on the backside, the jury will...have to consider whether the assault was such an affront to her modesty as to amount to an indecent assault.'<sup>147</sup> Lord Goff suggested that either intent to obtain sexual gratification should be an ingredient of the offence, or it should not. Lord Goff summed up his dissent as follows:

'First, if the prosecution cannot establish that an assault is objectively indecent, they are not allowed to fortify their case by calling evidence of a secret indecent intention on the part of the defendant. Second, if an assault is *prima facie* indecent, the defendant may seek to show that the circumstances of the assault were not in fact indecent, and for that purpose evidence of his intention would be relevant and admissible.'<sup>148</sup>

Lord Goff made it quite clear that he was not to be taken as saying that evidence of motive was never admissible. Thus, he conceded that such evidence might be admissible in certain cases where an accused person sought 'to say that what, *prima facie*, might appear to be indecent was not, in fact, circumstances of indecency'.<sup>149</sup>

The views expressed by Lord Goff were more preferable and more complainant-centred than the decision of the majority in *Court*. He highlighted the potential for injustice in cases where a man has been charged with what a reasonable person would call an indecent assault, but whom nevertheless claims that he is not guilty on the ground that he committed the assault only because he is a misogynist. In the vast majority of cases, the jury or magistrates would have been likely to have been able to glean from the circumstances of an assault whether or not the assault may have been indecent, without the need to have evidence of the defendant's intention. Lord Goff's argument appears to rest on the need for simplicity, clarity and consistency in the law. A consequence of his appeal for simplicity in the law is that complainants might have received greater protection under his approach. Requiring that courts establish an

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<sup>146</sup> *Ibid*, at 51.

<sup>147</sup> *Ibid*, at 52.

<sup>148</sup> *Ibid*, at 52.

<sup>149</sup> *Ibid*, at 51.

indecent intention on the part of D might have deflected attention from the invasion of sexual autonomy. It is the fact that the defendant assaulted the complainant in circumstances of indecency that should have been at the heart of the offence. Lord Goff's approach might have focused the court's attention on the circumstances of indecency, including the complainant's affective response to the touching. Indecent intention appears to have been an unnecessary ingredient of indecent assault and in chapter 5, I will argue that an intentional touching can be 'sexual' when there is no sexual intent.

### 2.3.3 Knowledge or recklessness as to consent

The fault element of indecent assault included knowledge or recklessness as to whether the other person was consenting. In the overwhelming majority of indecent assaults, the defendant would have known that the complainant was not consenting to the acts in question. Nevertheless, where the defendant was reckless as to whether the complainant was consenting or not, the courts applied a subjective recklessness test. A defendant would have been guilty only if he himself had considered the possibility that the complainant might not be consenting, but decided to continue with the act in any case. In *Kimber*,<sup>150</sup> the Court of Appeal stated that a defendant would be reckless as to consent if he 'couldn't care less' whether or not the victim was consenting. However, if the defendant himself believed, however unreasonable that belief may have been, that the victim was consenting, then he would have lacked the requisite *mens rea*. One issue for consideration was whether D could be acquitted when he honestly, but drunkenly believed in consent. In *Fotheringham*,<sup>151</sup> the Court of Appeal held that self-induced intoxication was no defence to a charge of rape, whether the issue was intention, consent or mistaken identity. Given the courts' reluctance to show any sympathy to intoxicated defendants, it appears that these same principles applied to indecent

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<sup>150</sup> (1983) 77 Cr App R 225.

<sup>151</sup> (1988) 88 Cr App Rep 206.

assault. In *R v Cluyer*,<sup>152</sup> the Court of Appeal held that the fact that D could not remember what had happened did not affect his responsibility for indecent assault.

## 2.4 CONCLUSION

There are three points arising from this discussion of the controversies surrounding the offence of indecent assault, which will provide criteria against which to measure the complainant-centred aspects of sexual assault throughout this thesis. First, indecent assault covered a wide range of conduct, 'from the relatively minor, such as bottom pinching, to the very serious, such as vaginal or anal penetration by a bottle or other object'.<sup>153</sup> Indecent assault was unclear in its scope and failed to include adequately those forms of conduct and complainant experiences that such an offence ought to include: the assault must have been committed 'intentionally', thereby preventing conviction of a reckless, yet culpable indecent assault. The label on conviction did not differentiate between the vastly different forms of conduct and their disparate seriousness. Nevertheless, the *actus reus* of indecent assault required only the 'causing of fear' that C would be touched, rather than a physical assault and this is an important complainant-centred aspect of the law, which no longer forms part of the definition of sexual assault.

Secondly, the offence required that the action be perpetrated in 'circumstances of indecency'. Moran's classification of indecency within the theme of civility suggests that the offence was concerned with individuals' adherence to general moral standards of appropriate conduct.<sup>154</sup> The decision in *Court* underplayed the notion of context-dependency and assumed that certain acts have an inherent decent/indecent quality.

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<sup>152</sup> (1992) *The Times*, April 17<sup>th</sup>. See also *DPP v H* [1992] COD 266; *R v Kingston* [1995] 2 AC 355.

<sup>153</sup> Criminal Law Revision Committee, 15<sup>th</sup> Report, Sexual Offences (1984) (Cmnd 9688) at para 4.6.

<sup>154</sup> This demonstrates how there is a difference between what is 'indecent' and what is 'sexual'. This is an important point because conduct may be 'indecent' without being 'sexual' or 'sexual' without being 'indecent'. For example, a kiss or a pat on the bottom, which might not nowadays be considered 'indecent' (even when done in public), may be unambiguously 'sexual'. In contrast, an intimate body search might well be considered 'indecent' without being 'sexual' at all.

Simester and Sullivan described the offence as an ‘anachronism’, arguing that ‘its concern with an *actus reus* of indecency is beside the point in a modern law focused on sexual violence’.<sup>155</sup> The judgment in *Court* rested on a consensual view of what constitutes indecent conduct, but that in itself includes a significant value judgement. This thesis will argue that sexual touching does not have an inherent value or meaning, but only acquires such meaning when others experience or respond to the assault. This is especially important when dealing with those actions as the fringes of liability. In respect of the indecent nature of the act, the law has never adequately acknowledged and included the experiences of complainants, denying them the status of ‘privileged speaker’.

Thirdly, the obligation on the prosecution to prove an indecent intention where the conduct itself was ambiguous further limited the reach of the offence. The expression ‘indecent intention’ was capable of many different interpretations and might have caused much confusion for future courts. A defendant’s indecent or sexual motivation should have been an irrelevant consideration in determining whether his conduct was indecent: the fact that the assault was objectively indecent or that C perceived the assault to be indecent should have been enough to constitute the offence.

In chapter 3 the process of sexual offences reform will be evaluated, considering the extent to which the various committees and reports pre-2003 adopted a sufficiently complainant-centred approach. The justifications for creating a new offence of sexual assault will be examined.

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<sup>155</sup> A.P. Simester & G.R. Sullivan. *Criminal Law: Theory and Doctrine* (Hart Publishing, Oxford, 2000) p.420.

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## A Reconfiguration of Indecent Assault: Complainant-centred Reform?

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Indecent assault was a widely drawn and ill-defined offence that was unclear in its scope and failed to include adequately those forms of conduct and complainant experiences that such an offence ought to include. This chapter will analyse two proposals for reform of the offence of indecent assault. It will further consider the extent to which the various committees and reports prior to the SOA 2003 adopted a sufficiently complainant-centred approach. It will also consider the structure of the SOA 2003 analysing the scope of the four consent-based offences contained in ss.1-4 and considering the extent to which the offences overlap with each other.

Part 1 will scrutinize the Criminal Law Revision Committee's (CLRC) 1984 report, *Sexual Offences*, which considered amongst other things, whether there should be two grades of indecent assault. The Report suggested that a new offence of 'aggravated indecent assault' could be created which could be defined based on (1) 'penetration', (2) 'aggravating factors' or (3) a combination of the two. The third approach would have included the situation where before, during or after the commission of an indecent assault the offender did an 'act which is likely, seriously and substantially to degrade or humiliate the victim'. This would arguably have been a more 'complainant-centred' approach than the other two options, as it would have focused on the direct effects on the complainant, rather than upon any one physiological aspect such as penetration.

Part 1 will further analyse Sullivan's proposal in 1989 for indecent assault to be replaced by a crime of sexual assault.<sup>1</sup> Sullivan's proposed offence would have covered any

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<sup>1</sup> G.R. Sullivan, 'The Need for a Crime of Sexual Assault' [1989] *Crim L R* 331

assault which of itself was ‘grossly sexually offensive to a person of ordinary sensitivity’ and which would have required D to have been ‘aware of the circumstances which made his conduct or intended conduct grossly sexually offensive to persons of ordinary sensitivity’. This would have been supplemented by a ‘complainant-subjective’ test in that D would also be charged with sexual assault where his assault or battery did or would have caused gross sexual offence to the victim and where D ‘was aware that it would cause such offence to the particular victim’. Whilst a test of ‘gross sexual offence’ appeared to be focused on the complainant’s affective response to the assault, Sullivan’s caveat that D must have been aware of the circumstances which made his conduct grossly sexually offensive or aware that C would be caused such offence would have been a major limitation on his proposed offence being complainant-centred.

Part 2 will consider the justifications for reform of sexual offences law in the context of the Home Office report, *Setting the Boundaries*<sup>2</sup> and the White Paper, *Protecting the Public*,<sup>3</sup> highlighting the lack of attention sexual assault received in the reform process and parliamentary debates and arguing that this has created an offence with ambiguity.

Part 3 will evaluate the scope of the four new consent based offences contained in the SOA 2003, ss.1-4, focusing specifically on the underlying objectives for replacing the offence of ‘indecent assault’ with new offences of ‘assault by penetration’ and ‘sexual assault’. It will situate s.3 in the context of the other sexual offences; highlighting the controversies with the new broad structure and arguing that s.3 is over-inclusive in potentially overlapping with rape and assault by penetration. The chapter concludes that sexual assault is imprecise and unclear, establishing a residual offence that catches behaviour falling outside the scope of rape and assault by penetration. Section 3 is

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<sup>2</sup> *Setting the Boundaries: Reforming the law on sex offences Vol. 1* (Home Office Communications Directorate, London, 2000). Hereafter referred to as ‘the Review’.

<sup>3</sup> *Protecting the Public: strengthening protection against sex offenders and reforming the law on sexual offences* (Cm 5668) (2002).

potentially not complainant-centred and this is what I am going to explore in subsequent chapters.

Table 3.1: The indecent assault/sexual assault reform process

| Date and reform body  | Recommendations   | <i>Actus reus</i>  | <i>Mens rea</i>   |
|---|---|--|---|
| 1984<br><br>Criminal Law Revision Committee's 15 <sup>th</sup> Report | <ul style="list-style-type: none"> <li>Rejected possibility of bringing the worst cases of IA into an artificially extended definition of rape</li> <li>Max penalty for worst cases of IA 10 years</li> <li>No longer separate offences of IA on a male and female</li> </ul> | <ul style="list-style-type: none"> <li>Considered category of '<i>aggravated IA</i>' based on:               <ol style="list-style-type: none"> <li>1. Penetration</li> <li>2. Aggravating factors</li> <li>3. Penetration + aggravating factors</li> </ol> </li> <li>Considered offence of '<i>gross sexual violation</i>'</li> </ul> | <ul style="list-style-type: none"> <li>No discussion of <i>mens rea</i> issues</li> <li>No consent reforms proposed</li> </ul>  |
| 1989<br><br>Sullivan's proposed offence of ' <i>sexual assault</i> '  | <ul style="list-style-type: none"> <li>Replacing IA with an offence of '<i>sexual assault</i>'</li> </ul>   | <ul style="list-style-type: none"> <li>Assault or battery</li> <li>'Grossly sexually offensive to a person of ordinary sensitivity' test</li> <li>Supplemented by a 'complainant-subjective' test- SA if it does or would cause gross sexual offence to the victim</li> </ul>  | <ul style="list-style-type: none"> <li>Intention to touch</li> <li>D must be aware of the circumstances which makes his conduct grossly sexually offensive</li> </ul> |
| 1999<br><br>'Setting the Boundaries' Sexual Offences Review           | <ul style="list-style-type: none"> <li>A new offence of '<i>sexual assault by penetration</i>' to cover penetration of the vagina or anus by the insertion of an object or other body part</li> <li>A new offence of '<i>sexual assault</i>'</li> </ul>                       | <ul style="list-style-type: none"> <li>Sexual touching (defined as behaviour that a reasonable person would consider to be 'sexual')</li> </ul>  | <ul style="list-style-type: none"> <li>Intent or recklessness as to an assault</li> <li>Intent or recklessness in relation to the lack of consent</li> </ul>          |



|  |   |  |  |
|--|---|--|--|
|  | to replace other non-penetrative sexual touching contained in the offence of IA   | <ul style="list-style-type: none"> <li>No consent</li> </ul>   |  |
| <p>2002</p> <p>'Protecting the Public' White Paper</p> | <ul style="list-style-type: none"> <li>A new offence of '<i>sexual assault by penetration</i>' to cover penetration of the vagina or anus by the insertion of an object or other body part</li> <li>A new offence of '<i>sexual assault</i>' to replace other non-penetrative sexual touching contained in the offence of IA</li> </ul> | <ul style="list-style-type: none"> <li>No discussion of the specific <i>actus reus</i> requirements for an offence of sexual assault</li> </ul>          | <ul style="list-style-type: none"> <li>No discussion of the specific <i>mens rea</i> requirements for an offence of sexual assault</li> </ul>  |
| <p>2003</p> <p>Sexual Offences Bill</p>                | <ul style="list-style-type: none"> <li>A new offence of '<i>sexual assault</i>' to replace other non-penetrative sexual touching contained in the offence of IA</li> </ul>  | <ul style="list-style-type: none"> <li>D touches another person</li> <li>The touching is 'sexual'</li> <li>C does not consent to the touching</li> </ul> | <ul style="list-style-type: none"> <li>Intention to touch</li> <li>D does not believe C consents, or</li> <li>A reasonable person in all the circumstances would doubt C consents</li> </ul> |
| <p>2003</p> <p>Sexual Offences Act 2003</p>            | <ul style="list-style-type: none"> <li>A new offence of '<i>sexual assault</i>' to replace other non-penetrative sexual touching contained in the offence of IA</li> </ul>  | <ul style="list-style-type: none"> <li>D touches another person</li> <li>The touching is 'sexual'</li> <li>C does not consent to the touching</li> </ul> | <ul style="list-style-type: none"> <li>Intention to touch</li> <li>D does not reasonably believe C consents</li> </ul>   |

### 3.1 PROPOSALS FOR REFORM OF INDECENT ASSAULT

Indecent assault was a broad offence that covered a wide and undefined range of conduct: there was no one specific activity that it covered. The offence did not sufficiently reflect the gravity and seriousness of sexual assaults perpetrated by the penetration of the anus or female genitalia by the insertion of an object, or other part of the body and this problem was exacerbated by its low maximum sentence. The requirement that the assault must have been committed ‘intentionally’ and excluding conviction of a reckless, yet culpable indecent assault was under-inclusive and insufficiently complainant-centred. The judgment in *Court* that certain acts have an inherent indecent/decent quality rested on a consensual view of what constitutes indecent conduct, which included a significant value judgment. In respect of the ‘indecent’ nature of the act, the law has never adequately acknowledged or included the experiences of complainants. The requirement that the prosecution must prove an ‘indecent intention’ where the conduct itself is ambiguous considerably narrowed the scope of the offence. Indecent assault was unclear in its scope and therefore failed to include adequately those forms of conduct and complainant experiences that such an offence ought to include.<sup>1</sup> This section will analyse two specific proposals for reform of indecent assault, considering the extent to which the recommendations dealt with the problems highlighted here and in chapter 2.

#### 3.1.1 Criminal Law Revision Committee 15th Report

One area of debate was whether indecent assault ought to be divided into two grades so that the more serious forms of assault could be labelled separately. In 1984, the CLRC considered whether there should be two degrees of indecent assault.<sup>2</sup> The CLRC contended that indecent assault covered a ‘wide range of conduct, from the relatively minor, such as bottom pinching, to the very serious, such as vaginal or anal penetration

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<sup>1</sup> There is an argument that the labelling of an offence should reflect the actual experiences of complainants’. In chapter 4, I will argue that the ‘sexual assault’ label contravenes the principle of fair labelling as the label on conviction fails to reflect adequately (a) the defendant’s conduct and (b) the complainant’s experience.

<sup>2</sup> Criminal Law Revision Committee, 15<sup>th</sup> Report, *Sexual Offences* (Cmnd 9688) (1984) at para 4.10.

by a bottle or other object',<sup>3</sup> with some members arguing that there were 'in reality two broad categories of indecent assaults'.<sup>4</sup> The first covered 'violent'<sup>5</sup> assault inflicted with an implement, such as a bottle and the second, lesser category, conduct including indecent touching through clothes. Some members of the CLRC expressed the fear that if the offence was not divided:

'a man convicted of indecent assault could unfairly incur the stigma of being regarded as a serious sexual offender simply because of the maximum penalty applicable to the offence, when the facts of his case were comparatively minor and he had been punished by a small fine.'

Other members of the CLRC were of the opinion that indecent assault should not be treated as if it were a unique offence. They argued that courts in passing sentence can be trusted to ensure that defendants are treated fairly, and used the example of theft to demonstrate an offence which is defined to include under one heading cases covering a range of seriousness. Not all members of the CLRC agreed but a new category of 'aggravated indecent assault', which would provide an alternative charge to indecent assault, was still considered. This, they argued could be based on (a) 'penetration', (b) 'aggravating factors' or (c) a combination of the two.

#### (a) 'Penetration'

Liability would arise where there was penetration of the mouth by a penis or of the vagina or anus by an object or by the hand.<sup>6</sup> Some members of the CLRC concluded that a slight penetration of the vagina by a fingertip was not serious enough to merit inclusion in an 'aggravated' category of indecent assault. Aggravated indecent assault would therefore require deeper penetration by more than one finger, the whole hand

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<sup>3</sup> *Ibid*, at 4.6.

<sup>4</sup> *Ibid*, at 4.10.

<sup>5</sup> It is interesting to note that the CLRC referred to violent assaults without a definition of those actions it considered violent. Arguably, the category would also have included non-violent assaults. See E. Stanko, *The Meaning of Violence* (Routledge, London, 2003).

<sup>6</sup> This implies that there is something inherent in the act of penetration that makes it sufficiently serious. I will argue in chapter 5 that there is no essential characteristic that makes an act 'sexual' and so recourse must be had to the complainant's experience of the touching.

or even a fist. It was agreed, however, that it would be 'wholly impracticable' for the law to distinguish between various forms of manual penetration and they suggested therefore that it would be open to the prosecutor to charge ordinary indecent assault in comparatively minor cases. The CLRC concluded that to define aggravated indecent assault by reference to penetration would have the advantage of simplicity and clarity, but also be, 'open to the charge of concentrating unduly upon one physiological aspect and fostering the unfortunate impression that any indecent assault lacking penetration is trivial'.<sup>7</sup>

(b) 'Aggravating factors'

The presence of any one of a list of aggravating factors would turn an ordinary indecent assault into an aggravated one. In the Australian State of Victoria, the offence of indecent assault<sup>8</sup> is aggravated by the following circumstances: where the offender inflicted serious personal violence, has an offensive weapon, degraded or humiliated the victim or was aided or abetted by another person.<sup>9</sup> The Committee questioned whether these factors are appropriate for distinguishing one offence from another and considered that it might seem 'artificial' to adopt the concept for indecent assault and not to use it for the other sexual offences, to which the circumstances equally apply. The Committee did not elaborate on why it might be inappropriate to distinguish offences on the basis of aggravating factors, but it might have been because aggravating factors could be taken into account at sentencing. Another interpretation might be because they were reluctant to distinguish between 'archetypal rape'<sup>10</sup> and 'aggravated

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<sup>7</sup> *Op cit*, n 2 at 4.19.

<sup>8</sup> Crimes Act 1958 (Vic) s.39(2).

<sup>9</sup> Crimes (Sexual Offences) Act 1980, section 46(1). This provision also applies to rape, attempted rape and assault with intent to rape.

<sup>10</sup> 'Archetypal' or 'stereotypical' is summarised by Temkin & Krahe as '...an attack by a stranger on an unsuspecting victim in an outdoor location, involving the use of force by the assailant and active physical resistance by the victim' J. Temkin & B. Krahe, *Sexual Assault and the Justice Gap: A Question of Attitude* (Hart Publishing, Oxford, 2008) p.31. See also S.J. Lea, U. Lanvers & S. Shaw, 'Attrition in rape cases: Developing a profile and identifying relevant factors' (2003) 43 *Brit J of Crim* 583.

rape',<sup>11</sup> on the same basis that feminist groups disagree with the separate distinction of acquaintance rape. All rape is harmful<sup>12</sup> and distinguishing offences based on aggravating factors might place the offences in a hierarchy of seriousness.

(c) 'Combination approach'

The aggravated offence would consist in an act of penetration or where immediately before or after the commission of an indecent assault the offender does an act which is 'likely seriously and substantially to degrade or humiliate the victim'.<sup>13</sup> There were differences of opinion between members over how a 'degrade or humiliate' test would work and the CLRC also noted that it lacked the certainty generally required for the criminal law. This approach would arguably have been more 'complainant-centred' than the other two approaches because it would have focused on the likely effects on the victim, rather than upon any one physiological aspect such as penetration, or the presence of a particularly serious circumstance. A 'degrading or humiliating' test would have been experience-centred, focusing decision-makers' attention on the violation of bodily integrity. However, some members of the CLRC expressed concern that such words might lead to 'substantial inconsistencies between the verdicts of different juries'.<sup>14</sup> Other members considered that, with proper guidance, juries and magistrates could make the 'degrading or humiliating' test work. They highlighted how the criminal law contains a number of flexible concepts that are left to juries to decide, such as the meaning of grievous in grievous bodily harm.<sup>15</sup> In their opinion the objection on the ground of uncertainty would have had less force when what is in issue is the drawing of a dividing line between two offences rather than between conduct that is punishable and conduct that is not.

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<sup>11</sup> 'Aggravated rape' might include situations where the offender is armed with a weapon, where there is more than one offender or where the victim is below a certain age.

<sup>12</sup> Although Gardner and Shute argue that the harmfulness of rape is not sufficient to justify treating it as a serious wrong. See J. Gardner & S. Shute, 'The Wrongness of Rape' in *Oxford Essays in Jurisprudence*, (eds) J. Horder (4<sup>th</sup> series) (OUP, Oxford, 2000).

<sup>13</sup> *Op cit*, n 2 at 4.22.

<sup>14</sup> *Op cit*, n 2 at 4.22.

<sup>15</sup> OAPA 1861, ss.18 & 20. See *DPP v Smith* [1961] AC 290.

The CLRC was predominantly concerned with fairness to the defendant in the imposition of a proportionate sentence and failed to consider how the proposals would affect complainants. They did suggest that, if the offence were divided, defendants would probably be less inclined to plead guilty to the aggravated offence, knowing that it attracted a higher maximum penalty and that this 'would not be in the interests of the victim',<sup>16</sup> because it would require them to give detailed evidence in court on the precise nature and extent of the defendant's acts.

After discussion and much disagreement, the CLRC made no recommendation on whether the offence of indecent assault should be divided and the offence remained unaltered. They did however recommend that the maximum penalty for the worst cases of indecent assault should be 10 years' imprisonment and that there should no longer be separate offences of indecent assault on males and females.<sup>17</sup> Although they were unable to resolve their own differences over whether and how the offence of indecent assault should be divided, the CLRC recommended that *if* it were to be divided the name 'indecent assault' should be retained for the lesser category of offences. However, they were again divided over what to call the aggravated offence. Options included 'gross sexual violation' or 'aggravated sexual assault' with a desire, based on the advice of the Policy Advisory Committee, to move away from the concept of 'indecent' in this context. It is likely that the CLRC were keen to avoid the ambiguity and uncertainty of the term 'indecent' for the aggravated offence, with a preference to focus on the 'sexual' nature of the transgression.

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<sup>16</sup> *Op cit*, n 2 at 4.13.

<sup>17</sup> This proposal was approved by the Law Commission and incorporated into the draft Criminal Code Bill as cl 111:

‘A person is guilty of an indecent assault if he assaults another in such a manner, of which he is aware, or in such circumstances, of which he is aware, as are-

(a) indecent, whatever the purpose with which the act is done; or

(b) indecent only if the act is done with an indecent purpose and he acts with such a purpose.’

The Law Commission stated that cl 111 incorporated the effect of the decision of the House of Lords in *Court*. (Law Com No 177, 1989, para 15.46). Given the wording of cl (b) it is possible that an assault which is 'indecent only if the act is done with an indecent purpose', could have been interpreted as extending the offence to those cases where the act is objectively innocent, but the defendant nevertheless had a secret indecent motive.

The purpose of the CLRC's *Fifteenth Report* was to 'review...the law relating to and penalties for sexual offences'.<sup>18</sup> However, the primary concern and dominant feature of the report was the offence of rape, with the offence of indecent assault being a lesser concern. This same issue arose in relation to the SOA 2003: the scope and nature of the offence of rape was the prevailing issue, with the three new consent based offences of assault by penetration, sexual assault and causing sexual activity without consent being predominantly overlooked by the drafters and in parliamentary debate.<sup>19</sup>

The issue of whether there should be two grades of indecent assault continually presented itself in academic debate.<sup>20</sup> Ashworth suggested that there was a strong argument for having two grades of indecent assault in English law, or for moving some of the more serious forms of the crime, i.e. forced fellatio or cunnilingus into a broadened crime of rape or 'serious sexual assault'.<sup>21</sup> He asserted that much of the legal controversy concerned not the more serious varieties of indecent assault but the more ambiguous forms, where the element of indecency was used to separate the sexual offence from common assault.<sup>22</sup> The newly defined crime of sexual assault provides no further guidance regarding this matter and the dividing line between 'sexual' and 'non-sexual' contacts remains unclear. Section 78 of the SOA 2003 explains an approach to, though not a definition of 'sexual' based on the criteria proposed in *Court*.<sup>23</sup>

### 3.1.2 Sullivan's 1989 proposed offence of 'sexual assault'

In 1989, Sullivan argued that the crime of indecent assault should be abolished and replaced by a crime of sexual assault that did not use indecency as a defining element.<sup>24</sup> This suggestion was based on a consideration of the combined effect of *R v Philip*

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<sup>18</sup> *Op cit*, n 2 at 1.1.

<sup>19</sup> This will be analysed in section 4 below.

<sup>20</sup> Sullivan, *op cit*, n 1; A. Ashworth, *Principles of Criminal Law*, 3<sup>rd</sup> edn (Oxford University Press, Oxford, 1999) pp. 362-3; A.P. Simester & G.R. Sullivan, *Criminal Law: Theory and Doctrine* (Hart Publishing, Oxford, 2000) p.420.

<sup>21</sup> *Ibid.*

<sup>22</sup> *Ibid.*

<sup>23</sup> This provision will be analysed in chapter 7.

<sup>24</sup> Sullivan, *op cit*, n 1.

*White*<sup>25</sup> and *R v Court. White*, though merely a Crown Court decision held that there was no common law or statutory offence of assault with intent to rape. D followed a woman in the street, grabbed her, pulled her into an alleyway, and onto the ground. Defence counsel adopted the argument of Spencer that the offence of assault with intent to rape no longer existed in English law.<sup>26</sup> Spencer maintained that assault with intent to rape was an established offence at common law which became a statutory crime by virtue of s.38 OAPA 1861, but which was then abolished by the Criminal Law Act 1967.

Sullivan was concerned that serious assaults in terms of victim endangerment and trauma but which did not involve any overt indecency, bodily harm or act sufficiently proximate to constitute an attempt to commit a serious sexual offence stood to be punished as 'mere common assaults'. Sullivan envisaged the situation where serious wrongdoing in terms of sexual threat occurred, but where there was not an appropriate charge. His example is of a girl walking in an isolated place who is 'accosted'<sup>27</sup> by a man. She runs away, chased by the man, who closes on her. Before he can catch her, a third party arrives on the scene and the man makes off. The girl is terrified and suffers serious trauma. Subsequent to his arrest, the man confesses he intended to rape the girl. On such facts, indecent assault was unavailable as a charge. The conduct would not suffice the minimum *indicia* of indecency insisted upon in *Court*. In order to be capable of being indecent, conduct must 'suggest a possible form of sexual activity in its own right' to the right thinking observer. If the girl was physically unharmed, other forms of aggravated assault<sup>28</sup> seem ruled out and a charge of attempted rape may have failed on the

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<sup>25</sup> [1988] *Crim L R* 434.

<sup>26</sup> S. Spencer, "Assault with intent to Rape-Dead or Alive" [1986] *Crim L R* 110.

<sup>27</sup> One issue here is what Sullivan meant by the term 'accosted'. Did he mean that D approached C and spoke to her in an aggressive manner, or that he forced her down to the ground, or that he touched her top or attempted to take her top off. These are all different factual situations that may have affected the appropriate charge of indecent assault or attempted rape.

<sup>28</sup> Although a possible charge might have been actual bodily harm under s.47 OAPA 1861, given that 'serious trauma' could constitute the *actus reus* of ABH if it is a recognised psychiatric illness, supported by medical evidence (*Morris* [1998] 1 Cr App R 386).



question of sufficient proximity.<sup>29</sup> Sullivan argued that falling back on common assault with its low maximum penalty<sup>30</sup> was unsatisfactory, particularly if the defendant had previous convictions for serious sexual offences.<sup>31</sup> Table 3.2 provides a comparison between the conduct and fault elements of indecent assault and Sullivan’s proposed offence.

*Table 3.2: A comparison between indecent assault and Sullivan’s proposed offence*

|                                     | Indecent assault   | Sullivan’s ‘sexual assault’  |
|-------------------------------------|--|--|
| <i>Actus reus</i>                   | <ul style="list-style-type: none"> <li>• Assault or battery</li> <li>• Circumstances of indecency</li> </ul>   | <ul style="list-style-type: none"> <li>• Assault or battery</li> <li>• Gross sexual offence</li> </ul>   |
| Determining the aggravating feature | <ul style="list-style-type: none"> <li>• ‘Right thinking people’ test (<i>bystander-objective</i>)</li> </ul>  | <ul style="list-style-type: none"> <li>• ‘Gross sexual offence to a person of ordinary sensitivity’ test (<i>bystander-objective</i>), or</li> <li>• ‘that it does or would cause gross sexual offence to the victim’ (<i>complainant-subjective</i>)</li> </ul>   |
| <i>Mens rea</i>                     | <ul style="list-style-type: none"> <li>• Intention to touch</li> <li>• D must be aware of the circumstances which would amount to indecency</li> </ul> | <ul style="list-style-type: none"> <li>• Intention to touch</li> <li>• D must be aware of the circumstances which makes his conduct grossly sexually offensive, or</li> <li>• D must be aware that it would cause such offence to the particular victim</li> </ul> |

<sup>29</sup> The Criminal Attempts Act 1981, s.1(1) requires that the D has carried out acts which are ‘more than merely preparatory’, with the intention of committing the complete offence. The interpretation of the phrase ‘more than merely preparatory’ has been problematic. *Attorney General’s Reference (No 1 of 1992)*<sup>29</sup> [1993] 2 All ER 190 suggested that in the case of rape, actions which were some way from the commission of the full offence could nevertheless be sufficient for the *actus reus* of an attempt. It was not necessary to prove that D physically attempted to penetrate the woman’s vagina with his penis. Sullivan’s hypothetical scenario appears sufficient for it to be left to the jury to decide whether D did acts that were more than merely preparatory towards the commission of the offence.

<sup>30</sup> Criminal Justice Act 1988, s.39 (six months).

<sup>31</sup> It is also worth noting that the accused in *White* pleaded guilty to an alternative count of abduction contrary to section 17 of the Sexual Offences Act 1956 and the judge found that D intended to have unlawful sexual intercourse without consent and sentenced D to two years imprisonment.

Sullivan suggested that a crime of sexual assault could cover any assault which of itself was 'grossly sexually offensive to a person of ordinary sensitivity'. It could also cover any assault that although not sexually offensive *per se* was committed 'with intent to perform any further non-consensual act which would have been grossly sexually offensive to a person of ordinary sensitivity.'<sup>32</sup> Suppose D pushed C to the floor with the intention of undoing her trousers and touching her vagina, but who was frightened off by a passer-by. It is unclear whether such an action would have constituted psychic indecent assault. There would have been the possibility of a charge of attempted indecent assault,<sup>33</sup> or failing that, common assault. Under Sullivan's proposed offence, pursuit of sexual gratification would not be a defining element: the sexual offensiveness of the conduct or any intended further conduct would suffice to make the assault a sexual assault. Additionally there would be an assault notwithstanding that the assault of itself or any intended non-consensual act further to the assault would not cause gross sexual offence to a person of ordinary sensitivity 'provided that it does or would cause gross sexual offence to the victim of the assault and the defendant was aware that it would cause such offence to the particular victim.'<sup>34</sup> Three areas in particular are worthy of discussion: (a) the meaning of 'gross sexual offence', (b) the 'person of ordinary sensitivity' standard and (c) the *mens rea* requirements.

#### (a) Gross sexual offensiveness

Sullivan did not define the phrase 'gross sexual offensiveness' stating simply that '[t]his standard is adopted as suitable for a serious offence with a high maximum penalty.'<sup>35</sup> If the test of 'sexual offensiveness' was judged from C's point of view, it would have had

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<sup>32</sup> Sullivan, *op cit* n 1, at 337.

<sup>33</sup> An attempted indecent assault occurred when D did an act that was 'more than merely preparatory' to an indecent assault, but for whatever reason, he failed to complete the substantive offence. The question was ultimately one of fact for the jury in a particular case, but the judge had to decide whether there was sufficient evidence for the jury to consider it. Consider the situation where D approached C from behind, grabbed her by the hair and attempted to assault her. C kicked the offender in the shin in defence and managed to escape. Whether this constituted indecent assault would have been a question for the jury.

<sup>34</sup> Sullivan, *op cit* n 1, at 337.

<sup>35</sup> *Ibid*, at 338.

the benefit of focusing on the complainant's sexual autonomy and it is likely that in the majority of cases any unwanted sexual touching would cause offense. The requirement that the sexual offensiveness was 'gross' might have raised issues of interpretation and would arguably have limited the scope of such an offence. It would potentially have prevented any 'minor' touching of the buttocks or breasts from constituting sexual assault. Sullivan himself suggests that 'a non-genital touching of a clothed woman by a man...would not ordinarily raise an issue of gross sexual offensiveness'.<sup>36</sup> An offence of gross indecency was previously used by the law as a means to regulate physical expressions of homosexuality.<sup>37</sup> There was a marked reluctance on the part of the English judiciary to define the term 'gross indecency'. The prevalent view was that it was both unnecessary and unwise to attempt a rigid definition.<sup>38</sup> The flexibility inherent in the phrase 'gross indecency' may have been taken as a genuine attempt by the drafters to leave open to juries the decision as to whether certain conduct deserved censure.

#### (b) Person of ordinary sensitivity

Sullivan suggested the substitution of the *Court* test of 'right-thinking people' with the test of 'person of ordinary sensitivity'.<sup>39</sup> Sullivan argued that the test of 'right-thinking people', with its 'moralistic overtones might encourage a more unyielding judgmental standard than the collective sexual mores possessed by a particular jury'.<sup>40</sup> A 'bystander-objective' standard of ordinary sensitivity would preclude any argument that the actual complainant, by virtue of his or her previous sexual history, was less than normally sensitive in sexual matters and thus had not been caused or threatened with gross offence. The fact that the complainant through lack of understanding of the nature of the act by virtue of age, mental impairment or deception was not caused sexual offence would equally be irrelevant.

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<sup>36</sup> *Ibid.*

<sup>37</sup> Sexual Offences Act 1956, s.13.

<sup>38</sup> The Wolfenden Committee Report suggested that three forms of conduct would normally constitute 'gross indecency': mutual masturbation; intercrural contact; and oral-genital contact.

<sup>39</sup> The phrase 'person of ordinary sensitivity' is taken from Art. 204 of the Swiss Penal Code.

<sup>40</sup> Sullivan, *op cit*, n 1, at 338.

Under Sullivan's proposed offence, an action would also constitute sexual assault 'if it does or would cause gross sexual offence to the victim.' His offence would therefore have been more complainant-centred than indecent assault as it would have taken into account any harm caused to an individual complainant. The 'person of ordinary sensitivity' test, a 'bystander-objective' test would have been supplemented by a 'complainant-subjective' test. Sullivan highlighted how the 'bystander-objective' standard is not 'universally applicable':

'In a plural multi-racial society and in a matter so fundamentally subjective as sexuality the protection of a serious offence should be given to those caused or threatened with gross sexual offence albeit that the defendant's conduct or intended conduct would not have caused that degree of reaction in a person of ordinary sensitivity'.

Sullivan's proposed offence would have focused on the harm caused to an individual complainant, albeit that they are not a 'person of ordinary sensitivity'. There is an important caveat here though; namely, that D would have had to be aware that 'it would cause such offence to the particular victim'. Sullivan's test might have resulted in liability where D assaulted C with knowledge that C for whatever reason was abnormally sensitive in sexual matters. Thus, it would have resulted in liability where an abnormally sensitive complainant knew her assailant (for example because they were or had been in a relationship, were relatives or were known acquaintances) and because of such an acquaintance, D was aware that his assault (or battery) would cause gross sexual offence to the victim. It would also have resulted in liability where C held a particular religious or cultural belief, pertaining to sexual matters and where D was aware of this. This 'complainant-subjective' test would have taken account of the harm caused to an individual complainant rather than a 'reasonable-complainant'.

### (c) *Mens rea*

There would be two elements to the *mens rea* of Sullivan's proposed offence. The first element encompasses proof that the 'defendant was aware of those circumstances which made his conduct or intended conduct grossly sexually offensive to persons of

ordinary sensitivity.’ There is an ambiguity here. The phrase may be interpreted as meaning that the defendant must be aware only of the circumstances. Alternatively, it may mean that D must be aware that those circumstances made his conduct offensive. Sullivan clarified this vagueness towards the end of his article when he states that ‘proof should only be required that he was aware of those circumstances involved in his conduct or projected conduct which made for gross sexual offensiveness to ordinarily sensitive people’.<sup>41</sup> Sullivan does not explain why he argued for a requirement that D must be aware of the circumstances that made his conduct grossly sexually offensive. One explanation might be based on a belief that an individual is only blameworthy when there is a knowing and conscious risk of sexual offense. Sullivan might have been concerned that without such a requirement the threshold for criminal liability for sexual touching would have been set too low. His approach appears to have been concerned with fairness to defendants. Accordingly, if D was thoughtless or did not care that C would be caused such offence, he could not have been convicted.

The second element to the *mens rea* of Sullivan’s proposed offence would have required that D be aware that the assault would cause such offence to the particular victim. Sexual assault would be committed by a person aware that his intended non-consensual act further to the assault causes or would cause that degree of reaction in the particular complainant.<sup>42</sup> Sullivan’s stipulation that D must have been aware that C would be caused offence would have been a major limitation on his proposed offence being complainant-centred. It would have prevented liability where C was caused gross sexual offence (even though the person of ‘ordinary sensitivity’ would not have been caused offence) but where an ignorant or indifferent D was unaware that the assault would cause such offence to the particular victim.

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<sup>41</sup> *Ibid.*

<sup>42</sup> *Ibid.*

### 3.2 REVIEW OF THE LAW ON SEX OFFENCES

In 1997, the newly elected Labour government pledged to help victims of sexual offences obtain justice, commencing in a detailed and lengthy review process in 1999, the Sexual Offences Review.<sup>43</sup> This section will evaluate the reform process, arguing that although the Review had as its guiding principle a belief that the criminal law should protect everyone 'equally' from non-consensual sexual activity, it failed to define adequately what sort of behaviour the criminal law should and should not prohibit. One of the most striking features of the sexual offences reform process is the degree of attention paid by the members of the Review and during Parliamentary debates to some offences, most notably rape and crimes against children, and therefore the lack of consideration of the scope and definition of other new offences, for example sexual assault. Although the Review's intention might have been to create discrete offences, the process in fact created four new, often overlapping non-consensual sexual offences and failed to scrutinise and justify the sorts of behaviour encapsulated within each crime adequately.

#### 3.2.1 Sexual Offences Review

The *Setting the Boundaries* Review suggested that there were three main 'push' factors towards a reform of the law on sex offences. First, the law was described as a 'patchwork quilt of provisions'; secondly there was a recognition of the change in societal attitudes and thirdly, there was acknowledgment of the high attrition rates for rape and other sexual offences. These justifications for reform highlight the government's commitment to providing 'clear and coherent offences that protect individual complainants'.<sup>44</sup>

In *Setting the Boundaries*, the review noted how the law governing sex offences was complex, and made more difficult by piecemeal changes and amendments. Pre-2003, Parliament had not considered the structure of sex offences as a whole since 1956, and

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<sup>43</sup> The Review, *op cit*, n 2.

<sup>44</sup> *Ibid*, at para 0.3.

even then the Sexual Offences Act 1956 (SOA 1956) was a consolidation Act passed with little debate. The statutory framework was also supplemented by a number of common law offences such as outraging public decency. Important changes have occurred since 1956, notably the decriminalisation of homosexuality in private in 1967, the abolition of the marital rape exception<sup>45</sup> and the change to the definition of rape in 1994 to include non-consensual penile-anal intercourse.<sup>46</sup> The review team suggested that 'it is time for a root and branch examination of what the law should be and how it should be framed to meet the complex and changing needs of society.'<sup>47</sup>

The SOA 2003 is intended to modernize the law of sexual offences and to bring it more closely into line with contemporary attitudes. In the past century, society has undergone rapid and fundamental change. The law forbids discrimination on the grounds of race,<sup>48</sup> disability<sup>49</sup> or sex<sup>50</sup> and sexual orientation is gaining greater protection.<sup>51</sup> Society further recognises that children and the mentally ill are very vulnerable to sexual exploitation. The review noted that the existing law was plagued with inappropriate language; for example, the term 'defective' was used for individuals with learning disabilities.

The new framework was designed to 'plug existing gaps and seek to protect society from rape and sexual assault at one end of the spectrum and from voyeurism at the other.'<sup>52</sup> It is interesting that the Review refers to a 'spectrum' of sexual offences. This is open to dual interpretation. One interpretation of the use of the word 'spectrum' is that that the SOA 2003 should be viewed as a ladder of offences of decreasing severity, with rape (s.1), assault by penetration (s.2) and sexual assault (s.3) as the most heinous

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<sup>45</sup> *R v R* [1991] 3 WLR 767.

<sup>46</sup> Criminal Justice and Public Order Act 1994, s. 142.

<sup>47</sup> The Review at 1.1.2.

<sup>48</sup> Race Relations Act 1976.

<sup>49</sup> Disability Discrimination Act 1995.

<sup>50</sup> Sex Discrimination Act 1975.

<sup>51</sup> The Employment Equality (Sexual Orientation) Regulations 2003 (SI 2003/1661); The Equality Act (Sexual Orientation) Regulations 2007 (SI 2007/1263) which covers matters outside the sphere of pure employment law.

<sup>52</sup> *The Review* at para.9.

crimes and voyeurism (s.67), sexual penetration of a corpse (s.70) and sexual activity in a public lavatory (s.71) as the least serious offences. However, whilst all the sexual offences are not equally serious, this approach might be seen to de-value the individual harm caused by any act of sexual aggression. Adopting this perspective would indicate that sexual assault is beneath rape on the ladder of seriousness; however, there could be some very serious acts falling within sexual assault. Whilst I am not rejecting the notion of a ladder of offences in which certain offences should be seen as more serious than others, it is unlikely that this is what the Review had in mind when referring to a 'spectrum' of sexual offences. Arguably, the correct interpretation of the reference to a 'spectrum' of offences is that it highlights the extremely diverse nature of sexual offending and this is exemplified by the 54 different offences created by the legislation.

The high attrition rate for rape and sexual assault cases acted as a strong 'push' factor towards the strengthening of the law on sexual offences. Home Office figures show that the conviction rate in terms of the annual number of convictions as a percentage of the number of reported rapes is declining. In 1977, there was a conviction rate of 32 per cent of reported rapes.<sup>53</sup> By 2004/05, it had fallen to 5.3 per cent.<sup>54</sup> In respect of indecent assault, the conviction rate also declined. In 1995, there was a conviction rate of 19.9 per cent<sup>55</sup> and by 2003, this had dropped to 11%. Attrition in sexual offences has been the subject of a large amount of academic discussion and there are a number of high quality studies that confirm the phenomenon.<sup>56</sup> There is no specific research on

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<sup>53</sup> L. Regan & L. Kelly, *Rape: Still a forgotten issue* (Child and Women Abuse Studies Unit, London, 2003) p.13. See <http://www.rcne.com/downloads/RepsPubs/Attritn.pdf> [Online] (Accessed: 25<sup>th</sup> November 2009).

<sup>54</sup> *Criminal Statistics, England and Wales 2004*. Home Office Statistical Bulletin 19<sup>th</sup> May 2005, Main Volume, Table 3.12. See <http://www.homeoffice.gov.uk/rds/crimstats04.html> [Online] (Accessed: 25<sup>th</sup> November 2009); *Crime in England and Wales 2004/05*. Home Office Statistical Bulletin 11/05 (Home Office, London, 2005) Table 2.04, see <http://www.homeoffice.gov.uk/rds/pdfs05/hosb1105.pdf> [Online] (Accessed: 25<sup>th</sup> November 2009). The definition of rape changed with the SOA 2003, so that conviction rates thereafter are not strictly comparable with those of preceding years.

<sup>55</sup> *Ibid.*

<sup>56</sup> See J. Temkin & B. Krahe, *Sexual Assault and the Justice Gap: A Question of Attitude* (Hart Publishing, Oxford, 2008); *A Gap or a Chasm: Attrition in reported rape cases* (Home Office Research Study 293,



attrition in indecent assault cases, however a number of factors have been associated with the process generally: (1) no-criming, (2) cases where no further action is taken by the police, (3) cases where no further action is taken by the CPS, and (4) the jury decision not to convict.<sup>57</sup> The Government hoped that the reformed law would play its part in reducing the attrition rate in sexual offences and helping to convict the guilty. This was to be done by providing 'a clearer legal framework for juries as they decide on the facts of each case'.<sup>58</sup> In respect of sexual assault, the fact that key terms such as 'sexual' and 'consent' are under-defined means that the objective of reducing attrition rates may be no more than a hopeful aspiration.

The terms of reference for the review were:

'To review the sex offences in the common and statute law in England and Wales, and make recommendations that will:

- Provide coherent and clear sex offences which protect individuals, especially children and the more vulnerable, from abuse and exploitation;
- Enable abusers to be appropriately punished; and
- Be fair and non-discriminatory in accordance with the ECHR and Human Rights Act.'<sup>59</sup>

Both the *Setting the Boundaries* Review and the *Protecting the Public* White Paper asserted as their guiding principles a belief first, that the criminal law should protect everyone 'equally'<sup>60</sup> from non-consensual sexual activity and secondly that the criminal law should not intrude unnecessarily into the private lives of adults.<sup>61</sup> In addition, they accepted that there are certain circumstances in which constraints need to be imposed in order to protect others from harm. Thus the Review adopted a framework of respect

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2005); S. Lees & J. Gregory, *Rape and Sexual Assault: A Study of Attrition* (Islington Council, London, 1993); R. Wright, 'A Note on the Attrition of Rape Cases (1984) 24 *Brit J Crim* 399.

<sup>57</sup> S. Lees & J. Gregory, 'Attrition in Rape and Sexual Assault Cases in England and Wales' (1996) 36 *Brit J of Crim* 1.

<sup>58</sup> *Protecting the Public*, at para 10.

<sup>59</sup> *The Review* at para 1.1.8.

<sup>60</sup> One of the basic principles set out in the Review is that 'the criminal law should not discriminate unnecessarily between men and women nor between those of different sexual orientation,' at para 1.3.2.

<sup>61</sup> *The Review* at para 1.3.3. *Protecting the Public* at para. 14,

for personal freedom, subject only to the requirement to avoid harming others, which replicated Mill's famous principle that 'the only purpose for which power can be rightfully exercised over any member of a civilised community, against his will, is to prevent harm to others'.<sup>62</sup> Essentially the harm principle is that each person should be allowed to do and say what he or she likes if this does not harm the interests of others.<sup>63</sup> Simply because an activity is seen as immoral or harmful to the actor is not a good enough reason to justify criminalising it.<sup>64</sup> Mill offers no definition of what counts as harm, without which 'the application of the harm principle remains impracticably indeterminate'.<sup>65</sup> Feinberg, having built on Mill's analysis defines harm as a 'thwarting, setting back, or defeating of an interest'.<sup>66</sup> In turn, a person's interests comprise those things that make his life go well; thus we are harmed when our lives changes for the worse.<sup>67</sup>

Lord Devlin suggested that there are moral principles that are so fundamental to the way people lead their lives that they are society's 'moral cement'.<sup>68</sup> However, to what extent is this true in an increasingly diverse, multi-cultural, multi-faith society? In *Protecting the Public*, the Home Secretary frequently refers to 'our common values', assuming the existence of a shared popular consensus as to what constitutes right and wrong sexual behaviour. Munro suggests that in doing so 'he alludes to the existence of a communitarian dimension to the sexual offences reforms that is barely acknowledged in the individual rhetoric of the liberal philosophy'.<sup>69</sup> The White Paper suggests that the Sexual Offences Bill deals with conduct that the Home Office concludes is

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<sup>62</sup> J. S. Mill, *On Liberty* (Wordsworth Classics, Ware, 1996) p.13.

<sup>63</sup> The harm principle has received support from Feinberg, who sought to interpret and justify a modern understanding of the theory: J. Feinberg, *The Moral Limits of the Criminal Law Volume 1: Harm to Others* (Oxford University Press, Oxford, 1984).

<sup>64</sup> See J. Gardner, 'Prohibiting Immoralities' (2007) 26 *Cardozo Law Review* 2613; P. Alldridge, 'Making Criminal Law Known' in S. Shute & S. Simester (eds) *Criminal Law Theory* (OUP, Oxford, 2002).

<sup>65</sup> A.P. Simester & G.R. Sullivan, *Criminal Law: Theory and Doctrine* (Hart Publishing, Oxford, 2000) p.9.

<sup>66</sup> Feinberg, *op cit*, n 63 at p.33.

<sup>67</sup> *Ibid.*

<sup>68</sup> P. Devlin, *The Enforcement of Morals* (OUP, Oxford, 1965).

<sup>69</sup> V.E. Munro, 'Dev'l-in disguise: Harm, Privacy and the Sexual Offences Act 2003' in V. Munro & C. Stychin, C, *Sexuality and the Law: Feminist Engagements* (Routledge-Cavendish, Oxon, 2007).

‘unacceptable’, but does not attempt to answer the question ‘unacceptable to whom?’ The idea that sexual offences embody social standards of right and wrong will be discussed further in relation to the meaning of ‘sexual’, which is a defining feature of many of the new offences.<sup>70</sup>

### 3.3 SEXUAL ASSAULT: OVER-INCLUSIVE?

The SOA 2003 repeals the SOA 1956 and its various amendments.<sup>71</sup> It creates several new offences, with the primary concern of this thesis being the new offence of sexual assault. Sexual assault is not an isolated offence; it is one of many often-overlapping offences that deal with invasions of sexual autonomy (see table 3.1 below). It is therefore necessary to consider the statutory context in which sexual assault was considered worthy of a distinct label. This chapter will proceed to analyse the structure and scope of the four non-consensual sexual offences set out in ss.1-4 SOA 2003. I will argue that the lack of consideration by the Government and Parliament of sexual assault has resulted in an offence which is ill defined, ambiguous and which is over-inclusive because it overlaps with sections 1 and 2. Sexual assault is potentially not complainant-centred and it is this characteristic that I shall explore in subsequent chapters.

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<sup>70</sup> Although there was an explicit philosophy of respect for privacy, personal freedom and a focus on conduct causing harm to others, the SOA 2003 has also introduced a series of provisions that reflect a more paternalistic, moralistic rationale for criminalisation. Critics have argued that the Act’s treatment of sexual activity between minors and its failure to review prostitution-related activity ultimately undermines its liberal pretensions regarding justifiable intervention by supporting an agenda, according to which deviance from the sexual norm in itself justifies criminal intervention.<sup>70</sup> See F. Bennion. *Sexual Ethics and Criminal Law: A Critique of the Sexual Offences Bill 2003* (Lester Publishing, Oxford, 2003) p.13; A. Bainham & B. Brooks-Gordon, ‘Reforming the Law on Sexual Offences’ in B. Brooks-Gordon *et al.* *Sexuality Repositioned: Diversity and the Law* (Hart Publishing, Oxford, 2004) pp.261-96; J. Spencer, ‘The Sexual Offences Act 2003: Child and Family Offences’ [2004] *Crim L R* 347.

<sup>71</sup> There were 77 amendments to the original Act.

Table 3.3: Structure of SOA 2003, ss.1-4

| Offence                       | Elements to be proved   | Sentencing maxima   |
|-------------------------------|---|---|
| Rape (s.1)                    | <ul style="list-style-type: none"> <li>• Intentional penetration of vagina, anus or mouth with penis</li> <li>• No consent</li> <li>• No reasonable belief in consent</li> </ul>  | Life imprisonment (Indictable only)   |
| Assault by penetration (s.2)  | <ul style="list-style-type: none"> <li>• Intentional penetration of vagina, anus or mouth with a part of the body or anything else</li> <li>• Penetration is 'sexual'</li> <li>• No consent</li> <li>• No reasonable belief in consent</li> </ul> | Life imprisonment (Indictable only)   |
| Sexual assault (s.3)          | <ul style="list-style-type: none"> <li>• Intentionally touching another person</li> <li>• The touching is 'sexual'</li> <li>• No consent</li> <li>• No reasonable belief in consent.</li> </ul>   | On indictment: 10 years<br>Summarily: 6 months <sup>72</sup>  |
| Causing sexual activity (s.4) | <ul style="list-style-type: none"> <li>• Intentionally causing another person to engage in an activity</li> <li>• The activity is 'sexual'</li> <li>• No consent</li> <li>• No reasonable belief in consent</li> </ul>                            | On indictment: <ul style="list-style-type: none"> <li>• with penetration: life imprisonment</li> <li>• without penetration: 10 years</li> </ul> Summarily: 6 months <sup>73</sup> |

Section 3 SOA 2003 creates a new offence of sexual assault.<sup>74</sup> This is intended to cover behaviour which was previously charged as indecent assault, but which falls outside the

<sup>72</sup> 12 months if CJA 2003, s. 282(4) implemented.

<sup>73</sup> *Ibid.*

<sup>74</sup> The offence of sexual assault is gender-neutral in that may be committed by and against persons of either sex. This ensures equality of protection and of criminalization, thereby avoiding discrimination that might violate a person's Convention rights (e.g. *Sutherland and Morris v United Kingdom* (1997) 24 EHRR CD22 and *ADT v United Kingdom* (2000) 31 EHRR 803. There is no requirement that the defendant must be above a certain age (although a child under the age of 10 cannot be convicted of a criminal offence, Children and Young Persons Act 1933, s.50) or the complainant below a certain age. However, if the complainant is under 13, the appropriate charge is under s.7 of the 2003 Act, sexual assault of a child under 13.

scope of the new offence of assault by penetration. As a result, the parameters of the offence are very wide. There are a number of specific differences between the crime of indecent assault and the new offence of sexual assault. First, although both offences are framed in terms of an 'assault' section 3 is limited to touching and does not extend to cases where the complainant is put in fear of being touched. Secondly, the adjective 'indecent' has been replaced with the term 'sexual'. Thirdly, sexual assault is centred upon the concept of 'consent', which was not a feature of the definition of indecent assault. Section 3(1) of the SOA 2003 provides as follows:

- 'A person (A) commits an offence if-
- (a) he intentionally touches another person (B),
  - (b) the touching is sexual,
  - (c) B does not consent to the touching, and
  - (d) A does not reasonably believe that B consents.'

The new offence of sexual assault is triable either way and carries a maximum penalty of 10 years on indictment and six months imprisonment or a fine not exceeding the statutory maximum (currently £5000)<sup>75</sup> or both on summary conviction.<sup>76</sup>

The Sexual Offences Review's recommendations on rape and assault by penetration did not cover a range of behaviour it considered unacceptable, from 'frottage',<sup>77</sup> fondling and groping to 'quite serious assaults'.<sup>78</sup> The Review suggested that these acts 'are all distressing to the victim because there is a clear sexual intention, and they are often directed at the more sensitive and private parts of the body or carried out by the use of the private parts of the perpetrator'.<sup>79</sup> This suggests that these acts are distressing

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<sup>75</sup> Criminal Justice Act 1982, s.74, as read with the Magistrates' Courts Act 1980 s.32(9).

<sup>76</sup> s.3(4).

<sup>77</sup> Rubbing up against someone else in a sexual manner.

<sup>78</sup> *The Review* at para. 2.14.1. *The Review* did not clarify what it meant by the phrase 'quite serious assaults' but it might include 'using one's naked genital organs to stroke, rub, press or touch the naked genital organs of another'; 'using one's naked genital organs to rub any other part of another person's body, particularly the face or mouth'; 'using one's naked genital organs to stroke, rub, press or touch the clothed genital organs of another.' These criteria are taken from the *Sentencing Guidelines on Sexual Offences: Consultation Paper* (February 12<sup>th</sup>, 2004).

<sup>79</sup> *The Review* at para 2.14.1.

because there is a sexual intention and therefore that such contact would not be distressing if there was no obvious sexual motive. However, sexual intention is not a necessary ingredient of sexual assault. The sentence also refers to 'private parts'. Arguably, the Review should have clarified what it meant by this phrase and if it was referring to the genitalia should have made this explicit. Any part of the body could be labelled 'private', each person having the right to set the boundaries of their bodily and sexual autonomy.<sup>80</sup> The Review wished to refer to such activities as an assault, to cover not only touching but also behaviour that puts the complainant in fear of being touched. The Review highlighted how an offence that may not include a severe<sup>81</sup> assault could include a high level of fear, coercion, degradation and harm inflicted on victims.<sup>82</sup> They recommended a new offence of sexual assault to replace other non-penetrative<sup>83</sup> sexual touching that was previously contained in the offence of indecent assault. Section 3 actually creates an offence of 'sexual battery' rather than a strict offence of 'sexual assault' as will be explained in chapter 4.

The Review accordingly recommended the creation of a new offence of sexual assault to cover 'sexual touching'; defined as 'behaviour that a reasonable bystander would consider to be sexual, which is done without the consent of the victim'.<sup>84</sup> This recommendation was accepted by the Government, included in *Protecting the Public*<sup>85</sup> and enacted in s.3 of the 2003 Act. There was limited Parliamentary debate about the definition and scope of sexual assault. The majority of the legislative debates focused on the most controversial clauses, namely those dealing with rape, offences against children and offences committed by those in a position of trust. Although the SOA 2003 creates over 54 offences and there are obvious time constraints to the amount of time

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<sup>80</sup> The concept of 'private life' in Art.8 ECHR 'covers the physical and moral integrity of the person, including his or her sexual life.' *X and Y v Netherlands* (1986) 8 EHRR 235 at para.22.

<sup>81</sup> *The Review* uses 'severe' and 'serious' interchangeably.

<sup>82</sup> *Ibid* at para. 2.14.2.

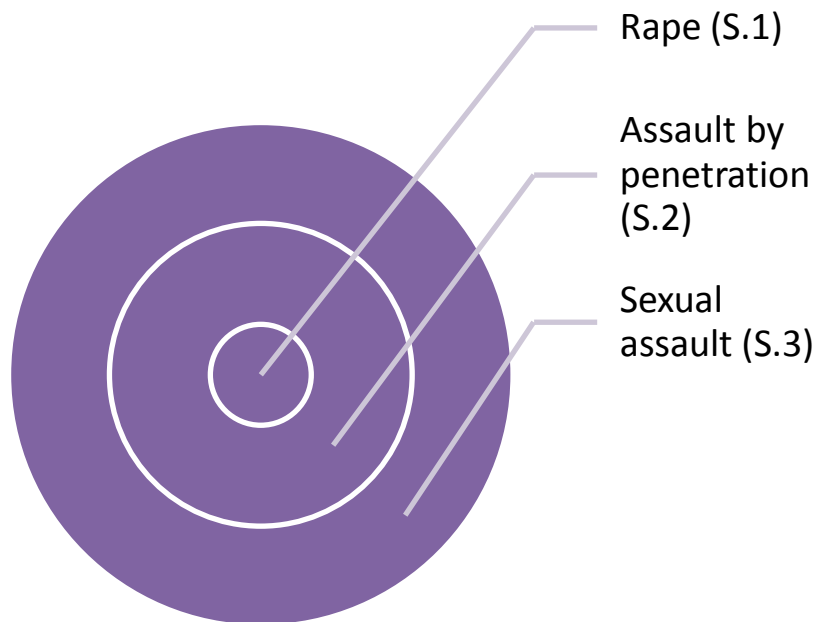
<sup>83</sup> Penetrative sexual touching, other than with the penis is now contained within s.2, assault by penetration.

<sup>84</sup> *The Review* at para. 2.14.4.

<sup>85</sup> Para 45.

spent discussing each individual crime, it is important in terms of fairness to complainants and defendants' that the reform process should consider and deliberate on all the controversies. This lack of discussion has resulted in the creation of an offence with ambiguity. The definition of touching expressly includes 'touching amounting to penetration'.<sup>86</sup> Theoretically, therefore, s.3 covers rape and assault by penetration, as demonstrated in figure 3.1, although it seems contrary to the intentions of Parliament to bring these activities within the offence.

*Figure 3.1: The overlap between s.1, s.2 and s.3*



Section 1(1) replaces and extends s.1 SOA 1956 and defines rape in the following terms:

'A person (A) commits an offence if-

- (a) he intentionally penetrates the vagina, anus, or mouth of another person (B) with his penis,
- (b) B does not consent to the penetration, and
- (c) A does not reasonably believe that B consents.'

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<sup>86</sup> S.79(8).

The requirement of penile penetration has resulted in the provision being gender-specific. The justification against gender-neutrality was that the offence of penile penetration is of a particularly personal kind, carrying with it the risk of pregnancy and/or disease transmission.<sup>87</sup> The provision not only includes penetration of the vagina or anus but also encompasses non-consensual oral sex (specifically fellatio)<sup>88</sup> as this was agreed to be just 'as abhorrent, demeaning and traumatizing' a violation and 'equally, if not more, psychologically harmful than vaginal and anal rape.'<sup>89</sup> It also carries similar risks of disease transmission. Non-consensual oral sex was previously charged as indecent assault and including it within the new definition of rape addresses some of the concerns about the broad scope of indecent assault highlighted in chapter 2; namely that the label on conviction did not differentiate between the vastly different forms of conduct and their disparate gravity. Doubts about broadening the offence were expressed inside and outside Parliament, largely because fellatio could easily be brought within the offence of assault by penetration and there was thought to be a risk that classifying forced oral sex as rape might devalue the offence or make juries reluctant to return rape verdicts in such cases. The Home Affairs Committee rejected such doubts, regarding the change as 'right in principle' and adding that there was no reason to think that juries would be reluctant to convict on the new definition.<sup>90</sup>

Section 2 creates a new offence of assault by penetration. Under s.2(1):

'A person (A) commits an offence if-

- (a) he intentionally penetrates the vagina or anus of another person (B) with a part of his body or anything else,
- (b) the penetration is sexual,
- (c) B does not consent to the penetration, and

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<sup>87</sup> *The Review* at para 2.8.4.

<sup>88</sup> Section 1 does not include non-consensual oral sex (cunnilingus) performed on a woman by a man or another woman. This is properly charged under s.4 as causing sexual activity without consent.

<sup>89</sup> Government Reply to Fifth Report Home Affairs Committee: Sexual Offences Bill. Session 2002-2003 HC 639.

<sup>90</sup> Home Affairs Committee, *Sexual Offences Bill* (Fifth Report of Session 2002-3, HC 639, 2003) at paras 10-14.



(d) A does not reasonably believe that B consents.’

The Review concluded that the offence of indecent assault did not sufficiently reflect the gravity of serious sexual assaults perpetrated by the penetration of the anus or female genitalia by the insertion of an object, or other part of the body e.g. digital penetration. Indecent assault covered a wide range of behaviour from touching<sup>91</sup> to ‘truly appalling violations’<sup>92</sup> and the sentence of 10 years imprisonment was considered ‘inadequate’ for the worst cases.<sup>93</sup> The forced entry of physical objects such as bottlenecks, vibrators and screwdrivers can often cause as much or more fear and distress, and potentially worse internal injuries, than penile penetration of the vagina or anus. s.2(1) reflects this and carries the same maximum penalty (life imprisonment)<sup>94</sup> as rape.

The Review recognised that other penetrative assaults could be as serious in their impact on the complainant as rape and that they should not be regarded lightly.<sup>95</sup> Implicit in the discussion was that s.2 violations do not deserve the label ‘rape’. The review was uneasy about extending the definition of rape to include all sexual penetration, on the basis that rape is commonly understood as penile penetration committed by men on women or men. Sexual assault by penetration can be as horrible, as demeaning, and as traumatising as penile penetration, possibly causing worse internal injuries, providing justification for a maximum penalty of life imprisonment. The

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<sup>91</sup> Touching in this context referred to touching in ‘circumstances of indecency’ or where the touching was proximate to an indecent event. See chapter 2 section 2.

<sup>92</sup> *The Review* did not define ‘truly appalling violations’, but arguably it refers to those acts at the most serious end of the spectrum and which could cause serious internal injuries. This type of conduct has been reclassified as assault by penetration, SOA 2003, s.2.

<sup>93</sup> *The Review* at para 2.9.1.

<sup>94</sup> SOA 2003, s.2(4).

<sup>95</sup> There are complicating issues regarding the timing of the assault and where it is not possible to prove definitively whether an indecent (or sexual) assault took place before or after 1<sup>st</sup> May 2004. Where for example the indecent acts were digital penetration or cunnilingus then since the commencement of SOA 2003 these are now more serious offences, potentially punishable by life imprisonment, rather than the maximum of 10 years imprisonment for indecent assault. See A. Gillespie, ‘Muddying the waters- indecent or sexual assault’ [2006] 156 *NLJ* 50.

label on conviction distinguishes penetration committed with the penis from other non-penile penetration.

There is a clear overlap between rape and assault by penetration as any penetration with the penis would amount to an assault by penetration, as demonstrated in figure 3.1 above. Where it is clear that the penis is the object with which somebody has been penetrated, a person will always be charged with rape. The two sections were drafted as they were because there may be circumstances where it is not clear with what the complainant was penetrated. If C is blindfolded or unconscious, for example, there may be a reasonable assumption that C was penetrated with a penis, but it will not always be clear and C might have been penetrated with an object.

Section 4 creates a new offence of causing a person to engage in sexual activity without consent, which has no direct precedent in law. Under s.4(1):

- ‘A person (A) commits an offence if-
- (a) he intentionally causes another person (B) to engage in an activity,
  - (b) the activity is sexual,
  - (c) B does not consent to engaging in the activity,
  - (d) A does not reasonably believe that B consents.’

The maximum penalty for this offence is life imprisonment if the activity involves penetration<sup>96</sup> and ten years if the activity does not involve penetration.<sup>97</sup> Previously where a person compelled another against their will to commit a sexual act either upon themselves, or with a third person or animal, it was not clear with what offence they would be charged. It was possible to charge such activities as indecent assault, as in

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<sup>96</sup> SOA 2003, s.4(4).

<sup>97</sup> SOA 2003, s.4(5). This approach, of sentencing based on whether the activity involves penetration, reflects the CLRC’s suggestion in its 15<sup>th</sup> Report of distinguishing aggravated indecent assault based on penetration. This implies that there is something inherent in the act of penetration that makes it particularly serious, when in fact, in determining the seriousness of a sexual offence, recourse must be had to the complainant’s experience of the action.

*Sargeant*,<sup>98</sup> but this meant that a maximum sentence of 10 years' imprisonment applied. The label indecent assault also failed to reflect the gravity of such an assault because it covered a wide and undefined range of conduct. A further option would have been a charge of common assault, although this would not have reflected the sexual nature of the act and would have limited the sentence to a maximum of six months' imprisonment.

Section 4 was recommended in the report and is intended to make a clear statement that compelling others to do sexual acts against their will is an offence.<sup>99</sup> This offence overlaps greatly with the offences discussed above, since in most cases D who rapes, sexually penetrates or sexually assaults C will also be causing C to engage in non-consensual sexual activity, although this is dependent on the meaning of the term 'engage'. However, its purpose is to catch a number of situations beyond the reach of those offences. Parliament has created a vague offence that is wide enough to cover procuring for prostitution, forcing a victim to masturbate<sup>100</sup> or forcing a victim to perform acts with third parties or with animals. The new offence is also intended to deal with women who compel men to penetrate them.<sup>101</sup> Causing a person to engage in sexual activity appears to be quite a complainant-centred offence, prohibiting actions that previously fell outside the scope of indecent assault. The essence of the conduct element is that D must cause C to engage in the sexual activity and this can be effected by explicit or implicit threats, or by use of a position of authority or dominance, rather than by actual physical coercion.

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<sup>98</sup> [1997] Crim LR 50.

<sup>99</sup> *The Review* at para 2.20.1

<sup>100</sup> In *R v Devonald* [2008] EWCA Crim 527 D took on the persona of a young woman and began to correspond with C over the internet. He persuaded C to masturbate in front of a web cam. The jury concluded that C had been deceived as to the purpose of the masturbation and D was convicted of causing sexual activity without consent. For discussion of the case and the meaning of deception as to the nature of the act (s.76) see J. Rogers, 'Sexual Offences: consent, "purpose" of defendant' [2008] 72 *J Crim L* 280 and Case Comment, 'Engaging in sexual activity without consent: meaning of deception as to the nature of the act' [2008] 172 *JP* 162.

<sup>101</sup> *The Review* at para 2.20.1.

The overlaps between sections 1-4 demonstrate one respect in which s.3 is over-inclusive and is arguably an example of the drafters attempting to cover all possible eventualities. S.79(8) could give rise to plea-bargaining, where the defendant indicates a willingness to plead guilty to sexual assault in return for the rape charge being dropped, thereby avoiding the stigma of a rape label and the possibility of life imprisonment. In considering whether to accept a plea, the CPS<sup>102</sup> will discuss the situation with the victim or the victim's family wherever possible, to explain the position and obtain their views in order to help them to make the right decision.<sup>103</sup> According to the *CPS Policy for Prosecuting Cases of Rape*, the CPS will always take proper account of the victim's interests and will not accept a guilty plea that is put forward upon a misleading or untrue set of facts. If a defendant offers to plead guilty to a different and possibly less serious charge, the prosecutor should only accept the plea if he or she thinks the court is able to pass a sentence that matches the seriousness of the offence, particularly where there may be aggravating features.

There is also the possibility that sexual assault charges may be utilised where there is insufficient proximity to charge attempted rape. Suppose D follows C into a nightclub toilet and attempts to undo her trousers. C fights back as she believes she will be raped and her trousers and top are ripped by D. D's charge is sexual touching and not attempted rape.<sup>104</sup> The fact that touching can include penetration means that it would be no defence to a charge under s.3 for a defendant to allege that, in fact, he committed rape or assault by penetration. This is significant, because in some cases it will be clear that D has sexually assaulted C but not clear what conduct that assault involved: for example, where C is unconscious or asleep.

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<sup>102</sup> In accordance with their obligations under the 'Attorney General's Guidelines on the Acceptance of Pleas and the Prosecutor's Role in the Sentencing Exercise 2005 (revised 2007)'.

<sup>103</sup> Although their views are not necessarily taken into account. There is a great deal of discussion about the place of victims' in criminal procedure, see for example M. Hall, *Victims of Crime* (Willan Publishing, Cullompton, 2009); I. Edwards, 'An Ambiguous Participant: The Crime Victim and Criminal Justice Decision-Making' (2004) 44 *Brit J Crim* 967.

<sup>104</sup> *Panorama: Freed to Offend Again*, television programme, BBC 1, 26<sup>th</sup> October 2009.

Generally, a defendant indicted for sexual assault may not be convicted in the alternative of common assault. This is because under s.6(3) of the Criminal Law Act 1967, the jury may bring in a verdict of guilty of 'another offence falling within the jurisdiction of the court of trial'. Common assault, which used to be a triable either way offence, was redesignated a summary offence by s.39 of the Criminal Justice Act 1988. However, there is provision in s.40 of the 1988 Act enabling a count charging common assault to be included in an indictment if it is founded on the same facts or evidence as a count charging an indictable offence. A count of common assault may therefore be included as an alternative count on an indictment charging sexual assault and where that is done an alternative verdict of guilty of common assault may be brought in. On a summary charge, the magistrates have no jurisdiction to find the defendant guilty of a lesser offence.<sup>105</sup>

### 3.4 CONCLUSION

The Sexual Offences Review was a detailed and lengthy process culminating in the implementation of the SOA 2003. The Review had as its motivating factors a desire to consolidate and clarify the law on sexual offences that had been described as 'archaic, incoherent and discriminatory.'<sup>106</sup> What emerged was a new piece of legislation designed to 'plug existing gaps and seek to protect society from rape and sexual assault at one end of the spectrum and from voyeurism at the other.'<sup>107</sup> The terms of reference for the Review included making recommendations that will '[p]rovide coherent and clear sex offences which protect individuals'. Accordingly, there appears to have been a desire to make the law more complainant-centred. The new offence of sexual assault had as its underlying objective the protection of men, women and children from unwanted sexual touching. However, no sufficient consideration was given to the scope and nature of the crime, creating an offence of ambiguity. Whilst the offence of rape prohibits specifically listed conduct, sexual assault is a residual offence that appears to

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<sup>105</sup> *Lawrence v Lawrence* [1968] 2 QB 93.

<sup>106</sup> Then Home Secretary David Blunkett, *Protecting the Public*, at para 8.

<sup>107</sup> *Ibid*, at para 9.

catch non-consensual conduct falling outside the scope of rape and assault by penetration. Consequently, sexual assault required sufficient analysis throughout the review process and in Parliament but this did not materialise. One aim of the SOA 2003 was to achieve greater clarity, so that people could know what behaviour was unacceptable. It may be an advantage that there are many separately labelled offences; but the Act 'adopts an unusually prolix style of drafting criminal provisions, and there are many overlaps between offences.'<sup>108</sup> This appears not to have been the best means to achieve the desirable objective of clarity. Whilst the Government appears to have adopted a complainant-centred approach to the sexual offences reform, this is what I will be questioning in the next chapters. Chapter 4 will analyse the requirements that D touches another and that C does not consent to the touching, which are necessary to establish the *actus reus* of sexual assault, in light of the complainant-centred nature of the reform process.

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<sup>108</sup> A. Ashworth, *Principles of Criminal Law*, 6<sup>th</sup> edn. (Oxford University Press, Oxford, 2009) p.329.

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## The Touching Problem: an Analysis of the Requirements that D Touches Another and that C does not Consent

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This chapter will begin the process of analysing the extent to which sexual assault is complainant-centred, evaluating two elements of the *actus reus* required for a conviction. Section 3, the provision that defines sexual assault, requires that D in fact touched another person and that C does not consent to the touching. For a conviction of sexual assault, the touching must also be 'sexual'. This element of the *actus reus* is the most contentious and ambiguous and accordingly will be analysed in chapters 5-8.

Part 1 will analyse the requirement in section 3(1)(a) that D 'intentionally *touches* another person'.<sup>1</sup> Touching is broadly defined in s.79(8) to include 'touching with any part of the body, with anything else or through anything and in particular includes touching amounting to penetration.' The definition of touching contains no *de minimis* exception and is therefore complainant-centred to the extent that there are no touchings that are 'too trivial' to be the subject of legal control.

Part 2 will consider why section 3 is limited to sexual touching given the offence is framed in terms of a 'sexual assault'. Sexual assault is narrower than indecent assault because it does not include situations where D intentionally or recklessly causes C to fear an immediate unlawful sexual touching. In this respect, the definition is under-inclusive and insufficiently complainant-centred. Whilst there are other offences that could be charged, section 3 ought to extend to situations where the complainant apprehends immediate and unlawful sexual touching for the sake of clarity and consistency in the criminal law. The law fails to label a psychic touching appropriately,

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<sup>1</sup> My emphasis.

because the label does not sufficiently represent the nature and seriousness of the harm done to the complainant.

Part 3 will analyse the requirement in section 3(1)(c) that the complainant 'does not consent to the touching'. The introduction of a test for consent that focuses on the complainant's 'freedom and capacity to make that choice' and the introduction of conclusive and evidential presumptions have clarified this area of the law and offered enhanced guidance on the issue of sexual consent. This demonstrates one area of the reform process that appeared to focus on justice for the complainant. However, in respect of sexual assault there remain issues about which touchings are impliedly consented to, both between strangers and between those in an intimate relationship. At the fringes of liability, there remains uncertainty about the meaning of 'consent'.

#### 4.1 THAT D IN FACT TOUCHED ANOTHER PERSON

The first requirement for a charge of sexual assault under s.3(1) is that D 'intentionally touches another person'. Leaving aside the intentionality issue, which will be dealt with in chapter 10, the focus of this section is on the issue of what constitutes touching. The meaning of touching is very broad and is welcome because it contains no *de minimis* exception. This is complainant-centred to the extent that there are no touchings that are 'too trivial' to be the subject of legal control.

##### 4.1.1 What constitutes 'touching'?

Section 79(8) of the 2003 Act provides that for the purposes of Part 1 of the Act, including s.3, 'touching includes touching-- a) with any part of the body, b) with anything else or c) through anything, and in particular includes touching amounting to penetration'.<sup>2</sup> There is no requirement that C must be aware of the touching, and so the

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<sup>2</sup> The requirement of 'touching' is also a defining feature of s.7 (sexual assault of a child under 13), s.9 (sexual activity with a child), s.16 (abuse of position of trust), s.25 (sexual activity with a child family member), s.26 (inciting a child family member to engage in sexual activity), s.30 (sexual activity with a person with a mental disorder impeding choice), s.34 (inducement, threat or deception to procure sexual



offence of sexual assault may be committed against someone who is asleep or otherwise unconscious<sup>3</sup> or who simply does not notice that the touching has occurred.

(a) Any part of the body

Touching includes touching with any part of the body. Sexual assault will therefore include touching with the hand, fingers, tongue, toes or any other part of the body. By virtue of s.79(3), the reference to 'part of the body' includes a reference to a part surgically constructed and accordingly sexual assault can be committed with an artificial hand, finger or toe. The reference is to touching with any part of *the* body, and not necessarily with D's own body. If D seizes X's hand and, before X can resist, places it on C's breast, D will thereby have touched C.<sup>4</sup>

(b) With anything else

'Anything else' is not defined but is sufficiently all-embracing to limit any judicial deliberation about what it may or may not cover. For the purposes of sexual assault, touching will therefore include touching with an object or with part of another person's body. An example of a touching by something other than a part of the body would be where D pushes a vibrator against C's breasts or genitals. This raises the issue of whether D has to be holding on to the implement that touches C.

*Example A*

D intentionally throws a ball at C's groin. There is little doubt that a battery can be carried out through an object. In *Fagan v MPC* the defendant committed a battery by failing to remove his car, which he had accidentally driven onto the complainant's foot.<sup>5</sup> As throwing a ball at someone clearly amounts to a battery, it seems inevitable that this

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activity with a person with a mental disorder), and s.38 (care workers: sexual activity with a person with a mental disorder).

<sup>3</sup> In which case the evidential presumptions of absence of consent in s.75 will apply.

<sup>4</sup> X would not be liable because his involvement is involuntary and the touching unintentional on his part.

<sup>5</sup> [1969] 1 QB 439.

would (putting aside issues of C's consent) constitute touching, albeit of an indirect nature. This action does not constitute an everyday touching which is 'generally acceptable in the conduct of daily life'.<sup>6</sup> If the action was accidental and occurred during a football match, there would be an implied consent to the physical contact. However, where the indirect touching is both intentional and of a 'sexual' nature, it could be charged as sexual assault. One might question whether this makes the offence too broad and potentially over-inclusive, as there is the possibility of liability where an 11-year-old boy deliberately throws a tennis-ball at another 11-year-old's groin.

#### *Example B*

D fires a water hose at C, with the intention of soaking C's flimsy t-shirt and making it transparent, thereby making visible her breasts. By virtue of similar reasoning to the *Fagan* decision, it has been well established that spitting on someone<sup>7</sup> or throwing beer on them<sup>8</sup> constitutes battery. Firing water at a woman would therefore constitute battery. Sexual assault ought to extend to situations, such as in the given example, where there is a deliberate targeting of C and where the action constitutes an invasion of her sexual autonomy.

There will inevitably be more ambiguous cases than those mentioned. Selfe gives the example of D, who, whilst in an office with C, directs a strong fan on C's legs, thereby deliberately causing her skirt to billow upwards revealing her underwear.<sup>9</sup> The defendant here has not himself 'touched' even the clothing of the complainant, and Selfe therefore suggests that this does not constitute 'touching' for the purpose of the SOA 2003. In establishing liability for sexual assault, the difficulty here is separating D's motives from what D appreciated about the 'sexual' nature of the conduct and how others (particularly C) interpret the incident. However, in the context of s.79(8) it is

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<sup>6</sup> *Collins v Wilcock* [1984] 3 All ER 374, at 379.

<sup>7</sup> *Smith* (1866) 176 ER 910.

<sup>8</sup> *Savage* [1992] 1 AC 699.

<sup>9</sup> D. Selfe, 'Sexual Assault and the Sexual Offences Act- A Touch Too Far' [2006] *Crim L R* 165.

possible to decide what constitutes 'touching' without reference to D's motive. D's motive might have been to humiliate and degrade C, but D might also just think that his action is funny, or that he is being 'playful' or 'flirtatious'.<sup>10</sup> D's motive is irrelevant to the issue of whether his action constitutes 'touching' for the purpose of s.3, although it might have relevance to the determination of the 'sexual' nature of the conduct, as we shall see in chapter 9.

### (c) Through anything

The issue of touching through clothing was discussed in *R v H (Karl Anthony)*.<sup>11</sup> Whilst walking across some fields the appellant grabbed the complainant's tracksuit bottoms by the fabric, attempted to pull her towards him and, without succeeding, attempted to place his hand over her mouth. She broke free and escaped. The appellant was convicted of sexual assault and appealed. Two issues arose in the Court of Appeal. First, whether the touching of B's tracksuit bottoms alone amounted to the 'touching' of another within the meaning of s.79(8) of the 2003 Act. The appellant argued that under s.79(8)(c) there can be no touching of another unless pressure in some form is brought against the body of the person concerned. Thus, although a sexual assault may involve D's stroking or fondling C's body through her clothing, it cannot merely take the form of touching or tugging at C's clothing. The Court of Appeal rejected the argument, which would have had the unfortunate consequence that if D attempts to tear off C's clothes, that might not involve any touching for the purpose of sexual assault. Where a person was wearing clothing, touching of that clothing constituted touching for the purposes of the offence contrary to s.3. The Court drew attention to the opening words of section 79(8), that 'touching includes touching' and in particular 'through anything' and said:

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<sup>10</sup> There is the possibility that C might perceive D's motive to be humiliation and degradation, but that that may not actually be D's motive(s). Similarly, C may well realise that D intended the incident as a joke but not experience it as such. This demonstrates the difficulty the law faces in considering D's motive(s) and what D appreciated about the conduct whilst giving due acknowledgment to the complainant's affective response to the action.

<sup>11</sup> [2005] 1 WLR 2005.

‘Subsection (8) is not a definition section...It was not Parliament’s intention by the use of that language to make it impossible to regard as a sexual assault touching which took place by touching what the victim was wearing at the time.’<sup>12</sup>

Therefore, it was unnecessary for there to be some form of pressure brought against the body of the individual who was alleged to have been assaulted for touching to occur for the purposes of s.3. There is no requirement of force or violence: the lightest touching will suffice. The second issue that arose was whether the touching had been what a reasonable person would consider ‘sexual’ for the purposes of s.78 SOA 2003. This issue will be dealt with in chapter 9, section 9.3.

Although s.79(8) clearly includes ‘touching through anything’ within the interpretation of touching, some commentators had suggested that the SOA 2003 required physical contact with C’s body. Card suggested that, ‘lightly touching an outer garment so thick that no physical contact is made with [C’s] body would not suffice’.<sup>13</sup> Following the decision in *H*, such conduct is capable of being a touching since the touching of C’s person may include C’s clothing. This is consistent with the decisions in relation to common assault generally. In *Thomas*,<sup>14</sup> where D had touched the bottom of C’s skirt, the Court of Appeal said *obiter* that ‘[t]here could be no dispute that if you touch a person’s clothes while he is wearing them that is equivalent to touching him’. Based on the decision in *H*, touching would also cover the situation where D grabs and raises the complainant’s skirt, without her consent, revealing her underwear.<sup>15</sup> It is submitted that as with the old law, there is no room for any ‘*de minimis*’ exception.<sup>16</sup> Female complainants should be protected from the objection that some sexual assaults are ‘too

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<sup>12</sup> *Ibid* per Lord Woolf CJ at p.2011.

<sup>13</sup> R. Card, *Sexual Offences: The New Law* (Jordan Publishing Limited, Bristol, 2004) para 2.3.2.

<sup>14</sup> (1985) 81 Cr App R 331, at 334.

<sup>15</sup> S.3(c) also covers D who engages in frottaging (rubbing his genitals against a fellow passenger on public transport). See *Tanylidiz* [1998] Crim L R 228.

<sup>16</sup> *Ananthanarayanan* (1994) 98 Cr App R 1, 5 per Laws J. See recently *Mills* [2003] EWCA Crim 3723, where a two-second touching of a barmaid’s breasts by a customer did constitute indecent assault.

trivial' to be the subject of legal control.<sup>17</sup> Patting a woman's bottom through her clothing may constitute the offence.<sup>18</sup>

#### (d) Touching amounting to penetration

The definition of touching expressly includes 'touching amounting to penetration'.<sup>19</sup> Theoretically, therefore, s.3 covers rape and assault by penetration, as analysed in chapter 3.

#### 4.2 SEXUAL ASSAULT: ASSAULT OR BATTERY?

Sexual assault is confined to touching and so, unlike the offence of indecent assault, does not extend to cases where the complainant apprehends immediate and unlawful sexual touching. Accordingly, the offence is too narrow and under-inclusive. Whilst there are a number of other offences that might be charged where C is put in fear of being touched, the law in these circumstances violates the principle of fair labelling as the label does not sufficiently represent the nature and seriousness of the harm done to the complainant.

The Sexual Offences Review<sup>20</sup> considered whether it would be more appropriate to adopt the term 'sexual touching' rather than 'sexual assault' as used in some other jurisdictions.<sup>21</sup> They did not elaborate on why the term 'sexual touching' might have

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<sup>17</sup> In *Court*, Lord Ackner gave as an example of inherently indecent conduct the case of a defendant who removed, without consent, a woman's clothing in public. Selfe by way of example suggests that such an act may involve the removal of a bikini top to reveal a woman's breasts whilst she is asleep. Selfe suggests that there is no actual direct contact with, that is touching of, the body of the complainant. Arguably it is impossible to remove a bikini top without touching the person. Perhaps one could untie a string bikini, but assuming the complainant was asleep on their front, the defendant would need to roll them over to actually remove the top and this would certainly necessitate a touching.

<sup>18</sup> CPS guidance on charging practice suggests that prosecutors must have regard to whether the public interest warrants a prosecution in respect of conduct 'at the lower end of the scale'. There may, however, be features that make such an offence more serious. Examples listed in CPS guidance include abuse of position of trust, use of drugs, use of violence or coercion and repeated offending.

<sup>19</sup> S. 79(8).

<sup>20</sup> Home Office Consultation Paper, *Setting the Boundaries: Reforming the law on sex offences*, July 2000. Hereafter referred to as 'the Review'.

<sup>21</sup> E.g. s.260 Maine Criminal Code, 'Unlawful Sexual Touching'.

been better but one interpretation might be that this would have adhered more closely to the principle of fair labelling. The principle of fair labelling attempts to ensure that offences are subdivided and labelled so as to represent fairly the nature and magnitude of the law breaking. A further advantage of the use of the label 'sexual touching' might be that the word touching is easily understandable to the lay public and would not have created the confusion about the scope of the assault/battery distinction. The Sexual Offences Review decided to recommend the 'sexual assault' label to stress that the offence ought not to be limited to just non-consensual touching, but also extended to cases where the complainant is put in fear of being touched.<sup>22</sup> However, although the offence is titled 'sexual assault' there is no reference to assault in the definition and the crime is essentially one of sexual battery.

The terms 'assault' and 'battery' are often used interchangeably by laymen and even lawyers. Technically, however, they are two separate crimes.<sup>23</sup> In 1983, Williams suggested a more accurate terminology to express the difference between these two offences.<sup>24</sup> He labelled 'assault' 'psychic assault' and 'battery' 'physical assault'. 'Psychic assault' is committed where D intentionally or subjectively recklessly<sup>25</sup> causes the complainant to *apprehend* immediate unlawful force to his person.<sup>26</sup> Battery is committed where D intentionally or subjectively recklessly *applies* unlawful force to another.<sup>27</sup> The slightest degree of force, even mere touching, will suffice.<sup>28</sup> *Collins v Wilcock*<sup>29</sup> makes it clear that 'everyday touchings', such as those that occur on busy tube trains, are not batteries. This raises issues of what are 'everyday touchings' and whether there are touchings, even sexual touchings which are impliedly consented to in everyday life. This will be analysed in section 3 below.

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<sup>22</sup> *The Review* at para 2.14.2.

<sup>23</sup> *Taylor, Little* [1992] 1 All ER 708.

<sup>24</sup> G. Williams, *Textbook of Criminal Law* 2<sup>nd</sup> edn (Sweet & Maxwell, London, 1983).

<sup>25</sup> *Venna* [1975] 3 All ER 788. Approved *obiter* in *Savage and Parmenter* [1992] 1 AC 699.

<sup>26</sup> *Fagan v Commissioner of Metropolitan Police* [1968] 3 WLR 1120.

<sup>27</sup> *Faulkner v Talbot* [1981] 3 All ER 468.

<sup>28</sup> *Cole v Turner* (1704) 6 Mod Rep 149.

<sup>29</sup> [1984] 3 All ER 374.

#### 4.2.1 Causing C to fear being touched: a lacuna in the law?

The new offence under s.3 falls short of the Review's stated objective to include fear of being touched, in that it is confined to touching and so, unlike the offence of indecent assault, does not extend to cases where the complainant apprehends immediate and unlawful sexual touching.<sup>30</sup> In essence, the Government has adopted the popular understanding of the term 'assault'. It is not enough to constitute sexual assault for D to cause C to think that he is about to touch her, if the touching does not in fact occur. So, for example, if C sees D's hand moving towards her breast and perceives that he is about to touch it, and manages to move out of the way just in time, there is no completed offence, although the circumstances may amount to an attempt. Accordingly, there appears to be a lacuna in the law as sexual assault does not cover situations where the defendant causes the complainant to apprehend a sexual touching. One might argue that although s.3 might not apply where C is put in fear of being touched, this is not problematic because this behaviour might be captured by one of a number of other offences. However, with so many alternative charges, this is overcomplicating the issue and making the law too complex. Practically it might cause confusion for the police and CPS when interpreting the behaviour and choosing the most appropriate charge. My point is not that section 3 is under-inclusive in precluding fear of being touched, because there are other offences that could be charged, but that section 3 *ought* to extend to situations where the complainant apprehends immediate and unlawful sexual touching for the sake of clarity and consistency in the criminal law. The SOA 2003 fails to label a psychic sexual touching appropriately.

The offence is termed a sexual assault, which like indecent assault beforehand, presupposes that it would encompass all forms of assault and battery as agreed by their Lordships in *Court*<sup>31</sup> i.e. both physical and psychic indecent assaults. An indecent physical assault included a battery or touching, whether the complainant was aware of

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<sup>30</sup> See *Rolfe* (1952) 36 Cr App R 4.

<sup>31</sup> [1989] AC 28.

it and the surrounding circumstances or not. This did not cause a problem as all batteries necessitated an unlawful touching.<sup>32</sup> An indecent psychic assault occurred where the complainant apprehended or feared an immediate and unlawful indecent touching through words or gestures: it did not require touching.<sup>33</sup> In *Rolfe*,<sup>34</sup> D moved towards C with his penis exposed and the Lord Chief Justice commented that 'if a man indecently exposes himself and walks towards a woman with his person exposed and makes an indecent suggestion to her that in the opinion of this court, can amount to an assault.' This will no longer constitute sexual assault, as D commits no touching. However, it might constitute attempted sexual assault or exposure, as will be discussed below.

The decision in *Sargeant*<sup>35</sup> demonstrates how the scope of indecent assault was much wider than sexual assault. D forced a 16-year-old boy to masturbate into a condom after threatening him with a stick. It seemed to the Court of Appeal that to compel somebody to masturbate in a public place was an indecent act and there was, accordingly, in the circumstances of the present case a coincidence of the ingredients required to establish indecent assault. There was no battery as such but the Court of Appeal held that the wielding of the stick constituted an indecent assault because the circumstances were indecent and a threat sufficient. It would appear that a 'psychic' sexual assault of the type committed in *Sargeant* is intended to be caught by the new s.4 offence of causing another to engage in sexual activity without their consent. However, s.4 does not extend to the situation where C is put in fear, but not compelled to act in any particular way. Consider the situation where C is forced to undress in front of a man wielding a bat, and whom she fears will sexually assault or rape her. It is possible that such a defendant could be charged under s.4 with causing sexual activity without consent. In

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<sup>32</sup> *Taylor, Little* [1992] 1 All ER 299.

<sup>33</sup> *R v Ireland* [1997] 3 WLR 534.

<sup>34</sup> (1952) 36 Cr App R 4.

<sup>35</sup> [1997] Crim LR 50.



respect of a conviction under s.4, it is the complainant who has to engage in the sexual activity so only if the woman does undress, could it fall under this section.<sup>36</sup>

The question that arises is why there should be a separate offence of 'psychic' sexual assault, where C apprehends immediate and unlawful sexual touching. Sexual offences protect an individual's sexual autonomy by providing the opportunity for criminal punishment for unjustified infringement. The *actus reus* of common assault requires only that D causes C to apprehend that she is about to be struck. There may be an assault where D has no intention to commit a battery but only to cause C to apprehend one.<sup>37</sup> The requirement is for apprehension, not fear. Applying the concept of assault to non-consensual sexual touching there appears to be no justifiable reason why the law should not criminalise instances where D causes C to apprehend that she is going to be touched sexually. If sexual assault were an indictable only offence, there might be an argument against 'psychic' sexual assault on the basis that such acts might not be sufficiently serious to justify imprisonment. However, sexual assault is triable either way. One argument in favour of criminalising 'psychic' sexual assault as the *Setting the Boundaries* Review identifies is so as 'not to diminish the importance of the offence of sexual assault'.<sup>38</sup> The Review quite rightly proposes that '[a]n offence that may not include a severe assault could include a high level of fear, coercion, degradation and harm inflicted on victims.'<sup>39</sup>

What the law on sexual assault should emphasise is the affective response D brings about, namely C's experience of the touching or apprehension of the threat of touching. Horder argues that 'what should be regarded as morally significant about the *actus reus* of a psychic assault is that it is experienced as a threatening *confrontation* by the

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<sup>36</sup> Although that is dependent on the meaning of the term 'activity'.

<sup>37</sup> *Logdon v DPP* [1976] Crim LR 121.

<sup>38</sup> Home Office Consultation Paper, *Setting the Boundaries: Reforming the law on sex offences* (July 2000) at para 2.14.2.

<sup>39</sup> *Ibid.*

victim.’<sup>40</sup> The morally significant way in which the harm of ‘psychic’ sexual assault might occur is ‘through confrontation’. What matters is C’s perception of what is happening or what might happen. This provides an argument for the decision in *Ireland*,<sup>41</sup> that words, no less than a gesture, are capable of amounting to an assault. The wrong of psychic sexual assault and the justification for it being a separate offence contained within s.3 SOA 2003 is the experience of being threatened with sexual interference, being confronted with sexual interference, an experience that induces a fear of unlawful sexual touching. Regardless of whether D’s intention was to touch C or to cause C to apprehend that she will be touched, the focus of the law on sexual assault should be the impact on C in being touched or being confronted and caused to apprehend unlawful touching.

There are a series of other possible offences that a defendant who causes a complainant to apprehend that she will be touched could be charged with and I will attempt to demonstrate how such offences fail to communicate the nature of the complainant’s violation. An essential part of an offence being complainant-centred is that the label reflects the conduct as experienced by C. This is one aspect of the principle of fair labelling.

#### 4.2.2 (Un)fair labelling

Fair labelling is a normative principle of criminal liability that attempts to ensure that offences are subdivided and labelled so as to represent fairly the nature and magnitude of the law breaking.<sup>42</sup> The law performs a labelling function, designating some conduct as acceptable and other conduct as criminal. The principle of fair labelling refers to the accurate naming of the crime of which the offender is convicted: the law needs precision in order to identify exactly what offence the wrongdoer has committed. When

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<sup>40</sup> J. Horder, ‘Reconsidering Psychic Assault’ [1998] Crim LR 392.

<sup>41</sup> [1998] AC 147.

<sup>42</sup> A. Ashworth, ‘The elasticity of *mens rea*’ in C. Tapper (ed), *Crime, Proof and Punishment* (Butterworths, London, 1981).

a crime occurs, justice must not only be done, it must be seen to be done.<sup>43</sup> One of the justifications for the principle of fair labelling is that '[f]airness demands that offenders be labelled and punished in proportion to their wrongdoing.'<sup>44</sup> Horder argued that:

'[W]hat matters is not just that one has been convicted, but of *what* one has been convicted. If the offence in question gives too anaemic a conception of what that might be, it is fair neither to the defendant, nor the victim, for the wrongdoing of the former, and the wrong suffered by the latter, will not have been properly *represented* to the public at large.'<sup>45</sup>

One might question why it matters what the offence is called, as long as the degree of punishment is not excessive. It appears that it is relevant for a number of connected reasons, all of which relate to the communicative function of the offence name.<sup>46</sup> Thus, we must consider the particular audiences to whom the offence label is important. The law must communicate to the offender exactly what the conviction is for and why he is being punished, in order that his punishment appears meaningful to him, not just an arbitrary harsh treatment. The law should also communicate the crime to the public, so that it too may understand the nature of the offender's transgression. Accurate labelling also provides information about an offender's conviction to criminal justice agencies and most importantly to this thesis, it serves to show to the victim that justice has been carried out.

One important issue in fair labelling theory is whether offence labels could and should sufficiently represent the nature and seriousness of the harm done to the victim? Offence labels ought to be fair to victims so that the legal record accords with their own perceptions of the nature and seriousness of the harm done to them. An accurately labelled offence demonstrates that society is showing solidarity with the victim and

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<sup>43</sup> A.P. Simester & G.R. Sullivan, *Criminal Law: Theory and Doctrine* (Oxford, Hart Publishing, 2000) p.32.

<sup>44</sup> A. Ashworth, *Principles of Criminal Law* 3<sup>rd</sup> edn (OUP, Oxford, 1999).

<sup>45</sup> J. Horder, 'Rethinking Non-Fatal Offences Against the Person' (1994) 14 *OJLS* 335, emphasis in original.

<sup>46</sup> See J. Chalmers & C. Leverick, 'Fair Labelling in Criminal Law' (2008) 71 *MLR* 217.

appropriately condemning the defendant's actions. Problems may arise where plea bargaining or a charging direction means that the offence of which the offender is convicted is not in fact the one which the victim believes has been committed. For example, D is charged with rape, but is convicted in the alternative with sexual assault, where the maximum sentence is 10 years' imprisonment rather than life imprisonment for rape. The victim believes she has been subject to a rape and the label accordingly does not reflect with sufficient moral weight the harm that has been suffered. This may be one such instance where the offence label is so manifestly out of line with the offender's conduct as to be unfair. Another example might be where D pleads guilty to common assault but C perceives what happened to be sexual assault. Where a psychic sexual touching has occurred the victim has a legitimate interest in fair labelling in that she deserves to have her suffering reflected by an offence of appropriate seriousness.<sup>47</sup> The desire of the victim may be to see the 'sexual' circumstance reflected in the label attached to the offence. There are 7 alternative offences that could cover 'psychic' sexual assault. However, the point here is that these other offences are inadequate because they fail to label appropriately the situation where C apprehends immediate and unlawful sexual touching.

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<sup>47</sup> The counter-argument to this is that it would be unfair to the offender if the offence label over-represented his culpability and unfair to the public if it under-represented it. There is also an issue here in relation to consistency of application of the criminal law. I will deal with this counter-argument in 8.4.2 below.

Table 4.1: Possible charges when someone is put in fear of being touched sexually

| Offence   | <i>Actus reus</i>  | <i>Mens rea</i>   | Maximum Sentence   |
|---|--|---|--|
| <b>(a) Attempted sexual assault</b><br>(CAA 1981)   | - D has done an act which is more than merely preparatory to the commission of sexual assault  | - D intended to assault C sexually  | Indictment: 10 years' imp<br>Summarily: 6 months imp or a fine, or both              |
| <b>(b) Intent to commit a sexual offence</b><br>(SOA 2003, s.62)  | - D commits any offence  | - D intends to commit a sexual offence  | Indictment: 10 years' imp <sup>1</sup><br>Summarily: 6 months imp or a fine, or both |
| <b>(c) Exposure</b><br>(SOA 2003, s.66)   | - Exposure of D's genitals   | - D intends that someone will see them and be caused alarm or distress  | Summarily: 6 months imp or a fine, or both<br>Indictment: 2 years imp                |
| <b>(d) Common assault</b><br>(CJA 1988, s.39)   | - Apprehension of imminent unlawful force  | - D intended or was reckless that C would apprehend imminent unlawful force   | Summarily: 6 months imp a fine not exceeding level 5, or both                        |
| <b>(e) Public Order Offences</b><br><ul style="list-style-type: none"> <li>Fear or provocation of violence<br/>(POA 1986, s.4)</li> </ul> | <ul style="list-style-type: none"> <li>Threatening, abusive or insulting words or behaviour</li> <li>Towards another person</li> </ul> | <ul style="list-style-type: none"> <li>D must intend or be aware that the words or actions are threatening, abusive or insulting</li> <li>D must intend that C will fear violence or provoke the immediate use of violence</li> </ul> | Summarily: 6 months imp, a fine not exceeding level 5, or both                       |
| <ul style="list-style-type: none"> <li>Intentional harassment, alarm or distress<br/>(POA 1986, s.4A)</li> </ul>                          | <ul style="list-style-type: none"> <li>Threatening, abusive, insulting or disorderly words or behaviour</li> </ul>                     | <ul style="list-style-type: none"> <li>D must intend or be aware that his conduct may be threatening, abusive, insulting or disorderly</li> <li>D must intend his behaviour to cause harassment, alarm or distress</li> </ul>         | Summarily: 6 months imp, a fine not exceeding level 5, or both                       |
| <ul style="list-style-type: none"> <li>Harassment, alarm or distress<br/>(POA 1986, s.5)</li> </ul>                                       | <ul style="list-style-type: none"> <li>Threatening, abusive or insulting words or behaviour</li> <li>Towards another person</li> </ul> | <ul style="list-style-type: none"> <li>D must know or appreciate that the words or actions are threatening, abusive or insulting</li> </ul>   | Summarily: a fine not exceeding level 3  |

<sup>1</sup> If the initial offence is kidnapping or false imprisonment the maximum sentence is life imprisonment.

#### (a) Attempted sexual assault

One obvious issue for consideration is whether D who intentionally causes someone to apprehend immediate and unlawful sexual touching is guilty of attempted sexual assault.<sup>1</sup> If so, does that mean that there is actually an offence of 'psychic' sexual assault? The SOA 2003 does not mention attempts to commit any of the offences therein contained. However, under the Criminal Attempts Act 1981 (CAA 1981), s.1(4) an attempt may always be left to the jury where any of the substantive offences are charged.<sup>2</sup> The fault element of an attempt rarely causes much difficulty: it must be shown that the defendant intended to cause the proscribed harm and had the necessary knowledge of facts and circumstances. In order to satisfy the *mens rea* of attempted sexual assault D must intend to touch C and not reasonably believe that C consents. Intentional conduct is understood to mean a 'purposive' or direct intent rather than an oblique intent. If D trips whilst walking on a busy street and accidentally touches C's breast, D does not intend to sexually assault C. He is not guilty of attempted sexual assault.

One complicating issue in charging an attempted sexual assault is proving the conduct element: it must be shown that D exhibited some willingness to bring his criminal intentions to fruition. The CAA 1981 requires D to have done an act that 'is more than merely preparatory to the commission of the offence'.<sup>3</sup> Every step towards the commission of an offence, except the last one, could properly be described as 'preparatory' to the commission of the offence. However, *R v Geddes*<sup>4</sup> held that a criminal attempt offence required evidence that a defendant had moved from the stage of planning and preparation to implementing his intention. Consider a scenario where D pushes C to the floor and begins to undo his trousers. C may well fear that she is about

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<sup>1</sup> For a comprehensive analysis of the theoretical terrain of the law on attempts, see R.A.Duff, *Criminal Attempts* (Clarendon Press, Oxford, 1996).

<sup>2</sup> Section 1(1) applies to attempts to commit only offences which, as defined by the law of England and Wales, are triable, either only on indictment, or either way.

<sup>3</sup> CAA 1981, s.1(1).

<sup>4</sup> [1996] Crim LR 894.

to be sexually assaulted. Given that the 'more than merely preparatory' test is one for the jury, such a situation could result in a conviction for attempted sexual assault. Nevertheless, a jury might also conclude that there is insufficient proximity. It might be the case that practically no sensible prosecutor would charge attempted sexual assault because of the difficulties of proof. Just because a man sticks his hand out does not mean that he is going to grope a woman's breast.

Whilst there are issues concerning the decision to prosecute in cases of attempted sexual assault, there are also issues about the labelling of such actions. In the context of non-consensual sexual touching, the label 'attempted sexual assault' appears to be defendant-centred because it focuses on D's personal behaviour; the fact he did not succeed in committing the relevant act. An essential part of an offence being complainant-centred is that the label reflects the conduct as experienced by C. In respect of sexual offences, there may be instances where the psychological impact on C would be the same regardless of whether D succeeds in committing the act e.g. whether he does in fact touch C's breasts or vagina or not. Accordingly, the label 'attempted sexual assault' does not accurately convey the complainant's affective response to a 'psychic sexual assault'. In offences that result in tangible harm the conduct involved in an attempt will often be far removed from the type of harm that would be needed to give rise to a charge under the relevant substantive offence.<sup>5</sup> Sexual offences are somewhat different because sexual harm is contentious and not always easily identifiable and therefore C's experience could be the same whether or not D completes the action. Attempted sexual assault implies that D was unsuccessful in completing the action, but fails to acknowledge that C might have been caused to apprehend immediate and unlawful sexual touching. In the context of psychic sexual assault, it is the confrontation as opposed to D's failure to complete the action that such an offence ought to convey.

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<sup>5</sup> See, generally, the Law Commission's recent Consultation Paper No 183, *Conspiracy and Attempt* (2007)

A further legal difficulty arising with a charge of attempted sexual assault is whether the evidential presumptions in s.75 of Act should be applied where there is a defence of consent. The ambit of s.75 is clearly stated in subsection 1, where if in proceedings for an offence to which this section applies it is proved: '(a) that the defendant did the relevant act.' This condition will not be satisfied by an attempt to commit a sexual assault. In 2002, Hilary Benn also made clear that the list of circumstances in s.75 is exhaustive and 'it will not be possible to amend it other than by means of primary legislation',<sup>6</sup> ruling out extension of the provision to include attempts by means of judicial interpretation. By virtue of s.4 CAA 1981, courts may generally impose a sentence as heavy as the defendant would have received had he succeeded with his sexual touching. The Law Commission has favoured this approach since attempts 'may range in scope from the offence which is frustrated at the last moment... to the earliest and most remote acts of preparation which can properly be regarded as an attempt'.<sup>7</sup>

#### (b) Intent to commit a sexual offence

A further offence that could be charged where C apprehends an immediate and unlawful sexual touching is common assault with intent to commit a sexual offence, one of several new offences contained in the SOA 2003.<sup>8</sup> Under s.62, a person commits an offence if 'he commits any offence with the intention of committing a relevant sexual offence.' A 'relevant sexual offence' is defined by s.62(2) to mean any offence under Part 1 of the Act (ss.1-79), including an offence of aiding, abetting, counselling or procuring such an offence. Intent to commit a relevant sexual offence covers the situation whereby the defendant hoped that the sexual activity would be consensual, but intended to sexually assault her if there was no consent. The maximum sentence on conviction on indictment is life imprisonment where the initial offence was kidnapping

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<sup>6</sup> Hansard, December 9<sup>th</sup> 2002, 122W.

<sup>7</sup> Law Com 102, *Attempt and Impossibility in Relation to Attempt, Conspiracy and Incitement* (1980).

<sup>8</sup> In the context of battery with intent to commit a sexual offence see *R v Wisniewski* [2004] EWCA Crim 3361.



or false imprisonment,<sup>9</sup> otherwise 10 years' imprisonment.<sup>10</sup> Summarily the maximum sentence is 6 months imprisonment<sup>11</sup> or a fine not exceeding the statutory maximum or both.<sup>12</sup> D could therefore be liable for common assault with intent to rape or sexually assault in situations where he intended to touch but was prevented before the commission of the act took place. However, if his intention is to humiliate or degrade the complainant, rather than commit a specific sexual offence he could not be charged under this section.

#### (c) Exposure

The act of indecent exposure originally set out in s.4 Vagrancy Act 1824 and now punishable under s.66 SOA 2003, prohibits the exposure of D's genitals, where D intends that someone will see them and be caused alarm or distress. A person who carelessly exposes his genitals does not commit an offence under s.66, nor does he commit such an offence even through deliberate exposure unless he acts with the specific intent required by s.66(1)(b). This requirement means that a defendant who intends that C will see his genitals, but does not contemplate C's alarm or distress, or thinks that they 'will like what they see' will not be liable. One problem with the law on exposure is that the offence does not communicate anything of the complainant's experience, other than her alarm or distress. The law on exposure fails to recognise the significance of such acts on complainants' for example where C fears she will be sexually assaulted or raped following the exposure.

#### (d) Common assault

Where D does not fulfil his intention of touching C but commits a psychic sexual touching there is the possibility of a charge of common assault under s.39 of the Criminal Justice Act 1988. The essence of common assault is that it consists of causing

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<sup>9</sup> S.62(3).

<sup>10</sup> S.62(4)(b).

<sup>11</sup> 12 months if CJA 2003, s.282(4) implemented.

<sup>12</sup> S.62(4)(a).

apprehension of an immediate touching or application of unlawful force. In *Ireland and Burstow*,<sup>13</sup> the Court of Appeal held that words, unaccompanied by any threatening conduct, could amount to an assault.<sup>14</sup> The primary purpose of the offence is to penalize the deliberate or reckless creation of fear of attack. The fault element required for common assault is either intention or advertent recklessness as to the respective conduct element. Where such an assault puts the complainant in fear of a non-consensual sexual touching the law fails to label the incident appropriately. The label common assault implies a non-sexual assault (e.g. where D threatens to strike C but is prevented from doing so) and in the context of psychic sexual assault therefore fails to convey the significance of C's apprehension of an unlawful sexual touching (e.g. where D threatens to 'molest' C).

#### (e) Public Order Act offences

A defendant who has caused a complainant to fear a non-consensual sexual touching could be charged with a public order offence. In particular, D could be charged with one of the three less serious offences provided by the Public Order Act 1986, ss.4, 4A and 5. The offences are described by their respective marginal notes as: 'fear or provocation of violence', 'causing intentional harassment, alarm or distress' and 'harassment, alarm or distress'. These summary offences do not involve actual violence and may be 'seen as a response to the call for a simplified and more practical scheme of offences for dealing with group disorder'.<sup>15</sup> For example, the offences can be used to deal with groups of people who persistently shout abuse or obscenities at passers-by. However, these offences are inappropriate as a response to the causing of fear of a sexual assault because they fail to acknowledge the 'sexual' element of the offending behaviour. The focus of such offences is public order and not the complainant's affective response to the defendant's conduct. Consider an intoxicated group of young men who follow and

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<sup>13</sup> [1998] AC 147, at 162.

<sup>14</sup> See chapter 2, section 2.2.1.

<sup>15</sup> A. Ashworth, *Principles of Criminal Law*, 6<sup>th</sup> edn (Oxford University Press, Oxford, 2009) p.317.

make sexually explicit comments towards a lone woman in the street. They put her in fear of being sexually assaulted or raped. Under current law, this is most likely to be charged, if at all, under the POA 1986. The public order offences fail to reflect the complainant's experience, who may quite legitimately have feared that she was going to be sexually assaulted or rape.

If C is caused to fear a sexual assault, the law should punish D and label the transgression in a fair and appropriate way. In excluding the causing of fear within the remit of sexual assault the offence is inappropriately labelled and less complainant-centred than indecent assault. The definition of sexual assault should be extended to cover the situation where the complainant is put in fear by the defendant's words alone, irrespective of the absence of any physical contact. Thus if D were to approach C from behind, and whilst unseen by C to utter rude and threatening words which made her apprehend an immediate battery of a 'sexual' nature, the charge should be sexual assault, communicating C's affective response to the violation and showing solidarity with C. In failing to define such acts as sexual assault, the law fails to recognise the significance of certain acts on complainants. The above discussion demonstrates how s.3 fails to achieve the Review's stated objective to include fear of being touched because it does not extend to cases where C apprehends immediate and unlawful sexual touching. Whilst there are other offences that could be charged in such situations, s.3 ought to include such behaviour for the sake of clarity and consistency in the criminal law.

#### 4.3 THAT C DOES NOT CONSENT

The presence or absence of consent has long been the crucial concept in establishing sexual offences. However, defining and proving consent is a difficult determination and this is due in part to the very nature of sexual offences: the absence of witnesses, the lack of clarity as to what constitutes consent, the continuing presence of myths and stereotypes about sexual assault. The nuances of sexual encounters and the power of

ingrained attitudes interact to create considerable problems in applying any definition and standards. Concerns about the extraordinarily low conviction rates for sexual offences, especially for rape,<sup>16</sup> has led to a tightening of the *mens rea* requirements and the introduction of a definition of and a number of evidential and conclusive presumptions focusing on the complainant's consent. Before the SOA 2003, to be guilty of rape a man must have known that, or been reckless as to whether, the other party was not consenting.<sup>17</sup> The 'mistaken belief in consent' test (which was established in *DPP v Morgan*<sup>18</sup>) did not require D's mistaken belief in consent to be objectively reasonable. The SOA 2003 now provides a general test of what is reasonable in all the circumstances. Section 3(2) states that: '[w]hether a belief is reasonable is to be determined having regard to all the circumstances, including any steps A has taken to ascertain whether B consents.' The reasonable belief in consent will not detain us here but is the focus of chapter 10.

This section will analyse the *actus reus* requirement necessary for a charge of sexual assault that C does not consent to the touching.<sup>19</sup> The requirement that C did not consent to the assault was not a feature of the statutory definition of indecent assault, but implied through the decision in *McAllister*<sup>20</sup> and provides evidence of one respect in which the new law is more complainant-centred. The SOA 2003 is the first piece of legislation in English law to attempt a statutory definition of 'consent' in the context of sex offences. The SOA 1956 did not attempt to define it, with courts treating consent as an ordinary word and thus as ultimately a matter for the jury or magistrates. *Olugboja*<sup>21</sup> left the decision on consent as a question of fact for the jury who had to decide what

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<sup>16</sup> See 'A Gap or a Chasm: Attrition in reported rape cases' (Home Office Research Study 293, 2005) which put the conviction rate for rape cases at an all time low of 5.6 per cent in 2002; L. Kelly & L. Regan, 'Rape: The Forgotten Issue? A European research and networking project' (University of North London: Child and Woman Abuse Studies Unit, 2001).

<sup>17</sup> SOA 1956, s.1 (as amended).

<sup>18</sup> [1976] AC 182.

<sup>19</sup> SOA 2003, s.3(1)(c).

<sup>20</sup> [1997] Crim L.R. 233.

<sup>21</sup> [1982] QB 320.

was in the complainant's mind at the time of the offence. The Court of Appeal suggested that 'real consent' is a different 'state of mind' from 'mere submission',<sup>22</sup> and that the difference between these two is a matter of degree.<sup>23</sup> This approach was analysed in chapter 2 and will not detain us again here. Consent now has a much more complainant-centred meaning than before the SOA 2003. However, there remain issues about which touchings are impliedly consented to, both between strangers and between those in an intimate relationship. At the fringes of liability, there remains uncertainty about the meaning of 'consent'. This has received little attention in the literature, which has focused on consent in rape, where the issues are different.

#### 4.3.1 What constitutes consent?

The SOA 2003 defines 'consent' in s.74: 'a person consents if he agrees by choice, and has the freedom and capacity to make that choice.' It is implicit in the definition that consent can be given only by the person in question and not (for example) by a partner or parent or someone in a position of authority over that person. In requiring that a person must have the freedom and capacity to make the relevant choice, this offers the potential for a less one-dimensional understanding of agency (than the *Olugboja* definition decision which left the meaning of consent undefined and failed to locate consent in the interaction between the parties) thus acknowledging that the notion of consent cannot be 'radically divorced from the circumstances under which the choice is made'.<sup>24</sup> In determining whether agreement has been given to a particular sexual act a court or jury should look at the whole background circumstances, emphasising the essentially interactive nature of sexual conduct. Section 74 is intended to be a factual or 'attitudinal' definition, turning on what C felt rather than what C expressed.

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<sup>22</sup> *Ibid*, at 332B-E.

<sup>23</sup> *Ibid*.

<sup>24</sup> V. Munro & E. Finch, 'Breaking Boundaries? Sexual Consent in the Jury Room' (2006) 26 *LS* 303.

#### 4.3.2 Implied consent

Section 3 SOA 2003 requires that the touching in question must be without C's consent. In some situations, sexual touching proceeds on the basis of the consent of the parties without there being discussion or negotiation about it, for example where the parties have a long-standing relationship and regularly engage in a particular type of sexual activity. The giving of consent in this way, implied consent, may also arise through conventions by which certain actions, or even doing nothing at all, can be understood as the giving of consent. Accordingly, in the context of sexual assault, there are two situations, admittedly at the fringes of liability, where the meaning of 'consent' is vague and the boundaries of sexual assault become indistinct. First, consent to sexual touching may be problematic when C and D do not know each other and secondly, consent may be problematic where C and D were in an ongoing sexual relationship at the time of the offence.

##### (a) Where C and D do not know each other

The first situation is where C and D do not know each other. *Collins v Wilcock*<sup>25</sup> makes it clear that all citizens 'impliedly consent' to 'all physical contact which is generally acceptable in the ordinary conduct of daily life'.<sup>26</sup> The decision in *Collins v Wilcock* thus creates an exception for the 'exigencies of everyday life'<sup>27</sup> such as the jostling that occurs on busy tube trains. There are two possible explanations for that decision. First, when entering crowded places or attending events when touchings are common, a person impliedly consents to the physical contact. Secondly, some everyday touchings are an inevitable part of life and it is thus necessary to create a general exception to the offence of battery to cover these. Most of the physical contacts of everyday life are not actionable because they are impliedly consented to by all who move in society and so expose themselves to the risk of bodily contact. So nobody can complain of the jostling

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<sup>25</sup> [1984] 3 All ER 374.

<sup>26</sup> *Ibid*, at 378.

<sup>27</sup> *Ibid*.

that is inevitable from his presence in, for example, a supermarket, an underground station or a busy street; nor can a person who attends a party complain if his hand is seized in friendship, or even if his back is slapped.<sup>28</sup>

This then raises the question of what touchings are 'generally acceptable' and whether there are touchings which are impliedly consented to in everyday life, which could be interpreted as 'sexual' by the complainant'. Is a kiss on the cheek impliedly consented to? What about having your bottom pinched? The point here is not that there are certain sexual touchings that are always impliedly consented to, because there is always a room for argument about what is generally acceptable conduct, and that may depend on relational, social and spatial contexts. My point is that there is the possibility of cases arising at the fringes of liability, where the issue is whether C impliedly consented to the touching and where the boundaries of sexual assault become unclear.

One only needs to consider the range of consensual and non-consensual 'speculative touching' that occurs in nightclubs. Is having your bottom pinched part of the expected conduct in a nightclub that everyone should be expected to tolerate? To what extent do people consent to minor non-sexual touching, for example a hand on a shoulder to signify that someone is trying to squeeze past, as opposed to brushing past someone's breasts on a crowded dance floor? Nightclubs are busy, crowded places with many people lacking spatial awareness because they are intoxicated. Although people who enter nightclubs consent to the minor annoyance and 'hustle and bustle' of entering a crowded environment, they do not consent to unjustified invasions of their sexual integrity. Pinching C on the buttocks, touching C's breast, kissing C or rubbing against someone who does not consent are all invasions of C's sexual autonomy. They are all deliberate willed actions carried out by D and the tolerable conduct exception should not extend this far. One might argue that we should not be too puritanical or over-enthusiastic about using the criminal law to sanction speculative touching in nightclubs.

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<sup>28</sup> See *Tubbsville v Savage* (1669) 86 ER 684.

However, in any sexual interaction, either there is or there is not consent to the sexual touching and this ought to be determined based on direct and/or indirect evidence of Cs state of mind at the time of the alleged assault. The Canadian Supreme Court has resisted a 'tolerable conduct' exception to sexual conduct, on the grounds that the exception is limited to 'the casual, accidental or inevitable consequence[s] of general human activity and interaction... [as opposed to] singling out another person's body in a deliberate targeted act'.<sup>29</sup>

It is by no means clear whether social conventions exist in respect of sexual conduct,<sup>30</sup> or if they do exist whether it is correct to use them to establish consent or a lack of consent. Serious questions arise whether there are in fact conventions of this type that are accepted and understood by all parties whose actions are to be interpreted by them. What of the boss who pinches the bottom of his employee or the stolen kiss at the office Christmas party? There are some good reasons to suppose that some of these conventions reflect a one-sided, partial view of sexuality. There is an extensive literature that indicates that men and women adopt different perspectives in the context of sexual interaction.<sup>31</sup> If this is the case then such conventions should not be used as a means of determining consent.

Does s.74 provide a definition of consent that offers hope for the better protection of the intoxicated partygoer? If so, does this mean that the 'art of seduction' is criminalised under English law? If English law rejects any notion of implied consent to sexual touching, does it risk criminalising harmless sexual overtures in 'ambiguous cases' where there is a real issue of whether a sexual assault occurred? These types of cases have yet to appear before the courts. An obvious and common scenario is of two intoxicated

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<sup>29</sup> See *Scalera v Oppenheim* [2000] SCR 24, per McLachlin J; *R v Ewanchuck* [1999] 1 SCR 330.

<sup>30</sup> D.N.Husak & G.C.Thomas III, 'Date Rape, Social Convention and Reasonable Mistake' (1992) 11 *Law and Philosophy* 95.

<sup>31</sup> See D. Archard, *Sexual Consent* (Westview, Oxford, 1998) pp.30-37; A. Abbey, 'Sex Differences in Attributions for Friendly Behaviour: Do Males Misperceive Females' Friendliness?' (1982) 42 *Journal of Personality and Social Psychology* 830.



students at a nightclub, who do not know each, but who start kissing and intimately touching each other.<sup>32</sup> If C and D have been kissing consensually, does that mean that C consents to D putting his hand up her skirt and touching her vagina? There is a concern that the rejection of the doctrine of implied consent to sexual touching would result in the unjust conviction of an accused who has commenced consensual sexual touching that unbeknownst to him at some point becomes unwanted, but unexpressed by the complainant. Where C changes her mind, there is obviously a transitional period where that change of mind is going to have to be communicated in some manner to D.

(b) Where C and D do know each other

The second situation is where C and D do know each other. This may be because they are in or have been in a sexual relationship. Where there is such a relationship, there must ordinarily be some element of sexual give and take within it, and although D's mistimed sexual touch might be rejected by C, C would not ordinarily be considered (or consider herself to be) the victim of a sexual assault. It might of course be different if sexual relations between them have broken down or if D persists in touching C despite clear indications that she does not consent at the time or indeed to that kind of touching.<sup>33</sup> Consent is communicated differently in different types of sexual relationships. The dynamics of a sexual relationship may well be such that consent to sexual contact (e.g. a kiss, hug, pat or caress) is presumed between the participants until and unless a contrary indication is issued. This will be a question of fact in every case, but if the principle were not recognised it would mean that a large proportion of married or cohabiting partners would at some time have committed, and/or been the complainant of sexual assaults.<sup>34</sup> There is a concern that if the doctrine of implied consent to sexual touching is not recognised by English law, that this might result in the

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<sup>32</sup> An alternative example of a situation where C and D might not each other, but where there is implied consent to sexual touching is where C is a woman working as a prostitute.

<sup>33</sup> See Pill J's observation in *Zafar* (unreported) 1992, 92/2763/W2.

<sup>34</sup> R. Card, A. Gillespie & M. Hirst, *Sexual Offences* (Jordan Publishing Limited, Bristol, 2008) p.51.

unjust conviction of D who was involved in an ongoing sexual relationship with C at the time of the alleged offence.

#### 4.3.3 S.74: a communicative model of consent?

Academics have responded in different ways to the s.74 definition. Munro and Finch argue that the enhanced guidance on the issue of sexual consent has attempted to 'bring a more communicative understanding of sexuality, grounded in agreement about intercourse between the parties, rather than on a presumption of male proposition.'<sup>35</sup> Lacey supports this definition suggesting that it 'pins its colours firmly to a significantly positive conception' of sexual autonomy, encouraging a communicative model of consent and shifting 'the doctrinal boundaries of rape... in the direction which cogent feminist analyses have argued to be desirable'.<sup>36</sup> Rumney is more sceptical of the extent to which this framework in fact encourages a more communicative model, pointing out that the provisions continue to operate by placing the complainant, and her freedom and capacity as manifested in her conduct and words, at the centre of judicial scrutiny.<sup>37</sup> The approach seeks to examine the complainant's behaviour in a broader context, within which the behaviour of the defendant, amongst other things, will also be considered.

Consent remains a somewhat vague term that juries can still interpret and apply for themselves with attendant problems of consistency and coherence. Section 74 describes consent in terms of four other contested concepts: agreement, freedom, choice and capacity. These terms can be interpreted in radically divergent and often minimalist ways, but ultimately the responsibility for this interpretation is left in the

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<sup>35</sup> V. Munro. & E. Finch, 'Breaking Boundaries? Sexual Consent in the Jury Room' (2006) 26 *LS* 303. For a description of the distinction between communicative notions of consent and attitudinal notions of consent see N. Brett, 'Sexual Offences and Consent' (1998) 11 *Can J Law & Juris* 69.

<sup>36</sup> N. Lacey, 'Beset by Boundaries: The Home Office Review of Sex Offences' [2001] *Crim L R* 3.

<sup>37</sup> P.N.S. Rumney, 'The Review of Sex Offences and Rape Law Reform: Another False Dawn?' (2001) 64 *MLR* 890, at 900.

hands of the judicial studies board and the judiciary, and then in the hands of jurors.<sup>38</sup> This has the potential to result in inconsistent and incoherent decisions between juries. Koski's research confirms the tendency of jurors to rely on erroneous views about the inevitability of male sexual initiative and the inherently whimsical or passive nature of female sexuality.<sup>39</sup> Finch and Munro's study of mock jury deliberations found that most jurors concluded that if the complainant experiences a high level of intoxication she did not consent to intercourse, since she lacked the capacity to do so under s.74.<sup>40</sup> A number of participants however, indicated that the complainant, so long as she remained conscious, retained the capacity to make a choice.<sup>41</sup> Finch and Munro observe that:

'the fact that freedom, choice and capacity are terms whose meaning is within everyone's understanding does not entail that everyone understands those terms to mean the same thing, either in the abstract, or in specific cases'.<sup>42</sup>

The study also showed that the introduction of the requirement that the complainant agree by choice in circumstances of capacity and freedom, did little to prevent some jurors from continuing to presume consent in the absence of positive dissent. Some participants insisted that, even in the case of a heavily intoxicated complainant, they would expect to find some evidence of a struggle to establish non-consent. Unlike rape, sexual assault is triable either way and therefore magistrates will have to interpret and apply the meaning of consent. Finch and Munro's study focused on mock jury deliberations and there does not appear to be any research about how magistrates do or might view consent.

The problem of leaving jurors and magistrates to interpret consent in sexual assault cases lies in the ambiguity of sexual encounters. The meaning attributed to the groping

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<sup>38</sup> *Op cit*, Finch and Munro, n 78.

<sup>39</sup> D. Koski, 'Jury decision-making in rape trials- a review and empirical evidence assessment' (2002) 38 *Criminal Law Bulletin* 21.

<sup>40</sup> *Op cit*, Finch and Munro, n 78 at 314.

<sup>41</sup> *Ibid*.

<sup>42</sup> *Ibid*, at 315.

of a barmaid's breasts or the stolen kiss at the office Christmas party depends very much upon the mental picture the fact-finder applies to such situations. Actions that involve minimal or fleeting contact leave the victim little time to express any resistance and might appear to fact-finders not to constitute 'real' sexual assault. The factors typically attributed to 'real' rape and sexual assaults include the use of force, a stranger assailant and an outdoor attack. LaFree makes the point that since sexual assault cases typically lack corroborative evidence, there is more scope for fact-finders to be influenced by personal values.<sup>43</sup> The absence of consent should be determined by reference to C's subjective internal state of mind towards the touching, at the time it occurred. S.74 has a more complainant-centred meaning than the definition of consent pre-2003 but there are still concerns about its interpretation in the context of sexual assault, especially involving situations arise at the fringes of liability. As Finch and Munro rightly conclude, 's.74 did not do all that might be hoped... partly as a result of stereotypical views about 'appropriate' gender roles, but partly also because of the vagueness of its central definitional terms'.<sup>44</sup>

#### 4.3.4 Evidential and conclusive presumptions

The general definition of consent is supplemented by ss.75 and 76 of the SOA 2003, which represent a new departure in the law governing non-consensual offences in that they set out respectively evidential and conclusive presumptions. These have been welcomed for sending out important social signals about the boundaries of acceptable sexual behaviour. Section 75 provides that there will be certain situations in which a complainant is deemed not to have consented and that the defendant will be presumed not to have had a reasonable belief in such consent unless evidence to the contrary is adduced. The circumstances include where violence was used against the complainant, where the complainant was asleep or otherwise unconscious, or where the complainant

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<sup>43</sup> G. LaFree, *Rape and Criminal Justice: The Social Construction of Sexual Assault* (Wadsworth, Belmont, CA, 1989).

<sup>44</sup> *Ibid*, at 316.

was stupefied or overpowered at the time of the relevant act.<sup>45</sup> The significance of the presumption depends on how demanding the evidential burden imposed on the defendant to establish a 'real issue' about consent or reasonable belief in consent proves to be.<sup>46</sup> Section 76 specifies two situations where in all cases the complainant is presumed irrebuttably not to have consented. The situations are first, where D induces the complainant by impersonation and, secondly, where D intentionally deceives the complainant as to the nature and purpose of the act. Deceiving a person as to the purpose of an act applies where D deceives C as to the ulterior reason for or objective of the act. For example, in *Piper*,<sup>47</sup> several women agreed to be measured for a bikini by D on the (false) basis that it was necessary to determine their modelling potential, whereas in fact it was for his sexual pleasure. D's conviction for sexual assault was upheld. The Court of Appeal held that the victims had been deceived, exploited and humiliated.

Temkin and Ashworth have cast doubt on the three tiered approach to consent questioning whether obtaining compliance through fraud or deception can really be deemed worse than 'other ways of avoiding true consent, such as using threats or violence, administering drugs, or taking advantage of a sleeping or unconscious person'.<sup>48</sup> Finch and Munro criticise the decision to make the list of s.75 circumstances exhaustive. They highlight the omission of other situations of dubious consent, for example, where the complainant has been subjected to threats other than those of violence or where the complainant is self-intoxicated to a point short of stupefaction.<sup>49</sup> Tadros argues that it is a mistake to call the provisions in sections 75 and 76

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<sup>45</sup> For the full list of circumstances see SOA 2003, s.75(2).

<sup>46</sup> J. McEwan, 'Proving consent in sexual cases: legislative change and cultural evolution (2005) 9 *International Journal of Evidence and Proof* 1.

<sup>47</sup> [2007] EWCA Crim 2131.

<sup>48</sup> J. Temkin. & A. Ashworth, 'The Sexual Offences Act 2003: (1) Rape, Sexual Assaults and the Problems of Consent' [2004] *Crim L R* 328.

<sup>49</sup> E. Finch & V.E. Munro, 'The Sexual Offences Act 2003: Intoxicated Consent and Drug Assisted Rape Revisited', [2004] *Crim L R* 789.

presumptions.<sup>50</sup> They are not evidence of lack of consent but are rather circumstances that constitute rape. Tadros has gone as far as suggesting that the law should be re-structured so as to place minimal reliance on such a contested concept such as consent.<sup>51</sup>

#### 4.3.5 Intoxicated consent

There are two issues here. First, how the law deals with the situation where C is involuntarily intoxicated and secondly, how the law approaches the impact of voluntary alcohol consumption on the ability to give consent to intercourse. Under s.75 (2)(f), it is stated that consent is presumed to be absent in any situation in which:

‘Any person had administered to or caused to be taken by the complainant, without the complainant’s consent, a substance, which, having regard to when it was administered or taken, was capable of causing or enabling the complainant to be stupefied or overpowered at the time of the relevant act.’

In situations in which an individual has been given an intoxicant without their consent, whether by the defendant or a third party, there will be a *prima facie* presumption that she did not consent to intercourse or sexual touching.<sup>52</sup>

An important issue arose in *Bree*,<sup>53</sup> regarding the impact of voluntary alcohol consumption on the ability to give consent to intercourse. The defendant and complainant had been drinking together and engaged in sexual intercourse. The defendant was convicted of rape. The prosecution had alleged at the beginning of the trial that D had raped the complainant when her level of intoxication was so great that she was effectively unconscious and incapable of consenting within the meaning of s.74. However, by the end of the evidence, the prosecution case was that although the complainant had been conscious and capable of consenting, she had not in fact

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<sup>50</sup> V. Tadros, ‘Rape without Consent’ (2006) 26 *OJLS* 515.

<sup>51</sup> *Ibid.*

<sup>52</sup> For a detailed consideration of the scope and application of s.75(2)(f) see Finch & Munro, *op cit*, n 92.

<sup>53</sup> [2007] EWCA Crim 804.

consented. The appeal focused upon misdirection by the trial judge in addressing the effect of voluntary heavy alcohol consumption as it applies to rape. The Court of Appeal determined that misdirection had occurred and that the appeal be allowed. The central principle was that where the complainant had voluntarily consumed even substantial quantities of alcohol, but, nevertheless, remained capable of choosing whether or not to have intercourse, and in drink agreed to do so, that would not be rape, although as a matter of practical reality, capacity to consent might evaporate well before a complainant became unconscious.

The current approach to consent is an improvement on the pre-2003 law in that it provides a definition of consent and guidance and examples on certain situations where consent is to be disregarded. Consent has been given a special meaning in the context of sexual offences. The idea of consent is and will continue to be inherently ambiguous and in the context of sexual assault difficulties might arise in the context of implied consent. There ought to be no 'ordinary conduct of everyday life' exception for touchings that C experiences as 'sexual'.

#### 4.4 CONCLUSION

There are three main issues arising from this discussion. First, touching is a broad, all-embracing term which has no *de minimis* exception and is therefore complainant-centred because there are no touchings that are 'too trivial' to be the subject of legal control. Secondly, the new offence is limited to a battery and does not extend to cases where C apprehends immediate and unlawful sexual touching. Whilst this behaviour might be captured by one of a number of other offences, section 3 ought to be extended to cover psychic sexual touchings for the sake of clarity and consistency in the criminal law. The law fails to label a psychic sexual touching appropriately, failing to communicate the complainant's affective response to the action. In this respect, sexual assault is under-inclusive and less complainant-centred than indecent assault.

Thirdly, whilst consent will often prove a difficult concept in cases of rape and sexual assault, the definition of 'freedom and capacity' in s.74, and the evidential and conclusive presumptions have clarified this area of law. The parameters of consent have been defined, enabling the full legal meaning of the term to be clearly understood by judges and juries. Sexual assault is primarily a crime against the sexual autonomy of others and clarifying the concept of consent in terms of C's 'freedom and capacity to make that choice' reaffirms each person's liberty to withhold sexual contact. Given the determination to clarify the law on consent,<sup>54</sup> this aspect of the definition of sexual assault is more complainant-centred than the respective provision that existed under common law for indecent assault. However, there remain issues about which touchings are impliedly consented to, both between strangers and between those in an intimate relationship. At the fringes of liability, there remains uncertainty about the meaning of 'consent'.

Whilst some of the inherent problems with indecent assault have been addressed, the reform process failed adequately to define the parameters of sexual assault, resulting in a widely drawn provision that is under-inclusive and inappropriately vague. Chapter 5 will seek to demonstrate that sexual assault is a context-dependent offence, thereby evaluating the need for a complainant-centred approach to the meaning of 'sexual'. It demonstrates how there is precedent in English law for offences to be defined, if only partially, in terms of the complainant's experience of an act.

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<sup>54</sup> Lord Falconer spoke of the need for 'crystal clarity', HL Deb, col 772, 13 Feb 2003.



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## The Need for a Context-Dependent Approach to the Meaning of ‘Sexual’

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The requirement that an activity or touching is ‘sexual’ is a defining feature of many of the new offences contained in the SOA 2003. However, sexuality is socially constructed rather than having an essential quality and consequently the term ‘sexual’ is context-dependent. This chapter will demonstrate why the law needs a context-dependent approach to the meaning of ‘sexual’ in respect of sexual assault. Context-dependent offences give rise to the possibility of different interpretations, one of which is complainant-centred. I will argue that given its context-dependent nature, the definition of ‘sexual’ should include consideration of all the relevant circumstances *including* the complainant’s affective response to the touching. The complainant’s experience is an important aspect in understanding the nature and seriousness of the act.

Part 1 will highlight how sexuality is socially and historically contingent rather than having an essential quality. According to this perspective, the meaning of a touch or movement is dependent on the interactions between the ‘participants’. People act towards things based on the meaning those things have for them; and those meanings are derived from social interaction and are modified through interpretation.<sup>1</sup> The chapter will consider the ontological essence of sex and analyse four methods of distinguishing ‘sexual’ from ‘non-sexual’ acts as outlined by Alan Soble, one of the leading authors on the philosophy of sex.<sup>2</sup> According to Soble whether an act can be characterised appropriately as ‘sexual’ may be dependent on four possible factors: the body parts involved, the extent to which it provides sexual pleasure, the actor’s

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<sup>1</sup> H. Blumer, *Symbolic Interactionism: Perspective and Method* (University of California Press, Berkeley, 1969).

<sup>2</sup> A. Soble, *Sexual Investigations* (New York University Press, New York, 1998) ch 3.

intentions and the extent to which the act is procreative.<sup>3</sup> I will argue that none of these four methods are a satisfactory way of distinguishing 'sexual' from 'non-sexual' acts.

Part 2 will examine the concept of context-dependency, to identify a category of criminal offences in which D's action may or may not, 'depending on the circumstances', constitute the commission of an offence.<sup>4</sup> The analysis will be limited to one aspect of context-dependency; offences which are defined, at least in part, by the complainant's experience of an act or omission. The argument of this section is that no action or touching is intrinsically 'sexual': it only becomes so when someone experiences and defines it as such. Sexual assault is therefore a context-dependent crime. There is no essential characteristic that makes an act 'sexual' and so recourse must be had to the complainant's affective response to the touching. Part 2 will attempt to define both 'context' and 'circumstances' considering whether they are synonymous terms and highlighting their problematic nature.

Part 3 discusses those circumstances that may render an action or touching 'sexual'. I will discuss the relevance of the relationship between the parties; the purpose of the defendant; the spatial or temporal context and the complainant's affective response to the touching. I will argue that sexuality impinges on our lives in a polymorphous way and accordingly any definition of 'sexual' should consider all the possible circumstances of an action, including the complainant's affective response to the touching. The chapter argues that no touching is intrinsically or inherently 'sexual' and accordingly the term 'sexual' is context-dependent. Context-dependent offences give rise to the possibility of different perspectives: the defendant's perspective; the complainant's perspective; a reasonable-bystander perspective and within each of these categories, it is possible to identify different strands. In order to appreciate sufficiently the nature and seriousness of the action recourse must be had to the complainant's experience.

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<sup>3</sup> *Ibid.*

<sup>4</sup> J. Jaconelli, 'Context-Dependent Crime' [1995] *Crim L R* 771.

### 5.1 SEXUALITY AS A SOCIALLY AND HISTORICALLY CONTINGENT CONCEPT

Howard Becker maintained that no behaviour is deviant or criminal until it is so defined and thereby labelled by a section, or the whole, of society.<sup>5</sup> Becker argued that:

‘[D]eviance is not a quality of the act the person commits, but rather a consequence of the application by others of rules and sanctions to an ‘offender’. The deviant is one to whom that label has successfully been applied: deviant behaviour is behaviour that people so label’.<sup>6</sup>

Each society creates deviants and criminals by making rules whose breach will constitute deviance or criminality, and these rules are not constant.<sup>7</sup> In 1969, Herbert Blumer coined the term ‘symbolic interactionism’ to describe the perspective that people act towards things based on the meaning those things have for them; and those meanings are derived from social interaction and modified through interpretation.<sup>8</sup> Blumer claimed that people interact with each other by interpreting or defining each other’s actions instead of merely reacting to each other’s actions. For the interactionist, sexual meanings, as well as deviance, exist as ambiguous and problematic categories rather than as universal absolutes. Mead’s analysis of symbolic interactionism saw it as a presentation of gestures and a response to the meaning of those gestures. Mead defined a gesture as any part or aspect of an ongoing action that signifies the larger act of which it is a part, for example, the forcible removal of a person’s clothes as an indication that D might rape C. The gesture has meaning for the person who makes it and for the person to whom it is directed. The meaning of a sexual touch is accordingly dependent on the interactions between the participants. To say that an act that involves physical contact with any sexual part of the body is the distinguishing feature that makes it ‘sexual’ is flawed. In a medical examination of the genitals, the acts performed are ordinarily not ‘sexual’ even though sexual parts are touched. Physical contact with

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<sup>5</sup> H. Becker, *Outsiders: Studies in the Sociology of Deviance* (Free Press, New York, 1963).

<sup>6</sup> *Ibid.*

<sup>7</sup> J. Tierney, *Criminology: Theory and Context* 2<sup>nd</sup> edn (Pearson Education Limited, Edinburgh, 2006).

<sup>8</sup> Blumer, *Op cit*, n 1.

any sexual part of the body is neither necessary nor sufficient to define an act as 'sexual'.

In the same way that no behaviour is deviant until it is so labelled, no action is 'sexual' until it is characterized as such. Notions of sexuality and the legal responses to sexuality are not fixed but are socially and historically contingent. As Foucault argued, it is a mistake to assume either that such social understanding is uncontested or that law is the only disciplinary mechanism in the production and control of sexuality:

'We must...abandon the hypothesis that modern industrial societies ushered in an age of increased sexual repression. We have not only witnessed a visible explosion of unorthodox sexualities; but... a deployment quite different from the law...has ensured...the proliferation of specific pleasures and the multiplication of disparate sexualities.'<sup>9</sup>

There is no cross-cultural, ahistorical common denominator, or essence that makes 'sexual' acts 'sexual'. Accordingly, that which is considered 'sexual' will vary enormously between individuals and groups and may even vary across a period of time with the same people. Bodily movements acquire meaning only by existing within a culture that attaches meaning to them. Changes in sexual behaviour and beliefs contribute to and in turn are influenced by changes in sexual concepts. Advances in birth control, for example, have effected how we perceive and conceive sexuality. Certain kinds of touches and movements might be labelled as 'sexual' acts in one culture but not in others. For example, in a number of European cultures friends and relatives greet each other with a kiss to both cheeks. This practice is not seen by them as 'sexual', but due to the ambiguity of physical movements and the fact that in many societies kisses are 'sexual' these pecks could on occasion be intended or interpreted as 'sexual'. In the Sambia and Etoro tribes in New Guinea, young boys fellate older males to orgasm and

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<sup>9</sup> M. Foucault, *The History of Sexuality: An Introduction* (Peregrine translation, New York, 1976) p. 49.

ingest the ejaculate.<sup>10</sup> The tribes consider this ‘fellatio insemination’ akin to breast-feeding in that both acts provide nourishment to growing children. In such circumstances, this ‘fellatio insemination’ is not recognised in that culture as ‘sexual’, even though it might be considered a standard ‘sexual’ act in Western culture.

Within an individual society, there are likely to be people with differing expectations and contested understandings of certain acceptable or unacceptable (both ‘sexual’ and ‘non-sexual’) conduct. It is difficult, if not impossible, to identify a dominant or mainstream sexual standard in modern British society. The sexual liberalisation of the 1950s and 1960s<sup>11</sup> allowed people to explore and express their sexuality like never before. The decriminalisation of homosexuality<sup>12</sup> in 1957 and the recognition of marital rape in 1991<sup>13</sup> are perhaps two of the biggest indicators of how British society’s acceptance of sexual behaviour has changed over time. The law on sexual assault therefore has to set out standards of behaviour in a complex cultural situation where the boundaries of ‘acceptable’ sexual behaviour are unclear.

#### 5.1.1 Distinguishing ‘sexual’ from ‘non-sexual’ acts

One of the main concerns of this thesis is how we are to define those types of touching that are ‘sexual’. How, for example do we tell the difference between a ‘sexual’ and a ‘non-sexual’ kiss? To begin this analysis we must consider the ontological essence of sex. For the benefit of this analysis, consideration will be given to four views of the essence of sexual activity as outlined by Alan Soble, one of the leading authors on the philosophy of sex.<sup>14</sup> The first view is that sexual acts by their very nature involve physical contact with the genitals. The second concept is that sexual acts are those that produce ‘sexual’

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<sup>10</sup> See G. Herdt, *Guardians of the Flute* (University of Chicago Press, Chicago, 1994); K. Raymond, ‘Witchcraft and Sexual Relations’ in P. Brown & G. Buchbinder, (eds) *Man and Woman in the New Guinea Highlands* (American Anthropological Association, Washington D.C., 1976).

<sup>11</sup> See J. Gagnon, *Sexual Conduct: the Source of Human Sexuality* (Aldine Transaction, London, 2004).

<sup>12</sup> Report of the Committee on Homosexual Offences and Prostitution (Her Majesty’s Stationary Office, London, 1957); Sexual Offences Act 1967.

<sup>13</sup> *R v R* [1991] 4 All ER 481; Criminal Justice & Public Order Act 1994, s.1.

<sup>14</sup> Soble, *op cit*, n 2.

pleasure. The third theory is that sexual acts are those that are accompanied by or flow from a sexual intention. Lastly, is the notion that sexual acts are those that are procreative in form. I will argue that none of these four possible ways of distinguishing 'sexual' from 'non-sexual' acts is satisfactory because sexuality is a socially and historically constructed concept.

#### (a) Body parts

The basic idea in Soble's first analysis is that sexual acts by their nature involve physical contact with the genitals, defined by the Oxford English Dictionary as the 'external organ or organs of generation'.<sup>15</sup> According to this view, one must first identify the sexual parts of the body and then decide whether an act is 'sexual' by observing whether it involves contact with one of those parts. According to Laumann sexual activity is:

'mutually voluntary activity with another person that involves *genital contact* and sexual excitement or arousal, that is, feeling really turned on, even if intercourse or orgasm did not occur.'<sup>16</sup>

The definition does not make penile-vaginal penetration necessary for an act to be 'sexual', but requires some kind of contact with someone's genitals. Physical contact with the scrotum or penis of a male and/or the vulva or vagina of a female would constitute a sexual act as these anatomical features constitute the genitalia.<sup>17</sup> Nevertheless, an analysis of sexual activity should not be restricted to genital contact, as there are a variety of 'erogenous' body parts, areas that 'give rise to sexual desire'.<sup>18</sup> D's touching of C's breasts might be perceived by C or reasonable people to be 'sexual', even in the absence of any prior or subsequent contact with the genitals. Sometimes the hands are used in 'non-sexual' acts and at other times they are used in 'sexual' acts. Those in a loving relationship may press their hands together and feel a surge of sexual

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<sup>15</sup> Oxford English Dictionary, [www.oed.com](http://www.oed.com) [Online] (Accessed: 21<sup>st</sup> November 2009).

<sup>16</sup> E. Laumann *et al*, *The Social Organization of Sexuality: Sexual Practices in the United States* (University of Chicago Press, Chicago, 1994). My emphasis.

<sup>17</sup> K. Saladin, *Anatomy and Physiology: The Unity of Form and Function* (McGraw-Hill Higher Education, New York, 2010) p.1048.

<sup>18</sup> Oxford English Dictionary, [www.oed.com](http://www.oed.com) [Online] (Accessed: 21<sup>st</sup> November 2009).

pleasure. Whether the hands are a 'sexual' part of the body therefore depends on the nature of the particular activity in which they are engaged. A touch on the arm might be a friendly pat, an assault or part of a sexual exchange. The physical features alone do not distinguish a friendly, consoling pat from a sexual event or request for attention. The arm touch exhibits polysemicity; it is devoid of any one meaning. Described in an opposing way the arm touch may have no meaning and will not have any meaning until other factors are taken into account.

This first view of the essence of sexual activity presupposes that it is possible to construct a list of definite bodily movements that comprise the domain of sexual acts. However, the diverse range of bodily movements, coupled with the number of sensitive body parts, prevents such a comprehensive list being drawn. A further caveat to such a catalogue is the relative neglect of the context of the act. Some sexual acts are in certain contexts, not 'sexual' at all. Massaging a breast might be considered 'sexual' if done by lovers, but not when done during a breast cancer examination. Looking, touching an arm or a back rub are all activities that may or may not be 'sexual'. The fact that an act involves physical contact with any sexual part of the body is not therefore the distinguishing feature that makes it 'sexual'. Bodily movements acquire meaning, whether 'sexual' or not, only by existing within a culture that attaches meaning to them.

#### (b) Sexual pleasure

Soble's second analysis suggests that sexual acts are those that produce sexual pleasure and was originally advanced by Robert Gray.<sup>19</sup> For Gray, sexual activities are just those that 'give rise to sexual pleasure'.<sup>20</sup> According to Gray, producing sexual pleasure is both necessary and sufficient for acts to be 'sexual': 'any activity might become a sexual activity' if sexual pleasure is derived from it and 'no activity is a sexual activity unless

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<sup>19</sup> R. Gray, 'Sex and Sexual Perversion' in A. Soble, *The Philosophy of Sex: Contemporary Readings* 4th edn (Rowman and Littlefield, Totowa, 1980).

<sup>20</sup> *Ibid*, at 160.

sexual pleasure is derived from it'. This view implies that acts performed to obtain pleasure which fail are not 'sexual' acts.<sup>21</sup> Consider a man who touches the breasts of a woman standing at a bar for the purposes of sexual gratification. She does not experience sexual pleasure and neither does he. Under this second analysis, this is a failed sexual act and so not 'sexual' at all, because it does not produce sexual pleasure. On the contrary, I would argue that whilst sexual pleasure is not a necessary condition for an act to be classified as 'sexual' it might be sufficient for an act to be 'sexual'. Some members of British society may well define an act as 'sexual' even though it is not pleasurable. A couple may not enjoy sex or find it pleasurable, but engage in intercourse in the hope of conceiving a child. On Gray's view, they have tried to engage in sex, but failed and their acts are not 'sexual' at all. A lifeguard might unintentionally feel sexual arousal and pleasure during resuscitation of a swimmer, even though he acts from a 'non-sexual' purpose. Even though homogenous British society does not classify the mouth-to-mouth contact of resuscitation as 'sexual', it can become 'sexual'. Gray notes the possibility that one and the same act might be 'sexual' for one participant but not for the other. On his view, the prostitute who performs pleasure-less fellatio is not engaging in sexual activity even though her partner is. Under this analysis, the act is 'sexual' if one of the participants experiences pleasure.

### (c) Sexual intention

Soble's third theory is that sexual acts are those that are accompanied by or flow from the actor's sexual intention. Under this analysis, a sexual intention is an intention to give and/or experience sexual arousal. The idea that sexual acts are to be analysed in terms of this motive occurs in the law. For example, in Michigan 'sexual contact' is defined as:

'the intentional touching of the victim's or actor's intimate parts or the intentional touching of the clothing covering the immediate area of the victim's or actor's intimate

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<sup>21</sup> Catherine MacKinnon has also argued that '[w]hat is sexual is what gives a man an erection'. See C. MacKinnon, *Toward a Feminist Theory of the State* (Harvard University Press, Cambridge, 1989) p.137.



parts, if that intentional touching can reasonably be construed as being for the purpose of sexual arousal or gratification, done for a sexual purpose...'<sup>22</sup>

Under this analysis, it is not the touching of certain body parts that makes an act 'sexual'; it is that the actor touches them with a certain purpose. Thus, it could be argued that the lifeguard's action in resuscitating the swimmer is 'sexual' if he intends to get sexual pleasure from contact with her. If he happens to feel sexual pleasure that is not enough to make his acts 'sexual'. One of the problems of defining sexual acts in terms of a sexual intention is that as a definition it is circular. If one argues that a sexual intention arises when one desires for or intends to produce sexual pleasure that inevitably leads to the question 'what does sexual mean?' Sexual activity has many purposes: to express affection, make money, kill time, relieve stress, burn calories, etc. The motive one has cannot therefore distinguish 'sexual' from 'non-sexual' acts. A couple who engage in sexual intercourse purely for procreation purposes may experience no sexual arousal and yet they are performing what is historically a central case of 'sexual' activity, as we shall see below. Intentions are neither necessary nor sufficient to categorise 'sexual' acts because they are focused on solely on the defendant's reason for acting and fail to consider C's affective response to the action. Suppose D touches C's breasts. D might protest that he did nothing 'sexual' and his reason for acting was to satisfy his curiosity, amuse his friends or win a bet. However, even if not by intention, D has done something that might be perceived by C and/or reasonable people to be 'sexual'.

#### (d) Procreation

Soble's final analysis suggests that sexual acts are those that are procreative in form. This is not surprising, for the procreative act is biologically and historically a central case of sexual activity. However, there are many acts that have the potential to be labelled 'sexual' despite not being procreative in form: kissing, fellatio, cunnilingus, holding hands. An expanded version of this analysis might suggest that the various activities

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<sup>22</sup> Mich. Comp. Laws Ann, s.750.520a(q).

commonly called 'foreplay' fall within the domain of the 'sexual'. These acts are 'sexual' because of psychological or physiological links with sexual intercourse. The intent to procreate might be sufficient to categorise sexual acts but it is not necessary. Homosexuals experience arousal and desire and engage in sexual acts without any procreative intent.

Soble's analysis identified two sufficient conditions for an act to be 'sexual': that it produces sexual pleasure, or that it is procreative in form. The first explained why pleasurable acts are 'sexual', whether procreative or not, while the second explained why procreative acts and their concomitants are 'sexual', whether pleasurable or not. However, this does not mean that an act has to correspond with one of the two categories otherwise it is not 'sexual'. The point is merely that these are sufficient conditions for determining whether an act is 'sexual'. There is no necessary condition for acts to be classified as 'sexual' and therefore no identifiable essence of sex. However, acts that produce a certain kind of pleasure, or are procreative, are 'sexual', both transculturally and ahistorically.

## 5.2 SEXUAL ASSAULT: A CONTEXT-DEPENDENT CRIME?

It may be argued that some types of touching are 'sexual' by nature; for example the penetration of a woman's vagina with a man's penis. However, even these types of touching involve a process of labelling and require interpretation by the participants involved. Jaconelli identified a category of criminal offences in which D's actions may or may not, 'depending on the circumstances', constitute the commission of an offence.<sup>23</sup> Those crimes, which Jaconelli argued most typically comprise offences where the *actus reus* consists of some form of communication,<sup>24</sup> he labeled 'context-dependent' crimes. Sexual touching is a method of communication and self-expression. One of the

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<sup>23</sup> Jaconelli, *op cit*, n 4.

<sup>24</sup> Jaconelli focuses on speech crimes as examples of context-dependent crimes, specifically: obscenity, contempt of court, incitement to racial hatred and public order offences.

fundamental aspects of communicative sexuality is the idea of mutuality, that is, a form of sexuality that is concerned with exchange and agreement. A leading proponent of communicative sexuality, Lois Pineau, has argued that 'communicative sexual partners will not overwhelm each other with the barrage of their own desires... a person engaged in communicative sexuality will be most concerned with the mutuality of desire'.<sup>25</sup> This emphasis on communication between sexual partners also re-asserts the law's function of protecting 'sexual self-determination'.<sup>26</sup>

Jaconelli used the label context-dependent without offering a sufficient definition or explanation of what he meant by the term. He confined his discussion to one element of context-dependency: offences that are defined at least in part by the complainant's experience of an act/omission. Accordingly, an offence is context-dependent if it requires a particular reaction in the complainant. In labelling certain offences as context-dependent one is drawn to the inevitable conclusion that there are a range of (or what Jacconelli suggested as 'the overwhelming majority of') criminal offences that can be described as context-independent. Context-independent offences are ones in which the circumstances or result required as part of the *actus reus* can be factually determined. Rape<sup>27</sup> is a context-independent offence because the requirement of penile penetration is definitive: it does not require interpretation from the complainant's or defendant's perspective. Equally, murder is a context-independent offence as death has an objective quality. The actions of the accused and the harm inflicted on his victim are coextensive. Neither rape nor murder requires judgment or opinion from any of the parties involved or from a reasonable person's perspective.

Context-dependent crimes, on the other hand, are ones where the tribunal of fact needs to consider the totality of the circumstances of the act/omission because the conduct

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<sup>25</sup> L. Pineau, 'Date Rape: A Feminist Analysis' (1989) 8 *Law and Philosophy* 217, at 236.

<sup>26</sup> S. Schulhofer. *Unwanted Sex: The Culture of Intimidation and the Failure of Law* (Harvard University Press, London, 1998) p.40.

<sup>27</sup> SOA 2003, s.1.

prohibited by the law is non-essentialist; it has no inherent value or meaning. This argument subscribes to the theory of relativism: the idea that some elements or aspects of experience or culture are relative to, i.e. dependent on, other elements or aspects. Thus, crimes that are context-dependent have as their defining feature an element of *actus reus* that involves non-specifically defined conduct and requires interpretation by the jury or magistrates. Context-dependent terms 'involve an interaction between subject and observer, the labels being the means of conveying to others the observer's affective response to the subject'.<sup>28</sup> Jaconelli maintained that context-dependent crimes are a subdivision of 'result crimes',<sup>29</sup> in that the law is concerned with whether 'in the particular context under consideration, the harm that it strives to avert has in fact materialized'.<sup>30</sup> However, not all context-dependent crimes are result crimes and so the tribunal of fact might be required to consider whether the conduct prohibited by the law has occurred.

The meaning of terms such as 'beauty', 'damage' and 'anti-social' are context-dependent; they all require an affective response by an observer. Anti-social behaviour is a paradigmatic example of a context-dependent offence. No behaviour is inherently anti-social. Whitehead argued that:

'virtually any activity can be anti-social depending on a range of background factors, such as the context in which it occurs, the location, people's tolerance levels and expectations about the quality of life in a certain area'.<sup>31</sup>

The inherent subjectivity of anti-social behaviour means it is 'extremely difficult to define in any meaningful sense'.<sup>32</sup> The behaviour of others may be seen as anti-social

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<sup>28</sup> See I. Edwards, 'Banksy's Graffiti: A not so simple case of criminal damage?' (2009) 73 *JoCL* 345.

<sup>29</sup> The criminal law distinguishes between conduct crimes and result crimes. Conduct crimes are those where the *actus reus* is the prohibited conduct itself. Result crimes are those where the *actus reus* of the offence requires proof that the conduct caused a prohibited consequence or result. See D. Ormerod, *Smith & Hogan Criminal Law* 11<sup>th</sup> edn (OUP, Oxford, 2005) pp. 37-39.

<sup>30</sup> Jaconelli, n 4 at 772.

<sup>31</sup> C.M.E., Whitehead, J.E Stockdale & G. Razzu, *The Economic and Social Costs of Anti-Social Behaviour* (London School of Economics, London, 2003) pp.4-5.

<sup>32</sup> J. Manning., C.L. Manning & V. Osler. *Blackstone's Guide to the Anti-Social Behaviour Act 2003* (Oxford University Press, Oxford, 2004).

because it does not fit parochial cultural and social understandings of norms of behaviour. Repeatedly having an excessively noisy party in a deserted field is unlikely to make other people's lives a misery. However, if you repeatedly have a loud party in your house in a residential area, it is likely to cause harassment, alarm or distress to the neighbours. The physical location and temporal environment of the party and people's tolerance levels to behaviour of this kind are therefore the deciding features in determining whether this behaviour is anti-social.

'Sexual' does not have the same objective quality as a term such as 'death'. Nor does it have the same objective quality as 'dangerousness' in driving offences which is explicitly stated in the Road Traffic Act 1988, s.1 to be objectively assessed by reference to the standards of the reasonably competent driver. Sexual assault is therefore a context-dependent crime: the 'sexual' nature of an act cannot be determined without having reference to the 'context' in which it occurred. The problem with context-dependent terms such as 'sexual' is that they are open to different interpretations. Whilst D might honestly believe that no one would consider his squeezing of C's bottom to be 'sexual', C might in fact experience the touching as 'sexual'. Whether the touching is 'sexual' involves an interaction between the subject (D's touching) and observer (D's perception of the touching, C's affective response to the touching or an objective bystander's perspective). The 'sexual' circumstance requires interpretation by the jury or magistrates: it is not ascertainable without evaluation of the action's context.

While there may be some non-consensual, non-medical sexual touchings that all persons would consider to constitute an invasion of sexual autonomy,<sup>33</sup> the dependence of 'sexualised' touching on subjective interpretation and context-specificity means some actions will be unacceptable in one situation, but accepted or even celebrated, in

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<sup>33</sup> For example touching of the penis or vagina.

another context. This can be demonstrated by the example of kissing.<sup>34</sup> A kiss may be used as an expression of affection, respect, greeting, farewell, sexual desire or romantic affection to name but a few.<sup>35</sup> There are many ways in which a kiss can be delivered and its meaning both to participants and to onlookers will vary accordingly. In her analysis of late medieval culture, Shenigorn suggests that kissing had not yet acquired twentieth-century sexual connotations.<sup>36</sup> While kissing is widespread in industrialised countries, the Middle East and among Hindu groups, for other such as those in Japanese and Chinese societies, kissing was not in the sexual repertoire until contact with industrialised society.<sup>37</sup> In India public displays of affection and sex are still largely taboo;<sup>38</sup> nonetheless, many Indian sculptures depict incredibly explicit sexual acts, which are deemed important expressions of fertility and therefore not considered obscene. The categorization of kissing as 'sexual' depends on the relationship between the parties, the purpose of the kisser and the area of the body that is being kissed. A long-lingering kiss offered as an expression of romantic affection or desire between those in a relationship is likely to be experienced as 'sexual' by the participants and labelled as 'sexual' by reasonable onlookers. However, it is unlikely to be experienced or labelled 'sexual' where a grandparent issues a slobbering greeting to a reluctant grandchild. The physical nature of the kiss (i.e. the use of tongue(s) in the former case) and the relationship between the parties acquires great significance. Where D approaches C as she walks home late at night and tries to kiss her, it is likely that most

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<sup>34</sup> See K. Harvey, *The Kiss in History* (ed) (Manchester University Press, Manchester, 2005); A. Blue, *On Kissing: from the metaphysical to the erotic* (Indigo, London, 1997).

<sup>35</sup> See C.C. Bombaugh, *The Literature of Kissing, Gleaned from History, Poetry, Fiction and Anecdote* (J.B. Lippincott, Philadelphia, 1876); C. Nyrops, *The Kiss and its History* (Sands & Co, London, 1901).

<sup>36</sup> P. Shenigorn, 'The Bodily Embrace or Embracing the Body: Gesture and Gender in Late Medieval Culture', in A. Knight (ed), *The Stage as Mirror: Civic Theatre in Late Medieval Europe* (D.S. Brewer, Cambridge, 1997)

<sup>37</sup> E. Gregerson, *The World of Human Sexuality: Behaviours, Customs and Beliefs* (Irvington Publishers, New York, 1994); L. Tiefer, *Sex Is Not a Natural Act and Other Essays* 2<sup>nd</sup> edn (Westview Press, Boulder, 2004).

<sup>38</sup> In April 2007, Richard Gere kissed Shilpa Shetty on the cheek several times in jest during an AIDS awareness event. The kiss, considered an attack on India's cultural and moral values prompted protests and a warrant for both their arrests. <http://news.bbc.co.uk/1/hi/6560371.stm> [Online] (Accessed: 10th February 2009).

reasonable people would consider this action to be 'sexual', there being no obvious justifiable purpose to D's action.

As was demonstrated in section 5.1 above, sexuality is a socially and historically contingent concept. In some cultures, the removal of a female shoe might be considered to be an act that by its nature is 'sexual'. Nudity and the exposure of genitals are not always actions that are by their nature 'sexual'. In some cultures, nudity is viewed as 'non-sexual'. Athletes in Ancient Greece commonly competed nude, but often no female participants or spectators were allowed at these events.<sup>39</sup> In Germany, Finland and the Netherlands, nudity in mixed sex saunas is considered 'non-sexual'. However, in Britain some people perceive nudity in saunas as having sexual connotations. Artistic nudity is not always 'sexual' and often reflects social standards of aesthetics and morality.<sup>40</sup> In British culture, nudity in art is more accepted by some people than actual nudity.<sup>41</sup> Even in a gallery that depicts nude art, nudity of a visitor is typically not accepted. Models remove their clothes for health awareness or charitable purposes e.g. to raise awareness of breast or testicular cancer. It is the context that renders nudity 'sexual' and it is not the case that nudity is in any event inherently 'sexual' irrespective of the circumstances in which it arises. Whilst the nudity of adults in certain situations has become acceptable, increasing social awareness about paedophilia and child pornography has instilled in some cultures concerns over dangers associated with child nudity.<sup>42</sup>

One problem with the use of the term context-dependent and a problem which Jaconelli does not address in his article is the meaning of the terms 'context' and 'circumstances'.

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<sup>39</sup> See P. Veyne, *A History of Private Life: From Pagan Rome to Byzantium v.1* (Harvard University Press, Harvard, 1992).

<sup>40</sup> See the work by Spencer Tunick at <http://www.spencertunick.com> [Online] (Accessed: 13<sup>th</sup> March 2010).

<sup>41</sup> There were a variety of responses to the 'naked Rambler', who is currently incarcerated in a Scottish prison on charges of Breach of the Peace and Contempt of Court. See <http://nakedwalk.org/> [Online] (Accessed: 15<sup>th</sup> January 2010).

<sup>42</sup> See S. Ost, *Child Pornography and Sexual Grooming* (Cambridge University Press, Cambridge, 2009).

Does the context of a crime include motives, consequences or circumstances? All of these terms are problematic. Context is something of a catch-all word. The Collins Dictionary defines context as ‘the *circumstances* relevant to an event or fact’.<sup>43</sup> Context is a broad and fluid term that might be described as referring to ‘the bigger picture’. The context of a particular crime may therefore include a range of different perspectives: defendants, complainants or reasonable persons. If the context of a crime is made up of all the relevant circumstances, then context and circumstances are synonymous. The Oxford English Dictionary defines circumstances as ‘[t]he logical surroundings or “adjuncts” of an action; the time, place, manner, cause, occasion etc., amid which it takes place’.<sup>44</sup> Arguably, the ‘context’ of a sexual assault is made up of all the *circumstances* that might affect the determination of the ‘sexual’ nature of the conduct. The complainant’s affective response to the touching is one circumstance of the offence and therefore one element of context-dependency. The complainant’s perspective is an important and relevant, although not decisive aspect in assessing the ‘sexual’ nature of conduct.

### 5.3 ‘SEXUAL’ CIRCUMSTANCES

There are several circumstances that both separately and/or together may render an action or touching ‘sexual’. These include but are not limited to the relationship between the parties, the defendant’s motive, the spatial and temporal environment, and the complainant’s experience of the action.

#### 5.3.1 Relationship between the parties

One circumstance that might be considered in determining the ‘sexual’ nature of an action is the relationship between the parties. Are they relatives, friends or complete strangers? Spanking someone on the bottom is an action that may or may not be

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<sup>43</sup> Collins Dictionary, <http://www.collinslanguage.com/Default.aspx> [Online (Accessed: 3<sup>rd</sup> December 2009). My emphasis.

<sup>44</sup> Oxford English Dictionary, [www.oed.com](http://www.oed.com) [Online] (Accessed: 3<sup>rd</sup> December 2009).



considered 'sexual' and it is this issue that the courts grappled with in *Court*.<sup>45</sup> If the person being spanked is a child and the purpose of their parents is chastisement, this will probably not be an action that is considered 'sexual'. Spanking may also refer to the practice of striking an adult, not as punishment but as a social ritual or form of entertainment. The buttocks are also an intimate part of the body in close proximity to the sexual organs and non-consensual touching of this part of the body is certainly capable of being 'sexual'. The non-consensual slapping of a woman's buttocks by a stranger in a pub is an action that might be considered by C or an objective bystander to be 'sexual' given its associated sexual connotations.

### 5.3.2 Purpose of the defendant

A further circumstance that might be considered in determining the 'sexual' nature of an act is the purpose of the defendant. If we take the act of touching the vagina, we see that the 'sexual' nature of the act is open to different interpretations depending on the purpose of the defendant. Touching the vagina of a woman may be carried out to sexually arouse either the actor or the recipient. The purpose of sexual gratification thereby renders the action 'sexual' in this circumstance. However, where D, a doctor, is subjecting his patient to a vaginal examination for medical purposes, his purpose is non-sexually motivated and therefore the touching is not 'sexual'. One of the problems here is that an intimate examination may be experienced as intensely 'sexual' by some patients. This demonstrates how the purpose of the defendant does not necessarily determine the patient's affective response to the 'sexual' nature of the touching. However, given the patient's consent to such invasive contact, combined with the doctor's non-medical purpose, the sexual touching would not constitute sexual assault in these circumstances. Including the purpose of the defendant as a circumstance to be considered in assessing the 'sexual' nature of conduct implies that motive is a relevant consideration in determining the *actus reus* of certain sexual offences. However, English law is generally reluctant to take account of motive in terms of substantive offence

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<sup>45</sup> [1989] AC 28. See chapters 2 & 3.

definitions.<sup>46</sup> Many offences are defined on the basis of simplicity and certainty, with context and motivation left (if at all) until sentencing.<sup>47</sup>

### 5.3.3 Spatial and temporal environment

A third circumstance that might be considered in determining the 'sexual' nature of the touching is the spatial and temporal environment. The physical location of the touching and when it takes place may affect the determination of the 'sexual' nature of the touching. If D touches C's groin, whilst attempting to tackle C during a rugby game, one might argue that the touching is not 'sexual'. In *Barnes*,<sup>48</sup> the Court of Appeal acknowledged that contacts outside of the rules of the game can in certain circumstances, be consented to.<sup>49</sup> The Court of Appeal held that in highly competitive sports, conduct outside the rules can be expected to occur in the heat of the moment, and...it still may not reach the threshold level required for it to be criminal.<sup>50</sup> The Court took the vague approach of stating that only conduct that was sufficiently grave to be labelled as criminal should result in conviction, outlining a series of relevant considerations.

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<sup>46</sup> This view has come under challenge. See A. Norrie, *Crime, Reason and History* (Butterworths, London, 2001) pp. 35-45; J. Horder, 'On the Irrelevance of Motive in Criminal Law' in J. Horder (ed), *Oxford Essays in Jurisprudence* (OUP, Oxford, 2000).

<sup>47</sup> One exception to this is the 'racially aggravated offence' created by the Crime and Disorder Act 1998. Any of the existing offences specified in the Act becomes a new racially aggravated offence with an enhanced penalty if, *inter alia*, 'the offence is motivated (wholly or partly) by hostility towards members of a racial group, based on their membership of that group'. Hate crimes are similarly defined on the basis of the perpetrators motivation. The Criminal Justice Act 2008 amended Part 3A of the Public Order Act 1986 (which already prohibited the incitement of racial or religious hatred) to include the offence of inciting hatred on grounds of sexual orientation. Section 29J of Part 3 which protects freedom of expression has come under recent scrutiny. See [http://news.bbc.co.uk/1/hi/uk\\_politics/8356093.stm](http://news.bbc.co.uk/1/hi/uk_politics/8356093.stm) [Online] (Accessed: 14<sup>th</sup> November 2009).

<sup>48</sup> [2004] EWCA Crim 3246.

<sup>49</sup> For analysis see: S. Parsons, 'Contact Sports and the Criminal Law' (2010) 174 *JPN* 39; A. Pendlebury, 'Perceptions of Playing Culture in Sport: The Problem of Diverse Opinion in the Light of Barnes' (2006) 4 *Entertainment and Sports Law Journal*.

<sup>50</sup> Per Lord Woolf, CJ at para.15.

#### 5.3.4 Complainant's affective response to the touching

A fourth circumstance that might be considered in determining the 'sexual' nature of an action is the complainant's affective response to the touching. In order to appreciate sufficiently the nature and seriousness of the action recourse must be had to the complainant's experience. Sexuality is a complex and subjectively experienced phenomenon. Sexuality is intrinsically part of our character and decisions as moral agents. There is much greater general awareness of the effects that undesired sexual acts can have on complainants, than say 30 years ago.<sup>51</sup> The high maximum sentences for crimes of sexual violence under the SOA 2003 indicate a legislative appreciation of the pressing need to protect society and especially the vulnerable from non-consensual sexual activity. Consider the slapping of a woman's buttocks by a stranger in a pub. Some women may perceive this behaviour as 'sexual' and therefore totally unacceptable conduct. Other women may not consider the action 'sexual'. A further group of women may acknowledge that this is common behaviour of some drunken men and whilst acknowledging the 'sexual' nature of the act, disregard the incident as an assault. Different people can interpret the same behaviour in different ways but this does not mean that those who are caused harm or offence constituted in terms of a violation of their sexual physical integrity should be left without criminal redress. One recent complainant whose bottom was groped in a nightclub described the action as 'disgusting, a violation. It wasn't just a little pinch it was a squeeze done in a sexual way. I was really offended.'<sup>52</sup> The criminalisation of non-consensual sexual touching exists to protect bodily integrity and sexual autonomy and to exclude consideration of the complainant's affective response to the touching would fail to communicate law's

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<sup>51</sup> There are numerous studies on the experiences of sexual assault victims but see e.g. A.W.Burgess & L.L. Holstrom, *Rape—Crisis and Recovery* (Brady, London, 1979); L.J. Cohen & S. Roth, 'The Psychological Aftermath of Rape: Long term effects and individual differences in recovery' (1987) 5 *J Soc Clin Psychol* 525; J. Petrak, A. Doyle *et al*, 'The Psychological impact of sexual assault: A study of female attenders of a sexual health psychology services (1997) 12 *Sexual and Marital Therapy* 339; J. Temkin, *Rape and the Legal Process* 2<sup>nd</sup> ed (Oxford University Press, Oxford, 2002) ch 1.

<sup>52</sup> S. Bird, 'Marlon King assault victim says he should never play football again', *The Times*, 2<sup>nd</sup> November 2009 [Online]. Available at <http://www.timesonline.co.uk/tol/news/uk/crime/article6898439.ece> (Accessed: 2<sup>nd</sup> November 2009).

symbolic condemnation of acts interfering adversely with bodily integrity. The complainant's perspective is an important and relevant, although not decisive aspect in assessing the 'sexual' nature of conduct. In chapter 8, I will analyse the merits of a 'complainant-subjective' approach to the meaning of 'sexual'. I will argue that such an approach demonstrates that women's experiences of non-consensual sexual touching are taken seriously and can be at the heart of a substantive offence definition.

#### 5.4 CONCLUSION

The intrinsic problem with the offence of sexual assault is that the law has to set out standards of behaviour in a complex cultural situation when the boundaries of acceptable or 'normal' sexual behaviour are unclear. This chapter has demonstrated how sexuality is a socially and historically contingent concept and how there is no essential characteristic that distinguishes 'sexual' from 'non-sexual' acts. Sexual assault is a context-dependent crime because the conduct prohibited by the law is non-essentialist. In the same way that no behaviour is deviant until it is so labelled, no action is 'sexual' until it is characterized as such. This context-dependency underlies controversies with the term 'sexual'. Context-dependent offences give rise to the possibility of different perspectives: the defendant's perspective, the complainant's perspective, a reasonable-bystander perspective. Chapters 6 through 8 will analyse five possible approaches to assessing the meaning of 'sexual', in light of the argument set out here that sexual assault is a context-dependent crime and that the definition should therefore refer to all the possible circumstances, including the complainant's experience of the touching. Then, in chapter 9, the current approach adopted in English law to the meaning of 'sexual' will be analysed.

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## An Analysis of the Possible Perspectives from which ‘Sexual’ could be Viewed and Defined

### Part 1: Non-Interpretive and Objective Approaches

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There are numerous ways in which the meaning of ‘sexual’ could be defined (both legal and non-legal) for the purposes of an offence of sexual touching. The next three chapters will identify five different possibilities for interpreting ‘sexual’, critiquing the approaches against the fundamental aims and principles of criminal law. In this chapter, I will analyse a ‘non-interpretive approach’, a ‘bystander-objective’ approach and a ‘defendant -objective’ approach. In chapter 7, I will evaluate a ‘defendant-subjective’ approach and in chapter 8, a ‘complainant-subjective’ approach. Following this examination, in chapter 9 I will analyse English law’s actual approach to the meaning of ‘sexual’ set out in s.78 SOA 2003. Whilst these chapters will be analysing an aspect of the conduct element within the offence rather than the fault element, when one is examining a context-dependent term such as ‘sexual’ which could be interpreted in many different ways, the difference between the two is somewhat blurred. It is possible to view ‘sexual’ as a word that can be assessed independently of the *mens rea* requirements and as a word that is dependent on the defendant’s mental state for definition.

This chapter will delineate three different possible legal approaches to assessing the meaning of ‘sexual’ for the purpose of defining sexual assault. Taking each approach in turn, it will consider the benefits and drawbacks of the possible perspectives from which the word ‘sexual’ could be viewed and defined. Part 1 will consider the interplay between subjective and objective approaches to criminal liability, identifying the five possible legal approaches to the meaning of ‘sexual’ that will be evaluated.

Part 2 will consider the merits of an approach that defines specifically which areas of the body are to be considered 'sexual' for the purposes of an offence of sexual assault. This approach would have the advantages of promoting certainty in the criminal law and adhering most closely to the principle of fair warning. However, such an approach would lack the flexibility necessary for an offence of sexual assault because it would focus solely on a state-of-affairs and would accordingly fail to take account of the context in which the touching occurred.

Part 3 will consider the philosophical foundations of an orthodox objectivist approach. Objectivists assert that it is sufficient to prove that the reasonable person would have perceived the relevant circumstances or consequences comprising the *actus reus*, irrespective of whether the defendant himself was aware of them. Objectivism thus has a greater social dimension, applying an external assessment regardless of whether the defendant is aware of a particular circumstance.

Part 4 will evaluate two different objective approaches to the meaning of 'sexual'. These will be labelled 'bystander-objective' and 'defendant-objective' respectively. A 'bystander-objective' approach would hold the defendant's conduct to a standard that society deems appropriate even though D may subjectively be incapable of appreciating the 'sexual' nature of the conduct. A 'bystander-objective' approach would be problematic because of the ambiguity of existing social norms, particularly with respect to sexual issues. A 'defendant-objective' test on the other hand is an objective test subject to capacity-based exceptions. The chapter concludes that the three approaches identified are insufficiently complainant-centred.

## 6.1 CRIMINAL LIABILITY

Over the years, two dominant approaches to criminal liability have developed. First, there are the subjective approaches that punish the 'evil intent of a person'.<sup>1</sup> The defendant is judged according to his mental state when he did the act prohibited by the law. Secondly, there are objective approaches. Lord Thomas summed up, what I will label a 'bystander-objective' approach, in debates on the SOA 2003, explaining that 'the law can draw a line in the sand and say that it does not matter what the defendant was thinking and that if he crosses that line he has committed an offence'.<sup>2</sup> The next three chapters will identify and evaluate five possible legal approaches to the meaning of 'sexual', as set out in table 6.1 below, which draw on existing theories of criminal responsibility. As an introduction, each will be explained briefly here and then analysed in detail in the relevant chapters.

*Table 6.1: Five different legal approaches to the meaning of 'sexual'*

|                  | Test                       | Obligation on criminal justice decision maker   | Relevance of complainant's experience |
|------------------|----------------------------|---|---------------------------------------|
| Non-interpretive | 1). Anatomical             | Did body part x touch body part y?  | None                                  |
| Interpretive     | 2). Bystander-objective    | Would a reasonable person consider the touching to be 'sexual'?                           | None                                  |
|                  | 3). Defendant-objective    | Would a reasonable person in D's position appreciate the 'sexual' nature of the touching? | None                                  |
|                  | 4). Defendant-subjective   | Did D appreciate that the touching is or might be 'sexual'?                               | None                                  |
|                  | 5). Complainant-subjective | Did C experience the touching as 'sexual'?  | Necessary                             |

<sup>1</sup> Lord Thomas of Gresford. HL Deb 13<sup>th</sup> Feb 2003, col 780.

<sup>2</sup> *Ibid.*

Perspective 1 is a non-interpretive approach that would define specifically which areas of the body are to be considered 'sexual' for the purposes of sexual assault. This is labelled a 'non-interpretive' approach, as it would be devoid of any reference to the participants' experiences. It would define 'sexual' according to the body parts involved and without consideration of the defendant's mental state or the complainant's perception of the touching. The touching would be 'sexual' if body part X touches body part Y. Underlying this approach is the philosophical concept of essentialism: the idea that qualities possessed by a person or thing are unchanging and not dependent on context. Under this approach, action X *will be* 'sexual' rather than action X *might be* 'sexual'. Perspective 1 would establish a strict liability test, requiring the decision-maker to apply an anatomical test and would accordingly be devoid of any reference to C's experience.

Perspective 2 is labelled a 'bystander-objective' approach. Objectivists assert that it is sufficient to prove that the reasonable person would have perceived the relevant circumstances or consequences comprising the *actus reus*, irrespective of whether the defendant himself was aware of them.<sup>3</sup> Objective approaches are all external approaches that focus on the conduct as it would seem to an outside observer. A 'bystander-objective' approach concerns what a 'reasonable person' would believe or expect, as distinct from what this particular agent believed or expected.<sup>4</sup> Under a 'bystander-objective' approach, an action would be 'sexual' if a reasonable person would consider it to be 'sexual'. The defendant's intentions or beliefs are irrelevant to this form of objectivism. If D intentionally touched C, without C's consent, and a reasonable person would consider the touching to be 'sexual', then objectively there would be a sexual assault. The reasonable person standard holds the defendant's conduct to a standard that society deems appropriate even though he may subjectively

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<sup>3</sup> D. Ormerod, *Smith and Hogan Criminal Law* 11<sup>th</sup> edn (OUP, Oxford, 2005) p.91.

<sup>4</sup> E.g. subjectively I am shooting at a person; but if a reasonable person would realize that my target is obviously a tree, objectively I am shooting at a tree.



be incapable of appreciating the 'sexual' nature of his action. The complainant's experience of the touching is not a feature of this second perspective.

Perspective 3, a 'defendant-objective' approach to the meaning of 'sexual', would be concerned with what the defendant ought to have known about his conduct i.e. that it is 'sexual' or is/might be considered by reasonable people to be 'sexual'. What D ought to know would be measured according to the standards of the reasonable person in possession of the same information as D. This adds an element of subjectivity to the test as characteristics of D would be considered in judging whether he ought to have known that the touching might be 'sexual'. Therefore, if D is a child, his appreciation of the 'sexual' nature of the conduct will be viewed against the standard of a reasonable child. Similarly, if D suffers from a mental illness that will be taken into account in determining what he ought to have known about his behaviour. The complainant's experience of the touching is not a feature of perspective three.

Perspective 4 is labelled a 'defendant-subjective' approach. Orthodox subjectivists argue that a person's criminal liability should be assessed on what they were trying to do, intended to do and believed they were doing, rather than on the actual consequences of their actions.<sup>5</sup> Ashworth suggests that 'there is no reason why a human system for judging and formally censuring the behaviour of others should be a slave to the vagaries of chance.'<sup>6</sup> A 'defendant-subjective' approach to the meaning of 'sexual' would require that D has knowledge of or appreciates the 'sexual' nature of the touching. If an offence requires knowledge of a given circumstance, a person who is honestly mistaken about that circumstance should be acquitted for lack of knowledge. The 'defendant-subjective' approach could also be referred to as a 'defendant-centred' approach and attempts to ensure that 'the act is attributable to the defendant'.<sup>7</sup>

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<sup>5</sup> A. Ashworth, *Principles of Criminal Law* 3<sup>rd</sup> edn (Oxford University Press, Oxford, 1999) p.462.

<sup>6</sup> *Ibid.*

<sup>7</sup> G. Fletcher, *Rethinking Criminal Law* (Little Brown & Co, Boston, 1978).

Perspective 5, a 'complainant-subjective' approach to the meaning of 'sexual', would be concerned with the complainant's perception of the nature of the touching. The defendant's intention or motive would be irrelevant to this account of liability; the focus would be on the complainant's affective response to the action. A 'complainant-subjective' approach would be experienced-centred and would enable the individual complainant to define the parameters of her sexual and bodily autonomy. A 'complainant-subjective' approach is not a common part of orthodox criminal liability, being more a focus of tort liability. A 'complainant-subjective' approach could also be referred to as a 'complainant-centred' or 'victim-centred' approach. I will argue that this is the most preferable approach to the meaning of 'sexual' because it is necessary to refer to C's perspective in order to appreciate the seriousness of the act's impact and the level of D's culpability.

## 6.2 NON-INTERPRETIVE APPROACH

This section will analyse an approach that defines specifically which areas of the body would be considered 'sexual' for the purposes of sexual assault. This is labelled a 'non-interpretive' or 'context-independent' approach, as it would be devoid of any reference to the participants' experiences. It would be based on defining 'sexual' according to the body parts involved and without consideration of the defendant's mental state or the complainant's perception of the touching. As such, a non-interpretive approach would be neither 'defendant-centred' nor 'complainant-centred'. The acts included within this non-interpretive approach do not depend on any interpretation by onlookers or participants for their quality; they have essential qualities. The touching is 'sexual' if body part X touches body part Y. Underlying this approach is the philosophical concept of essentialism: the idea that certain properties possessed by a person or thing are universal, unchanging and not dependent on context.<sup>8</sup> Under this approach action X is 'sexual' rather than action X *may* be 'sexual'. A non-interpretive approach imposes a

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<sup>8</sup> See A. Sayer, 'Essentialism, social constructionism and beyond' (1997) 45 *Sociological Review* 453.

strict liability test, whereby D is legally responsible for his actions regardless of culpability.

#### 6.2.1 Benefits of a non-interpretive approach

A non-interpretive approach would not necessarily have to be exhaustive, but some indication of those acts that are considered 'sexual' would have the benefit of enabling the citizen, the police and prosecutors to have some fair warning as to which acts might result in liability. One argument in favour of a non-interpretive approach is that the citizen is entitled to specificity so that he knows which acts will result in criminal liability. D should have sufficient notification in a statute exactly which activities will result in liability for sexual assault. A non-interpretive approach would provide meaningful guidance on the scope of the criminal law and the conduct that may be lawfully pursued. The principle of legality suggests that criminal offences should be clearly enough defined to enable people who wish to be law abiding to live their lives confident that they will not be breaking the law.<sup>9</sup> A non-interpretive approach would avoid having a vaguely defined offence whose interpretation can be expanded or contracted by the magistrates or jury to fit the justice of the particular case. A non-interpretive approach would also enable police officers to know with some degree of certainty whether an offence has, or appears to have been, committed and would promote consistency of approach in the arrest, charge and prosecution of sexual assault.

Horder suggests that the more serious the offence, the more important it is in point of 'moral nominalism', to incorporate moral detail into the definition of the offence.<sup>10</sup> Horder adopts the phrase 'moral nominalism' to describe when the definition of an offence details precisely what the defendant has done and argues that this gives the law its necessary moral substance. A non-interpretive approach would adhere to the

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<sup>9</sup> See A. Ashworth, *Principles of Criminal Law* 6<sup>th</sup> edn (Oxford University Press, Oxford, 2009) pp.57-74; P. Weston, 'Getting the Fly out of the Bottle: the False Problem of Free Will and Determinism' (2005) 8 *Buffalo Criminal Law Review* 599.

<sup>10</sup> J. Horder, 'Rethinking Non-Fatal Offences against the Person' (1994) 14 *OJLS* 335.

principle of maximum certainty; for justice to be done, and to be seen to be done, it is vital that the criminal law indicates the elements of a crime with as much precision as possible. This approach would also pay regard to the principle of fair labelling.<sup>11</sup> It would explain to society the nature of wrongdoing and scale of harm. This would increase the law's educative and declaratory functions.

### 6.2.2 Problems with a non-interpretive approach

#### (a) Defining 'sexual' body parts

The difficulty of a test of this kind is establishing the touching of which areas of the body should be included on the list. Which actions are 'sexual'? The statute could specify that touching of C's genitals, anus or female breasts will be considered 'sexual' for the purposes of the offence. This is the approach adopted in Alaska where 'sexual contact' is defined as:

'(a) the intentional touching, directly or through clothing, by the defendant of the victim's genitals, anus or female breasts; or (b) the defendant's intentionally causing the victim to touch, directly or through clothing, the defendant's or victim's genitals, anus or female breasts.'<sup>12</sup>

The Alaskan approach is exhaustive: it includes only touching of the genitals, anus or female breasts within the definition of sexual contact.<sup>13</sup> However, what feature makes each of these areas of the body 'sexual'? The genitals are the primary sexual organs, which are involved in sexual reproduction. In medical literature, the female breasts are

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<sup>11</sup> *Ibid.*

<sup>12</sup> A.S. 11.81.900(b)(51). The Alaskan definition of 'sexual contact' refers specifically to 'intentional touching'. I will argue in chapter 10 that complainants should also be protected from unintentional yet culpable sexual touching.

<sup>13</sup> A non-interpretive approach to the meaning of 'sexual' is also used in many American states. For example, in the District of Columbia unlawful sexual contact is defined as: 'touching with any clothed or unclothed body part or any object, either directly or through the clothing, of the genitalia, anus, groin, breast, inner thigh, or buttocks of any person with an intent to abuse, humiliate, harass, degrade, or arouse or gratify the desire of any person,' without that person's consent. In Virginia, unlawful sexual contact is defined as: 'The accused intentionally touches the complaining witness's intimate parts or material directly covering intimate parts'- including their genitalia, anus, groin, breast or buttocks- without that person's consent.

not defined as sexual organs but secondary sexual characteristics<sup>14</sup> and are commonly associated in Western society as being objects of sexual gratification. The anus has a relatively high concentration of nerve endings and is considered a specific erogenous zone, an area of the body that has heightened sensitivity and where stimulation normally results in sexual response.<sup>15</sup> Anal sex is an alternative form of intercourse. In chapter 9, these reasons will be considered more fully; what is important here is that there are other body parts that are more difficult to categorise as 'sexual'. Why is kissing not included within the definition given that it is in some circumstances an expression of sexual desire and may or may not be sexually motivated? Why is the touching of other erogenous zones for example the neck or feet not 'sexual' when licking, stroking or caressing in these areas is sexually arousing to many people?

A non-interpretive approach to the meaning of 'sexual' fails to consider the context of the action. Thus kissing, stroking of the thigh, touching the shoulder or any other touching, might be considered 'sexual' if they are proximate to an exposed sexual organ<sup>16</sup> or where it was suggested by the defendant that sexual intercourse take place.<sup>17</sup> This reiterates the context-dependent nature of sexual assault and demonstrates how some unacceptable conduct may escape criminality. The Alaskan definition of 'sexual' is very simplistic and does not acknowledge that the surrounding circumstances may render an action 'sexual'. It is impossible to define 'sexual' by reference to body parts given that it is a subjectively experienced phenomenon that means so many different things and is experienced in so many different ways by different people.

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<sup>14</sup> K. Saladin, *Anatomy and Physiology: The Unity of Form and Function* (McGraw-Hill Higher Education, New York, 2010) p.1048. Secondary sexual characteristics are traits that distinguish the two sexes of a species, but that are not directly part of the reproductive system. In humans the most visible are breasts of females and beards and moustaches of males.

<sup>15</sup> R.K. Winkelmann, 'Erogenous Zones: Their Nerve Supply and Significance' (1959) 34 *Mayo Clin Proc* 39.

<sup>16</sup> *Beal v Kelley* [1951] 2 All ER763.

<sup>17</sup> *R v Leeson* (1986) 52 Cr App R 185.

### (b) Fetishism

Defining by reference to areas of the body, as in the Alaskan definition, suggests that there is a relationship between the genitalia and the 'sexual'. In a non-interpretive definition, the nature of the relationship can be expressed in the following way: the genitalia are 'sexual' and therefore touching of the genitalia is 'sexual'. This appears problematic in reference to fetishism. In fetishism, Freud argued, the libidinal investment in the genital is displaced onto and reinvested in another object, which may be another part of the body remote from the genitals, in rituals of behaviour, in objects such as the shoe, underwear and so on.<sup>18</sup> Moran suggests that fetishism 'draws attention to libidinal mobility and problematises the idea of the sexual as a single necessary relation.'<sup>19</sup> 'Libidinal mobility' presumably means that sexual instinct and desire are not confined to the genitalia and can be freely exercised without the aims of reproduction. Sexual instinct manifests itself not only from the genitals but also from other areas of the body, most notably the erogenous zones. A non-interpretive approach would fail to acknowledge that the 'sexual' is an assignable relation: the interest in the 'sexual' may be transferred from the genitalia to other body parts, which may or may not have heightened sensitivity.

### (c) Context-independency

A non-interpretive approach, whilst desirable, does not have the flexibility necessary for an offence of sexual assault. One of the drawbacks of a definition that refers to specific touching of certain areas of the body is that it takes no account of the context in which the action occurred: it establishes a context-independent test. Whilst the 'sexual' can be defined as the 'genital' it is also an assignable relation. Accordingly, a non-interpretive approach, which would specify the touching of certain body parts as 'sexual' to the exclusion of others, may fail to address the harm caused by a fetishist, whose obscure

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<sup>18</sup> S. Freud, 'Three essays on the theory of sexuality' in A. Richards, *On Sexuality* (Penguin, Harmondsworth, 1991) p.69.

<sup>19</sup> L. Moran, 'Indecent Assault: What is Indecency?' (1989) 11 *Liverpool Law Review* 99.

touching may be experienced by a complainant as 'sexual'. A non-interpretive approach would arguably protect the complainant of a paradigmatic sexual assault (i.e. one where there is evidence of touching of the genitals, anus or female breasts). It would not, however, impose liability on a defendant whose touching of C is not 'sexual' by nature, but which, when considering the totality of the circumstances might be considered a 'sexual'.

A definition that concentrates on certain body parts focuses solely on a state-of-affairs; 'this body part *did* touch that body part'. In doing so it fails to account for the context in which the touching occurred, which as was demonstrated in chapter 5 is an essential element in designating conduct as 'sexual'. A non-interpretive approach does not allow for a context-dependent evaluation of the conduct: it makes no reference to the relationship between the parties, the complainant's experience of the touching or the defendant's culpability and reason for acting.<sup>20</sup> It is devoid of any reference to the participants' experiences and would therefore fail to uphold a complainant's sexual integrity. A non-interpretive approach does not capture those types of touching that appear non-sexual to observers but which are experienced by complainants as 'sexual', or where the purpose of a defendant is 'sexual'. For the archetypal sexual assault case, a non-interpretive approach may well suffice, but in some limited situations, a more nuanced, subtle, context-dependent approach is required.

A list of the activities that were or were not to be considered 'sexual' would provide greater certainty, but only at the expense of replacing judgment with a robotic and inflexible approach that might be incapable of responding flexibly to atypical situations. In some cases, whether acts are 'sexual' or not will depend on their circumstances or attendant purpose, which cannot be defined in advance. A list that limits sexual activity to acts per se (i.e. by their nature) 'sexual' would be far too narrow. On the other hand,

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<sup>20</sup> Although in chapter 11 I will argue that we should not read *mens rea* or an equivalent construction into the 'sexual' nature of touching under the SOA 2003.

a list that refers to acts in more general terms might be incapable of taking sufficient account of the enormous range of circumstances and purposes that may be encountered.

### 6.3 OBJECTIVISM

The legal philosophy traditionally applied in mainstream English criminal law is known as 'subjectivist theory'. It rests on the principle that moral guilt and hence criminal liability should be imposed only on people who can be said to have chosen to behave in a certain way or to cause or risk causing certain consequences or circumstances. The roots of subjectivism lie in a liberal philosophy that regards individuals as autonomous beings, capable of choice and each deserving of individual respect.<sup>21</sup> It is called 'subjectivism' because of the significance it accords to the individual's state of mind at the time of the prohibited conduct. Subjectivists assert that, for serious crimes at least, the mental element of a crime should require that the defendant has personal awareness of his actions and has perceived the relevant circumstances and consequences comprising the *actus reus* of the offence.<sup>22</sup> There is an ongoing debate between subjectivists and objectivists. Objectivists assert that it is sufficient to prove that the reasonable person would have perceived the relevant circumstances or consequences comprising the *actus reus*, irrespective of whether the defendant himself was aware of them.<sup>23</sup> This is of course a very simplistic view of the competing positions and there are shades of objectivism and subjectivism along a spectrum. This chapter will evaluate two possible objective approaches to the meaning of 'sexual' and chapters 7 and 8 will analyse two different possible subjective approaches to the meaning of 'sexual'. Despite strong endorsement of the subjectivist position from the House of Lords in *G*,<sup>24</sup> Parliament has demonstrated a willingness to create serious offences in which the fault element is

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<sup>21</sup> This view can be contrasted with e.g. 'utilitarian theory' which places emphasis on the social benefit to be derived from punishing a person (e.g. deterring others) rather than on the deserts to the individual offender himself.

<sup>22</sup> D. Ormerod, *Smith and Hogan Criminal Law* 11<sup>th</sup> edn (OUP, Oxford, 2005) p.91.

<sup>23</sup> *Ibid.*

<sup>24</sup> [2003] UKHL 50.



explicitly objective. Recent examples include many sexual offences in the SOA 2003 and some of the money laundering offences in the Proceeds of Crime Act 2002.

### 6.3.1 Objectivist theory

Objectivism grounds fault in conduct rather than choices, arguing that an action attracts blame if it inflicts harm when a reasonable person would not have acted that way. Under the objective analysis, awareness of wrongdoing is not essential. If sexual touching is undesirable, then D has a reason not to do it whether or not he appreciates the 'sexual' nature of the conduct. Sexual touching does not become acceptable just because it is done without advertence to the 'sexual' nature of the conduct. If the defendant has failed to behave like a reasonable person, we may infer culpability, since his conduct has fallen short of reflecting that of the archetypal reasonable person.

Fletcher suggests that 'objective standards are 'social' rather than individual standards,'<sup>25</sup> in that they 'sacrifice the individual to the general good.'<sup>26</sup> Justice to the individual is thereby outweighed by the protection of society from crime. Subjectivism is a very individualistic approach, rooted in the actor's state of mind, whereas objectivism arguably has a greater social dimension, applying an external assessment regardless of whether the actor thinks he is doing the right thing. The rationale for punishment under this account of liability is therefore social protection and not the distribution of punishment according to individual culpability.<sup>27</sup> Perhaps the clearest examples of the imposition of liability for the failure to fulfil a duty of care are road traffic offences. Offences such as causing death by dangerous driving<sup>28</sup> and causing death by careless driving<sup>29</sup> make drivers criminally liable for the degree to which they fall below the standards expected of a competent motorist. In the context of road traffic offences, the

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<sup>25</sup> G. Fletcher, *Rethinking Criminal Law* (Little Brown & Co, Boston, 1978) Ch 6.8.

<sup>26</sup> *Ibid*, at p.48.

<sup>27</sup> See further, H.L.A. Hart, *Punishment and Responsibility* (Clarendon Press, Oxford, 1968).

<sup>28</sup> Road Traffic Act 1988, s.1.

<sup>29</sup> Road Safety Act 2006, s.30 (inserting a new s.3ZA into the Road Traffic Act 1988).

imposition of objective liability is justified because a motorist's behaviour can so easily impinge on others, sometimes with disastrous consequences.

Fletcher suggests that the question of wrongdoing is an objective standard, for it focuses on the act in abstraction from the actor; the issue of attribution is subjective in the sense that it focuses on the actor's personal accountability for wrongdoing.<sup>30</sup> Amirthalingam has similarly argued that there is a residual objective element that is part of *mens rea* and it is that which determines whether the accused is morally blameworthy.<sup>31</sup> Blameworthiness is a normative inquiry as to whether the person deserves to be labelled and punished as a criminal. As such, one cannot determine blameworthiness or culpability without reference to some external standard. An objective evaluation of criminal liability therefore attributes moral blameworthiness to the accused. Amirthalingam suggests that a dualistic model of *mens rea* be preferred, where the 'mens' and the 'rea' are separate.<sup>32</sup> The 'mens' is the subjective mental element that attributes responsibility for the conduct and consequence to the accused; the 'rea' is the normative evaluation of that mental element, which attributes moral blameworthiness to the accused. With recklessness, the 'rea' question in many cases will be whether the accused should have foreseen certain additional consequences of his intentional or foreseeable conduct. In objectivist terms, punishment itself can be understood, not primarily as an efficient technique for preventing criminal conduct, but as an appropriate response to criminal wrongdoings: as a response which condemns or censures that wrongdoing. The law's aim is to declare and seek our obedience to those minimal standards of behaviour that are necessary for social life and to protect rights and interests against infringement. Duff suggests that a focus on wrongful actions rather than on 'dangerous persons' is inherent in this account.<sup>33</sup>

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<sup>30</sup> Fletcher, *op cit*, n 9.

<sup>31</sup> K. Amirthalingam, 'Caldwell Recklessness is Dead, Long Live Mens Rea's Fecklessness' (2004) 67 *MLR* 491.

<sup>32</sup> *Ibid.*

<sup>33</sup> R.A. Duff, *Intention, Agency and Criminal Liability* (OUP, Oxford, 1990).

### (a) Objectivism and the morality of punishment

Since both the operation of the criminal process and the imposition of punishment infringe the liberty of individual citizens, Lacey advocates that criminal justice requires justification.<sup>34</sup> The main divide in debates about the morality of punishment is between liberalism and communitarianism. The common ground in this debate is that the practice of punishment can be justified by the promotion of valued social goals. The division concerns the nature of the goals to be pursued. Liberals are concerned with individual freedom and see the purpose of the state as to provide individuals with a secure framework within which they can pursue their personal autonomy. The function of punishment is to uphold the criminal law's norms of appropriate behaviour through censuring and attaching unpleasant consequences to those who are found to have breached those norms.<sup>35</sup> A further defining element of liberalism is that punishment must be distributed in a way that appropriately marks the moral distinction between different forms of criminal behaviour.<sup>36</sup> Under the 'just deserts' model, punishment came to be seen as something that ought to consist of a fair or proportional amount of censure and retribution.<sup>37</sup> My central focus here, however, is on the communitarian theory and its links with objectivism.

Communitarian punishment theory, on the other hand, values collective welfare at least as much as individual welfare. It is based on the premise that people do not function autonomously in society but rather pursue their goals within webs of inter-dependency and social attachments.<sup>38</sup> 'Just deserts' thinking is criticised by communitarian theorists on the basis that its premise of individual responsibility for crime and its belief in the deterrent and 'social educative efficacy' of punishment ignores the extent to which

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<sup>34</sup> N. Lacey, *A Reader on Criminal Justice* (ed) (OUP, Oxford, 1994) p.4.

<sup>35</sup> A. Sanders & R. Young, *Criminal Justice* 2<sup>nd</sup> edn (Butterworths, London, 2000).

<sup>36</sup> For further discussion of liberalism see, M. Sandel, *Liberalism and its critics* (ed) (New York UP, New York, 1984); S. Mulhall & A. Swift, *Liberals and Communitarians* 2<sup>nd</sup> edn (Blackwell, Oxford, 1996).

<sup>37</sup> The just deserts framework for sentencing was established by the Criminal Justice Act 1991.

<sup>38</sup> N. Lacey, 'Community in Legal Theory: Idea, Ideal or Ideology' (1996) 15 *Studies in Law, Politics and Society* 105.

aspects of social context and structure shape the ability and willingness of individuals to conform to the criminal law's requirements.<sup>39</sup> Communitarians have agitated for those affected by an offence, including the defendant, complainant and affected communities, to play a central role in deciding what the response to an offence should be.<sup>40</sup> Communitarian punishment prioritises the promotion of collective welfare through measures designed to reintegrate offenders into their 'communities' and to compensate victims.<sup>41</sup>

Lacey describes the 'principle of welfare' as including the 'fulfilment of certain basic interests such as maintaining one's personal safety, health and capacity to pursue one's chosen life plan.'<sup>42</sup> The specification of the interests thus to be protected should be a matter for democratic decision-making: this means both that the interests will be objectively determined, not just according to the preference of each individual, and also that individuals whose preferences are at odds with those of the majority would lose out. It is therefore the responsibility of the jury, representing twelve 'reasonable people' to determine whether certain actions are capable of constituting a sexual assault. Whereas the principle of autonomy suggests that individual rights should be given high priority in the legal structure, the principle of welfare recognizes the social context in which the law must operate and gives weight to collective goals.<sup>43</sup> One of these goals is the right to respect for sexual autonomy.

What then are the functions of punishment under a communitarian approach? One aim of a punishment may be to deter a harmful form of behaviour, but it is also part of its

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<sup>39</sup> See A. Norrie, 'The Limits of Justice: Finding Fault in the Criminal Law' (1996) 59 *MLR* 540 who argues that the liberal and the communitarian conceptions of criminal justice both have value, and that achieving their synthesis is bound to be problematic.

<sup>40</sup> M. Cavadino & J. Dignan, 'Reparation, Retribution and Rights' (1997) 4 *Int Rev Victimology* 233 defend this position.

<sup>41</sup> R.A. Duff & D. Garland, *A Reader on Punishment* (OUP, Oxford, 1994).

<sup>42</sup> N. Lacey, *State Punishment* (Routledge, London, 1994).

<sup>43</sup> J. Feinberg, *The Moral Limits of the Criminal Law Volume 3: Harm to Self* (OUP, New York, 1986) pp.37-47.

function to reinforce the 'moral analogy' (the social judgment that that form of behaviour is indeed harmful and wrong) which constitutes an important part of the social meaning of crime as opposed to civil law. From the point of view of the law of the community, the standards of the criminal law become non-optional- and the very idea of non-optionality seems to presuppose some kind of consequence on breach. A second justification for punishment under this model is to encourage members of the community to put their faith in and give allegiance to the community as guardian of the framework of common values within which citizens can develop their lives. A further educative function affirms the social values fostered by the denunciation of the behaviour involved in the offence. As well as a certain level of general and individual deterrence, there is also the aim of reducing the extent to which people might resort to private vengeance or self-help. Punishment also demonstrates that the community takes seriously the harm done to the complainant and takes upon itself the responsibility for upholding the standards breached. Lacey suggests that the proper meaning of punishment within a community has to do with its responses to actions that are hostile to and express rejection of fundamental community values.<sup>44</sup> From this review of communitarian approaches to justice we can see how there may be sound reasons for adopting approaches to criminal liability that are rooted in objective standards of behaviour rather than depending solely on subjectivist approaches to liability. In the context of the meaning of 'sexual', we can delineate two objective approaches: 'bystander-objective' and 'defendant-objective'.

#### 6.4 OBJECTIVE APPROACHES

There is a range of objectivist perspectives, but for present purposes, I will limit my analysis to two angles, a 'bystander-objective' approach and a 'defendant-objective' approach. A 'bystander-objective' standard creates the appearance of justice, promoting procedural fairness for both D and C. However, such an approach is also

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<sup>44</sup> For further discussion of communitarianism see, A. Sanders & R. Young, *Criminal Justice* 2<sup>nd</sup> edn (Butterworths, London, 2000).

problematic because of the ambiguity of existing social norms, particularly with respect to the meaning of 'sexual'. A 'defendant-objective' test, on the other hand, would preserve the principle of individual autonomy by ensuring that no person is convicted who lacked the capacity to conform his behaviour to the standard required. There is a third possible objective approach, a 'complainant-objective' approach. Such an approach to the meaning of 'sexual' would be concerned with how reasonable people in C's position would experience the act. C's affective response to the touching would be measured according to the standards of a reasonable person with the same characteristics and experiences as C. Accordingly; there is little difference between this and a 'complainant-subjective' approach and I will leave this analysis until chapter 8.

#### 6.4.1 'Bystander-objective' approach

Under a 'bystander-objective' approach, touching would be 'sexual' for the purpose of the section if a reasonable person would consider that it is 'sexual'. For example, D believes that touching someone on the buttocks is not 'sexual'. But if a reasonable person would appreciate that touching someone on the buttocks is 'sexual', then objectively, touching someone on the buttocks would be 'sexual' for the purposes of the offence. The focus would be on the act of touching and not the actor's perception and therefore on the wrongdoing rather than the attribution. The focus is on the reasonable person's perception of the 'sexual' nature of the touching without reference to D's experience. The 'reasonable person' standard is an objective standard of perception based on a fictitious 'reasonable person', which seeks to eliminate all differentiations among people.<sup>45</sup> As an abstract standard, it purportedly represents the values and expectations of neither the judge, nor the jury, nor any other actual person. Oliver Wendell Holmes explained the 'reasonable person' standard as resulting from the fact that for life in organized society, 'a certain average of conduct, a sacrifice of individual

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<sup>45</sup> One of the earliest cases contributing to the development of the modern reasonable person standard was the 1837 case *Vaughan v Menlove* (1837) 132 ER 490 which articulated a test based on the level of caution that 'a man of ordinary' prudence would observe.

peculiarities going beyond a certain point, is necessary to the general welfare'.<sup>46</sup> The law, consequently, 'does not attempt to see men as God sees them.'<sup>47</sup> Under this explanation, no account is made for the infinite differences in character between men. Thus if a man is accident-prone, the results of his conduct are no less troublesome to those around him than if they arose from neglect and the courts should therefore 'decline to take his personal equation into account'.<sup>48</sup> Under a 'bystander-objective' approach, 'sexual' would carry its normal, everyday meaning. This raises the question: what is the normal, everyday meaning attached to the word 'sexual'? I will address this conundrum in chapter 9.

#### (a) Merits of a 'bystander-objective' approach

One of the greatest merits of a 'bystander-objective' approach is that it creates the appearance of justice: it allows for an evaluation of the 'sexual' nature of the touching that is neither defendant- nor complainant-centred. The law insists on appearing neutral and fair and a 'bystander-objective' to the meaning of 'sexual' promotes procedural fairness for both defendants and complainants. Some criminal offences, especially non-consensual sexual offences, are more open to dual interpretation by the parties involved than others are. Sexual assault is not an outcome-based offence where the actual link between mental state and actual outcome is easier to draw. As was argued in chapter 5, sexual assault is a context-dependent offence, so D may be oblivious to the possible *harm* of his conduct. Where conduct does not involve tangible harm (for example theft of property or physical injury) there are likely to be differing perceptions of the action. This is especially true of those sexual assault cases at the fringes of liability and which are not inherently sexual/non-sexual e.g. touching of the foot or hair. Ehrenreich notes that the 'reasonable person'<sup>49</sup> is 'portrayed as a mediating concept by

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<sup>46</sup> O. Wendell Holmes, *The Common Law* (Little Brown & Co, Boston, 1881) p.108.

<sup>47</sup> *Ibid.*

<sup>48</sup> *Ibid.*

<sup>49</sup> Or what Ehrenreich refers to as the 'mythical being'. N. Ehrenreich, 'Pluralist Myths and Powerless Men: The Ideology of Reasonableness in Sexual Harassment Law' (1990) 99 *Yale L J* 1177 at 1178.

which the competing liberty interest of the individual defendant and security interest of the complainant are balanced.’<sup>50</sup> In fairness to both the defendant and complainant, a ‘bystander-objective’ approach would require the magistrates or jury, as twelve reasonable people, to reach consensus on which conduct society deems ‘sexual’.

The merits of a ‘bystander-objective’ evaluation of the meaning of ‘sexual’ can be demonstrated by the example of a footwear fetishist who steals shoes from women’s feet. From the complainant’s perspective, this action may or may not, depending on their individual interpretation of the incident, constitute a ‘sexual’ touching. The defendant may deny any appreciation of the ‘sexual’ nature of the act. In fairness to both parties, the ‘reasonable person’ standard therefore allows for an objective evaluation of the action that is neither defendant nor complainant-centred. A further advantage of leaving the determination of the ‘sexual’ nature of an act to the jury or magistrates to decide is that the issue is essentially an issue of fact. It is far easier for a jury or magistrates to give words their normal meaning, rather than some technical, legal meaning that they may misunderstand. Further, giving ‘sexual’ its normal meaning helps to make the law predictable and readily understandable to ordinary people. Defining ‘sexual’ in terms of the standards of the ordinary decent person also has the advantage that the legal meaning of ‘sexual’ is kept in line with current standards of sexuality. Defining ‘sexual’ by the standard of the reasonable person also means that idiosyncratic and trivial harms will not be the concern of the law and people will not be held accountable when they could not have anticipated the complainant’s reaction and no one could have. A charge of sexual touching is also more likely to result in conviction if the jury or magistrates are required to ask what a reasonable person would have appreciated about the ‘sexual’ nature of the conduct, rather than what D actually appreciated.

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<sup>50</sup> *Ibid.*



### (b) Problems with a 'bystander-objective' approach

The 'bystander-objective' approach is concerned with reasonable people without any particular characteristics of D or C. It therefore holds D's conduct to a standard that society deems appropriate even though D may subjectively be incapable of appreciating the 'sexual' nature of his conduct. The question is whether the touching is 'sexual' according to the reasonable person and not whether, taking into account D's age and characteristics, he would be capable of appreciating the 'sexual' nature of the conduct.<sup>51</sup> This approach might be considered very harsh on defendants who are incapable of appreciating the 'sexual' nature of their conduct. Proponents of 'bystander-objectivism' would argue that the rationale for punishment under this account of liability is social protection and not the distribution of punishment according to individual culpability.

English law has used a 'bystander-objective' approach in the criminalisation of harassment. Under the Protection from Harassment Act 1997 (PFHA 1997), pursuing a course of conduct which the defendant ought to know amounts to harassment is a 'bystander-objective' test based upon what the 'reasonable person in possession of the same information'<sup>52</sup> would think amounted to harassment'.<sup>53</sup> This objective requirement was deemed necessary to ensure that there was comprehensive protection of all stalking victims and that stalkers whose mental illness precluded them from appreciating the impact of their conduct were not excluded from the scope of the legislation. The objective nature of the test laid down in s.1(2) PFHA 1997 is emphasised in *R v Colohan*,<sup>54</sup> where it was held that D's schizophrenia could not be taken into account in determining whether he ought to have known that his course of conduct

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<sup>51</sup> Cf the 'reasonable person' in causation. *R v Roberts* [1992] 2 All ER 183 sets out a test of reasonable foreseeability and in *R v Marjoram* [2000] Crim LR 372 the CA said the reasonable person has no particular characteristics of D.

<sup>52</sup> If the defendant possesses information relating to a particular vulnerability of the victim which gives him knowledge that his *prima facie* innocuous conduct will harass the victim, this knowledge will be transferred to the reasonable man and the defendant will be liable for harassment despite the outwardly innocent appearance of the conduct. (Lord Chancellor, *HL Deb*, Vol 578 Col 528, 17 February 1997.

<sup>53</sup> PFHA 1997, s.1(2).

<sup>54</sup> [2001] EWCA Crim 1251.

would have amounted to harassment of another. Hughes J observed that to take into account the mental illness of the accused in applying the objective test laid down by s.1(2) would undermine the very purpose of the PFHA 1997, given that it was aimed at the activities of persons who might be expected to suffer from some form of mental illness. On the face of it, this decision appears to be very harsh and it seems as though very little thought was given to the implications for defendants such as Colohan. However, it was held that the conduct at which the PFHA 1997 was aimed and from which it sought to provide protection was likely to be conduct pursued by those of obsessive or otherwise unusual psychological make-up and very frequently by those suffering from an identifiable mental illness. Ormerod and Underhill suggest that the prosecution of mentally disordered individuals under this offence not only ensures the protection for victims of stalking, but also increases the chances of the offender receiving psychiatric assessment and treatment.<sup>55</sup>

A further problem of judging 'sexual' according to the standard of the fictitious reasonable person and asking juries to apply such a standard is that it assumes juries are heterogeneous and have consistent values. However, there is no common consensus regarding what is considered acceptable sexual touching. The 'bystander-objective' approach is inappropriate in areas where there are different standards about what is considered appropriate behaviour and what is considered harmful. This is particularly true of sexual touching where there are many different perceptions of the meaning of 'sexual'. This is one area where depending on their age, sex, cultural or religious beliefs, people may perceive certain sexual conduct quite differently. Thus, the use of a 'reasonable person' in designating certain types of touching as 'sexual' is questionable when there is no social consensus on appropriate standards of sexual behaviour. If different persons can reasonably hold different views about what is 'sexual', there is a real danger of different verdicts, on the same set of facts, from different juries. In turn,

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<sup>55</sup> D. Ormerod & G. Underhill, 'Case Comment' [2001] *Crim L R* 845.

this undermines the rule of law. Even an informed defendant may be unable to predict whether his behaviour will contravene the law.

The 'reasonable person' standard is problematic because of the ambiguity of existing social norms, particularly with respect to sexual issues. A 'bystander-objective' test which would rely on how conduct appeared to the reasonable person, appears much more malleable and unpredictable than subjective tests which ask whether or not a defendant was aware of a given, and Ashworth argues that objective tests 'explicitly leave room for courts and even prosecutors to make social judgments about the limits of the criminal sanction.'<sup>56</sup> A further weakness of such an approach is that it does not take account of C's experience. Given that, as was argued in chapter 5, sexual assault is a context-dependent crime, the law needs to refer to C's perspective regarding the 'sexual' nature of the conduct in order to appreciate the seriousness of the act's impact and the level of D's culpability.

#### 6.4.2 'Defendant-objective' approach

A 'defendant-objective' approach to the meaning of 'sexual' would focus on the reasonable person in D's position. If D is an ordinary person, he cannot be blamed for failing to take notice of a circumstance if it would not have been apparent to an average person in his position, because the criminal law cannot require an exceptional standard of awareness from him. The jury would therefore be asked whether a reasonable person in D's position would appreciate that the touching is 'sexual'. Under this approach, defining 'sexual' involves an assessment of culpability i.e. should D have known that his action would be perceived by C or the reasonable person to be 'sexual'. Thus, if D is a 13-year-old male, his age and gender will be taken into account in determining whether he ought to have known that his action would be perceived as 'sexual'. This would ensure that D would have been capable of perceiving the 'sexual' circumstance had he

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<sup>56</sup> Ashworth, *op cit*, n 9 at p.189.

directed his mind to it. A 'defendant-objective' test insists that D should not be punished for being less intelligent, mature or capable than the average person.

A 'defendant-objective' test is an objective test subject to capacity-based exceptions. This preserves the principle of individual autonomy by ensuring that no person is convicted who lacked the capacity to conform his or her behaviour to the standard required. In 1982 in *Caldwell*,<sup>57</sup> the House of Lords introduced a 'bystander-objective' definition of recklessness. Lord Diplock's model direction stated that a person is guilty of causing damage recklessly if:

'(i) he does an act which in fact creates an obvious risk that property would be destroyed or damaged and (ii) when he does the act he either has not given any thought to the possibility of there being any such risk or has recognized that there was some risk involved and has nevertheless gone on to do it.'

Lord Diplock's test extended recklessness beyond the scope of 'advertent recklessness'<sup>58</sup> to include thoughtless and inconsiderate wrongdoers. A major problem with Lord Diplock's test of what would have been obvious to the reasonable person was that it admitted of no exceptions. The effect was to convict children and mentally impaired defendants by applying to them an objective standard of foreseeability that they could not meet, which produced unfair convictions in some cases. For example, in *Elliot v C*,<sup>59</sup> the defendant, a 14-year-old girl with learning disabilities was held liable for criminal damage because the risk of setting fire to the shed would have been obvious to the reasonable person, even though it was not obvious to her.

Under a 'defendant-objective' approach, the question of what touching is 'sexual' is not an issue of whether the D appreciated the 'sexual' nature of the conduct; it is a question of whether an ordinary and prudent person in D's position would have been aware that the touching is 'sexual'. There is no need to prove that D adverted to the 'sexual'

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<sup>57</sup> [1982] AC 341.

<sup>58</sup> *Cunningham* [1957] 2 QB 396.

<sup>59</sup> (1983) 77 Cr App R 103. See also *Stephenson* [1979] QB 695 (man with schizophrenia).

circumstance at all, so long as the court is satisfied that a reasonable person in that situation would have done so. So long as the individual had the capacity to behave otherwise, it is fair to impose liability in those situations where there are sufficient signals to alert the reasonable citizen to the need to take care. To this extent, defendants cannot be permitted to displace the law and judge what is right for themselves. For an objectivist, D's knowledge of the 'sexual' circumstance would be enough to establish liability, even if reasonable people would not have known.

## 6.5 CONCLUSION

This chapter has evaluated three possible approaches to interpreting the meaning of 'sexual'. The first possible approach was labeled a non-interpretive approach as it would be devoid of any reference to the participants' experiences and would establish a strict liability test. One argument in favour of a non-interpretive approach is that it promotes certainty in the criminal law, adhering most closely to the principle of fair warning. However, an approach that focuses solely on a state-of-affairs would be unsatisfactory because it would lack the flexibility necessary for an offence of sexual assault and would fail to take account of the context in which the touching occurred. As I argued in chapter 5, sexual assault is a context-dependent offence and the definition of 'sexual' should therefore include consideration of all the relevant circumstances, including the complainant's affective response to the touching.

Orthodox objectivism grounds fault in conduct rather than choices and emphasizes the protection of society from crime over individual liberty. Objective approaches are all external approaches that focus on the conduct, as it would seem to an outside observer. A 'bystander-objective' approach to the meaning of 'sexual' would create the appearance of justice: it would allow for an evaluation of the 'sexual' nature of the touching that is neither defendant- nor complainant-centred. A charge of sexual touching is more likely to result in conviction if the jury or magistrates are required to ask what a reasonable person would have appreciated about the 'sexual' nature of the

conduct, rather than what D actually appreciated. However, there are three notable drawbacks of a 'bystander-objective' approach. First, the approach is concerned with reasonable people without any particular characteristics of D or C and might be considered very harsh on defendants who are incapable of appreciating the 'sexual' nature of the conduct. Secondly, the use of a 'reasonable person' standard is questionable when there is no social consensus on appropriate standards of sexual behaviour. Thirdly, such an approach does not take into account C's experience. A 'defendant-objective' approach would require the jury or magistrates to be asked whether a reasonable person in D's position would appreciate that the touching is 'sexual'. This is advantageous in that it insists that D should not be punished for being less intelligent, mature or capable than the average person.

Chapter 7 will continue the theme of evaluating the possible legal perspectives from which 'sexual' could be viewed and defined, analysing a 'defendant-subjective' approach. There are four possible 'defendant-subjective' states of mind that could apply to interpreting 'sexual', but such approaches would be unsatisfactory as they take insufficient account of C's experience.

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## An Analysis of the Possible Perspectives from which ‘Sexual’ could be Viewed and Defined

### Part 2: A ‘Defendant-Subjective’ Approach

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There are a variety of different possibilities for interpreting and defining the meaning of ‘sexual’. In chapter 6, a non-interpretive approach and two objective approaches were evaluated. In chapter 9, the current approach adopted in English law to the meaning of ‘sexual’, a ‘bystander-objective’ approach will be analysed. This chapter and the next will posit two ‘subjective’ approaches as possible ways in which the definition of ‘sexual’ could be interpreted. The approaches are ‘subjective’ because of the significance they accord to the participant’s state of mind at the time of the action. The first approach will be labelled ‘defendant-subjective’ because of the significance it accords to the defendant’s state of mind at the time of the action. This approach will be criticised for being insufficiently complainant-centred: it fails to take account of how the complainant perceived and experienced the act. The second approach will be labelled ‘complainant-subjective’ because of the significance it accords to the complainant’s experience of the ‘sexual’ nature of the touching. Although a ‘complainant-subjective’ approach to the meaning of ‘sexual’ bears significant dangers and problems for criminal law, it is the most complainant-centred of those analysed and is preferable because in order to appreciate the seriousness of the act’s impact and the level of D’s culpability it is necessary to refer to C’s perspective.

This chapter will analyse a ‘defendant-subjective’ approach to the meaning of ‘sexual’. Part 1 will consider the philosophical foundations of an orthodox subjectivist approach. The choice conception of criminal liability is criticised for failing to attribute liability to those who are negligent and for defining recklessness as advertent risk-taking. The character conception of criminal liability, on the other hand, is criticised for failing to

explain adequately what is meant by 'character responsible' and why it is fair to punish individuals who are 'character responsible'. Part 1 further demonstrates how a 'defendant-subjective' approach adheres to the principle of correspondence; the idea that the fault element of a crime correspond to the conduct element. This is criticised for restricting the ambit of the criminal law and for failing to acknowledge that D is able to exercise control through his behaviour: it is only given D's behaviour that the outcome is thereafter beyond his control.

There are a range of ways in which a 'defendant-subjective' approach might focus on D's attitude to the 'sexual' nature of the touching and part 2 will delineate four possible 'defendant-subjective' approaches: (1) where D knows the touching is or might be by its very nature 'sexual'; (2) where D is aware that the touching will, or might be, experienced by C as 'sexual'; (3) where D is aware that the touching will, or might be, considered by reasonable people to be 'sexual'; and (4) where D believes that the touching is 'sexual' even though C and/or reasonable people would not consider it 'sexual'.

Whilst a 'defendant-subjective' approach to the meaning of 'sexual' would adhere most closely to the core principles of criminal liability, it is insufficiently complainant-centred. In part 3 the 'defendant-subjective' approaches will be criticised for being insufficiently complainant-centred because they are concerned with culpability and thereby justice to the individual accused. Although this must be a part of any fair and just system of substantive criminal law, it fails to take sufficient account of how the complainant experienced the act. The chapter concludes that whilst a 'defendant-subjective' approach to the meaning of 'sexual' would adhere most clearly to the core principles of criminal liability, it would be the least complainant-centred of the approaches analysed as the nature of the violation as experienced by C would be overlooked.



## 7.1 ORTHODOX SUBJECTIVISM

Orthodox subjectivists argue that an individual's criminal responsibility is at root based upon their capacities and opportunities: it is only fair to punish someone who has the capacity to understand what they are doing and the fair opportunity to act otherwise than they did.<sup>1</sup> In legal terms, the capacity conception is generally interpreted as entailing the paradigm case of '*mens rea*' or legal responsibility and comprising a (defendant) subjective mental state.<sup>2</sup> There are a range of subjectivist theories with differing ideas and concepts, but they are all founded on similar propositions.<sup>3</sup> Orthodox subjectivism, as Duff has called it,<sup>4</sup> is founded on the political values of individualism, liberty and self-determination.<sup>5</sup> Maximum freedom from state interference and coercion is desirable to enable individuals to choose their life plans and to pursue their own conceptions of the good.<sup>6</sup> The law thus addresses the individual in Kantian terms, as a subject with an entitlement to respect and concern and with a commitment to treating them as ends, not means.<sup>7</sup> MacCormick suggests that without allowing independence of action to individuals they could hardly be regarded as moral persons.<sup>8</sup> The criminal law accords individuals the status of autonomous moral agents who can be fairly held accountable and punishable for the rational choices of wrongdoing that they make.<sup>9</sup>

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<sup>1</sup> H.L.A. Hart, *Punishment and Responsibility* (Clarendon Press, Oxford, 1968).

<sup>2</sup> The subjective approach was recently endorsed by the House of Lords in *B v DPP* [2000] 1 All ER 833 and *R v G* [2003] UKHL 50.

<sup>3</sup> The most familiar are the 'choice' and 'character' accounts of criminal liability as discussed below.

<sup>4</sup> R.A. Duff, *Intention, Agency and Criminal Liability* (OUP, Oxford, 1990).

<sup>5</sup> I. Dennis, 'The Critical Condition of Criminal Law' (1997) 50 *Current Legal Problems* 213.

<sup>6</sup> J. Feinberg, *Harm to Others- the Moral Limits of the Criminal Law* (OUP, Oxford, 1984) pp.206-14.

<sup>7</sup> R.M. Dworkin, *Taking Rights Seriously* (Gerald Duckworth & Co Ltd, London, 1977); D. Richards, 'Rights, Utility and Crime' (1981) 3 *Crime & Justice: An Annual Review* 274.

<sup>8</sup> D.N. MacCormick, *Legal Rights and Social Democracy* (Clarendon Press, Oxford, 1982).

<sup>9</sup> H.L.A. Hart, *Punishment and Responsibility* (OUP, Oxford, 1968); A. Ashworth, 'Belief, Intent and Criminal Liability' in J. Eekelaar & J. Bell, *Oxford Essays in Jurisprudence* (fourth series) (OUP, Oxford, 1987) ch 1.

### 7.1.1 Choice and criminal liability

There are different forms of subjectivism, the most familiar being the 'choice' and the 'character' accounts of criminal liability.<sup>10</sup> At the heart of subjectivism is the stipulation that informed voluntary choices of harmful actions justify blame and punishment.<sup>11</sup> Individuals have 'free will'<sup>12</sup> and are able to make rational self-interested choices of action in the world.<sup>13</sup> Subjectivists argue that we should reserve the stigma of the criminal sanction for the most blameworthy actors, and the most blameworthy actors are the ones who appreciate possible outcomes or circumstances and act anyway. For example, murder is a serious<sup>14</sup> criminal offence because a person has chosen to cause death or grievous bodily harm.

'Choice' theorists insist that we can only hold an agent accountable for those actions that he chose to perform. The 'choice' version of subjectivism can be defined by Ashworth's 'intent' and 'belief' principles: defendants should be held 'criminally liable for what they *intended* to do, and not according to what actually did or did not occur' and must be 'judged on the basis of what they *believed* they were doing, not on the basis of actual facts and circumstances which were not known to them at the time.'<sup>15</sup> This 'choice' conception of responsibility argues that to be liable, a person must both understand the nature of his actions, knowing the relevant circumstances and being aware of the possible consequences, and have a genuine opportunity to do otherwise than he did. A system of criminal justice that makes liability depend on choice respects individual freedom, and maximises citizens' control over their own lives. Hart suggested

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<sup>10</sup> R.A.Duff, 'Subjectivism, Objectivism and Criminal Attempts' in A. Simester and A. Smith (eds.) *Harm and Culpability* (OUP, Oxford, 1996) pp. 19-22.

<sup>11</sup> Dennis, *Op cit*, n 5.

<sup>12</sup> A. Kenny, *Freewill and Responsibility* (Routledge and Kegan Paul, Oxford, 1978).

<sup>13</sup> Over the centuries the 'free will' argument has been contradicted by the 'determinist' claim that all human behaviour is determined by causes that ultimately each individual cannot control. See A. Norrie, 'Freewill, Determinism & Criminal Justice' (1983) 3 *LS* 60.

<sup>14</sup> G. Fletcher, *Rethinking Criminal Law* (Little Brown & Co, Boston, 1978) p.352.

<sup>15</sup> A. Ashworth, 'Criminal Attempts and the Role of Resulting Harm' (1988) 19 *Rutgers LJ* 725; and 'Belief, Intent, and Criminal Liability' in J. Eekelaar & J. Bell (eds) *Oxford Essays in Jurisprudence* (OUP, Oxford, 1987).

that the conception avoids the uncertainty and unpredictability which would be engendered should individuals not be able to plan their lives so as to avoid the intervention of the criminal law.<sup>16</sup> A 'defendant-subjective' approach to criminal law necessitates offences that are themselves defined with absolute precision and clarity, so that individuals can make choices about their actions with full knowledge as to which of those actions will attract criminal liability.

#### (a) Criticism of the choice conception

One problematic area for criminal law subjectivists is liability for negligence; a failure to meet an objectively determined standard of behaviour.<sup>17</sup> Some subjectivists would argue that to have negligence as a standard of criminal liability would move away from advertence as the foundation of criminal responsibility and in doing so might show insufficient respect for the principle of autonomy.<sup>18</sup> Thus, it would weaken the element of individual culpability that justifies the condemnatory element in a criminal conviction, as distinct from an award of damages in tort. Choice theorists would exclude liability for negligence, since a negligent agent does not choose to take or create the risk to which he is negligent, arguing that the negligent act or omission is more a concern for tortious liability.<sup>19</sup>

Wrongful actions done negligently may not be as culpable as those performed intentionally or recklessly, but are nevertheless culpable to some degree and justify, in the context of the criminal law, an attribution of responsibility and some punitive response. Negligent actions are culpable because the defendant has acted in a way in which a reasonable person would not have acted. One argument in favour of

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<sup>16</sup> H.L.A Hart, *Punishment and Responsibility* (OUP, Oxford, 1968).

<sup>17</sup> J.C. Smith & B. Hogan, *Criminal Law: Cases & Materials* (Lexis Nexis, London, 2002) ch 5; *Elliot v C* (1983) 2 All ER.

<sup>18</sup> Some subjectivists might accept a case for some criminal negligence liability, while insisting that it is categorically different from liability based on choice. See M. Moore, *Placing Blame* (OUP, Oxford, 1997) ch 9.

<sup>19</sup> See, H.L.A Hart, 'Negligence, *Mens rea* and Criminal Responsibility' in *Punishment and Responsibility* (OUP, Oxford, 1968) on how the theory can be adapted to portray negligence as a genuine species of fault.

criminalising certain instances of negligence is where there are well-known risks of serious harm. This argues in favour of negligence as a standard of liability for rape and other serious sexual offences. The risk of doing a serious wrong by non-consensually penetrating or touching another is so obvious that it is right for the law to impose a duty to take care before proceeding. There is no need to prove that D adverted to the consequences or circumstances at all, so long as the court is satisfied that a reasonable person would have done so. This was the justification for liability in *Elliott v C*,<sup>20</sup> who was held to be liable for criminal damage to a shed to which she set fire in spite of evidence that she did not have the capacity to appreciate the risk she was running.<sup>21</sup> In section 3.1, I will argue that a 'defendant-subjective' approach is insufficiently complainant-centred and that negligence is an appropriate basis for liability. Accordingly, D should be liable when he *ought* to have known that the touching is or will be experienced by C as 'sexual'.

Another controversy with the 'belief' and 'intent' principles is that they require recklessness to be defined as conscious risk-taking: I choose to take or to create only those risks that I realise I am taking or creating. Duff argues, however, that an agent's criminal recklessness can be displayed in his very failure to notice the risk that he is taking or creating.<sup>22</sup> Failure to consider risk may be symptomatic of an attitude of what Duff calls 'practical indifference' to legal norms.<sup>23</sup> An attitude of 'practical indifference' is not as blameworthy as a deliberate decision to do harm, but it may betray a qualitatively different but also culpable contempt for the values protected by the criminal law sufficient to justify punishment.<sup>24</sup> Practical indifference extends to include cases in which D fails to advert to certain aspects of the situation: 'what I notice or attend to reflects what I care about and my very failure to notice something can display

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<sup>20</sup> [1983] 2 All ER 1005.

<sup>21</sup> There was extensive criticism of the decision and it was overruled by *R v G* [2003] UKHL 50. See chapter 10, section 3.1.

<sup>22</sup> R.A. Duff, *Intention, Agency and Criminal Liability* (Blackwell, Oxford, 1990) ch.7.

<sup>23</sup> *Ibid.*

<sup>24</sup> *Ibid.*

my utter indifference to it'.<sup>25</sup> A defendant who is practically indifferent to the 'sexual' circumstance of an action is therefore blameworthy, but not as culpable as one who does avert to it. In choosing to touch another person, the defendant ought to consider the complainant's interests. A man who is practically indifferent as to whether pinching a woman's buttock might be 'sexual' is not as culpable as one who is aware of the 'sexual' nature of the action, but is still culpable to some degree. Both defendants' demonstrate disregard for the sexual and physical integrity of the complainant.

### 7.1.2 The correspondence principle

The correspondence principle<sup>26</sup> concerns the relationship between *actus reus* and *mens rea*, requiring intention or recklessness as to all the elements in the *actus reus*. Orthodox subjectivists insist that the fault element of a crime correspond to the conduct element. The intent and the act must both concur to constitute the crime, for '[p]resumably, no element is included in the definition of an *actus reus* unless it contributes to the heinousness of the offence.'<sup>27</sup> This ensures that the defendant is punished only for causing a harm or circumstance that he chose to risk or to bring about. The correspondence principle has been described as a 'limited ethical principle',<sup>28</sup> one that recognises that criminal liability should depend not only upon a person's acts but also upon his moral guilt with respect to those acts. Criminal liability should be a matter of culpability and not of luck. As Ashworth puts it:

'Not only should it be established that the defendant had the required fault, in terms of *mens rea* or belief; it should also be established that the defendant's intention, knowledge or recklessness related to the proscribed harm. Thus, if the conduct element

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<sup>25</sup> *Ibid*, at 162-3.

<sup>26</sup> The Law Commission Report, *Legislating the Criminal Code: Involuntary Manslaughter* (Law Com No. 237, 1996) identifies three principles as inherent in a (defendant) subjective basis for liability. The first of these is the '*mens rea* principle', which imposes liability only for those outcomes which were intended or knowingly risked by the alleged wrongdoer. This ensures that 'the act is attributable to the defendant'. The second principle, the 'belief principle', judges a defendant according only to what she believed she was doing or risking. The third principle is the 'principle of correspondence'.

<sup>27</sup> J. Smith & B. Hogan, *Criminal Law* (Butterworths, London, 1999) p.72.

<sup>28</sup> A.P. Simester & G.R. Sullivan, *Criminal Law: Theory and Doctrine* (Hart Publishing, Oxford, 2000) p.187.

of a crime is 'causing serious injury', the fault element ought to be 'intention or recklessness as to causing serious injury'.<sup>29</sup>

Of the aggravated assaults only s.18 of the OAPA 1861 (causing grievous bodily harm with intent to cause grievous bodily harm) complies with the correspondence principle. In respect of an assault occasioning actual bodily harm<sup>30</sup> the only *mens rea* requirement is intent or recklessness that C will be unlawfully touched or caused to apprehend immediate and unlawful personal violence. There is no need to show that the defendant foresaw any actual bodily harm.<sup>31</sup> Similarly, under s.20 OAPA 1861 there is no need to intend or foresee grievous bodily harm or wounding. Even the offence of murder infringes the correspondence principle: intention to do grievous bodily harm is sufficient.<sup>32</sup>

If the conduct element of sexual assault requires the touching to be 'sexual', in order to satisfy the correspondence principle the fault element ought to be the intention to touch another person and an appreciation of the 'sexual' nature of touching. A 'defendant-subjective' approach to 'sexual' that adhered to the correspondence principle would therefore require the courts to ascertain whether the defendant appreciated the 'sexual' nature of the touching. For choice theorists that approach is fairest to the defendant, who may or may not be aware that some actions would be perceived by the complainant or a reasonable person as 'sexual' in nature.

The stigma attached to being labelled a sexual offender and the implications of being on the sex offender's register<sup>33</sup> provide support for the view that a defendant should not be guilty of sexual assault unless his *mens rea* is the intention to touch and he appreciates that the touching is of a 'sexual' nature. It is the 'sexual' element of the

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<sup>29</sup> A. Ashworth, *Principles of Criminal Law* 4<sup>th</sup> edn (OUP, Oxford, 2003) p.88.

<sup>30</sup> OAPA 1861, s.47.

<sup>31</sup> *DPP v Parmenter* [1992] 1 AC 699.

<sup>32</sup> *Cunningham* [1982] AC 566.

<sup>33</sup> Under the Sex Offenders Act 1997, as amended by the Sexual Offences Act 2003, all convicted sex offenders must register with the police within three days of their conviction or release from prison.

offence that distinguishes it from common assault and determines whether the defendant will be placed on the sex offender's register. Suppose D is charged with sexual assault, having grabbed the buttocks of a waitress. He claims that he genuinely believed this kind of conduct is not 'sexual' as between a customer and a waitress. A strict application of the correspondence principle would make his conduct lawful and infer that he should not be labelled a sexual offender. A more flexible approach to the correspondence principle might suggest that if the defendant intends to touch the waitress and is aware that his action might be perceived by C and/or reasonable people to be 'sexual' he should be responsible.

#### (a) Criticism of the correspondence principle

Gardner suggests that adherence to the correspondence principle is part of an overarching subjectivist policy of using what might broadly be called *mens rea* issues to restrict the ambit of the criminal law in the interests of liberal humanitarianism (the idea that in a just society free will and freedom are the ultimate goals).<sup>34</sup> The wrongdoing must be 'knowing' and the knowledge must extend to all aspects of the *actus reus*. He criticises this for leading to the over-simplification of complex moral issues, such as the relationship between luck and responsibility.<sup>35</sup> Luck it may be thought is involuntary and culpability should be dependent on control rather than luck. However, D is able to exercise control through his behaviour. It is only given D's behaviour that the outcome is thereafter beyond his control. It is D's dangerous driving or pulling the trigger that brings the uncontrolled factors into play and makes the luck relevant.

Horder argues that the law is, in some circumstances, justified in departing from the correspondence principle. Horder argues that defendants who embark on conduct

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<sup>34</sup> J. Gardner, 'On the General Part of the Criminal Law' in A. Duff (ed.), *Philosophy and the Criminal Law* (Cambridge University Press, Cambridge, 1998).

<sup>35</sup> *Ibid.*

which carries a risk that someone may be harmed should be liable for the harm caused, even where that harm is greater than the harm intended or foreseen, because they 'deserve' their bad luck.<sup>36</sup> Horder's main justification for departing from the correspondence principle is that where D engages in violent conduct, luck legitimately plays a role in extending liability to cover harm of the same form but more serious than that which foreseen or foreseeable. In engaging in violence, the defendant changes his normative position towards C, and in doing so, accepts the risks involved. Applying this argument to sexual assault a defendant who non-consensually touches another person should be liable if C and/or reasonable people would consider this action 'sexual' because D has altered his normative position by engaging in unlawful battery. The most significant element in D's conduct is his decision to touch another without consent and there is insufficient moral weight in the plea, 'I only intended to touch C's breasts as a joke'. D displays indifference to the risk of invading C's sexual autonomy and he should be criminally liable even if no consequences result from his intrusion.

The correspondence principle appears to apply less easily to context-dependent terms such as 'sexual'. The principle is clearest when the prohibited conduct is a tangible harm such as death or grievous bodily harm; it is easy to argue that the conduct element is causing death and therefore that the person must have intended to cause or been reckless about causing death. When one is considering context-dependent terms such as 'sexual' or 'damage'<sup>37</sup> the issues are more complicated. In relation to sexual assault, the harm is not tangible and it appears that the correspondence principle applies less easily to such terms. In response, advocates of the correspondence principle might simply argue that D has to know, or be aware of the possibility, that the touching is or might be experienced as 'sexual' by C or viewed as 'sexual' by onlookers. They would not necessarily argue that D need to intend the touching to be 'sexual'.

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<sup>36</sup> J. Horder, 'A Critique of the Correspondence Principle' [1995] *Crim L R* 759.

<sup>37</sup> See I. Edwards, 'Banksy's Graffiti: A not so simple case of criminal damage?' (2009) 73 *JoCL* 345.



A further criticism of the correspondence principle is its lack of distinction between intention and foresight, a distinction that is crucial to fair labelling issues. The principle of fair labelling<sup>38</sup> requires that there be a close match between the labels or name attached to a crime, such as 'murder' or 'manslaughter' and the nature and gravity of what the defendant has done. The correspondence principle insists that one cannot be fairly labelled as a 'murderer' or 'manslaughterer' unless one's *mens rea* related to the prohibited consequence itself, the unlawful killing.<sup>39</sup> As is well known, in English law both murder and constructive manslaughter fall short of this requirement: a person may be convicted of murder if he intended to cause grievous bodily harm<sup>40</sup> and in manslaughter if he intends to commit an unlawful act.<sup>41</sup>

### 7.1.3 Character and criminal liability

'Character' theorists by contrast, hold that we should ground criminal liability in the character traits manifested in the defendant's conduct. Actions for which we hold a person fully responsible are those in which his 'usual character' is centrally expressed. The finding of a mental element such as intention or recklessness on the character model provides an important piece of evidence from which the existence of 'character responsibility' may be inferred. Suppose D touches C's vagina. If he appreciates the 'sexual' nature of the touching and acts without lawful excuse,<sup>42</sup> he merits conviction. The disposition to touch 'sexually' and non-consensually is an undesirable character trait that merits condemnation and punishment. Sexual assault constitutes the infringement of sexual and bodily autonomy, gaining non-consensually that which should only be shared consensually. If, however, D acted without the requisite fault element or with some suitable defence, then he merits acquittal: for no inference to any undesirable character trait is warranted.

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<sup>38</sup> See chapter 4, section 2.2.

<sup>39</sup> For a defence of the correspondence principle see, B. Mitchell, 'In Defence of a Principle of Correspondence' [1999] *Crim L R* 195.

<sup>40</sup> *Cunningham* [1982] AC 566.

<sup>41</sup> *R v Creamer* [1966] 1 QB 72.

<sup>42</sup> E.g. that he is a medical practitioner.

Duff describes character traits as ‘relatively stable patterns of thought, emotion and action’ that embody a person’s ‘settled values, concerns and attitudes’.<sup>43</sup> Why then should the law be concerned with character? First, the law demands of us obedience to its rules and respect for the values it protects, demanding certain character traits. Secondly, the justification for punishment is that there is something about the offender that requires blame, and this must be an underlying character trait revealed by his action. Thirdly, what makes my actions mine, as their responsible agent, is their relationship to my character. A character conception of liability can be related to a communitarian account of the proper nature and purposes of the criminal law: one that portrays the law, being the law of a moral community, as having a proper interest in the moral character of its citizens.<sup>44</sup> Instead of inquiring directly into a state of mind accompanying the act, the character conception asks a wider set of questions about the defendant himself and the extent to which the *actus reus* was a truly representative example of his behaviour. Character theorists are only interested in those character traits that are defective or undesirable because they are liable to lead to familiar types of criminal conduct.

The most obvious merit of the character conception is that it serves to highlight the importantly practical orientation of the criminal law as a form of social control. It seeks to reduce by means of prohibition, conviction and punishment, certain unwanted forms of behaviour, such as sexual offending, as well as to mitigate the social effects of unprevented crime and to uphold, perhaps symbolically, certain framework social values. A further strength relates to the notion that all citizens can legitimately demand of a criminal justice system that it respond punitively only to actions which are in a real sense their own and which manifest a real hostility to or rejection of the norms of the criminal law.<sup>45</sup> Another appeal of the character conception seems to be its relevance to

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<sup>43</sup> Duff, *op cit*, n 22.

<sup>44</sup> *Ibid.*

<sup>45</sup> N. Lacey, *State Punishment* (Routledge, London, 1988).

both backward and forward-looking aspects of the criminal process. The character conception fits well with the criminal law's purposive functions such as its contribution to social protection both in terms of its 'taking us as we are' and in that it is centrally concerned with the extent to which the behaviour manifests settled attitudes and dispositions, thus linking in turn with judgments of the likelihood of repetition of the type of behaviour. Lacey argues that defendants should not be held liable for 'out of character' actions in which their 'settled dispositions' are not 'centrally expressed'.<sup>46</sup> The actions for which a person is convicted and punished must be 'his'; they must be suitably related to attitudes or motives which are aspects of his continuing identity as a person.

#### (a) Criticism of the character conception

The character conception of responsibility is formed on the basis that people have a 'usual character' for which they are 'character responsible'. These phrases are not defined in theory and are sufficiently vague as to prove problematic. A character-based justification for liability appears to undermine the rule of law: a person should be punished because they have a disposition that is not liked by the majority of society. It eschews equality before the law: two people might be dealt with differently when they have committed similar acts if those acts are deemed out of character for one, but well within character for the other. The most fundamental objection to this theory is that it does not explain what is meant by 'character responsible' and why it is fair to punish individuals who are 'character responsible'. This conception implies that it is legitimate to make general assessments of the worth of offenders. The theory moves beyond a conception of responsibility or attribution towards a more normative judgment of personality based on an isolated incident or set of incidents in a person's life.<sup>47</sup> Autonomy requires that the criminal process treat seriously the individuality and sense of identity of each citizen by responding punitively only to actions which are genuinely

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<sup>46</sup> *Ibid.*

<sup>47</sup> *Ibid.*

expressive of the agent's relevant disposition: which the agent can truly identify and call her own.

One obvious drawback of both the 'choice' and 'character' conceptions of responsibility is that they do not take account of the person who lacks capacity. Bayles argues that mentally disordered persons should be liable to conviction for criminal offences, for their conduct is 'good evidence of an undesirable character trait justifying a social response'.<sup>48</sup> Lacey suggests that actions performed by a person suffering from a long-term mental illness, whilst they call for a different reactive response in terms of traditional concepts of blameworthiness, still require some controlling intervention on the part of the state.<sup>49</sup> Character theorists argue that mental disorder does not involve a kind of 'defective character trait' that merits criminal liability. It is a defining feature of some mental disorders that they involve non-rational patterns of thought, feeling and motivation. This means that we cannot engage with the mentally disordered person in a discussion of his conduct or what motivated it.

## 7.2 POSSIBLE 'DEFENDANT-SUBJECTIVE' STATES OF MIND

There are two ways in a defendant's attitude towards a sexual touching could be relevant. First, his knowledge of the fact that he is touching another: does D intend to touch another? This element of the *mens rea* will be analysed in chapter 10. Secondly, his knowledge of the 'sexual' nature of the touching: does D appreciate that the touching is or may be 'sexual'? This second element emphasizes the defendant's attitude towards the 'sexual' circumstance. In general terms the requirement of knowledge is regarded by lawmakers and academics as having the same intensity as that of intention, except that knowledge relates to *circumstances* forming part of the definition of the crime and intention relates to the *consequences* specified in the

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<sup>48</sup> M.D. Bayles, 'Character, Purpose and Criminal Responsibility' (1982) 1 *Law and Philosophy* 5.

<sup>49</sup> Lacey, *op cit*, n 45.

definition of the crime.<sup>50</sup> The knowledge relates to a fact or circumstance: although it will usually be relevant to D's reason for acting, it may be separated analytically from the result that D intends. For example, D may be aware that his slapping of his daughter's bottom might be perceived by her and/or reasonable people to constitute a sexual touching and yet his motive is disciplinary and the result that he intends to bring about is 'non-sexual'.

Subjectivism is a theory that argues that criminal culpability should be confined to the person who acts 'knowingly' (intentionally or subjectively recklessly), excluding the person who 'gives no thought to whether there is a risk or not'.<sup>51</sup> The 'defendant-subjective' approach can be labelled a context-dependent approach as it requires reference to the defendant's subjective experience of the 'sexual' nature of the touching, in contrast to a context-independent approach, which is devoid of any reference to the participants' experiences (as was analysed in chapter 6). The jury or magistrates would be required to consider the defendant's internal account of the 'sexual' nature of the touching and this can be contrasted with objective approaches, external approaches,<sup>52</sup> which focus on what a 'reasonable person' would believe or expect.

A 'defendant-subjective' approach is defendant-centred: a defendant would only satisfy this element of the *actus reus* if he has knowledge of or appreciates the 'sexual' nature of the touching. It is worth reiterating here that I am analysing an element of the conduct element within the offence (*actus reus*), rather than a fault element (*mens rea*). However the difference between these two elements of an offence is somewhat blurred when a context-dependent term such as 'sexual' is used, which could be interpreted in many different ways. A 'defendant-subjective' approach accordingly imports an

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<sup>50</sup> A. Ashworth, *Principles of Criminal Law* 6<sup>th</sup> edn (Oxford University Press, Oxford, 2009) p.182. Emphasis added.

<sup>51</sup> J.C. Smith & B. Hogan, *Criminal Law* 8<sup>th</sup> edn (Butterworths, London, 1996) p.71.

<sup>52</sup> Fletcher *op cit*, n 14.

additional fault element into the offence definition. Under this approach, a defendant who does not appreciate the 'sexual' nature of his action should not satisfy this element of the *actus reus*.

A 'defendant-subjective' approach to the meaning of 'sexual' would require the jury or magistrates to ascertain whether the defendant appreciated the 'sexual' nature of the touching. If an offence requires knowledge of a given circumstance, a person who is mistaken about that circumstance should be acquitted for lack of knowledge. A defendant may intend to touch C on the breasts, but claim that his motive was not 'sexual'. However, what is important in establishing this element of the *actus reus* would be whether the defendant recognised that touching someone on the breasts is by its nature 'sexual', would be experienced by C as 'sexual' or would be viewed by onlookers as 'sexual'. A 'defendant-subjective' approach can therefore be further subdivided. Although each of the following sub-categories is 'defendant-subjective' in terms of being dependent on D's awareness or belief there are subtle differences between them.

*(a) D recognises that the touching is, or might be by its very nature 'sexual'*

The first possible 'defendant-subjective' state of mind is where D is aware that the contact is, or might be, by its very nature 'sexual'. If D touches C's vagina non-consensually and appreciates the 'sexual' nature of the contact, then he would satisfy this element of the *actus reus*. His action is blameworthy because he has chosen the circumstance, in the sense of having knowledge of the 'sexual' nature of the touching. D is sufficiently aware of what he is doing and of the possible invasion of sexual autonomy and privacy and can be fairly said to have chosen the behaviour and its consequences. If D recognises that touching C's vagina is 'sexual' then he is more blameworthy than if he has no awareness that the action might be by its very nature 'sexual'. Where D believes that the touching *might* be 'sexual' he can be described as having 'reckless knowledge', an alternative form of fault to knowledge, where D knows that there is a risk that a

prohibited circumstance exists.<sup>53</sup> If D believes that there is a risk that the touching might be by its very nature 'sexual' and goes on to take that risk then under a 'defendant-subjectivist' approach, he would satisfy this element of the offence.

One problem with this category is that individuals tend not to label activities as 'sexual'. This raises an issue about the process of identifying and recognising something as 'sexual'. What does it mean for someone to recognise a touching as 'by its very nature sexual'? Is the question whether D recognises at the particular time of the touching that it is 'sexual'? Or that when put in the witness stand and asked about his perceptions at the time of the touching, he recognises his thought processes at the time as identifying the touching as 'sexual'? All reactions involve culturally and socially conditioned responses by individuals and it is very difficult to speak in terms of people recognising touchings as being 'inherently sexual'. This first 'defendant-subjective' approach is concerned with behaviour that is discernible to D as 'sexual' at the time it occurs, which might include situations where D experiences a sexual response.

An interesting question is how those across the 'sexuality spectrum' and from all parts of our pluralistic society might be treated under this approach to defining 'sexual' and whether such treatment would be fair? There will be defendants who have no concept of 'sexual' acts in the way we do in our sexualised, Western society. Consider D, an indigenous tribesman, who moves to England from a remote part of South America. He touches the breasts of a young woman standing next to him at a bus stop. He has no concept of sexuality other than for procreative purposes. Under this first approach, he would not be blameworthy because he has no awareness that the action might be by its very nature 'sexual'.

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<sup>53</sup> Ashworth, *op cit*, n 50 at p.184.

*(b) D is aware that the touching will, or might be, experienced by C as 'sexual'*

The second possible 'defendant-subjective' state of mind is where D is aware that the contact will, or might be, experienced by C as 'sexual'. Consider a prison officer who strips a violent prisoner of all his clothes and makes him stand naked in the cold.<sup>54</sup> Although the prison officer might not intend that his act assume a sexual character, acting purely for disciplinary purposes, the issue in this second category is whether D is aware that the touching will, or might be, experienced by C as 'sexual'. If D were aware that C will, or might, experience the action as 'sexual', he would satisfy this aspect of the *actus reus*. This second possible state of mind might also apply where D knows that C is exceptionally sensitive to being touched and perceives any touching as a sexual violation, having been sexually abused in her past. It might further apply if D knows that C has certain religious or cultural beliefs about sexuality. Suppose D shakes a woman's hand in a dominating way, with his hand on top of hers. Some religious groups might experience such conduct as 'sexual' and if D knows that C will or might experience the touching as 'sexual' then he is more blameworthy than if he has no awareness that C might consider it 'sexual'. This second 'defendant-subjective' approach is the most blameworthy of the four identified as D who is aware that C will or might experience the touching as 'sexual', has knowledge of the 'sexual' circumstance and C's affective response to the action and chooses to act regardless. In contrast to the first category, where D is aware that the touching is by its nature 'sexual' and where C may or may not perceive the touching to be 'sexual',<sup>55</sup> D is more culpable because he is aware of the possible affective response of this individual complainant.

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<sup>54</sup> I. Bantekas, 'Can touching always be sexual when there is no sexual intent?' (2008) 72 *JoCL* 251.

<sup>55</sup> C may regard the conduct as 'funny' or a 'joke'. In other circumstances C might not even react to the conduct at all.



*(c) D is aware that the touching will, or might be, considered by reasonable people to be 'sexual'*

The third possible 'defendant-subjective' state of mind is where D is aware that reasonable people may judge the touching to be 'sexual'. Consider D, who does not think that patting a woman on the bottom is in anyway 'sexual', but is aware that the touching will, or might be, considered by reasonable people to be 'sexual'. His state of mind as to the 'sexual' nature of the touching is therefore culpable. What of D, who does not consider that touching and licking C's earlobe is 'sexual' and is unable to contemplate that reasonable people would consider such conduct 'sexual'? Under this third possible 'defendant-subjective' approach, D would not satisfy this element of the *actus reus*. If 'D could not care less' whether such a touching might be considered by reasonable people to be 'sexual' he would not satisfy this element of the *actus reus*, highlighting the potential for injustice to complainants. This third possible 'defendant-subjective' state of mind is less blameworthy than the second, because although D is aware that the touching will, or might be, considered by reasonable people to be 'sexual' he is unaware of the individual complainant's affective response.

*(d) D believes that the touching is 'sexual', even though C and/or reasonable people would not consider it 'sexual'*

A fourth possible 'defendant-subjective' state of mind is where D is aware that the contact is, for him 'sexual', even though it is not by its nature 'sexual', it is not considered by C as 'sexual' and would not be considered by reasonable people to be 'sexual'. This might cover the situation where D's secret motive is sexual gratification. Consider D, an armpit fetishist, who touches and smells C's armpit. D's perception that the touching is inherently 'sexual' based on his experiencing sexual arousal might be at odds with that of C and/or reasonable people. Suppose D is a shoe-shop assistant who obtains sexual gratification when removing women's shoes from their feet or a hairdresser who experiences sexual arousal when cutting or washing his client's hair. The action is for him 'sexual', even though there are no obvious sexual circumstances, it

is not considered by C as 'sexual'<sup>56</sup> and would not be considered by reasonable people to be 'sexual'. This state of mind is the least blameworthy of the four identified as C is unaware of D's secret motive. The risk of an invasion of C's sexual autonomy is minimal, unless C becomes aware of D's motive at the time of the action, or a later date.

### 7.3 INSUFFICIENTLY COMPLAINANT-CENTRED

Whilst a 'defendant-subjective' approach to the meaning of 'sexual' would adhere most clearly to the core principles of criminal liability, it can be criticised for being insufficiently complainant-centred. 'Defendant-subjective' approaches are in themselves insufficiently complainant-centred because they are concerned with culpability and thereby justice to the individual accused. Rupert Cross lamented the fact that some criminal lawyers were 'in total bondage to the subjectivist bug'.<sup>57</sup> He suggested that there was an unwillingness to accept that objective standards of liability might in certain circumstances have a proper place. There is evidence of this in Smith and Hogan's textbook on *Criminal Law*,<sup>58</sup> which Wells suggested subscribed almost 'evangelically' to the subjectivist approach.<sup>59</sup> Fletcher argues that guilt, fault and culpability are normative judgments based on an evaluation of the actor's conduct and state of mind and that an alternative method of assessing culpability would combine both objective and subjective elements.<sup>60</sup>

One problem with a 'defendant-subjective' approach to the meaning of 'sexual' is that 'sexual' has many different meanings, so there is a lack of clarity and certainty in the definition. This uncertainty may lead to a wide and strained interpretation of the law in ways not envisaged by the legislature and presents an obvious threat to the principle of legality. An inherent problem with all 'subjective' tests is that they are difficult to prove

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<sup>56</sup> In situations where C is unaware of D's secret fetish, there would in effect be no complaint and no case to answer.

<sup>57</sup> R. Cross, 'Centenary Reflections on Prince's Case' (1975) 91 *LQR* 540.

<sup>58</sup> J. Smith & B. Hogan, *Criminal Law* 4<sup>th</sup> edn (Butterworths, London, 1978).

<sup>59</sup> C. Wells, 'Swatting the Subjectivist Bug' [1982] *Crim L R* 209.

<sup>60</sup> Fletcher, *op cit*, n 14 at 509-10.

as the jury or magistrates have to get inside the defendant's head. This is simply an evidential issue but may lead to unfairness by discouraging prosecution of culpable defendants because of difficulty in assessing the realistic prospect of conviction. However, it does not preclude successful prosecutions as the decision-maker can infer intention or knowledge from the circumstances and evidence. This difficulty of proof provides an argument for adopting an objective approach to liability (as was analysed in chapter 6): it is easier to convict if the jury asks what a reasonable person would have thought, rather than what D actually thought.<sup>61</sup>

A 'defendant-subjective' approach to the meaning of 'sexual' is insufficiently complainant-centred because it is only concerned with a defendant's attitudes and beliefs about the touching and not the actual or possible experiences of C. The criminal law has to reconcile the two competing priorities of social protection and individual liberty. Under a 'defendant-subjective' approach, primacy is given to the defendant's autonomy and liability is assessed on the facts as he or she believed them to be. This very individualistic approach to the meaning of 'sexual' fails to take any account of the experience of the complainant. In doing so, it prioritises justice to the individual accused (in only being responsible for those acts which he chooses to bring about) over social protection, (C's right not to be touched non-consensually). An examination of the defendant's knowledge of the 'sexual' nature of the act might deflect the attention of the court from the degradation, fear or harm inflicted on the complainant. A defendant should be held criminally responsible for those beliefs that manifest insufficient concern for others' interests.

An orthodox 'defendant-subjective' test of responsibility tends to the minimum criminalization of individuals.<sup>62</sup> It changes the offence from what Fletcher has called the

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<sup>61</sup> The Sexual Offences (Amendment) Act 1976, s.1(2) tried to deal with this issue, asking the jury to consider the reasonableness of D's claim when deciding whether he honestly believed C was consenting.

<sup>62</sup> Dennis, *op cit*, n 5.

pattern of manifest criminality,<sup>63</sup> whereby the offence is founded on some objectively wrongful act, to the pattern of subjective criminality, whereby the offence is essentially founded on the defendant's culpable state of mind. Subjective tests heighten the protection of individual autonomy, but they typically make no concession to the principal of welfare and the concomitant notion of duties to take care and to avoid harming the interests of fellow citizens. The orientation to the protection of individual freedom generally leads to a preference for individual over collective welfare, so that it is only the more obvious setbacks to individual interests that count uncontroversially as harms.<sup>64</sup> In respect of sexual assault, a 'defendant-subjective' approach to 'sexual' appears to ensure that only actions that are objectively 'sexual' would satisfy this element of the *actus reus*. Thus, in relation to the four possible 'defendant-subjective' categories identified above, it will be easier for the prosecution to prove category 3, that 'D is aware that the touching will, or might be, considered by reasonable people to be 'sexual''. It would prove challenging for the prosecution to prove D's awareness of the 'sexual' nature of the act, unless the action is at least categorisable by reasonable people as 'sexual' regardless of D's awareness.

Fletcher has argued that the necessity for informed rationality (that D had the capacity and fair opportunity to act otherwise) at the time of the act may give a misleading and unduly favourable picture of the defendant's culpability.<sup>65</sup> As was noted above, Duff argues that responsibility should be founded on a person's attitude to risk.<sup>66</sup> 'Practical indifference' is not as blameworthy as a deliberate decision to do harm, but it may betray a qualitatively different but also culpable contempt for the values protected by the criminal law sufficient to justify punishment. A defendant should be liable for sexual assault where he ought to have known about the 'sexual' nature of the touching or 'could not care less' about the complainant's experience of the action.

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<sup>63</sup> Fletcher, *op cit*, n 14 at p.115-22.

<sup>64</sup> Feinberg, *op cit*, n 6.

<sup>65</sup> *Ibid.*

<sup>66</sup> Duff, *op cit*, n 10, ch 7.

In forcing the jury or magistrates to consider exclusively the defendant's mental state at the time of the touching, a 'defendant-subjective' approach does not refer to the context in which the action occurred, the nature of the activity or the relationship between the parties. It is plausible that the jury or magistrates would consider these issues, having heard the facts of the case, but these would not be factors that they have to take into account in determining the 'sexual' nature of the touching. A 'defendant-subjective' approach would place too much emphasis on safeguarding the defendant and not enough on protecting the complainant in circumstances where D should be aware of the possible violation of sexual autonomy. A defendant should be liable not only when they appreciated the 'sexual' nature of the touching, but also where they ought to have appreciated the 'sexual' nature of the action. Thus, D should be liable for sexual assault if he is capable of perceiving the 'sexual' nature of the act, had he directed his mind to it. This can be described as constructive knowledge, which is a species of negligence and is indicative of a failure to live up to a certain standard of social behaviour. If the defendant's conduct is objectively 'sexual' then it manifests a failing on the part of the defendant, to respect C's sexual and bodily integrity, for which he may properly be blamed. Sexual assault is a violation of sexual autonomy regardless of the state of mind of the defendant, thus it is essential to provide protection against both deliberate and inadvertent sexual touching.

A defendant who appreciates the 'sexual' nature of a touching is more culpable than another person who fails to think about or recognise the 'sexual' nature of the action. But, negligence is still an appropriate standard of criminal liability for sexual touching because there are well known risks of invading sexual autonomy, the risk is obvious to one who puts his mind to it and the defendant has the capacity to take the required precautions. In failing to recognise the risk of invading sexual autonomy, it shows that D is insufficiently motivated by the interests of the individual who might suffer from his lack of care and diligence. One argument in favour of criminalising instances of negligent sexual touching is that crimes of negligence may exert a general deterrent effect, by

alerting people to the need to take care in certain situations. One of the primary aims of the criminal law is the protection of fundamental social interests. If the object of the law on sexual offences is to prevent the occurrence of invasions of sexual autonomy, it would seem appropriate to include negligent actions. The invasion of sexual autonomy would be the trigger for state action, aimed at minimizing the risk of the harm being repeated.

One might respond to the criticism that complainants are overlooked in a 'defendant-subjective' approach by drawing attention to the opportunity for a complainant to institute legal proceedings under civil law. However, sexual assault is not just an individual injury; it is also a social injury that occurs on a personal level. Marshall and Duff suggest that it is not sufficient to say that crimes against individuals are penalised because they threaten the social order, because that diminishes the significance of the victimisation of the individual that is clearly central to the offence.<sup>67</sup> Equally, they argue, it is not sufficient to rely merely on the State's duty to ensure protection of these rights of individuals, because that could be achieved by civil law methods or by providing public assistance for private prosecutions. Their argument is that crimes are public wrongs because even those that consist of attacks on the body or property of an individual (such as rape, sexual assault and theft) might be seen as 'wrongs against the community to which the individual belongs'.<sup>68</sup> These wrongs are shared by other members of the community with which the victim is identified and by which her identity is partly constituted.<sup>69</sup> The right to sexual autonomy, the right at the centre of the law of sexual assault is justified by the public good, which is nurtured in its existence and recognition.<sup>70</sup> Sexual assault constitutes a violation of public order that necessitates a

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<sup>67</sup> S.E. Marshall & R.A. Duff, 'Criminalization and Sharing Wrongs' (1998) 11 *Canadian J of Law and Jurisprudence* 7.

<sup>68</sup> *Ibid.*

<sup>69</sup> *Ibid.*

<sup>70</sup> See J. Gardner & S. Shute, 'The Wrongness of Rape' in J. Horder (eds) *Oxford Essays in Jurisprudence* (4<sup>th</sup> series) (OUP, Oxford, 2000).

state response. Thus, it should be for the state not the individual complainant to bring a case against her attacker, even for those sexual assaults at the fringes of liability.<sup>71</sup>

#### 7.4 CONCLUSION

Orthodox subjectivism is concerned with culpability and justice to the individual accused. Whilst a 'defendant-subjective' approach, which is traditionally applied in mainstream English criminal law, might be suitable for certain areas of criminal liability, it would not be a desirable approach to interpreting the meaning of 'sexual'. There are four possible 'defendant-subjective' states of mind that could apply to interpreting 'sexual', but such approaches would be unsatisfactory, as they would take insufficient account of C's experience. 'Defendant-subjective' approaches are very individual approaches, rooted in the defendant's state of mind. If defendants could raise as denials of *actus reus* their own 'defendant-subjective' evaluation of the 'sexual' nature of their conduct, the integrity of the sexual wrong would be entirely undermined: the nature of the violation as experienced by C would be overlooked. The question of wrongdoing should not be assessed by a 'defendant-subjective' standard, which fails to take account of the context in which the action occurred and the complainant's perception and experience of the action. In the context of sexual offences, negligence is an appropriate basis for liability: D should be liable when he ought to have known that the touching is, or will be experienced by C, as 'sexual'. A person who is practically indifferent as to whether a particular touching might be experienced as 'sexual' demonstrates disregard for the sexual and physical integrity of C. In the context of sexual assault, the appropriate focus for the law should be social protection and a 'defendant-subjective' approach would undermine that priority.

Chapter 8 will continue the theme of evaluating the possible legal perspectives from which 'sexual' could be viewed and defined, analysing a 'complainant-subjective'

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<sup>71</sup> These arguments will be developed further in chapter 12, section 2.1 where I will highlight the public dimension of sexual assault.

approach. I will argue that a 'complainant-subjective' test is both complainant- and experience-centred and is therefore the most preferable approach.



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## **An Analysis of the Possible Perspectives from which ‘Sexual’ could be Viewed and Defined**

### **Part 3: A ‘Complainant-Subjective’ Approach**

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In light of the criticisms of a ‘defendant-subjective’ approach in chapter 7, this chapter will analyse a ‘complainant-subjective’ approach to the meaning of ‘sexual’. A ‘complainant-subjective’ approach, which focuses on the complainant’s affective response to the touching, is not a common part of orthodox criminal liability, being more a focus of tort liability.<sup>1</sup> The question that this chapter addresses is whether a ‘complainant-subjective’ approach to the meaning of ‘sexual’ is fair, appropriate and workable? I will argue that the complainant’s perspective must be an important and relevant factor in assessing the ‘sexual’ nature of conduct. Although a ‘complainant-subjective’ approach to the meaning of ‘sexual’ bears significant dangers and problems for criminal justice, it is the most complainant-centred of those analysed in this thesis and is preferable because it requires the jury or magistrates to show solidarity with the person who has been harmed or wronged.

Part 1 discusses how the crime victim has, until recently, been the ‘forgotten player’ in the criminal process. Traditionally the idea of a crime is that it is something that necessitates the intervention of the State and the tensions in the criminal process were presented by academics diametrically as those between the defendant and the State. Recent political and academic interest in the crime victim has attempted to challenge orthodox conceptions of criminal justice, positing the crime victim as a stakeholder with individual rights and needs. The emergence of restorative justice is evidence of a shift in criminal justice policy towards acknowledging that complainants and victims have needs

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<sup>1</sup> A. Ashworth, ‘Punishment and Compensation: Victims, Offenders and the State’ [1986] 6 *OJLS* 86.

and interests and that the criminal justice system could and should acknowledge and respond to them. There are a range of approaches to liability that build in 'complainant-subjectivity', the differences arising when we consider the relationship between C's experience and D's fault. Part 1 will delineate four policy options as to how a 'complainant-subjective' offence of sexual assault might be implemented. Each choice is 'complainant-subjective' in the sense of needing C to experience the act as 'sexual' before D can be liable, but with each option the weight given to C's experience lessens. I will demarcate my preferred policy option, which requires only that the touching be intentional and that C experienced the act as 'sexual': it does not entail that D appreciated, or that reasonable people would have been aware of, the possible 'sexual' nature of the touching

It may be argued that a 'complainant-subjective' standard is not pragmatic and that it is unlikely the courts will accept such a standard. However, there is precedent in English law for offences to be defined, if only partially, in terms of the complainant's experience of an act. The partial nature arises from C's experience being a necessary but not sufficient condition of liability. In part 2, criminal harassment and anti-social behaviour will be used as case studies to demonstrate how there is precedent in English law for the conduct element of offences to be defined in a 'complainant-subjective' manner. In the context of stalking, the law does not proscribe certain forms of conduct *per se* but enables the complainant to declare such violations unacceptable on an individualistic basis, subject to the *mens rea* requirements in s.1(1)(b) PFHA 1997. The definition of anti-social behaviour is similarly complainant-centred, with s.1(1)(a) focusing on the effect the defendant's conduct had/would have been likely to have on the victim. Section 1 prohibits conduct which causes annoyance or anxiety to another person not of the same household as the defendant.

Part 3 will set out my arguments for adopting a 'complainant-subjective' approach to the meaning of 'sexual'. The approach is labelled 'complainant-subjective' because of

the significance it accords to the complainant's experience of, and affective response to, the touching. A 'complainant-subjective' approach is experience-centred and takes account of the particular complainant and the many differences in individual's experiences and perceptions of non-consensual touching. I will argue that a 'complainant-subjective' approach to the meaning of 'sexual' is the most favourable because it emphasises the context-dependent nature of the term, requiring the decision-maker to consider the complainant's affective response to the touching and highlighting how in changing his 'normative position' towards C, D should be liable for all the consequences of his actions.

Part 4 addresses some of the problems with adopting a 'complainant-subjective' approach to the meaning of 'sexual'. Although a 'complainant-subjective' approach to the meaning of 'sexual' is desirable, it is also beset by problems. First, it might lead to 'net-widening' because it would not be subject to a *de minimis* exception. Secondly, it might create an offence of uncertainty, as a person will not be able to predict whether a particular type of conduct will result in criminal liability, violating the principle of fair warning. A defendant might be liable as a result of a complainant's idiosyncratic affective response and could be accountable in a situation when he could not have anticipated the complainant's reaction and no-one could have. However, I will argue that the law ought to prohibit *any* sexual touching of another person without consent or lawful excuse and a 'complainant-subjective' test would declare the law's regard for the sexual integrity of citizens. Thirdly, it might lead to unfair labelling. In spite of these concerns, I will argue that a 'complainant-subjective' approach to the meaning of 'sexual' is the most preferable because in order to appreciate the nature and seriousness of a sexual touching and the level of D's culpability it is necessary to refer to C's affective response.

### 8.1 THE COMPLAINANT: THE 'FORGOTTEN PLAYER' IN THE CRIMINAL PROCESS

The criminal law is merely one amongst several methods of social control in society.<sup>2</sup> The idea of a crime is that it is something that rightly concerns the State, and not just the person(s) affected by the wrongdoing. Civil liability is restitutive in nature, ensuring that a person either honours his obligations or makes good any derogation from those obligations. Civil law courts provide a forum for deciding disputes involving torts, contract and any other private matters that involve private parties or organizations. Many crimes are civil wrongs as well and it is for the injured party to decide whether to sue for damages. However, the decision to make conduct into a crime implies that there is a 'public interest' in ensuring that such conduct does not happen and that, when it does, there is the possibility of State punishment. What emerges is an ongoing debate about the interface between crimes as 'offences against the State' and crimes as acts that directly involve and affect private citizens, who may be excluded from legal processes in which the State 'steals' conflicts from those citizens.<sup>3</sup>

In November 2006, the Queen pledged that 'My Government will put victims at the heart of the criminal justice system'.<sup>4</sup> This pledge had already appeared in multiple policy documents, including the seminal 2002 White Paper, *Justice for All*.<sup>5</sup> Victims of crime have remained a topical and pervasive issue for politicians, policy-makers, academics and the media. The media and politicians frequently invoke the metaphor of a balance between the rights of the victim and the rights of the defendant and some academics argue that the current system of criminal justice is not 'victim-centred'.<sup>6</sup> A

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<sup>2</sup> The education system, the family, morality, religion and the civil law all provide alternative and often-complementary systems for the control of behaviour and attitudes, with their own distinctive types of sanction.

<sup>3</sup> See A. Ashworth, 'Rights, Responsibilities and Restorative Justice' (2002) 40 *B J Crim* 578.

<sup>4</sup> Queen's speech of 15<sup>th</sup> November 2006.

<sup>5</sup> Home Office, Cmnd 5563, July 2002.

<sup>6</sup> See M. Hall, *Victims of Crime* (Willan Publishing, Cullompton, 2009); I. Edwards, 'An Ambiguous Participant: The Crime Victim and Criminal Justice Decision-Making' (2004) 44 *Brit J Crim* 967.

recent Home Office survey, *Crime in England and Wales: 2007/08*<sup>7</sup> also demonstrates how the public perceive the criminal justice system as being 'defendant-centred'. 80% of those surveyed in 2007/08 were very or fairly confident that the criminal justice system '[r]espects rights of people accused of committing a crime and treats them fairly'.<sup>8</sup> This can be contrasted with only 36% who were very or fairly confident that the criminal justice system '[m]eets the needs of victims of crime'. Until fairly recently orthodox criminal lawyers and academics have focused on the defendant and assessments of his or her liability. Why then has the crime victim recently received much greater political and academic attention? There are a number of strands to the answer and the question has been addressed by other writers, such as Robert Elias.<sup>9</sup>

Central to an understanding of the significance of the role of the victim in the development of criminal justice is the way crime is normatively viewed as the property of the State.<sup>10</sup> Before the introduction of professional police forces in the mid-nineteenth century, the investigation and prosecution of crime was, in most cases, the responsibility of the victim. A prosecution was virtually impossible to attain unless the victim was wealthy or a member of a prosecution society. Nevertheless, the process ensured that victims were in control of, and knew what was happening in their cases.<sup>11</sup> By the 1980s, amalgamated police forces had become bureaucracies positioned between victims and the courts and, therefore, when there was a prosecution between victims and their cases. For many years, victims were the 'forgotten actors' in the criminal justice system. Neither the police nor the prosecutors had any great interest in

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<sup>7</sup> C. Kershaw *et al*, *Crime in England and Wales: 2007/08* (Home Office Statistical Bulletin, London, 2008).

<sup>8</sup> *Ibid* at Table 5b Public confidence in the criminal justice system, 2001/02 to 2007/08 BCS.

<sup>9</sup> R. Elias, *Victims Still: the Political Manipulation of Crime Victims* (Sage, London, 1993); R. Elias, *The Politics of Victimization: Victims, Victimology and Human Rights* (Oxford University Press, Oxford, 1986). See also D. Miers, 'The Responsibilities and Rights of Victims of Crime' (1992) *MLR* 482; Hall *op cit*, n 6; Edwards *op cit*, n 6.

<sup>10</sup> D. Garland, 'The Limits of the Sovereign State: Strategies of Crime Control in Contemporary Society' (1996) 36 *Brit J Crim* 445.

<sup>11</sup> See generally, D. Hay & F. Snyder, *Policing and Prosecutions in Britain, 1750-1850* (OUP, Oxford, 1989).

ascertaining the views or interests of, or facts about the victim except in relation to information that could form legal evidence. In legal terms, the police and Crown Prosecution Service do not prosecute 'for' the victim, but rather prosecute for the State. Victims are simply citizens who may or may not be used as witnesses, which is again a matter wholly for the prosecution.<sup>12</sup>

The main lines of argument and conflict in adversarial criminal justice were between the accused and the State. In 1968, Herbert Packer constructed two models of the criminal process to explain the tensions in criminal justice and consider whether the system was balanced primarily in favour of the State or the accused.<sup>13</sup> The essence of each of Packer's two models is captured by an evocative metaphor. The criminal process in the crime-control model resembles a high-speed 'assembly-line conveyor belt' operated by the police and prosecutors. The end product of the assembly line is a guilty plea. In contrast, the due process model is an 'obstacle course' in which defence lawyers argue before judges that the prosecution should be rejected because the accused's rights have been violated. The assembly line of the crime-control model is primarily concerned with efficiency and operated in favour of the State, while the due process model is primarily concerned with fairness to the accused and 'quality control'. Victims' interests did not feature in Packer's models. It may be argued that the emergence of 'Victimology' as a discipline in its own right, concerned with the effects of crime on victims and victim involvement in criminal justice, highlighted the division between victims and offenders as two distinct stakeholders with individual rights and needs.<sup>14</sup> Douglas Beloof has suggested that a third model of criminal justice is needed to complement Packer's two models: the Victim Participation Model.<sup>15</sup> This third model recognises that the law now

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<sup>12</sup> The CPS Code for Crown Prosecutors outlines in paragraph 5.12 the CPS's position on the relationship between victims' interests and the public interest.

<http://www.cps.gov.uk/Publications/docs/code2004english.pdf> [Online] (Accessed: 7<sup>th</sup> January 2010).

<sup>13</sup> H. Packer, *Limits of the Criminal Sanction* (Stanford University Press, Stanford Cal, 1968).

<sup>14</sup> See J. Goodey, *Victims and Victimology* (Pearson/Longman, Harlow, 2005); S. Walklate, *Handbook of Victims and Victimology* (Willan, Cullompton, 2007).

<sup>15</sup> [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=174788](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=174788) [Online] (Accessed: 7<sup>th</sup> January 2010).

acknowledges the importance of victim participation in the criminal process. The important point here is that, as I noted in chapter 3, the move towards 'victims' rights' has been dominated thus far by 'procedural rights' (the right of participation in the criminal justice system, including sentencing) and 'service rights' (the provision of facilities, services, information and support to victims) but substantive law has been a somewhat neglected area. There is little discussion of what it would mean to have a genuinely 'complainant-centred' offence and what such a definition might look like.

In a highly influential article Nils Christie argues that the criminal law appropriates the experiences of victims, substituting the State for the individual victim and leaving no place in the criminal justice process for victims to tell their stories.<sup>16</sup> Christie suggests that the key element in a criminal proceeding is that the proceeding is converted from something between the parties, into a conflict between one of the parties and the State.<sup>17</sup> Accordingly, two important things have happened. First, the parties are being represented and Christie argues that with lawyers involved, proceedings are professionalised and thus exclude the conflict's real 'owners'. Secondly, the one party that is represented by the State, the victim, is so thoroughly represented that she or he for most of the proceedings is not an active participant. She or he is being denied rights to full participation in what might have been one of the more important ritual encounters in life. In theory, the victim has lost the case to the State.<sup>18</sup> Victim dissatisfaction with criminal justice is in part because they lack a legitimate role in the processing of their cases beyond that of witness for the prosecution.<sup>19</sup> The chance to be heard at all is usually the crucial aspect for victims in achieving a sense of satisfaction with the justice system.<sup>20</sup> Christie argues for the creation of a victim-orientated court in which detailed consideration should be given to what could be done for the victim, first

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<sup>16</sup> *Ibid.*

<sup>17</sup> N. Christie, 'Conflicts as Property' (1977) 17 *Brit J Crim* 1.

<sup>18</sup> *Ibid.*

<sup>19</sup> See J. Shapland *et al*, *Victims in the Criminal Justice System* (Gower, Aldershot, 1985) pp.176-78.

<sup>20</sup> T. Tyler, 'What is Procedural Justice? Criteria Used By Citizens To Assess the Fairness of Legal Procedures', (1988) 22 *Law & Society Rev* 103 at pp.125-27.

and foremost by the offender, secondly by the local neighbourhood and thirdly by the State.<sup>21</sup> Christie's recommended court model is one 'with an extreme degree of lay participation', since, as he suggests, this is essential when conflicts are seen as property that ought to be shared. His ideal is a court of equals representing themselves. When they are able to find a solution between themselves, no judges are needed. When they are not, the judges ought also to be their equals.<sup>22</sup> Christie's proposed 'victim-orientated' model is similar to that advocated by proponents of restorative justice.

Various pro-victim initiatives<sup>23</sup> and the advent of forms of restorative justice is evidence of a shift in criminal justice policy towards acknowledging that complainants have needs and interests and that the criminal justice system could and should acknowledge and respond to them. Since the 1990s, restorative justice has been one of the most rapidly proliferating criminal justice innovations, especially in response to youth crime. A restorative justice approach to liability focuses on repairing the harm caused by crime, in contrast to retributive justice that focuses on punishing an offence. One well established definition of restorative justice is of a 'process whereby parties with a stake in a particular offence come together to resolve collectively how to deal with the aftermath of the offence and its implications for the future.'<sup>24</sup> The overall purpose of restorative justice is not to inflict punishment in proportion to the seriousness of the offence, or to incapacitate offenders so that they pose no further risk to the public, but 'the restoration into safe communities of victims and offenders who have resolved their conflicts.'<sup>25</sup> One claim of restorative justice is that of victim empowerment: the victim is at the centre of the events, in control and telling her story in her own way. The process offers the victim the occasion she needs not only for the offender to hear her story; but

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<sup>21</sup> Christie, *op cit*, n 17.

<sup>22</sup> *Ibid*.

<sup>23</sup> For example the provision of government funding for organizations such as Victim Support and the Witness Service; the 1996 Victim's Charter; the *Declaration of Basic Principles for Victims of Crime and Abuse of Power* (United Nations 1985).

<sup>24</sup> T.F. Marshall, 'The Evolution of Restorative Justice in Britain' (1996) 4 *European Journal on Criminal Policy and Research* 37.

<sup>25</sup> D.W. Van Ness, 'New Wine and Old Wineskins: Four Challenges of Restorative Justice' (1993) 4 *Crim Law Forum* 251, at 258.



also to have it validated by others, and for him to hear that validation.<sup>26</sup> For sexual assault victims in particular, what is avoided is the experience that the victim, not the defendant is on trial. Hulsman makes a similar claim in relation to the use of civil rather than criminal procedures in cases of rape and sexual assault: 'From a victim of sexual violence and from a pitiful humiliated, dependent state she becomes an active party, a claimant in a civil law case.'<sup>27</sup> The victim's definition of harm and her ability to identify her own requirements is at the centre of proceedings. Restorative justice is symptomatic of the rediscovery of victims and their centrality in modern criminal justice.

The idea of restorative justice as a diversion from adversarial criminal justice procedures is at the heart of the argument against its use for very serious offences, and the arguments are most often used in relation to gendered and sexual offences.<sup>28</sup> It is assumed that if cases are diverted from court to conference, it will appear that offenders are being treated too leniently and that offences are not being taken seriously enough, what Coker evocatively terms the 'cheap justice' problem.<sup>29</sup> Feminists call for these actions to be taken more seriously and believe that more robust forms of justice should be available. They suggest forms of justice that will combine strong censure with effective incapacitative action. Criminalization and penalization may not create societies that are safer for women,<sup>30</sup> but they do show that society is serious about condemning this sort of action. Finstad insists that any non-imprisoning response to sexual violence must satisfy certain demands:

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<sup>26</sup> A. Morris & L. Gelsthorpe, 'Re-visioning Men's Violence against Female Partners' (2000) 39 *Howard Journal* 412.

<sup>27</sup> L. Hulsman, 'The Abolitionist Case: Alternative Crime Policies' (1991) 25 *Israeli Law Rev* 681, at 705. Hulsman studied a development in the Netherlands of the use of civil summary procedures by victims of sexual violence.

<sup>28</sup> B. Hudson, 'Restorative Justice: The Challenge of Sexual and Racial Violence' (1998) *Journal of Law and Society*, June, 25(2).

<sup>29</sup> D. Coker, 'Enhancing Autonomy for Battered Women: Lessons from Navajo Peacemaking' (1999) *UCLA Law Review*, 47, 1-111.

<sup>30</sup> L. Snider, 'Towards safer societies: punishment, masculinities and violence against women,' (1998) *British Journal of Criminology*, (38)1, 1-39.

‘Guilt and responsibility must be firmly and unequivocally attached to the perpetrator; protection and compensation must be effected for the victim; the extent and seriousness of sexualised violence must not be made invisible.’<sup>31</sup>

Offenders may use an informal restorative process to diminish guilt, trivialize the assault or shift the blame to a victim. There is also the concern that some victims may not be able to advocate effectively on their behalf. A further argument against the use of restorative justice in cases of sexual violence concerns the improbability of reaching an agreed outcome when the perspectives of offender and victim are likely to be widely separate.<sup>32</sup> As Finstad highlights, ‘with sexualised violence, there are two non-negotiable wrongs: his and hers’.<sup>33</sup>

The problems of identifying the ‘community’ and securing its participation, representation and co-operation, is a further flaw of the restorative justice programmes. Hudson suggests that ‘without the concern to make safer communities, restorative justice is in danger of merely substituting civil justice for criminal justice.’<sup>34</sup> Daly suggests that community norms may reinforce, not undermine, male dominance and victim blaming and communities may not be sufficiently resourced to take on these cases.<sup>35</sup> There is also the problem of conflicting community standards. By what standard should offences be judged? A defendant in possession of cannabis may consider this to be perfectly acceptable. Some community members may agree but other, maybe older community members may consider it wholly unacceptable.

The notion of community restoration is also rather ambiguous. By what standard is it to be decided how much damage has been done to the community and how it needs to be restored and what if no harm results? Offences such as driving without a licence and

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<sup>31</sup> L. Finstad, ‘Sexual Offenders Out of Prison: Principles for a Realistic Utopia’ (1990) 18 *International J. of the Sociology of Law* 157.

<sup>32</sup> Hudson, *op cit*, at n 28.

<sup>33</sup> Finstad, *op cit*, at n 31.

<sup>34</sup> Hudson, *op cit*, at n 28.

<sup>35</sup> K. Daly. ‘Restorative Justice and Sexual Assault: An Archival Study of Court and Conference Cases’ (2006) 46 *Brit J Criminol* 334.

making hoax 999 calls involve no actual harm to a defined person or loss of property. For restorative justice to work it might sometimes be necessary to involve the potential harm that could have resulted from D's actions. One consequence of empowering communities might be to sacrifice the 'rule of law' values that ought to be attached to state criminal justice. If different communities can adopt separate standards, the result is likely to be a form of 'justice by geography' or 'postcode lottery'.<sup>36</sup> Another criticism of restorative justice concerns the willingness of victims to participate. Restorative theories emphasise victim participation, and yet many victims are unwilling to become involved.<sup>37</sup>

Critics of restorative justice might argue that it is impossible to reconcile a complainant-centred approach with the traditional adversarial trial process and defendants' due process rights. However, restorative justice does not tend to exist in isolation from established criminal justice and in England the adversarial trial process still forms the dominant backdrop to alternative forms of dispute resolution. Accordingly should a victim or an offender claim dissatisfaction or absence of due process and legal rights in the course of restorative justice intervention, then the law is there to reassert its dominion. As Goodey quite rightly notes, 'restorative justice appears to pose a symbolic and piecemeal reform, rather than a substantive and wholesale reform, of criminal justice'.<sup>38</sup>

While the criminal law judges criminal intent, restorative justice looks at the harm done by offenders to victims and their 'community'. As the damage inflicted on the victim may be greater than the intent, it is necessary for restorative justice practitioners to

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<sup>36</sup> A. Ashworth, 'Is Restorative Justice the Way Forward for Criminal Justice?' in E. McLaughlin, *et al.* *Restorative Justice: Critical Issues* (OUP, Oxford, 2003).

<sup>37</sup> In their study of schemes piloted in 11 different areas, Newburn *et al* found that the restorative potential of the referral order was significantly hindered by the very low levels of victim participation: just 13 per cent had attended the panel meetings. T. Newburn *et al*, *The Introduction of the Referral Orders into the Youth Justice System*, Home Office Research Study 242 (Home Office, London, 2002), 63.

<sup>38</sup> J. Goodey, *Victims and Victimology: Research, Policy and Practice* (Pearson Education Limited, Harlow, 2005) at p.209.

uphold the principle of proportionality with respect to offence and sanction. Restorative justice should ensure that restorative agreements do not exceed the punishment an offender would receive under the existing criminal law.

#### 8.1.1 'Complainant-subjective' policy options

There are four possible policy options as to how a 'complainant-subjective' offence of sexual assault might be implemented, the differences arising when we consider the relationship between C's experience and D's fault. Each model is 'complainant-subjective' in the sense of needing C to experience the act as 'sexual' before D can be liable, but with each option the weight given to C's experience lessens.

*Table 8.1: 'Complainant-subjective' policy options*

|                 | Intentional touching | Reasonable people would have been aware of the possible 'sexual' nature of the touching | D appreciated the possible 'sexual' nature of the touching | C experienced the act as 'sexual' |
|-----------------|----------------------|---|--|-----------------------------------|
| Policy option 1 | x                    | x   | x  | ✓                                 |
| Policy option 2 | ✓                    | x   | x  | ✓                                 |
| Policy option 3 | ✓                    | ✓   | x  | ✓                                 |
| Policy option 4 | ✓                    | x   | ✓  | ✓                                 |

#### *Option 1: An offence of strict liability*

The first possible model of 'complainant-subjective' liability is one in which C's experience is determinative, and there is no fault element required. This first choice imposes a strict liability standard in which any touching experienced by C as 'sexual' would be an offence and is accordingly complainant-focused. Suppose D accidentally brushes against C's breasts as he attempts to exit a busy dance floor. If C experiences the touching as 'sexual' D would be liable under this approach, albeit that his touching

was inadvertent. This demonstrates how such an approach is too broad, placing too little emphasis on fault. In the context of serious offences, orthodox subjectivists have argued that defendants should be held ‘criminally liable for what they *intended* to do, and not according to what actually did or did not occur’.<sup>39</sup> An offence of strict liability would potentially lead to unfair labelling, whereby D would be labelled as a sexual offender even though his action was unintentional, on the basis of C’s affective response to the touching. There would also be an issue whether a strict liability offence of sexual assault infringes the presumption of innocence guaranteed under Art 6(2) of the European Convention on Human Rights. Strict liability offences may offend against Art 6(2) because once the prohibited act is proved, D is ‘presumed’ to be liable. However, the European Court has held that strict liability offences are compatible with the Article: ‘in principle the contracting States may, under certain conditions, penalize a simple or objective fact as such irrespective of whether it results from criminal intent or from negligence’.<sup>40</sup> The English courts have taken account of that conclusion in holding that Article 6(2) is restricted to providing procedural protection and does not render the imposition of strict liability incompatible with Art 6(2).<sup>41</sup>

*Option 2: Require that the touching be intentional and that C experienced the act as ‘sexual’*

The second ‘complainant-subjective’ option would be to require that the touching be intentional and that C experienced the act as ‘sexual’. If a man touches C in a manner he does not believe to be ‘sexual’, but the test is ‘complainant-subjective’ and C perceives that it is ‘sexual’ then he would be liable. This second option is also complainant-focused because it only requires fault in respect of the touching, regardless of whether D and/or reasonable people would appreciate the possible ‘sexual’ nature of the touching.

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<sup>39</sup> A. Ashworth, ‘Criminal Attempts and the Role of Resulting Harm’ (1988) 19 *Rutgers LJ* 725; and ‘Belief, Intent, and Criminal Liability’ in J. Eekelaar & J. Bell (eds) *Oxford Essays in Jurisprudence* (OUP, Oxford, 1987). See chapter 7, section 1.

<sup>40</sup> *Salibaku v France* (1998) 13 EHRR 379.

<sup>41</sup> *Barnfather v Islington LBC* [2003] EWCH 418.

However, C's experience is not determinative; it is necessary, but not sufficient for liability. Suppose that D accidentally touches C's bare legs, whilst attempting to pick up his shopping bags on a crowded bus. Under this second policy, option there would be no liability, because the touching was unintentional even if such touching would be perceived as 'sexual' by the individual woman. However, where D intentionally strokes C's hair and C perceives the touching to be 'sexual', D would under this approach be liable even if D does not appreciate that the touching is 'sexual' and no other reasonable people would appreciate it either. This is my preferred policy option and throughout this chapter, I will consider the arguments for and against it. In particular, I will argue that in unlawfully touching another, D has changed his 'normative position' towards C and his liability should extend to further unintended consequences that result from his intrusion. One particular problem with this 'complainant-subjective' policy option and a concern that equally applies to complainant-centred approaches in general, is that it raises issues of consistency of application of criminal law and non-retroactivity. I will discuss such concerns in section 8.4.2 below.

*Option 3: Require that the touching be intentional, that reasonable people would have been aware of the possible 'sexual' nature of the touching and that C experienced the act as 'sexual'*

The third 'complainant-subjective' policy option would be to require not only that the touching be intentional, but also that reasonable people would have been aware of the possible 'sexual' nature of the touching. If those conditions are met *and* C experienced the act as 'sexual' then D would be liable. This option does not require D to have been aware of the 'sexual' nature of the touching. If D is unwilling to try to understand C's affective response to the touching, then he is to be blamed for treating C as a means to his own ends. Such an approach holds the defendant's conduct to a standard that society deems appropriate even though D may subjectively be incapable of appreciating the 'sexual' nature of his conduct. This approach can also be criticised for assuming there is common consensus regarding what is considered acceptable sexual touching.

*Option 4: Require that the touching be intentional, that D is aware of the possible 'sexual' nature of the touching and that C experienced the act as 'sexual'*

The final 'complainant-subjective' option is like the previous one except that the test is what D appreciated about the possible 'sexual' nature of the touching<sup>42</sup> rather than the reasonable person, whilst requiring C to have experienced the act as 'sexual'. This policy choice is fault-based requiring D to have been aware of the possible 'sexual' nature of the touching. Whilst this option is 'complainant-subjective' in the sense that C must experience the act as 'sexual', it would appear to be more correctly labelled as a 'defendant-subjective' approach, as was analysed in chapter 7, because it focuses on D's attitude to the 'sexual' nature of the touching.

Discussion of the various 'complainant-subjective' policy options raises the issue of whether D should ever be liable if C does not experience the act as 'sexual'. There might be situations in which D touches C intentionally, reasonable people would have been aware of the 'sexual' nature of the touching, but C does not experience the act as 'sexual' (perhaps she has led a very sheltered life, or has suffered years of abuse and no longer associates such touching with sexuality). In these cases, one might argue that D should be liable even if C does not interpret the act as 'sexual'. In this respect, there may be cases on which C's experience of the act as 'sexual' is not even necessary. Even when C does not experience the act as 'sexual', there is a public interest<sup>43</sup> in intervening and punishing D. The essence of the wrong is the violation of autonomy, which is something that can and should be punished regardless of the actual extent to which C is aware of the 'sexual' nature of the touching.

## 8.2 SUBSTANTIVE CRIMINAL LAW: THE RELEVANCE OF COMPLAINANTS' EXPERIENCES

It may be argued that a 'complainant-subjective' standard is not pragmatic and that it is unlikely the courts will accept such a standard. However, there is precedent in English

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<sup>42</sup> In chapter 11, section 11.2 I will analyse whether the current definition of sexual assault as set out in s.3 SOA 2003 requires any *mens rea* in relation to the intentional touching being 'sexual'.

<sup>43</sup> For discussion of the public dimension of sexual assault, see chapter 12, section 2.1.

law for offences to be defined, if only partially, in terms of the complainant's experience of an act. The partial nature arises from C's experience being a necessary but not sufficient condition of liability. In relation to a charge of grievous bodily harm in *Bollom*,<sup>44</sup> the Court of Appeal held that:

'[i]n deciding whether injuries are grievous, an assessment has to be made of, amongst other things, *the effect of the harm on the particular individual*. We have no doubt that in determining the gravity of these injuries, it was necessary to consider them in their real context.'<sup>45</sup>

This decision gives rise to two interesting questions. First, what kind of harm would ordinarily and naturally be regarded as serious, given the age and state of health of the person on whom it was inflicted? The Court of Appeal took the view that the term 'grievous' should be assessed with reference to the particular victim. They suggested that the injuries inflicted on the complainant in this particular case, would be less serious on a 'six-foot adult in the fullness of health' than on 'an elderly or unwell person,' or 'someone who was physically or psychiatrically vulnerable'. Horder labels this an 'agent-specific' view of grievous harm because it can depend on the individual vulnerabilities of the victim.<sup>46</sup> Accordingly, 'harm that would be regarded as non-serious if inflicted on a more robust person, can be regarded as serious if inflicted on a less robust person'.<sup>47</sup> This relates to my 'complainant-subjective' label, which is concerned with the direct effects on the victim. Secondly, what if D causes C an injury that C dismisses as merely trifling but reasonable people would see as very serious? *Bollom* does not extend so far as to suggest whether C's experiences in that situation are relevant. As the question whether the harm that resulted should be regarded as grievous (serious) is solely one for the jury, considering 'amongst other things, the effect of the harm on the particular victim' a conviction for grievous bodily harm may seem

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<sup>44</sup> [2003] EWCA Crim 2846.

<sup>45</sup> *Ibid* at 52. My emphasis.

<sup>46</sup> J. Horder, 'Transferred malice and the remoteness of unexpected outcomes from intentions' [2006] *Crim L R* 383, at 394.

<sup>47</sup> *Ibid*.



just if D intended serious harm, whether the actual victim experienced such harm or not.

The recommendation of the MacPherson Report that a 'racist incident is any incident which is perceived to be racist by the victim or any other person,'<sup>48</sup> can also be described as a 'complainant-subjective' test. However, there is a significant difference between a racist incident and a charge of racially aggravated assault.<sup>49</sup> Section 28(1) Crime and Disorder Act 1997 (CDA 1997) makes it clear that it is the presence of racial 'hostility' that is the key triggering device which transforms the basic offences into the racially aggravated offences.<sup>50</sup> The main justification for these offences is the greater culpability of the perpetrator who acts out of racial 'hostility'. In determining the presence of racial hostility, the courts are not required to use the MacPherson definition of a racial incident. The new offences shift issues of the motivation of the perpetrator that are typically reserved for sentencing back into the definition of the racially aggravated offence.<sup>51</sup> One of the fundamental problems in s.28 is that there is no definition provided of 'hostility' and no standard legal definition. The degree of hostility required to demonstrate hostility on grounds of race is not clear. The law treats the issue as a question of fact for the jury.

There are numerous examples of situations where D says or does something that C experiences as a racial incident, yet was not intended or foreseen by D as such. Suppose D calls C, a person of Chinese descent a 'chinky'. Whilst C may experience the word as insulting, D may perceive it as harmless fun. This may be particularly relevant with

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<sup>48</sup> *The Stephen Inquiry*, Cm 4262-I (1999) Recommendation No. 12.

<sup>49</sup> See P. Jepson, 'The Difference between a Racial Incident and a Criminal Offence!' [2001] *NLJ* 651.

<sup>50</sup> These aggravated offences were created in order to signify the social seriousness of assaults that are accompanied by, or motivated by, racial or religious hostility: s.29 (racially or religiously aggravated assaults), s.31 (racially or religiously aggravated public order offences), s.32 (racially or religiously aggravated harassment etc) CDA 1997.

<sup>51</sup> Although many participants in the Home Office Research Study 244, *Racist Offences- How is the Law Working?* made clear that 'demonstrating hostility' as defined in s.28(1)(a) is the reason for the great majority of prosecutions. Few cases reaching the courts at any level are about motivation presumably because proving motive can be very difficult.

people of different generations. For example, an older, white male using the words 'darkie' or 'brownie' without perceiving any offence. From the perspective of those using the terms such as 'Gook', 'Gringo', 'Nigger' etc they may simply be terms used to delineate and separate ethnic groupings, rather than principally to show hostility. The law has no clear approach to the issue of racial hostility; it is simply a matter for the jury to decide.

The point is that a wholly 'complainant-subjective' approach focuses solely on C's reaction, making it determinative (as in policy option 1) and accordingly undermines *mens rea* principles: it turns an offence into one of strict liability. A non-determinative approach, on the other hand, posits C's reaction as necessary but not sufficient, D's mental state also being a condition of liability (as in policy options 2, 3 and 4). Criminal harassment provides an interesting example of an offence in which C's adverse experience is necessary but not sufficient for liability and thus of the merits of a 'complainant-subjective' approach to the conduct element of an offence. Both 'harassment' and 'sexual' are context-dependent terms; both require an affective response by an observer.

#### 8.2.1 Case study 1: Criminal harassment

Criminal harassment is a context-dependent and complainant-centred crime because what is essential to the offence is not what is done, but the complainant's perceptions of what is done.<sup>52</sup> It is injuries to feelings and to self-esteem that the (partially) 'complainant-subjective', context-dependent character of 'harassment, alarm or distress' in s.1(1) of the Protection from Harassment Act 1997 (PFHA 1997) is intended to protect. In 'stalking',<sup>53</sup> the law does not proscribe certain forms of conduct *per se* but

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<sup>52</sup> This concept is also found in sexual harassment law, see *Reed and Bull Information Systems v Stedman* [1999] IRLR 299.

<sup>53</sup> Stalking is not an official legal term, it is a description of a particular manifestation of the offence of harassment (PFHA 1997, s.7). Thus, whilst all stalking cases amount to harassment, not all harassment cases involve stalking. There have been prosecutions under the PFHA 1997 involving disputes between neighbours (*R v Dunn* [2001] Crim LR 130), school bullying (*R v Barking Youth Court ex p B* (1999)

enables the complainant to declare such violations unacceptable on an individualistic basis (subject to the s.1(1)(b) *mens rea* requirements) and punishes accordingly. The persistent receipt of flowers may seem innocuous to a 'bystander-objective' observer, but it is the complainant's perception of these gifts and the defendant's awareness of the impact of the gifts that is important. There are a range of possible reactions to stalking, ranging from amusement, indifference and tolerance to the more unwelcome reactions such as anger, distress and anxiety. Accordingly 'stalking' is a context-dependent crime as the conduct involved may not be objectionable *per se* but it becomes so in the particular context in which it occurs.

The PFHA 1997 created two substantive criminal offences: criminal harassment (s.2) and causing fear of violence (s.4). Section 1 prohibits a course of conduct that amounts to harassment of another and section 2 makes that proscribed conduct a criminal offence. Section 1 provides that:

'(1) A person must not pursue a course of conduct—

(a) which amounts to harassment of another, and

(b) which he knows or ought to know amounts to harassment of the other.

(2) For the purposes of this section, the person whose course of conduct is in question ought to know that it amounts to harassment of another if a reasonable person in possession of the same information would think the course of conduct amounted to harassment of the other.'

The process of establishing harassment can be seen as a distinct three-stage process. There must be a course of conduct, this must amount to harassment of another, and the defendant must know or should have known that this would have been so. The combination of the three elements of harassment has created a broad offence that spans an immense range of harassing conduct that will inevitably vary in seriousness. Each of these stages raises discrete issues which may have implications for the imposition of liability for harassment, but the immediate concern for understanding the

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unreported, 27 July, Divisional Court) and animal rights protestors (*Huntingdon Life Sciences v Curtin* (1997) *The Times*, 11<sup>th</sup> December).

‘context-dependence’ of ‘sexual’ is the issue of defining harassment. I will consider whether an entirely ‘complainant-subjective’ approach to harassment, such as policy option 1, where C’s experience is determinative of liability is just and argue that it is necessary to have some fault element in the offence, whereby C’s experience is a necessary but not sufficient condition of liability.

(a) Conduct that ‘amounts to harassment of another’

To incur liability under the PFHA 1997, the conduct must ‘amount[s] to harassment of another’. Section 7(2) PFHA 1997 partially defines harassment as including, but not being limited to ‘alarming the person or causing the person distress’. No further definition was deemed necessary as ‘harassment as a concept has been interpreted regularly by the courts since 1986’.<sup>54</sup> This is a reference to the Public Order Act 1986 (POA 1986) section 4(A). However, for the purposes of s.4(A) POA 1986 the ‘harassment, alarm or distress’ must have been caused by ‘threatening, abusive or insulting behaviour’ whereas there are no restrictions upon the nature of behaviour which engenders liability if it results in harassment, alarm or distress under the PFHA 1997. The harassment need not be caused by any particular type of words or behaviour.

Whether a course of conduct amounts to ‘harassment’ is a partially ‘complainant-subjective’ matter based upon the reaction of the complainant. Under s.1(1)(a) ‘a person must not pursue a course of conduct- that amounts to harassment of another’. This ‘complainant-subjective’ focus acknowledges that individuals may react in different ways to similar events hence conduct that causes alarm and distress to one person may leave another unperturbed. However, liability for criminal harassment is also dependent on whether the defendant knows or ought to know that the conduct will amount to harassment (s.1(1)(b)) and also whether D can show that the conduct was reasonable (s.1(3)(c)). This is closest to policy option 4, but widens the behaviour amenable to

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<sup>54</sup> M. Howard, *HC Deb* Vol 287 Col 784, 17<sup>th</sup> December 1997.

criminalization as D is also liable where he *ought* to know that the conduct will amount to harassment.

During the enactment of the PFHA 1997, campaign groups<sup>55</sup> highlighted how it was essential for the protection of 'stalking' victims that primacy was given to the complainant's interpretation of events when attributing liability. The focus upon the impact of the conduct on the recipient was deliberately adopted to avoid the difficulties of formulating a definition of the conduct element of 'stalking'. The possible range of conduct(s) is so broad that it is not possible to include in legislation a detailed list that would cover them all:

'Let us not worry about what any one of 1,000 activities might be. Let us worry about the effect on the victim. If the effect is to cause harassment to the victim, we can trigger the offence'.<sup>56</sup>

All conduct which has the proscribed result is included within the definition, thus providing a degree of flexibility, but also uncertainty, that is absent in a more specific definition which delineates the precise nature of the prohibited conduct.

The PFHA 1997 focuses on the harm that results rather than the inherent nature of the act or the seriousness of the act as assessed by the reasonable person. This acknowledges that many acts that are not of themselves harassing can cause harassment to the recipient because of the context in which the conduct occurs. The meaning of 'harassment', like 'sexual', is inevitably context-dependent.<sup>57</sup> Conduct that appears innocuous to an objective observer may assume a more menacing characteristic when the history of the relationship between the stalker and complainant is taken into account. The persistent receipt of flowers may seem innocuous to an objective observer who does not possess the same information as the defendant or complainant, but it is

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<sup>55</sup> The need for legislation of this kind had been highlighted by groups including the Suzy Lamplugh Trust, the National Anti-Stalking and Harassment Campaign and the Police Federation.

<sup>56</sup> D. Mclean, HC Deb Vol 287 Col 826, 17<sup>th</sup> Dec 1996.

<sup>57</sup> See chapter 5.

the complainant's perception of these gifts that defines the significance of the acts. A reasonable observer may be unaware that the complainant is harassed by the daily receipt of flowers from her estranged boyfriend. Equally, sending a woman a picture of a baby is not an act that would be objectively judged to be harassment. When the relationship between the parties is known (they are ex-partners and the woman aborted the man's baby against his wishes) and the context of the conduct (the pictures are sent every year on the date that the woman has the abortion) it is clear that this would be conduct which is highly likely to cause harassment, alarm or distress.<sup>58</sup> The mischief the law seeks to combat is the harm caused to the complainant by being the object of unwanted attention and relentless pursuit.

Stalking is a context-dependent crime because the response of the victim is a necessary but not sufficient factor that delineates lawful and unlawful conduct. The law is concerned with whether the prohibited conduct has materialised; in the case of harassment, whether the victim has been caused harassment, alarm or distress by the defendant's conduct. The absence of such a response places the conduct outside the remit of the law even if it were undertaken with the express intention of causing such an adverse reaction. This provision obviates the need to establish the motives behind the conduct or to establish whether the conduct is objectively harassing; the fact that it amounts to harassment of a particular individual will suffice to satisfy this stage of liability. The impact of the conduct upon the complainant is therefore a necessary but not sufficient condition of liability. The law is declaring relevant the individual's experience, thus acknowledging the context-dependent nature of 'stalking'. However, this 'complainant-subjective' focus does nothing to limit the breadth of the offence caused by the generality of the definition of 'course of conduct'.<sup>59</sup> Taken in conjunction, these two elements give rise to the potential to impose liability based upon two

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<sup>58</sup> E. Finch, *The Criminalisation of Stalking: Constructing the Problem and Evaluating the Solution* (Cavendish Publishing Ltd, London, 2001) Case history 12, p.294.

<sup>59</sup> A 'course of conduct' is defined as conduct on at least two occasions that may include speech (PFHA 1997, s.7).

incidents that nobody other than the complainant would view as harassment.<sup>60</sup> If the definition of criminal harassment were wholly 'complainant-subjective', lacking any *mens rea* requirement, it would most closely resemble policy option 1, but as we shall see that would not be fair or just.

(b) The defendant 'knows or ought to know'

One way to ameliorate the impact of such an easily satisfied *actus reus* would be to combine it with an onerous *mens rea* requirement, such as an intention to cause the *actual* harm, harassment or distress. A more easily satisfied requirement would be to require awareness that one's conduct might cause *any* harm, harassment or distress. The government did not adopt this approach and liability for the offence of harassment will be complete if it is established that the 'defendant knew, or ought to have known, that his conduct would amount to harassment.'<sup>61</sup> The offence contains alternatives of either a 'defendant-subjective' or a 'bystander-objective' *mens rea*. What the defendant ought to know is a 'bystander-objective' standard based upon what the reasonable person in possession of the same information as the defendant would think amounted to harassment. Finch argues that this dual mental element encapsulates differing levels of culpability, 'as knowingly harassing is suggestive of deliberate wrongdoing, whereas failing to appreciate that conduct would be viewed as harassment is indicative of failure to live up to a certain standard of social behaviour.'<sup>62</sup> If the defendant possesses information relating to a particular vulnerability of the complainant that gives him knowledge that his *prima facie* innocuous conduct will harass the complainant, this knowledge will be transferred to the reasonable man and the defendant will be liable for harassment despite the outwardly innocent appearance of the conduct.<sup>63</sup>

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<sup>60</sup> The persistent receipt of gifts or champagne (*R v Clarence Barrington Morris* [1998] 1 Cr App R 386) might be seen by many as harassment, but the receipt of two gifts might be conduct that nobody other than the complainant would view as harassment.

<sup>61</sup> S.2(1).

<sup>62</sup> Finch, *op cit*, n 45, at 238.

<sup>63</sup> Lord Chancellor, *HL Deb*, Vol 578, Col 528, 17<sup>th</sup> February 1997.

The 'bystander-objective' requirement was deemed necessary to ensure that there was comprehensive protection of all 'stalking' victims and that stalkers whose mental illness precluded them from appreciating the impact of their conduct were not excluded from the scope of the legislation. The 'bystander-objective' nature of the test laid down in s.1(2) is emphasised in *R v Colohan*,<sup>64</sup> where it was held that D's schizophrenia could not be taken into account in determining whether he ought to have known that his course of conduct would have amounted to harassment of another. The Court of Appeal observed that to take into account the mental illness of the accused in applying the objective test laid down by s.1(2) would undermine the very purpose of the PFHA 1997, given that it was aimed at the activities of persons who might be expected to suffer from some form of mental illness.<sup>65</sup> The decision in *Colohan* appears to undermine *mens rea* principles and s.1(2) makes no distinction between those who did not realise that their conduct would cause harassment, but were capable of doing so had they addressed their minds to the issue, and those who are inherently incapable of perceiving the effect of their actions.

This analysis has demonstrated how there is precedent in law for the conduct element of a context-dependent offence to be defined in a 'complainant-subjective' way. Thus, one might argue that it is possible for a 'complainant-subjective' approach to the meaning of 'sexual' to be fair, appropriate and workable.

### 8.2.2 Case-study 2: Anti-social behaviour

The above discussion of criminal harassment as an example of a complainant-centred offence is problematic because of the objective perception of harassment within the definition of the offence. The definition of anti-social behaviour is also a workable example of a complainant-centred offence. However, anti-social behaviour is not in itself a crime if it does not fall within any other defined criminal offence and this may be

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<sup>64</sup> [2001] EWCA Crim 1251.

<sup>65</sup> See chapter 6, section 4.1.



critical in understanding why the complainant-centred approach is used there but not in substantive criminal law.

In 1998, the Crime and Disorder Act (CAD Act 1998), s.1, created the anti-social behaviour order (ASBO):

‘(1) An application for an order under this section may be made by a relevant authority if it appears to the authority that the following conditions are fulfilled with respect to any person aged 10 or over, namely—

(a) that the person has acted, since the commencement date, in an anti-social manner, that is to say, in a manner that caused or was likely to cause harassment, alarm or distress to one or more persons not of the same household as himself; and

(b) that such an order is necessary to protect relevant persons from further anti-social acts by him.’

In Parliament, Lord Williams of Mostyn observed that the ASBO ‘requires the subject of it to do no more than to behave in a decent way to the fellow citizens of our county.’<sup>66</sup>

Although proceedings to obtain an ASBO are civil, breach of its terms is a criminal offence. A defendant who breaches its terms is guilty of an offence carrying a maximum of six months’ imprisonment on summary conviction and five years’ imprisonment on indictment.<sup>67</sup> The order must last for a minimum period of two years.<sup>68</sup> This section will analyse the anti-social behaviour order, in particular considering whether the definition of anti-social behaviour is ‘complainant-subjective’ and therefore whether the order is an example of a complainant-centred offence.

#### (a) What constitutes anti-social behaviour?

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<sup>66</sup> HL Report, Feb 3 1998, col 514.

<sup>67</sup> CAD Act 1998, s.10.

<sup>68</sup> CAD Act 1998, s. 1(7).

Manning *et al* suggest that anti-social behaviour 'is extremely difficult to define in any meaningful sense'.<sup>69</sup> Traditionally it referred to conduct which was described in terms of causing a nuisance or annoyance to other people, usually neighbours.<sup>70</sup> The first attempts at any statutory definition, not derived from the tenancy-related concepts of 'good neighbourliness' were made by the PFHA 1997 which, borrowing language from the POA 1986, ss.4A and 5, referred to 'harassment' in terms which included causing 'alarm or distress'.<sup>71</sup> This was made the basis of the only statutory definition of the phrase 'anti-social behaviour', in s.1 of the CAD Act 1998, namely conduct 'causing or likely to cause harassment, alarm or distress' to a person not of the same household as the perpetrator. To the critics, this definition is intolerably 'sweeping and vague'.<sup>72</sup> Nevertheless, observers more sympathetic to the ASBO also note the intrinsically subjective character of harassment, alarm or distress<sup>73</sup> and the absence of any criteria of seriousness.<sup>74</sup>

The Home Office consultative document of 2002 '*Tackling Anti-Social Tenants*' considered whether there should be a statutory definition of what is anti-social behaviour.<sup>75</sup> A tightly drawn definition means that individuals can plan their affairs and also protects those undeserving of an order from having one imposed on them. However, no definition has been brought into being and some practitioners believe a

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<sup>69</sup> J. Manning, C.L. Manning & V. Osler, *Blackstone's Guide to the Anti-Social Behaviour Act 2003* (Oxford University Press, Oxford, 2004). For other discussion of the phrase anti-social behaviour see A. Millie, J. Jacobson, E. McDonald & M. Hough, *Anti-Social Behaviour Strategies: Finding a Balance* (The Policy Press, Bristol, 2005); E. Burney, *Crime and Banishment: Nuisance and Exclusion in Social Housing* (Waterside Press, Winchester, 1999).

<sup>70</sup> See e.g. Housing Act 1985, Sch 2, Pt 1, ground 2, the nuisance ground for possession as originally enacted.

<sup>71</sup> PFHA 1997, s 7(2).

<sup>72</sup> Ashworth *et al*, 'Neighbouring on the oppressive: the government's Anti-Social Behaviour Order Proposals' (1998) 16 *Criminal Justice* 7 at p.9.

<sup>73</sup> S. Bright & C. Bakalis, 'Anti-Social behaviour: local authority responsibility and the voice of the victim' (2003) 62 *CLJ* 305.

<sup>74</sup> A. Pema & S. Heels, *Anti-Social Behaviour Orders* (Jordan Publishing Ltd, Bristol, 2003).

<sup>75</sup> 'Tackling Anti-social Tenants: A Consultation Paper' (Department for Transport, Local Government & the Regions, London, 2002) available at <http://www.crimereduction.gov.uk/antisocialbehaviour/antisocialbehaviour7.htm> [Online] (Accessed: 20<sup>th</sup> November 2009).

valuable opportunity to regulate or clarify this area has been lost.<sup>76</sup> The Institute for Public Policy Research highlighted the lack of an overall definition and what problems that can cause:<sup>77</sup>

‘The very elasticity of the term anti-social behaviour adds to the problem. In covering everything from dropping litter to serious criminal activity, it implies that the jump from illegally parked cars to crack dens is a short one. The ‘I know it when I see it’ approach is not terribly helpful in trying to disentangle what we mean by these very different- and admittedly anti-social behaviours.’

The government welcomed the opinion of the House of Commons Homes Affairs Select Committee<sup>78</sup> whose views in this area were as follows:

‘We have listened carefully to criticisms of the current legal definitions of anti-social behaviour as too wide. We are convinced however, that it would be a mistake to try and make them more specific. This is for three main reasons; first, the definitions work well from an enforcement point of view and no significant practical problems seem to have been encountered. Second, exhaustive lists of behaviour considered anti-social by central government would be unworkable. Third, anti-social behaviour is inherently a local problem and falls to be defined at a local level. It is a major strength of the current statutory definitions of anti-social behaviour that they are flexible enough to accommodate this. We would also argue that the definitions are helpful in backing an approach that stands with the victims of anti-social behaviour and their experience rather than narrowly focusing on the behaviour of the perpetrators.’<sup>79</sup>

The Home Affairs Committee assumes that if the police and enforcement have found the definition simple to use, then it is essentially a good definition. In respect of their second argument, traditionally, the ‘exhaustive list’ of behaviour they refer to is known as the ‘criminal law’. However, the criminal law focuses on single events, which New

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<sup>76</sup> N. Bland. ‘Policing Anti-Social Behaviour’ (Police Research Series Paper 123, Home Office, London 2000) available at <http://www.homeoffice.gov.uk/rds/prgpdfs/fprs123.pdf> [Online] (Accessed: 20<sup>th</sup> November 2009).

<sup>77</sup> ‘Anti-social behaviour, perception or reality’ by Miranda Lewis, Senior Research Fellow, People and Policy article in *Inside Housing*, 2<sup>nd</sup> September 2005.

<sup>78</sup> House of Commons Home Affairs Committee 5<sup>th</sup> Report of Session 2004-05 on anti-social behaviour.

<sup>79</sup> *Ibid* at para 44.

Labour argued meant that it is ill-equipped to deal with a course of conduct where the overall impact of the behaviour is far greater than the sum of its parts. The Home Affairs Committee further argue that anti-social behaviour is a 'local problem' but do not attempt a definition of 'local'. In emphasizing an approach that 'stands with the victim', this reflects government statements about rebalancing justice in favour of victims.

(b) Anti-social behaviour: a subjective or objective test?

The question then arises as to whether or not the assessment of anti-social behaviour is a 'bystander-objective' or a 'complainant-subjective' test. The discussion centres on one of the three descriptions of anti-social behaviour, namely the concept of harassment. Is 'harassment' judged by the standard of the independent bystander or if there were credible evidence that one of the complainants felt harassed is that, in itself, sufficient and conclusive?<sup>80</sup>

There are two possible ways in which a defendant might meet the criteria laid down in s.1(1)(a) CAD Act 1998. For the purposes of s.1(1)(a), behaviour which 'causes harassment, alarm or distress' is that which causes annoyance or anxiety to another person not of the same household. This is a 'complainant-subjective' enquiry: if V experiences something as harassing, alarming or distressing it constitutes anti-social behaviour. The defining feature of anti-social behaviour, like that of stalking, is 'harassment, alarm or distress' and as such, the offence can similarly be described as a context-dependent crime: anti-social behaviour 'is an expression which carries different weight according to its context.'<sup>81</sup> Repeatedly having a party in a deserted field is unlikely to make other people's lives a misery. However, if you repeatedly have a party in your house in a residential area, it is likely to cause harassment, alarm or distress to the neighbours. The context of the party is therefore a crucial feature in determining

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<sup>80</sup> See N. Botham, 'What Behaviour is "Antisocial"?' (2005) *JP* 169(49).

<sup>81</sup> S. MacDonald, 'A Suicidal Woman, Roaming Pigs and a Noisy Trampolinist: Refining the ASBOS's Definition of Anti-Social Behaviour' (2006) *MLR* 69(2), 183-213 at 185.

whether this behaviour is anti-social. The flexibility of section 1(1)(a) stems from the elasticity of the definition of anti-social behaviour, which can be invoked against all potential forms of anti-social behaviour regardless of the degree of seriousness. Anecdotal examples that demonstrate the complainant-centred implementation of ASBOs include against an 87-year-old great-grandfather who was prohibited from making sarcastic remarks to his neighbours<sup>82</sup> and a 13 year-old autistic boy whose neighbours complained about the noise the boy was making when jumping on his trampoline.

The definition of anti-social behaviour in s.1(1)(a) looks only to the effect the defendant's behaviour had/would have been likely to have on the victim. There are no safeguards within the legislation for those cases in which the victim is oversensitive or bigoted and thus the ASBO appears to be complainant-centred. Critics expressed concerns about the vagueness and breadth of the definition and about the degree of discretion it would confer on enforcement agencies.<sup>83</sup> In response, New Labour pointed to a filtering process within the legislation that they believed would 'ensure that such orders are not used for trivial behaviour'.<sup>84</sup> Only if the applicants can prove that the behaviour is anti-social<sup>85</sup> does the case continue in order to consider whether an order is necessary to protect persons from further anti-social behaviour by the defendant and if so, on what terms. Individuals seeking an ASBO must go to one of the enforcement agencies and ask them to apply. New Labour argued that if the person's complaint is frivolous or vexatious, they are likely to 'receive a very short answer.'<sup>86</sup>

Section 1(1)(a) also allows for a hypothetical assessment of the effect of the defendant's conduct, and allows for a finding against the defendant if he has acted in a manner

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<sup>82</sup> 'Anti-Social OAP faces jail' BBC website 22 July 2003

<http://news.bbc.co.uk/1/hi/england/merseyside/3087007.stm> [Online] (Accessed: 29 November 2009).

<sup>83</sup> A. Ashworth *et al*, 'Overtaking on the Right' (1995) 145 *NLJ* 1501.

<sup>84</sup> Alun Michael (HC Standing Committee B col 46 30 April 1998).

<sup>85</sup> *R (on the application of McCann) v Crown Court at Manchester* (2002) 166 JP 657.

<sup>86</sup> Lord Williams (HL Deb vol 585 col 566 3 February 1998).

that...was *likely to cause harassment, alarm or distress*’ (emphasis added). If a court is considering these words in relation to a defendant’s conduct, sufficient evidence of actual causation will be lacking. In *Chief Constable of Lancashire v Potter*<sup>87</sup> Auld L.J. ruled that ‘likely’ means ‘more probable than not’ but nonetheless confessed that the application of a standard of proof to the likelihood element presented a task ‘difficult of analysis’. He further suggests that proving the probability involves the same sorts of inference that may be required to prove the existence of intention or recklessness, however, the facts proved in each case are of a different order. In the case of intention, a tribunal of fact is declaring itself sure that something existed, while with s.1(1)(a), the tribunal declares itself sure that it might have existed. Since conduct is to be considered ‘depending on the circumstances’, the standard of sensitivity upon which the risk assessment is to be made is not a general and ‘objective’ one such as the likely effect of conduct of a person of ‘reasonable fortitude.’ Such an objective standard would be too narrow an interpretation of the subsection and would conflict with the essential context-dependency of the concept of harassment, alarm or distress. In summary the effect of the words ‘likely to cause’ in s.1(1)(a) is to allow a context-sensitive evaluation of the risk that feelings will be caused in others to substitute for evidence of feelings actually caused in others.

During the Parliamentary passage of the CAD Act 1998, New Labour resisted opposition amendments aimed at tightening s.1(1)(a)’s definition of anti-social behaviour. The amendments included inserting the word ‘serious’, requiring that the behaviour would have caused harassment, alarm or distress to a person of reasonable firmness, requiring that the defendant intended to cause harassment, alarm or distress and requiring that the behaviour complained of would have amounted to either a crime or a civil wrong. It appears that ‘harassment’ is treated in a ‘complainant-subjective’ manner, and Botham argues that this runs the ‘risk of pandering to people who are either susceptible to or particularly offended by certain forms of behaviour on the basis of their own life

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<sup>87</sup> [2003] EWHC 2272.

experience, trauma and so forth.’<sup>88</sup> On the other hand, if you treat ‘harassment’ in an entirely objective manner, you are forced to ignore how the complainant says he or she feels and simply weigh the conduct of the defendant against the norms of society, which will fluctuate over time in any event?<sup>89</sup>

In *Stephens v South East Surrey Magistrates*,<sup>90</sup> on the question of whether anti-social behaviour is to be judged objectively or subjectively, Calvert-Smith J was referred to the judgment in *Clingham v Royal Borough of Kensington and Chelsea*<sup>91</sup> at para.22: ‘Under s.1(1) (a) all that has to be established is that the person has acted ‘in an anti-social manner, that is to say in a manner that caused or was likely to cause harassment, alarm or distress to one or more persons not of the same household as himself. This is an objective inquiry; *mens rea* as an ingredient of the particular offences need not be proved.’ Whilst it was accepted that the judgment in *Clingham* was dealing with whether or not ASBO proceedings were criminal or civil in nature, Calvert-Smith J was nevertheless clear that the assessment of what is anti-social cannot rest solely on the subjective view. A reasonable view had to be taken to the interpretation of ss.1 and 2 and the test is an objective one to the extent that the court has to make up its mind as to whether such acts were such as to cause harassment alarm or distress. The CAD Act 1998 provides a modicum of assistance in s.1(5) where it states that in assessing the test under s.1(1)(a) the court shall disregard any behaviour which the defendant shows to be reasonable. How can the court exclude evidence of behaviour that is manifestly reasonable where it has not been ‘shown’ to be such by the defendant?

One might argue that the fact that anti-social behaviour is not a crime might be critical in understanding why the complainant-centred approach is used there but not in substantive criminal law. However, Ashworth proposes two reasons that might have led

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<sup>88</sup> Botham, *op cit*, n 80.

<sup>89</sup> *Ibid.*

<sup>90</sup> [2004] EWHC Admin 1456.

<sup>91</sup> [2002] UKHL 39.

the Government to look beyond criminal law and justice as a response to such behaviour.<sup>92</sup> First, in the context of anti-social behaviour witnesses may be reluctant to come forward and therefore it may be problematic to bring a prosecution. Secondly, it may be difficult to assemble evidence sufficient to convey the persistence of the conduct. A criminal charge relates only to an individual incident and it may not always be possible to convey the true extent of the anti-social behaviour, even if the prosecution charges several offences.

### 8.3 MERITS OF A 'COMPLAINANT-SUBJECTIVE' APPROACH

In this section, I will consider the arguments for a 'complainant-subjective' approach to the meaning of 'sexual'. Having set out the broad nature of a 'complainant-subjective' approach, sexual assault will be used as a specific example of an offence where the conduct element could be defined in terms of C's affective response: did C experience the act as 'sexual'? The approach is labelled 'complainant-subjective' because of the significance it accords to the complainant's experience of the touching. A 'complainant-subjective' approach to the meaning of 'sexual' is 'complainant-centred': this element of the *actus reus* would only be satisfied if the complainant experienced and defined the touching as 'sexual' in nature. The jury or magistrates would be required to consider the complainant's internal account of the nature of the touching to decide whether C experienced or perceived the touching as 'sexual' and this can be contrasted with objective approaches, which concern what a reasonable person would consider. A 'complainant-subjective' approach protects a person's interests in his or her bodily integrity. Primacy would be given to the complainant in determining the 'sexual' nature of the touching and therefore distinguishing sexual assault from a battery.

A 'complainant-subjective' approach focuses on 'how the complainant perceived the nature of the conduct'. This is not a common part of orthodox subjectivist approaches

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<sup>92</sup> A. Ashworth, 'Social Control and "Anti-Social Behaviour": The Subversion of Human Rights' [2004] *LQR* 120, 263 at 264.



to criminal liability, being more a focus of tort liability: whilst criminal law has traditionally focused on the guilt or innocence of the accused, tort law focuses on the victim and compensating the victim for breach of the particular duties owed to them. Tortfeasors take their victims as they find them: if the complainant has an 'eggshell skull', the tortfeasor who negligently kills that complainant is liable for the death although anyone else would only have suffered a bump on the head. Criminal law, in contrast, has traditionally erred on the side of the defendant: the criminal sanction (the power to deprive D of his liberty) is potentially the most serious intervention that the State can use against an individual and it should therefore be used sparingly. However, there are three good reasons why, in the context of sexual assault, the criminal law ought to focus on the complainant's affective response to the touching. First, a 'complainant-subjective' approach emphasises the context-dependent nature of sexual assault. Secondly, a 'complainant-subjective' approach is harm-centred, focusing on invasions of sexual autonomy. Thirdly, in unlawfully touching another, D changes his 'normative position' towards C, and in doing so, accepts the risks involved.

#### 8.3.1 Context-dependency

The 'complainant-subjective' approach is an interpretive approach as it requires the decision-maker to consider the complainant's affective response to, or subjective experience of the action or omission, in contrast to a non-interpretive approach as was analysed in chapter 6. A 'complainant-subjective' approach is not only concerned with C's experienced harm and understanding of the incident. C's experience will also be important where there is no tangible harm but where C is alarmed or put in fear. A 'complainant-subjective' approach highlights the need to refer to C's perspective in order to appreciate the seriousness of the act's impact and the level of D's culpability. A 'complainant-subjective' approach to the meaning of 'sexual' would focus entirely on the individual complainant and whether they experienced the act as 'sexual'. This emphasises the context-dependent nature of sexual assault and demonstrates respect for an individual's sexual and bodily autonomy. Consider an alleged case of sexual

assault where a defendant slaps the buttocks of a woman standing at a bar. The defendant does not appreciate the 'sexual' nature of the touching, but the complainant experiences the action as an invasion of her sexual integrity. In fairness to the complainant, who has been wronged, a complainant-subjective' approach emphasises that the complainant's perception of the 'sexual' nature of the act is determinative of the question whether the touching was 'sexual'.

The 'complainant-subjective' approach is fairest to complainants for sexual assault cases at the fringes of liability. This refers to those actions that are not because of their nature 'sexual' e.g. brushing someone's hair or attempting to remove their shoes.<sup>93</sup> In chapter 5, I argued that no touching is intrinsically or inherently 'sexual' and accordingly the term 'sexual' is context-dependent. A 'complainant-subjective' approach to the meaning of 'sexual' emphasises the context-dependent nature of the term and the individual nature of affective responses to touching. A decision-maker cannot evaluate the seriousness of a sexual assault without knowing how the crime has affected the victim, for the degree of harm is 'partly a function of the differential response by the victim'.<sup>94</sup>

### 8.3.2 Sexual autonomy

A 'complainant-subjective' approach to the meaning of 'sexual' is harm-centred. The centrality of harm in the theory of criminal law is closely associated with the utilitarian tradition, which holds that the purpose of punishment is to further the interests of society. At the heart of liberalism is the proposition that the State is justified in intervening to regulate conduct only when that conduct causes harm to others. The Harm principle was first articulated by John Stuart Mill:

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<sup>93</sup> M. Wolfgang, 'Basic concepts in victimological theory: individualisation of the victim' in H.J.Schneider. *The Victim in International Perspective* (de Gruyter, New York, 1982) p.49.

<sup>94</sup> *Ibid.*

‘That the only purpose for which power can be rightfully exercised over any member of a civilised community against his will is to prevent harm to others. His own good, either physical or moral, is not a sufficient warrant.’<sup>95</sup>

This then brings us to the question of what counts as harm, and in the context of sexual assault what is the harm that the State is attempting to prevent? On Feinberg’s account a harm is a ‘thwarting, setting back, or defeating of an interest’.<sup>96</sup> Taken as a miscellaneous collection, one’s interests consist of all those things in which one has a stake. When we are harmed, one or more of our interests is left in a worse state than it was beforehand. Harm therefore involves the impairment of a person’s opportunities to engage in worthwhile activities and relationships and to pursue valuable, self-chosen, goals.

Part of the rationale for laws against sexual offending is to protect the autonomy of individuals in sexual interaction, ensuring that there are criminal prohibitions to prevent unwanted sexual interference and to criminalize those who culpably interfere with individuals’ sexual autonomy.<sup>97</sup> Sexual autonomy affects well-being not only because it promotes self-respect but also because it helps one pursue preferences of various kinds. The wrongfulness of sexual assault derives from the fact that the victim has a proprietary right over her own body. It is her body, she owns it, nobody else may use it without her saying so.<sup>98</sup> Sexuality is an intrinsic part of one’s personality, it is one mode of expressing that personality in relation to others, and it is therefore fundamental that one should be able to choose whether to express oneself in this way. Even where a sexual assault involves no significant physical force, it constitutes a wrong in the sense that it invades a deeply personal zone, gaining non-consensually that which should only

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<sup>95</sup> J.S. Mill, *On Liberty* (Wordsworth Classics, Ware, 1996).

<sup>96</sup> *Ibid* at p.33.

<sup>97</sup> *Setting the Boundaries: Reforming the law on sexual offences Vol.1* (Home Office Communications Directorate, London, 2000) paras 1.1.8-1.1.9.

<sup>98</sup> J. Gardner. & S. Shute. ‘The Wrongness of Rape’ in J. Horder (ed.) *Oxford Essays in Jurisprudence* (4<sup>th</sup> series) (OUP, Oxford, 2000) p.205.

be shared consensually.<sup>99</sup> The right of sexual autonomy provides that people have the right to decide with whom to have sexual relations.<sup>100</sup> Where a person participates in a sexual act in respect of which she has not freely chosen to be involved, that person's autonomy has been infringed, and a wrong has been done to her.

Much of our personal identity is tied to our gender and sexual expression and hence to our sexual self-determination. Sexual assault is a form of being subjected to another's dominion. In sexual interactions, unlike in other interactions, it is more important that we are able to control whom we are intimate with, since sexual relationships expose us more than other relationships and thereby make us more vulnerable. This is a reason why non-consensual sexual touching, even as a 'joke' is offensive. It makes the recipient merely a sexual being, vulnerable and exposed. The essence of 'sexual self-expression' is that it should be voluntary, both in the giving and in the receiving. Gardner and Shute argue that the real 'gravamen' of rape is that it amounts to 'the sheer use of a person, and in that sense the objectification of a person'.<sup>101</sup> In their view, rape is 'dehumanizing' because it is 'a denial of the victim's personhood'.<sup>102</sup> These arguments can just as easily be applied to sexual assault. Even the momentary non-consensual caress of a woman's clothed breast is wrongful in that it amounts to regarding the complainant as an object and 'using' her.

In assessing the meaning of 'sexual' from the complainant's perspective, this approach is the most complainant-centred because it takes account of the particular complainant, and the many differences in individual's experiences and perceptions of non-consensual touching. The focus shifts from an emphasis on the mental state of the defendant, to a

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<sup>99</sup> See N. Lacey, *Unspeakable Subjects* (Hart, Oxford, 1998) ch 4; S. Schulhofer, *Unwanted Sex* (Harvard University Press, Cambridge, Mass, 1998) reviewed by M. Childs, 'Sexual Autonomy and Law' (2001) 64 *MLR* 309.

<sup>100</sup> The leading proponent of this view is Schulhofer, *Op cit*, n 59. See also J. Larson, 'Women Understand so Little, They Call My Good Nature "Deceit": A Feminist Rethinking of Seduction' (1993) 93 *Columbia Law Review* 74.

<sup>101</sup> Gardner & Shute, *op cit*, n 58 at p.205.

<sup>102</sup> *Ibid.*

focus on the actions themselves and how the complainant perceives and experiences these actions. The 'complainant-subjective' standard has the advantage of avoiding claims of stereotyping and essentialism: it does not assume there is a commonly held belief about how individuals should and do experience and react to touching. Complainant's perceptions are not measured against a universalizing external standard. If a woman suffers an invasion of her sexual autonomy it should not matter whether she is particularly sensitive or insensitive.

### 8.3.3 'Change of normative position'<sup>103</sup>

A 'complainant-subjective' approach is preferable to a 'defendant-subjective' approach because it puts the person who has been wronged, the victim, at the heart of criminal justice. Accordingly, it requires the law to show solidarity with those who have been wronged. One argument for 'complainant-subjectivity' is that in unlawfully touching another, D changes his 'normative position' towards C, and in doing so, accepts the risks involved. Horder argues that defendants who embark on conduct which carries a risk that someone may be harmed should be liable for the harm caused, even where that harm is greater than the harm intended or foreseen, because they 'deserve' their bad luck.<sup>104</sup> On this approach, it is the commission of any crime against another that is taken to supply sufficient culpability to justify extended liability. The relevant normative position for sexual assault is the commission of a battery. By choosing to engage in unlawful touching, the defendant crosses a significant moral and criminal threshold and should be held responsible where C perceives the touching as 'sexual' in nature, since it would not have resulted if D had not crossed the moral threshold. Accordingly, once D is on the wrong side of the law he should be answerable for any resulting harm or experiences that can be said to have been caused by him.

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<sup>103</sup> The doctrine of 'change of normative position' originated with J. Gardner 'Rationality and the Rule of Law in Offences against the Person' (1994) 53 *Cambridge L J* 502 and was then adopted by Jeremy Horder, 'A Critique of the Correspondence Principle' [1995] *Crim L R* 759.

<sup>104</sup> Horder, *op cit*, n 63.

This brings us to the question of when does D change his normative position, or cross a moral threshold, sufficiently for liability for sexual assault? Suppose D strokes C's arm, with the result that C experiences the touching as 'sexual' and suffers long-term psychological effects. There are a number of possible fault elements in such a case. First, D could have been pushed into C at a busy shopping mall, accidentally stroking C's arm as he tries to steady himself. This case can be eliminated on the basis that D did not intend to assault C or to commit any wrong against C. Secondly, D could have seen C crying, approached her and stroked her arm in order to provide comfort and reassurance. Here D intended to touch C but did not intend to commit any wrong against her. Thirdly, D could have approached C whilst she was sitting alone in a nightclub and stroked her arm. Such a scenario ought to be sufficient for sexual assault because D has intentionally assaulted C, thereby changing his normative position in relation to harms that might result, including C experiencing the touching as 'sexual'. Despite the fact that D might have lacked any awareness of the sexual circumstance, he ought to be liable as he manifests a disregard for C's sexual integrity and ought to have been aware of the possible invasion of sexual autonomy. There is a duty not knowingly to wrong another by injuring their protected interests in sexual and bodily integrity by way of an unlawful battery. The most significant element in D's conduct is his decision to touch another without consent and there is insufficient moral weight in the plea, 'I only intended to touch C's breasts as a joke'. D displays indifference to the possibility that C will experience an invasion of her sexual autonomy and he should be criminally liable for further unintended consequences that result from his intrusion.

#### 8.4 PROBLEMS WITH A 'COMPLAINANT-SUBJECTIVE' APPROACH

The criminalisation of sexual assault as partially contingent on the reaction of the complainant is advantageous in terms of widening the scope of behaviour amenable to prosecution. However, it also bears significant problems and dangers for criminal justice. First, it does not establish a minimum level of tolerance to the disagreeable actions of others. Secondly, it would create an offence of uncertainty: a defendant could

be liable for an act that nobody other than the complainant considered to be 'sexual', violating the principle of fair warning. Lastly, it contravenes the principle of fair labelling as the defendant is not labelled in proportion to his conduct. Each of these problems will be addressed. Whilst acknowledging these problems, I will argue that a 'complainant-subjective' approach has considerable merit because it focuses on the complainant's sexual autonomy, which is the humane and just thing to do.

#### 8.4.1 'Net-widening'

One of the criticisms of a wholly 'complainant-subjective' test is that it does not create the appearance of justice: it implies that the law is only concerned with the complainant's experience and definition of the nature of the conduct. A wholly 'complainant-subjective' approach would create an offence of great breadth, as it would not establish a *de minimis* exception. An act that is *de minimis* is one that does not rise to a level of sufficient importance to be dealt with judicially. The law insists on appearing rational, neutral and fair and a 'complainant-subjective' standard acknowledges that defendants would be liable as a result of a complainant's idiosyncratic affective response. Complexities arise when we consider the hypersensitive woman who perceives a touch on her shoulder as an invasion of her sexual autonomy. It is questionable whether the 'reasonable person' or even the 'reasonable woman' would consider this a 'sexual' touching. Orthodox subjectivists would argue that a defendant should not be convicted of sexual assault on the basis that only C perceived the touching as 'sexual'. What about the complainant who has been abused in her past, and consequently perceives any touching as a sexual violation, however innocently D meant it? A 'complainant-subjective' approach would make the experiences of those who are hypersensitive key to interpreting whether the touching was 'sexual' thereby creating an extremely wide offence with virtually no limitations. In the context of sexual harassment, Rubenstein suggests that a 'complainant-subjective'

test would 'trivialise sexual harassment' and that 'negative publicity would result if minor cases were allowed and the law would not be taken seriously.'<sup>105</sup>

The 'complainant-subjective' definition of harassment and the generality of the definition of 'course of conduct',<sup>106</sup> give rise to the potential to impose liability<sup>107</sup> based upon two incidents that nobody other than the complainant would view as harassment. Addison and Lawson-Cruttenden suggest that, 'almost any form of activity which annoys another person could technically be described as harassment' and they give the example of the person who cries 'here comes useless' whenever a work colleague enters the room.<sup>108</sup> If repeated on two occasions this would amount to a course of conduct, it may well cause the recipient to feel harassed and if the court considered that D ought to have known that that might be the consequence of his conduct then D would be liable under s.2. Whilst this behaviour is clearly unpleasant, it is debatable whether it should attract criminal liability. There is a danger that excessive paternalism will lead to increased reliance upon the courts to adjudicate the most 'minor of life's disruptions'.<sup>109</sup> This is only problematic when C's experience is determinative and I am positing a situation in which C's experience is necessary, but not sufficient for liability.

The introduction of a *de minimis* standard to the meaning of 'sexual' would detract from the 'complainant-subjective' nature of the offence by establishing an objective borderline between 'sexual' and 'non-sexual' conduct. Without a provision that establishes a minimum level of tolerance to the disagreeable actions of other, the level of criminality is exceptionally low as the 'complainant-subjective' standard of 'sexual' encompasses the hypersensitive. However, the law prohibits *any* touching of another

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<sup>105</sup> M. Rubenstein, *The Dignity of Women at Work* (Office for Official Publications of the European Communities, 1988) para 6.18.

<sup>106</sup> Defined as conduct on at least two occasions (s.7(3)) that may include speech (s.7(4)).

<sup>107</sup> The potential nature of the liability arises from the fact that D still needs to satisfy the *mens rea* requirements.

<sup>108</sup> N. Addison and T. Lawson-Cruttenden, *Harassment Law and Practice* (Blackstone, London, 1998).

<sup>109</sup> Finch, *op cit*, n 45, at 228.



person without consent or lawful excuse and a 'complainant-subjective' test would declare the law's regard for the sexual integrity of citizens.<sup>110</sup> As Blackstone put it: 'the law cannot draw the line between different degrees of violence, and therefore totally prohibits the first and lowest stage of it; every man's person being sacred, and no other having a right to meddle with it, in any the slightest manner'.<sup>111</sup> Is a certain degree of sexual touching an acceptable aspect of everyday life? There are lots of types of touching that occur in everyday life, some of which are non-consensual and some of which may be experienced as 'sexual' by the recipient; however, which of these types of touching is routinely acceptable as part of everyday life is narrower than that within 'non-sexual' assault or harassment. Sexual assault may be committed by the least unwanted touching or stroking of one person's body by another and the law should make clear that the offence concerns the invasion of another person's right not to be touched or violated in any way.

#### 8.4.2 Uncertainty and consistency of approach

A second criticism of the 'complainant-subjective' approach is that it might create an offence of uncertainty,<sup>112</sup> as a person will not be able to predict whether a particular type of conduct will result in criminal liability. It bases liability on that which is inherently unknowable to the defendant: the reaction and experience of another person. Different people respond to similar situations in different ways. It is difficult, if not impossible, to predict with any degree of certainty how another individual will respond in a given situation. Obviously 'sexual' conduct will not pose a problem.<sup>113</sup> It is highly probable that most complainants would find non-consensual contact between the naked genitalia of the defendant and naked genitalia, face or mouth of the complainant harmful. Difficulty arises when more ambiguous conduct is involved, such

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<sup>110</sup> See chapter 4, section 4.1.1.

<sup>111</sup> W. Blackstone, *Commentaries on the Laws of England* (Apollo Press, London, 1768) p.120.

<sup>112</sup> Under Article 5 European Convention, the European Court has insisted that all criminal offences should meet 'quality of law' standards, one of which is that the ambit of the offence is certain.

<sup>113</sup> In chapter 9, section 9.2.1 I will argue that there are a limited number of acts that can be described as 'obviously sexual'.

as the pinching of the buttocks, combing of the hair or removal of shoes. A defendant could target two women with exactly the same behaviour, resulting in two different responses. One may be unperturbed by the action and readily able to dismiss the conduct as harmless, whilst the other experiences this as an invasion of her sexual integrity. D might therefore be liable for his actions towards the latter woman and not the former. The context-dependent nature of the term 'sexual' renders the definition of conduct contingent on something that is neither ascertainable nor predictable to the defendant at the time of the action. However, drawing on the earlier argument that the defendant who unlawfully touches another person changes their 'normative position' towards that person, a 'complainant-subjective' test would require the defendant to consider the complainant's interests.

A 'complainant-subjective' approach to the meaning of 'sexual' might be criticised for lacking clarity, violating one of the fundamental principles of criminal law, fair warning. Defendants could be held accountable in situations where they could not have anticipated the complainant's reaction and no one could have. By treating the terms 'sexual' and 'harassment' in a 'complainant-subjective' manner there is a risk 'of pandering to people who are either susceptible to or particularly offended by certain forms of behaviour on the basis of their own life experience, trauma and so forth'.<sup>114</sup> Many would argue that conviction of a criminal offence should not depend on the personality of the complainant. It is not in the interests of justice that a defendant should be liable for an act that only the complainant perceives as 'sexual'. This goes against the principle that the criminal law punishes fault. Respect for the citizen as a rational, autonomous individual and as a person with social and political duties requires fair warning of the criminal law's provisions and no undue difficulty in ascertaining them.<sup>115</sup>

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<sup>114</sup> N. Botham, 'What Behaviour is "Antisocial"?' (2005) 169 *JP* 948.

<sup>115</sup> A. Ashworth, *Principles of Criminal Law* 6<sup>th</sup> edn (Oxford University Press, Oxford, 2009) p.65.

Closely related to the idea of uncertainty, a 'complainant-subjective' approach to the meaning of 'sexual' also raises issues of consistency of application of criminal law and non-retroactivity. The concepts of equality and fairness that underlie the criminal law require decision-makers to apply the law consistently. The requirement that touching is 'sexual' is a central element of the definition of sexual assault and implementing a 'complainant-subjective' test means that this element of the *actus reus* would have different meanings depending on the individual complainant. One might argue that consistency in the application of the criminal law is a defendant interest and that a complainant-centred offence makes the law unnecessarily complex and might inevitably lead to inconsistencies. However, arguably, there are different types of consistency and in the context of sexual assault, two arguments can be put forward. First, that the criminal law ought to be focusing on consistency of respect for complainant's interests and secondly, that consistency as a principle can be compromised. The second of these arguments is more defensible. Whilst consistency of application is an important principle of criminal law, in the context of sexual assault there are clear policy justifications as to why it can be compromised. In areas that are especially complex, such as the meaning of 'sexual' it would be impossible for all the contradictions and ambiguities in the law to be removed. Whilst a 'complainant-subjective' approach would not necessarily be any more certain or consistent the argument, as I argued above, is for putting victims' at the heart of criminal justice.

#### 8.4.3 (Un)fair labelling

If the definition of 'sexual' were to be judged 'complainant-subjectively', a defendant could be liable for an act which nobody other than the complainant considered to be 'sexual'. A defendant could be subject to notification requirements and entry onto the Sex Offender's Register for an act that only one person distinguished as 'sexual' assault. Fair labelling requires offences to be appropriately defined so that the label reflects accurately what the defendant has done. One of the justifications for the principle of fair labelling is that offenders be labelled and punished in proportion to their

wrongdoing. It might be argued that a 'complainant-subjective' approach violates the principle as the 'sexual' nature of contact is established purely from the C's perspective, when in fact nobody else would consider the defendant a 'sexual' offender. However, in chapter 4 I argued that it is important that an offence label sufficiently represents the nature and seriousness of the harm done to the victim.

## 8.5 CONCLUSION

A 'complainant-subjective' approach is the most complainant-centred of all those analysed. Primacy would be given to the complainant in determining the 'sexual' nature of the touching and therefore distinguishing sexual touching from a battery. 'Complainant-subjective' approaches are harm-centred: they require the decision maker to consider any violations of the complainant's sexual and bodily autonomy. They further acknowledge the many differences in individual complainants' experiences and perceptions of non-consensual touching. There appears to be greater general awareness and concern amongst lawmakers for offences that include experience-centred approaches. There is precedent in English law for offences to be defined, if only partially, in terms of the complainant's experience of an act or omission and criminal harassment was used as a case-study. However, the emergence of victims as a central part of modern criminal justice policy poses challenges to orthodox conceptions of criminal procedure and substantive criminal law. 'Complainant-subjective' approaches might lead to 'net-widening', establishing too low a threshold for liability. They might also create offences of uncertainty, as a person will not be able to predict whether a particular type of conduct will result in criminal liability and lead to unfair labelling. Although there are certain dangers with adopting a 'complainant-subjective' approach to the meaning of 'sexual', for example that it could result in a defendant being convicted of sexual assault for an act which nobody other than the complainant considered to be 'sexual', this approach should be favoured. A 'complainant-subjective' approach requires the decision-maker to consider the complainant's affective response

to the touching highlighting how in changing his 'normative position' towards the C, D should be liable for all the consequences of his action.

In chapter 9 the current legal approach to the meaning of 'sexual', set out in s.78 SOA 2003 will be evaluated to test the extent to which the law actually *is* complainant-centred'. The definition of 'sexual' and recent limited case-law interpreting the provision will be analysed, demonstrating the insufficiently complainant-centred nature of the present approach.

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## To What Extent is Section 78 of the SOA 2003 Sufficiently Complainant-centred?

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The requirement that conduct is 'sexual' appears in a number of offences in the SOA 2003.<sup>1</sup> It is therefore of great significance and the Act seeks to explain an approach, though not a definition, based on that propounded by the House of Lords in *Court*.<sup>2</sup> This chapter will analyse the s.78 definition of 'sexual'. S.78 requires that penetration, touching or any other activity must pass one of two tests in order to be labelled as 'sexual' and envisages three possible situations: (i) the act is indisputably 'sexual'; (ii) the act is potentially 'sexual'; and (iii) the act is indisputably not 'sexual'. This chapter will examine the problems and ambiguities surrounding the use of the word 'sexual' in the SOA 2003 and the way it is used as a defining feature of many of the offences, with particular emphasis on sexual assault. It will focus specifically on the extent to which the current definition of 'sexual' sufficiently takes into account the complainant's experience of the act. I will argue that the lack of certainty and clarity which has resulted from the s.78 definition of 'sexual' is undesirable as the offence of sexual assault may not cover acts experienced by complainants as 'sexual'. Accordingly, s.3 might fail to be the complainant-centred offence envisaged by the Government during the early stages of the reform process. The s.78 definition is unclear, ambiguous and likely to lead to inconsistencies.

Part 1 will analyse the original clause 80 of the Sexual Offences Bill and its subsequent amendments in Parliament, highlighting the lack of discussion given to the meaning of

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<sup>1</sup> Including ss.2-4 (assault by penetration, sexual assault, causing sexual activity without consent), 6-12 (offences against children), 16-19 (abuse of positions of trust), 25-26 (sexual activity with a family member), 30-41 (offences against those with a mental disorder), 64-65 (sex with an adult relative) and 70-71 (sexual penetration of a corpse, sexual activity in a public lavatory).

<sup>2</sup> *R v Court* [1989] AC 28. See chapter 2.

‘sexual’ and how the complex definition set out in clause 80 would have forced users to turn to the explanatory note for guidance. Part 2 will evaluate four criticisms of the existing approach to the meaning of ‘sexual’ specified in s.78: it is tautological, obscure, sex-negative and unclear as to when the issue must be left to the jury.

Part 3 will analyse the three possible situations envisaged by the s.78 definition. It demonstrates how s.78 is insufficiently precise and does not provide clear guidance on what constitutes ‘sexual’. It will be argued that the current definition of ‘sexual’ is complex and vague, making it hard for judges and juries to interpret and apply to factual situations. There are three main grounds of criticism. First, s.78(a) provides that some acts may be indisputably ‘sexual’, but these acts are very limited in number and type. Secondly, s.78(b) gives juries and magistrates a lot of discretion to decide what else is ‘sexual’, requiring them to consider the ‘circumstances’ and ‘purpose of any person’ in relation to the action. There is an inherent complexity in the concepts of ‘circumstances’ and ‘purpose’, resulting from the undefined form in which they have been introduced. In particular, this part will consider where, if anywhere, the complainant’s interpretation of the act is relevant for the purposes of s.78, considering whether it is a legally relevant ‘circumstance’ or ‘purpose’ that can or must be considered by the decision-maker. Consideration will also be given to the decision in *R v H (Karl Anthony)*<sup>3</sup> and the approach taken by the Court of Appeal to s.78 where the touching was not automatically by its nature ‘sexual’. Thirdly, there is no act that is incapable of being ‘sexual’ so that any act has the potential to be turned into a ‘sexual’ one by D’s purpose being sexual gratification or where C experiences the action as ‘sexual’.

The definition of ‘sexual’ will be criticised for being insufficiently complainant-centred and in part 4, I will propose an addition to the s.78 definition that makes explicit reference to C’s experience. This would require the jury or magistrates to consider the

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<sup>3</sup> *R v H (Karl Anthony)* [2005] EWCA Crim 732.

complainant's affective response to the touching and would force the law to show solidarity with those who have been harmed through an invasion of their sexual integrity.

### 9.1 CLAUSE 80 OF THE SEXUAL OFFENCES BILL

Section 3(1)(b) SOA 2003 states that for a conviction of sexual assault the touching must be 'sexual'. The *Setting the Boundaries* review was concerned not to use very broad terms such as 'indecent' in offences, preferring instead to frame clearer and more specific offences.<sup>4</sup> However, 'sexual' is also a very broad term and arguably no clearer than indecent in this context. The review suggested that defining proscribed behaviour by body parts (breasts/buttocks/genitalia), such as the genital proximity text proposed in *Beal v Kelly*<sup>5</sup> is inflexible and that a better alternative is to define sexual touching as behaviour that a reasonable person would consider 'sexual', thus reflecting a 'bystander-objective' approach as discussed in chapter 6.

The original clause 80 of the Sexual Offences Bill, as introduced in the House of Lords on 28<sup>th</sup> January 2003, defined 'sexual' in the following way:

- 'For the purposes of this Part, penetration, touching or any other activity is sexual if-
- (a) from its nature, a reasonable person would consider that it may (at least) be sexual, and
  - (b) a reasonable person would consider that it is sexual because of its nature, its circumstances or the purpose of any person in relation to it, or all or some of those considerations.'

Lord Falconer claimed that the definition was 'guided by the case law' on the definition of the word 'indecent' in the context of an indecent assault.<sup>6</sup> However, in the context of indecent assault the standard was that of the 'right-minded person' whereas the

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<sup>4</sup> Home Office Consultation Paper, *Setting the Boundaries: Reforming the law on sex offences* (July 2000) at para 2.14.4.

<sup>5</sup> [1951] 2 All ER 736, at 764. See chapter 2, ss. 2.2.1 and 2.2.4.

<sup>6</sup> Lord Falconer of Thoroton, HL Deb 19<sup>th</sup> May 2003 col 617.



definition of 'sexual' explicitly refers to the 'reasonable person'. There was limited Parliamentary debate on the meaning of the term 'sexual'. A significant proportion of the discussion on the Sexual Offences Bill focused on the scope of the offence of rape and the decision to provide a definition of consent. As a result, the other, 'minor' offences, such as sexual assault, were only briefly considered. The limited discussion given to the meaning of 'sexual' is surprising considering that it is a defining feature of many of the new offences.<sup>7</sup> In relying on the characterization of 'indecent' conduct to define 'sexual' and by providing a definition that uses the very term it is defining, Parliament has provided a definition that is ambiguous and which has not addressed the problems and ambiguities that arose in attempting to distinguish 'indecent' assault from common assault.

#### 9.1.1 Paragraph (a)

Paragraph (a) required the decision-maker to consider how the reasonable person would look at the nature of the activity in question. According to the official explanatory notes, paragraph (a) covered any 'obviously sexual activity' such as sexual intercourse or masturbation.<sup>8</sup> If it would not occur to the reasonable person that it would be 'sexual', it did not meet the test, even if a particular individual may obtain sexual gratification from carrying out the activity. According to the official explanatory notes, 'the effect of this is that obscure fetishes do not fall within the definition of sexual activity'.<sup>9</sup> All fetishes are by their nature somewhat 'obscure', to the extent that sexual arousal is associated with a depersonalized physical thing, traditionally non-living objects. However, one interpretation of the explanatory note might be that there are some fetishes that are commonly recognised as fetishes, including boots, leather and domination. Other

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<sup>7</sup> See n 1.

<sup>8</sup> Sexual Offences Bill: Explanatory Notes (HL) Session 2002-03.

<sup>9</sup> *Ibid.*

fetishes are obscure and might be experienced by only a very few people, for example dendrophilia in which a person is aroused by trees.<sup>10</sup>

The meaning of the phrase 'it may (*at least*) be sexual'<sup>11</sup> would have been confusing and arguably unnecessary. Lord Falconer maintained that the words 'at least' had an important purpose in clause 80 because of the way in which the definition is set out.<sup>12</sup> He clarified by stating that the phrase was chosen in an attempt to 'cover acts that may or may not be sexual,' such as digital penetration of a woman's vagina by a GP in his surgery and 'acts that are always sexual, for example sexual intercourse.'<sup>13</sup> Surely, the definition meant 'that an activity is sexual if a reasonable person would consider it sexual' and if so, why did the drafters choose to make the definition more complex than necessary?

#### 9.1.2 Paragraph (b)

Paragraph (b) of the original clause required the reasonable person to consider the nature, circumstances or purpose of the activity in considering whether it is 'sexual'. The example given in the explanatory notes was the digital penetration of a woman's vagina by a doctor.<sup>14</sup> Penetration could be fundamental to diagnosis or treatment, but could also be wholly irrelevant and only carried out for the doctor's sexual gratification. Lord Lucas was concerned that the words 'or all or some of these considerations' in paragraph (b) might allow a court merely to consider some of the circumstances, rather than taking into account all the relevant circumstances; or to consider the nature of the activity and not its circumstances.<sup>15</sup> He expressed concern that touching a young girl on

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<sup>10</sup> See J. Money, 'Paraphilias: Phenomenology and Classification' (1984) 38 *American Journal of Psychotherapy* 164.

<sup>11</sup> My emphasis.

<sup>12</sup> HL Deb 19<sup>th</sup> May 2003 col 619.

<sup>13</sup> *Ibid.* See chapter 5 for discussion of the problems of defining the essence of 'sexual' and the argument that penile penetration of the vagina is not always 'sexual'.

<sup>14</sup> At para 65.

<sup>15</sup> HL Deb 17<sup>th</sup> June 2003 col 744-7

her bottom might not be considered 'sexual' if the circumstances or the purposes of the action were considered. Lord Lucas moved to insert 'in all the circumstances' after the word 'consider' in paragraph (b). Baroness Scotland promised that this was not what the wording meant.<sup>16</sup> She further explained that, '[w]e do not want to capture activity that no reasonable person would consider to be sexual just because the defendant happened to have a secret fetish not known to the victim'.<sup>17</sup> Baroness Scotland clarified that the definition was drafted carefully to exclude touching another person for 'legitimate, non-sexual reasons, such as an emergency medical purpose or to touch a child on the bottom to push it out of the way of a speeding car'.<sup>18</sup>

Bennion argues that the original definition of 'sexual' was useless unless you had the explanatory note.<sup>19</sup> He suggests that the complex definition and meaning of 'it may (at least) be sexual' would force users to turn for guidance to the explanatory note. This should not be the case since most users of the act, including judges, juries and practitioners will not have the explanatory note. The preface to the explanatory notes justly points out that they have no authority and are purely for guidance purposes.

Clause 80 had two limbs (paragraphs (a) and (b)), both of which must be satisfied if the activity in question was to be held 'sexual'. What is relevant here is the use of the term 'and' rather than 'or' separating the two paragraphs. Clause 80, (then clause 79) was amended by Standing Committee B on 18 September 2003,<sup>20</sup> to make it easier for 'juries to understand' and to improve its 'clarity'. Clause 79 became section 78 SOA 2003 (see definition below). In moving the amendment, to substitute the 'or' for 'and' Paul Goggins MP for the Government said:

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<sup>16</sup> *Ibid.*

<sup>17</sup> *Ibid.*

<sup>18</sup> *Ibid.*

<sup>19</sup> F. Bennion, 'The Meaning of 'Sexual' in the Sexual Offences Bill 2003' (2003) 167 *JP* 764.

<sup>20</sup> Cols 311-313.

'The jury are required to use three criteria in their assessment of whether an activity was sexual: whether an act is sexual by its own nature or is only ambiguously sexual by nature; the circumstances in which the act took place; and the purpose of any person in relation to the act. In short, the test covers all activity that a reasonable person would consider sexual. However, it rules out any activity that a reasonable person would never consider sexual by reason of its nature, such as removing a person's shoes. That ensures that we do not capture activity that no reasonable person would consider to be sexual, and may have been sexual only because the defendant happened to have a secret fetish not made known to the victim- in that example, a foot fetish.'<sup>21</sup>

Paul Goggins assumed that in all situations where D has a secret fetish this is not made known to C. There is also the possibility that D does not know that he has a fetish, but a reasonable person would know. In such a situation, D's conduct would satisfy this element of the *actus reus* regardless of the fact that D is unaware of the 'sexual' nature of the touching.

## 9.2 SECTION 78 DEFINITION OF 'SEXUAL'

Section 78 provides that:

'[P]enetration, touching or any other activity is sexual if a reasonable person would consider that-

- (a) whatever its circumstances or any person's purpose in relation to it, it is because of its nature sexual, or
- (b) because of its nature it may be sexual and because of its circumstances or the purpose of any person in relation to it (or both) it is sexual.'

Section 78 applies the same test as clause 79, but clearly separates activity that is 'sexual' by nature, and would be considered to be so by any reasonable person regardless of the circumstances in which it takes place or the purpose of any person in relation to it (paragraph (a)), from activity that is 'sexual' only because of those circumstances or that purpose (paragraph (b)).

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<sup>21</sup> *Ibid* at col 312.

### 9.2.1 Criticisms of the s.78 definition

There are four criticisms that can be levelled at the s.78 definition. First, it is not a true definition. Secondly, the definition is obscure. Thirdly, the definition is an example of what Bennion labels the 'sex-negative' nature of the act.<sup>22</sup> Fourthly, the section is unclear as to when the issue must be left to the jury.

#### (a) Lack of a true definition

The s.78 definition of 'sexual' is not a true definition. It breaks the first logical rule of definitions by using the very term it is defining, and doing so with the assumption that the reader already knows the intended meaning of that term. As Mellone wrote, 'A definition must not use the term to be defined. An apparent definition which commits this fault is said to be "circular" or "tautological" ...'<sup>23</sup> In the context of sexual assault this is significant because it assumes that the jury or magistrates already have a common understanding of the meaning of 'sexual'. If the decision-maker is assumed to be aware of the meaning of 'sexual' then the s.78 definition would be superfluous.

#### (b) Obscurity of the definition

A further fault is that the supposed definition in s.78 is obscure. Mellone said, 'The definition should not be obscure. This arises usually from the use of expressions, which are less familiar than the one to be defined, thus defining "the obscure by the more obscure" (*obscurum per obscurius*)'.<sup>24</sup> Which activities are 'because of [their] *nature* sexual'?<sup>25</sup> There are many popular and etymological meanings of the term 'sexual'. The Oxford English Dictionary<sup>26</sup> has no fewer than five quite different definitions of the

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<sup>22</sup> *Op cit*, n 19.

<sup>23</sup> S.H. Mellone, *Elements of Modern Logic* (University Tutorial Press, London, 1949).

<sup>24</sup> *Ibid*.

<sup>25</sup> My emphasis.

<sup>26</sup> [www.oed.com](http://www.oed.com) [Online] (Accessed: 1<sup>st</sup> October 2007).

adjective 'sexual', highlighting the breadth of its possible interpretations.<sup>27</sup> Of these the most relevant to this work are:<sup>28</sup>

- '3. a. Designating those organs or anatomical structures concerned in sexual reproduction or (esp.) in sexual intercourse, as **sexual organ** (often in *pl.*), **sexual parts**.
- b. Relating to or affecting the genitals or reproductive organs.
4. a. Relating to, tending towards, or involving sexual intercourse, or other forms of intimate physical contact.
- b. Of or relating to sexuality as a social or cultural phenomenon; regarding sexual conduct.
- c. Characterized by sexual instincts or feelings, or the capacity for these; possessing or displaying sexuality.'

Bennion suggests that the SOA 2003 'mystifyingly' avoids saying what the Oxford English Dictionary 1989 says;<sup>29</sup> namely, that in the sense intended, penetration, touching or any other activity by a person, is 'sexual' if carried out with a view to the 'gratification of their sexual appetites'.<sup>30</sup> However, Bennion's proposed clarification is arguably no clearer, as the phrase 'gratification of sexual appetites' is extremely vague and it is not 'mystifying' that the Government should seek to avoid using it. It is plausible that the

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<sup>27</sup> F. Bennion, *Sexual Ethics and Criminal Law: A Critique of the Sexual Offences Bill 2003* (Lester Publishing, Oxford, 2003) p. 27.

<sup>28</sup> The other definitions are:

1. Characteristic of or peculiar to the female sex; feminine.
2. a. Of, relating to, or arising from the fact or condition of being either male or female; predicated on biological sex; (also) of, relating to, or arising from gender, orientation with regard to sex, or the social and cultural relations between the sexes.
- b. *Biol.* Of an animal, plant, or other organism: characterized by sex; sexed, sexuate; capable of sexual reproduction; having distinct male and female reproductive organs, often (though not necessarily) in separate individuals. Opposed to *asexual*.
5. *Biol.* Of reproduction in animals, plants, and other organisms: taking place by means of a physical connection or fusion between two cells (usually distinct male and female reproductive cells or gametes) and the recombination of their genetic material to produce a new cell with a genotype containing elements from each. Esp. in **sexual reproduction**. Opposed to *asexual* or *agamic*.

<sup>29</sup> J.A. Simpson & E.S.C Weiner, *The Oxford English Dictionary* 2<sup>nd</sup> edn (Clarendon, Oxford, 1989): 'Relative to the physical intercourse between the sexes or the *gratification of sexual appetites*.' (emphasis added).

<sup>30</sup> *Op cit*, n 19.

Government would want to avoid the use of ambiguous phrases such as 'gratification' and 'sexual appetite', which would need further definition and be open to wide interpretation. If 'gratification' refers to the intention to give rise to the sexual arousal of either party, that would place an additional burden on prosecutors to prove that intention.

#### (c) 'Sexual' and sex-negativism

Bennion further suggests that the lack of definition of 'sexual' is another example of the 'sex-negative' nature of the act. The terms and concept of 'sex-positive' and 'sex-negative' are generally attributed to Wilhelm Reich. His hypothesis was that some societies view sexual expression as essentially good and healthy, while other societies take an overall negative view of sexuality and seek to repress and control the sex drive.<sup>31</sup> Bennion argues that sex positivism or the happy acceptance of human sexuality, seeking its fulfilment, is largely absent from our society, even though it is essential for human happiness.<sup>32</sup> He proposes that what the Act means by 'sexual' is having to do with sexual desire and what in some places it calls sexual gratification and yet it is afraid to say so.<sup>33</sup> Bennion fails to consider that D's motive for an act does not have to be sexual gratification. If D's purpose in inserting an instrument in a woman's vagina is to humiliate and/or injure her and there is no element of sexual gratification, it would still be 'sexual' under s.78 because his purpose is to use what, in those circumstances, are sexual means to achieve his main purpose.

#### (d) When must the issue be left to the jury?

Sexual assault is a triable-either way offence and it is therefore a question of fact for the jury (or magistrates) whether the touching meets the requirements of s.78. If the judge considers that no reasonable person properly directed could find that it does, he should

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<sup>31</sup> W. Reich, *The Invasion of Compulsory Sex-Morality* (Farrar, Strauss, Giroux, 1971)

<sup>32</sup> F. Bennion, *The Sex Code: Morals for Moderns* (Harmondsworth, Penguin, 1975).

<sup>33</sup> *Op cit*, n 19.

not leave the question to the jury.<sup>34</sup> If the defence submit that this is the proper course, the judge will need to decide whether the jury could reasonably find that a reasonable person would consider that the alleged touching is 'sexual', either because of its nature alone or because of its nature combined with the circumstances in which it takes place and/or the purpose of any person in relation to it. If he concludes that a reasonable person could possibly answer those questions adversely to the defendant, then the matter would have to be left to the jury.<sup>35</sup> The question of whether a reasonable person could find a particular touching 'sexual' may not always be easily answered. This test is rather ambiguous in the context of what constitutes a reasonable person. As Lord Northbourne rightly noted, '[p]eople with so many different views can all be reasonable'.<sup>36</sup> There is a risk that what is considered 'reasonable' will be another aspect of the legislation which will be left to the discretion of judges and in an increasingly pluralistic and fragmented society this is likely to lead to inconsistent decision-making. There is the possibility that judges have a particular view of what constitutes 'sexual' touchings, but without empirical evidence, any judgement would be speculative. In practice, the perceptions of the reasonable person will be those of the jury or magistrates; it is unlikely that they will have other evidence of what a hypothetical person might think about the conduct, nor will they consider themselves anything other than reasonable.

### 9.3 ANALYSIS OF THE S.78 APPROACH

S.78 does not provide a definition of the term 'sexual'; rather it sets out an approach for determining whether the activity in question is 'sexual' where this may be in doubt (as shown in figure 9.1 below).<sup>37</sup> This approach closely mirrors the decision in *Court*,<sup>38</sup> in

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<sup>34</sup> *R v H* [2005] EWCA Crim 732, at para 12.

<sup>35</sup> *Ibid.*

<sup>36</sup> HL Deb 19<sup>th</sup> May 2003 col 609.

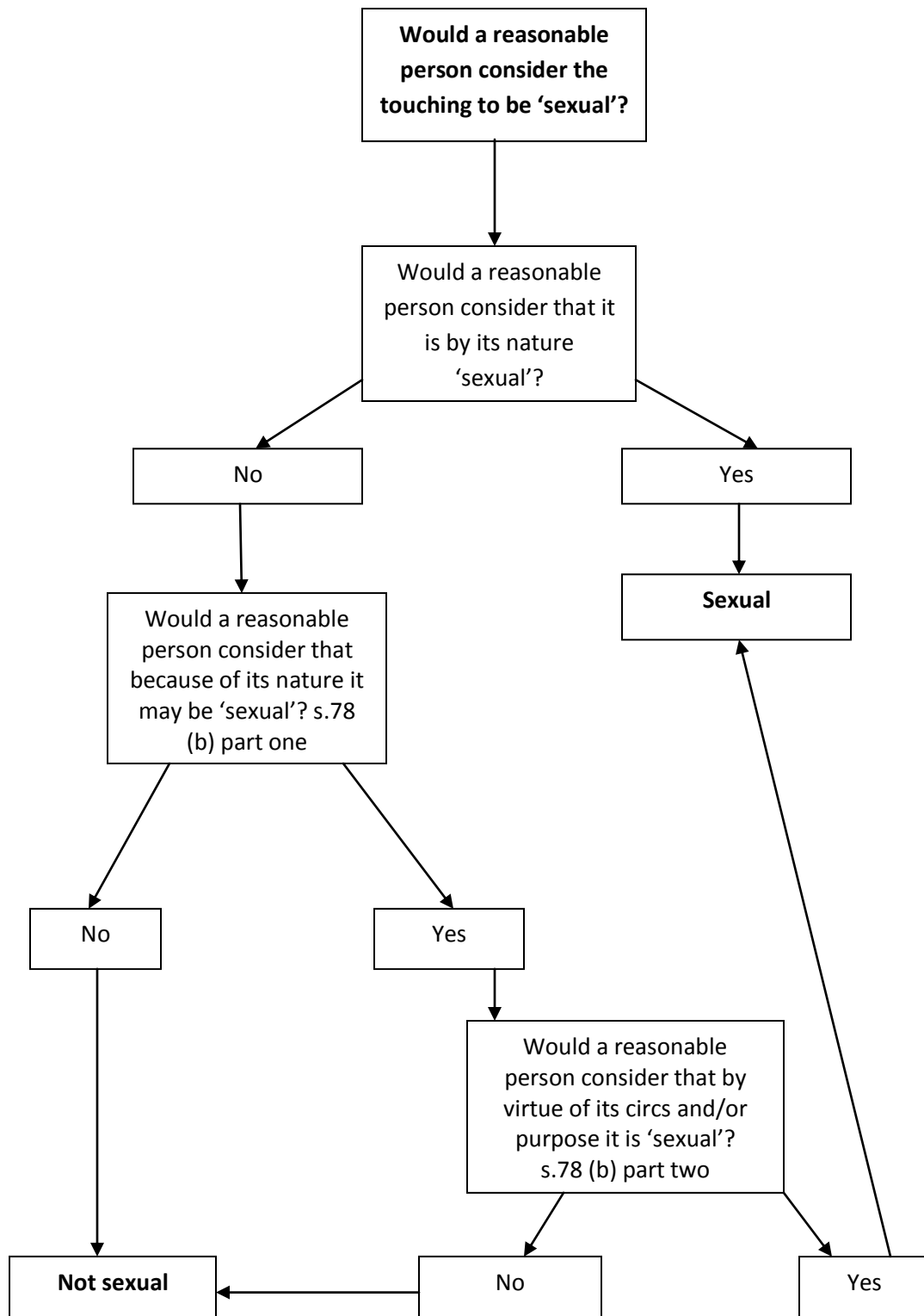
<sup>37</sup> J. Temkin & A. Ashworth. 'The Sexual Offences Act 2003: (1) Rape, Sexual Assaults and the Problems of Consent' [2004] *Crim L R* 331.

<sup>38</sup> [1989] AC 28.



which the House of Lords distinguished three types of case in order to decide when an activity could be designated 'indecent' for the purposes of the offence of indecent assault (as discussed in chapter 2). The s.78 definition envisages three possibilities: (i) the act is indisputably 'sexual'; (ii) the act is potentially 'sexual' and (iii) the act is indisputably not 'sexual'. Each will be considered in detail. Although there is no technical distinction made between the two parts of s.78(b), for the sake of clarity I will refer to s.78(b) part one and s.78(b) part two to refer to the two parts respectively.

Figure 9.1: Section 78 flow-chart



### 9.3.1 The act is indisputably 'sexual'

The first situation envisaged by s.78 is where the act is indisputably 'sexual'. The jury or magistrates are asked to identify and objectify particular forms of touching as being inherently 'sexual' when in fact, as was argued in chapter 5, no form of touching is 'sexual' by nature, but instead is dependent on context.<sup>39</sup> Thus, there are no acts which are 'by their nature sexual', but there are a limited number that all 'reasonable people' might consider to be 'sexual' 'by their nature'. Section 78(a) is not concerned with the *a priori* nature of acts, but with how reasonable people perceive those acts.

#### (a) S.78(a): is it 'because of its nature sexual'?

Under s.78(a), the first step is to consider whether the reasonable person would consider the conduct 'because of its nature sexual'. This is an objective test based upon whether a reasonable person would consider that the nature of the touching is 'sexual', irrespective of the surrounding circumstances or purpose of any person. S.78(a) applies where the nature of the sexual activity is unambiguous to a reasonable person and does not require any further contextual explanation such as that advanced by the House of Lords in *Court*. Where conduct was only *capable* of being an indecent assault, Lord Ackner stated that the following factors were clearly relevant: 'the relationship of the defendant to this victim (were they relatives, friends or virtually complete strangers?), how had the defendant come to embark on this conduct and why was he behaving in this way?'<sup>40</sup> Section 78(a) can therefore be described as a context-independent test as it is the action, as opposed to the circumstances or purpose that is being judged. Underlying this approach is the philosophical concept of essentialism: the idea that properties or qualities possessed by a person or thing are unchanging and not dependent on context. It is also a non-interpretive test as it is devoid of any reference to the participants' experiences.

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<sup>39</sup> See chapter 5.

<sup>40</sup> [1989] AC 28, at 43.

Temkin and Ashworth argue that s.78(a) is an objective test that is based upon whether the conduct is 'transparently' sexual.<sup>41</sup> However, one of the weaknesses of this classification is that 'transparently' is an ambiguous term that adds no value to the explanation of conduct as 'sexual'. Modifiers such as 'transparently', 'inherently'<sup>42</sup> and 'obviously' might add little to an already ambiguous term such as 'sexual' or they might add additional layer(s) of complexity. 'Transparently' for example raises the question, 'transparent' from whose perspective? Transparently also implies an external visibility of the act. It is possible that the drafters chose to avoid coupling 'sexual' with a further vague adverb such as 'transparently' which does not appear in the statute, on the basis of the problems caused in *Court* in describing conduct as 'inherently indecent'.<sup>43</sup>

Examples of conduct that the reasonable person might consider is 'because of its nature sexual' would include anal or vaginal sexual intercourse, oral sex and inserting a vibrator into a woman's vagina. These actions all involve the primary sex organs. Virtually any penetrative act would satisfy this test,<sup>44</sup> unless conducted in the course of *bona fide* medical examinations, treatment, or intimate searches by the police and other enforcement agencies. The test in s.78(a) requires a correlation between the nature of the activity and an associated sexual connection. In terms of non-penile penetration (for example the forced entry of a vibrator into the vagina) which is in essence simulating sexual intercourse, this is easily satisfied.

In relation to sexual assault, the s.78(a) definition of 'sexual' would apply to those batteries, where there can be no doubt or ambiguity as to the 'sexual' nature of the

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<sup>41</sup> *Op cit* n 37 at p.331. Temkin and Ashworth do not provide any examples of conduct they describe as 'transparently' sexual.

<sup>42</sup> Used by K. Stevenson., A. Davies, & M. Gunn, *Blackstone's Guide to the Sexual Offences Act 2003* (Oxford University Press, Oxford, 2004) p.44.

<sup>43</sup> See chapter 2, section 2.2.2.

<sup>44</sup> Any penetrative act falling within s.78(a) would be an offence under s.2 SOA 2003 and more appropriately charged under that section. This demonstrates the overlap between s.1, s.2 and s.3 as analysed in chapter 3, section 3.4.

touching. This draws attention to the connection between sexuality and reproductivity. In theory only touching of and/or by<sup>45</sup> the primary or secondary sex organs without the consent of the complainant would constitute an indisputable sexual assault. The reproductive system consists of primary and secondary sex organs. The primary sex organs, or gonads, are organs that produce the gametes (sex cells): testes of the male and ovaries of the female.<sup>46</sup> The secondary sex organs are organs other than gonads that are necessary for reproduction.<sup>47</sup> According to location, the reproductive organs are classified as external<sup>48</sup> and internal genitalia.<sup>49</sup> The scrotum and penis constitute the external genitalia of the male and occupy the perineum.<sup>50</sup> The external genitalia of the female occupy most of the perineum and are collectively called the vulva (principally the clitoris, labia minora and labia majora). In men, the s.78(a) definition of 'sexual' would appear to apply to touching of and/or by the scrotum and penis. In women, the s.78(a) definition of 'sexual' would appear to apply to the touching externally of and/or by the vulva, and internally of the vagina. The acts falling within s.78(a) appear to be quite limited and in respect of a charge of sexual assault appear to be limited to the touching of and/or by the primary and secondary sexual organs. However, considering the context-dependent nature of sexual assault even acts involving the primary or secondary sex organs may be ambiguous.

#### (b) Interpreting s.78(a) in the courts

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<sup>45</sup> Conduct that a reasonable person might consider 'because of its nature sexual' could include where a man rubs his penis against any part of another person's body or where a woman rubs her vulva against another person.

<sup>46</sup> K. Saladin, *Anatomy and Physiology: The Unity of Form and Function* (McGraw-Hill Higher Education, New York, 2010) p.1048. See also A. Bolin, *Human Sexuality: Biological, Psychological and Cultural perspectives* (Routledge, Oxon, 2009) chs 5 & 6.

<sup>47</sup> In the male, they constitute a system of ducts, glands, and the penis, concerned with the storage, survival and conveyance of sperm. In the female, they include the uterine tubes, uterus and vagina, concerned with uniting the sperm and egg and harbouring the developing foetus.

<sup>48</sup> The external genitalia are located in the perineum. Most of them are externally visible, except for the accessory glands of the female perineum.

<sup>49</sup> The internal genitalia are located mainly in the pelvic cavity, except for the male testes and some associated ducts contained in the scrotum.

<sup>50</sup> Saladin, n 46.

Whilst s.78(a) appears to be a straightforward test for courts to apply because it applies to a limited range of conduct, it might be considered problematic in two ways. First, s.78(a) might be regarded as 'overly strict' on defendants because it does not take into account D's non-sexual motive.<sup>51</sup> Leake and Ormerod give the example of a defendant who pulls down C's shorts. They suggest that the case may well fall immediately into s.78(a), with the nature of the act rendering it 'indisputably sexual'. If in pulling down C's shorts, the defendant had a disciplinary motive, there will only be an opportunity for this explanation if the case is decided under s.78(b). Leake and Ormerod appear to imply that nudity is inherently 'sexual', although as was discussed in chapter 4, arguably, nudity is context-dependent and therefore cases of this type should typically fall within s. 78(b).

Secondly, Temkin and Ashworth suggest that in most cases, it will not be difficult to apply the test in s.78(a) and only in exceptional circumstances will s.78(b) come into play.<sup>52</sup> Nevertheless, if we consider a spectrum of offences from the indisputably 'sexual' to the obviously not 'sexual', (see figure 9.2 below) s.78(b) acquires significance in designating ambiguous conduct 'sexual'. Given the difficulty in distinguishing 'sexual' from 'non-sexual' conduct s.78(b) has an important role in differentiating between sexual assault and common assault. Section s.78(a) is context-independent: the limited acts that fall within the subsection can be so classified because there is no need to have recourse to the surrounding circumstances in order to appreciate the 'sexual' nature of the act. S.78(a) is neither complainant nor defendant-centred. The test is objective, judging the action from a reasonable person's perspective. Paragraph (a) gives no consideration to the purpose of the accused or the complainant's interpretation of the

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<sup>51</sup> S. Leake & D.C. Ormerod, 'Sexual Assault: Whether touching of complainant's clothing without bringing pressure against complainant's body 'touching' for purposes of sexual assault?' [2005] *Crim LR* 734.

<sup>52</sup> *Op cit*, n 37 at p.332.

incident. It covers a small range of acts and thus s.78(b) assumes great importance for deciding whether something is 'sexual'.

### 9.3.2 The act is potentially 'sexual'

Section 78 paragraph (b) deals with those situations where the act is potentially 'sexual'. Paragraph (b) is more controversial than paragraph (a) and is ambiguous as to the approach jurors (or magistrates) should adopt in deciding whether an act is 'sexual'. It gives juries and magistrates a lot of discretion to decide what else is 'sexual' based on their own individual understanding and interpretation of the term.

#### (a) S.78 (b) (i): Might it be 'sexual' by its nature?

The first part of s.78(b) requires the jury (or magistrates) to establish that the action 'because of its nature' *might* be 'sexual'. Thus, although a reasonable person would not consider that the activity is because of its nature 'sexual', the reasonable person would nevertheless consider that because of its nature it *may be* 'sexual'. The difference is between an activity being definitely 'sexual' because of its nature and being possibly 'sexual' because of its nature depending on the need for further contextual information. Examples of touching which might be held to be 'sexual' because of its nature, and which under the old law were held to constitute an inherently indecent assault, are where a man grabs a woman's breasts,<sup>53</sup> or gives her a long, lingering sexually-charged kiss.<sup>54</sup>

#### *Example 1: Breasts*

One issue for consideration is whether touching of the female breasts is 'sexual' 'because of its nature' or whether such touching is only rendered 'sexual' by the

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<sup>53</sup> *Shaukat*, unreported, July 11, 2000 (No.00/3439/Z5).

<sup>54</sup> *M.A.* [2003] EWCA Crim 716. Other examples include where D inserts his finger into C's vagina *McCormack* [1969] 2 QB 442; *K.C.S.*, unreported, October 2, 1998 (No.98/02823/Z2) or removes her clothing *Court* [1989] AC 28, at 42H-43A.

surrounding circumstances. There is more than one function of the female breast. In medical literature, breasts are not defined as primary sexual characteristics, because they are not involved in sexual reproduction. The breasts are defined as secondary sexual characteristics: traits that distinguish the two sexes of a species and play a role in mate attraction, but that are not directly part of the reproductive system.<sup>55</sup> In humans, the most visible secondary sexual characteristics are breasts of females and beards and moustaches of males. Breasts play an important part in human sexual behaviour. Touching, kissing, licking and sucking the breasts are considered in Western culture to be erotic and can lead to sexual arousal. The breasts of a female also contain the mammary glands, which secrete milk to feed infants. In some African cultures, breasts are not considered erotic but the source of food for an infant. In other Western cultures, breasts are considered both erotic and a source of food.

Under s.14 of the SOA 1956, touching of the naked breasts was considered inherently indecent.<sup>56</sup> It is less clear whether, following the change of adjective from 'indecent' to 'sexual', courts will rule that breasts are 'because of their nature sexual'. Being a secondary sexual characteristic, touching of the breasts has the potential to be considered 'sexual' by the reasonable person and it is this invasion of sexual autonomy that the law seeks to protect. However, touching of the breasts is not by its nature 'sexual', as medical examinations of the breasts are not 'sexual'. One might argue that *non-consensual* touchings of the breast are by their nature 'sexual' touchings.<sup>57</sup> This brings us to the conclusion that consent is a relevant circumstance for the jury or magistrates to consider in deciding whether a touching was 'sexual'.

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<sup>55</sup> Saladin, n 46.

<sup>56</sup> *R v Naveed Tabassum* [2000] 2 Cr App R 328; *R v Kumar* [2006] EWCA Crim 1946; *R v Bates* [2004] EWCA Crim 163.

<sup>57</sup> An example of a situation where a non-consensual touching of breasts might be non-sexual might be where a stranger who is performing CPR on an unconscious woman in the street touches her breasts. Under s.75(2)(d) SOA 2003 there is a presumption of non-consent where the complainant 'was asleep or otherwise unconscious at the time of the relevant act'. This raises a further complicating issue of whether we all impliedly consent to being rescued?



### *Example 2: Kissing*

A further issue might be whether a kiss is 'sexual' by its nature, or whether its categorization depends on the circumstances and purpose of the kisser.<sup>58</sup> Kissing may or may not be sexually motivated. We can distinguish between kissing offered as a greeting or farewell (often consisting of brief contact with the cheek) from that offered as an expression of romantic affection or sexual desire (consisting of kissing on the lips or French kissing). In the Scottish case *Boyle v Ritchie*,<sup>59</sup> the Appeal Court held that a kiss might be perfectly decent in an open social setting but 'indecent' in a lewd and libidinous setting. Williams suggested that deep-kissing, by which I assume he means kissing involving the participant's tongues (or what is commonly referred to as French kissing), is 'unambiguously sexual' and could therefore be regarded as an indecent assault.<sup>60</sup> He further suggests that 'such an assault upon an adult woman is unlike an ordinary kiss, which is not an affront to modesty, even though unwelcome.'<sup>61</sup> One problem with this categorisation is that where kissing is non-consensual, even the slightest kissing on the lips may constitute an invasion of sexual and bodily integrity. In British culture, kissing is normally confined to those of close acquaintance<sup>62</sup> and being kissed on the lips by a stranger may invoke feelings of disgust and fear of what may follow (i.e. that she will be further sexually assaulted or raped). Distinguishing on the basis of whether the kissing involved is 'deep' or otherwise is therefore not an accurate basis for distinction.

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<sup>58</sup> Thus there will be no liability where a grandma issues a slobbering greeting to her reluctant grandson. The physical nature of the kiss, the relationship between the parties and the non-sexual purpose acquire great significance. For discussion of the social anthropology of kissing see chapter 5, section 5.2.1.

<sup>59</sup> (1999) SCCR 278.

<sup>60</sup> G. Williams, 'The Meaning of Indecency' (1992) 12 *LS* 20, at 29.

<sup>61</sup> *Ibid.*

<sup>62</sup> In other cultures for example French and Italian kissing between those not of close acquaintance is common.

In *M.A.*<sup>63</sup> a long, lingering sexually charged kiss was held to constitute an inherently indecent assault. A less passionate kiss was also capable of qualifying as indecent assault: in *Kallides*,<sup>64</sup> a man who kissed and stroked a small boy was held to have committed an indecent assault. Would a jury (or magistrates) consider that kissing various other parts of another's body, such as the neck, ears, breasts, and navel might be because of their nature 'sexual'? These are all areas of the human body that have heightened sensitivity and kissing them can result in sexual arousal. Some kisses, for example, those placed on or near the genitals or breasts of the complainant, would seem clearly to fall within the possibly 'sexual' category. Other kisses will perhaps depend on the precise factual circumstances of the case in question and therefore fall under s.78(b).

(b) S.78 (b) (ii) Is it 'sexual' by virtue of its circumstances and/or purpose?

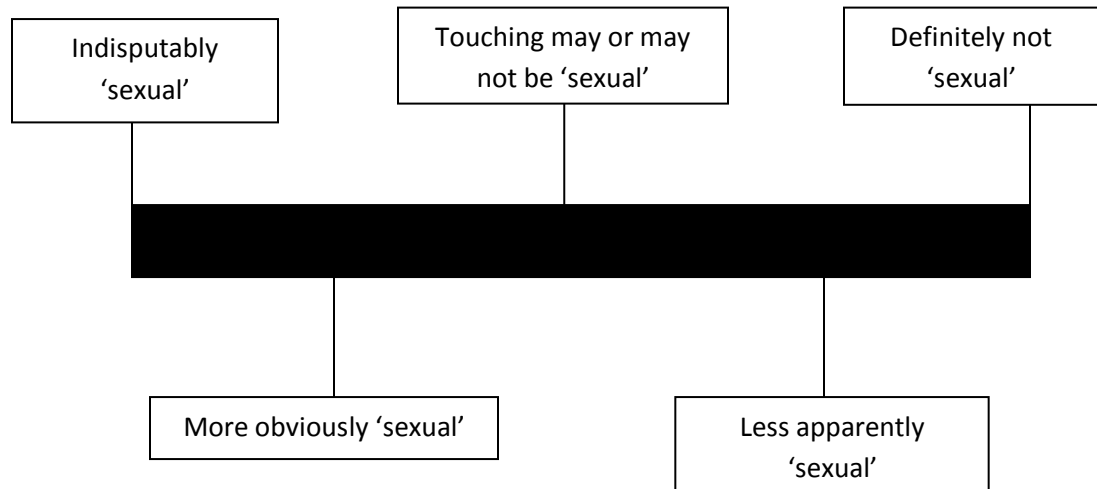
Where the conduct is ambiguous and because of its nature *might* possibly be 'sexual', then, under s.78(b) part two, the circumstances of the action, or purpose of any person in relation to it, or both are to be considered in assessing whether the conduct is 'sexual' or not. This is an important aspect of the s.78 test, widening the scope of behaviour amenable to prosecution. However, this feature of the definition of 'sexual' is also problematic because it is sometimes unclear when the circumstances and/or purpose of D are 'sexual'. The second limb of the test only arises if the answer in respect of the first limb is affirmative. If we consider a continuum of touching from the obviously 'sexual' to the definitely not 'sexual', the circumstances and/or purpose of any person become increasingly important in characterizing those assaults that are not indisputably 'sexual' or 'non-sexual'.

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<sup>63</sup> [2003] EWCA Crim 716.

<sup>64</sup> Referred to in *Sutton* [1977] 1 WLR 1086. See further A.N. Mackesy, 'The Criminal Law and the Woman Seducer' [1956] *Crim L R* 529, at 530; G. Williams, 'The Meaning of Indecency' (1992) 12 *LS* 20.

Figure 9.2: Spectrum of 'sexual' behaviour



S.78(b) is also an objective test, but can be described as context-dependent to the extent that the circumstances and purpose of any person in relation to it may be taken into account when designating the conduct as 'sexual'. Where the activity is, for example, oral sex, it seems likely that the reasonable person would only need to consider the nature of the activity to determine that it is 'sexual' by its nature. However, where it is digital penetration of the vagina, the reasonable person would need to consider the nature of the activity (it may or may not be 'sexual'), the circumstances in which it is carried out (if it is in a doctor's surgery it is probably not 'sexual') and the purpose of any of the participants (if the doctor's purpose is medical, the activity will not be 'sexual'; if the doctor's purpose is 'sexual', it will be 'sexual'). Table 9.1 below shows the relevance of the circumstances of an action and the purpose of any person to a finding of a sexual act under s.78(b) when the act is potentially 'sexual'.

*Table 9.1: Relevance of circumstances/purpose to the 'sexual' nature of a touching (s.78(b))*

|         |              | Circumstances          |                                    |
|---------|--------------|------------------------|------------------------------------|
|         |              | 1.<br>Sexual           | Non-sexual                         |
| Purpose | 2.<br>Sexual | 3.<br>Sexual touching  | 4.<br>Sexual touching?             |
|         | Non-sexual   | 5.<br>Sexual touching? | 6.<br><u>Not</u> a sexual touching |

*Situation 1: Circumstances alone*

The first possible situation under s.78(b) part two is whether an act could be determined to be 'sexual' by examination of the circumstances alone. One of the problems with the use of the term 'circumstances' in the definition of 'sexual' is that it is a vague word (as critiqued in chapter 5). The Oxford English Dictionary defines circumstances as '[t]he logical surroundings or 'adjuncts' of an action; the time, place, manner, cause, occasion, etc., amid which it takes place'.<sup>65</sup> 'Circumstances' is such an imprecise term as to potentially cover anything. Several circumstances both separately and/or together may render a touching 'sexual'. These include but are not limited to the relationship between the parties, the defendant's motive, the spatial and temporal environment, and the complainant's experience of the action. S.78(b) part two states that 'circumstances' and the defendant's purpose are two separate issues to be considered by the jury or magistrates. However, arguably the expression 'circumstances' refers to anything that

<sup>65</sup> Oxford English Dictionary, definition 2a [Online] Available at [www.oed.com](http://www.oed.com) (Accessed: 12<sup>th</sup> December 2009).

may affect the determination of the 'sexual' nature of the touching, and this therefore *includes* the D's purpose.

It is possible that the complainant's affective response to the touching falls within the 'circumstances' to be considered by the jury (or magistrates). But, in failing to define what they meant by 'circumstances' the drafters have failed to make the complainant's affective response to the touching explicitly relevant and s.78 essentially allows the decision-makers to consider whatever they like, which may or may not include the C's experience. However, it is worth noting again that the two-stage test in s.78(b) and decision in *H* means that decision-makers cannot consider all the 'circumstances' at the first stage.

Examples of touchings which are likely to be held 'sexual' because of their circumstances, and which under the old law were held to involve an indecent assault, are where a man with an exposed penis pulls a boy towards himself,<sup>66</sup> or where a man kisses a young girl while suggesting they have sex,<sup>67</sup> or where a woman cuddles a young girl, who is sexually excited and is sexually stimulating the woman,<sup>68</sup> or where a man strokes a woman's hair and touches her ankle after entering her bedroom at night while she is sleeping.<sup>69</sup> Where a doctor uses his fingers to examine a patient's vagina or anus, this would not ordinarily be considered 'sexual'; but if he makes inappropriate comments or suggestions whilst doing so, or if there is proof that he knows the examination to be unnecessary, a reasonable person would probably conclude that his action might indeed be 'sexual'.

### *Situation 2: Purpose alone*

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<sup>66</sup> *Beal v Kelley* (1951) 35 Cr App R 128; and see *Sargeant* [1997] Crim L R 50.

<sup>67</sup> *Leeson* (1968) 52 Cr App R 185.

<sup>68</sup> *Goss and Goss* (1990) 90 Cr App R 400.

<sup>69</sup> *Turner*, unreported, November 30, 1999 (No.99/1266/Z5).

The second possible situation under s.78(b) part two is whether an act is 'sexual' by examination of the defendant or any person's purpose alone. The facts of *Court*<sup>70</sup> itself fell within this category. D placed a 12-year-old girl, fully clothed, across his knee and beat her 12 times on her buttock. Whether that type of touching was considered 'sexual' under the SOA 2003 would depend largely on whether or not his purpose was sexual gratification. If his purpose were purely chastisement, it would not be 'sexual'. Examples of touching likely to be held capable of being 'sexual', so that D's purpose can be used to prove that it was, are where a man touches naked young boys on the hands, arms, legs and torsos in order to arrange poses for photographs which he intends to sell to indecent magazines,<sup>71</sup> or where a man places plastic bags over young girls' heads and takes photographs of them, which he admits later using for sexual gratification,<sup>72</sup> or where a doctor unnecessarily carries out an intimate medical examination of a young girl, where there is evidence that he did so for purposes of sexual gratification.<sup>73</sup> A reasonable person might consider that any touching of a woman's breast may because of its nature be 'sexual', and would consider that 'groping' a woman's breast for sexual gratification was 'sexual' in light of the purpose with which the touching is done.

It is also worth noting that an act can be rendered 'sexual' by the 'purpose of *any* person'.<sup>74</sup> Even though D may not have a 'sexual' purpose, a third party's purpose could make an act 'sexual', where for example a third person encourages D's acts. If X encourages D to stroke C's thigh and X finds the touching sexually gratifying, a reasonable person may conclude that the touching is 'sexual'. This might also cover the situation where a medical examination, though necessary, was conducted in an

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<sup>70</sup> [1989] AC 28. See chapter 2.

<sup>71</sup> *Sutton* [1977] 1 WLR 1086.

<sup>72</sup> *Gosling*, unreported, November 4, 1999 (No.99/02105). It is not entirely clear why placing a bag over a girl's head should be capable of being an indecent act if taking off her shoe is not (*George* [1956] Crim L R 52).

<sup>73</sup> *Court*, above n 70, at 43G-44C *per* Lord Ackner; at 35D, *E per* Lord Griffiths.

<sup>74</sup> S. 78(b) emphasis added. The 'purpose of any person' might include the purpose of the complainant, as explained below.

inappropriate manner. For example, in the Canadian case of *Bolduc v Bird*,<sup>75</sup> D carried out a proper vaginal examination but allowed a friend to be present, masquerading as a medical student, for purposes of sexual gratification.

*Situation 3: Circumstances 'sexual', purpose 'sexual'*

The third possible situation under s.78(b) part two is where both the circumstances and the purpose of the accused are 'sexual'. One of the problems here is that it is sometimes unclear when the circumstances are 'sexual'. If D strokes C's thigh whilst speaking of his intention to have sexual intercourse with her, it is probable that both the circumstances and purpose will be considered 'sexual'. Or, if a man encourages a young child to strip in front of him for purposes of sexual gratification it is probable that a reasonable person would think that the act because of its nature may be 'sexual', but would also consider (by reference to its circumstances and the man's purpose) that it is 'sexual'. Here the circumstances appear to be 'sexual' by reference to the child's nudity.

A further problem here is that a person can have multiple purposes. Although dealing with a case of indecent assault, *R v Kumar*<sup>76</sup> is instructive on this issue. D, a doctor carried out a clinically necessary breast examination on a patient. The Court of Appeal, upholding D's conviction for indecent assault appeared to endorse the trial judge's direction to the jury to the effect that an assault was indecent if they were satisfied that D had intended to obtain sexual gratification. Four possibilities were identified:

- (i) D's sole intention had been to obtain sexual gratification (D guilty);
- (ii) D's sole intention had been to gain clinical information (D not guilty);
- (iii) D had a dual intention, namely, legitimate breast examination as cover with intention to gain sexual gratification from the outset (D guilty);

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<sup>75</sup> [1967] SCR 677.

<sup>76</sup> [2006] EWCA Crim 1946.

- (iv) D had, in the course of a legitimate medical examination, gained sexual gratification (D not guilty).

Situations (i) and (iii) would come within s.78(b) given the admissibility of evidence as to D's purpose. The issue of which kinds of touching will satisfy this element of the *actus reus* is harder to determine when only either one of the circumstances or purpose is 'sexual' but not both, as in situations 4 and 5 in the table above.

*Situation 4 : Circumstances 'non-sexual', purpose 'sexual'*

The fourth possible scenario under s.78(b) part two is where the circumstances are 'non-sexual' but the purpose is 'sexual'. This would cover the situation where the complainant is not necessarily aware of the 'sexual' nature of the act, that nature only becoming clear when D's purpose is understood. This raises the question of when circumstances are 'non-sexual'? Arguably, the circumstances are 'non-sexual' when the action has no associated sexual connotation: it is not commonly associated with being an object of sexual pleasure or gratification.

*Example 3: Hair*

Would a reasonable person think that the nature of combing a person's hair might be 'sexual'? The answer is probably not: as a general everyday activity, it is not commonly associated with being an object of sexual pleasure or gratification. However, what of the hairdresser who is sexually aroused when cutting or washing others' hair? Trichophilia or hair fetishism is a paraphilia in which one becomes sexually aroused by, or is extremely fond of human hair, commonly head hair.<sup>77</sup> It is unlikely that a jury or magistrates would consider a hairdressers cutting of C's hair to be 'sexual' unless they know about his motive. However, if liability is conditional upon the jury reaching agreement that the haircut *may* be 'sexual' in the first place, without consideration of or reference to D's possible trichophilia, then it is unlikely that such conduct will be held to be 'sexual'.

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<sup>77</sup> See C. Scorolli *et al*, 'Relative prevalence of different fetishes [2007] 19 *Int J Impot Res* 432.



Whether a jury reaches a decision that a haircut may be 'sexual' will be dependent on their understanding of the range of fetishes that exist.

#### *Example 4: Feet*

In *Court*, the House of Lords appears to have regarded *George*<sup>78</sup> as an example of conduct that could never be indecent. *George* was charged with indecent assault on the basis that he had removed a shoe from a girl's foot because it gave him sexual gratification, but was acquitted on the basis of the trial judge's ruling that he had done nothing, on this evidence, that could be described as indecent. In the context of 'indecent', *George* may have been correct on its facts,<sup>79</sup> but whether such conduct could properly be described as 'sexual' under SOA 2003 is another matter. In *H*, Lord Woolf said:

'We would express reservations as to whether or not it would be possible for the removal of shoes in that way, because of the nature of the act that took place, to be sexual as sexual is now defined in s 78. That in our judgment may well be a question that it would be necessary for a jury to determine.'<sup>80</sup>

Podophilia<sup>81</sup> or foot fetishism is the most common form of sexual preference for otherwise non-sexual objects or body parts.<sup>82</sup> A reasonable person might consider that the removal of a shoe *may* be 'sexual' by nature and that because of the shoe remover's fetishism it is 'sexual', whereas he would consider that the removal of the shoe for

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<sup>78</sup> [1956] Crim LR 52.

<sup>79</sup> Contrast *Price* [2004] 1 Cr App R 145, in which D's conduct in stroking the complainant's legs through her trousers below her knee whilst begging her to remove her ankle boots was held to be capable of amounting to indecent assault, contrary to SOA 1956, s.14. It is certainly clear that his motives were sexual and in contrast to *George* this must have been obvious to the complainant and to reasonable people.

<sup>80</sup> [2005] 2 Cr App R 149, at 11.

<sup>81</sup> Podophilia is a type of partialism where sexual arousal is obtained by specific, non-genital body parts. Individuals with partialism sometimes describe the anatomy of interest to them as having equal or greater erotic attraction for them as do the genitals.

<sup>82</sup> Scorolli *et al*, *op cit*, n 77. See also R. Dobson, 'Heels are the World's No 1 Fetish' *The Independent*, 25<sup>th</sup> February 2007. In April 2007, a footwear fetishist, who admitted eight thefts of women's shoes, received a 12 month suspended sentence from the Crown Court. Jurors failed to reach a verdict on a charge of sexual assault and the Crown Prosecution Service said it was not in the public interest to proceed with a retrial. See <http://news.bbc.co.uk/1/hi/england/london/6567445.stm> [Online] (Accessed: 21<sup>st</sup> November 2009).

legitimate purposes by an assistant in a shoe shop is not 'sexual' in light of the assistant's purpose and the circumstances. There seems no justifiable reason why the shoe fetishist who distresses a woman by an activity that gives him sexual gratification, possibly to the point of ejaculation, should not be liable to punishment. D changes his normative position towards C by touching her non-consensually and should therefore be responsible where C experiences his conduct as 'sexual'. If C is completely unaware of D's podophilia at the time of the act, because the 'circumstances' do not reveal anything about the act as 'sexual', but subsequently becomes aware of D's sexual motive, D should still be culpable and guilty of a non-consensual sexual touching. If C never becomes aware of D's sexual motive and does not experience the touching as 'sexual' there would be no case to answer.

*Situation 5: Circumstances 'sexual', purpose 'non-sexual'*

The fifth possible scenario under s.78(b) part two is where the circumstances of the touching are 'sexual', but the purpose is 'non-sexual'. As noted above, it is controversial and unclear as to when circumstances are 'sexual'. Consider the situation where D, a prison guard strips an inmate not for purposes of sexual gratification but to humiliate him in front of other convicts thereby deterring others from behaving in a similar way.<sup>83</sup> The circumstance of rendering someone naked and humiliating them in front of other inmates may be considered by reasonable people and/or C to be 'sexual' and it is possible that one or more of the inmates may receive sexual pleasure from the action, but the purpose is disciplinary and 'non-sexual'. This again raises the complicating issue that purposes can be multi-layered.<sup>84</sup> D's primary purpose could be disciplinary and yet he might intend or hope to obtain sexual gratification. Following *Kumar*, as discussed above, D would not be guilty if his sole purpose was disciplinary, but would be guilty where his sole purpose was to gain sexual gratification. Where he has a dual intention

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<sup>83</sup> I. Bantekas, 'Can touching always be sexual when there is no sexual intent?' [2008] 72 *JoCL* 251.

<sup>84</sup> Cf. the discussion of oblique intention in murder. See A. Norrie, *Crime, Reason and History: A Critical Introduction to Criminal Law* 2<sup>nd</sup> edn (Butterworths, London, 2001) ch 3.

and uses the disciplinary action as a ruse for his sexual motive he would be guilty. If his intention was disciplinary, but when rendering C naked, and not intending it, he or other inmates obtained sexual gratification, he would not be guilty. Stripping a person for disciplinary measures is an unjustified invasion of the person's sexual autonomy: even if his sole intent is disciplinary, the prison officer in this situation is using sexual means (in the sense that C/and or reasonable onlookers might consider the action to be 'sexual') to achieve the designated purpose when other non-sexual actions may be just as effective, and should accordingly should satisfy this element of the *actus reus*.

This fifth category, where the circumstances are 'sexual', but the purpose non-sexual' would also cover practical jokes. In *Cooney*,<sup>85</sup> D, a driving instructor put a 12-inch carrot down his trousers and told a pupil she had given him an erection. He took her hand and made her touch the vegetable before showing her the carrot. The circumstances here are 'sexual': D forced C to touch what she believed to be his genitalia, a sexual body part. Cooney insisted the incident was a practical joke that went wrong. He therefore claimed to have acted from a non-sexual purpose. Regardless that D claimed to have acted from a non-sexual purpose he was convicted of sexual assault.

*Situation 6: Circumstances 'non-sexual', purpose 'non-sexual'*

The final possible scenario under section 78(b)(ii) is where the touching might be 'sexual' by its nature, but the circumstances are 'non-sexual' and the purpose is 'non-sexual'. This would include where a police officer pats down a suspect, or a rugby player intentionally grabs the testicles of an opponent in the scrum. If D touches C without C's consent in circumstances where there is no or insufficient evidence that the touching is 'sexual' D may be charged with common assault or one of the offences against the

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<sup>85</sup> *Cooney*, Unreported, BBC news, 7<sup>th</sup> December 2007.

person.<sup>86</sup> Another example is where a mother tells her young child to strip in her presence before the child takes a bath; a reasonable person would consider that that the child's act of stripping by its nature may be 'sexual', but no reasonable person would conclude from its circumstances or the purpose of anyone (including the mother) that it is 'sexual'.

A further possible situation is where the circumstances are not 'sexual', the purpose is not 'sexual', but C experiences the act as 'sexual'. It is not necessary on a prosecution for sexual assault under s.3 for the prosecution to prove that D or C were aware that the touching was 'sexual': under s.78, it is enough for the jury (or magistrates) to find that a reasonable person would consider it so. The SOA 2003, and specifically s.78, is ambiguous as to the relevance of C's experience. Whilst s.78 makes no explicit reference to the complainant's interpretation of the incident, I have argued above (see comments on situation 1) that C's experience might be implicitly referred to by the jury or magistrates as the term 'circumstances' is broad enough to include anything, including C's experience. The jury (or magistrates) will also, usually, have access to C's testimony and this will arguably give them an understanding of the complainant's affective response to the touching. A further possible interpretation is that the reference to the purpose 'of any person' includes the person to whom it is done. Thus, if C considers the activity *is* in this case 'sexual', then that might satisfy this element of the offence. In failing to define what they meant by 'the purpose of any person' the drafters have excluded this from being a legally relevant consideration. There is also a significant difference in referring to C's 'purpose' in relation to the touching and C's affective response to the touching.

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<sup>86</sup> Where bodily harm is caused to C, assault occasioning actual bodily harm, (OAPA 1861, S.47), maliciously causing grievous bodily harm (OAPA 1861, s.20) or inflicting grievous bodily harm with intent (OAPA 1861, s.18).

In *Court*, Lord Ackner listed three specific circumstances that he considered relevant to the determination of the indecent nature of the conduct: ‘the relationship of the defendant to this victim (were they relatives, friends or virtually complete strangers?), how had the defendant come to embark on this conduct and why was he behaving in this way?’<sup>87</sup> Lord Ackner did not refer to the complainant’s experience of the touching. In this respect, s.78 is an improvement on the old law that explicitly ruled out C’s experience. Lord Ackner’s list was exhaustive and interpreted as such.<sup>88</sup>

S.78(b) enables the purpose of the accused or any person to be considered in determining whether the action was ‘sexual’ but no reference is made to the impact on the complainant. Section 78 can be described as ‘defendant-centred’ to the extent that the impact on the complainant is not an explicitly relevant circumstance to be considered in determining whether the touching was ‘sexual’. Section 78 is ambiguous as to the relevance of the complainant’s experience. Given the limited number of cases so far it is not possible to argue that it is not a legally relevant consideration. Even if the ambiguity does not produce manifest injustice for complainants, the lack of clarity is important in demonstrating the law’s oversight of a complainant perspective, which was, after all, one of the key motivations for the Government’s reform of the law. Section 78 fails to, but should, make explicit reference to the complainant’s experience of the touching. In part 4, I will propose an addition to the s.78 definition that makes explicit reference to C’s experience.

### (c) Interpreting s.78(b) in the courts

To date, there is little case law dealing explicitly with section 78 and the process of defining the ‘sexual’ nature of conduct. There are two possible approaches to section 78(b). First, a flow-chart approach could be used (see figure 9.1 above). This would

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<sup>87</sup> [1989] AC 28, at 43.

<sup>88</sup> See chapter 2.

require the decision maker to be satisfied that part one is met before reaching a verdict on part two and would potentially rule out certain acts (such as fetishes as we shall see below). Secondly, the jury or magistrates could be entrusted to use their own skill and judgment in deciding what constitutes 'sexual'. This would require the decision maker to read the subsection as if the 'and' in it were an 'or'.

The Court of Appeal in *H* has stressed that s. 78(b) creates a two-stage process and that the first stage (that the act because of its nature may be 'sexual') has to be established without reference to the issues raised by the second stage (the surrounding circumstances and D's purpose):

'If there were not two requirements in subs (b), the opening words "because of its nature it may be sexual" would be surplus. If it was not intended by the legislature that effect should be given to those opening words, it would be sufficient to create an offence by looking at the touching and deciding whether because of its circumstances it was sexual. In other words, there is not one comprehensive test. It is necessary for both halves of s 78(b) to be complied with.'<sup>89</sup>

Thus, the jury (or magistrates) must first be satisfied that a reasonable person would consider the touching to be capable of being 'sexual', looked at in isolation and divorced from the circumstances before and after the touching and from any evidence as to the purpose of any person in relation to the touching. Only if that hurdle is cleared should they consider whether a reasonable person would assess the touching, having regard to the surrounding circumstances and the purpose of D or 'any person', as actually 'sexual'. In *H*, the jury had to establish firstly that D's grabbing of C's tracksuit bottoms might be 'sexual' under s.78(b) part one and no account could be taken of the fact that, when he first approached her, he had said, 'do you fancy a shag', until the second stage. Section 78(b) provides a logical two-stage process for jurors to use in reaching a conclusion. However, that is not to say that it is an easy test for jurors to apply; the two stages may confuse many. In that sense, jurors might use their own skill and judgment in deciding

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<sup>89</sup> [2005] 2 Cr App R 149, at 9.

what constitutes 'sexual' and 'do their own thing in the jury room', rather than follow the two-stage process. It is only possible to speculate, since s.8 of the Contempt of Court Act 1981 prohibits the examination of jury decision-making.

The implication of this flow chart interpretation of s.78 is that there must be some kinds of touching which are incapable of being 'sexual' no matter what the surrounding circumstances are, or how much D is motivated by sexual gratification or whether C experienced the act as 'sexual'. This two-stage process explicitly rules out some acts, for example fetishes. Accordingly there may be acts which the complainant experiences as 'sexual', but which might not be judged 'sexual' following *H*, if the act 'falls at the first hurdle'. The jury may not consider that removing someone's shoes 'may be sexual' and therefore the action of a shoe fetishist who distresses women by removing their shoes for sexual gratification would fail under the first part of s.78(b). This action would not be ruled out if the jury (or magistrates) were required to regard the subsection as a whole, rather than a distinct two-stage process.

Juries and magistrates will find it difficult, if not impossible, in any future comparable situations, to do what is expected of them as a result of the decision in *H*, namely to consider only the 'nature' of the activity at stage one, before being permitted to consider the circumstances or purpose at stage two. The wording of s.78(b) therefore increases the chances of a defendant convicted of sexual assault appealing. Taking the shoe fetishist as an example, there is a danger that the jury will conclude that the conduct is capable of being 'sexual' by referring, illegitimately,<sup>90</sup> to D's secret motive, particularly when viewed against the backdrop of C having complained.<sup>91</sup> As such, it will

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<sup>90</sup> In respect of considering whether the conduct 'because of its nature may be sexual' irrespective of sexual motive.

<sup>91</sup> Leake and Ormerod, n 51.

only be the most unusual fetishes where D derives sexual gratification from the most innocuous conduct that will definitely fall outside the scope of the section.<sup>92</sup>

Can and should we leave vague terms such as ‘sexual’ (and ‘dishonest’ in offences against property) to the jury to decide? Temkin and Ashworth affirm the decision to include a definition of the term ‘sexual’ in the SOA 2003, highlighting how the exclusion of such a provision in the legislation in Canada has led to a costly proliferation of cases in which courts have been called upon to rule in what circumstances a particular assault may be described as ‘sexual’.<sup>93</sup> The fact that jurors remain sole arbiters of what is ‘sexual’ is not conducive to the development of a consistent jurisprudence on a fundamental statutory term.<sup>94</sup> There is the possibility of inconsistency in jury decision-making with the possibility of two cases based on the same facts being decided in different ways. Which acts would the reasonable person consider ‘sexual’ because of their *nature*? I consider myself a reasonable person, but those acts that I consider ‘sexual’ because of their *nature* may vary from that of another reasonable person. In an increasingly pluralistic and fragmented society universal ‘current standards’ may not exist, and in any event different courts are likely to have different perceptions of what they are. The SOA 2003 aims at protecting complainants, but the vagueness of the term ‘sexual’ may result in jurors overlooking the complainant’s experience. They may be prevented from considering C’s experience by applying the two-stage test, if the act does not pass the first test.

There is also an important issue in respect of the role of magistrates in defining and interpreting ‘sexual’. The cross-section of magistrates is unrepresentative of society as a

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<sup>92</sup> Rook and Ward consider the example of *Gosling* (1999), unreported, where D placed bags over young girls’ heads and photographed them. P. Rook. & R. Ward, *Rook and Ward on Sexual Offences Law & Practice* (Sweet & Maxwell, London, 2004).

<sup>93</sup> *Op cit*, n 37 at 332. See further S.J. Usprich, ‘A New Crime in Old Battles: Definitional Problems with Sexual Assault’ (1987) 29 *Crim L Q* 200 at 203; C. Boyle, *Sexual Assault* (The Carswell Company Limited, Toronto, 1984); *R v Robicheau* (2002) 209 SCC 45.

<sup>94</sup> Leake & Ormerod, *op cit*, n 51.



whole. Martin claims that the traditional image is that magistrates are 'middle-aged, middle-class and middle-minded'.<sup>95</sup> A report in 2002, *'The Judiciary in the Magistrates Court'* found that a third of lay magistrates were over 60, (only 4% were under 40) they were drawn overwhelmingly from professional and managerial ranks and 40% were retired from full time employment.<sup>96</sup> The lay magistrates are disproportionately middle-class, compared to the population at large. At the time of the research, 49% of lay magistrates were women and 6% from ethnic minorities, which suggested that the lay magistracy was gender balanced and ethnically representative.<sup>97</sup> In comparison, stipendiary magistrates, who sit full-time and who are often assigned to deal with cases, which are likely to be lengthy or particularly complex, are mostly male, white and tend to be younger.<sup>98</sup> The research shows that magistrates are not representative of society as a whole. They will have an individual and subjective interpretation of the meaning of 'sexual' which might differ from those of the reasonable person and pose the possibility of inconsistent decisions between benches. Of course, this discussion is somewhat speculative, in the absence of evidence of magistrates' attitudes to the meaning of 'sexual', but one can tentatively suggest that the background of decision-makers will inform their understandings of the meaning of the word 'sexual'.

### 9.3.3 The act is indisputably not 'sexual'

A further problem with the section 78 definition, as interpreted in *H*, is that it implies that there is a category of acts which by their very nature cannot possibly be 'sexual' no matter what the circumstances and motive of the actors. If D's conduct is incapable of being regarded as 'sexual', his intention cannot make it so. One can only speculate as to what kind of conduct would be considered incapable of being 'sexual', given that the 'reasonable person' must presumably be attributed with some knowledge of the

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<sup>95</sup> J. Martin, *The English Legal System* 5<sup>th</sup> edn (Hodder Education, London, 2007).

<sup>96</sup> <http://www.homeoffice.gov.uk/rds/pdfs/occ-judiciary.pdf> [Online] (Accessed: 2nd January 2010).

<sup>97</sup> *Ibid.*

<sup>98</sup> *Ibid.*

enormous range of fetishes and practices that may sexually excite other people. Many men and women are aware that some people are aroused by practices such as bondage, flagellation, uniforms or high heels and some are similarly excited by horse riding, suffocation, urination, fur or even executions. These are just a few examples of a much wider phenomenon. So, whereas a judge must remind the jury to consider both limbs of the test, it may be open to a juror to conclude that if some people can derive sexual gratification from a given type of behaviour, then it must indeed be capable of being 'sexual'. It makes no sense to include obvious fetishes while excluding others merely because they are unusual or bizarre and therefore that part of s.78 is redundant.

One argument suggests that there should be no act that is incapable of being 'sexual' so that any act has the potential to be turned into a 'sexual' one by D's purpose being sexual gratification. The counter-argument is that while to base conviction on D's purpose where the act looks ambiguous is acceptable, that may not be the case where the act looks unambiguously 'non-sexual'. It is worth noting that, even if not 'sexual', the act would still constitute ordinary battery. There should be no act that is incapable of being 'sexual': any action that C experiences as 'sexual' should be amenable to prosecution.

#### 9.4 A PROPOSED ADDITION TO S.78: REFERENCE TO C'S EXPERIENCE

In light of the argument that the current definition of 'sexual' is ambiguous as to the relevance of C's experience, this section will analyse a proposed addition to s.78 that explicitly makes reference to the complainant's experience. Section 78 is insufficiently complainant-centred: C's experience is not listed as being explicitly relevant. Juries or magistrates might consider it, but they should be instructed to take it into account. There are some acts which C might experience as 'sexual', but which are not by their nature 'sexual' and therefore would not get past the first test in s.78(b). Suppose D strokes the hair of a woman sitting in front of him at the cinema, whilst whispering of

his desire to 'meet her afterwards'. C may complain that she experienced the touching as 'sexual'. However, such conduct is unlikely to get past the first test in s.78(b) which requires the jury to ask whether the act might have been by its very nature 'sexual'. If the answer to this question were in the negative, then the case would proceed no further, regardless of the fact that C experienced the touching as 'sexual'. S.78(b) and the decision in *H* thereby fail to punish acts experienced by C as 'sexual'.

A complainant-centred definition of 'sexual' might be framed in the following way:

'[P]enetration, touching or any other activity is sexual if a reasonable person would consider that-

- (a) whatever its circumstances or any person's purpose in relation to it, it is because of its nature sexual, or
- (b) because of its nature it may be sexual and because of its circumstances, the purpose of any person in relation to it, ***or the complainant's experience of it (or a combination of these factors)***<sup>99</sup> it is sexual.'

My proposed addition to the s.78 definition would render the definition complainant-centred because it makes explicit reference to the complainant's affective response to the touching. Thus, the decision-maker would be required to take into account the direct effects on the complainant.

The current section 78 definition of 'sexual' ensures that the law does not capture an activity that no reasonable person would consider 'sexual' and this undermines the individual affective response of complainants to non-consensual touching. Some women may be just as distressed by the removal of a shoe as they would by the groping of their breasts or pinching of their buttocks. Sexuality is a complex aspect of our personality and 'self'. Sexuality is the force that empowers us to express and display strong, emotional feelings for another person and is a natural stimulus for procreation. Human

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<sup>99</sup> The emphasis is my proposed addition to the s.78 definition.

sexuality rarely falls into neat categories or lends itself to simple labelling, but rather is a rich and complex area of human experience. Sexual practices and what is considered 'sexual' vary from person to person. C's sexuality is harmed when D shows disrespect for her sexual autonomy: her ability to decide whom to engage in sexual activity with, when and in what form.

Suppose D approaches C as she is walking down a busy street. He puts his hand up to hold the back of her neck, runs his hand up her scalp and down through her hair. She considers this a violation and that D is groping her hair. Under the current section 78 definition, such an action might not be considered to be 'sexual' by a jury or magistrates on the basis that it might not pass the first hurdle of s.78(b) that 'because of its nature it may be sexual'. There should be no underestimation of the physical, emotional and psychological harm caused to innocent complainants when they are touched non-consensually. Acts of non-consensual touching can never be counted upon as being 'trivial' as far as its effect on the complainant may be concerned. It is proper for the state to promote the basic value of respect for sexual autonomy and to recognise that this value is so significant as to justify criminalization. Even where a person who does not consider or appreciate how their actions might be experienced by C describes behaviour, such as pinching someone on the buttocks or groping their breasts as 'trivial' or 'a bit of fun' these actions may have severe and long-lasting results. Nevertheless, the harm of sexual assault is also related to the serious wrong done to the complainant: the 'sheer use'<sup>100</sup> of the complainant by the defendant.

In chapter 4, I argued that the section 3 definition of sexual assault should be expanded to include liability where C fears an immediate and unlawful sexual touching on the basis that fair labelling is one way in which an offence can be complainant-centred. In

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<sup>100</sup> J. Gardner. & S. Shute, 'The Wrongness of Rape' in J. Horder (ed.) *Oxford Essays in Jurisprudence* (4<sup>th</sup> series) (OUP, Oxford, 2000).

light of this argument, my proposed addition to the s.78 definition of 'sexual' would extend to situations in which what D says adds to the 'sexual' nature of the offence. Suppose D strokes C's cheek whilst making sexually explicit comments to her. It is unlikely that such conduct would currently pass the first test of s.78(b). Whilst I am proposing only a minor amendment to s.78, it may be of practical significance for complainants, demonstrating that the law is showing solidarity with the complainant who has been wronged and potentially encouraging more people to make a complaint.

When defining and interpreting a context-dependent term such as 'sexual', there are obvious concerns in relation to consistency of application. Whilst an objective approach to the meaning of 'sexual' renders the law vague and uncertain in application, that is not to say that a greater focus on the complainant's perspective would be any more certain or consistent. My point is that the s.78 definition is insufficiently complainant-centred and ought to be amended to explicitly make reference to the complainant's experience. As I argued in chapter 5, the meaning of 'sexual' is context-dependent and therefore decisions ought to be made on a case-by-case basis. Whilst there are inherent concerns about consistent decision-making, a complainant-centred approach to the meaning of 'sexual' is preferable because in order to appreciate the nature and seriousness of a 'sexual' touching and the level of D's culpability it is necessary to refer to C's affective response.

## 9.5 CONCLUSION

'Sexual' is that extra aggravating factor that turns battery into a sexual assault. However, the s.78 definition of 'sexual' is flawed: it is unclear, ambiguous and likely to lead to inconsistencies. Parliament has refrained from listing those activities it considers 'sexual' providing an approach that is far from satisfactory. The fact that in s.78(b) there are two different questions complicates the task of the judge and that of the jury and is liable to lead to inconsistent findings. Defining 'sexual' using the term itself, assumes

that the reader already knows the intended meaning of the term, which as has been shown, is inaccurate. The s.78 definition of 'sexual' is complex and controversial. It appears to assume that the 'sexual' nature of conduct is easily recognized and that there is a common consensus amongst reasonable people as to which acts are 'indisputably' 'sexual', which acts are potentially 'sexual' and which acts are definitely not 'sexual'. Who constitutes the 'reasonable person' in a multicultural society with widely differing views on sexuality?

Section 78 is vague, unclear, and therefore difficult for prosecutors, judges and juries to interpret. It is likely that most cases will be unproblematic involving touching of the genitals or breasts. Nevertheless, ambiguous cases will arise especially at the least serious end of the spectrum. Will judges and juries consider that a pat on the bottom or a hand placed on a thigh is capable of constituting sexual assault? I propose clear guidelines for judges and jurors who have to consider whether an act is to be considered 'sexual'. The complainant's affective response to the touching is not an explicitly relevant consideration in determining the 'sexual' nature of the conduct. Section 78 makes no explicit reference to the complainant's perception of the action, although it is possibly a relevant 'circumstance', and therefore jurors (or magistrates) may not focus sufficiently on the complainant's experience. This problem would be overcome if my proposed addition to the s.78 definition of 'sexual' were introduced.

It has been demonstrated that the s.78 definition of 'sexual' provides for both a context-dependent and context-independent test. S.78(a) focuses specifically on the activity 'being because of its nature sexual' providing a context-independent test. S.78(b) meanwhile provides for a context-dependent test to the extent that the circumstances and purpose of the accused, or both, can be taken into account in determining whether the conduct is 'sexual'. In failing to identify and define which circumstances are relevant to a finding of the 'sexual' nature of an act s.78(b) essentially allows jurors (and

magistrates) to decide whatever they like. The lack of certainty and clarity that has resulted from the new law is clearly undesirable for complainants and may deter some from pursuing a complaint. It may also have a negative effect on prosecutors who may prefer to use a charge of assault or be inclined to settle for a plea of guilty to assault, rather than take a borderline case (where the 'sexual' nature of the conduct is in dispute) to court.

Chapter 10 will analyse the two *mens rea* elements required for a conviction of sexual assault under s.3: that D must intentionally touch another person and must 'not reasonably believe' that the other person consents to the touching. The chapter will consider the relevance of intoxication to a charge of sexual assault and propose an extension of the offence to include liability for reckless, yet culpable, sexual touching.

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## **Sexual Assault, Responsibility and Blameworthiness: the Case for an Offence of Reckless Sexual Touching**

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It has been demonstrated in earlier chapters how the definition of sexual assault is, in some respects, insufficiently complainant-centred and this criticism extends to the mental requirements necessary for a conviction. Some aspects of the *mens rea* are unclear and controversial and these could be modified to make the law more 'complainant-centred'. However, there must be limits to how far an offence such as sexual assault can be 'complainant-centred' if particular criminal law principles of fairness, rationality and neutrality are to be upheld. The next two chapters will analyse the two elements of *mens rea* required for a conviction of sexual assault. This chapter will analyse the requirement that D must 'intentionally' touch another person, considering the circumstances in which D is culpable for the touching and arguing that liability should extend to reckless sexual touchings. Chapter 11 will analyse the requirement that D must 'not reasonably believe' that the other person consents to the touching and will discuss whether s.3 requires any *mens rea* in relation to the intended touching being 'sexual'.

Part 1 will evaluate the requirement that D must 'intentionally' touch another person. This aspect of the definition will be criticised for being insufficiently complainant-centred as it excludes reckless or careless touchings which may be culpable and worthy of the criminal sanction. It will be argued that there are some non-intentional sexual touchings that are culpable and which deserve to come within the offence and that, in excluding unintentional yet culpable touching, the provision is unfair to complainants. Reckless sexual touchings may be culpable and deserving of the label sexual assault



because D has manifested an attitude of 'practical indifference' as to whether touching takes place.

Part 2 will consider the relevance of involuntary and voluntary intoxication to a charge of sexual assault and analyse case-law since the introduction of s.3. The recent decision in *R v Heard*<sup>1</sup> is crucial in establishing that a defendant cannot raise intoxication as a denial of *mens rea*. However, the decision also formalizes the inherent failure of s.3 to recognise that some unintentional touchings are culpable and therefore worthy of a criminal response. The characterization of all intoxicated non-intentional touching as 'accidental' and the opinion of the Court of Appeal that a defendant who unintentionally touches another whilst drunk should be acquitted, undermines the protective purpose of the law's approach to intoxication and basic intent.

The chapter reaches three main conclusions. First, that the current definition of sexual assault ought to be amended to include recklessness within s.3(1)(a) on the basis that reckless sexual touching shows insufficient regard to C's sexual interests and integrity. Secondly, that *Heard* is complainant-centred in holding that s.3 is a basic intent offence, even though it appears to be a specific intent offence, which means intoxication cannot be used as an excuse or defence. Thirdly, the decision in *Heard* gives excessive scope to the concept of 'accidental' touching, which may have the effect of blurring the boundaries of recklessness.

### 10.1 CRIMINALISATION OF INADVERTENT SEXUAL TOUCHING?

The first issue of *mens rea* to be considered is the requirement set out in s.3(1)(a), that D 'intentionally touches' C. This is one aspect of the definition of sexual assault that is insufficiently complainant-centred. If the touching is accidental, careless or reckless, the offence is not committed. I will argue that a defendant who recklessly touches another

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<sup>1</sup> [2007] EWCA Crim 125.

person is not as blameworthy as one who intentionally touches another, but that such a person is still culpable because he shows a lack of respect for C's sexual integrity and that that culpable touching is worthy of the criminal sanction. There is accordingly an argument for section 3 to be reformulated to include liability for reckless sexual touching.

#### 10.1.1 Intention to touch

There are two subjective states of mind in orthodox criminal law theory: intention and recklessness. In both cases, D is aware that the prohibited act or consequence may occur, but with intention, there is the added aggravating factor that D aims to do the prohibited act or cause the prohibited consequence. Recklessness is a lesser species of fault than intention, since the reckless agent chooses only to take a risk of touching, whereas an intentional agent chooses actually to touch. Many offences, for example criminal damage, are satisfied by proof of intention or subjective recklessness so that the boundary line between intention and recklessness is not of practical importance, given the possibility of charging with reckless criminal damage if it is unclear that the defendant acted intentionally.<sup>2</sup> However, there are some crimes, such as sexual assault, which can only be satisfied by proof of intention, making it important that citizens, the police, prosecutors and decision-makers know where intention ends and recklessness begins. Although intention seems a straightforward concept in everyday language, the courts have struggled (despite a number of attempts by the House of Lords in the context of murder) to define its limits.<sup>3</sup> Lord Bridge in *Moloney* made clear that the legal

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<sup>2</sup> The intention/recklessness distinction is still important though; the prosecution needs to be clear about the appropriate charge e.g. intentional criminal damage or reckless criminal damage for trial purposes. It is also important in terms of defences: automatism and intoxication defences rest on a distinction between basic intent (including recklessness) and specific intent.

<sup>3</sup> *DPP v Smith* [1961] AC 290; *Hyam v DPP* [1975] AC 55; *Moloney* [1985] AC 905; *Hancock and Shankland* [1986] AC 455. In *Nedrick* (1986) 83 Cr App R 267 the CA stated that if D foresaw the relevant consequence as virtually certain the court is 'entitled to infer' intention. In *Woollin* [1999] 1 AC 82 the House held that the *Nedrick* formulation should be followed with one modification: *Woollin* states that the court is 'entitled to find' intention. Ashworth argues that this change has little 'practical significance, and it leaves open the possibility that...there may occasionally be cases where [the courts] lawfully decide not to

meaning of the word 'intention' is the ordinary meaning of the word: '...the judge should avoid any elaboration or paraphrase of what is meant by intent, and leave it to the jury's good sense to decide whether the accused acted with the necessary intent...'<sup>4</sup> Following *Woollin*,<sup>5</sup> in the rare case where there is no direct evidence that it was D's purpose to touch C, the jury should be directed that that they are not entitled to find the required intention proved unless they feel sure that touching was a virtually certain result of D's actions and that D appreciated that such was the case.

Under s.1(1) of the SOA 2003 for a defendant to be convicted of rape, he must intentionally penetrate the vagina, anus or mouth or another person with his penis. On proof of actual penetration, there will be an almost overwhelming inference that it was intentional, since it is not the sort of action that generally happens by mistake or accident.<sup>6</sup> Herring provides an example where proof of 'intentional' penetration may be in doubt: where the defendant intended to engage in vaginal intercourse, but in fact engaged in anal intercourse.<sup>7</sup> As both are a sufficient form of the *actus reus*, arguably intent to penetrate either orifice is sufficient. However, it is conceivable that C consents to vaginal penetration but not anal penetration, and D mistakenly penetrates C's anus. If D reasonably believes that C consents to anal penetration he will not be liable for rape.

In sexual assault, the intentionality requirement acquires great significance since it is very easy to touch accidentally, for example, by brushing against a woman's breast or bottom in a crowded street. If the touching is accidental, there is no liability for sexual

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find intention despite foresight of virtual certainty'. A. Ashworth, *Principles of Criminal Law* 6<sup>th</sup> edn (Oxford University Press, Oxford, 2009) p.174.

<sup>4</sup> [1985] AC 905, at 926.

<sup>5</sup> [1999] 1 AC 82.

<sup>6</sup> This is subject to exceptions. In August 2007, a RAF serviceman who claimed he was sleepwalking when he had sex with a teenage girl was cleared of rape. <http://news.bbc.co.uk/1/hi/england/dorset/6933623.stm> [Online] (Accessed: 16<sup>th</sup> August 2008).

<sup>7</sup> J. Herring, *Criminal Law: Text, Cases and Materials* 3<sup>rd</sup> edn (OUP, Oxford, 2008) p.433. In 2005, Norfolk found that 10% of women said it had happened to them. G. Norfolk, 'Accidental anal intercourse: does it really happen?' (2005) 12 *Journal of Clinical Forensic Medicine* 1.

assault; although there would be legal responsibility if the offence was one of strict liability. Offences of strict liability require proof that the defendant performed the prohibited conduct, but do not require proof that the defendant was blameworthy.<sup>8</sup> If the defendant has committed the *actus reus*, he or she is guilty even if he or she was acting reasonably.<sup>9</sup> Once it is proved that there was a 'sexual' touching without the complainant's consent the offence would be made out. The main argument for imposing strict liability is a form of protectionism or 'social defence'.<sup>10</sup> It maintains that one of the primary aims of the criminal law is the protection of fundamental social interests. The criminal law is regarded as an efficient social resource for the prevention of harm. The infliction of the prohibited harm is the trigger for state action and criminalization is aimed at minimizing the risk of the harm being repeated. This brings us to the question of whether it is just and fair to ignore completely, in all cases, the defendant's particular state of mind? The criminal law is society's strongest formal condemnation and respect for individual autonomy requires that criminal liability be imposed only where D has chosen to perform the prohibited act and has a genuine opportunity to do otherwise than he did. An individual is blameworthy, not because of accidental conduct, but because he consciously ran a risk that harm will be caused or circumstances will occur. Moreover, in so far as the criminal trial has a communicative function, strict liability impairs this by severely limiting D's ability to explain, excuse or justify the conduct.

If sexual assault was a strict liability offence there would be no requirement that D intended to touch C. Where D accidentally or mistakenly touches C in the course of his everyday activities he would be liable for sexual assault provided C did not consent. Thus, if D touched C's breasts whilst attempting to leave a busy tube train he would be

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<sup>8</sup> For a detailed discussion of the meaning of strict liability, see S. Green, 'Six senses of Strict Liability: A Plea for Formalism' in A. Simester, *Appraising Strict Liability* (Oxford University Press, Oxford, 2005).

<sup>9</sup> Although reasonableness could play a key part in establishing D's defence e.g. duress or self-defence (see *Jones, Milling et al* [2007] 1 AC 136).

<sup>10</sup> A. Ashworth, *Principles of Criminal Law* 6<sup>th</sup> edn (Oxford University Press, Oxford, 2009) p.161.

liable for the offence.<sup>11</sup> It would seem unfair that defendants should be liable for all unintentional touching of another person, as there are many insignificant or accidental touches that are incidental to everyday life, as will be explored below. The significance of the intentionality requirement therefore arises from the implicit labelling of every non-intentional touching as ‘accidental’ with no intermediate category of non-intentional yet culpable touching.

In limiting the *mens rea* to intent and excluding recklessness, s.3 replicates Lord Ackner’s view in *Court*<sup>12</sup> that limited the *mens rea* of indecent assault to intent only. From a practical perspective, confining the offence to intention will not seriously inhibit its range of application, as most archetypal sexual assaults are intentional, that is to say ‘deliberate’.<sup>13</sup> A defendant who brushes past a woman’s breasts as he attempts to leave a crowded underground train in London during the rush hour would not be liable to conviction for sexual assault.<sup>14</sup> Similarly, a defendant who is pushed forward during a crowd surge at a busy concert and as a result touches the buttocks of a woman standing in front of him will not be liable.<sup>15</sup> However, there is an intermediate category of touchings in which culpability or the lack of it is less straightforward.

#### 10.1.2 Reckless sexual touching

Recklessness will not suffice for sexual assault under s.3(1)(a). The SOA 2003 appears specifically to distinguish between ‘intention’ and ‘recklessness’: sections 63(1), 69(1)(c) & (2)(c) and 70(1)(c) expressly refer to recklessness. In excluding recklessness from the definition of sexual assault, the section fails to acknowledge that there are some unintentional sexual touchings which are culpable and which deserve to come within

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<sup>11</sup> Although liability in this situation is obviously dependent on how consent is defined.

<sup>12</sup> [1989] AC 28.

<sup>13</sup> An issue may arise in relation to self-induced intoxication, as will be discussed below.

<sup>14</sup> If he intentionally rubs against a woman in a crowded train he will be liable. See *Neem* (1993) 14 Cr App R 18.

<sup>15</sup> The importance of excluding ‘reckless’ touchings depends on the breadth of ‘consent’ to everyday touchings. See chapter 4, section 3.2.

the offence. There is a case for the definition to be extended to include reckless touching: this is needed to protect the interests and sexual autonomy of complainants.

S.3(1)(a) excludes any reference to recklessness, endorsing Lord Ackner's view in *Court*<sup>16</sup> that limited the *mens rea* of indecent assault to intent only. Lord Ackner, for the majority, described the *mens rea* for indecent assault in the following terms:

'On a charge of indecent assault the prosecution must prove (1) that the accused intentionally assaulted the victim, (2) that the assault, or the circumstances accompanying it, are capable of being considered by right-minded persons as indecent, (3) that the accused intended to commit such an assault as is referred to in (2) above.'<sup>17</sup>

Lord Ackner defined the *mens rea* element as intent to assault C in circumstances of indecency, excluding recklessness as to whether C would be assaulted. He concluded that 'it cannot, in my judgement, have been the intention of Parliament that an assault can, by a mere mistake or mischance, be converted into an indecent assault, with all the opprobrium which a conviction for such an offence carries.' This was surprising in light of the fact that in most other forms of aggravated assault, the *mens rea* for the assault element is satisfied by intent or recklessness.<sup>18</sup>

Ashworth argues that 'the chief concern of the criminal law is to prohibit behaviour that represents a serious wrong against an individual or against some fundamental social value or institution.'<sup>19</sup> This suggests that there are some wrongs that are not serious enough or appropriate for any legal liability. One assumption about the criminal law therefore is that it is not concerned with reckless or trivial touching. In recommending

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<sup>16</sup> [1989] AC 28.

<sup>17</sup> *Ibid*, at 46.

<sup>18</sup> E.g. assault occasioning actual bodily harm, s.47 OAPA 1861; inflicting bodily injury with or without a weapon, s.20 OAPA 1861 (See *Savage* [1992] 1 AC 699); racially aggravated assault, s.29 CADA 1998. The only exception to this is s.18 OAPA 1861, wounding with intent, which is satisfied by proof of intention only and thus complies with the correspondence principle (as discussed in chapter 7, section 7.1.5.)

<sup>19</sup> A. Ashworth, *Principles of Criminal Law* 6<sup>th</sup> edn (Oxford University Press, Oxford, 2009) p.1.

an offence to deal with unwanted sexual touching, the *Setting the Boundaries Review* states that '[t]he new formulation provides for intent or recklessness as to an assault.'<sup>20</sup> Thus it appears that there was some motivation to allow sexual assault to be committed recklessly, although the Review did not state why it proposed such an offence and indeed elsewhere in the document, state that '[r]ecklessness in sex offences is recklessness as to the consent of the victim rather than as to the deed'.<sup>21</sup> Despite the Review's formulation of sexual assault, the offence contained in s.3 cannot be committed recklessly. In *Court*, the House of Lords held that indecent assault could not be committed recklessly and the drafters of the SOA 2003 may have regarded this decision as good law and considered that, in the context of the new offence of sexual assault, *Court* still stands on this issue. Anything less than intention does not suffice for sexual assault. Recklessness or negligence were not, and are not, considered appropriate standards for the offences of indecent assault and sexual assault. If one of the purposes of the criminal law is to differentiate on reasonable grounds between serious and minor offences this might provide an insight into why Parliament were unable to allow sexual assault to be committed recklessly. In addition, as I argued above most archetypal sexual assaults are intentional and the issue of recklessness as to the commission of the offence might only arise at the fringes of liability. In section 1.4, I will consider whether reckless touchings are too 'trivial' to concern the law, but first it is constructive to consider arguments in favour of the subjective/objective formulation of recklessness in relation to sexual assault.

One issue that arises is whether it is possible to conceive of an unintentional yet culpable sexual touching. Their Lordships in *Heard* commented that 'we think that such a possibility is a remote one, but we are unable wholly to rule it out'.<sup>22</sup> One possible

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<sup>20</sup> Home Office Consultation Paper, *Setting the Boundaries: Reforming the law on sex offences* (July 2000) at para 2.14.3.

<sup>21</sup> *Ibid* at 2.12.4.

<sup>22</sup> [2007] EWCA Crim 125, at 22.

example they gave is of a defendant who intends to avoid actual physical contact, but realises that he may touch and nevertheless takes the risk. This is similar to the facts of *Shimmen*.<sup>23</sup> D, a martial arts expert attempted to perform a kick near to a window without breaking it. His foot made contact with the window and broke it. He maintained that he had eliminated any risk because of his muscular control and skill in the martial arts. The Divisional Court held that evidence of his expertise did not displace the inference of recklessness and gave a direction to convict. How might facts similar to these apply to sexual assault?

#### *Example A*

A man brushes past a buxom woman, face to face, in a packed nightclub. He is aware that his chest might brush her chest, and secretly hopes that some contact will be made. He has not left enough room. The defendant acted intentionally in trying to move past the woman, but not in relation to touching her chest. He acknowledged the risk of touching the woman's breasts and proceeded to continue. In *Heard*, the House of Lords held that to 'flail about, stumble or barge around in an uncoordinated manner which results in an unintended touching, objectively sexual, is not this offence.'<sup>24</sup> D, in this example is not carelessly stumbling around; he has seen the risk of touching C's chest and gone on to take it. He manifests a disregard for C's sexual autonomy. This constitutes a reckless sexual touching and would not presently result in liability. Where D is 'practically indifferent'<sup>25</sup> to touching C he is less blameworthy than D who intends to touch, but is still culpable to some degree.

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<sup>23</sup> [1986] Crim L R 800.

<sup>24</sup> [2007] EWCA Crim 125, at 23.

<sup>25</sup> R.A. Duff, *Intention, Agency and Criminal Liability* (Blackwell, Oxford, 1990) ch 7. This concept will be explained further below.



### *Example B*

A group of men in the pub are discussing the attractiveness of a woman standing close to them. One of the men, for a laugh, pretends to strike the bottom of the woman, who cannot see him. He aims not to make contact, but misjudges the distances and strikes her on the bottom. The man has foreseen the risk of touching and is therefore subjectively reckless as to the touching. Even if he argues that 'I acted without thinking', he should still be liable. He ought to have known that there was a likelihood that in getting close enough to C to pretend to strike her bottom, there was a chance that he would in fact make contact. In such a situation, he is *Caldwell* reckless. D would not be liable where X takes his hand and strikes C with it. D is not liable because he has done no voluntary act: voluntary here means that D must consciously bring about the bodily movement for which he is being held liable.

### 10.1.3 Subjective or objective recklessness?

The examples above demonstrate how there is an argument for section 3(1)(a) should to be amended to include recklessness on the basis that D has manifested an attitude of 'practical indifference' as to whether touching takes place. Thus, the section would read '(a) he intentionally or *recklessly* touches another person'. Under this proposed modification a person would act recklessly as to a touching when (i) he does an act which in fact creates an obvious risk that he will touch another and (ii) when he does the act he either has not given any thought to the possibility of there being any such risk or has recognized that there was some risk involved and has nonetheless gone on to do it. This is a modification of the model direction Lord Diplock formulated in *Caldwell*. It includes advertent recklessness by referring to the person who recognizes the risk and takes it (subjective recklessness), but goes further, extending to all those who fail to give any thought to the possibility of a risk which would be obvious to the reasonable person (objective recklessness).

#### (a) Subjective recklessness

A person who does not intend to cause a harmful result or consequences might have acted being aware of the possibility of a result or circumstance. If he so acts he is, in orthodox criminal law theory, subjectively reckless. The (defendant) subjective approach to recklessness, or what is commonly referred to as advertent or *Cunningham*<sup>26</sup> recklessness, suggests that, in fairness to D, he should be liable only when he has foresight of a risk; when he has foreseen an unreasonable risk and gone on to take that risk. The justifications for the advertent definition of recklessness are grounded in the principle of individual autonomy and the importance of respecting choice (as discussed in chapter 7). The distinction between recklessness and negligence turns on D's awareness or unawareness of the risk. In both cases, there is an unreasonable risk taken, but D should only be held to be reckless if he or she was aware of the risk. A person who is aware of the risk usually (although not always)<sup>27</sup> chooses to create it or run it, and therefore chooses to place his or her interests above the well-being of those who may suffer if the risk materializes.

#### (b) Objective recklessness

The (bystander) objective approach or what is commonly referred to as inadvertent or *Caldwell*<sup>28</sup> recklessness suggests that people ought to come up to a general standard of behaviour in fairness to the rest of society. It includes the advertent element, but then goes further, extending to all those who fail to give any thought to the possibility of a risk in circumstances where the risk would have been obvious to the reasonable person. In October 2003, the House of Lords upheld its preference for a purely (defendant) subjective doctrine of *mens rea* by overruling the *Caldwell*<sup>29</sup> test of recklessness. The

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<sup>26</sup> [1957] 2 QB 396.

<sup>27</sup> For example, D could be aware of the risk and choose not to take it.

<sup>28</sup> [1982] AC 341.

<sup>29</sup> The old *Cunningham* ([1957] 2 QB 396) requirement of actual foresight of a risk was supplemented by a new test of foreseeability to a reasonable person. The decision was heavily criticised, see: J. Smith & B.

House of Lords handed down judgment in *R v G and another*,<sup>30</sup> ruling that the word 'reckless' should be assessed (defendant) subjectively and that the law, as understood before *Caldwell*, should be restored. The facts in *G* were that the defendants, two young boys aged 11 and 12 set fire to some newspapers in the yard at the back of a shop and threw the lit newspapers under a bin. They left without putting out fire, which spread and caused £1 million worth of damage to the shop and adjoining buildings. They were charged with arson contrary to s.1(1) and (3) of the Criminal Damage Act 1971 (CDA 1971). The defendants' case was that they expected the newspapers to burn themselves out on the concrete floor. Neither appreciated the risk of the fire spreading as it did.

The majority of the House of Lords decision was given by Lord Bingham who gave four substantive reasons for departing from the *Caldwell* decision. The first, and more substantial, of the four reasons is captured in the statement:

'It is clearly blameworthy to take an obvious and significant risk of causing injury to another. But it is not clearly blameworthy to do something involving a risk of injury to another if...one genuinely does not perceive the risk. Such a person may fairly be accused of stupidity or lack of imagination, but neither of those failings should expose him to conviction of serious crime or the risk of punishment.'<sup>31</sup>

Lord Bingham stated that it is a 'salutary principle' of the law that it had to be proven, especially in cases of serious crime, that the defendant had the necessary *mens rea* to commit the crime. This was a clear attack on the principles for an objective test for recklessness.

Lord Bingham's second substantive reason for departing from *Caldwell* is based on the 'obvious unfairness' it is capable of generating, where the defendants' capacity to

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Hogan. *Smith & Hogan's Criminal Law* (Butterworths, London, 1988) p.67; G. Williams, 'The Unresolved Problems of Recklessness' (1988) 8 *LS* 74; A. Norrie, 'The Limits of Justice: Finding Fault in the Criminal Law' (1996) 59 *MLR* 540.

<sup>30</sup> [2003] UK HL 50.

<sup>31</sup> *Ibid*, at 32.

appreciate risks is inherently inferior to that attributable to the ordinary, prudent person.<sup>32</sup> Lord Bingham added that: 'It is neither moral nor just to convict a defendant (least of all a child) on the strength of someone else would have apprehended if the defendant himself had no such appreciation.'<sup>33</sup> This merely provided an argument for preserving the *Caldwell* test and engrafting a capacity exception on it so as to exempt those who might be incapable of attaining the objective standard. The House of Lords rejected this solution on the ground that the decision was already complicated and that such a solution would over-complicate the task of jury or magistrates.<sup>34</sup> However, it is not clear that such a task would be any more complicated than many of the other tasks juries are routinely required to perform in criminal cases.<sup>35</sup> The third argument used by Lord Bingham was that he did not feel able to ignore the criticism of *Caldwell* given by academics, judges and practitioners. He added that 'a decision which attracts reasoned and outspoken criticism by the leading scholars of the day, respected as authorities in the field, must command attention.'<sup>36</sup> The final argument utilised by Lord Bingham was that the decision of the House of Lords in *Caldwell* was a misrepresentation of the CDA 1971, because the judges involved in the decision failed to consult the Law Commission's report that led to the passing of the Act.<sup>37</sup>

In summary, the House of Lords in *G* concluded that it should depart from *Caldwell* because it was 'just' to do so and in the context of the case, the fact that the defendants were children and the charge related to criminal damage, there is obvious merit in the decision. The decision reasserts the primacy of subjectivism, echoing other recent

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<sup>32</sup> [2003] UK HL 50, at 33.

<sup>33</sup> *Ibid.*

<sup>34</sup> *Ibid.*, at 38.

<sup>35</sup> E.g. in relation to 'dishonesty' under the Theft Act 1968, or the defences of provocation or duress.

<sup>36</sup> *Ibid* at 34.

<sup>37</sup> *Ibid* at 35.

decisions in the House of Lords.<sup>38</sup> However, the choice is not simply between strict subjective and objective approaches.

### (c) The 'hybrid' approach

The law of recklessness thus consists of two incompatible approaches: whilst subjectivism employs too narrow a conception of individual responsibility, objectivism involves an overbroad conception of social condemnation. In the context of sexual assault, there is an argument for adopting the broader form of recklessness, objective recklessness, with a capacity exception so as to preserve its logic but prevent injustice. This is similar to the hybrid approach to defining recklessness proposed by Amirthalingam, in which the court would focus on whether someone like the defendant ought to have appreciated the 'sexual' nature of the touching.<sup>39</sup> The question then becomes: would or should D have foreseen the risk given his intellectual capacities and knowledge at the time. D would be liable where he has manifested an attitude of what Duff calls 'practical indifference' as to whether touching takes place.<sup>40</sup> People who are practically indifferent to certain features of a situation are still blameworthy to some extent, although not as blameworthy as those who do advert to them. Practical indifference is 'a matter, not of feeling distinct from action, but of the practical attitude which the action itself displays'.<sup>41</sup> Moreover, it may include cases in which D fails to advert to certain aspects of a situation: 'what I notice or attend to reflects what I care about and my very failure to notice something can display my utter indifference to it'.<sup>42</sup>

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<sup>38</sup> *DPP v B* [2000] AC 428; *R v K* [2002] 1 AC 462 (strict liability); *Morgan (Smith)* [2001] 1 AC 146 (provocation).

<sup>39</sup> K. Amirthalingam, 'Caldwell Recklessness is Dead, Long Live Mens Rea's Fecklessness' (2004) 67 *MLR* 491.

<sup>40</sup> R.A. Duff, *Intention, Agency and Criminal Liability* (Blackwell, Oxford, 1990) ch.7. The Law Commission did recently provisionally propose a form of reckless indifference in its offence of second-degree murder, but reverted to a test based on subjective recklessness in its final report. See 'A New Homicide Act for England and Wales' LCCP 177 (2006).

<sup>41</sup> *Ibid.*

<sup>42</sup> *Ibid.*

What makes a reckless agent more culpable, more fully responsible for the risks he creates, is that he displays a gross indifference to that particular risk or to the particular interests that he threatened. In negligence, there is no need to prove that D foresaw the consequences at all, so long as the court is satisfied that a reasonable person in the situation would have done so. The defendant is culpable because he was not paying as much attention as he could and should have paid. A defendant who negligently touches another person could have done otherwise; he could have taken the care necessary to avoid the touching. As long there is fair warning and a fair opportunity to conform to the standard, advertence should not always be required. Recklessness and negligence are appropriate standards for sexual assault because they alert people to their duties and the need to take care in certain situations. If a reasonable person would notice that touching might occur, D should be liable on the basis that he ought to have considered C's interests in such cases. The fault element in sexual assault consists in a serious disregard for C's sexual interests and integrity, in some cases treating her as a sexual object,<sup>43</sup> rather than as an autonomous subject.

In the context of sexual assault, Lord Bingham's first reason for departing from Caldwell is unsatisfactory because the failure to perceive an obvious risk of touching another depends entirely on the context in which the action occurs. In some cases, the flaw may indeed amount to 'stupidity or lack of imagination', but in others, there is a genuine disregard for C's sexual integrity. A failure to advert to an obvious risk is not always blameless. Ashworth suggests that '[w]hether it is justifiable to take a risk depends on the social value of the activity involved relative to the probability and the gravity of the harm which might be caused.'<sup>44</sup> With non-consensual sexual touching, the slightest

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<sup>43</sup> There may be situations in which D inadvertently touches C and where little blame attaches. This is particularly so given that if one adopted a complainant-centred approach to the meaning of 'sexual', it would only be necessary to prove that D ought to have known that he might touch C, not that he ought to have known that the touching would be 'sexual'. Some defendants might dispute that they were treating C as a sexual object, given arguably how little blame attaches to his conduct.

<sup>44</sup> A. Ashworth, *Principles of Criminal Law* 6<sup>th</sup> edn (Oxford University Press, Oxford, 2009) p.108.

possibility of the occurrence of harm should be enough. As we shall see in chapter 11, for all the offences in ss.1-4 SOA 2003, it must not only be proved that C did not consent to what was done, but also that D did not reasonably believe that C was consenting. This reasonable belief test demonstrates a desire to move away from the subjective test in *DPP v Morgan*<sup>45</sup> that judged D on the facts as he or she believed them to be, however unreasonable that belief might be. In the context of sexual offences, even orthodox subjectivists have argued for a lessening of the strictness of the subjectivist principles.<sup>46</sup> There are certain situations in which the risk of doing a serious wrong is so obvious that it is right for the law to impose a duty to take care to ascertain the facts before proceeding. As Ashworth puts it, 'not only are serious sexual offences a denial of the victim's autonomy, but the ascertainment of one vital fact- consent- is a relatively easy matter.'<sup>47</sup>

Brudner argues that *mens rea* should be satisfied by any state of mind that signifies 'disrespect' for the equal freedom of another self.<sup>48</sup> In the context of sexual touching the defendant manifests disrespect for the autonomy of the complainant when: (1) he intentionally touches C; (2) knowing that it will certainly or probably result from his action, or is indifferent to whether he touches C; (3) he knowingly risks touching C; (4) he is wilfully blind to the possibility of touching C. Sexual offenders should be held to a wider account of responsibility due to the fact that sexual choice is a most 'intimate aspect of affected individuals' lives'.<sup>49</sup> Reckless sexual touching can be described as a careless direct act. Reckless sexual touchings are culpable and deserving of the label sexual assault because the defendant has shown insufficient regard for the interests of others. An offence of reckless sexual touching would demonstrate that the law does not

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<sup>45</sup> [1976] 1 AC 182.

<sup>46</sup> See Temkin, J. & Ashworth, A., 'The Sexual Offences Act 2003: (1) Rape, Sexual Assaults and the Problems of Consent' [2004] *Crim LR* 328.

<sup>47</sup> A. Ashworth, *Principles of Criminal Law* 6<sup>th</sup> edn (Oxford University Press, Oxford, 2009) p.341.

<sup>48</sup> A. Brudner, 'Agency and Welfare in the Penal Law', in S. Shute, J. Gardner & J. Horder (eds) *Action and Value in Criminal Law* (Clarendon Press, Oxford, 1993).

<sup>49</sup> See, e.g. *Sutherland and Morris v UK* (1997) 24 EHRR CD22, para.57.

tolerate invasions of C's sexual integrity. It is insignificant whether the touching is intentional or reckless: both demonstrate that D has shown disrespect for C's sexual integrity. It may be that recklessness will be particularly relevant to situations in which the touching arises whilst the defendant is intoxicated, as will be discussed in section 10.3.

#### 10.1.4 Reckless, accidental or mistaken touching?

One of the difficulties of framing an offence of sexual assault in terms of intentional or reckless touching is where to draw the line between conduct that is 'reckless' and that which is 'accidental'<sup>50</sup> or 'mistaken'. There are many insignificant or accidental touches that occur in everyday life: the accidental brush on the underground or the hug that lasts a few seconds too long. Nevertheless, how do we distinguish these from those of closer proximity and which might be considered culpable sexual touchings? What of the stranger who pushes against a woman's buttocks as he edges past her on the crowded dance floor; or the man who sticks his hand out as he passes a woman on the street so that his palm briefly grazes the side of her breasts or buttocks; or the man who shakes C's right hand whilst simultaneously grasping her upper left arm in his left hand and rubbing up against the side of her breast. Minimizing 'minor' sexual touching as an accident, a joke or a fact of life allows assailants to treat other's bodies as public property. In *Elvidge*,<sup>51</sup> D was found guilty of sexually assaulting C by touching 'her private parts over her trousers'.<sup>52</sup> The defendant slid into the complainant's seat whilst she went to the bar and on her return, he put his hands between her legs and squeezed her vaginal area. D's defence was that what happened was an 'accident' and that when C returned to her seat, he put his palm down to move himself across and she sat on his hand. Cases such as this one demonstrate the difficulties courts face in distinguishing

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<sup>50</sup> An example of a sexual touching that can be described as accidental is where D, a doctor, who is trying to resuscitate C, inadvertently touches her breasts.

<sup>51</sup> [2005] EWCA Crim 1194.

<sup>52</sup> *Ibid*, at 2.



between intentional, reckless and accidental conduct. It might be argued that including reckless touching within the definition of sexual assault provides for a wide definition of recklessness and that it should be confined to D who is aware of a 'serious risk' i.e. one that is 'more than insignificant or remote'.<sup>53</sup> However, any risk may be sufficient as a minimum for recklessness so long as D is aware of it and it materializes.

A further difficulty of framing an offence of sexual assault in terms of recklessness is whether the conduct is serious enough to deserve the label 'sexual assault' and stigma attached to that label. Is this sort of touching too 'trivial' to concern the law and should it fall within a 'tolerable conduct'<sup>54</sup> exception being 'generally acceptable in the ordinary conduct of daily life'?<sup>55</sup> It has long been established that any touching of another person, however slight, may amount to a battery.<sup>56</sup> The breadth of this principle reflects the fundamental nature of the interest so protected; as Blackstone wrote in his *Commentaries*, 'the law cannot draw the line between different degrees of violence, and therefore totally prohibits the first and lowest stage of it; every man's person being sacred, and no other having a right to meddle with it, in any the slightest manner'.<sup>57</sup> The effect is that everybody is protected not only against physical injury but also against any form of physical molestation.<sup>58</sup> The point here is that the significance of including 'reckless touchings' depends on the extent to which 'touching' has a broad meaning in law. In chapter 4 I argued that, in relation to sexual assault, touching is broadly defined and that there is no room for any '*de minimis*' exception.<sup>59</sup>

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<sup>53</sup> The Law Commission, '*Murder, Manslaughter and Infanticide*' (Law Com No 304) paras 3.36-3.40, relating to first degree murder and to reckless murder.

<sup>54</sup> J. Horder, 'How Culpability Can, and Cannot be Denied in Under-age Sex Crimes' [2001] *Crim L R* 15.

<sup>55</sup> *Collins v Wilcock* [1984] 3 All E.R. 374, at 378.

<sup>56</sup> *Cole v Turner* (1704) 6 Mod 149.

<sup>57</sup> BL. 3 Comm.120, cited in *Collins v Wilcock* [1984] 3 All ER 374, at 378.

<sup>58</sup> It must be remembered that what is required is an intention to touch, or as is argued in this chapter recklessness as to the touching and not intention or recklessness as to the causing of harm.

<sup>59</sup> See *Mills* [2003] EWCA Crim 3723, where a two-second touching of a barmaid's breasts by a customer did constitute indecent assault.

One further issue for consideration is the cumulative effect of both reformulating the *mens rea* of sexual assault and the definition of 'sexual'. In chapter 10, I proposed an addition to the s.78 definition of 'sexual' that makes explicit reference to the complainant's affective response to the touching and above I have argued that s.3(1)(a) should be amended to include recklessness. One might argue that the combined effect of both of these proposals virtually creates a strict liability offence and considerably widens the scope of the offence, with consequent impact on important criminal law principles of non-retroactivity, consistency, fair labeling etc. This is also an important observation because there is no requirement of *mens rea* in relation to the 'sexual' nature of the touching, as we shall see in chapter 11. Whilst, thus far, each element of the offence has been considered in isolation, the s.3 definition of sexual assault that included my amendments might be framed in the following way:

- 'A person (A) commits an offence if-
- (a) he intentionally or *recklessly* touches another person (B),
  - (b) the touching is sexual,
  - (c) B does not consent to the touching, and
  - (d) A does not reasonably believe that B consents.'

The important point here is that my proposals to reformulate the *mens rea* of sexual assault in respect of D's attitude towards the likelihood of touching and to require a complainant-centred definition of 'sexual' do not create a strict liability offence. The modified s.3 would require two elements of *mens rea*, namely that D 'intentionally or recklessly touches another person' and that D does not 'reasonably believe' that the other person consents to the touching. The combination of these fault elements will attempt to ensure that only those who are morally culpable will be punished by the criminal courts. The presence or absence of consent and the defendant's lack of a reasonable belief in consent is at the heart of sexual offence cases. The importance of the reasonable belief in consent test will be analysed in chapter 11. The cumulative effect of my modifications would be to make the offence complainant-centred, forcing

the decision-maker to consider the victim's experiences and placing victims' interests at the heart of the offence definition.

## 10.2 INTOXICATION

One complicating aspect of the requirement that D must intend to touch C is the case of the intoxicated defendant. On ordinary principles, if D was prevented by intoxication from forming the intention to touch C, he cannot be convicted of the offence regardless of whether his intoxication was involuntary or self-induced. In *Majewski*,<sup>60</sup> the House of Lords held that the rule at common law was that self-induced intoxication could not be a defence to a criminal charge in which no special intent was necessary. As sexual assault cannot be committed recklessly, it appears to be an offence of 'specific' rather than 'basic' intent, so that a defendant might rely on self-induced intoxication to raise a doubt as to whether he had the required intention. However, following *Kingston*,<sup>61</sup> involuntary intoxication is not in itself a defence to indecent assault. This is a complainant-centred decision for the purposes of s.3 because as long as D has the necessary intent to touch, it does not matter if that intent is formed whilst involuntarily intoxicated. The Court of Appeal in *Heard*<sup>62</sup> held that s.3 is a basic intent offence, even though it appears to be a specific intent offence. In the remainder of this chapter, I will argue that this is also a complainant-centred decision because it means voluntary intoxication is unavailable as a defence to a charge of sexual assault. Nevertheless, the decision formalizes the inherent failure of s.3 to recognise that some unintentional touchings are culpable and therefore worthy of a criminal response. The characterization of all intoxicated non-intentional touching as 'accidental' undermines the protective purpose of the law's approach to intoxication.

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<sup>60</sup> [1977] AC 443.

<sup>61</sup> [1995] 2 AC 355.

<sup>62</sup> [2007] EWCA Crim 125.

### 10.2.1 Involuntary intoxication

In 1995 in *Kingston*, the House of Lords held that involuntary intoxication is not in itself a defence to indecent assault. D, who had paedophilic homosexual tendencies, was in dispute with a couple who arranged for X to obtain damaging information against D that could be used against him. X invited a 15-year-old boy to his room. According to the prosecution, the boy was drugged by X and fell asleep. Whilst the boy was asleep, D visited X's room and indulged in 'indecent acts' on the boy. These were recorded by X. D's defence was that he had been involuntarily intoxicated at the time because X had laced his drink. The judge directed the jury that they should acquit D if they found that he was involuntarily so intoxicated that he did not intend to commit the indecent assault on the boy. The jury convicted D who appealed successfully to the Court of Appeal. The Crown then appealed successfully to the House of Lords. Provided he acted voluntarily with the requisite *mens rea*, the fact that involuntary intoxication led D to commit the offence, which he would not have committed when sober, does not afford him a defence, and this is so even when D is acting under the influence of substances he was not aware he had ingested. If despite his condition, D was able to and did form the intention to touch, it is no defence that he acted as he did only because of a loss of self-control or inhibition caused by intoxication.<sup>63</sup> However, if D's drink is spiked and he lacks the intention to touch through involuntary intoxication he is not liable to conviction for the offence. For the purposes of s.3, this is a complainant-centred decision because it maintains that involuntary intoxication would be no defence to a charge of sexual assault and is only relevant in so far as it proves or disproves *mens rea*. An intention to touch sexually produced by the surreptitious administration of drink or drugs is still a criminal intent. The Law Commission in its report on *Intoxication and Liability* have recommended that this common law position be retained and that there 'should be no defence of reduced inhibitions and blurred perception of morality where D's condition

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<sup>63</sup> *Sheehan and Moore* (1975) 60 Cr App R 308.

was caused by involuntary intoxication.’<sup>64</sup> The Law Commission suggested that such involuntary intoxication might be relevant as a mitigating factor and may well justify a reduced sentence if the defendant is convicted of an offence.<sup>65</sup>

### 10.2.2 Voluntary Intoxication

As discussed above, the *mens rea* of sexual assault is limited to intention and the offence cannot be committed recklessly; as a result it *appears* to be an offence of ‘specific’ rather than ‘basic’ intent, so that a defendant might rely on self-induced intoxication to raise a doubt as to whether he had the required intention. The distinction between crimes of basic and specific intent is important and was emphasised by the House of Lords decision in *DPP v Majewski*.<sup>66</sup> However, in 2007, the Court of Appeal held in *R v Heard*,<sup>67</sup> that sexual assault is an offence of basic intent. This is complainant-centred because it means that self-induced intoxication cannot be used as an excuse or defence.

#### (a) *DPP v Majewski*

In *Majewski*,<sup>68</sup> the House of Lords held that the rule at common law was that self-induced intoxication could not be a defence to a criminal charge in which no special intent was necessary. The House of Lords held that the authority which had been relied upon for the last half century was the speech of Lord Birkenhead in *DPP v Beard*,<sup>69</sup> where he said that the cases:

‘establish that where a specific intent is an essential element in the offence, evidence of a state of drunkenness rendering the accused incapable of forming such an intent should be taken into consideration in order to determine whether he had in fact formed

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<sup>64</sup> Law Commission, *Intoxication and Criminal Liability* Cm 7526. 15<sup>th</sup> January 2009 at para 4.8. Available at <http://www.lawcom.gov.uk/docs/lc314.pdf> [Online] (Accessed: 20<sup>th</sup> March 2010).

<sup>65</sup> *Ibid*, at para 4.9.

<sup>66</sup> [1977] AC 443.

<sup>67</sup> [2007] EWCA Crim 125.

<sup>68</sup> [1977] AC 443.

<sup>69</sup> [1920] AC 479, at 449.

the intent necessary to constitute the particular crime. If he was so drunk that he was incapable of forming the intent required he could not be convicted of a crime which was committed only if the intent was proved.'

The position would appear to be that voluntary intoxication is a defence only to crimes requiring a specific intent. Voluntary intoxication is irrelevant to crimes, such as assault, which require only a basic intent. In *Majewski*, Lord Elwyn-Jones defended the position in relation to basic intent crimes:

'His (the defendant's) course of conduct in reducing himself by drink or drugs to that condition in my view supplies the evidence of *mens rea*, of guilty mind certainly sufficient for crimes of basic intent. It is a reckless course of conduct and recklessness is enough to constitute the necessary *mens rea* in the assault cases. The drunkenness itself is an integral part of the crime, the other part being the unlawful use of force against the victim. Together they add up to criminal recklessness.'

The decision in *Majewski* generated confusion from the outset.<sup>70</sup> It was unclear whether their Lordships' distinction between basic and specific intent was founded on (i) a requirement of some element of intention beyond the immediate *actus reus*<sup>71</sup> or (ii) a requirement of 'purposive intent'<sup>72</sup> or (iii) a distinction between crimes of recklessness and intention.<sup>73</sup> This confusion continued to such an extent that in 1995 the Law Commission was unable to state with confidence what the law was.<sup>74</sup> It became widely accepted that all crimes of recklessness, negligence, malice and strict liability were crimes of 'basic' intent. Those requiring knowledge or intention were crimes of 'specific' intent.<sup>75</sup> Murder is therefore a crime of specific intent as proof of intention to kill or

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<sup>70</sup> A. Ward, 'Making Some Sense of Self-Induced Intoxication' [1986] *CLJ* 247.

<sup>71</sup> See Lord Elywn-Jones at 471.

<sup>72</sup> Per Lord Salmon.

<sup>73</sup> D. Ormerod, 'Voluntary Intoxication: Whether Voluntary Intoxication Available as a Defence on a Charge of Sexual Assault' [2007] *Crim LR* 654.

<sup>74</sup> Law Commission Report No.229, *op cit*, n57 at paras 1.15 and 3.27.

<sup>75</sup> This approach drew clear albeit *obiter* support from *Caldwell* [1982] AC 341 and was stated explicitly in *Archbold: Criminal Pleading, Evidence and Practice* (Sweet & Maxwell, London, 2007) para.17-110.

cause grievous bodily harm is required; recklessness will not suffice.<sup>76</sup> The confusion surrounding the use of the terms 'basic' and 'specific' intent has continued to attract criticism from the Law Commission and in its 2009 report on *Intoxication and Criminal Liability* the Commission have recommended that the terms should be discarded and replaced with an integral fault element.<sup>77</sup> It further recommends the provision of a definitive list of states of mind to which self-induced intoxication is relevant.<sup>78</sup>

Applying this interpretation of *Majewski* to a charge of sexual assault, with the requirement of an 'intentional' touching, it was arguable that the crime would be one of specific intent.<sup>79</sup> If D therefore sought to rely on his voluntary intoxication to deny that he had the *mens rea* for the offence, the Crown would be obliged to prove that he formed the intent despite his intoxication. However, the Court of Appeal in *R v Heard*<sup>80</sup> concluded that sexual assault is a crime of basic intent.

#### (b) R v Heard

While drunk, the defendant rubbed his genitals against the complainant police officer's leg. The trial judge ruled that as s.3 of the SOA 2003 was a crime of basic intent, the defendant was precluded from advancing self-induced intoxication as a defence. In greater detail he ruled that the offence was one which had to be committed deliberately rather than accidentally- that was the meaning, he held, of the word 'intentionally' in s.3(1)(a).<sup>81</sup> He contrasted the offence with one that requires proof of an intention that goes beyond the prohibited act, such as for example the offence created by s.66, which provides:

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<sup>76</sup> *R v Moloney* [1985] AC 905.

<sup>77</sup> *Intoxication and Criminal Liability*, *op cit*, n 57 at paras 1.28 & 3.33- 3.52.

<sup>78</sup> *Ibid*, at para 3.46.

<sup>79</sup> J. Smith & B. Hogan, *Criminal Law* 11<sup>th</sup> edn (Butterworths, London, 2005) p.264; R. Card, *Sexual Offences: the New Law* (Jordan Publishing Limited, Bristol, 2004) para 1.31; P. Rook & R. Ward, *Rook and Ward on Sexual Offences Law & Practice* (Sweet & Maxwell, London, 2004) para 2.72.

<sup>80</sup> [2007] EWCA Crim 125.

<sup>81</sup> *Ibid*, at 8.

'66. Exposure

- (1) A person commits an offence if-
  - (a) He intentionally exposes his genitals, and
  - (b) He intends that someone will see them and be caused alarm or distress.'

The judge graphically described a requirement such as that in s.66(1)(b), that there be proved an intention that someone would see the exposed genitals and be caused alarm or distress, as a 'bolted on'<sup>82</sup> intention, going beyond the intention to expose oneself required by s.66(1)(a). It is clear that a person who carelessly exposes his genitals does not commit an offence under s.66, nor does he commit such an offence even through deliberate exposure unless he acts with the specific intent required by s.66(1)(b). This requirement means that a defendant who intends that C will see his genitals, but does not contemplate C's alarm or distress, or thinks that they 'will like what they see' will not be liable. If for example a person unwittingly causes alarm or distress by stripping off in a mixed sauna (perhaps because that is normal practice in his home country) he will commit no offence; and nor will a man commit the offence by deliberately exposing himself to a new girlfriend whom he mistakenly supposes would welcome such behaviour.<sup>83</sup> It is not necessary for D's genitals to have been seen by anyone or for anyone to have been alarmed or distressed.

The defendant appealed on the ground that the offence under s.3 was one of specific intent, as it required intentional touching and the issue of the defendant's intoxication should have been left to the jury. The Court of Appeal held that the judge had been right to rule that the touching must be deliberate. On the evidence, the appellant plainly intended to touch the police officer with his penis. That he was drunk may have meant that he was disinhibited and did something he would not have done if sober, and/or

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<sup>82</sup> *Ibid.*

<sup>83</sup> R. Card, A. Gillespie & M. Hirst, *Sexual Offences* (Jordan Publishing Limited, Bristol, 2008) p.331.



that he did not remember it afterwards.<sup>84</sup> Neither of those matters would destroy the intentional character of the touching on the basis that '[i]n the homely language employed daily in directions to juries in cases of violence and sexual misbehaviour, "a drunken intent is still an intent."'”<sup>85</sup> Lord Justice Hughes, delivering the judgment of the Court, said that some offences, including the s.3 offence, could not simply be labelled as either of basic or specific intent as different elements of the offence required proof of different states of mind. The touching had to be intentional, while the sexual character of the touching was a purely objective question as set out in s.78(a). In respect of the 'sexual' nature of the touching, if the act itself was 'objectively equivocal',<sup>86</sup> the purpose of the defendant may be a relevant consideration: where the conduct is ambiguous and because of its nature *might* possibly be 'sexual', then, under s.78(b)(ii), the circumstances of the action or purpose of any person in relation to it or both, are to be considered in assessing whether the conduct is 'sexual' or not.<sup>87</sup> Finally, under s.3(2), the belief in consent had to be objectively reasonable.<sup>88</sup>

The Court of Appeal stressed that the direction that the touching 'must have been deliberate' amounts to 'a direction that for conviction the appellant's mind (drunken or otherwise) had to have gone with his physical action of touching'.<sup>89</sup> The judge was accordingly correct to direct the jury that the touching must be deliberate and the defence that voluntary drunkenness rendered the defendant unable to form the intent to touch was not open to him. The Court further held that to 'flail about, stumble, or barge around in an uncoordinated manner' when intoxicated 'which results in an unintended touching, objectively sexual, is not this offence,' on the basis that the

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<sup>84</sup> [2007] EWCA Crim 125 at 17.

<sup>85</sup> *Ibid.*

<sup>86</sup> *Ibid.*, at 15.

<sup>87</sup> See chapter 9.

<sup>88</sup> This issue will be dealt with in chapter 11.

<sup>89</sup> [2007] EWCA Crim 125 at 17.

intoxication, in such a situation, has 'not impacted on intention'.<sup>90</sup> The Court held that in such situations intention is not in question and that what is in issue is 'impairment of control of limbs'.<sup>91</sup>

The Court of Appeal advanced the view that an offence of specific intent is one that requires an 'ulterior intent': 'proof of a state of mind addressing something beyond the prohibited act itself, namely its consequences'.<sup>92</sup> Basic intent is concerned with 'intention as applied to acts apart from their purposes' or deliberate conduct. Lord Justice Hughes cited a passage from the speech of Lord Simon in *Majewski*:

'A general intent attending the commission of an act is, in some cases, the only intent required to constitute the crime while, in others, there must be, in addition to that general intent, a specific intent attending the purpose for the commission of the act.'

The point here was that s.3 is not a specific intent crime because there is no specific intent needed to bring about a particular purpose or consequence, only intent to touch. As Ashworth quite rightly notes this 'narrowing of the concept of 'specific intent' to cases of purpose is a poor fit with the existing case-law'.<sup>93</sup> The intentional touching element of the offence fell into the category of basic intent, and it followed that voluntary intoxication could not be relied upon to negate that intent. In reaching this conclusion, the Court explicitly stated that there is a large element 'of policy in the decision whether voluntary intoxication can or cannot be relied upon in relation to an offence'.<sup>94</sup> It noted the decision in *R v C*,<sup>95</sup> that indecent assault was a crime of basic intent, at least unless the act was an equivocal one so that the defendant's purpose had

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<sup>90</sup> *Ibid*, at 23.

<sup>91</sup> *Ibid*.

<sup>92</sup> *Ibid* at 31. The trial judge had called this a 'bolted-on intent'.

<sup>93</sup> Ashworth, *op cit*, n 3 at p.343.

<sup>94</sup> [2007] EWCA Crim 125 at 32. The Law Commission argue that: 'this alternative basis for imposing criminal liability fully accords with general legal principle...D is incurring liability and being punished accordingly, to the extent justified by his or her conduct and, bearing in mind the need to deter such conduct and provide the public with effective protection.' *Op cit* n 67 at para 2.16.

<sup>95</sup> [1992] Crim LR 642.

to be examined.<sup>96</sup> The SOA 2003 had not altered the law so as to make voluntary intoxication available as a defence to an allegation of intentional touching.

In its 2009 report, the Law Commission is critical of the *Heard* decision. It argues that the suggestion in *Heard* that recklessness can be a 'specific intent' is 'contrary to an established interpretation of the distinction between "basic" and "specific" intents and should be disregarded.'<sup>97</sup> Accordingly, an explicit requirement of intention in the definition of an offence does not necessarily mean that the offence is one of specific intent. They further suggest that, on this point, 'the decision in *Caldwell* is still good law.'<sup>98</sup> I shall return to this point after discussing the implication of *Heard* for s.3.

#### 10.2.3 Implications of the decision in *Heard*

There are two note-worthy issues arising from the decision in *Heard*. First, the decision is complainant-centred in holding that s.3 is a basic intent offence, even though it appears to be a specific intent offence. Intoxication is therefore unavailable as a defence to a charge of sexual assault. Secondly, the decision formalizes the inherent failure of s.3 to recognise that some unintentional touchings are culpable and therefore worthy of a criminal response. The Court's conclusion that the crime is one of basic intent, despite the clear element of intention in s.3(1)(a), was anticipated by some commentators.<sup>99</sup> Ormerod gives two examples to illustrate how the Court's 'radical reinterpretation' of *Majewski* aligning specific intent with an ulterior *mens rea* produces difficulties.<sup>100</sup> First, there is the defendant who becomes so heavily intoxicated that he genuinely has no

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<sup>96</sup> This implied that the intoxication is relevant on the question of when the act is 'sexual', in the sense of being relevant to D's motive.

<sup>97</sup> *Intoxication and Criminal liability*, *op cit*, n 57 at n 12.

<sup>98</sup> *Ibid.*

<sup>99</sup> P. Rook. & R. Ward, *Rook and Ward on Sexual Offences Law & Practice* (Sweet & Maxwell, London, 2004) at 2.72.

<sup>100</sup> D. Ormerod, 'Voluntary Intoxication: Whether Voluntary Intoxication Available as a Defence on a Charge of Sexual Assault' [2007] *Crim LR* 654, at 656.

appreciation of the circumstances or consequences surrounding his physical actions.<sup>101</sup> Ormerod gives the example of D who 'might be so intoxicated that he thinks he is stroking an animal at the centre of the earth when in fact he is stroking a woman's breast.'<sup>102</sup> On the Court's approach, since the offence is one of 'basic intent' this actor will be guilty. Ormerod argues that it 'would be difficult in any ordinary sense of the word to say that D 'intended' to touch as s.3 requires'. However, the fact that his inebriation led him to do something he would not have done if sober, should not provide him a defence. Allowing a general defence of intoxication would result in too many acquittals of guilty defendants and would bring the law into disrepute by offering no protection to complainants. There is an element of prior fault in the decision of D to take drink or drugs to such an extent as to lose control over his behavior. It is perfectly fair to assume that most people realize the possible effects of taking alcohol or drugs: '[i]t is common knowledge that those who take alcohol to excess or certain sorts of drugs may become aggressive or do dangerous or unpredictable things.'<sup>103</sup> However, there is a notable difference between appreciating the general risks of drunkenness and appreciating the risk of specific acts one might be likely to perform when drunk. Sentencing decisions suggest that intoxication may mitigate on the first occasion it is raised, if the offence can be portrayed as 'out of character', but it will not mitigate any subsequent offences committed in an intoxicated state.<sup>104</sup> After *G*,<sup>105</sup> voluntary intoxication does not provide a defence for a defendant who realised when he was getting drunk that he was putting himself in a condition where he would be likely to engage in the prohibited conduct in question. The Court did not rule on whether it would be open to a defendant to argue that as a result of his voluntary intoxication 'his

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<sup>101</sup> See *Lipman* (1969) 55 Cr App R 600 where the defendant, laboring under a delusion resulting from the consumption of hallucinogenic drugs, fancied himself to be fighting a snake when in fact he was strangling his girlfriend.

<sup>102</sup> Ormerod, *op cit*, n 93.

<sup>103</sup> *Bailey* (1983) 77 Cr App R 76, at 80.

<sup>104</sup> See *Sheehan and O'Mahoney* [2007] 1 Cr App R 149 and *McDermott* [2007] 1 Cr App R 157.

<sup>105</sup> [2004] 1 AC 1034.

mind did not go with the physical act', with the result that he could not be convicted of an intentional offence even if the crime is one of basic intent.

The second situation is one in which Ormerod argues that a 'no more deserving actor' will, following the Court's approach, be acquitted. D who is heavily intoxicated, fooling around with his mates in a pub pretends to strike the bottom of a woman who is bending over to reach the bar and who cannot see him. He aims not to make contact by stopping his hand short, thereby amusing his mates in the process. His intoxication causes him to misjudge the distance and he ends up patting her on the bottom. He intends to move his arm and intends to come close to touching her, but not to do so. He is reckless about that consequence: he has seen the risk and gone on to take it.<sup>106</sup> However, recklessness will not suffice under s.3 as the Court acknowledges. It is possible that D in this situation might try to argue that because of his intoxication he did not have the requisite *mens rea*; because he was drunk he did not know what he was doing. As sexual assault is an offence of 'basic intent', it would seem he would be liable. However, Hughes L.J. concluded in *Hardy* that D must in these circumstances be acquitted, but does so by describing his conduct as 'accidental'.<sup>107</sup> This type of actor is deserving of criminal liability and the action should properly be charged under a reformulated section 3 (as suggested above). It is misleading to describe the defendant's conduct as 'accidental': he is treating the complainant as an 'object' and using her for his own purposes. Even where D claims that 'I was just having a laugh', he is using C 'as a means to an end'. The wrongfulness of sexual assault derives from the fact that the victim has a proprietary right over her own body. It is her body, she owns it, nobody else may use it without her saying so.<sup>108</sup> Sexual assault is a form of being subjected to another's dominion. In sexual interactions, unlike in other interactions, it is even more important

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<sup>106</sup> Cf. *Shimmen* discussed above.

<sup>107</sup> [2007] EWCA Crim 125 at 23.

<sup>108</sup> J. Gardner. & S. Shute, 'The Wrongness of Rape' in J. Horder (ed.) *Oxford Essays in Jurisprudence* (4<sup>th</sup> series) (OUP, Oxford, 2000) p.205.

that we are able to control with whom we are intimate, since sexual relationships expose us more than other relationships and thereby make us more vulnerable. This is a reason why non-consensual reckless sexual touching, even as a 'joke', is offensive. It makes the recipient merely a sexual being, vulnerable and exposed.

The Court also discusses the drunken dancer whose control of his limbs is uncoordinated or impaired, which leads him to touch a woman's 'private parts' as he flails around.<sup>109</sup> The Court concludes that the conduct is 'accidental' and that he should be acquitted. Again, D is reckless as to whether he will touch C. What is the difference between the hypothetical dancer and the appellant in *Heard*? Whilst the touching of the policeman's thigh was not accidental, neither can the uncontrolled dancing be described as accidental. This broad application of the word 'accidental', which results in acquittal, undermines the whole protective purpose of the law's approach to intoxication and basic intent. The voluntarily intoxicated defendant who is charged with having 'groped' a person at a party may claim that the touching was unintentional and that he was, in the words of Ormerod 'merely flailing around (in what nowadays passes for dancing) or holding his hands out to steady himself in his stupor.'<sup>110</sup> Consider D, who is drunk at the office party, and gropes C. In excluding recklessness from the definition of sexual assault, D is provided with a possible argument that any contact was 'accidental'.

The decision in *Heard* gives excessive scope to the concept of 'accident', by treating it as covering not only acts that are not voluntary or willed, but also those that are willed and involve unintended but foreseeable touching. This may have the effect of blurring the boundaries of recklessness. The Court reiterated that just as a drunken intent remains an intent, a drunken accident remains an accident.<sup>111</sup> This overlooks the complainant's experience of the touching and places too much emphasis on D's blameworthiness.

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<sup>109</sup> [2007] EWCA Crim 125 at 20.

<sup>110</sup> D. Ormerod, *Smith and Hogan Criminal Law* 11<sup>th</sup> edn (OUP, Oxford, 2005) p.625.

<sup>111</sup> [2007] EWCA Crim 125 at 33.

These problems are implicit in the exclusion from s.3(1)(a) of recklessness and the decision in *Heard* merely formalizes the inherent failure of s.3 to recognise that some unintentional touchings are culpable and therefore worthy of a criminal sanction. Ormerod suggests that the Court seems to be using the word ‘accidental’ in distinction to ‘intention’ to describe both the state of mind of the actor as to the proscribed act (the ‘sexual’ touching) and the voluntary willed movement of the actor in controlling his arms.<sup>112</sup> This interpretation of the meaning of ‘accident’ echoes the decision in *Brady*,<sup>113</sup> where the Court of Appeal considered whether D’s conduct in perching on the balcony over a dance-floor and falling onto the victim, rendering her paraplegic, was an ‘accident’. D was convicted of inflicting grievous bodily harm contrary to s.20 of the OAPA 1861.<sup>114</sup> D’s deliberate bodily movement to perch on the balcony was not an accident. The conduct produced a risk of falling and injured those below. D saw that his conduct produced that risk and was reckless in unreasonably taking that risk. D’s appeal against conviction was allowed because the trial judge, in focusing simply on whether D acted maliciously, failed to separate out issues regarding accidental/deliberate risk of harm, and unlawfulness of D’s conduct as part of the external elements of the offence.<sup>115</sup>

As noted, on its facts, *Heard* should never have given rise to problems. D’s plea was that he had no recollection of the incident. That is never a basis for a plea of intoxication and that should have been the end of the matter. In *Caldwell*,<sup>116</sup> the House of Lords held that for offences of basic intent, intoxication provides evidence of *mens rea*, effectively relieving the prosecution of the burden of proving *mens rea*. It is therefore possible that

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<sup>112</sup> Ormerod, *op cit*, n 93.

<sup>113</sup> [2006] EWCA Crim 2413.

<sup>114</sup> The decision in *Brady* can be distinguished from *Heard* on the basis that with s.20 recklessness is included in the definition, through interpretation of the word ‘malicious’.

<sup>115</sup> See D.C. Ormerod, ‘Assault: Whether recklessness requires proof that defendant had foreseen “an obvious and significant risk”’ [2007] *Crim L R* 564; A. Reed, ‘Subjective recklessness and the Offences Against the Person Act 1861, s.20’ [2007] *Crim Law* 175.

<sup>116</sup> [1982] AC 341.

the decision in *Caldwell* applies to both *Heard* and s.3: as sexual assault is a basic intent crime, if D claims to have been so drunk as not to have intended to touch, that in itself provides evidence of an intention to touch. *Heard* is a very confusing case: the Court appears to have reached a decision based on the facts of the case and swayed by policy considerations and then attempted to make the basic/specific intent principles match their conclusion.

There is a further issue to be discussed here and that is the question of how s.3 would work if the Law Commission's proposed *Criminal Law (Intoxication) Bill* were to be introduced. As s.3 requires that D acted with subjective fault (i.e. an intention to touch) then the applicable provisions of Part 1 would apply. Clause 2 states that '[i]f D's intoxication was involuntary, evidence of it may be taken into account in determining whether the allegation has been proved.' Accordingly, if D did not act with the required intention to touch on account of being involuntarily intoxicated, then D would not be liable for sexual assault. In relation to voluntary intoxication clause 3 states that 'in determining whether the allegation has been proved, D is to be treated as having been aware at the material time of anything which D would have been aware of but for the intoxication.' There are several exceptions to this general rule and these are listed in clause 3(5). Under this approach, a defendant whose voluntary inebriation led him to do something he would not have done if sober would be liable for sexual assault. This is complainant-centred to the extent that evidence of D's voluntary intoxication cannot refute a claim that D intended to touch C.

### 10.3 CONCLUSION

This chapter has considered the circumstances in which D is responsible and blameworthy for the touching. Three main conclusions have been reached. First, the requirement that D must intentionally touch another person and the decision to exclude recklessness from this element of the *mens rea* fails to acknowledge that there are certain unintentional, yet culpable, actions that deserve to come within the offence. The



current definition of sexual assault should be amended to include recklessness within s.3(1)(a) on the basis that the law's failure to capture reckless sexual touchings shows insufficient regard to C's sexual interests and integrity. However, framing an offence of sexual assault in terms of recklessness as to the touching is not without its problems: distinguishing reckless from 'accidental' conduct might prove problematic and it is also questionable whether all forms of reckless sexual touching are deserving of the sexual assault label and the opprobrium attached to that label. Secondly, the recent decision in *R v Heard* is complainant-centred in holding that s.3 is basic intent offence, even though it appears to be a specific intent offence. This is crucial in providing that a defendant cannot raise intoxication as a denial of *mens rea*. Thirdly, the decision in *Heard* also gives excessive scope to the concept of an 'accident' by treating it as covering not only acts that are not voluntary or willed, but also those that are willed but have unintended though foreseen consequences. The Court of Appeal inappropriately distinguished between intentional and accidental touchings.

Chapter 11 will analyse the requirement that D must 'not reasonably believe' that the other person consents to the touching, arguing that it is inappropriate for the reasonableness of a belief to be determined in light of D's characteristics. It further discusses whether s.3 requires any *mens rea* in relation to the intended touching being 'sexual', arguing that the law ought not to require such awareness.

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## **Sexual Assault, Responsibility and Blameworthiness: the Reasonable Belief in Consent Test and the Ambiguity of a Sexual Intent**

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In chapter 10, I analysed the requirement that D must ‘intentionally’ touch another person and argued that liability should extend to reckless sexual touchings. In this chapter I will scrutinize the second element of *mens rea* set out in s.3 that D must ‘not reasonably believe’ that the other person consents to the touching. Whilst this test is an improvement on the old law, it allows for the reasonableness of a belief to be determined in light of D’s characteristics and this is inappropriate. The chapter further discusses how s.3 is unclear whether D must appreciate the ‘sexual’ nature of the touching, arguing that the law ought not to impose such a *mens rea* requirement. Part 1 will consider why the ‘mistaken belief in consent’<sup>1</sup> test was deemed unsatisfactory and analyse the current ‘reasonable belief’ in consent test as set out in s.3(2). The test will be criticised for establishing a ‘defendant-objective’ standard, which allows the jury to look at personal characteristics of D in deciding the reasonableness of his actions. This might encourage jurors to scrutinise C’s behaviour to determine whether there is anything about it that could have induced a reasonable belief in consent. This is insufficiently complainant-centred because it might result in juries responding to the reasonable belief test in different ways and might further reinforce stereotypes and value judgments about ‘appropriate’ sexual behaviour.

Part 2 will discuss whether s.3 requires any *mens rea* in relation to the intentional touching being ‘sexual’. It will consider whether, in light of the decision in *B v DPP*,<sup>2</sup>

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<sup>1</sup> *DPP v Morgan* [1976] AC 182.

<sup>2</sup> [2000] 2 AC 428.

appeal courts might read in to s.3 a presumption of *mens rea*: namely that, in order to be guilty, D must either know the act is 'sexual', know that reasonable people would consider the act 'sexual', be aware of the possibility of the touching being 'sexual', or be aware that reasonable people might label the touching 'sexual'. This is one aspect of the definition that ought to be resolved so as to make the offence more complainant-centred; requiring that D be aware of the 'sexual' nature of the touching might deflect the court's attention away from the invasion of C's sexual autonomy and fail to communicate law's symbolic condemnation of acts interfering adversely with sexual self-determination.

#### 11.1 REASONABLE BELIEF IN CONSENT

The second element of the *mens rea* of sexual assault, under s.3(1)(d) SOA 2003 is that the defendant does not 'reasonably believe' that the other person consents to the touching. Prior to the SOA 2003, there existed a 'mistaken belief' in consent test that was unsatisfactory and insufficiently complainant-centred, as it did not require D's mistake to be objectively reasonable. The Sexual Offences Bill introduced a reasonable person test that was unnecessarily complex and criticised for its failure to take account of D's particular characteristics. This reasonable person test was changed through its Parliamentary progress and the SOA 2003 now provides a general test of what is reasonable in 'all the circumstances'. Section 3(2) states that: '[w]hether a belief is reasonable is to be determined having regard to all the circumstances, including any steps A has taken to ascertain whether B consents.'<sup>3</sup> The 'reasonable belief' test establishes a 'defendant-objective' test and shows considerable leniency towards defendants because it allows the jury to look at the personal characteristics of D in deciding the reasonableness of his actions. The Government specifically mentioned an intention that the defendant's particular characteristics will be relevant in order to

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<sup>3</sup> This provision is identical to that used in relation to rape (s.1), assault by penetration (s.2) and causing another person to engage in sexual activity without consent (s.4).

determine whether their belief was reasonable, as will be discussed below. The 'reasonable belief' test explicitly focuses on any steps that D has taken to ascertain whether C was consenting, which appears to be quite complainant-centred. However, it might encourage jurors to scrutinise C's behaviour to determine whether there is anything about it that could have induced a reasonable belief in consent. I will argue that although the 'reasonable belief' test is a marked improvement in the law it is still insufficiently complainant-centred and a better approach would involve a test for consent that did not require the individual characteristics of the defendant to be taken into account. This could be subject to an exception for those who lack capacity, for example because they have a learning disability or mental disorder.

#### 11.1.1 Reform of the 'mistaken belief' test

Before the SOA 2003, to be guilty of rape, a man must have known that, or been reckless as to whether, the other party was not consenting.<sup>4</sup> The 'mistaken belief in consent' test, which was established in *DPP v Morgan*,<sup>5</sup> was a (defendant) subjective one, which did not require the defendant's mistaken belief to be objectively reasonable.<sup>6</sup> Any belief that the complainant was consenting, no matter how unreasonable, would negate this element of the *mens rea*. This landmark decision was widely applauded by subjectivists for its upholding of an important criminal law principle, since it emphasised that people ought to be judged on the facts as they believed them to be, and not on facts to which they had given no thought.<sup>7</sup> It was reviled by many academics and women's advocates as too favourable to defendants.<sup>8</sup> In

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<sup>4</sup> SOA 1956, s.1 (as amended).

<sup>5</sup> [1976] AC 182.

<sup>6</sup> Following the decision in *Morgan*, legislation was introduced to require that when a jury considers whether a belief was genuine, they have regard to the 'presence or absence of reasonable grounds for such belief': Sexual Offences (Amendment) Act 1976, s.1(2).

<sup>7</sup> J.C. Smith, 'Rape' (1975) *Crim L R* 41.

<sup>8</sup> T. Pickard, 'Culpable Mistakes and Rape: Relating *Mens Rea* to the Crime' (1980) 30 *University of Toronto Law Journal* 75; C. Wells 'Swatting the Subjectivist Bug' [1982] *Crim L R* 209; R. Charlow, 'Bad Acts in Search of a *Mens Rea*: Anatomy of a Rape' (2002) 71 *Fordham Law Review* 263; K. Huigens, 'Is Strict Liability Rape Defensible?' in R.A.Duff & S. Green, *Defining Crimes* (OUP, Oxford, 2005) p.202.

*Kimber*,<sup>9</sup> the Court of Appeal held that the decision in *Morgan* applied equally to indecent assault. The fault element of the crime included knowledge or recklessness as to whether the other person was consenting. Here, as with rape, it was sufficient to show that D 'could not care less' whether the other party was consenting.<sup>10</sup> Following *Morgan* the prosecution had to prove not only that C did not consent, but also that D did not, in fact, honestly believe that C consented (in the sense that D knew that or could not care less whether, C was not consenting). In respect of C's behaviour, *Morgan* arguably put the focus of trials on complainants in order to assess whether D did believe, or might have actually believed, in consent.

In support of the reform to introduce a 'reasonableness' requirement, the Minister of State at the Home Office, Lord Falconer, said:

'The unsatisfactory elements of the current position are, first that it implicitly authorises the assumption of consent regardless of the views of the victim. Secondly, it is easy for the defendant to seek consent- the cost to him is very slight and the cost to the victim of forced sexual activity is very high indeed. We believe that it is not unfair to ask any person to take care to ensure that their partner is consenting and for them to be at risk of a prosecution if they do not.... So we take a strong view that there should be an objective element in the matter.'<sup>11</sup>

Lord Falconer suggested that introducing an objective element to the *mens rea* of rape is a 'more just approach' and is 'likely to produce more convictions.'<sup>12</sup> In considering where justice lies, Lord Falconer went on to say that, 'it is important to consider not only the interests of the defendant but the interests of the victim.'<sup>13</sup> In defending the introduction of an objective element into the *mens rea* of rape, he suggested that as a matter of justice the risk of non-consensual sexual activity should lay with the

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<sup>9</sup> (1983) 77 Cr App R 225.

<sup>10</sup> *Ibid.*

<sup>11</sup> HL Deb, 2<sup>nd</sup> June 2003, col 1060.

<sup>12</sup> HL Deb, 31<sup>st</sup> March 2003, col 1088.

<sup>13</sup> *Ibid.*

defendant, as the victim would suffer doubly; from the humiliation of being raped and not receiving justice. Lord Falconer suggested that the honest belief in consent test 'undermines the faith that victims are prepared to place in the justice system and we believe that it discourages them from bringing cases to court.'<sup>14</sup>

Clause 1 subsections (2) and (3) of the Sexual Offences Bill originally proposed to replace the *Morgan* test with a two-stage test:

(2) This subsection applies if A does not believe that B consents (whether because he knows that B does not consent, gives no thought to whether B consents, or otherwise).

(3) This subsection applies if—

(a) a reasonable person would in all the circumstances doubt whether B consents, and

(b) A does not act in a way that a reasonable person would consider sufficient in all the circumstances to resolve such doubt.'<sup>15</sup>

This required the jury to consider first, whether a reasonable person would, in all the circumstances have doubted whether the complainant was consenting. If there was the possibility of doubt, then the jury was required to consider, secondly, whether the defendant acted in a way that a reasonable person would consider sufficient in all the circumstances to resolve such doubt. The House of Commons Home Affairs Committee feared that this formulation would lead to injustice in some cases because it failed to take account of the defendant's particular characteristics:<sup>16</sup> it would result in conviction of defendants who lacked the capacity to act in a way that a reasonable person would consider sufficient (such as children and the mentally disordered).<sup>17</sup>

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<sup>14</sup> HL Deb, 2<sup>nd</sup> June 2003, col 1060.

<sup>15</sup> This clause defined rape, but would equally have applied to sexual assault, see s.5 (2) & (3).

<sup>16</sup> House of Commons Home Affairs Committee, *Sexual Offences Bill*, Fifth Report of Session 2002-03, HC 639, para 23.

<sup>17</sup> There is a problem here of treating mental disorder as if it is a cohesive set of conditions, when in fact it is very broad. See G. Richardson, 'Mental Capacity at the Margin: The Interface Between Two Acts (2010) 18 *Med L R* 56.

Clause 1 was also said to be unnecessarily complex and made more difficult by its operation in connection with the presumptions in clauses 76 & 77.<sup>18</sup> Lord Lloyd of Berwick suggested it was in danger of confusing juries and generating more appeals:

‘For the jury would presumably have to be asked after the defendant had been convicted on which of the two grounds they had convicted him, whether under Clause 1(2) or Clause 1(3). That is always a source of trouble, as anyone who has had experience of dealing with juries will know.’<sup>19</sup>

The Chairman of the Criminal Bar Association suggested that the test be amended to require the jury to consider ‘what a reasonable person “sharing the characteristics of the defendant” would have thought.’<sup>20</sup> The Government opposed this, however, because it would require the jury to consider all the characteristics of the individual defendant. Viscount Bledisloe used the example of the defendant who arrives in England or Wales from a country where ‘whenever ladies say “no” they meant “yes”’.<sup>21</sup> He questioned whether this background characteristic should be submitted to the court as a defence, arguing that once one begins taking into account individual characteristics, trials will go on indefinitely.<sup>22</sup> Can and should we consider all aspects of a person’s life and personality in order to determine whether their belief was reasonable? Whilst it is necessary to consider the defendant’s beliefs in the context in which those beliefs are made, it would unduly burden a jury and prove very time-consuming to require that every individual aspect of a person’s life and character that might be relevant to the question of whether D’s belief was reasonable be provided as evidence to support or discredit their belief in consent. Although this might make trials fairer for defendants, ensuring that only those who are truly culpable (rather than merely ignorant are liable) it also places too much emphasis on the complainant’s behaviour.

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<sup>18</sup> For discussion of the evidential and conclusive presumptions see chapter 4, section 3.2.

<sup>19</sup> HL Deb, 31<sup>st</sup> March 2003, col 1065.

<sup>20</sup> Peter Rook QC, Evidence 45.

<sup>21</sup> HL Deb, 31<sup>st</sup> March 2003, col 1104.

<sup>22</sup> *Ibid.*

Hilary Benn, Parliamentary Under-Secretary in the Home Office, indicated that the drafting in clause 1(3) already took sufficient account of the individual defendant because the jury was invited to look at 'all the circumstances'. Against that, however, Viscount Bledisloe argued that "'circumstances" means surrounding facts...not the peculiar characteristics of the individual defendant.'<sup>23</sup> The government agreed to reconsider the formulation of clause 1(3), and when introducing the amendments the Minister of State in the Home Office, Baroness Scotland of Asthal QC, said that:

'the revised version of the reasonableness test moves away from the concept of 'the reasonable person' and requires the prosecution to prove that the defendant did not have a reasonable belief in consent. The test is supported by an explanation of the type of criteria to be used to determine whether the D's belief in consent was reasonable in relation to the alleged offence. The jury is directed to have regard to all the circumstances at the time, including any steps taken that the D may have taken to establish that the complainant consented to the sexual activity.'<sup>24</sup>

#### 11.1.2 'Reasonable belief' in consent test

S.3(2) provides that '[w]hether a belief is reasonable is to be determined having regard to all the circumstances, including any steps A has taken to ascertain whether B consents.' S.3(2) makes it clear that the defendant will have the *mens rea* if he lacks a reasonable belief that the complainant consents. This includes any one of three states of mind. First, where he knows the complainant does not consent. Secondly, where he gives no thought to whether the complainant consented. Thirdly, where he does not reasonably believe the complainant consented. The test suggests that there is an onus on D to verify C is consenting. Heaton suggests that this is easily achieved and that 'there is no room for a modern Casanova to assume his irresistibility.'<sup>25</sup>

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<sup>23</sup> HL Deb, 31<sup>st</sup> March 2003, col 1107.

<sup>24</sup> HL Deb, 17th June 2003, col 669.

<sup>25</sup> R. Heaton, *Criminal Law* 2<sup>nd</sup> edn (OUP, Oxford, 2006) p.128.



Lacey *et al* describe the 'reasonable belief' standard as a 'half-way house' for it allows the defendant's reasonableness to be measured in relation to his own perception of the circumstances.<sup>26</sup> Despite the reference to 'all the circumstances' in s.3(2), one might argue that characteristics should only be taken into account to the extent that they could reasonably affect the defendant's perception or understanding of whether or not the complainant is consenting. S.3(2) does not rely on a 'reasonable person' standard, adopting instead a general test of what is reasonable in all the circumstances. As such, this provision might not only permit, but might actually invite jurors 'to scrutinise the complainant's behaviour to determine whether there was anything about it which could have induced a reasonable belief in consent'.<sup>27</sup> Thus, an examination of the complainant's conduct, her relationship with the defendant and her previous sexual history might be dissected. This might further reinforce stereotypes and value judgments about 'appropriate' female sexual behaviour in our society e.g. that if a woman drank with him, flirted with him, or invited him in for coffee she is partly to blame for being raped.<sup>28</sup> It is also unclear whether as a matter of law 'all the circumstances' would include D's inebriated state, although it would seem contrary to the intentions of the Government for the test of 'reasonable beliefs' to be adjusted to take account of drunken beliefs. The key issue seems to be whether the jury (or magistrates) can be trusted to come to a fair and just conclusion. There is empirical evidence suggesting that concerns about leaving the jury to interpret and apply the reasonable belief test are well founded.

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<sup>26</sup> N. Lacey, C. Wells & O. Quick, *Reconstructing Criminal Law* 3<sup>rd</sup> edn (Lexis Nexis, London, 2003) p.500.

<sup>27</sup> J. Temkin & A. Ashworth, 'The Sexual Offences Act 2003: (1) Rape, Sexual Assaults and the Problems of Consent' [2004] *Crim L R* 328.

<sup>28</sup> ICM, 'Sexual Assault Research Summary Report' prepared for Amnesty International UK, 12<sup>th</sup> Oct 2005 [http://www.amnesty.org.uk/uploads/documents/doc\\_16619.doc](http://www.amnesty.org.uk/uploads/documents/doc_16619.doc) [Online] (Accessed: 5<sup>th</sup> June 2008).

### 11.1.3 Mock jury study on sexual consent

In 2006, Finch and Munro conducted seven scripted rape trial scenarios on sexual consent in the jury room to examine the ways in which the concepts of freedom, capacity and reasonableness were interpreted.<sup>29</sup> They found that participants responded to the reasonable belief test in divergent ways.<sup>30</sup> Some of the jurors retreated to a more 'traditional' objective test, focusing on whether the belief was one that the majority would consider reasonable. By contrast, other participants interpreted the SOA 2003 as requiring them to adopt an at least partially subjective approach, considering whether it was reasonable for the defendant to think that C was consenting. The study presented two significant findings on the reasonable belief test. First, it illustrated that the current terminology of the statute is confusing for jurors who find themselves left to interpret the level of objectivity or subjectivity required by the test. Secondly, the findings support the concerns expressed by critics that the move away from an unmodified objective test (applying a test of whether the belief was one that the majority would consider reasonable) will considerably reduce the impact of the new legislation, at least in terms of its aim of imposing a duty on men to ascertain consent.

Finch and Munro's study also highlighted the extent to which, in the absence of specific guidance to the contrary, jurors often interpreted the notion of 'reasonable in all the circumstances' extremely broadly, taking into account 'wider circumstantial factors' e.g. factors about the whole situation, the party, the drinking and so on.<sup>31</sup> The introduction of these factors is problematic as it shows that jurors effectively deduced sexual consent from other events that lacked 'any temporal correspondence with intercourse'.<sup>32</sup> In addition, it generates an opportunity for the introduction into the jury room of a range of views about 'appropriate' socio-sexual interaction. One of the conclusions of the

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<sup>29</sup> V. Munro & E. Finch, 'Breaking Boundaries? Sexual Consent in the Jury Room' (2006) 26 *LS* 303.

<sup>30</sup> *Ibid.*

<sup>31</sup> *Ibid.* Jury R.

<sup>32</sup> *Ibid* at 318.

mock jury study was that the 'defendant-objective' test 'generated considerable leniency towards the defendant', far more so than had the test been purely objective.<sup>33</sup> This was because the subjective requirement caused jurors to fall back on stereotypes about rape on the ground that the defendant's own thinking might have been influenced by them. On the other hand, jurors who applied 'an unmodified objective standard [...] generally held the defendant to a higher standard of care and responsibility.'<sup>34</sup>

Finch and Munro's research focused on rape and as such there are limits in terms of the conclusions we can draw from their survey with respect to sexual assault. There are also obvious methodological problems of jury-simulation research. In the absence of being able to undertake research into actual jury deliberations,<sup>35</sup> we can never be certain which factors influence jurors in rape trials and the extent to which jurors are capable of impartially interpreting and applying judicial guidance on the meaning of complex terms. In Weiten and Diamond's landmark study on jury simulation method they identified a number of threats to its value, relating in particular to inadequate sampling, inadequate stimuli, inappropriate dependent variables, the issue of role playing and the failure to include group deliberation and corroborative field data.<sup>36</sup> Finch and Munro attempt to respond to these concerns in their article.<sup>37</sup> Despite obvious trepidation about mock juries 'verisimilitude to real juries', Finch and Munro's study is perhaps the closest we can hope to get to the jury room and highlights the, albeit generalised, processes of reasoning that lead to a particular verdict.<sup>38</sup>

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<sup>33</sup> *Ibid* at 317.

<sup>34</sup> *Ibid*.

<sup>35</sup> The Contempt of Court Act 1981, s.8 prohibits the examination of jury decision making.

<sup>36</sup> W. Weiten & S.S. Diamond, 'A Critical Review of the Jury Simulation Paradigm' (1979) 3 *Law and Human Behaviour* 71.

<sup>37</sup> Finch & Munro n 29 at 311-312.

<sup>38</sup> In a recent report on the jury decision-making process, 'Are Juries Fair?' Ministry of Justice Research Series 1/10, February 2010, little evidence of jury unfairness was found. The study did however identify several areas where the criminal justice system should better assist jurors.

#### 11.1.4 Reasonableness: a 'defendant-objective' test?

By focusing on the reasonableness of the individual defendant's belief, s.3(2) also allows the jury to look at personal characteristics of the defendant, such as learning disability or mental disorder, and consider them. The test of reasonableness is thus 'defendant-objective' or what Temkin and Krahe label 'subjective/objective'<sup>39</sup> rather than purely objective: a purely objective or 'bystander-objective' approach focuses on a reasonable person with no characteristics of the defendant, whereas a 'defendant-objective' approach focuses on a reasonable person in D's position.<sup>40</sup> Lord Falconer, while refusing to require the jury to take account of all the personal characteristics of the defendant in assessing what would be reasonable in all the circumstances,<sup>41</sup> also refused to rule out consideration of factors beyond age and mental impairment, opining that it would be for the judge and jury, applying their good sense, to decide which characteristics were relevant for this purpose.<sup>42</sup>

On the one hand, courts might take an expansive approach to the inclusion of characteristics, as in *Smith (Morgan)*<sup>43</sup> on provocation and allow any relevant characteristics to be considered. On the other hand, courts might take a more restrictive approach, as in *Colohan*,<sup>44</sup> concerning the Protection from Harassment Act 1997, in which the Court of Appeal refused to accept that the defendant's characteristics rendered his actions or beliefs reasonable. Although these two cases applied to different contexts, respectively a *defence* to murder and the *offence* of harassment, they highlight the possible judicial interpretation of a fundamental statutory phrase. The *Protecting the Public* White Paper stated that "'reasonable" will be judged by reference

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<sup>39</sup> J. Temkin & B. Krahe, *Sexual Assault and the Justice Gap: A Question of Attitude* (Hart Publishing, Oxford, 2008) p.69.

<sup>40</sup> See chapter 6.

<sup>41</sup> Lord Falconer, *Hansard* HL Deb, col 1073, 2<sup>nd</sup> Jun 2003.

<sup>42</sup> *Ibid* at cols 1074-1075.

<sup>43</sup> [2001] AC 146. This decision was overruled by *AG for Jersey v Holley* [2005] 2 AC 580 which interpreted the Homicide Act 1957, s.3 as setting a purely objective standard.

<sup>44</sup> [2001] Crim LR 845.

to what an objective third party would think in the circumstances.’<sup>45</sup> Cowan has expressed concern for this development, highlighting the need for greater guidance on the question of to whom the belief needs to be reasonable:

‘What if the accused has led an especially sheltered life, in a rural place, within a sexist family, has not been schooled in the shifting gender power relations of the 21<sup>st</sup> century, and believes a sexual partner to be consenting despite her protestations: will it be reasonable for him to think she is consenting?’<sup>46</sup>

Mackinnon, writing on rape in the 1980s, forewarned of the dangers of moving away from an honest belief test and assuming that this in itself represented a progressive step towards protecting sexual autonomy.<sup>47</sup> She argued that ‘to attempt to solve (the problem of rape) by adopting reasonable belief as a standard without asking, on a substantive social basis, to whom the belief is reasonable and why- without asking what conditions make it reasonable- is one sided: male sided’.<sup>48</sup> Temkin and Krahe argue that ‘introducing an element of subjectivity into the issue of determining a defendant’s belief in consent is likely to raise the conviction threshold.’<sup>49</sup>

This brings us to the question of the possible alternative approaches to the ‘reasonable belief’ test and the extent to which these alternative approaches might be better for complainants and fairer and which approach ought to be preferred. The first option is a purely objective or what I labelled in chapter 6 as a ‘bystander-objective’ approach. A ‘bystander-objective’ approach would involve a test for consent that did not require the individual characteristics of the defendant to be taken into account. The defendant

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<sup>45</sup> Home Office, *Protecting the Public: strengthening protection against sex offenders and reforming the law on sexual offences* (Cm 5668) (2002).

<sup>46</sup> S. Cowan, ‘Freedom and capacity to make a choice: a feminist analysis of consent in the criminal law’ in V. Munro & C. Stychin, *Sexuality and the Law: Feminist Engagements* (Routledge-Cavendish, Oxon, 2007).

<sup>47</sup> C. MacKinnon, *Towards a Feminist Theory of the State* (Harvard University Press, Cambridge, 1989) p.183.

<sup>48</sup> *Ibid.* It is worth reiterating that the SOA 2003 applies equally to male and female complainants and defendants, other than in respect of rape, which applies only to male defendants.

<sup>49</sup> *Op cit* n 39, at p.50.

would be held to the standard of a 'reasonable person', similar to that set out in clause 1(3) of the Sexual Offences Bill. A 'bystander-objective' approach phrased in this way would suffer from serious drawbacks. It would convict a mentally disordered defendant who does not realise, because of his disorder that C was not consenting. However, a purely objective approach ought to be preferred over a 'defendant-objective' approach because it focuses on social protection. Although I acknowledge the importance of D's state of mind, the law needs to emphasise the potential seriousness of non-consensual sexual touchings.

An alternative and more preferable 'complainant-centred' approach might be to include additional elements to the 'reasonable belief' test. For example, one could add to the 'reasonable belief' test that the decision-maker should 'consider the importance of protecting C's autonomy'. A further option would be to make an addition to the list of circumstances that jurors or magistrates must explicitly consider. At present, the decision-maker is instructed to consider 'any steps A has taken to ascertain whether B consents' but this could be amended to explicitly require jurors (or magistrates) to exclude consideration of any rape myths. Thus, D would be blameworthy where his reasonable belief was founded on the basis of stereotypes or rape myths. In other words what C was wearing, whether C had been drinking or whether C had behaved in a flirtatious manner would all be irrelevant to establishing D's reasonable belief in consent. The most 'complainant-centred' approach would be to adopt a strict liability approach. In the context of sexual assault, this would mean that D would be guilty if C did not in fact consent even if D reasonably believed that C consented. This might be very harsh on defendants who, on perfectly reasonable grounds believed the complainant consented, but in fact it is proved she did not. One way in which such an approach could be made less severe on defendants would be to require *mens rea* in relation to the 'sexual' nature of the touching. In the next section, I will consider this in more detail.

### 11.2 INTENTION TO TOUCH SEXUALLY?

The issue here is the significance of the defendant's perception at the time of acting of the nature of his action. There is a lack of clarity in the law about whether a defendant needs *mens rea* in respect of each element of the *actus reus*. Section 3(1)(b) is silent as to whether D must appreciate that his actions are 'sexual' or know that reasonable people would consider the act 'sexual', or be aware of the possibility of the touching being 'sexual', or that reasonable people might consider the touching 'sexual'. This is one unresolved aspect of s.3 that means we cannot properly evaluate how sufficiently complainant-centred the definition is. The principle of correspondence dictates that the fault elements of a crime correspond to the conduct elements.<sup>50</sup> Section 3 does not adhere to the correspondence principle: it does not appear to require any *mens rea* in relation to the intended touching being 'sexual'. This is rightly so; it is not necessary for every element of an offence to have a corresponding *mens rea*. In chapter 7, I argued that the correspondence principle appears to apply less easily to context-dependent terms such as 'sexual'. Requiring that D be aware of the 'sexual' nature of the touching might deflect the court's attention away from the invasion of the complainant's sexual autonomy. Although there are good reasons for the correspondence principle, namely that it ensures that the defendant is punished only for causing a harm or circumstance that he chose to risk or to bring about, in the context of sexual assault it would place too much emphasis on culpability and would lead to an insufficiently complainant-centred approach to the offence. The debate as to whether s.3(1)(b) requires any *mens rea* ought to be resolved to make the definition more complainant-centred because there are sound policy reasons for not requiring the prosecution to prove that the defendant appreciated the 'sexual' nature of the touching.

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<sup>50</sup> See chapter 7.

### 11.2.1 Sexual intent

The existing literature contains little discussion of whether the many offences under the SOA 2003 requiring proof that the conduct was 'sexual' also require that the Crown establish any *mens rea* on the part of the defendant as to that element. Section 3 makes two requirements in subsections 1(a) and 1(b), that A intentionally touches another person, B, and that the 'touching is sexual'. It does not seem to require any *mens rea* in relation to the intended touching being 'sexual'. Sexual assault can thus be described as an offence subject to what Simons calls 'impure formal strict liability'. Simons contrasts 'substantive' strict liability with two kinds of formal strict liability: pure and impure.<sup>51</sup> Substantive strict liability is a moral notion meaning liability without fault. By contrast, formal strict liability is a technical concept depending on the practice of analysing the elements of an offence. An offence is one of 'pure' strict liability if it requires no culpable mental state with respect to any of the constituent elements making up the proscribed act. An 'impure' strict liability offence requires no *mens rea* with respect to at least one of these act elements, but *mens rea* in relation to others. In sexual assault, there is no requirement of *mens rea* in relation to the 'sexual' nature of the touching. Therefore, a defendant might be convicted of sexual assault even if he did not appreciate the 'sexual' nature of the touching.<sup>52</sup> In light of *B v DPP*<sup>53</sup> (discussed below) it is possible that appeal courts might read in to the statute a presumption of *mens rea*, namely that in order to be guilty D must either know that the act is 'sexual', know that reasonable people would consider the act 'sexual' or be aware of the possibility that reasonable people would consider the act 'sexual'.

One of the difficulties of speaking in terms of a 'sexual intent' is distinguishing this from a 'sexual motive' and 'sexual gratification'. A 'sexual intention' requires that D intend to

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<sup>51</sup> K.W.Simons, 'When is Strict Criminal Liability Just?' (1997) 87 *J Crim L & Criminology* 1075.

<sup>52</sup> Chapter 7 analysed an approach to the meaning of 'sexual' that is dependent on the defendant's mental state for definition.

<sup>53</sup> [2000] 2 AC 428.



touch C and appreciates the 'sexual' nature of the touching. A 'sexual motive' is D's purpose or reason for acting, for example to obtain sexual gratification. Norrie has argued that the line between motives and intention is in fact almost impossible to draw.<sup>54</sup> He argues that once we start looking at what causes intentions and including an analysis of motive, we inevitably bring in complex social and political explanations for people's actions. Often a person's motive is to produce a particular result (in which his or her motive and intention are the same). This is especially true for sexual assault. If a defendant's reason for touching C is to obtain sexual gratification, he is arguably aware of the 'sexual' nature of the touching. In the context of sexual assault, sexual motivation therefore provides evidence of the defendant's intention.

#### 11.2.2 Sexual motivation

Orthodox criminal liability generally excludes issues of motive, unless Parliament has declared it to be relevant as part of the definition of an offence. Certain offences in the SOA 2003 expressly provide that liability depend on whether the defendant acted for the purpose of sexual gratification,<sup>55</sup> and the implication is that where this is *not* an element of the offence, such a purpose need not be proved. Under s.78(a) the jury (or magistrates) need only establish that the touching is 'because of its nature sexual', irrespective of the purpose of any person. Where the conduct is ambiguous and because of its nature *might* possibly be 'sexual', then, under s.78(b)(ii), the circumstances of the action, or purpose of any person in relation to it, or both are to be considered in assessing whether the conduct is 'sexual' or not. There may be limited circumstances where in practice a jury (or magistrates) is likely to find that D's 'ambiguous' touching of C was 'sexual' without being satisfied that D had a sexual purpose. Evidence that D had a non-sexual purpose is therefore likely to be of real practical significance. However, in

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<sup>54</sup> A. Norrie, *Punishment, Responsibility and Justice: A Relational Critique* (Oxford University Press, Oxford, 2000) p. 170-81.

<sup>55</sup> See ss. 11-12, 18-19, 32-33, 36-37, 40-41 and 67.

*Pratt*,<sup>56</sup> D's non-sexual motive did not result in a successful appeal against conviction for indecent assault. The defendant gave evidence that his sole motive in causing the boys to expose their private parts was to search for cannabis, which he thought the boys had taken from him. The prosecution needed only to prove intention or recklessness as to the common assault and the jury could then find if there were circumstances of indecency accompanying the assault. The Crown Court held that even though he did not touch either of the boys, there were circumstances of indecency accompanying the assault.

A similar conclusion was reached in *Tabassum*,<sup>57</sup> where the appellant appealed against his conviction for indecent assault on the grounds that no sexual motive could be proved. He had asked several women to take part in a breast cancer survey in order to create a database and they had consented in the mistaken belief that he was qualified. In order to undertake the agreed breast self-examination they removed their clothes in front of him and allowed him to feel their breasts. There was no evidence of sexual motive but the Court of Appeal held that, as the touching was *prima facie* indecent there was no requirement to prove any sexual motive and the appeal was dismissed. The decision in *Tabassum* appears to undermine the decision of the House of Lords in *Court* and is arguably more complainant-centred because it does not require the defendant to intend that his act assume an indecent character. Lord Ackner in *Court* stated that 'any evidence which tends to explain the reason for the defendant's conduct, be it his own admission or otherwise, would be relevant to establish whether or not he intended to commit, not only an assault, but an indecent one.'<sup>58</sup> On this basis, the defendant in *Tabassum* ought to have been acquitted. Interpreting s.3 in light of *Tabassum* and *Court*, it would appear that provided the touching is 'sexual' it is not

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<sup>56</sup> [1984] Crim L R 41.

<sup>57</sup> [2000] 2 Cr App R 328.

<sup>58</sup> [1989] AC 28, at 44.

necessary to prove any sexual intent, only intent to touch. However, evidence of purpose/intent/motive is admissible to explain the 'sexual' nature of the conduct.

As was demonstrated in chapter 9, it is clear from *H*<sup>59</sup> that, in some cases, conduct will be 'sexual' *per se* and in those cases the accused's awareness of the 'sexual' nature of the conduct need not be established. However, in other cases, where the 'sexual' nature of the conduct is in issue, D's motivations will be a relevant factor for the jury to consider.<sup>60</sup> The jury (or magistrates) will need to consider first whether they as twelve reasonable persons, considered that the touching could be 'sexual'. Secondly, they will need to consider whether they, as twelve reasonable persons, considered that in light of all the circumstances of the case, the purpose of the touching had in fact been 'sexual'. Lord Woolf in *H* drew attention to s.63(2) SOA 2003 ('committing an offence with intent to commit a sexual offence') as providing an alternative charge to s.3 where the first requirement of s.78(b) cannot be established, but where what took place was certainly done with the intention to do the prohibited act of a relevant sexual offence. If a person therefore committed an assault, which does not come within s.3, but he intended to commit, for example, a sexual assault, then he could appropriately be charged under s.62.

After the decision in *H*, it appears that too much emphasis is being placed by the court on the defendant's motive in order to establish whether the touching is 'sexual' and this might deflect the court's attention from the complainant's affective response to the touching and the potential seriousness of non-consensual sexual touchings. As was demonstrated in chapter 5, the defendant's motive is one of several circumstances which both separately and/or together may render a touching 'sexual' and this includes C's experience. Although D's motive is, in certain situations, an important aspect of

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<sup>59</sup> [2005] EWCA Crim 732.

<sup>60</sup> *Ibid* at 15.

designating ambiguous conduct 'sexual', it must be remembered that, whatever D's reason for acting (unless D has a reasonable belief in consent) he has still manifested disrespect for C's sexual integrity. The most complainant-centred version of liability would disregard D's motive, but this would raise additional dangers of injustice to defendants. The point here is that there might be situations in which D wants to adduce evidence of a non-sexual motive and where in doing so he deflects the decision-makers attention from C's affective response to the touching. Ultimately, D's explanation for his conduct ought to be judged in light of C's experiences.

### 11.2.3 *B v DPP*<sup>61</sup> and presumption of *mens rea*

In 2000, the House of Lords in *B v DPP* reinforced the common law that in constructing statutory offences there is a presumption against strict liability and in favour of *mens rea*. One issue for consideration is how the appeal courts would approach an appeal in which D has been convicted of sexual assault, but argues he honestly believed that his actions were not 'sexual', and he honestly believed that reasonable people would not consider the act 'sexual'? I will argue that there is no justification for a requirement in s.3 that D must appreciate the 'sexual' nature of the touching. Such a necessity would make the offence insufficiently complainant-centred, focusing the court's attention on D's reason for acting and deflecting attention from the complainant's affective response to the touching.

In *B v DPP*, D, a boy aged 15, repeatedly requested a 13-year-old girl to perform oral sex during a bus journey. He was charged with inciting a girl under 14 to commit an act of gross indecency, contrary to the Indecency with Children Act 1960 (IwCA 1960) s.1(1). D maintained a not guilty plea on the basis that he had honestly believed that the girl was over 14. The House of Lords overturned the Divisional Court's view that the crime in s.1(1) was one of strict liability, and hence that D's belief was legally irrelevant. The

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<sup>61</sup> [2000] 2 AC 428.

House unanimously held that the 'common law presumes that, unless Parliament has indicated otherwise, the appropriate mental element is an unexpressed ingredient of every offence.'<sup>62</sup> The common law presumption of *mens rea* dictated that the prosecution must prove that D did not believe C was aged over 14. Accordingly, a belief that C was aged over 14, whether or not based on reasonable grounds, amounted to a denial of *mens rea*.<sup>63</sup> The Law Lords were drawn by what they perceived to be the force of the subjectivist understanding of the correspondence principle: 'By definition, the mental element in a crime is concerned with a subjective state of mind.'<sup>64</sup> Lord Steyn accepted the description of the presumption of *mens rea* as a 'constitutional principle' that is not easily displaced by a statutory text.<sup>65</sup> The reference is to a constitutional principle and not an absolute rule. Lord Nicholls held in *B v DPP* that courts may rebut the presumption of *mens rea* by reference to 'the nature of the offence, the mischief sought to be prevented, and any other circumstances which may assist in determining what intent is properly to be attributed to Parliament when creating the offence'.<sup>66</sup>

In a scathing criticism of the House of Lords' decision, Horder describes it as acquitting an accused who had behaved in a manner 'outside the bounds of what humane and decent people regard as tolerable'.<sup>67</sup> He lays the blame for the outcome squarely on the orthodox subjectivist approach to *mens rea*:

'The decision of the House of Lords, a decision that flies in the face of legislation and case law across much of the rest of the common law world, can be attributed more or

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<sup>62</sup> *Ibid* at 460.

<sup>63</sup> Section 1 of the IwCA 1960 has been replaced by s.8 and s.10 SOA 2003, causing or inciting a child under 13 to engage in a sexual activity and causing or inciting a child to engage in a sexual activity respectively. Following *R v G* [2006] EWCA Crim 821 there is no need to show that the defendant was aware that the victim was 13. The Court of Appeal rejected a claim that the offence interfered with the defendant's human rights under Articles 6 (right to a fair trial) and 8 (right to respect for private and family life).

<sup>64</sup> Per Lord Nicholls, at 462.

<sup>65</sup> Per Lord Steyn at 470, borrowing the expression from Sir Rupert Cross, *Statutory Interpretation* 3<sup>rd</sup> edn (Butterworths, London, 1995) at 166.

<sup>66</sup> *Ibid* at 463-4.

<sup>67</sup> J. Horder, 'How Culpability Can and Cannot, be Denied in Under-age Sex Crimes' [2001] *CLR* 15.

less directly to the pervasive influence of a subjectivist understanding of the so-called 'correspondence principle' in criminal law theory.<sup>68</sup>

Horder argues that the prosecution should not be obliged to show, as an integral part of proving *mens rea*, that a defendant realised the victim was under-age. Whatever C's age, he suggests that it should be a defence for the defendant to raise a doubt as to whether he or she was aware that his or her conduct was outside the bounds of what 'humane and decent people regard as tolerable, "in society as it is today"'.<sup>69</sup> This is an incredibly vague test, focusing on the hypothetical 'decent' person, and in the context of sexual touching, might provide a defence for a defendant who does not consider or appreciate how their actions might be experienced by the complainant and believes their 'wandering hands' are tolerable 'in society as it is today'.<sup>70</sup> Horder's exception would cover cases in which the conduct complained of is properly regarded as tolerable, as one of life's vicissitudes, and thus the kind of conduct described in *Collins v Wilcock*<sup>71</sup> as 'generally acceptable in the ordinary conduct of daily life'.<sup>72</sup> Even if the conduct is not regarded as having fallen within the scope of Horder's proposed exception, he suggests that the defendant may have had one of two beliefs about it, which become a *mens rea* issue. First, he may have believed that the conduct is tolerable, as one of life's vicissitudes. This principle is wholly (defendant) subjective, and thus focuses on whether D himself regarded the conduct as tolerable 'in society as it is today', even if it was not considered tolerable by 'humane and decent' people. Secondly, he may have believed that humane and decent people would regard it as tolerable, as one of life's

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<sup>68</sup> *Ibid* at 16.

<sup>69</sup> This is Lord Diplock's phrase, in describing the levels of self-control to be expected of ordinary people: see *DPP v Camplin* [1978] AC 705, at 717.

<sup>70</sup> *Ibid*.

<sup>71</sup> [1984] 3 All ER 374.

<sup>72</sup> The case concerned a police officer who was deemed to be acting outside the course of her duty when she detained the defendant for questioning by grabbing her arm. The action was unlawful and amounted to a battery since it went beyond the generally acceptable conduct of touching a person to engage their attention.

vicissitudes.<sup>73</sup> Horder argues that either of these two beliefs may be regarded as a denial of culpability.

The decisions of the House of Lords in *B v DPP*, and more recently in *R v K*,<sup>74</sup> have strengthened the presumption of *mens rea*. In light of *B v DPP*, are the appeal courts likely to read in to the SOA 2003, s.3 a presumption of *mens rea*, namely that in order to be guilty D either must know the act is 'sexual', know that reasonable people would consider the act 'sexual', be aware of the possibility of the touching being 'sexual', or be aware that reasonable people might label the touching 'sexual'? In *Sweet v Parsley*,<sup>75</sup> Lord Reid expressed the presumption of *mens rea* as follows:

'[T]here has for centuries been a presumption that Parliament did not intend to make criminals of persons who were in no way blameworthy in what they did. That means that whenever a section is silent as to *mens rea* there is a presumption that, in order to give effect to the will of Parliament, we must read in words appropriate to require *mens rea*... [I]t is firmly established by a host of authorities that *mens rea* is an essential ingredient of every offence unless some reason can be found for holding that that is not necessary.'<sup>76</sup>

Following the decisions in *B v DPP* and *R v K* the court will read *mens rea* into a statute unless either (1) there is clear wording in the statute indicating that the offence is to be one of strict liability,<sup>77</sup> or (2) there is a 'compellingly clear'<sup>78</sup> inference that the offence is to be one of strict liability. If some sections of a statute refer explicitly to a *mens rea* requirement and others do not that may indicate that those sections that do not are meant to be strict liability.<sup>79</sup> However, this will not be a conclusive factor,<sup>80</sup> as is clear

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<sup>73</sup> Horder terms this the '*Ghosh* principle' [1982] QB 1053. The test for the *mens rea* element of dishonesty was whether ordinary people would regard D's conduct as dishonest, and whether D realized that this was so.

<sup>74</sup> [2001] UKHL 41.

<sup>75</sup> [1970] AC 132.

<sup>76</sup> *Ibid* at 148-9.

<sup>77</sup> *Kirk and Russell* [2002] Crim LR 756.

<sup>78</sup> [2000] 2 AC 428, at 464.

<sup>79</sup> *R v Matudi* [2003] EWCA Crim 697.

from the decision in *K* itself. In the context of sexual assault, one might argue that the statute should be taken at face value: there are *mens rea* requirements in relation to touching and consent, but not in relation to 'sexual'. In that sense, it might be contended that 'sexual' is just an ordinary, objective term and it is not necessary for the prosecution to prove beyond reasonable doubt that D appreciated that the touching might be, or might be perceived by reasonable people as, 'sexual'.

The Privy Council in *Gammon (Hong Kong) Ltd v Attorney General of Hong Kong*<sup>81</sup> stated that the presumption of *mens rea* is 'particularly strong where the offence is "truly" criminal'. In deciding whether an offence is 'truly criminal', the court will consider, amongst other things, the severity of the punishment<sup>82</sup> and the level of stigma that attaches to conviction for that offence.<sup>83</sup> Sexual assault carries a maximum penalty of 10 years imprisonment, with a requirement to sign on to the Sex Offenders Register and therefore fault-based liability is inferred. A court will not presume *mens rea* when there is a 'compellingly clear'<sup>84</sup> inference that the offence is to be one of strict liability. This requires examination of the offence in its statutory and social contexts. The question is whether Parliament, by failing to include any fault terms in s.3(1)(b), did intend to exclude fault, or whether it was merely leaving the issue to be determined by the courts.<sup>85</sup> The intention of Parliament was not to introduce a distinct *mens rea* with regard to the 'sexual' nature of the touching, opining instead that the intentional character of the touching and the new test on the existence of consent and of the term

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<sup>80</sup> *Sherra v De Rutzen* [1895] 1 QB 918: 'there is a presumption that *mens rea*...is an essential ingredient in every offence; but that presumption is liable to be displaced either by the words of the statute creating the offence or by the subject-matter with which it deals, and both must be considered'.

<sup>81</sup> [1985] AC 1.

<sup>82</sup> *B v DPP* [2000] 2 WLR 452.

<sup>83</sup> *Barnfather v Islington London Borough Council* [2003] EWHC 418.

<sup>84</sup> [2000] 2 AC 428, at 464.

<sup>85</sup> P. Devlin, *Samples of Lawmaking* (OUP, London, 1970) pp.71-3.



‘sexual’ sufficed to guide the courts.<sup>86</sup> One cannot, therefore, read *mens rea* into s.3(1)(b) or s.78 where Parliament has consciously omitted such an inference. However, following *B v DPP*, in the absence of *mens rea* in s.78, one cannot read a presumption of strict liability either. Despite pronouncements from the House of Lords in *B v DPP* and *K* on the existence of a ‘constitutional principle’<sup>87</sup> requiring fault, English law remains in an unsatisfactory state. Whilst different statutes continue to be promoted by different government departments without an overall standard, progress towards a consistent approach to the presumption of *mens rea* will be hampered. The law is in a confused state and I would argue that section 3 ought to be amended to resolve any ambiguity regarding the presumption of *mens rea* in s.3(1)(b). In particular, it should be amended to exclude the defendant’s motive or awareness of the ‘sexual’ nature of the touching.

The important issue here is the effect of the defendant denying committing sexual assault on the basis that he honestly believed that what he was doing was not ‘sexual’ or he gave no thought to the possibility that C and/or reasonable people would consider it ‘sexual’. A provision that required that D be aware of the ‘sexual’ nature of the touching might deflect the court’s attention away from the invasion of the complainant’s sexual autonomy. It would place too much emphasis on culpability and thereby justice to the individual accused, creating an insufficiently complainant-centred approach to the offence. There are sound policy reasons for not requiring the prosecution to prove that the defendant appreciated the ‘sexual’ nature of the touching. The offence of sexual assault exists to protect bodily and sexual integrity, and to allow a sexual offender to avoid criminal liability by showing that he considered his action to be non-sexual would fail to protect sexual autonomy and fail to communicate law’s symbolic condemnation of acts interfering adversely with sexual self-

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<sup>86</sup> See Explanatory Notes to the Sexual Offences Bill [HL Bill 26], 28 January 2003, para. 65, ‘Clause 80: “Sexual”, available at <http://www.publications.parliament.uk/pa/ld200203/ldbills/026/en/03026xb.htm#end> [Online] (Accessed: 10<sup>th</sup> March 2009).

<sup>87</sup> In *K* both Lord Bingham (at 17) and Lord Steyn (at 32) described the presumption of *mens rea* as a ‘constitutional principle’.

determination. The defendant's opinion that his action was not 'sexual' ought to be irrelevant where C experiences the touching as 'sexual' in nature.

The problem that arises is that, as I argued in chapter 5, sexual assault is a context-dependent offence; there is no essential quality that makes an action 'sexual' and the offence requires an affective response by an observer.<sup>88</sup> One consequence of a requirement in s.3 that D appreciate the 'sexual' nature of the touching may be that the chauvinistic male or the defendant who gives no thought to whether his actions might be perceived by C and/or reasonable people to be 'sexual', will avoid liability by virtue of honestly believing his actions are not 'sexual'. Inherent in the law's protection of sexual autonomy is the marginalisation of other conceptions, in this context D's awareness of the 'sexual' nature of the conduct. Defendants should not be able to determine whether the *actus reus* of sexual assault is established. A defendant ought to be held liable under s.3 where he touches C without her consent, there is no sexual intent or purpose motivating the touching, he does not appreciate that the touching might be 'sexual', but C does actually experience it as 'sexual' or reasonable people would consider it 'sexual'. As I argued in chapter 9, it is C's interpretation and experience of the touching as 'sexual' that ought to be a key factor in deciding whether the touching was 'sexual'.

### 11.3 CONCLUSION

This chapter and the previous one have analysed the *mens rea* elements required for a conviction of sexual assault under s.3 SOA 2003. It has been shown that in relation to these requirements the legislation suffers from drawbacks and in some respects does not afford greater protection to complainants than the previous law did. Recommendations for modifications to the present definition have been made, whilst

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<sup>88</sup> In the context of criminal damage see I. Edwards, 'Banksy's Graffiti: A not so simple case of criminal damage?' (2009) 73 *JoCL* 345 on the problems of having a *mens rea* requirement that D appreciate his actions' consequences were, or might have constituted 'damage'.

acknowledging that there must be limits to how far an offence such as sexual assault can be complainant-centred, if particular criminal law principles are to be upheld. This chapter has reached two main conclusions. First, that the 'reasonable belief in consent' test still leaves much scope for interpretation by judges and juries in individual cases. This raises concerns that similar cases may be treated differently. Although the new test for consent is a considerable improvement in the law, it is 'defendant-objective' and therefore shows considerable leniency towards defendants because it allows the jury to look at personal characteristics of the defendant in deciding the reasonableness of his actions. The alternative approach to a reasonable belief in consent test, a 'bystander-objective' or a 'complainant-objective' approach would be better for complainants and fairer. Secondly, the relationship between the fault element and conduct element of sexual assault is somewhat unclear in respect of D's honest belief that his conduct was not 'sexual'. The law should be clarified in this respect. The prosecution should not have to prove *mens rea* in respect of the 'sexual' nature of the touching: a statutory provision which required that either D appreciated the 'sexual' nature of the touching, knew that reasonable people would or might consider the act 'sexual', would fail to protect sexual autonomy and fail to communicate law's symbolic condemnation of acts interfering adversely with sexual self-determination.

Having analysed the complainant-centred nature of the various requirements that make up the substantive definition of sexual assault, in chapter 12 I will consider the degree to which the law should and does take account of complainants' experiences of sexual assault at sentencing.

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## **To What Extent are Victims' Experiences of Sexual Assault Acknowledged or Taken into Account at Sentencing?**

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This thesis has argued that the substantive offence of sexual assault is insufficiently complainant-centred. In light of the insufficiently complainant-centred nature of the definition of sexual assault, this chapter will consider the degree to which the law should and does take account of complainants' experiences of sexual assault at sentencing. This chapter aims to examine the extent to which the seriousness of a sexual assault is determined by the complainant's perspective. This chapter will not provide a comprehensive overview of sentencing and sexual assault because without empirical research it is difficult to identify how sexual assault cases are actually sentenced. The chapter provides an analysis of the theoretical terrain and provides tentative suggestions as to how sentencing could be more complainant-centred, whilst acknowledging the problems with such an approach. Part 1 introduces the sentencing dilemma; the difficulty of assessing seriousness when there is a disparity between culpability and harm. It considers the possible approaches available to sentencers when there is a disparity between D's appreciation of the 'sexual' nature of the touching and C's experience of the sexual touching. It will be argued that in cases of sexual assault there is a sound penological basis for holding defendants responsible when the invasion of sexual autonomy is not intended or foreseen.

Part 2 will analyse the implications of sentencing on the basis of (1) standard harm and culpability and (2) individual victim experiences. The tension here is between sexual assault as primarily a personal offence and sexual assault as a public offence. Von Hirsch and Jareborg have developed a method for assessing the effect of particular

crimes upon the 'living standard' of typical victims.<sup>1</sup> This has the benefit of taking account of setbacks to collective interests and of the public dimension of wrongs inflicted on individuals but will be criticised for failing to take account of how the particular complainant has experienced the sexual assault. I will argue that the harm on which seriousness is measured and the offender accordingly punished should be that suffered by the particular victim in the instant case, rather than that caused in the average case. Nevertheless, there is scope for individual experiences to be factored in to sentencing, by treating victim harm as an aggravating factor and through the use of Victim Personal Statements (VPS). Determining offence seriousness, even in part, on the victim's actual harm or loss is problematic as it might compromise fundamental principles of procedural fairness and justice.

Part 3 will demonstrate how the law is somewhat unclear as to the place of individual victims' experiences in determining the seriousness of an offence. Section 143 of the Criminal Justice Act 2003 (CJA 2003) and the introduction, in 2001, of VPS suggest that sentencers *are* now required to take account of individual victims' experiences, indicating how sentencing has moved towards a more victim-centred approach. However, these provisions must be read in light of the Sentencing Guidelines Council's guideline *Overarching Principles: Seriousness* which emphasises standard harm and culpability as the main determinants of seriousness, stating that '[h]arm must always be judged in the light of culpability'.<sup>2</sup> In the context of sexual assault, the SGC's guidelines are welcome, but the categorisation of harm in terms of the physical nature of the touching that occurred will be criticised for failing to take account of the level of harm actually suffered by the victim. The chapter concludes that the actual place of victims' experiences of sexual assault in sentencing is somewhat ambiguous.

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<sup>1</sup> A. von Hirsch & N. Jareborg, 'Gauging Criminal Harm: A Living Standard Analysis' (1991) 11 *OJLS* 1.

<sup>2</sup> Sentencing Guidelines Council, '*Overarching Principles: Seriousness*' (16 Dec 2004) at para 1.17, available at [www.sentencing-guidelines.gov.uk](http://www.sentencing-guidelines.gov.uk) [Online] (Accessed: 12<sup>th</sup> December 2009).

### 12.1 SEXUAL ASSAULT AND THE SENTENCING DILEMMA

Sentencing is another area in which the law on sexual assault faces a dilemma, specifically, how to assess seriousness when there is an imbalance between harm and culpability. The conflict here is between sentencing based on the defendant's intended consequences or consequences about which he was reckless and sentencing based to some degree on the actual consequences.<sup>3</sup> Under s.3, sexual assault can only be committed intentionally and so the offence can only be perpetrated at the highest level of criminal liability. Accordingly, one might argue that in the context of sexual assault the difficulty of assessing seriousness when there is a disparity between culpability and harm does not arise. Anyone who touches another intentionally and non-intentionally risks causing harm and ought to be liable for the harm actually caused. The issue of an imbalance between harm and culpability is only really a problem when considering reckless or negligent offences. An issue may also arise in relation to intentional touchings in which D is unaware of the 'sexual' nature of the touching, but where C experiences the touching as 'sexual'. Sexual offences are somewhat different to other offences, in that the offender's intention may be to obtain sexual gratification, financial gain or some other result, rather than to harm the victim. Sexual assault is not an outcome-based offence, where the actual link between mental state and actual outcome is easier to draw. As was argued in chapter 5, sexual assault is a context-dependent offence, so D may be oblivious to the possible *harm* of his conduct. However, where the activity is in any way 'non-consensual, coercive or exploitative',<sup>4</sup> the offence is inherently harmful and therefore the offender's culpability is high.

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<sup>3</sup> A classic example of an offence involving unforeseen harm is causing death by careless or inconsiderate driving. See S. Cunningham, 'Punishing Drivers Who Kill: Putting Road Safety First?' (2007) 27 *LS* 288.

<sup>4</sup> Sentencing Guidelines Council, *Sexual Offences Act 2003: Definitive Guideline*, May 2007 at para 1.10. The guidelines do not define the terms 'coercive' or 'exploitative' but in the context of sexual offences they might refer to situations that involve psychological pressure, familial abuse and/or an abuse of a position of trust. See ss.16-24 SOA 2003 and *Attorney General's Reference (No.121 of 2006)* [2007] EWCA Crim 181. Exploitation could also refer to commercial exploitation that occurs in offences such as 'trafficking' (ss.57-60 SOA 2003).

In situations where the harm caused by a sexual assault exceeds that intended or foreseen by the defendant, there are three ways of approaching the issue of offence seriousness. First, the seriousness of the offence could be determined by the extent of harm caused to the victim. This would involve consideration of V's individual experience of the touching and results in an offender simply 'taking his victim as he finds her'. Secondly, the sentence could be determined principally by reference to the defendant's own culpability. This would involve consideration of the extent to which D appreciated the 'sexual' nature of the touching and his foresight of harm. Thirdly, the sentence could be enhanced to a certain degree, but not to the same extent that would have been appropriate had the defendant appreciated the 'sexual' nature of the touching and appreciated the consequences. This would involve a consideration of V's experience in light of D's awareness of the 'sexual' nature of the conduct and of the harm that might result and would allow for an increase in sentence above the starting point. The victim's experience would be an aggravating factor that increased the length of the sentence. Consider the example of a defendant who approaches a woman in a nightclub, engages in conversation with her and then grabs her breasts. The assault has a serious emotional effect on the victim, who previously to the incident suffered long-term sexual abuse from her ex-husband. She requires medical treatment for post-traumatic stress disorder (PTSD) and anxiety.<sup>5</sup> Whilst anxiety and PTSD are foreseeable consequences of sexual assault, the impact of the sexual touching and the extent of her emotional distress, is not actually foreseen by this defendant. Should this additional degree of harm be left out of account in sentencing, or can it 'fairly be attributed to the actor's choice'?<sup>6</sup>

The converse situation is a case where the victim has suffered less harm from the sexual assault than might reasonably have been expected. Consider a victim who thinks nothing of the non-consensual touching of her breasts or her buttocks. If there has been

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<sup>5</sup> See *R v Ralston* [2005] EWCA Crim 3279 where following a sexual assault, V's panic attacks, for which she was already taking medication became more frequent and more severe.

<sup>6</sup> A. von Hirsch, *Past or Future Crimes* (Manchester University Press, Manchester, 1986) pp.64-5.

significantly less harm from the offence than might have been expected, affecting one of the dimensions of crime seriousness, this indicates a sentence somewhat nearer to the lower end of the normal range for the offence. However, this focus on individual harm overlooks the public dimension of the wrong of sexual assault: it will be argued below that sexual assault is a serious offence even if the victim suffers little harm, because non-consensual sexual touching is also a collective wrong against the community to which the individual belongs. The offender is still deserving of punishment: as long as D was aware of the possibility of standard harm resulting the lesser degree of harm should not be a mitigating factor.<sup>7</sup> It is those comparatively rare cases at the fringes of sexual assault, where there is a conflict between the perceptions of the defendant and complainant that is the concern of this chapter. This brings us to the theoretical question, what ought to be the place of victim's experiences in sentencing and whether in determining offence seriousness, the individual V's experience should determine the harm component of the harm/culpability dyad or whether it should be based on standard harm.

## 12.2 PUBLIC vs. PRIVATE DIMENSION OF SEXUAL ASSAULT

In determining offence seriousness there are two possible options for establishing the harm component of the harm/culpability dyad: (1) sentencing based on standard harm and (2) sentencing based on individual victims' experiences. In the context of section 3, the debate is between sexual assault as primarily a personal offence and sexual assault as principally a public offence. Whilst sentencing based on standard harm is insufficiently complainant-centred, there are problems with incorporating a victim perspective: doing so might compromise fundamental principles of procedural fairness and justice.

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<sup>7</sup> Discussion of the various factors that affect sentencing decisions also raises the issue of whether D's sentence should be reduced where V is forgiving and does not agree with D's punishment. This is beyond the scope of this thesis but see I. Edwards, 'The Place of Victim's preferences in the Sentencing of 'their' Offenders' [2002] *Crim L R* 689 at pp.697-700.



### 12.2.1 Sentencing based on standard harm

In the majority of cases the harm caused by a sexual assault will fall somewhere within a range of broadly what might have been expected, in which case it can be left to the judge to take the expected degree of harm into account.<sup>8</sup> This is what is described by von Hirsch and Jareborg in their influential essay, 'Gauging Criminal Harms: A Living Standard Analysis' as the 'standard case'.<sup>9</sup> Von Hirsch and Jareborg have tried to develop a considered, rational and principled approach to proportionate sentencing. They argue that the highly subjective nature of victims' responses mean that it is unfair to base sentencing decisions on such a dimension. They note, however, that '[h]ow hurtful a given intrusion is depends on the situation of the victim, and the particular victim's situation varies greatly',<sup>10</sup> arguing that such variations should be taken into account in mitigation or aggravation of sentence. In developing a method by which harms can be standardised and built in to sentencing appropriately, von Hirsch and Jareborg argue that it is inappropriate to take account of the individual victim. In rating the standard case of a given species of crime, they assume that injury occurs to someone who is neither 'especially vulnerable nor resilient.' They argue that victim harm and characteristics are relevant only to the classification of the offence and its seriousness and that '[p]articular criminal acts are too diverse to be rated on an individual basis.'<sup>11</sup> Von Hirsch and Jareborg appear to take a subjectivist stance highlighting how culpability theory requires that 'in assessing the seriousness of conduct, unforeseen consequences should not be taken into account.'<sup>12</sup> They further contend that:

'The criminal law is a system of rules, not an arena for personalized judgments. If the law can assess crime-seriousness in the standard case, and then make deviations from

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<sup>8</sup> The Sentencing Guidelines Council, *Definitive Guidelines*, note at para 1.13 that 'In general, the difficulty of assessing seriousness where there is an imbalance between culpability and harm does not arise in relation to sexual offences.'

<sup>9</sup> A. von Hirsch & N. Jareborg, 'Gauging Criminal Harm: A Living Standard Analysis' (1991) 11 *OJLS* 1.

<sup>10</sup> *Ibid*, at p.4.

<sup>11</sup> *Ibid* at p.4.

<sup>12</sup> *Ibid* at p.5.

that assessment for various types of special circumstances, this is all one can reasonably hope to accomplish.'

Von Hirsch and Jareborg argue that sentencing must be logical, rational, consistent and structured, all of which would be lost by focusing on the individual victim's experience.

One argument for sentencing based on standard harm is that it takes account of setbacks to collective interests and the public dimension of wrongs inflicted on individuals. Marshall and Duff suggest that it is not sufficient to say that crimes against individuals are penalised because they threaten the social order, because that diminishes the significance of the victimisation of the individual that is clearly central to the offence.<sup>13</sup> Equally, they argue, it is not sufficient to rely merely on the State's duty to ensure protection of these rights of individuals, because that could be achieved by civil law methods or by providing public assistance for private prosecutions. Their argument is that crimes are public wrongs because even those that consist of attacks on the body or property of an individual (such as rape, sexual assault and theft) might be seen as 'wrongs against the community to which the individual belongs'.<sup>14</sup> These wrongs are shared by other members of the community with which the victim is identified and by which her identity is partly constituted.<sup>15</sup> Marshall and Duff suggest that a group of women might respond to a sexual assault on one of them as a collective rather than an individual wrong: they associate and identify themselves with the individual victim.<sup>16</sup> An attack on a member of the group is therefore an attack on the group, on their shared values and their common good. A group can in this way 'share' the wrongs done to its individual members, insofar as it defines and identifies itself as a community united by mutual concern, by genuinely shared values and interests, and by the shared recognition that its members' goods are bound up with their membership of the

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<sup>13</sup> S.E. Marshall & R.A. Duff, 'Criminalization and Sharing Wrongs' (1998) 11 *Canadian J of Law and Jurisprudence* 7.

<sup>14</sup> *Ibid.*

<sup>15</sup> *Ibid.*

<sup>16</sup> *Ibid.*

community.<sup>17</sup> The point here is that assessments of the seriousness of wrongs ought to take proper account of this wider community element, even in respect of crimes with individual victims. In emphasising the individual victim's harm sentencing would move further away from emphasising the broader, public dimension of the violation.

A closely connected theory of harm is what Hampton labels 'moral injury'.<sup>18</sup> This implies that some wrongful actions have, over and above their direct physical or psychological damage, the expression of diminution or degradation of the victim's value.<sup>19</sup> Moral injury is objective in that it is not dependent on the victim feeling a particular way: regardless of her psychological response to it, she has been wronged.<sup>20</sup> In the case of sexual assault, the diminishment in the victim's respect is tied to group membership. Women are primarily the target of sexual assault in society and the moral injury is thereby shared by women as a group.<sup>21</sup> Sexual assault is therefore not just an individual injury; it is also a social injury that occurs on a personal level. It is this wider community element that justifies the punishment of sexual assault as a criminal rather than a civil wrong. The public dimension of sexual assault is also an element of offence seriousness that should be considered in the sentencing of an offender. One might argue that if the seriousness of sexual assault arises from the violation of public interests, is it so very important to take account of the particular victim's experiences. To feminists<sup>22</sup> the crime of rape has been understood not primarily as a specific, singular crime, but rather

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<sup>17</sup> *Ibid.*

<sup>18</sup> J. Hampton, 'Defining the Wrong and Defining Rape' in K. Burgess-Jackson, *A Most Detestable Crime* (OUP, New York, 1999) p.123.

<sup>19</sup> J. McGregor, *Is it Rape: On Acquaintance Rape and Taking Women's Consent Seriously* (Ashgate Publishing, Aldershot, 2005) p.229.

<sup>20</sup> *Op cit*, n 18 at p.135.

<sup>21</sup> It is worth reiterating that sexual assault is a gender-neutral offence. However, there were 15,510 sexual assaults on a female aged 13 or over recorded by the police in 2008/09, compared with 1,154 on a male aged 13 or over. A. Walker *et al*, 'Crime in England and Wales 2008/09: Volume 1 Findings from the British Crime Survey and police recorded crime' (Home Office, July 2009).

<sup>22</sup> Researchers often organise feminism into four main perspectives: liberal, socialist, radical and Marxist, but they can be summarised by Brownmiller's statement: 'rape is nothing more or less than a conscious process of intimidation by which *all men* keep *all women* in a state of fear'. S. Brownmiller, *Against our Will: Men, Women and Rape* (Penguin Books, New York, 1975).

as the most blatant example of systematic misogyny and masculine dominance.<sup>23</sup> Brownmiller argues that rapists do not rape individuals, but members of a class. To be a man is to be a member of the dominant class and thus to have nearly limitless power. Feminists might argue that taking account of the individual victim's experience would be missing the point; the sentencing structure of rape and sexual assault ought to reflect the seriousness of offences of sexual violence regardless of the individual victim's experiences.

In relation to sexual assault, sentencing on the basis of standard harm and culpability means the process is insufficiently complainant-centred. Sexual assault is not an outcome-based offence: the occurrence of harm is not explicitly made a condition of criminal liability. Section 3 simply describes the prohibited conduct, non-consensual sexual touching, which the legislature is assumed to have considered harmful enough to be criminalized. The impact of a sexual assault upon the victim is a highly subjective matter and including information about victims' harm is therefore important for determining offence seriousness.

#### 12.2.2 Sentencing based on individual experiences

The law's criteria for harm could make allowances for differences in how people experience sexual touching. The harm on which seriousness is measured and the offender accordingly punished could be that suffered by the particular victim in the instant case, rather than that caused in the average case. Marvin Wolfgang argued that a sentencing system based on just deserts and offence seriousness can and should take the degree of harm inflicted on specific victims as a principal factor in establishing the seriousness of an offence.<sup>24</sup> According to Wolfgang:

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<sup>23</sup> A.J. Cahill, *Rethinking Rape* (Cornell University Press, Ithaca, 2001).

<sup>24</sup> M. Wolfgang, 'Basic concepts in victimological theory: individualisation of the victim' in H.J. Schneider, *The Victim in International Perspective* (de Gruyter, New York, 1982). See also L. Sebba & E. Erez, 'From individualization of the offender to the individualization of the victim: an assessment of Wolfgang's

'The principal point is that a variety of victim attributes and characteristics relative to the harm inflicted on the victim might be taken into account not only in scientific research but in statutory provisions and in the adjudication and offender sentencing process.'<sup>25</sup>

Wolfgang also noted that:

'Although some provisions exist which recognize the specificity of some victims, legislative recognition has been minimal, perhaps because of a vague sense of democratization of victims of similar cases so as not to acknowledge a hierarchy of differences, perhaps out of fear of retrogression to an earlier stage of social evolution.'<sup>26</sup>

He suggested that more crimes might be defined and sanctions provided on the basis of specific attributes of the victimization process. Wolfgang stated that his propositions are 'provocative and heuristic', rather than denoting his opinion about the relevance of victims' experiences in criminal justice decision-making.

A judge cannot evaluate the seriousness of a sexual assault without knowing how the crime has affected the victim, for the degree of harm is 'partly a function of the differential response by the victim'.<sup>27</sup> The substantive definition of sexual assault fails to focus on the victim and instead reflects more the intent of the criminal offender, providing a sound argument for sentencing to take account of individual experiences. It is consistent with 'just deserts' philosophy to claim that differential degrees of psychological harm caused to the victim should be included in the meaning of gravity. There are varying psychological effects on sexual assault victims as a function of age, sex and other physical, psychological and cultural factors. Reactions to rape and sexual assault probably are amongst the strongest and most lasting trauma. Violations of

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conceptualization of a victim-oriented criminal justice system' in W.S.Laufer & F. Adler, *The Criminology of Criminal Law* (Transaction Publishers, New Brunswick, 1999).

<sup>25</sup> Wolfgang, *op cit*, n 24 at p.48.

<sup>26</sup> *Ibid.*

<sup>27</sup> *Ibid.*, at p.49.

sexual autonomy are subjectively experienced and to emphasise standard harm, rather than particular harm means that only the most glaring and obvious psychological and emotional effects would be taken into account. Victim individualization does not violate the model of just deserts; it may indeed enhance it, 'by providing greater precision in the proportionality of the severity of sanctions to the gravity of victimization.'<sup>28</sup> It further reminds decision-makers that sexual assault is not just a crime against the State, but a crime against an individual person, with an interest in how the case is resolved.

Individualization of the victim at the sentencing stage may, in terms of its content, be expressed in at least three different ways.<sup>29</sup> First, the victim-related input may be concerned with the nature and degree of suffering inflicted upon the victim as a result of the crime. Secondly, it may be concerned with the personal attributes of the victim. Thirdly, victim-input may comprise the views of the victim regarding the offender and the sentence to be imposed. Whilst there are sound arguments for including victim information about the impact of the crime and for the consideration of victim attributes, it is not advocated here that the views of the victim regarding the sentence to be imposed should be admissible in sentencing proceedings.<sup>30</sup> Allowing victims to express an opinion on sentence might undermine the culpability principle and might also be unpredictable in that the majority of victims will be unaware of the full range of sentencing options and the statutory restrictions.

Sentencing ought to be based on retribution: the sentence should fit the seriousness of the offence and offence seriousness ought to be determined by reference to standard harm in most cases, but individual harm when it is particularly serious. D has chosen to

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<sup>28</sup> *Ibid*, at p.57.

<sup>29</sup> Sebba & Erez, *op cit* n 24 at 186.

<sup>30</sup> Whilst there is a clear theoretical distinction between the impact of the offence on the victim and the opinion of the victim as to sentence, in practice there is inevitably a danger that victims will be tempted to exaggerate the impact the offence has had on them in the hope of increasing the severity of the sentence imposed by the court.

interfere with the interests of others and harm criteria are supposed to measure the degree of that intrusion. Assessing seriousness in terms of individual victim experiences would also respect cultural variations in being subject to non-consensual sexual touching. A defendant should be held responsible for any extra degrees of harm: the outcome should not rest on his claimed lack of foresight.<sup>31</sup> As Horder quite rightly notes, defendants who direct their efforts towards harming someone should be liable for the harm caused, even where that harm is greater than the harm intended or foreseen, because they 'deserve' their bad luck.<sup>32</sup>

Whilst sentencing ought to take account of individual experiences, there are arguments against determining offence seriousness even in part on the victim's actual harm or loss. Sentencing based on individual victim's experiences has the potential to compromise fundamental principles of procedural fairness and justice. One of the fundamental theoretical constraints on the inclusion of individual victim experiences in the determination of the seriousness of a sexual assault is procedural fairness for the offender.<sup>33</sup> There is a concern that complainant-centred sentencing might compromise central tenets of the criminal process: impartiality, objectivity, rationality. It is a basic principle of the rule of law that a person should be sentenced for acts on which he has been found, or to which he has pleaded, guilty. Procedural fairness requires an independent and impartial decision-maker to take account only of relevant factors. Fairness also demands that the factual basis on which an offender is sentenced is accurate, based on objective facts. Determining seriousness on the basis of individual victim experiences threatens to undermine the objectivity and rationality of the sentencing process, unless those claims are scrutinised and corroborated. Procedural

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<sup>31</sup> See chapter 8, section 3.3 for discussion of the idea that when D's crosses a moral threshold he accepts the risks involved.

<sup>32</sup> J. Horder, 'A Critique of the Correspondence Principle' [1995] *Crim L R* 759.

<sup>33</sup> See A. Ashworth, 'Victims' Rights, Defendants' Rights and Criminal Procedure' in A. Crawford & J. Goodey, *Integrating a Victim Perspective within Criminal Justice: International Debates* (Ashgate, Dartmouth, 2000).

fairness thus requires offenders to be accorded an opportunity to challenge the accuracy of the factual basis on which they are to be sentenced.

Sentencing based on the victim's perception and experience of the touching may introduce inconsistencies. Two offenders may have committed similar acts, but one has a victim who is unperturbed by the action, while the other's victim has suffered severe emotional trauma. Courts would then be obliged to sentence more severely in the second case. Giving weight to the impact of a sexual assault on the individual victim moves the sentencing process away from a focus on the defendant's culpability and towards sentencing based on luck.<sup>34</sup> Orthodox subjectivists would argue that the severity of punishment should be proportionate to the gravity of the criminal conduct and this is based on the notion of fairness: punishment as a censuring response to criminal behaviour should reflect the degree of blameworthiness of the criminal conduct.

A further argument against complainant-centred sentencing is that criminal offences are offences against the State, which are prosecuted in the public interest and therefore the sentence should be passed in the public interest. Under this rationale, the victim's interest is only a small part of the public interest. This approach gives primacy to the State's interest in controlling the response to crime: 'those who violate the Queen's peace should be dealt with on that basis and not according to the desires of the individual victim, whether they be forgiving or vengeful.'<sup>35</sup> Sentencing in the public interest aims for consistency of treatment, which may both inspire public confidence and achieve fairness amongst defendants.<sup>36</sup>

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<sup>34</sup> For discussion see A. Ashworth, 'Taking the Consequences' in J. Gardner, J. Horder and S. Shute, *Action and Value in Criminal Law* (Clarendon Press, Oxford, 1993); J. Gobert, 'Fortuity of Consequence' (1993) 3 *Criminal Law Forum*.

<sup>35</sup> A. Ashworth, 'Victim Impact Statements and Sentencing' [1993] *Crim L R* 498.

<sup>36</sup> D. Miers, 'The Responsibilities and Rights of Victims of Crime' (1992) 55 *MLR* 482.



### 12.3 SEXUAL ASSAULT AND INDIVIDUAL VICTIM'S EXPERIENCES

In general, a court is required to pass a sentence that is commensurate with the seriousness of the offence.<sup>37</sup> However, the current law is somewhat unclear as to the place of individual victim's experiences in determining the seriousness of an offence. Section 143 CJA 2003 provides that the court must consider 'any harm which the offence caused, was intended to cause or might foreseeably have caused' and this implies that English law is placing increasing emphasis on the harm experienced by victims. However, the SGC's *Overarching Principles: Seriousness* emphasises standard harm and culpability. The introduction, in 2001, of the VPS Scheme also suggests that victims' experiences are relevant and will be taken into account by sentencers.

#### 12.3.1 Criminal Justice Act 2003, s.143

In every case where the offender is aged 18 or over at the time of conviction, the court must have regard to the five purposes of sentencing contained in s.142 CJA 2003:

- '(a) the punishment of offenders,
- (b) the reduction of crime (including its reduction by deterrence),
- (c) the reform and rehabilitation of offenders,
- (d) the protection of the public, and
- (e) the making of reparation by offenders to persons affected by their offences.'

The Act does not indicate that any one purpose should be more important than any other should and in practice, they may all be relevant to a greater or lesser degree in any individual case. Ashworth argues that this 'invites inconsistency, by requiring judges to consider a variety of different purposes and then, presumably, to give priority to one.'<sup>38</sup> Whilst the punishment of offenders and the making of reparation relate specifically to the victims' of crime, the rehabilitation of offenders and purposes of

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<sup>37</sup> Sentencing Guidelines Council, '*Overarching Principles: Seriousness*' (16 Dec 2004) at para 1.4, available at [www.sentencing-guidelines.gov.uk](http://www.sentencing-guidelines.gov.uk) (Accessed: 12<sup>th</sup> May 2008). Although for dangerous offenders proportionality is not the guiding feature of sentencing and there are exceptions to s.142(1) set out in s.142(2).

<sup>38</sup> A. Ashworth, *Sentencing and Criminal Justice*, 4<sup>th</sup> edn (Cambridge University Press, Cambridge, 2005) p.74.

general deterrence and protection of the public have little to do with individual victims. The SGC guideline, *Overarching Principles*, sets out the terms of s.142 and then goes on to state that ‘the sentencer must start by considering the seriousness of the offence,’ before setting out the terms of s.143. This implies that it is s.143, rather than s.142 that will underpin the guidelines it issues.

The assessment of the seriousness of the offence arises in respect of specific questions in sentencing: the assessment will (i) determine which of the sentencing thresholds has been crossed;<sup>39</sup> (ii) indicate whether a custodial, community or other sentence is the most appropriate and (iii) be the key factor in deciding the length of a custodial sentence,<sup>40</sup> the nature of the requirements to be incorporated in a community sentence<sup>41</sup> and the amount of any fine imposed.<sup>42</sup> s.143(1) of the CJA 2003 provides that in determining the seriousness of an offence ‘the court must consider the offender’s culpability in committing the offence and any harm which the offence caused, was intended to cause or might foreseeably have caused.’ The seriousness of wrongdoing is therefore determined by two main parameters: the culpability of the offender and the harm caused, or risked by the offence.<sup>43</sup> This implies that English law is placing increasing emphasis on the harm experienced by victims. However, s.143(1) is a broad provision, lacking clear guidance on the practical relevance of victims’ experiences. In theory, courts’ must take into account individual victim experiences, but the extent to which they do ‘consider’ such experiences and act on that information is likely to vary greatly. There is also an ambiguity in s.143(1) that being that the harm actually caused may be different from the harm intended or foreseen.

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<sup>39</sup> s.148(1) & s.152(2).

<sup>40</sup> s.153(2).

<sup>41</sup> s.148(2).

<sup>42</sup> s.164(2).

<sup>43</sup> Clarkson’s survey of 93 assault victims in 1990-91 found that there is in fact a very weak correspondence between harm and punishment. The research demonstrates that this is due to a number of factors, most of them operating outside the courtroom, and none admitted to have any legitimate influence upon criminal processing. See C. Clarkson, ‘Assaults: the Relationship between Seriousness, Criminalisation and Punishment’ [1994] *Crim L R* 4.

### 12.3.2 Sentencing Guidelines Council's guidelines

The provisions of the CJA 2003 must be read in light of the SGC's guideline *Overarching Principles: Seriousness*, which emphasises standard harm and culpability as the main determinants of seriousness, stating that '[h]arm must always be judged in the light of culpability.'<sup>44</sup> In 2007, the SGC issued a *Definitive Guideline* for sentencing the sexual offences contained in the SOA 2003. In respect of a conviction of sexual assault, this guidance is structured around the type of touching that occurs. This is inappropriate because it fails to account for the individualised responses of victims to non-consensual sexual touching.

#### (a) Sentencing Guideline on *Seriousness*

The SGC guideline, *Overarching Principles: Seriousness*, provides that '[a]ssessing seriousness is a difficult task, particularly where there is an imbalance between culpability and harm.'<sup>45</sup> The guideline suggests that in some cases the harm that actually results is greater than the harm intended by the offender and in others circumstances, the offender's culpability may be at a higher level than the harm resulting from the offence.<sup>46</sup> Where there is an imbalance between culpability and harm, the culpability of the offender in the particular circumstances of an individual case should be the primary factor in determining the seriousness of the offence.<sup>47</sup> This means that harm will always be judged in light of culpability. According to the SGC's guideline on *Seriousness*, four levels of criminal liability can be identified for sentencing purposes: intention, recklessness, knowledge and negligence.<sup>48</sup> In broad terms, an intention to cause harm is at the highest level of criminal culpability; the worse the harm intended, the higher the offender's culpability. Ashworth has argued consistently that culpability should be the

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<sup>44</sup> Sentencing Guidelines Council, '*Overarching Principles: Seriousness*' (16 Dec 2004) at para 1.17, available at [www.sentencing-guidelines.gov.uk](http://www.sentencing-guidelines.gov.uk) [Online] (Accessed: 23<sup>rd</sup> October 2008).

<sup>45</sup> *Ibid* at para 1.16.

<sup>46</sup> 'Culpability will be higher if an offender deliberately causes more harm than is necessary for the commission of the offence, or where an offender targets a vulnerable victim.' *Ibid*, at 1.17.

<sup>47</sup> *Ibid* at 1.19.

<sup>48</sup> *Ibid*, at para 1.7. Original emphasis.

prime determinant of sentencing: the 'sentence should be governed not by the vagaries of chance but by what the offender believed he was doing or risking'.<sup>49</sup> Orthodox subjectivists argue that the criminal law should punish blameworthy choices, and that if harm results that has not been chosen, a defendant should not be liable to punishment for that.<sup>50</sup>

Under some conceptions of retribution the harm caused by an offender is relevant to the determination of the seriousness of an offence and information about the consequences of an offender's action should be incorporated to facilitate accurate, proportionate sentencing. The guideline on *Seriousness* suggests that '[t]he nature of harm will depend on personal characteristics and circumstances of the victim and the court's assessment of harm will be an effective and important way of taking into consideration the impact of a particular crime on the victim.' One particular problem in assessing the seriousness of sexual assault is dealing with those cases in which there is a disparity between the defendant and complainant as to the 'sexual' nature of the touching. A further issue for consideration is whether there could be situations in which 'non-consensual, coercive or exploitative' behaviour takes place yet no harm results? Arguably sexual offences are by their nature harmful, which is why (combined with the defendant's culpability) they are offences. However, this brings us back to the question of what is 'harmful' and the potential physical and/or psychological effects of sexual offending. The actual harm caused by a non-consensual sexual touching is very much dependent on the individual victim's experience and interpretation of the incident. The individual victim's reaction can vary greatly, and there may be a disparity between the level of harm intended or foreseen by D and that which actually results. In the context of sexual assault, some 'minor' sexual touching such as pinching someone on the

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<sup>49</sup> Ashworth *op cit*, n 37 at p.122. See also A. Ashworth. *Principles of Criminal Law* 5<sup>th</sup> edn (OUP, Oxford, 2006), pp.158-61 & SGC, *Overarching Principles: Seriousness* (2004), para.1.18: 'where unusually serious harm results and was unintended and beyond the control of the offender, culpability will be significantly influenced by the extent to which the harm could have been foreseen'.

<sup>50</sup> For a discussion of subjectivist theory, see chapter 7.

buttocks may cause no harm to certain persons, whereas other persons may be severely distressed by the action.

(b) Definitive Guidelines on SOA 2003

By virtue of s.172 of the CJA 2003, every court must 'have regard to' a relevant guideline. In 2007, the SGC issued a *Definitive Guideline* for sentencing the sexual offences contained in the SOA 2003. The SGC states that 'the exact nature of the sexual activity should be the key factor in assessing the seriousness of a sexual assault'.<sup>51</sup> This should be used as the starting point from which to begin the process of assessing the overall seriousness of the offending behaviour. The *Definitive Guidelines* also state that '[s]ome offences may justify a lesser sentence where the actions were more offensive than threatening and comprised a single act rather than more persistent behaviour'.<sup>52</sup> The maximum penalty for sexual assault is 10 years custody on indictment,<sup>53</sup> and 6 months imprisonment or a fine not exceeding the statutory maximum, or both, when tried summarily.<sup>54</sup> This rises to 14 years imprisonment if the victim is under 13.<sup>55</sup> The sentences for public protection must be considered in all cases of sexual assault.<sup>56</sup> They are designed to ensure that sexual offenders are not released into the community if they present a significant risk of serious harm. Table 12.1 below shows the starting points and sentencing ranges for sexual assault. It must be recognized, however, that in many cases a sentence will need to reflect the fact that an offence has encompassed a range of these types of activity.

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<sup>51</sup> *Op cit*, n 4 at part 2B.3.

<sup>52</sup> *Ibid* at p.32.

<sup>53</sup> S.3(4)(b) SOA 2003

<sup>54</sup> S.3(4)(a) SOA 2003.

<sup>55</sup> S.7(2)(b) SOA 2003.

<sup>56</sup> Criminal Justice Act 2003, s.142(1).

Table 12.1: Starting points and sentencing ranges for sexual assault in Crown Court<sup>57</sup>

| Type/nature of activity  | Starting points  | Sentencing ranges  |
|--|--|--|
| <ul style="list-style-type: none"> <li>Contact between naked genitalia of offender and naked genitalia, face or mouth of the victim</li> </ul>   | <p><b>5 years custody</b> if the victim is under 13</p> <p><b>3 years custody</b> if the victim is aged 13 or over</p>   | <p><b>4-8 years</b></p> <p><b>2-5 years</b></p>  |
| <ul style="list-style-type: none"> <li>Contact between naked genitalia of offender and another part of victim's body</li> <li>Contact with genitalia of victim by offender using part of his or her body other than the genitalia or an object</li> <li>Contact between either the clothed genitalia of offender and naked genitalia of victim or naked genitalia of offender and clothed genitalia of victim</li> </ul> | <p><b>2 years custody</b> if the victim is under 13</p> <p><b>12 months custody</b> if the victim is aged 13 or over</p> | <p>1-4 years custody</p> <p><b>26 weeks-2 years custody</b></p>  |
| <ul style="list-style-type: none"> <li>Contact between part of offender's body (other than the genitalia) with part of the victim's body (other than the genitalia)</li> </ul>   | <p><b>26 weeks custody</b> if the victim is under 13</p> <p><b>Community order</b> if the victim is aged 13 or over.</p> | <p><b>4 weeks-18months custody</b></p> <p><b>An appropriate non-custodial sentence e.g. community order or fine.</b></p> |

According to the SGC, for the purpose of the guideline, types of sexual touching are 'broadly grouped in terms of seriousness'.<sup>58</sup> However, the table categorises harm in terms of the specific physical nature of the touching and it appears therefore that the

<sup>57</sup> The Magistrates Court Sentencing Guidelines for sexual assault are also taken from the Sentencing Guidelines Council's definitive guideline. See *Magistrates' Court Sentencing Guidelines: Definitive Guideline*, May 2008, Appendix 2 Table 1.0. available at [http://www.sentencingguidelines.gov.uk/docs/magistrates\\_court\\_sentencing\\_guidelines\\_update.pdf](http://www.sentencingguidelines.gov.uk/docs/magistrates_court_sentencing_guidelines_update.pdf) [Online] (Accessed: 23<sup>rd</sup> October 2008).

<sup>58</sup> *Op cit* n 4 at part 2B.5.

issue of seriousness is determined at least in part by reference to which body parts touched which body parts, rather than the impact on the victim. The guideline focuses on sentencing on the basis of the nature of the contact as opposed to sentencing based on the amount of harm inflicted on the victim. The SAP, in response to the criticism that their categorization took no account of the level of harm actually suffered by the victim, stated that they '[do] not minimize the need for the courts to take account of levels of psychological harm and any actual physical injuries sustained by an individual victim.'<sup>59</sup> The SAP further added that:

'in view of the very wide range of behaviour encompassed within the term 'sexual touching' we believe it is essential for the courts to have some initial guidance on the relative seriousness of the various types of touching and for related sentencing starting points to reflect that assessment.'<sup>60</sup>

The specificity of the sentencing guideline is noteworthy, given the lack of guidance and clarity in the substantive offence about the conduct that is considered 'sexual'. The purpose of the SGC is to produce workable guidelines and to assist in rational and fair decision-making, promoting 'consistency in sentencing'.<sup>61</sup> The objective here is uniformity of approach, not uniformity of outcome.

Unlike the SAP consultation paper,<sup>62</sup> which listed 13 categories of sexual touching, the sentencing guidelines delineate just 5 categories of contact. This is beneficial in that it allows room for judicial creativity and flexibility. However, it may be criticized for the injustice of very different cases being grouped together and treated alike. In view of the wide range of behaviour encompassed within the offence, it is preferable for the courts

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<sup>59</sup> Sentencing Advisory Panel, *The Sexual Offences Act 2003: The Panel's Advice to the Sentencing Guidelines Council* (7<sup>th</sup> June, 2006) available at <http://www.sentencing-guidelines.gov.uk/docs/advice-sexual-offences.pdf> [Online] (Accessed: 18<sup>th</sup> July 2009) at para 27.

<sup>60</sup> *Ibid.*

<sup>61</sup> CJA 2003, s.170(5). See M. Wasik, 'Sentencing Guidelines in England and Wales- State of the Art?' [2008] *Crim L R* 253; M. Wasik, 'The Status and authority of sentencing guidelines' (2007) 39 *Bracton Law Journal* 9.

<sup>62</sup> Sentencing Advisory Panel, *Sentencing Guidelines on Sexual Offences: Consultation Paper* (February 12, 2004).

to have some guidance on the relative seriousness of the various prohibited types of touching. The categories seem to assume intentional touching, presumably because this is the mental state required under s.3.<sup>63</sup> In focusing specifically on the issue of contact the sentencing guidelines appear to denote the level of the defendant's blameworthiness by the type of touching. This might be grounded in arguments about the physical risks associated with certain types of touching, (e.g. the risk of disease transmission or physical injury associated with contact in the top category) and the extent to which the contact involves touching with or of the genitalia, rather than the impact on the victim's personal dignity. However, is this an appropriate means of deciding on starting-points?

Categorising harm in terms of the specific physical nature of the touching is deficient in that it takes no account of the level of harm actually suffered by the victim. Is there anything intrinsically more serious about the activities listed at the top of table 12.1? Whilst it is reasonable to assume the categories at the top of the table are more serious, there is nothing inherent in the types of contact listed to indicate seriousness. As we have seen earlier in this thesis, sexual assault is a context-dependent offence and as a result there are numerous ways of interpreting the meaning of 'sexual' and thereby defining the scope of sexual assault. The guidelines appear to assume that particular types of touching will impact in a similar way on all such complainants. However, there is no essential characteristic that makes an act 'sexual' and so recourse must be had to the complainant's experience of the touching. Courts should be required to take account of levels of psychological harm and any actual physical injuries sustained by an individual victim. There is the possibility of cases arising where the touching involved matches the criteria listed at the top of the table, but where the incident is not considered by either the victim and/or the reasonable person to be very serious.

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<sup>63</sup> In chapter 10 it was argued that the offence of sexual assault be extended to include cases of reckless touching. In order for an offence of reckless sexual assault to prove workable, the sentencing guidelines would have to be extended to reflect the defendant's *mens rea*.



Consider the situation where V and D who have previously engaged in consensual sexual activity, remove their clothes and enter V's hot tub. D straddles V and his naked genitalia touch her naked genitalia. V does not consent and asks D to leave. This contact matches the activity listed in the top category of the table but V does not consider that it was particularly serious. Similarly, there is the possibility of cases arising where the touching involved matches the criteria listed at the bottom of the table, but where the victim and/or reasonable people consider the incident as very serious. For example, consider the situation in which D, who is unknown to V, approaches her and engages in conversation with her. He begins to sniff her hair and stroke her arm. D asks V 'Can we make love?'<sup>64</sup> V can smell alcohol on D's breath and is terrified that D may rape her. As this involved contact between a part of the offender's body (other than the genitalia) with part of the victim's body (other than the genitalia) the starting point is a community order. This implies that all non-consensual touching that does not involve contact with genitalia is not serious enough to warrant a custodial sentence, although courts do have discretion to alter sentencing based on the presence of aggravating and mitigating factors, as we shall see below.

Courts have a duty to 'have regard to' sentencing guidelines,<sup>65</sup> but the extent to which they do so is likely to vary greatly and possibly to lead to inconsistencies. Cooper reports a belief amongst members of the Bar that some judges are treating the guidelines as if they were a statutory formula that cannot be departed from.<sup>66</sup> However, as Davies argues, although not in relation to the SGC, guidelines are designed to 'strike a proper balance between rule and discretion'.<sup>67</sup> A number of important recent decisions of the Court of Appeal stress the flexibility that is inherent in the proper application of

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<sup>64</sup> See *R v Deal* [2006] EWCA Crim 684.

<sup>65</sup> CJA 2003, s.172.

<sup>66</sup> J. Cooper, 'The Sentencing Guidelines Council- A Practical Perspective [2008] *Crim L R* 277.

<sup>67</sup> K. Davies, *Discretionary Justice: A Preliminary Inquiry* (Louisiana State University Press, Baton Rouge, 1969) p.42.

sentencing guidelines.<sup>68</sup> In *Larcombe*,<sup>69</sup> the Court of Appeal made clear that the starting points and ranges were not rigid and the sentence would depend on the circumstances of the individual case. In this case, the nature and repetition of the offending completely changed the complexion of seriousness. The trial judge had expressed the view that the sentencing guidelines were of limited value since they looked only at the mechanics of the offence, that is to say the touching and not at the wider aggravating features. The Court of Appeal did note however, that 'the sentencing tables do not stand alone, and sentencers will be misled if they neglect the principles and explanatory guidance which apply to them.' Movement within and between ranges will depend on the circumstances of individual cases, particularly aggravating and mitigating features. The Court of Appeal added that the 'the expected approach is for the court to identify the description which most nearly matches the particular facts of the offence. This will identify a starting point from which the sentencer can depart to reflect aggravating or mitigating factors affecting the seriousness of the offence.'

The presence of aggravating factors can make an offence significantly more serious than the nature of the activity alone might suggest. The SGC guideline, *Overarching Principles: Seriousness*, suggests that aggravating factors indicate either a higher than usual level of culpability on the part of the offender, or a greater than usual degree of harm caused by the offence (or sometimes both).<sup>70</sup> Factors indicating a more than usually serious degree of harm include where there are multiple victims; where there is an especially serious physical or psychological effect on the victim, (even if unintended); where there is a sustained assault or repeated assaults on the same victim; the location of an offence (e.g. in an isolated place) and additional degradation of the victim.<sup>71</sup> The

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<sup>68</sup> *Oosthuizen* [2005] EWCA Crim 1978; *Last* [2005] EWCA Crim 106; *Peters* [2005] EWCA Crim 605; *Bowering* [2005] EWCA Crim 3215.

<sup>69</sup> [2008] EWCA Crim 2310. D was convicted of two counts of sexual assault which involved him touching the victims' legs over clothes and on the second occasion stroking the boy's genital area over his trousers.

<sup>70</sup> *Op cit*, n 2 at para 1.20.

<sup>71</sup> *Ibid*, at para 1.23.

fact that ‘an especially serious physical or psychological effect on the victim’ is an aggravating factor that can increase the length of a sentence appears to imply that sentencing does in fact reflect individuals’ experiences. Factors indicating higher culpability include the planning of an offence, the deliberate targeting of vulnerable victims and the abuse of power or a position of trust.<sup>72</sup> Table 12.2 shows the additional aggravating and mitigating circumstances for a conviction of sexual assault in the SGC’s guidelines.

*Table 12.2: Additional aggravating and mitigating factors for sexual assault*

| Additional aggravating factors   | Additional mitigating factors  |
|--|--|
| <ol style="list-style-type: none"> <li>1. Offender ejaculated or caused victim to ejaculate</li> <li>2. Background of intimidation or coercion</li> <li>3. Use of drugs, alcohol or other substance to facilitate the offence</li> <li>4. Threats to prevent victim reporting the incident</li> <li>5. Abduction or detention</li> <li>6. Offender aware that he or she is suffering from a sexually transmitted infection</li> <li>7. Physical harm caused</li> <li>8. Prolonged activity or contact</li> </ol> | <p><i>Where the victim is aged 16 or over</i></p> <ul style="list-style-type: none"> <li>• Victim engaged in consensual sexual activity with the offender on the same occasion and immediately before the offence</li> </ul> <p><i>Where the victim is under 16</i></p> <ul style="list-style-type: none"> <li>• Sexual activity between two children (one of whom is the offender) was mutually agreed and experimental</li> <li>• Reasonable belief (by a young offender) that the victim was aged 16 or over</li> </ul> <p>Youth and immaturity of the offender<br/>Minimal or fleeting contact</p> |

An example of a case in which the presence of aggravating features made the offence significantly more serious than the nature of the activity alone would have indicated is *Piper*.<sup>73</sup> The defendant appealed against a total sentence of 12 months’ imprisonment imposed following guilty pleas to seven offences of sexual assault on a female and one offence of possession of an offensive weapon. D ‘indecently’<sup>74</sup> touched the women

<sup>72</sup> *Ibid*, at para 1.22.

<sup>73</sup> [2007] EWCA Crim 2151.

<sup>74</sup> This is the phrase used in the judgement and presumably refers to the touching of the breasts. One of the victims said that ‘he brushed his hand against her nipples’.

whilst purporting to measure them and secretly filmed them in their underwear whilst conducting bogus interviews. The judge referred to the sentencing guidelines and found the sexual touching to be at the lower end of the scale of seriousness, but that D had used a deliberate device to lure women into a situation where he could film them. The appeal was dismissed on the basis that there was considerable organisation and planning involved in the offences and the victims were deceived, exploited and, with the benefit of hindsight, humiliated.

### 12.3.3 Victim personal statements

In October 2001, the Home Office introduced the Victim Personal Statement (VPS) Scheme to allow victims to have input into criminal justice decision-making. Whenever the police take a statement from a victim, they must also inform the victim of the right to make a VPS. The statements are supposed to be taken into account at each stage of the criminal process, including sentencing,<sup>75</sup> and provide a formal opportunity for the victim to explain in their own words how the crime has affected them physically, emotionally and financially.<sup>76</sup> Victims who make a VPS have the right to update it at any time before the trial. When a VPS is presented to a court, the proper approach is set out in a Practice Direction by the Lord Chief Justice. The VPS statement and any evidence in support 'should be considered and taken into account by the court prior to passing sentence'.<sup>77</sup> The relevant Practice Direction states that:

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<sup>75</sup> Home Office, *Making a Victim Personal Statement* (Home Office Communications Directorate, London, 2001).

<sup>76</sup> For reasons of space and relevance, it is not possible to provide a complete overview of the use of victim impact statements in the criminal justice system. For detailed analysis see: J. Chalmers *et al*, 'Victim Impact Statements: Can Work, Do Work (For Those who Bother to make them)' [2007] *Crim L R* 360; I. Edwards, 'A Genuine Voice?' (2005) 155 *NLJ* 1341; I. Edwards, 'The Place of Victim's preferences in the Sentencing of 'their' Offenders' (2002) *Crim L R* 689; A. Sanders, 'Victim Impact Statements: Don't Work, Can't Work' (2001) *Crim L R* 447; E. Erez, 'Integrating a Victim Perspective in Criminal Justice Through Victim Impact Statements' in A. Crawford. & J. Goodey, *Integrating a Victim Perspective within Criminal Justice* (Ashgate, Dartmouth, 2000).

<sup>77</sup> Practice Direction [2009] 1 WLR 1396, updating Practice Direction [2001] 4 All ER 640.

‘The court must pass what it judges to be the appropriate sentence having regard to the circumstances of the offence and of the offender, taking into account, so far as the court considers it appropriate, the impact on the victim.’

*R v Perks*<sup>78</sup> laid down general guidelines for sentencers on how to deal with the impact of an offence on the victim. *Perks* makes clear that a sentencer must not make assumptions unsupported by evidence, about the effects of an offence on a victim. *Perks* goes on to make clear that evidence of the effects on a victim must be in a proper form; a Section 9 witness statement, an expert’s report or otherwise, duly served on the defence. This is so that the defence may challenge the evidence regarding the effect the offence had on the victim and if necessary call evidence in refutation. The Court of Appeal went on to stress that evidence of the victim alone should be approached with care, the more so if it relates to matters the defence cannot be realistically expected to investigate. In *Ismail*,<sup>79</sup> the Court of Appeal stated that for offences which appear to have had a significant impact on the victim, it is essential for sentencing judges to have VPS, especially where a sexual offence has been committed against a young victim, so that that impact can be taken into account when determining the appropriate sentence.

The VPS scheme appears to mean that sentencers *are* now required to take account of individual victims’ experiences, but that is only possible when a VPS is made available to them.<sup>80</sup> A study by Carolyn Hoyle and others of a pilot scheme in 1997-8 found that only a small minority, about 30 per cent of victims, took advantage of the opportunity to make a VPS.<sup>81</sup> Hoyle’s research concluded that, if anything, the statements tended to understate rather than overstate the effects of the offence: this was largely because the

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<sup>78</sup> [2001] 1 Cr App R 19.

<sup>79</sup> [2005] EWCA Crim 397.

<sup>80</sup> It is worth highlighting that a court is required to obtain a pre-sentence report before imposing a custodial or community sentence (CJA 2003, s.156). A pre-sentence report is supposed to give an assessment of the consequences of the offence(s) including the impact it had on the victim.

<sup>81</sup> The *No Witness, No Justice* (NWNJ) initiative is intended to boost uptake of VPS. Crown Prosecution Service and ACPO, *No Witness, No Justice Pilot Evaluation* (29 October 2004).

statements were prepared so soon after the offence and not updated.<sup>82</sup> One reason given by victims for not making a VPS is that they did not perceive the impact of the crime as serious or find it particularly distressing.<sup>83</sup> It is, therefore, likely to be rare for sentencers to be faced with a VPS where the distress caused to the victim was minimal, or less than might have been expected given the nature of the crime, and thus rare for a VPS to lead to a sentence that is less than might be expected. Sanders argues that one reason why VPS rarely influence sentence decisions is because most cases are 'typical cases: that is, the impact of the crime on the victim is as one would expect given the nature and seriousness of the crime.'<sup>84</sup> In most cases, the VPS is likely to confirm information about the effect of the crime already known to the court, in which case it is unlikely to influence the sentence imposed.<sup>85</sup> However, there may be the occasional case where the information provided is significant and was not already known. There is a need for judges to take account of the serious and long-lasting effects of sexual offences. Information concerning the mental and psychological effects of sexual assault might be of particular relevance for those cases at the fringes of liability, where the 'sexual' nature of the touching is ambiguous.

#### 12.4 CONCLUSION

In penology, there exists a conflict between sentencing based on the defendant's intended consequences or consequences about which he was reckless and sentencing based on the actual consequences. In all likelihood the relevance of individual victim experiences may be of practical value in only a small percentage of cases, because in the majority of cases the harm caused will fall somewhere within a range of broadly what might have been expected. However, in respect of sexual assault, which is not an

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<sup>82</sup> C. Hoyle *et al*, *Evaluation of the One-Stop Shop and Victim Statement Pilots* (Home Office, London, 1998).

<sup>83</sup> *Ibid*, at p.27.

<sup>84</sup> A. Sanders, 'Victim Impact Statements: Don't Work, Can't Work' [2001] *Crim L R* 447.

<sup>85</sup> J. Chalmers, 'What Impact for Victim Statements?' (2003) 8 *Scottish Law and Practice Quarterly* 159 at p.161.

outcome-based offence, particular victim experiences as opposed to typical experiences acquire great significance, especially when there is a disparity between the victim and offender's perception of the 'sexual' nature of the touching. One argument for sentencing based on standard harm is that it takes account of set-backs to collective interests and the public dimension of wrongs inflicted on individuals. However, in determining offence seriousness, the individual C's experience should determine the harm component of the harm/culpability dyad. Such an approach is not unproblematic and might compromise fundamental principles of procedural fairness and justice. Although sentencers retain discretion in determining offence seriousness, the law is somewhat ambiguous as to the relevance of individual victims' experiences. Whilst s.143 CJA 2003 suggests that individual victim experiences are relevant, the SGC's *Overarching Principles* emphasises standard harm and states that harm is not determinative of seriousness and 'must always be judged in the light of culpability'.<sup>86</sup> In relation to sexual offences, where the psychological effects of the crime can be far-reaching, the law demands flexibility. The SGC's *Definitive Guideline* on the SOA 2003 categorises the harm of sexual assault in terms of the specific nature of the touching. The Guideline is welcome but flawed in focusing on the nature of the physical contact involved: it fails to take account of the level of harm actually suffered by the victim. Victims' experiences of sexual assault are individualised and any attempt to standardise the harm caused by sexual touching is insufficiently complainant-centred. However, the guidelines merely provide starting-points and there is scope for individual experiences to be factored in by treating victim harm as an aggravating factor and using VPS.

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<sup>86</sup> *Op cit*, n 2 at para 1.17.

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## Conclusion

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### 13.1 CONCLUDING REMARKS

This thesis analysed doctrinal and theoretical approaches to sexual assault, considering the extent to which the offence is and could be complainant-centred. This is a timely and relevant inquiry, since there has been insufficient research and commentary on the scope and application of sexual assault since the implementation of the SOA 2003. The terms of reference for the Sexual Offences Review included making recommendations that '[p]rovide coherent and clear sex offences which protect individuals...from abuse and exploitation'.<sup>1</sup> In light of this aim, this thesis analysed the extent to which sexual assault is in fact 'coherent' and clearly defined. Whilst the law cannot 'protect' citizens from sexual assault, in the sense that the law cannot prevent sexual assault from occurring in the first place, this thesis examined the extent to which the law appropriately labels conduct and communicates the nature of the offender's transgression to the complainant's satisfaction.

Section 3 prohibits any unwanted sexual touching ostensibly promoting respect for individual sexual and bodily autonomy. One question addressed by this thesis is how is the offence currently defined and another how could the offence be defined. Most importantly, this thesis made recommendations for how the offence should be defined, examining critically the case for a more complainant-centred approach and arguing that certain areas of the s.3 definition could be clarified and/or amended to make it more complainant-centred. Hence, this thesis began by examining the old law on indecent assault, setting the offence of sexual assault in its historical context and providing a

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<sup>1</sup> *Setting the Boundaries: Reforming the law on sex offences Vol. 1* (Home Office Communications Directorate, London, 2000) at para 0.3.



comparison against which the offence of sexual assault could be evaluated. Chapter 2 demonstrated how indecent assault was a widely and ill-defined offence which caught all non-consensual sexual behaviour falling outside the scope of rape. Indecent assault was insufficiently complainant-centred in four important respects. First, the label on conviction did not differentiate between the vastly different forms of conduct (i.e. both psychic and physical assault) and their disparate seriousness. Secondly, in respect of the indecent nature of the act, the law failed to adequately acknowledge and include the experiences of complainants. Lord Ackner's categorisation of certain acts as incapable of indecency implied that the complainant was denied the status of 'privileged speaker'. Thirdly, the definition of indecent assault was under-inclusive because it prevented conviction of a reckless, yet culpable indecent assault. Lastly, the obligation on the prosecution to prove an indecent intention where the conduct itself was ambiguous might have deflected the court's attention from the invasion of sexual autonomy.

In light of these criticisms of indecent assault chapter 3 assessed the extent to which the various committees and reports dealing with the sexual offences reform adopted a sufficiently complainant-centred approach. Chapter 3 found that the review process failed to scrutinise sufficiently the conduct falling within each of the new offences. Section 3 was barely discussed in the reform process and parliamentary debates and the result is an offence with ambiguity that fails to include adequately those types of activities and complainant experiences that such an offence ought to include. Sexual assault is over-inclusive as it includes penile and non-penile penetration within its ambit, giving rise to the option of plea-bargaining.

Perhaps the greatest problems with the definition of sexual assault stem from the broad definition of the central elements of 'sexual' and 'touching'. As shown in chapter 4 touching is broadly defined and contains no *de minimis* exception. This is an important complainant-centred aspect of the definition to the extent that there are no touchings

that are 'too trivial' to be the subject of legal control. However, sexual assault is narrower than indecent assault because it does not extend to cases where D intentionally or recklessly causes C to fear an immediate unlawful sexual touching. Whilst there are other offences that could be charged in such situations, section 3 ought to be extended to cover such scenarios for the sake of clarity and consistency in the criminal law. Sexual assault is a broad offence, over-inclusive at times, under-inclusive at others and for some cases the overarching label is not entirely accurate. As sexual assault is a widely defined and contentious offence, it fails to reflect accurately the defendant's conduct and the impact on the victim. Offence labels ought to be fair to victims so that the legal record accords with their own perceptions of the nature and seriousness of the harm done to them. An accurately labelled offence demonstrates that society is showing solidarity with the victim and appropriately condemning the defendant's actions.

The presence or absence of consent to sexual interaction is a difficult determination. Whilst the SOA 2003 is to be praised for being the first piece of English legislation to define consent in statute there is still concern about its interpretation. Section 74 defines consent in terms of four other contested concepts: agreement, freedom, choice and capacity. Consent thus remains a somewhat vague term that juries and magistrates can interpret and apply for themselves. In the context of sexual assault, there also remain issues about which touchings are impliedly consented to both between strangers and between those in an intimate relationship. These two situations, admittedly at the fringes of liability, demonstrate how the meaning of consent is vague and how the boundaries of sexual assault might become indistinct.

One of the intrinsic problems with the offence of sexual assault is that the law has to set out standards of behaviour in a complex cultural situation when the boundaries of acceptable or 'normal' sexual behaviour are unclear. Chapter 5 demonstrated how

sexuality is a socially and historically contingent concept and how there is no essential characteristic that distinguishes 'sexual' from 'non-sexual' acts. Sexual assault is a context-dependent crime because the harm that the law strives to avert is non-essentialist. Sexual touching can only constitute an assault when it is experienced and defined as such by the complainant. The complainant's experience of an action is therefore a necessary and important, although not decisive aspect in assessing the 'sexual' nature of an act.

Context-dependent offences give rise to the possibility of different interpretations, one of which is complainant-centred. Thus in relation to the meaning of 'sexual' there are numerous perspective from which the nature of the conduct might be judged. In chapters 6 through 8 I identified five possible perspectives from which the meaning of 'sexual' could be viewed and defined and critiqued the approaches against the fundamental aims and principles of criminal law. First, there is a non-interpretive approach that would define 'sexual' according to the body parts involved and devoid of any reference to the defendant's knowledge or awareness of the act's nature or the complainant's experience of the touching. Whilst adhering strictly to criminal law principles of certainty and fair warning this approach was criticised in chapter 6 for failing to take account of the context in which the touching occurred. Secondly, there is a 'bystander-objective' approach which would arguably be the fairest approach as it would require an evaluation of the action that is neither defendant- nor complainant-centred. The law insists on appearing neutral and fair and a 'bystander-objective' to the meaning of 'sexual' promotes procedural fairness for both defendants and complainants. However, such an approach may be criticised for holding the defendant's conduct to a standard that society deems appropriate even though D may subjectively be incapable of appreciating the 'sexual' nature of his conduct. It was also criticised for implying that there exists social consensus on appropriate standards of sexual touching. Thirdly, there is a 'defendant-objective' approach, where the reasonable person is in the

same position as and is credited with the knowledge of the defendant. Whilst a 'defendant-objective' approach preserves the principle of individual autonomy by ensuring that no person is convicted who lacked the capacity to conform his or her behaviour to the standard required, it was criticised for being insufficiently complainant-centred.

The fourth approach is a 'defendant-subjective' approach, which is traditionally applied, in mainstream English criminal law. Whilst chapter 7 acknowledged the importance of orthodox subjectivist approaches to liability that would be dependent on the defendant's knowledge and awareness of the act's nature, such an approach was criticised for being insufficiently complainant-centred. If defendants could raise as denials of *actus reus*, their own 'defendant-subjective' evaluation of the 'sexual' nature of their conduct, the nature of the violation as experienced by C would be overlooked. Thus, there are cogent arguments for adopting a 'complainant-subjective' or complainant-centred approach to defining 'sexual' as put forward in chapter 8. Whilst 'complainant-subjective' approaches, which focus on the complainant's affective response to the action are not a common part of orthodox criminal liability, being more a focus of tort liability, I argued that a 'complainant-subjective' approach is the most preferable because the complainant's perspective is an important and relevant factor in assessing the seriousness of the conduct and the level of D's culpability.

Both the Sex Offences Review and the Government made much of the SOA 2003 aim of introducing greater clarity into sexual offences law. 'Sexual' is a key term used in the Act, but s.78 is not satisfactorily defined, leaving the possibility that different juries and magistrates will interpret the term differently and that old stereotypes will continue to exert an influence. 'Sexual' is that extra aggravating factor that turns battery into a sexual assault and whilst 'sexual' is a term within everyone's understanding, 'this does not entail that everyone understands the term to mean the same things, either in the

abstract or in specific cases.’<sup>2</sup> Defining ‘sexual’ using the term itself, assumes that the reader already knows the intended meaning of the term and that there is a common consensus amongst reasonable people as to which acts are ‘indisputably’ ‘sexual’, which acts are potentially ‘sexual’ and which acts are definitely not ‘sexual’. However, this raises the question of who constitutes the ‘reasonable person’ in an increasingly multicultural society with widely differing views on sexuality? Even if the definition cannot be improved, steps should be taken to incorporate a model direction listing examples of activities that are ‘sexual’ for the purposes of the Act. The lack of certainty and clarity that has resulted from the new law is clearly undesirable for complainants and may deter some from making a complaint. Juries and magistrates ought to be instructed to take into account C’s experience, because as demonstrated in chapter 9 there are some acts which C might experience as ‘sexual’, but which are not ‘sexual’ by nature and therefore would not get past the first test in s.78(b). I proposed an addition to the s.78 which would require the law to show solidarity with those who have been harmed through an invasion of their sexual integrity.

In Chapter 10, I recommended modifications to the *mens rea* of sexual assault that would make the definition more complainant-centred. First, the definition should be amended to include recklessness within s.3(1)(a) on the basis that reckless sexual touchings show insufficient regard to C’s sexual interests and integrity. Secondly, in *Heard* the Court of Appeal held that s.3 is a basic intent offence, even though it appears to be a specific intent offence. This is complainant-centred because it means intoxication cannot be used as an excuse or defence. However, the decision also formalizes the inherent failure of s.3 to recognize that some unintentional touchings are culpable and therefore worthy of a criminal response. The decision gives excessive scope to the concept of an ‘accident’ by treating it as covering not only acts that are not voluntary or willed, but also those that are willed but have unintended though foreseen

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<sup>2</sup> V. Munro & E. Finch, ‘Breaking Boundaries? Sexual Consent in the Jury Room’ (2006) 26 *LS* 303.

consequences. Thirdly, the law is unclear whether D must appreciate the 'sexual' nature of the touching and this ought to be clarified so that one cannot legitimately read *mens rea* into the 'sexual' nature of the touching on the basis that this might deflect the court's attention from the complainant's affective response to the touching. Fourthly, the reasonable belief in consent test, whilst a considerable improvement in the law, shows considerable leniency towards defendants because it allows the jury or magistrates to look at personal characteristics of the defendant in deciding the reasonableness of his actions. The introduction of reasonableness into the *mens rea* of the belief in consent is to be celebrated, but how it is interpreted in case law is a different matter. The SOA 2003 appears to offer little reassurance that similar cases will not in fact be treated differently.

Sentencing is another area in which the law on sexual assault faces a dilemma of assessing seriousness when there is a disparity between harm and culpability. Chapter 12 demonstrated how the law is somewhat unclear as to the place of individual victims' experiences in determining the seriousness of an offence. The CJA 2003, s.143 and the introduction of VPS suggest that sentencers *are* now required to take account of individual victims' experiences, indicating how sentencing has moved towards a more victim-centred approach. However, these provisions must be read in light of the Sentencing Guidelines Council's guideline *Overarching Principles: Seriousness* which emphasises standard harm and culpability as the main determinants of seriousness, stating that '[h]arm must always be judged in the light of culpability'. The SGC's guidelines on sexual offences are welcome but flawed in focusing on the nature of the physical contact involved. In determining offence seriousness, the individual V's experience should determine the harm component of the harm/culpability dyad and not standard harm. Whilst the law on sentencing is more complainant-centred since 2003 than the respective provisions that existed for sentencing sexual assault, the actual place of victims' experiences in sentencing is still somewhat ambiguous.

To conclude, the definition of and processes of sentencing for sexual assault are an improvement on the respective provisions on indecent assault pre-2003. However, the substantive offence of sexual assault is still insufficiently complainant-centred and certain areas of the definition in s.3 could be clarified and/or amended to make it more complainant-centred. Sexual assault is an important and yet broadly defined offence which is predominantly 'over-shadowed' in academic commentary and empirical research by the crime of rape. Further research into the investigation, prosecution and sentencing of sexual assault cases is needed. Statistics demonstrate that the number of police recorded incidents of non-consensual sexual touching committed against women has fallen slightly from 2.9% in 2005 to 2.3 % in 2009.<sup>3</sup> However, the sensitivity of reporting sexual offences has resulted in under-reporting of these offences to the police. The statistics on sexual assault should therefore be interpreted with caution, given that they might substantially under-represent the extent and nature of the problem. The SOA 2003 has been in force for six years and whilst there are some notable limits to its reach in the context of sexual assault, it was a timely and necessary piece of legislation that has predominantly clarified the law on sexual offences and strengthened victim's interests and rights.

#### 13.1.1 Future research

This thesis highlights the importance of and pressing need for empirical research into the processes of investigation, trial and sentencing for sexual assault. In focusing exclusively upon the legal definition of sexual assault, this thesis has been limited to a 'black-letter' approach and an examination of the way in which sexual assault cases are interpreted and enforced by the criminal justice system is left for future work. This limitation was also evident in the review process. In concentrating on narrow statements of what the law is the sexual offences reform process failed sufficiently to

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<sup>3</sup> A. Walker *et al*, 'Crime in England and Wales 2008/09: Volume 1 Findings from the British Crime Survey and police recorded crime' (Home Office, July 2009) Table 3.12.

consider the offences in the context of interpretation and enforcement. A thorough analysis of the sexual assault cases arising in the magistrates' courts and Crown Courts would give us a better indication of the extent to which the problems highlighted in this thesis have practical significance. There is also a need for a comprehensive overview of the sentencing of sexual assault cases to determine the extent to which individual victim's experiences actually affect sentencing decisions. Empirical studies in the form of questionnaires and interviews with individuals involved in the processing of sexual assault cases can help us better understand how the decision to prosecute is made. In the absence of being able to undertake research into actual jury deliberations, mock jury simulations would give an indication of how the meaning of 'sexual' is interpreted and how jurors respond to the section 78 test. A public survey about opinions as to the meaning of 'sexual' and the scope of sexual assault is also important. This thesis has also highlighted the need for greater public awareness about the nature and scope of the offence of sexual assault and how it differs from rape and assault by penetration. This is particularly important given the tendency of the media to refer to and to label any sexual violation as 'sexual assault'.



# **Appendix**

## **Sexual Offences Act 1956**

### **1. Rape of a woman or man**

- (1) It is an offence for a man to rape a woman or another man.
- (2) A man commits rape if-
  - (a) he has sexual intercourse with a person (whether vaginal or anal) who at the time of the intercourse does not consent to it; and
  - (b) at the time knows that the person does not consent to the intercourse or is reckless as to whether that person consents to it.
- (3) A man also commits rape if he induces a married woman to have sexual intercourse with him by impersonating her husband.
- (4) Subsection (2) applies for the purpose of any enactment.

### **14. Indecent assault on a woman**

- (1) It is an offence, subject to the exception mentioned in subsection (3) of this section, for a person to make an indecent assault on a woman.
- (2) A girl under the age of sixteen cannot in law give any consent which would prevent an act being an assault for the purposes of this section.
- (3) Where a marriage is invalid under section two of the Marriage Act 1949, or section one of the Age of Marriage Act 1929 (the wife being a girl under the age of sixteen), the invalidity does not make the husband guilty of any offence under this section by reason of her incapacity to consent while under that age, if he believes her to be his wife and has reasonable cause for the belief.
- (4) A woman who is a defective cannot in law give any consent which would prevent an act being an assault for the purposes of this section, but a person is only to be treated as guilty of an indecent assault on a defective

by reason of that incapacity to consent, if that person knew or had reason to suspect her to be a defective.

**15. Indecent assault on a man**

- (1) It is an offence for a person to make an indecent assault on a man.
- (2) A boy under the age of sixteen cannot in law give any consent which would prevent an act being an assault for the purposes of this section.
- (3) A man who is a defective cannot in law give any consent which would prevent an act being an assault for the purposes of this section, but a person is only to be treated as guilty of an indecent assault on a defective by reason of that incapacity to consent, if that person knew or had reason to suspect him to be a defective.

**Sexual Offences Act 2003**

**1. Rape**

- (1) A person (A) commits an offence if-
  - (a) he intentionally penetrates the vagina, anus or mouth of another person (B) with his penis,
  - (b) B does not consent to the penetration, and
  - (c) A does not reasonably believe that B consents.
- (2) Whether a belief is reasonable is to be determined having regard to all the circumstances, including any steps A has taken to ascertain whether B consents.
- (3) Sections 75 and 76 apply to an offence under this section.
- (4) A person guilty of an offence under this section is liable, on conviction on indictment, to imprisonment for life.

**2. Assault by penetration**

- (1) A person (A) commits an offence if-
  - (a) he intentionally penetrates the vagina or anus of another person (B) with a part of his body or anything else,
  - (b) the penetration is sexual,
  - (c) B does not consent to the penetration, and
  - (d) A does not reasonably believe that B consents.
- (2) Whether a belief is reasonable is to be determined having regard to all the circumstances, including any steps A has taken to ascertain whether B consents.
- (3) Sections 75 and 76 apply to an offence under this section.
- (4) A person guilty of an offence under this section is liable, on conviction on indictment, to imprisonment for life.

### **3. Sexual assault**

- (1) A person (A) commits an offence if-
  - (a) he intentionally touches another person (B),
  - (b) the touching is sexual,
  - (c) B does not consent to the touching, and
  - (d) A does not reasonably believe that B consents.
- (2) Whether a belief is reasonable is to be determined having regard to all the circumstances, including any steps A has taken to ascertain whether B consents.
- (3) Sections 75 and 76 apply to an offence under this section.
- (4) A person guilty of an offence under this section is liable-
  - (a) on summary conviction, to imprisonment for a term not exceeding 6 months or a fine not exceeding the statutory maximum or both;
  - (b) on conviction on indictment, to imprisonment for a term not exceeding 10 years.

**4. Causing a person to engage in sexual activity without consent**

- (1) A person (A) commits an offence if-
  - (a) he intentionally causes another person (B) to engage in an activity,
  - (b) the activity is sexual,
  - (c) B does not consent to engaging in the activity, and
  - (d) A does not reasonably believe that B consents.
- (2) Whether a belief is reasonable is to be determined having regard to all the circumstances, including any steps A has taken to ascertain whether B consents.
- (3) Sections 75 and 76 apply to an offence under this section.
- (4) A person guilty of an offence under this section, if the activity caused involved-
  - (a) penetration of B's anus or vagina,
  - (b) penetration of B's mouth with a person's penis,
  - (c) penetration of a person's anus or vagina with a part of B's body or by B with anything else, or
  - (d) penetration of a person's mouth with B's penis,is liable, on conviction on indictment, to imprisonment for life.
- (5) Unless subsection (4) applies, a person guilty of an offence under this section is liable-
  - (a) on summary conviction, to imprisonment for a term not exceeding 6 months or to a fine not exceeding the statutory maximum or both;
  - (b) on conviction on indictment, to imprisonment for a term not exceeding 10 years.

**7. Sexual assault of a child under 13**

- (1) A person commits an offence if-
  - (a) he intentionally touches another person,

- (b) the touching is sexual, and
  - (c) the other person is under 13.
- (2) A person guilty of an offence under this section is liable-
  - (a) on summary conviction, to imprisonment for a term not exceeding 6 months or a fine not exceeding the statutory maximum or both;
  - (b) on conviction on indictment, to imprisonment for a term not exceeding 14 years.

**74. 'Consent'**

For the purposes of this Part, a person consents if he agrees by choice, and has the freedom and capacity to make that choice.

**75. Evidential presumptions about consent**

- (1) If in proceedings for an offence to which this section applies it is proved-
  - (a) that the defendant did the relevant act,
  - (b) that any of the circumstances specified in subsection (2) existed, and
  - (c) that the defendant knew that those circumstances existed,the complainant is to be taken not to have consented to the relevant act unless sufficient evidence is adduced to raise an issue as to whether he consented, and the defendant is to be taken not to have reasonably believed that the complainant consented unless sufficient evidence is adduced to raise an issue as to whether he reasonably believed it.
- (2) The circumstances are that-
  - (a) any person was, at the time of the relevant act or immediately before it began, using violence against the complainant or causing the complainant to fear that immediate violence would be used against him;

(b) any person was, at the time of the relevant act or immediately before it began, causing the complainant to fear that violence was being used, or that immediate violence would be used, against another person;

(c) the complainant was, and the defendant was not, unlawfully detained at the time of the relevant act;

(d) the complainant was asleep or otherwise unconscious at the time of the relevant act;

(e) because of the complainant's physical disability, the complainant would not have been able at the time of the relevant act to communicate to the defendant whether the complainant consented;

(f) any person had administered to or caused to be taken by the complainant, without the complainant's consent, a substance which, having regard to when it was administered or taken, was capable of causing or enabling the complainant to be stupefied or overpowered at the time of the relevant act.

(3) In subsection (2)(a) and (b), the reference to the time immediately before the relevant act began is, in the case of an act which is one of a continuous series of sexual activities, a reference to the time immediately before the first sexual activity began.

## **76. Conclusive presumptions about consent**

- (1) If in proceedings for an offence to which this section applies it is proved that the defendant did the relevant act and that any of the circumstances specified in subsection (2) existed, it is to be conclusively presumed-
- (a) that the complainant did not consent to the relevant act, and
- (b) that the defendant did not believe that the complainant consented to the relevant act.
- (2) The circumstances are that-

- (a) the defendant intentionally deceived the complainant as to the nature or purpose of the relevant act;
- (b) the defendant intentionally induced the complainant to consent to the relevant act by impersonating a person known personally to the complainant.

**77. Sections 75 and 76: relevant acts**

In relation to an offence to which sections 75 and 76 apply, references in those sections to the relevant act and to the complainant are to be read as follows-

| <i>Offence</i>                                 | <i>Relevant Act</i>  |
|--|--|
| An offence under section 3<br>(sexual assault) | The defendant intentionally touching another person ('the complainant'), where the touching is sexual. |

**78. "Sexual"**

For the purposes of this Part (except section 71), penetration, touching or any other activity is sexual if a reasonable person would consider that-

- (a) whatever its circumstances or any person's purpose in relation to it, it is because of its nature sexual, or
- (b) because of its nature it may be sexual and because of its circumstances or the purpose of any person in relation to it (or both) it is sexual.

**79. Part 1: general interpretation**

- (2) Penetration is a continuing act from entry to withdrawal.
- (3) References to a part of the body include references to a part surgically constructed (in particular, through gender reassignment surgery).

- (8) Touching includes touching-
- (a) with any part of the body,
  - (b) with anything else,
  - (c) through anything,
- and in particular includes touching amounting to penetration.
- (9) 'Vagina' includes vulva.

## Magistrates Court Sentencing Guidelines

### Sexual assault<sup>4</sup>

| Examples of nature of activity   | Starting point  | Range  |
|--|---|--|
| Contact between part of offender's body (other than the genitalia) with part of the victim's body (other than the genitalia)   | 26 weeks custody if the victim is under 13<br><br>Medium level community order if the victim is aged 13 or over | 4 weeks custody to Crown Court<br><br>Band C fine to 6 weeks custody |
| Contact between naked genitalia of offender and another part of victim's body<br><br>Contact with genitalia of victim by offender using part of his or her body other than the genitalia or an object<br><br>Contact between either the clothed genitalia of offender and naked genitalia of victim or naked genitalia of offender and clothed genitalia of victim | Crown Court if the victim is under 13<br><br>Crown Court if the victim is aged 13 or over                       | Crown Court<br><br>26 weeks custody to Crown Court                   |
| Contact between naked genitalia of offender and naked genitalia, face or mouth of the victim   | Crown Court   | Crown Court  |

<sup>4</sup> These guidelines are taken from the Sentencing Guidelines Council's definitive guideline *Sexual Offences Act 2003* published 30 April 2007.



## **Abbreviations**

|             |   |
|-------------|---|
| CAA 1981    | Criminal Attempts Act 1981                                |
| CDGD        | Causing death by careless or inconsiderate driving        |
| CDDD        | Causing death by dangerous driving                        |
| CDA 1971    | Criminal Damage Act 1971                                  |
| CDA 1998    | Crime and Disorder Act 1998                               |
| CJA 1991    | Criminal Justice Act 1991                                 |
| CJA 2003    | Criminal Justice Act 2003                                 |
| CJPOA 1994  | Criminal Justice and Public Order Act 1994                |
| CLAA 1885   | Criminal Law Amendment Act 1885                           |
| CLAA 1951   | Criminal Law Amendment Act 1951                           |
| CLRC        | Criminal Law Revision Committee                           |
| ECHR        | European Convention on Human Rights                       |
| EE (SD) R   | Employment Equality (Sex Discrimination) Regulations 2005 |
| OAPA 1861   | Offences Against the Person Act 1861                      |
| OPA 1959    | Obscene Publications Act 1959                             |
| PFHA 1997   | Protection from Harassment Act 1997                       |
| POA 1986    | Public Order Act 1986                                     |
| SDA 1975    | Sex Discrimination Act 1975                               |
| SAP         | Sentencing Advisory Panel                                 |
| SGC         | Sentencing Guidelines Council                             |
| SO(A)A 1976 | Sexual Offences (Amendment) Act 1976                      |
| SOA 1956    | Sexual Offences Act 1956                                  |
| SOA 1967    | Sexual Offences Act 1967                                  |
| SOA 1985    | Sexual Offences Act 1985                                  |
| SOA 2003    | Sexual Offences Act 2003                                  |
| YJCEA 1999  | Youth Justice and Criminal Evidence Act 1999              |

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