

Chapter 9

Rape or love? The importance of sexual consent

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Abstract: There has been a long discussion in Ukraine and elsewhere whether affirmative consent should precede intercourse. Many would agree that there is no need to make a statement of sexual consent unless the person wants to reject the offer. However, the presence or absence of voluntary consent could define if the rape took place for practical purposes. It is generally excepted both people engaged in intercourse have to consent to the sexual experience. Permission is usually given by words or by conduct. The speech by conduct expresses consent without saying words. However, some states would require affirmative consent. That raises the issue of when the absence of affirmative consent does not necessarily mean coercion. If the law says that it does, then the civil liberties and constitutional rights subjecting the person to the criminal wrong that one did not commit. Should it be affirmative consent, or could it be just interpreted from conduct? Another controversy of this topic is the balance of the rights of the accused versus the accuser. In these cases, when one takes the laid-back pattern of responses, what ends up happening is that people do not take the accusations seriously. The burden to prove is not simple because it happened in private places, without witnesses or evidence. Even more challenging to prove these cases in the long run. The significance of the consent should not be underestimated. A clear understanding of it is not merely a precondition for better legal protection and prevention of the crime but evidence for the victims of sexual misconduct. The article articulates the conventional definition of rape as a nonconsensual sexual behavior. It stresses the validity of the consent and the factors surrounding it, such as deception and misunderstanding. It provides examples of such conduct and further discusses the *Lenient Thesis*, *Volenti Maxim* concepts, and other ideas used to interpret the consent. It attempts to demonstrate the complexity of the topic by providing various perspectives. The article reveals that consent can have multiple manifestations. The form of permissible consent is pretty much dependent on the situation. Thus, there is no universal rule on how one should consent to an intimate experience.

Keywords: Prima facie wrong; sexual consent; effective consent; affirmative consent; morally valid consent; sexual deception.

Consent and “no consent”

Even though lawyers have not reached a consensus on the meaning and nature of sexual consent, the disposition of rape in criminal codes across jurisdictions shares the same core characteristics. Following Jonathan Herring, Vice Dean and Professor of Law at the University of Oxford, it is common to define rape as sexual penetration by the defendant without the victim’s consent³⁵². However, in some jurisdictions, physical resistance can be regarded as the absence of consent. What the courts usually consider is an absence or presence of a victim’s genuine choice³⁵³. Under Washington statute: “consent means that at the time of the act of sexual intercourse or sexual contact, actual words or conduct are indicating freely given agreement to have sexual intercourse or sexual contact.”³⁵⁴.

The consent would only be relevant if an act were *prima facie* wrong, such as sexual penetration. Consent provides a reason for performing such an act. If the victim gives effective consent, this provides the defendant with a justifying excuse³⁵⁵. The defendant is entitled to say that the intercourse was a victim’s decision *where effective consent occurs*. “To be effective consent, it must provide him or her with sufficient grounds to conclude that the victim has made an appropriate assessment of whether the penetration is in his or her best interest.”³⁵⁶.

Herring proposed that consent and consideration of the person’s best interests who gives the permission together can justify sexual penetration. When the doctor performs the surgery that assumingly is in the patient’s best interests, he should also ask the patient for consent. Where there is the presumption of surgery’s benefit to the patient, there is no reason to

³⁵² Jonathan Herring, “Rape and the definition of consent,” *National Law School of India Review* 26 no. 1 (2014): p. 62.

³⁵³ *Ibid.*

³⁵⁴ RCW 9A.44.010(7).

³⁵⁵ *Ibid.*, 64.

³⁵⁶ *Ibid.*

think sex will benefit the person³⁵⁷. Both cases require consent, but the initiator of the sexual experience should find even better reasoning for defining the person’s best interests in moral work. As mentioned earlier in Herring’s concept of *prima facie* wrong act, the justification and sound reasoning should precede the intercourse. Hence, the person who initiates sex is liable to ensure that another human being has not been wronged.

There is a clear border between consent and “no consent.” By Schulhofer, “sexual intimacy must always be preceded by the affirmative permission that both parties freely gave.”³⁵⁸. One does not consent if the person does nothing in response to the proposal; hence, it cannot exonerate *prima facie* wrong. Thus, Herring welcomes the English courts’ requirement of consent as a positive act³⁵⁹. Let’s suppose the victim is asleep at the time of the intercourse; then, the defendant has no good reason for committing the wrong. Therefore, it will be considered rape. Analogously, strong intoxication of the victim when they do not resist cannot amount to consent.

One employs the language of autonomy to understand the consent’s role. Joseph Raz defined the principle of autonomy as: “the vision of people controlling, to some degree, their destiny; the ruling idea behind the idea of personal autonomy is that people should make their own lives.”³⁶⁰.

It claims that individuals make decisions for themselves, and others should respect those decisions, including the law, unless the decision involves harming another³⁶¹. However, “guaranteeing everyone’s right to sexual self-determination is quite impossible.”³⁶². In the context of sexual con-

³⁵⁷ Jonathan Herring, “Rape and the definition of consent,” *National Law School of India Review* 26 no. 1 (2014): 63.

³⁵⁸ Joseph J. Fischel, *Sex and Harm in the Age of Consent* (Minneapolis: University of Minnesota Press, 2016), 117.

³⁵⁹ 8 R.(F) v. Director of Public Prosecutor, 2013; in Jonathan Herring, “Rape and the definition of consent,” *National Law School of India Review* 26 no. 1 (2014): p. 65.

³⁶⁰ Joseph Raz, *The Morality Of Freedom* (Oxford: Clarendon Press, 1986), 369.

³⁶¹ Jonathan Herring, “Rape and the definition of consent,” *National Law School of India Review* 26 no. 1 (2014): 66.

³⁶² Jed Rubenfeld, “The Riddle of Rape-by-Deception and the Myth of Sexual Autonomy,” *The Yale Law Journal* 122 no. 6 (2013): 1418.

sent, the individual has a right to refuse. Such a negative response to other's desires does not need any justification. This refusal is not *prima facie* wrong; thus, this decision does not require sound reasoning. Therefore, the principle of autonomy is limited; a person's freedom ends where another man's freedom begins.

Coercion, deception, and consent

One has characterized consent as "moral magic."³⁶³ It shapes the border between rape and lovemaking, a theft and a gift, battery, a boxing match, or autocracy and democracy³⁶⁴. In his article "Coercion and Consent," Konow defined coercion as the intentional act that threatens one's entitlement, compelling to a choice that otherwise the person would not have taken³⁶⁵. In the light of Locke's and David Hume's moral obligation theories to obey the government, he concluded that coercion could generate personal benefits and the public good when it constrains oneself and a larger population³⁶⁶. State intervention is also a form of coercion. The use of coercion can be justified in cases such as taxation or military service. Similarly, the restrictive measures imposed by the State due to the Covid-19 may be considered undesirable or even threatening to some entitlements. However, the State has a right to do so for the public good and security. The legitimacy of the State is the basis for the moral authority and justifiable criteria for its coercion. Even though private coercion can apply analogous reasoning, the two are independent. The private one is more circumscribed due to the contestable cases in moral justifications.

Other than coercion, deception can violate human rights by misleading the individual about some fundamental aspects of an offer. One should agree freely without coercion or deception. It means that the individual has

³⁶³ James Konow, "Coercion and Consent," *Journal of Institutional and Theoretical Economics (JITE) / Zeitschrift für die gesamte Staatswissenschaft*, Vol. 170, no. 1 (2014): 49.

³⁶⁴ *Ibid*, 49.

³⁶⁵ *Ibid*, 50.

³⁶⁶ *Ibid*, 51.

a complete picture of the risks and benefits and knows the other person involved. Free choice indeed comprises the conscientiousness of a person. Therefore, agreeing when highly intoxicated does not count as morally valid consent. However, there are minor “white lies” that are often far more compelling than the truth. It is hard to disagree that modern moral norms are “quite permissive” concerning sexual deception³⁶⁷. As Jeffrie Murphy affirms, it is only “a minor kind of fraudulent misrepresentation” to misrepresent oneself as “unusually sensitive and caring.”³⁶⁸.

Some argue against the Lenient Thesis as it involves minor deception. However, some little things that might seem of minor importance could be far more crucial for another individual. The relativity of the thought should not be underestimated. Dougherty based the argument on morally valid consent, defined as the consent that someone must have to not wrong the consenter. The consent makes permissible some actions that would not otherwise be so. Moreover, morally valid consent requires more than mere agreement³⁶⁹. He holds that another person would be seriously wronged if the deception concerns the feature of the sexual encounter to which the other person’s will is opposed³⁷⁰. If coercion can vitiate consent, deception can do so too. Since it is seriously wrong to have sex with someone without permissible consent, deceiving someone into sex is seriously wrong.

The Lenient Thesis could not constitute an acceptable account of morally valid consent. Therefore, Dougherty’s second premise is that the deceived party does not give morally right consent to sex³⁷¹. David Archard approached a notion of voluntariness. There are aspects of a sexual act—what, why, and with whom—crucial for consent. The more completely a person is misled, the less willingly she can be said to engage in that act,

³⁶⁷ Alan Wertheimer, *Consent to Sexual Relations*, (Cambridge: Cambridge University Press, 2003), 193.

³⁶⁸ Jeffrie Murphy, “Women, Violence and the Criminal Law,” in *In Harm’s Way: Essays in Honor of Joel Feinberg*, ed. Jules Coleman and Allen Buchanan (Cambridge: Cambridge University Press, 1994), 219.

³⁶⁹ Tom Dougherty, “Sex, Lies, and Consent,” *Ethics: An International Journal of Social, Political, and Legal Philosophy* 123, no. 4 (July 2013): 718.

³⁷⁰ *Ibid*, 719.

³⁷¹ *Ibid*, 720.

and the more wronged she is if she does engage in that act³⁷². On this view, someone does not validly consent to a sexual encounter when deceived about its “core” features³⁷³.

Every human being has rights over her persons and property; these rights include negative rights against interference. Speaking about it, more specifically, the person has rights against particular actions by particular individuals³⁷⁴. Indeed, the person can waive her rights by giving morally valid consent. However, these waivers are not absolute; one can take back her consent and reimpose her rights. Hence, Dougherty claims that waivers are revocable. The infringement of these rights is morally impermissible. The stringency of a specific right defines how wrong it would be to violate this right. It depends on the importance to us of a particular sphere of relations. Assuredly, controlling sexual contact is centrally significant. It does not necessarily mean that sex has to be an active, emotionally meaningful part of someone’s lifestyle, but sexual choices determine sex life. In light of the value of individual sexual rights and control, it is seriously wrong to violate someone’s rights³⁷⁵.

Morally valid consent

Michelle Madden Dempsey offers an original account of the normative force of consent, according to which consent creates exclusionary permission, and thus, is morally transformative³⁷⁶. The common concern is that one can consider the conduct victimless only because the harmed person has consented to it. In such a case, the definition of consent should be consistent with legal norms and moral values in society. Undoubtedly, consent is legally transformative as it stresses a critical consideration in many legal

³⁷² David Archard, *Sexual Consent* (Oxford: Westview, 1998), 50.

³⁷³ Tom Dougherty, “Sex, Lies, and Consent,” *Ethics: An International Journal of Social, Political, and Legal Philosophy* 123, no. 4 (July 2013): 736.

³⁷⁴ *Ibid.*, 723.

³⁷⁵ *Ibid.*, 724.

³⁷⁶ Michelle Madden Dempsey, “Victimless Conduct and the Volenti Maxim: How Consent Works,” *Crim Law and Philos* 7 (2013): 11.

doctrines concerning the assumption of risk, as informed consent to medical procedures³⁷⁷. Joel Feinberg offered one of the most influential modern accounts of the normative force of consent. According to Feinberg, the *volenti maxim: volenti non-fit injuria* (“to one who consents, no wrong is done”) captures the sense in which one’s consent transforms the moral quality of another’s conduct (Feinberg 1984, p. 115).

Tom Dougherty asserted that consenting, like promising, requires both an appropriate mental attitude and communication of such an attitude³⁷⁸. The State of California defined “affirmative consent” as “affirmative, conscious, and voluntary agreement to engage in sexual activity. It is the responsibility of each person involved in the sexual activity to ensure that they have the other or others’ affirmative consent to engage in sexual activity. Lack of protest or resistance does not mean consent, nor does silence mean consent.”³⁷⁹. These standards raised the question of whether morally valid consent requires communication.

Tom Dougherty argued that “the consent is morally valid if it generates moral permission.”³⁸⁰. Thus, the distinction between affirmative and morally valid consent is critical for understanding if affirmative consent is always needed. “Yes, Means Yes: Consent as Communication” investigated the necessity of communication in morally valid sexual consent. This issue has a significant value for the normative foundations of rape law. Meanwhile, there has been a debate on whether non-communicated intention can be sufficient for morally valid sexual consent. In “Sex and Harm in the Age of Consent,” Fischel assessed the affirmative standard of consent: it does not need to be verbal; one can express it through body language, particular conduct, and mutual initiation³⁸¹.

³⁷⁷ Ibid, 12.

³⁷⁸ Tom Dougherty, “Yes Means Yes: Consent as Communication,” *Philosophy and Public Affairs* 43 no.3 (2015): 228.

³⁷⁹ California Senate Bill 967 (2014), https://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201320140SB967.

³⁸⁰ Tom Dougherty, “Yes Means Yes: Consent as Communication,” *Philosophy and Public Affairs* 43 no.3 (2015): 226.

³⁸¹ Joseph J. Fischel, *Sex and Harm in the Age of Consent* (Minneapolis: University of Minnesota Press, 2016), 117.

Morally valid consent does not always take the form of communication. One can also communicate through nonverbal behavior. Admittedly, a person can even agree with an omission, so long as the context ensures that the omission speaks a message³⁸². The attitudinal view suggests that if the person intends to consent to intercourse, she is engaged in it voluntarily and cannot complain; she is not wronged by sex. In contrast, the performative theorists argue that even if there is the intent to consent to sex, the person can still complain about it. They separate the actions that are wanted and the ones guided by requests. Thus, a victim's complaint can be that the interaction is not consensual because she did not communicate consent³⁸³.

Some regard that communication is the must for high-stakes consent. When people undertake crucial decisions that would result in a grave moral wrong without their will, such as sex, consent is of high-stakes. Hence, it should be affirmative in those situations. Since consent must be intentional, everyone should agree that an intention is essential for morally valid consent³⁸⁴. The "performative view" denies that a mere intention can be sufficient, countering that valid consent requires communication³⁸⁵. Although people can analyze each other behavior, they cannot read other's minds. Thus, guessing if a person agreed to sex is not a worth risk to take. Dougherty claimed that the violence and the absence of the intention to consent in nonconsensual sex are very much alike. Therefore, following the performative theorists, morally permissible sex requires expressed consent.

Indeed, one could agree that sex is not one of those topics that can easily be communicated. Many people find it superfluous to discuss the intention that has been explicitly demonstrated. "Consent does not require communication: A reply to Dougherty" refutes Dougherty's primary argument on the affirmative consent in sex as a must. Promises and consent are two distinct ideas. Even though promises require communication, the

³⁸² Tom Dougherty, "Yes Means Yes: Consent as Communication," *Philosophy and Public Affairs* 43 no.3 (2015): 230.

³⁸³ Ibid, 232.

³⁸⁴ Ibid, 229.

³⁸⁵ Ibid, 230.

attitude and need alone constitute consent. While promises create obligations, expectations and give rise to reliance, “consent is merely to remove a moral barrier.”³⁸⁶ Larry Alexander, Heidi Hurd, and Peter Westen gave the “Wanted Sex” example to demonstrate those barriers were down even without the communication or miscommunication – such as in *Pool Party scenarios*.³⁸⁷ Dougherty’s position might create dilemmas for criminal law. For example, suppose sexual consent is both an attitude and communication. In that case, the law will not account for the distinctive harm a person suffers when she is a sexual intercourse victim against her wishes.

Juxtaposing promise and consent

Besides sex, consent plays other indispensable roles in life. There are various examples from the daily human routine, such as inviting guests to the residence, using someone’s property, and agreeing to medical treatment. In addition, consent is the permission to actions that will otherwise be morally impermissible. Therefore, knowing when consent requires communication, if it does at all, is crucial.

One should also distinguish consent from other ideas, such as promises. The first does not produce any responsibility on behalf of the consentor, whereas the second entails undertaking an obligation to do something³⁸⁸. While both involve the combination of dyadic duties and rights, their application creates different results and causes on these duties and rights. For example, when consenting to a guest entering home, one releases the guest from duty not to trespass. On the contrary, when one promises to visit someone’s house, they generate an obligation to do so. Tom Dougherty called them the counterpoints since consent frees people from duties. At the same time, the promise puts a duty on the promisor to do, or forbear from, a particular act, giving the right promise to require the

³⁸⁶ Larry Alexander, Heidi Hurd, and Peter Westen, “Consent does not require communication: A reply to Dougherty,” *Law and Philosophy* 35 no.6 (2016): 657.

³⁸⁷ Ibid, 658.

³⁸⁸ Ibid, 18.

declaration's commitment. "While consent eliminates these duties and waives these rights, promise creates these duties and these rights."³⁸⁹

Dougherty described consent's role in a theory of rights – "consent releases people from duties that one person owes to another."³⁹⁰ The combination of different promise and consent views creates an anomaly within a theory of rights – "in some contexts, a mere act of the will can change the parties' rights and duties; elsewhere, the will is impotent without the aid of communication."³⁹¹ Communication creates a common belief in the promise that ensures the relationships of accountability. Although, in theory, this communication could be performed implicitly and through non-verbal behavior, how could one communicate the promise without words? According to Dougherty, one should communicate the promise if it is a high-stakes one. In those circumstances, the promisor is accountable to the promisee in a significant way. Therefore, communication would need to be correspondingly clear.

In some cases, one can withdraw the consent after giving it. By revoking the consent, one reasserts the right previously waived, thus reimposing the other person's duty. Similarly, one can reverse the promise. Dougherty described the two possible ways to do that. First, the promisee may refuse the promise at the time when the promisor makes an offer. Second, after making a promise, the promisee can release the promisor. In both situations, communication is required to release the promisor from duty. But, from the attitudinal view of consent, a mere intention can waive a right and free another person from liability for consent³⁹². This perspective of consent creates tension with a performative concept of reversing promises. Thus, it leads to a further discussion on the connection between promise and consent.

³⁸⁹ Tom Dougherty, "Yes Means Yes: Consent as Communication," *Philosophy and Public Affairs* 43 no.3 (2015): 233.

³⁹⁰ *Ibid*, 232.

³⁹¹ *Ibid*, 236.

³⁹² Tom Dougherty, "Yes Means Yes: Consent as Communication," *Philosophy and Public Affairs* 43 no.3 (2015): 236.

Dougherty concluded that consent, like to promise, must act publicly to produce the common belief that guarantees that rights have a practical outcome by framing mutually recognized accountability relations³⁹³. At the same time, he attributed sexual consent to a high-stakes one, where a correspondingly high degree of shared belief in each other's consent is needed. Thus, creating and maintaining accountability in sexual encounters is essential. Moreover, it has instrumental value in protecting people from unwanted sex and constitutive value in defining sexual encounters for partners³⁹⁴.

It is also critical that consent communication is unambiguous. Ambiguity is more likely to happen when alcohol, drugs are involved. Intoxication can diminish people's abilities to send and receive signals through nonverbal behavior. Similarly, ambiguity is more likely in communication between relatively inexperienced individuals; limited communicative ability in a speaker and limited interpretive ability in a listener is likely to preclude the clear communication needed for sexual consent³⁹⁵. With these factors, nonverbal behavior fails to communicate consent adequately. In such a context, unambiguous consent would require explicit communication.

Capacity to consent

Presently, there are international, regional, and national legal frameworks protecting individual sexual rights. The Rome Statute provides the broadest statutory recognition of gender-based violence as a crime under international criminal law to date³⁹⁶. In article 7(1)(g), the Rome Statute classifies "rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable

³⁹³ Ibid, 251.

³⁹⁴ Ibid, 251.

³⁹⁵ Ibid.

³⁹⁶ United Nations, Department of Economic and Social Affairs, Division for the Advancement of Women, *Handbook for Legislation on Violence against Women*, New York: United Nations publication, no. E.10.IV.2, 2010.

gravity” committed “as part of a widespread or systematic attack directed against any civilian population” as crimes against humanity³⁹⁷.

In addition to developing legal and policy instruments at the regional level, there is also an increasing body of jurisprudence on sexual violence under the regional human rights treaties. Cases heard by the European Court of Human Rights and the Inter-American Commission on Human Rights have directed States to: create appropriate criminal legislation, review and revise existing laws and policies, and monitor legislation enforcement. In *X and Y v. the Netherlands*³⁹⁸, The European Court of Human Rights found that the Netherlands had breached its human rights responsibilities under the European Convention for the Protection of Human Rights and Fundamental Freedoms (Article 8) by failing to create appropriate criminal legislation applicable to the rape of a mentally disabled young woman.

Across jurisdictions, the law denies the capacity to consent to sex in particular circumstances. Unavoidably a law that restricts the ability to agree to a distinct sexual act also affects individual liberty. Laws that designate that a person cannot consent in advance to unconscious sexual activity or that a person under a certain age or with a particular intellectual capacity cannot consent impact sexual freedom. Regardless of the substantive definition of consent operative in a specific jurisdiction, these legal regulations remove actors’ ability to engage in consensual sexual activity without some risk of criminal liability.

In Canada, the capacity to consent to sex is determined based on age, level of consciousness, cognitive ability, the social utility of the sex act, and degree of consanguinity³⁹⁹. Most jurisdictions formulate the capacity to consent to sexual contact by some or all of these same variables. The growing

³⁹⁷ Rome Statute of the International Criminal Court.

³⁹⁸ *X and Y v. the Netherlands*, European Court of Human Rights 8978/80, 1985.

³⁹⁹ Criminal Code, RSC 1985, c. C-46, § 150.1 (age of consent), *R v. J.A.*, 2011 SCC 28, [2011] 2 SCR 440 (consciousness); Criminal Code, RSC 1985, c. C-46, § 153.1(1) (mental capacity); *R v. Jobidon*, [1991] 2 SCR 714, 128 NR 231; *R v. Welch*, [1995] 25 OR (3d) 665; 101 CCC (3d) 216 (social utility). Elaine Craig, “Capacity to Consent to Sexual Risk,” *New Criminal Law Review: An International and Interdisciplinary Journal*, 17, no. 1 (Winter 2014): 104.

competition between political and religious interests, transforming social order, affects the changing legal capacity parameters to consent to sexual contact in all world. The aftermath of revelations about the sexual conduct of Jimmy Savile arose the debate in Britain on the age of consent⁴⁰⁰. Rape cases in England proved the difficulties for sexual violence victims to prove rape in a court. In 2018 Crown Prosecution Service's annual report showed a 23% drop in prosecutions for rape; however, a new analysis of the latest crime statistics revealed that just 1.5% of all rape cases lead to a suspect being charged or summoned⁴⁰¹. According to the E.U. broad survey has found over 1 in 10 people in the U.K. think being drunk or on drugs may be an excuse for sexual violence⁴⁰².

Most theorists recognize there are particular facts, the presence of which nullifies the consent⁴⁰³. Hurd points out that "prima facie consent is the possession of the subjective mental State (which she calls *mens rea of the consent*) along with an external manifestation of the consent (the *actus reus of the consent*)."⁴⁰⁴ The lack of the capacity or the opportunity for meaningful choice in consenting fails to generate valid consent. Mark Dsouza names the conditions that "defeat a person's status as a responsible agent; a person with infancy, insanity, and automatism cannot exercise the moral autonomy necessary to give genuine consent."⁴⁰⁵ Besides, according to Dougherty's argument, the deception falls under the factors that vitiate consent. Therefore, it impairs a proper choice of an individual and hinders seeing the actual situation. Hence, such a mistake makes a person incapable of making a choice.

⁴⁰⁰ Ellie Crumbo, Reacting to Child Abuse by Lowering the Age of Consent Would Be Cruel, THE GUARDIAN, May 10, 2013, <http://www.guardian.co.uk/commentisfree/2013/may/10/child-abuse-age-of-consent>.

⁴⁰¹ Chiara Capraro, "The Law is clear – sex without consent is rape. So why is Justice increasingly out of reach?" HUFFPOST U.K. edition, July 8, 2019.

⁴⁰² Ibid.

⁴⁰³ Mark Dsouza, "Undermining prima facie consent in the criminal law," *Law and Philosophy* 33, no. 4 (July 2014), p. 498.

⁴⁰⁴ Ibid, 499.

⁴⁰⁵ Ibid, 502.

To sum up, consent is no absolute right of each individual. The government interferes with forbidding wrongful behavior and protecting others. The State's failure to provide an appropriate criminal legislature affects individual freedoms. Scholars agree that capability is a key to morally permissible consent. Hence, consent can only be valid if the person has the right to give one.