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Criminalizing Sex: Is Consent all that Matters?

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Abstract
In *Criminalizing Sex*, Stuart P Green aims to provide a unified liberal theory of sexual offenses law. Green's strategy is to provide a rational reconstruction of sexual offenses law that centres consent. In this article, I raise some doubts about whether Green fully succeeds in his aim. Nevertheless, *Criminalizing Sex* is an impressive book, and essential reading for anyone interested in the liberal foundations of sexual offenses law.

Keywords Consent · Criminal law · Stuart P Green · Criminalizing sex

1 Introduction

Stuart Green's *Criminalizing Sex* is an ambitious and impressive book. In it, Green attempts to provide – as the book's subtitle suggests – a 'unified liberal theory' of sexual offenses law.[1] Providing such a theory for even a single jurisdiction would be an impressive achievement. But Green sets his ambitions even higher, aiming to provide a unified liberal theory of sexual offenses law that is generally applicable across common law jurisdictions, and perhaps beyond.

In this article, I raise some doubts about whether Green succeeds in providing a unified liberal theory of sexual offenses law. I start, in Sect. 1, by providing an overview of the book's methodology of 'normative reconstruction', and of the book's organizing idea, which I call the *Exclusivity of Consent Principle*. Roughly speaking, the Exclusivity of Consent Principle is the idea that sex should be criminalized if but

[1] Stuart P Green, *Criminalizing Sex: A Unified Liberal Theory* (Oxford University Press 2020). Page references in the footnotes that follow refer to this text, unless otherwise specified.

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only if it is nonconsensual. In Sect. 2, I argue that the Exclusivity of Consent Principle is, strictly speaking, inconsistent with Green's own view about the role of *affirmative consent*. Green's view about the role of affirmative consent is plausible. Accordingly, I suggest we should reject the Exclusivity of Consent Principle. However, rejecting the Exclusivity of Consent Principle does not commit us to abandoning the project of providing a normative reconstruction of sexual offenses law which centers consent. In Sect. 3, I suggest a revised principle to try to save this Greenian project, which I call the *Centrality of Consent Principle*. In Sect. 4, I test the plausibility of the Centrality of Consent Principle against Green's views about sadomasochistic sex. On its face, according to the Centrality of Consent Principle, it is impermissible to criminalize sadomasochistic sex to which genuine and affirmative consent has been given. However, many people – including Green himself – believe that it is permissible to criminalize at least some such cases. I suggest two possible strategies for reconciling this belief with the Centrality of Consent Principle. The first strategy relies on the idea of substantive constraints of consent. I suggest that this may come at too high a theoretical cost. The second strategy limits the scope of the Centrality of Consent Principle, so that it governs only when it is permissible to criminalize sexual behavior *qua* sexual behavior. I suggest that this strategy is more promising. However, its plausibility depends on why the law criminalizes wrongs such as sexual assault using distinct legal provisions from those it uses to criminalize wrongs such as nonsexual assault. I am unsure how Green would answer this question. Whatever his answer – as I conclude in Sect. 5 – *Criminalizing Sex* is essential reading for anyone interested in the liberal foundations of sexual offenses law.

2 Criminalizing Sex: A Brief Overview

It is helpful to start with a brief overview of *Criminalizing Sex*. As Green explains at the book's outset, he seeks to provide a 'normative reconstruction' of sexual offenses law. Normative reconstruction involves dismantling the relevant law to decide what fits into a '"coherent whole" and what needs to be "discarded or abandoned or at least revised."'[2]

Green's starting point is to note that, at least in liberal Western democracies, the 'broad arc of history bends towards increased punitiveness with respect to nonconsensual [sexual] conduct and greater permissiveness with respect to consensual [sexual] conduct.'[3] As a key example of the former trend, Green cites the abolition of the marital rape exemption. As an example of the latter, he cites the decriminalization of consensual sex between two men.[4]

We can say more about the precise kind of normative reconstruction Green aims to provide. He aims, as he suggests in the book's subtitle, to provide a 'unified liberal theory' of sexual offenses. It is liberal in the sense that it prioritizes the liberal value of autonomy. In this respect, Green takes his cue from the liberal tradition stretch-

[2] xvii (references omitted).

[3] xvi.

[4] xv.

ing from John Stuart Mill, through HLA Hart and Joel Feinberg to the present day.[5] According to Green,

> In the realm of sexual behavior specifically, it [this liberal tradition] assumes that the government has an obligation to enact and enforce legislation protecting individuals from having their negative sexual autonomy infringed and to refrain from passing laws that would prevent them from exercising their positive sexual autonomy (alone or with competent partners). And the fulcrum upon which all this turns is consent.[6]

Green's picture, then, is as follows. The liberal tradition prioritizes the value of autonomy. And consent protects the value of autonomy. Accordingly, the liberal tradition should prioritize consent. This picture leads Green to the following General Principle:

> *General Principle*. [A]n ideal system of criminal law would contain provisions that adequately criminalize all cases in which an offender subjects a victim to nonconsensual sex but do so without criminalizing any cases involving sex that is genuinely consensual or aconsensual and would not adversely impact third parties.[7]

This General Principle ends in two caveats. One concerns adverse impacts on third parties. This leaves open possibilities that I suspect will strike many as plausible. For example, it leaves open the possibility that an ideal system of criminal law might criminalize sex to which the participants genuinely consent but which occurs in public (see Green's discussion of indecent exposure in chapter 13). The other caveat concerns aconsensual sex. That is sex where there is no subject to give or withhold consent. For example, sex with a blow-up doll, or – more controversially – sex with nonhuman animals (bestiality, chapter 17) and sex with a human corpse (necrophilia, chapter 18). According to the General Principle, an ideal system of criminal law would not criminalize any cases of aconsensual sex.

In this paper, my focus will be on cases of sexual contact between adult human persons which do not adversely impact third parties. This allows us to focus on a simpler principle, without the related caveats, which we can call the *Exclusivity of Consent Principle*:

> *Exclusivity of Consent Principle*. An ideal system of criminal law would contain provisions that adequately criminalize all cases in which an offender subjects a victim to nonconsensual sex but do so without criminalizing any cases involving sex that is genuinely consensual.

[5] 39.

[6] 43-44.

[7] xvii, 76.

According to the Exclusivity of Consent Principle, an ideal system of criminal law would not criminalize behavior if (but only if) it is *genuinely* consensual. This naturally gives rise to the question of what it takes for consent to be genuine. For consent to be genuine in the relevant sense requires, at a minimum, that it not be induced by serious coercion or deception. Green considers these issues in chapters 7 and 6, respectively. Genuine consent also requires the consent-giver to have *capacity* (which Green considers in chapter 8). These chapters will perhaps attract the most critical engagement. For it is controversial how and to what extent coercion, deception, and lack of capacity prevent a person's sexual consent from being genuine. Whatever the ultimate answers to these important and difficult questions, Green lays out the issues and competing positions with admirable clarity.

Even where there is no coercion, deception, or incapacity, there is the question of what it takes to perform an act of consent.[8] This, too, is controversial. According to what Green calls *attitudinal* accounts of consent, it is possible for someone to perform an act of consent purely mentally.[9] *Communicative* accounts of consent deny this.[10] Some communicative accounts combine the mental element with a behavioral element, so that performing an act of consent requires both a mental component and a non-mental act of communication.[11] Other communicative accounts jettison the mental component, so that it is possible to perform an act of consent exclusively by behaving in certain ways.[12]

Green implicitly adopts an attitudinal view of consent. We can infer this from the way Green formulates two sexual offenses he proposes. Green calls his proposed primary offense 'sexual assault involving non-consensual sex.' This offense covers cases such as *Unwilling*:

> *Unwilling*. A is not willing for B to have sex with A. B nevertheless has sex with A.[13]

The 'non-consent' in this primary offense refers to the absence of A's consent in an attitudinal sense: it is the absence of A's mental willingness for B to have sex with A. This offense constitutes the most serious kind of sexual wrongdoing.

By contrast, Green calls the secondary offense, 'sexual misconduct involving (consensual) sex in the absence of affirmative consent.'[14] This secondary offense aims to cover a less serious kind of wrongdoing than the primary offense, but which

[8] This is sometimes called a 'token' of consent. See e.g. Alan Wertheimer, *Consent to Sexual Relations* (Cambridge University Press 2003) 31.

[9] 26.

[10] 26.

[11] See Tom Dougherty, 'Yes Means Yes: Consent as Communication' (2015) 43 Philosophy & Public Affairs 224.

[12] See e.g., Renée Jorgensen Bolinger, 'Moral Risk and Communicating Consent' (2019) 47 Philosophy & Public Affairs 179.

[13] For B's behavior to be a crime, B must also have the relevant *mens rea*. Both the *Unwilling* and *Uncommunicated* cases discussed here are simplified versions of cases first formulated in Tom Dougherty, 'Affirmative Consent and Due Diligence' (2018) 46 Philosophy & Public Affairs 90.

[14] 94.

is nevertheless sufficiently serious to justify criminalization. The secondary offense covers cases like *Uncommunicated*:

> *Uncommunicated*. A is mentally willing for B to have sex with A. However, A does not communicate this willingness to B because A would feel awkward doing so. B has sex with A.[15]

Given Green's name for the secondary offense, we can infer that on Green's view, *Uncommunicated* is a case in which A *consents* to B's having sex with A From this it follows that it is possible, on Green's view, for A to consent while being mentally willing but without communicating this willingness to B. It follows that Green has an attitudinal view of consent. What B lacks in *Uncommunicated*, on Green's view, is A's *affirmative* (i.e. communicated) consent.[16]

In this section, I have provided a brief overview of *Criminalizing Sex*. This has included introducing the Exclusivity of Consent Principle, and Green's proposed secondary offense of sexual misconduct involving consensual sex in the absence of affirmative consent. In the following section, I consider the relationship between these two ideas.

3 Rejecting the Exclusivity of Consent Principle

In the previous section, we saw that Green proposes a secondary offense of sexual misconduct involving consensual sex in the absence of affirmative consent. I share Green's view that there should be such an offense, for the reasons that Green outlines. However, for Green to suggest such an offense is somewhat puzzling. Recall that the Exclusivity of Consent Principle tells us that an ideal system of criminal law would not criminalize any cases involving sex that is genuinely consensual. However, Green's proposed secondary offense would criminalize the behavior in *Uncommunicated*, despite the fact that this case involves sex that is – in Green's view – genuinely consensual. Green explicitly acknowledges this consequence of his view. He says that his proposed secondary offense would have the effect of 'criminalizing at least some conduct that is not nonconsensual.'[17] In this section, I consider whether it is possible to reconcile the Exclusivity of Consent Principle with Green's view that there should be a secondary offense covering cases like *Uncommunicated*. I consider two possibilities. The first aims at reconciliation by appealing to the nonideal nature of our criminal law. I argue that this strategy is unpromising. The second strategy gives up on the goal of reconciliation. Instead, it rejects the Exclusivity of Consent Principle to accommodate Green's insight that there ought to be an offense that covers cases like *Uncommunicated*, replacing it with a weaker principle. I argue that this

[15] As in *Unwilling*, for B's behavior to be a crime, B must also have the relevant *mens rea*.

[16] Communicative accounts of consent can differ about the degree to which an act of consent requires that the communication be successful. These differences need not concern us here.

[17] 88.

is a more promising strategy. I argue that to be fully plausible, however, the replacement principle must overcome two problems.

Is there a way to reconcile the Exclusivity of Consent Principle with the view that we should criminalize cases like *Uncommunicated*? One strategy we might try is to appeal to the nonideal nature of our criminal law. The Exclusivity of Consent Principle says only that an *ideal* system of criminal law would not criminalize any case involving sex that is genuinely consensual. However – as many practicing lawyers would doubtless attest – our actual system of criminal law is far from ideal. Therefore, the argument goes, the Exclusivity of Consent Principle does not preclude criminalization of cases like *Uncommunicated* in our actual, nonideal, criminal law.

This resort to the nonideal nature of our criminal law is an unpromising strategy by which to defend a Greenian view. After all, the process of normative reconstruction at the heart of the book aims to both explain and justify the criminal law of sexual offenses. Insofar as the legal provisions in our actual criminal law cannot be justified, those offenses ought to be jettisoned.

A second strategy gives up on the goal of reconciliation. This strategy is to reject the Exclusivity of Consent Principle, and to replace it with a weaker principle. Instead of insisting – as the Exclusivity of Consent Principle does – that an ideal system of criminal law would *never* criminalize consensual sex, we might say something weaker. And Green sometimes writes as if this is his view. For example, he says that when the sex individuals are engaged in is genuinely consensual, 'we can normally assume that the government should keep its hands off.'[18] This suggests something like what we might call the *Weak Consent Principle*:

> *Weak Consent Principle*. It is *normally* but not *always* impermissible to criminalize sex that is genuinely consensual.

The Weak Consent Principle could deliver the intuitively correct verdict that it is permissible to criminalize the behavior in cases like *Uncommunicated*. This is because the presence of genuine consent in such cases is not enough to rule out the possibility that it is permissible to criminalize the sex in those cases, according to the Weak Consent Principle.

There are two possible problems with replacing the Exclusivity of Consent Principle with the Weak Consent Principle. The first concerns the explanatory and justificatory work done by the Exclusivity of Consent Principle. Recall that there were historically legal prohibitions on sex that did not focus on whether it was consensual. A key example is the historic criminalization of sexual activity between two men. I believe that the criminalization of such sex was morally impermissible. And I am confident that Green would agree. And the Exclusivity of Consent Principle provides us with an explanation and justification for why. For the Exclusivity of Consent Principle tells us that sexual behavior should be criminalized *only* if it is nonconsensual. So sex between two men, provided it is genuinely consensual, should not be criminalized.

[18] 44.

Taken alone, however, the Weak Consent Principle cannot provide the same explanation and justification for why sex between two men should not be criminalized. This is because, according to the Weak Consent Principle, it is only *normally* – but not *always* – impermissible to criminalize sex that is genuinely consensual. Call this the *Explanatory Problem*.

The second problem is that the Weak Consent Principle does not give us a comprehensive account of which sexual behavior may permissibly be criminalized. Call this the *Comprehensiveness Problem*. To give us a comprehensive account, the Weak Consent Principle must be supplemented by a second principle. That second principle must tell us which (if any) genuinely consensual sex it is permissible to criminalize, and which not.

4 The Centrality of Consent Principle

In this section I suggest a revised principle, which I call the Centrality of Consent Principle. The Centrality of Consent Principle combines the Weak Consent Principle with a supplementary principle incorporating Green's insight about the importance of affirmative consent.

In searching for a principle to supplement the Weak Consent Principle, a natural place to look is in Green's discussion of the importance of affirmative consent. A plausible supplementary principle, I suggest, focuses on the importance of affirmative consent. For the reasons Green outlines, it is plausible that it is permissible to criminalize B's having sex with A without A's affirmative consent, even if that sex is genuinely consensual.

Combining Green's insights about the importance both of genuine attitudinal consent and of affirmative consent, we can formulate the *Centrality of Consent Principle*:

> *The Centrality of Consent Principle.* It is permissible to criminalize B's having sex with A if but only if the sex satisfies at least one of the following conditions:
> (1) *The Attitudinal Consent Condition*. A does not give genuine attitudinal consent to B's having sex with A. That is to say, A is not genuinely willing for B to have sex with A.
> (2) *The Affirmative Consent Condition*. A does not give affirmative consent to B having sex with A. That is to say, A does not communicate that A is willing for B to have sex with A.[19]

According to the Centrality of Consent Principle, it is impermissible to criminalize sex that meets two requirements. The first requirement – provided by the Attitudinal Consent Condition – is that the sex must be genuinely consensual. This requirement is a version of the Weak Consent Principle. The second requirement – provided by the Affirmative Consent Condition – incorporates Green's insight that that there must be affirmative consent to sex.

[19] Again, for B's behavior to amount to a crime, B must also have the relevant *mens rea*.

Importantly, according to the Centrality of Consent Principle, it is permissible to criminalize some, but only some, genuinely consensual sex – namely, genuinely consensual sex that involves no affirmative consent, but no other genuinely consensual sex. In this way, the Centrality of Consent Principle provides us with a comprehensive account of which sexual behavior may (and may not) permissibly be criminalized, thereby overcoming the Comprehensiveness Problem.

The Centrality of Consent Principle also avoids the Explanatory Problem, for two related reasons. The first is its extensional adequacy. The Centrality of Consent Principle generates intuitively correct verdicts in the cases we have so far considered. On the one hand, according to the Centrality of Consent Principle, it is permissible to criminalize B's behavior in *Unexpressed*. This is because the sex in *Unexpressed* does not satisfy the requirements of the Affirmative Consent Condition. On the other hand, it is impermissible to criminalize sex between two men, provided there is affirmative consent to that sex.

The second reason the Centrality of Consent Principle avoids the Explanatory Problem is that it has a plausible theoretical motivation. Recall Green's picture of the role of consent in liberal sexual morality. On that picture, the liberal tradition prioritizes the value of autonomy, and consent protects that value. Authors in the liberal tradition often claim a link between consent and autonomy. However, it is less common for them to articulate precisely what the link is. The Centrality of Consent Principle's two conditions help us distinguish two different ways in which consent protects the value of autonomy.

The Attitudinal Consent Condition protects against *infringements* of A's negative sexual autonomy. A's negative sexual autonomy is A's moral claim right against B having sex with A unless A is genuinely willing for B to do so. If A is not genuinely willing for B to have sex with A, B thereby infringes A's moral claim right against infringements of A's negative sexual autonomy. This is what goes wrong in cases like *Unwilling*.

However, infringing someone's sexual autonomy is not the only way to fail to live up to the moral demands of the value of autonomy. One can also fail to *respect* someone's autonomy.[20] This is where the Affirmative Consent Condition plays a role.[21] The idea is that B can appropriately respect A's autonomy only if B's behavior is appropriately sensitive to whether A attitudinally consents. B's behavior can be appropriately sensitive to whether A attitudinally consents only if B reliably knows whether A attitudinally consents. B can reliably know whether A attitudinally consents only if A communicates A's willingness for B to engage in the relevant behavior.

The Centrality of Consent Principle is an appealing Greenian principle. It avoids the oversimplified picture painted by the Exclusivity of Consent Principle, according to which it is impermissible to criminalize any genuinely consensual sex. But it does

[20] For discussion, see Neil C Manson, 'Permissive Consent: A Robust Reason-Changing Account' (2016) 173 Philosophical Studies 3317, 3330. Citing Suzanne Uniacke, 'Respect for Autonomy in Medical Ethics' in David Archard, and others (eds), *Reading Onora O'Neill* (Routledge 2013).

[21] This account of the relationship between affirmative consent and respect for autonomy is borrowed from Dougherty (n 13). The following discussion of Dougherty's view of that relationship is from Karamvir Chadha, 'Sexual Consent' in Brian D Earp, Clare Chambers, and Lori Watson (eds), *The Routledge Handbook of Philosophy of Sex and Sexuality* (Routledge 2023) 222.

so by appealing to the liberal value of autonomy – the same value that animates the Exclusivity of Consent Principle.

5 Testing the Centrality of Consent Principle

In this section, I test the plausibility of the Centrality of Consent Principle. To do this, I consider Green's views about sadomasochistic sex. It seems possible to give genuine and affirmative consent to at least some sadomasochistic sex. Intuitively, however, it seems permissible to criminalize the behavior in at least some of these cases. If all this is correct, it seems we must reject the Centrality of Consent Principle. In this section, I offer two possible strategies for reconciling the Centrality of Consent Principle with the intuition that it is permissible to criminalize at least some sadomasochistic sex to which genuine and affirmative consent has been given. The first strategy relies on the idea of substantive constraints on the genuineness of consent. I suggest this strategy may come at too high a theoretical cost. The second is to restrict the scope of the Exclusivity of Consent Principle. I suggest that this strategy is more promising. However, whether this strategy is fully plausible depends on why the law criminalizes wrongs such as sexual assault using distinct legal provisions from those it uses to criminalize nonsexual assault.

Let us start by considering an example of sadomasochistic sex. This is a simplified example based on a real case, *R v Brown*:[22]

> *Sadomasochistic Sex*. A has capacity, and is not induced by coercion or deception. A gives affirmative consent to B making sexual contact with A including: nailing A's foreskin and scrotum to a board; inserting hot wax into A's urethra; and burning A's penis with a candle. B does these things to A.

Is it permissible to criminalize B's behavior in this case? If we accept the Centrality of Consent Principle, then it appears the answer must be no. After all, A has capacity and is not induced by coercion or deception, and gives affirmative consent to B's behavior. Yet many people – including the judges in *Brown* – find this answer powerfully counterintuitive. They believe it is permissible to criminalize B's behavior. And Green seems to agree. His own proposed legal regime 'would allow people to consensually slap and bind their sexual partners but not to choke or cut them.'[23] It is natural to assume, then, that Green believes it is permissible to criminalize B's behavior in *Sadomasochistic Sex*.

Is it possible to reconcile the Centrality of Consent Principle with the intuition that it is permissible to criminalize B's behavior in *Sadomasochistic Sex*? In the remainder of this section, I consider two strategies for doing so.

[22] Brown [1994] 1 AC 212 (HL).

[23] 294.

5.1 Substantive Constraints on the Genuineness of Consent

One strategy for reconciliation relies on a distinction between two kinds of constraints on whether consent is genuine. The first are what we might call *procedural* constraints on the genuineness of consent.[24] Plausible procedural constraints on the genuineness of consent include that the consent-giver must have capacity to consent, and that their consent must not be induced by serious coercion or deception. As these examples help illustrate, the key point about procedural constraints is that they apply largely independently of what is consented to.[25] We can contrast procedural constraints with *substantive* constraints on consent. Substantive constraints on consent prevent consent being genuine when it is given to certain kinds of action. For example, it might be impossible to give genuine consent to being tortured or to being enslaved. More controversially, it might be impossible to give genuine consent to being killed. Now, it is possible to deny the existence of any substantive constraints on the genuineness of consent.[26] However, this is a minority view. As Green himself recognizes, 'many self-proclaimed liberals' accept the existence of at least some substantive constraints on consent.[27] And this includes liberals such as Mill, in whose tradition Green takes himself to be writing.[28]

Let us assume for the sake of argument that there are substantive constraints on the genuineness of consent, and that those constraints preclude the possibility of genuine consent to B's behavior in *Sadomasochistic Sex*. If all that is correct, then we have a way of reconciling the Centrality of Consent Principle with the intuition that it is permissible to criminalize B's behavior. According to the Centrality of Consent Principle, it is permissible to criminalize B's behavior if A does not give genuine attitudinal consent to that behavior (due to the Attitudinal Consent Condition). And due to the assumed substantive constraints on the genuineness of consent, it is not possible for A to give genuine attitudinal consent to B's behavior in *Sadomasochistic Sex*. It follows that, according to the Centrality of Consent Principle, it is permissible to criminalize B's behavior in *Sadomasochistic Sex*.

However, this strategy comes at a heavy theoretical cost. It saves the Centrality of Consent Principle, but in a way that threatens its unifying explanatory power. This is because we need an account of the substantive constraints on the genuineness of consent. This account will have to rely on values other than autonomy, at least as

[24] The distinction between procedural and substantive constraints on consent is from Keith Hyams, 'When Consent Doesn't Work: A Rights-Based Case for Limits to Consent's Capacity to Legitimise' (2011) 8 Journal of Moral Philosophy 110.

[25] The caveat 'largely' independent is necessary because there may be some ways in which procedural constraints depend on the substance of what is consented to. For example, a 13-year-old may have capacity to give genuine consent to a medical mouth swab but lack capacity to give genuine consent to sexual intercourse. For an adult, the level of coercion that would prevent their consent to sexual intercourse from being genuine may be different from the level of coercion that would prevent their consent to a colleague borrowing their pen from being genuine.

[26] For a view like this, see Stephen Kershnar, 'A Liberal Argument for Slavery' (2003) 34 Journal of Social Philosophy 510.

[27] 282.

[28] For a discussion of the relevant literature on Mill's views, see David Archard, 'Freedom Not to Be Free: The Case of the Slavery Contract in J. S. Mill's on Liberty' (1990) 40 The Philosophical Quarterly 453.

Green conceives of autonomy. For autonomy, according to Green, is the right to 'act in accordance with [one's] own desires and agency, subject only to the restriction that, in so doing, [one does] not impede the freedom of others to do the same.'[29] In *Sadomasochistic Sex*, A acts in accordance with their own desires and agency, and does not impede the freedom of others to do the same. Accordingly, any substantive constraints on the genuineness of A's consent will have to rely on values other than autonomy. There are many other values that might be relied on in this way. One candidate value is dignity. Perhaps A cannot genuinely consent to behavior that undermines A's dignity, and *Sadomasochistic Sex* involves such behavior. Another candidate value is harm prevention. Perhaps A cannot genuinely consent to serious physical harm, which is present in *Sadomasochistic Sex*. Whatever the value that places substantive constraints on the genuineness of A's consent, it is a value other than autonomy. However, if we accept that values other than autonomy affect which sexual behavior may permissibly be criminalized, this comes at a heavy theoretical cost for the Greenian project. For once we accept this, the theoretical motivation for a consent-based principle such as the Centrality of Consent Principle becomes unclear. The initial motivation was that consent protects autonomy. But if autonomy is not the only value we must protect, then there is no motivation for thinking that the principles governing the permissible criminalization of sexual behavior must be limited to such consent-based principles.

5.2 Limiting the Scope of the Centrality of Consent Principle

To avoid this heavy theoretical cost, we might instead try a different strategy for reconciling the Centrality of Consent Principle with the intuition that it is permissible to criminalize B's behavior in *Sadomasochistic Sex*. This second strategy limits the scope of the Centrality of Consent Principle. The thought here is that the Centrality of Consent Principle is limited to the issue of when it is permissible to criminalize sexual behavior *qua* sexual behavior. This strategy accepts that it is permissible to criminalize B's behavior in *Sadomasochistic Sex*. However, it insists that the reason that criminalization is permissible has nothing to do with B's behavior being sexual. Instead, the feature of *Sadomasochistic Sex* that makes criminalization permissible is that B seriously physically harms A. And it is a familiar thought that it is permissible for the law to criminalize such physical harm, even if the person harmed gives genuine and affirmative consent. This explanation fits neatly with the decision in *R v Brown*, where the defendants were charged and convicted of nonsexual assaults under the Offences Against the Person Act 1861.

I think this is the most promising strategy for reconciling the Centrality of Consent Principle with the intuition that it is permissible to criminalize B's behavior in *Sadomasochistic Sex*. However, I think there is a question that needs answering before this strategy becomes fully plausible.

The law criminalizes wrongs such as sexual assault using distinct legal provisions from those it uses to criminalize wrongs such as nonsexual assault. We could instead have just one offense of touching someone – whether sexually or nonsexually – with-

[29] 19 (citations omitted).

out their genuine and affirmative consent. Why, as John Gardner asks, are these not 'collapsed into one crime of "doing to another that to which they do not consent"?'[30]

The plausibility of this strategy depends on the answer to this question. On the one hand, Green says that 'Sexual assault differs from other assaults in the particular wrong it entails; unjustifiably touching someone who does not want to be touched is morally wrong, but forcing someone to engage in sexual contact is almost invariably treated as a distinct offense.'[31] In other words, Green seems to accept that when it comes to nonconsensual physical contact, whether the contact is sexual makes a difference to how it should be criminalized: the law should individuate offenses of nonconsensual physical contact in a way that distinguishes the sexual from the nonsexual.

On the other hand, when it comes to physical contact that harms another person, Green seems to deny that whether the contact is sexual makes a difference to how that contact should be criminalized. For example, he says that 'using sex to transmit a disease is wrongful, but it is not clear that it is qualitatively worse than doing so by means of a (nonsexual) blood transfusion.'[32] Accordingly, we might expect Green to say something similar about B's behavior in *Sadomasochistic Sex*. If this is Green's view, however, it is unclear what principled reason there could be for treating the sexual and nonsexual differently when it comes to consent, but the same when it comes to harm. It seems that whatever considerations incline us to individuate the sexual from the nonsexual when it comes to nonconsensual contact should also incline is to individuate the sexual from the nonsexual when it comes to harmful contact.

6 Summary and Conclusions

I began by clarifying the project of Green's book, and introducing its main principle, the Exclusivity of Consent Principle. According to the Exclusivity of Consent Principle, an ideal system of criminal law would contain provisions that adequately criminalize all cases in which an offender subjects a victim to nonconsensual sex but do so without criminalizing any cases involving sex that is genuinely consensual. I have argued that the Exclusivity of Consent Principle is inconsistent with Green's own view about the role of affirmative consent. I have suggested that Green's view about the role of affirmative consent is plausible. Accordingly, I have suggested we should reject the Exclusivity of Consent Principle. I have suggested an alternative principle, called the Centrality of Consent Principle, which accommodates the importance of affirmative consent. Like the Exclusivity of Consent Principle, the Centrality of Consent Principle is animated exclusively by the value of autonomy. However, it improves on the Exclusivity of Consent Principle by capturing – though its two conditions – two distinct ways in which consent and autonomy are linked. The

[30] John Gardner, 'The Wrongness of Rape', *Offences and Defences: Selected Essays in the Philosophy of Criminal Law* (Oxford University Press 2007) 3. An earlier version of this essay appeared as John Gardner and Stephen Shute, 'The Wrongness of Rape', *Oxford Essays in Jurisprudence* (Clarendon Press 2000).

[31] 14.

[32] 15.

Attitudinal Consent Condition protects against infringements of sexual autonomy, whereas the Affirmative Consent Condition protects respect for sexual autonomy. I have tested the plausibility of the Centrality of Consent Principle against Green's views about sadomasochistic sex. On its face, according to the Centrality of Consent Principle, it is impermissible to criminalize any sadomasochistic sex to which genuine and affirmative consent has been given. However, I noted that many – including Green himself – believe this to be powerfully implausible. Accordingly, I suggested two possible strategies for reconciling this belief with the Centrality of Consent Principle. The first strategy relied on the idea of substantive constraints on consent. I suggested that this may come at too high a theoretical cost, because it is unclear why relying on values other than autonomy should motivate a purely consent-based principle for when it is permissible to criminalize sexual behavior. The second strategy was to limit the scope of the Centrality of Consent Principle, so that it governs only when it is permissible to criminalize sexual behavior *qua* sexual behavior. I have suggested that this strategy is more promising. However, its plausibility depends on why the law criminalizes wrongs such as sexual assault using distinct legal provisions from those it uses to criminalize wrongs such as nonsexual assault. I am unsure how Green would answer this question. Whatever his answer, *Criminalizing Sex* is essential reading for anyone interested in the liberal foundations of sexual offenses law.

Declarations

Research Involving Human Participants and/or Animals Not applicable.

Informed Consent Not applicable.

Conflicts of Interest Not applicable.