Re-Negotiating the Boundary between Sex and Sexual Violation: Abstract

This paper proposes a new model for sexual offending based around the idea that all parties must have the “freedom to negotiate” the fact and nature of their participation in a sexual act. It is argued that this is preferable to the current “consent” model because it involves interrogating the defendant’s behaviour in context, rather than primarily scrutinising the complainant’s behaviour to ascertain whether it gave rise to a reasonable inference of consent. It also provides greater scope to consider the context of a contested sexual encounter, and to take into account factors such as unequal power dynamics between the parties and/or a history of abuse.

The paper focuses on exploring how such a model would work in practice. It considers the kind of factors that would restrict freedom to negotiate, and whether they should be constructed as issues of law or fact. It addresses the question of when this freedom would be sufficiently restricted to amount to a criminal offence, drawing on critiques of gross negligence manslaughter and the Ghosh test for dishonesty in order to avoid the pitfalls of overly vague criminal standards. It also considers the kinds of sexual behaviour that would be covered, and the relationship between different forms of sexual violation.