German Law Journal (2021), **22**, pp. 691–702
doi:10.1017/glj.2021.42

CAMBRIDGE UNIVERSITY PRESS

ARTICLE

Special Issue: Sexual Violence and Criminal Justice in the 21st Century

Sexual Violence and Criminal Justice in the 21st Century

Boris Burghardt[1] and Leonie Steinl[2]

[1]Visiting Professor for Criminal Law, Criminal Procedural Law, and Legal Philosophy, Humboldt University, Berlin, Germany and [2]Senior Researcher and Lecturer in Criminal Law, Humboldt University, Berlin, Germany
Corresponding author: boris.burghardt@rewi.hu-berlin.de

(Received 12 July 2021; accepted 12 July 2021)

Abstract
In recent years, no area of criminal law has received more public attention than the laws on sexual violence. Discussions about the need for reforms have exhibited a mobilizing force extending far beyond the legal community. From a legal perspective, these discussions concern intricate normative questions regarding the content of the right to sexual autonomy and the suitability of the consent paradigm to establish the limitations of its protection under criminal law. At the same time, they ultimately concern the question of gender-related societal power hierarchies. Acknowledging these broader socio-political dimensions allows us to comprehend the highly contentious manner in which this debate is often conducted. This Special Issue attempts to analyze from a transnational perspective both the fundamental legal and socio-political questions in the current discussions on sexual violence and criminal justice. A recurring theme is the question as to whether criminal law can be used not only as an instrument of repressive social control, but also as a means of power-critical – even emancipatory – social policy.

Keywords: Sexual violence; rape; criminal justice; consent paradigm; #MeToo; sexual autonomy; carceral feminism; emancipatory criminalization; digital violence; gender-based violence

A. Introduction

#MeToo. "El violador eres tu (The rapist is you)." #IBelieveWomen. #balancetonporc (#RatOutYourPig). "#米兔 (literal translation: Rice Bunny, phonetic: Me Too). "Consent is king." #ЯНеБоюсьСказать (#IAmNotAfraidToSpeak). #WhyIDidntReport. "No means no." #ANAKAM (#MeToo). #YesAllWomen. #Akademiuppropet (#AppealToAcademia). #MyDressMyChoice. #QuellaVoltaChe (#ThatTimeWhen). "If it's not a yes, it's a no." #Aufschrei (#Outcry). #TimesUp.

These are examples of some of the most prominent hashtags and slogans seen on social media platforms and protest banners all over the world during recent years. In fact, it seems that very few legal topics have received as much attention—particularly outside the legal community—as crimes of sexual violence. The discussions surrounding these hashtags and slogans have brought to light mainly three things. First, they have demonstrated how widespread the experience of sexual violence is.[1] Second, they have prompted the public to reconsider which kinds of behaviors constitute a violation of a person's sexual autonomy.[2] Third, the hashtags can be seen as evidence

[1]*See* Catherine MacKinnon, *Global #MeToo*, *in* ROUTLEDGE HANDBOOK OF THE POLITICS OF THE #METOO MOVEMENT 42 (Giti Chandra & Irma Erlingsdóttir eds., 2021).

[2]*See* Tatjana Hörnle, *#MeToo – Implications for Criminal Law?*, 2 BERGEN J. CRIM. L. & CRIM. JUST. 115, 177 (2018).

of the increasing frustration of those affected by sexual violence with the response, or lack thereof by, societies, legislators, and courts.[3]

As the examples given above show, the #MeToo movement is the most prominent but by no means only example. Building on older initiatives—in particular by activist and community organizer Tarana Burke—actress Alyssa Milano took the allegations against film producer Harvey Weinstein as an opportunity to urge victims of all forms of sexual violence to use the hashtag #Metoo to come forward.[4] Other hashtags followed and older online initiatives against sexual violence gained momentum as a result. Often times, these campaigns have led to calls for criminalization or harsher penalties.[5]

In some countries, such as India or Spain, particularly grave individual incidents of sexual violence sparked large-scale online and offline protests and led to a renewal of long-standing demands for a reform of the criminal law provisions on sexual violence. Not least because of the political pressure stemming from a mass mobilization on social media, the demands were finally heard and ultimately resulted in legislative changes in both countries.[6]

These developments can be viewed as a form of digital grassroots activism, where the political agenda is no longer set exclusively by institutionalized actors such as political parties and organizations, but by short-term occasional coalitions of individual activists and civil society actors who mobilize by means of social media and can thereby exert considerable political influence.[7]

Yet the debates surrounding these different movements and initiatives have also triggered controversial discussions on the suitability of criminal law to respond to sexual violence—in particular when taking into account victims' interests.[8] From a feminist perspective, the question comes to mind as to whether the master's tools really will dismantle the master's house.[9] Or are the attempts to use criminal law in an emancipatory manner doomed to fail because they are ultimately perpetuating institutions and processes that are themselves products of the same hegemonic structures that produce gendered sexual violence?[10]

I. The New Paradigm of Consent

On a broader level, all of these discussions mirror important changes in the perception of the right to sexual autonomy and its legal protection. Over the last decades, societal conceptions of sexuality have moved away from collective determinations of morality and decency towards individual

[3]*See* Lisa Salmonsson, *#Akademiuppropet: Social Media as a Tool for Shaping a Counter-Public Space in Swedish Academia*, in Routledge Handbook Of The Politics Of The #MeToo Movement 439 (Giti Chandra & Irma Erlingsdóttir eds., 2021).

[4]*See* Karen Boyle, #MeToo, Weinstein and Feminism 1 (2019).

[5]*See* Eithne Dowds, *Rethinking Affirmative Approaches to Consent: A Step in the Right Direction*, *in* Sexual Violence on Trial – Local and Comparative Perspectives 162 (Rachel Killean, et al. eds., 2021); Margo Kaplan, *Reconciling #MeToo and Criminal Justice*, 17 Ohio St. J. Crim. L. 361, 361 (2020).

[6]*See* Awantika Tiwari & Kalika Metha, *Between Sexual Violence and Autonomy: Rethinking the engagement of the Indian Women's Movement with Criminal Law,* in this Special Issue; Patricia Faraldo Cabana*, The Wolf Pack Case and the Reform of Sex Crimes in Spain*, in this Special Issue.

[7]*See* Maria T. Nicolas-Gavilan, María P. Baptista-Lucio, & Maria A. Padilla-Lavin, *Effects of #MeToo Campaign in Media, Social and Political spheres: The Case of Mexico*, 10 Interactions: Stud. Comm. & Cult. 273 (2019); Milad Mirbabaie, Felix Brünker, Magdalena Wischewski & Judith Meinert, *The Development of Connective Action during Social Movements on Social Media*, 4 ACM Transact. Soc. Comp. 1 (2021).

[8]*See* Angela Davies, *Struggle, Solidarity and Social Change*, *in* Routledge Handbook Of The Politics Of The #MeToo Movement 27, 30 (Giti Chandra, Irma Erlingsdóttir eds., 2021).

[9]Audre Loude, The Master's Tools Will Never Dismantle The Master's House (1984).

[10]*See* Dean Spade, *Their Laws Will Never Make Us Safer*, *in* Against Equality. Prisons Will Not Protect You 1–12 (Ryan Conrad ed., 2012), with regard to hate crimes laws in the US.

https://doi.org/10.1017/glj.2021.42 Published online by Cambridge University Press

sexual autonomy.[11] These developments, together with fundamental shifts in our awareness of gendered power hierarchies in societies, have led to an understanding that the legal regulation of sexuality should be based on the idea of consent.[12]

In the area of international human rights law, the paradigm of consent is now enshrined in the Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence—the so-called "Istanbul Convention"—which requires member states to ensure that "non-consensual acts of a sexual nature" are criminalized.[13] As a result, numerous states have recently moved away from the requirement of force or threat and introduced a consent-based sexual offense model. While some states, such as Germany, have introduced a "No means No" approach,[14] others, such as Sweden, have gone a step further and implemented an affirmative consent based "Only Yes means Yes" approach.[15]

These legislative changes, praised and celebrated by many feminist lawyers and human rights activists, have also caused controversial debates on over-criminalization and "carceral feminism" in academic as well as public discussions.[16] Furthermore, these international developments have also been met with stark political resistance and caused destructive backlash, as the recent withdrawal of Turkey from the Istanbul Convention demonstrates.[17]

The laws on sexual offenses have become a highly symbolic field of socio-political debate. The idea that it is merely a question of legal-technical expertise and the correct formulation of laws, though comfortable to many lawyers, clearly turns out to be an illusion. In our view, the debate ultimately concerns questions around the negotiation, and re-negotiation, of gendered power hierarchies in society.

II. The Non-Physical Dimension of Sexual Autonomy

While digitalization has without a doubt boosted various forms of activism relating to accountability for sexual violence and criminal justice reform, it has also enabled new forms of violations

[11] *See* ANTHONY GIDDENS, THE TRANSFORMATION OF INTIMACY: SEXUALITY, LOVE & EROTICISM IN MODERN SOCIETIES (1992); Volkmar Sigusch, *Kultureller Wandel der Sexualität*, *in* SEXUELLE STÖRUNGEN UND IHRE BEHANDLUNG 16, 26 (Volkmar Sigusch ed., 1996).

[12] *See* Dana-Sophia Valentiner, *The Human Right to Sexual Autonomy,* in this Special Issue.

[13] Convention on Preventing and Combating Violence Against Women and Domestic Violence, May 11, 2011, C.E.T.S. No. 210 https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=090000168008482e [hereinafter ISTANBUL CONVENTION].

[14] Tatjana Hörnle, *The New German Law on Sexual Assault and Sexual Harassment*, 18 GERMAN L.J. 1309, 1317–29 (2017).

[15] *See* Brottsbalken [BrB] [Penal Code], 6:1 (Swed.), https://www.government.se/498db0/contentassets/7a2dcae0787e465e9a2431554b5eab03/the-swedish-criminal-code.pdf; Moa Bladini and Wanna Svedberg Andersson, *Swedish Rape Legislation From Use of Force to Voluntariness - Critical Reflections From an Everyday Life Perspective*, 8 (2) BERGEN J. OF CRIM. LAW & CRIM. JUST. 95, 97 (2021); For an overview see Rory Smith, *Sweden Passes Law Defining Sex Without Consent as Rape*, CNN (May 24, 2018), https://edition.cnn.com/2018/05/24/europe/sweden-rape-consent-law-intl/index.html. *See also* Linnea Wegerstad's contribution in this Special Issue.

[16] *See, e.g.*, Alex Press, *MeToo Must Avoid "Carceral Feminism"*, VOX (Feb. 18, 2018), https://www.vox.com/the-big-idea/2018/2/1/16952744/me-too-larry-nassar-judge-aquilina-feminism. For a balanced summary of the German discussion see Anja Schmidt, *Zum Zusammenhang von Recht, Moral, Moralpolitik und Moralpanik am Beispiel der Reform des Sexualstrafrechts*, 38 ZEITSCHRIFT FÜR RECHTSSOZIOLOGIE 244 (2018). For an analysis of the broader discussion in the US, see Aya Gruber, *When Theory Met Practice: Distributional Analysis in Critical Criminal Law Theorizing*, 83 FORDHAM L. REV. 3211, 3017 (2015). The term "carceral feminism" was coined earlier with regards to demands to outlaw sex work, see Elizabeth Bernstein, *The Sexual Politics of the 'New Abolitionism'*, 18 DIFFERENCES 128, 137, 143 (2007).

[17] On Turkey's withdrawal, see, for example, Ayşe Alniacik, *Turkey's Withdrawal from the Istanbul Convention and the Normalization of Male Violence*, CAMBRIDGE CORE BLOG Apr. 3, 2021, https://www.cambridge.org/core/blog/2021/04/03/turkeys-withdrawal-from-the-istanbul-convention-and-normalization-of-male-violence/; Ayşegül Kula, *An Unconstitutional Setback: Turkey's Withdrawal from the Istanbul Convention*, VERFASSUNGSBLOG (Mar. 22, 2021), https://verfassungsblog.de/erdogan-istanbul-convention/. On the broader setbacks, see Stephanie Burnett, *Istanbul Convention: How a European Treaty Against Women's Violence Became Politicized*, DEUTSCHE WELLE (Mar. 22, 2021), https://www.dw.com/en/istanbul-convention-how-a-european-treaty-against-womens-violence-became-politicized/a-56953987.

https://doi.org/10.1017/glj.2021.42 Published online by Cambridge University Press

of sexual autonomy occurring in the virtual sphere.[18] Examples include the distribution of various forms of image-based sexual abuse, such as "revenge porn."[19] In many countries, these behaviors are not criminally sanctioned or at least not as sexual offenses. This finding—again—led to increasing demands for criminalization. Recent examples of criminal law reforms triggered by such demands include revenge porn in Australia[20] and "upskirting" in Germany.[21] In addition, there are ongoing legislative proceedings aimed at criminalizing "dick pics" and other forms of non-consensual sexting in Finland.[22]

These developments have not only raised contentious debates on the need for further criminalization but also on the scope of sexual autonomy, moving away from an exclusively physical concept. The increasing sensitization for the non-physical dimensions of the right to sexual autonomy is also evident in the ongoing discussions about verbal forms of sexual harassment, especially so-called catcalling. Amendments to the criminal law prohibiting verbal sexual harassment have already been passed in France,[23] while the need for such legislative changes is currently being vividly debated in other countries, such as the U.K. and Germany.[24]

B. Overview of the Special Issue

We started working on this Special Issue with these observations in mind. Our aim was to provide a multifaceted picture of what we view as the central discussions in the area of sexual violence and criminal justice. We did not want to limit this discussion to academic voices, but also include voices from practice and persons who see themselves as activists. Neither did we want to focus exclusively on criminal law approaches, but also take into consideration analyses from a constitutional law and human rights or gender studies and sexology perspective. Further, we decided not only to cover voices in favor of the reforms of sexual offenses and those who call for further adjustments of the criminal law in the interest of a comprehensive protection of sexual autonomy, but also those who are highly critical with regard to the alleged gaps in protection and the demands for reforms and who view these calls as overestimating the positive effects of criminal law. And lastly, we of course did not want to reduce our analysis of the core issues of sexual violence and criminal justice to perspectives from Germany or even from the Global North.

At the same time, we were aware that we were pursuing an ideal that—in particular within the limits of a Special Issue—could only be partially and incompletely realized. Of course, many questions are not addressed in this issue and perspectives and voices are missing. To name just one void that we find particularly regretful: We are missing a contribution on legal approaches to dealing with sexual violence that go beyond criminal law and which do not follow the grammar of retributive justice but try to live up to an ideal of restorative or transformative justice.

[18]*See* Kim Barker & Olga Jurasz, *Sexual Violence in the Digital Age: A Criminal Law Conundrum?*, in this Special Issue.

[19]On the concept of image-based sexual abuse, see Clare McGlynn & Erika Rackley, *Image-Based Sexual Abuse*, 37 Oxford J. Leg. Stud. 534 (2017); Nicola Henry et al., Image-Based Sexual Abuse: A Study on the Causes and Consequences of Non-Consensual Nude or Sexual Imagery (2020).

[20]Matilda Boseley, *Revenge Porn in Australia: The Law is Only as Effective as the Law Enforcement,* The Guardian, May 8, 2020, https://www.theguardian.com/society/2020/may/09/revenge-porn-in-australia-the-law-is-only-as-effective-as-the-law-enforcement.

[21]*Germany Makes 'Upskirting' a Punishable Crime*, Deutsche Welle, July 3, 2020, https://www.dw.com/en/germany-makes-upskirting-a-punishable-crime/a-54037371.

[22]*In Finland, Sexting Could Become a Crime,* Deutsche Welle, Oct. 27, 2020, https://www.dw.com/en/in-finland-sexting-could-become-a-crime/a-55403668.

[23]Stéphanie Fillion, *2 Years Later, What We Can Learn From France's Anti-Catcalling Law,* Forbes, Jan. 28, 2021, https://www.forbes.com/sites/stephaniefillion/2021/01/26/2-years-later-what-we-can-learn-from-frances-anti-catcalling-law/.

[24]Emily Reynolds, *Criminalising Street Harassment Works. Britain Must Follow France's Lead,* The Guardian, May 2, 2019, https://www.theguardian.com/commentisfree/2019/may/02/criminalising-street-harassment-britain-france-catcalling-groping; *Young Activists Fight to Criminalize Catcalling in Germany,* Deutsche Welle, Mar. 15, 2021, https://www.dw.com/en/young-activist-fights-to-criminalize-catcalling-in-germany/a-56664043.

https://doi.org/10.1017/glj.2021.42 Published online by Cambridge University Press

Unfortunately, our efforts to find authors for such a contribution were ultimately unsuccessful.[25] Furthermore, we consciously decided against including the topic of sexual violence against children as the discussion revolves around fundamentally different questions which would go beyond the scope of the Special Issue as we imagined it.

Additionally, despite all efforts to create a diverse and multifaceted picture, we cannot and do not want to claim that even the perspectives included in this issue are represented equally. It remains a highly subjective selection that reflects our own interests, viewpoints and origins in many ways—both with regard to the topics dealt with as well as the contributing authors. The picture our Special Issues paints of sexual violence and criminal justice in the 21st century is therefore unmistakably drawn from a legal, specifically a criminal law perspective, which also remains a predominantly German, white, and academic perspective. Further, our selection reveals something else: In the spectrum of the—often times extremely controversial—discussions concerning the need for an improved protection from sexual violence through new or reformed criminal offenses, we find ourselves in the camp of those who consider the demands for reforms and the developments in this regard to be in principle justified. Despite all the skepticism and reluctance which we share with regard to the effects of a criminal law approach, we do not want to categorically distance ourselves from this instrument. The premise assumed in most of the contributions is that criminal law can be used in a self-aware critical manner to challenge structural power asymmetries. Moreover, we are even convinced that this is necessary if the equal protection of the right to sexual autonomy is to be guaranteed. As long as a criminal prohibition remains the central legal means by which a society expresses that a certain behavior is considered an intolerable violation of the rights of others, it is difficult in our view to justify a more skeptical approach towards criminal justice when it comes to violations of the right to sexual autonomy as compared to other rights. We realize of course that we are speaking from our perspective as German criminal law scholars with a criminal justice system in mind that—despite all its flaws—we do not deem to be beyond repair.

Nonetheless, we are aware that the belief in the possibility and the benefits of such a progressive use of criminal law cannot be taken for granted. For many, the term "progressive criminal law" may already serve as an expression of a dangerous, moralizing, illiberal politicization of law.[26] Likewise, it may be considered unacademic to speak of a "belief" in this respect instead of citing normative or empirical arguments for or against the possibility or the benefit of such an approach. For now, we will have to accept this criticism as this introductory Article is not the appropriate place to justify these premises; at this point it only seems necessary to us to name them.

We have divided the Special Issue into four sections: Defining Sexual Autonomy and the Consent Paradigm (I.), Sexual Autonomy and the Limits of Criminal Justice (II.), Social Movements and their Influence on Sexual Violence and Criminal Justice (III.), Sexual Violence in International Criminal Law (IV). Below we will introduce our main thoughts and question behind each of these sections as well as the contributions in it.

I. Defining Sexual Autonomy and the Consent Paradigm

All recent law reform processes regarding acts of sexual violence are intended to ensure the protection of sexual autonomy. But what is sexual autonomy? A common answer would probably be that it entails the right to engage in consensual sexual acts and to be free from non-consensual

[25] *See, e.g.*, Kathleen Daly, *Reconceptualizing Sexual Victimization and Justice*, *in* Justice For Victims. Perspectives on Rights, Transition and Reconciliation 378 (Inge Vanfraechem, Antony Pemberton, & Felix Ndahinda eds., 2014); Nikki Godden-Rasul, *Repairing the Harms of Rape of Women Through Restorative Justice*, *in* Restorative Responses To Sexual Violence 15 (Estelle Zinstag & Marie Keenan eds., 2017).

[26] *See* Ralf Kölbel, *"Progressive" Criminalization? A Sociological and Criminological Analysis Based on the German "No Means No" Provision,* in this Special Issue.

https://doi.org/10.1017/glj.2021.42 Published online by Cambridge University Press

acts.[27] But this seemingly easy answer quickly leads to a number of other intricate questions: What does consent mean? Does it require the victim to say "no" or the perpetrator to wait for a "yes"? What about persons who are deemed unable to consent due to constitutive deficits—are they excluded from a self-determined expression of sexuality? Are there situational or structural contexts in which it is impossible to speak of consent? Do these contexts include all forms of dependency or unequal power relations between the people concerned, such as the existence of professional hierarchical relationships? Does the consent paradigm leave room for the design of sexual contacts that appear abnormal, repulsive, or degrading from the perspective of a heteronormative or even a decidedly feminist perspective?[28] Is there a danger that the consent paradigm will possibly lead to a juridification of sexuality, which in turn becomes an impairment to a subjectively fulfilling sex life of all persons involved?[29] Does the consent paradigm perhaps impose a form of rationality in an area that was previously considered to be decidedly remote from rationality, even a reserve of sensual and impulsive experiences? In other words, is there a possibility that the consent paradigm turns against itself and exhibits paternalistic features threatening individual freedom?

The three contributions in the first section of the Special Issue tackles these questions of sexual autonomy and consent from three different angles.

In the first Article of this section, Dana-Sophia Valentiner explores "The Human Right to Sexual Autonomy." She shows how the beforementioned paradigm shift from ideas of decency towards concepts such as autonomy and consent posed challenges for the law on various levels. At the core of her analysis lies the idea that an autonomy-based understanding of self-determination requires more than just the state-guaranteed protection from sexual violence, coercion, and discrimination. In order to protect the right to control one's own body as well as to control the involvement in sexual interactions with others, states are obliged to take measures that protect the preconditions for exercising self-determination. According to Valentiner, this requires, in particular, sexual education measures and reliable access to information and medical services.

In the second contribution, Rona Torenz discusses "The Politics of Affirmative Consent" from a gender and sexuality studies perspective. As Torenz delineates, the introduction of the "No means No" standard in the German penal code in 2016 was welcomed by many sides as a consistent implementation of feminist demands and thus of the right to sexual autonomy. Yet, since the early 1990s at the latest, the concept of "No means No" has been further developed in the direction of an "only Yes means Yes" approach. In contrast to "No means No," which defines the circumstances under which sex should be criminalized as sexual violence and leaves open what "morally correct" sex could look like, "Yes means Yes" makes positive statements about what "good" sex should contain. The affirmative consent approach relies on a contract-like model of negotiation in sex and thus implicitly devalues other forms of sexuality. As Torenz argues, affirmative consent is primarily considered as a social discourse and a result of cultural as well as social practices, which produce knowledge within existing power relations. This knowledge can have stabilizing and/or transformative effects on these power relations. Therefore, affirmative consent as a critical discourse can reproduce heteronormative notions of sexuality and gender.

[27]Stuart P. Green, *Lies, Rape, and Statutory Rape, in* Law and Lies: Deception and Truth-Telling in the American Legal System 194, 207 (Austin Sarat ed., 2015); Elisa Hoven & Tom O'Malley, *Consent in the Law Relating Sexual Offences*, *in* Core Concepts of Criminal Law and Criminal Justice 132, 138 (Kai Ambos et al. eds., 2020); Joan McGregor, *Force, Consent, and the Reasonable Woman*, *in* In Harm's Way: Essays in Honor of Joel Feinberg 111, 111–12 (Jules L. Coleman & Allen Buchanan eds., 1994); Stephen J. Schulhofer, Unwanted Sex: The Culture of Intimidation and the Failure of Law 99 (1998).

[28]A classic case concerning this question is R. v. Brown [1993], 1 AC (HL). *See* David Kell, *Social Disutility and the Law of Consent*, 14 Oxford J. Leg. Stud. 121 (1994).

[29]On the dangers of the consent paradigm as a concept of sexual politics, see Joseph Fischel, Screw Consent. A Better Politics of Sexual Justice (2019).

https://doi.org/10.1017/glj.2021.42 Published online by Cambridge University Press

In the last contribution of the section entitled "'Sex Must Be Voluntary': Sexual Communication and the New Definition of Rape in Sweden," Linnea Wegerstad takes a closer look at the legal situation in Sweden, where rape was redefined based on the criterion of nonvoluntary participation in 2018. This development forms part of a larger global trend of replacing outdated sex offense regulations with laws that accurately correspond to late modern ideas about gender equality, sexual self-determination, and consensual sex. The Article analyzes the representation of rape in the new law and in the legal discourse in Sweden and demonstrates that rape is represented as a matter of choice and communication in sexual situations. Wegerstad argues that the new rape law poses problems with regard to sexual communication and gray zones in sexual encounters. She suggests that in order to understand this new representation of rape, further exploration is necessary both into the effects of sexual violence being framed as a matter of individual choice, consent, and communication in late modernity and into the role of criminal law in an era of thin normativity. The Article concludes that the new rape law sends a clear message about what sex should be—namely, voluntary—but does not accurately describe the crime and the behavior that deserves criminal censure.

II. Sexual Autonomy and the Limits of Criminal Justice

A clear understanding of what sexual autonomy entails forms the basis of a consistent understanding of the kinds of behaviors that violate or endanger sexual autonomy. In the traditional understanding, sexual offences required an act of force or threat. A view that is consistently oriented towards sexual autonomy, on the other hand, is able to recognize the violating dimension of other behaviors, such as deceptions in the context of sexual contacts or verbal sexual attacks. Furthermore, in the age of digitalization, new forms of sexual violence have emerged and gained increasing practical relevance. The phenomenon of "revenge porn" and other image-based forms of sexual abuse serve as examples. This raises a number of important questions around the conceptualization of sexual autonomy in non-physical terms.

At the same time, it is questionable whether the purpose of criminal law is to criminalize all such violations and endangerments. Rather, it is actually a hallmark of liberal criminal law that not all interpersonal violations and threats to the law are sanctioned with the "last resort" of criminal justice, but that, in minor cases, other legal and extra-legal conflict resolution mechanisms take effect. This raises the question as to the existence of gaps in protection that make legislative action necessary. The debate around the limits of the protection of sexual autonomy through criminal law is extremely controversial. It is a discussion in which fundamental questions of criminal law theories are renegotiated under specific circumstances: What is the purpose of criminal law? Is it legitimate to create criminal offences whose function is essentially limited to symbolism? Can criminal law be an instrument of progressive social developments or must it be limited to building on the existing social conventions of the population?

Finally, the limits of a criminal justice response to sexual violence are particularly apparent when looking at the experiences of victims during criminal proceedings. Despite the fact that there have been substantial improvements in the last decades, this remains a key area of critique. In recent times, human rights conventions and international treaties have created incentives and obligations to recognize victims' rights, which have subsequently been incorporated into national criminal procedural law.[30] Yet, the adjustment of criminal procedural law to the rights and

[30] *See* Istanbul Convention, *supra* note 13 at arts. 30, 54, 56. For the EU see, for example, Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 Establishing Minimum Standards on the Rights, Support and Protection of Victims of Crime, and Replacing Council Framework Decision 2001/220/JHA, 2012 O.J. (L 315); European Parliament Resolution of 30 May 2018 on the Implementation of Directive 2012/29/EU Establishing Minimum Standards on the Rights, Support and Protection of Victims of Crime 2016/2328(INI), 2020 O.J. (C 76); Council Directive 2004/80/EC of 29 April 2004 Relating to Compensation to Crime Victims, 2004 O.J. (L 261); Directive 2011/92/EU of the European Parliament and of the Council of 13 December 2011 on Combating the Sexual Abuse and Sexual

https://doi.org/10.1017/glj.2021.42 Published online by Cambridge University Press

interests of victims has also been subject to stark criticism. Critics raise the question as to whether this development does not inevitably jeopardize the painstakingly acquired balance between the interests of the legal community in the effective investigation and punishment of criminal offenses on the one hand and the interests of the accused on the other.[31]

The contributions in this section seek to address these challenging questions regarding the limits of criminal justice.

In the first contribution, Beatriz Correa Camargo and Joachim Renzikowski, explore "The Concept of an 'Act of a Sexual Nature' in the Criminal Law." As the authors demonstrate, all jurisdictions assume a concept of an act of a sexual nature by regulating sexual crimes. Until the sex revolution and feminist movements for equality in sexual relations, criminal law was mostly concerned with specific types of sexual acts, particularly non-marital sexual intercourse. With the paradigm shift of recent years, criminalization tends to embrace all acts of a sexual nature with another person without her valid consent. Whether the law contains a definition of a sexual act or not, borderline cases show that neither merely objective criteria nor purely subjective elements can serve as basis for the description of the conduct under prohibition. The authors hence try to overcome this deficit in the criminal law theory. They argue that sexual acts should not be understood through the metaphor of a "picture," as German legal scholars believe, but with the metaphor of a script played out by an actor, as sexual theorists put it.

In the following contribution, Nora Scheidegger takes a look at the question of "Balancing Sexual Autonomy, Responsibility, and the Right to Privacy: Principles for Criminalizing Sex by Deception." She argues that due to the reconceptualization of rape and other sexual offenses as violations of a person's sexual autonomy, consent has replaced the element of force as the focal point of rape law. This shift to a consent model has prompted heated discussions about the scope of sexual autonomy and the problem of "rape by deception" in legal scholarship. Most theorists of consent argue that certain forms of deception invalidate any token of consent in the same way as forcible sexual contact. However, there is also a widely shared concern that criminalizing sex-by-deception poses serious problems in terms of drawing the line between deceptions that violate sexual autonomy and deceptions that do not. Scheidegger offers an account of principles that should be considered when examining legal cases related to sex-by-deception. These principles are examined and articulated in a way that strike a balance between responsibility, autonomy, and other principles and rights, such as the right to privacy.

Subsequently, Kim Barker and Olga Jurasz, analyze the phenomenon of "Sexual Violence in the Digital Age" and pose the question as to whether this constitutes a criminal law conundrum. The authors note that the emergence of new interactions, notably those online, has led to the parallel development of criminal behaviors—not all of which are captured by the current legal framework. They thus address the challenge posed to criminal law by the emergence of technologically facilitated violence, specifically its sexualized online forms. Barker and Jurasz draw upon—contentious—national examples of attempts to regulate disruptive sexual violence perpetrated through digital means, with particular attention being given to provisions in the UK, Germany, and France. They argue for cautious yet specific criminalization of violent behaviors online whilst considering the

Exploitation of Children and Child Pornography, and Replacing Council Framework Decision 2004/68/JHA, 2011 O.J. (L 335); Directive 2011/36/EU of the European Parliament and of the Council of 5 April 2011 on Preventing and Combating Trafficking in Human Beings and Protecting its Victims, and Replacing Council Framework Decision 2002/629/JHA, 2011 O.J. (L 101); Directive (EU) 2017/541 of the European Parliament and of the Council of 12 March 2017 on Combating Terrorism and Replacing Council Framework Decision 2002/475/JHA and Amending Council Decision 2005/671/JHA, 2017 O.J. (L 88).

[31]For a mostly critical assessment of the increasing implementation of victims' rights in Germany, see the contributions in Stephan Barton Ralf Kölbel, Ambivalenzen der Opferzuwendung des Strafrechts (2012); for the common law perspective, see, for example, Marie Manikis, Conceptualizing the Victim within Criminal Justice Processes in Common Law Systems 247, *in* The Oxford Handbook of Criminal Procedure (Darryl K. Brown, Jenia Iontcheva Turner, & Bettina Weisser eds., 2019).

https://doi.org/10.1017/glj.2021.42 Published online by Cambridge University Press

broader criminal liabilities of all actors involved in the facilitation and perpetration of digital sexual violence.

In the last Article of this section, Anne-Katrin Wolf and Maja Werner turn towards criminal procedural law in their contribution on "Victims' Rights Looking Good on Paper: How Criminal Prosecution in Germany Fails Victims of Sexual Violence." As the authors argue, whether in Germany or abroad, victims of sexual violence typically played only a minor part in criminal proceedings, serving primarily as witnesses. This led to victim disempowerment and a paternalistic method of state protection of victims. Yet, during the last decades, this perception underwent major changes in many European legal systems, owing to a rising awareness of victims' needs, especially in cases of sexual violence. International and European conventions and treaties played a major role in this development by establishing an international regulatory framework. To implement these international standards, domestic criminal laws have changed significantly on both the substantive as well as the procedural level. Today, Germany's criminal procedural law contains many mechanisms for protecting victims. Nevertheless, in cases of sexual violence, the implementation of these mechanisms leaves much to desire due to the effect of gender-stereotypes and rape myths. This leads Wolf and Werner to conclude that in sexual violence cases, the law in action ultimately fails to meet the international requirements.

III. Social Movements and their Influence on Sexual Violence and Criminal Justice

A particularly interesting development concerns the influence of social movements and digital forms of activism on the recent reforms of sexual offences in different countries. The demands for the elimination of gaps in legal protection and changes in applying these laws are not new. However, they are now being voiced on social media platforms and met with such a high level of public recognition and approval that they can no longer be ignored by the executive and legislative branch. As has been elaborated above, these forms of activism have served as an influential tool in drawing attention to the fact that violations of sexual autonomy are ubiquitous while highlighting the shortcomings of criminal justice systems in addressing such violations. Nonetheless, some argue that these movements embody a type of "carceral feminism" ill-suited to address the structural discrimination against women in our societies.

It is also noteworthy that in various countries, these movements were triggered by individual crimes which were used to highlight structural problems in the society and the judiciary: The keywords Harvey Weinstein, New Year's Eve in Cologne, *La Manada (Wolfpack)* Case, and *Nirbhaya* Case stand for these individual cases leading to a mobilization of various and quite heterogeneous social actors who were able to create a breakthrough moment in social and criminal law policy.

This poses a number of important questions: Why was the mobilization so successful in these cases? How can and should the effect of these forms of activism on criminal law and criminal justice practice be assessed? Can they be understood as emancipatory forms of participation in legislative reforms in democratic states? Can categories of critical criminology such as moral entrepreneurs and moral panic help to understand these developments or do they form part of a hetero-masculine discourse of delegitimization?

The contributions in this section aim to tackle these questions surrounding social movements and their influence on criminal justice reform in the area of sexual violence from very different perspectives.

In the first contribution entitled "'Progressive' Criminalization? A Sociological and Criminological Analysis of the German 'No Means No' Model," Ralf Kölbel analyzes the developments that led to the reform of the sexual offenses provisions in the German Penal Code from a criminological perspective. He argues that feminist activists, in close collaboration with some criminal law scholars, managed to take advantage of the mass media scandal of the events of New Year's Eve in Cologne in 2015-16 to achieve the implementation of the "no means no" model in Germany. The deficits of the previous laws, repeatedly asserted by the same actors, could hardly

https://doi.org/10.1017/glj.2021.42 Published online by Cambridge University Press

have been proven with sober empirical and sociological consideration. The first statistical surveys on criminal justice activities in the area of sexual offenses since the reform also showed that despite being hailed as a milestone, it had brought far fewer practical changes and improvements than its advocates had promised. A belief in progressive criminal law that is disconnected from these criminological findings appears to be very problematic to Kölbel. His contribution can be viewed as representative of an influential strand of critique in Germany, which accuses the activists calling for reforms of the laws on sexual violence of too carelessly placing their hopes in a criminal justice approach.[32]

In the second contribution "Evaluating #MeToo: The Perspective of Criminal Law Theory," Tatjana Hörnle takes a closer look at the #MeToo movement. In doing so, she notes not only positive effects but asserts some quite problematic features of the mobilization triggered via social media. In particular, she emphasizes that these movements can, through their spread and reach, achieve exclusionary effects that have a similarly drastic affect on the denounced individuals' lives as state penalties. The problem, however, is that there are no comparable standards of due diligence for reviewing allegations before "imposing" such informal sanctions. In addition, the alleged perpetrators usually have little opportunity to defend themselves against the allegations. In these conflicts of interpretation, which are primarily carried out via social media, there is no accepted authority whose task it is to come to a neutral, balanced judgment on a matter of fact. Rather, an emotionalized partiality dominates.

Similarly, the reform of the criminal provisions on sexual offenses in Spain cannot be understood without taking into account the mobilization of broad sections of the population with the help of social media. In her contribution on "The Wolf-Pack Case and the Reform of Sex Crimes in Spain," Patricia Faraldo Cabana analyzes how the *Manada* Case became a symbol of existing social and legal problems and at the same time a transformative moment for feminism in Spain. Moreover, her contribution shows the emotional significance that seemingly technical distinctions in sexual criminal law can acquire with regard to their social reception. A fundamental point of concern that led to mass protests was that the perpetrators in the *Manada* Case were only convicted of sexual assault, but not of rape, by the court of first instance. Regardless of the sentence of imprisonment imposed on the main perpetrators—which was actually quite considerable from a comparative law perspective—this legal assessment was seen as an exemplary reflection of the sexist and victim-delegitimizing interpretation of cases of sexual violence.

In the last contribution of this section entitled "Between Sexual Violence and Autonomy: Rethinking engagement of Indian Women's Movement with Criminal Law," Awantika Tiwari and Kalika Mehta turn towards India. They analyze how a very drastic case of sexual violence in 2012 became the starting point for large-scale protests and vocal calls for reforms of the sexual assault laws as well as the criminal justice system's response to sexual violence. Yet, the disillusionment that Indian activists subsequently experienced also becomes very clear in this contribution: From the reduction of the actual demands in the legislative process to the distortion of the legislative regulation in criminal justice practice—most hopes that the reform would become a crucial factor with regard to more fundamental change in gender relations and the protection of women's sexual autonomy in Indian society seem to have been disappointed for the time being. The authors therefore emphasize the importance of framing sexual violence not only as a criminal wrong for which individuals have to be held responsible, but as the result of social inequality and injustice that needs to be addressed in other ways.

[32]*See, e.g.,* Thomas Fischer, *Noch einmal: § 177 und die Istanbul-Konvention*, 7 ZEITSCHRIFT FÜR INTERNATIONALE STRAFRECHTSDOGMATIK [ZIS] 312 (2015); Monika Frommel, *Muss der Tatbestand der Sexuellen Nötigung/Vergewaltigung—§177 StGB—reformiert werden? in* FESTSCHRIFT FÜR HERIBERT OSTENDORF ZUM 70. GEBURTSTAG 321 (J. Brüning, T. Rotsch & J. Schady eds., 2015); Ralf Kölbel, *Die dunkle Seite des Strafrechts. Eine kriminologische Erwiderung auf die Pönalisierungsbereitschaft in der strafrechtswissenschaftlichen Kriminalpolitik*, 31 NEUE KRIMINALPOLITIK 249 (2019).

https://doi.org/10.1017/glj.2021.42 Published online by Cambridge University Press

IV. Sexual Violence in International Criminal Law

Lastly, an analysis of sexual violence and criminal justice in the 21st century would be incomplete without taking a look at the developments in international criminal law:

It is clear that sexual violence is a constant feature of armed conflicts. For a long time, it was viewed as an unfortunate yet unavoidable by-product of war. Today, the dominant understanding of conflict-related sexualized violence is the "weapon of war" narrative: Sexualized violence during conflict is employed strategically by rational actors.[33] The change in our conceptual understanding of wartime sexualized violence goes along with another answer to this phenomenon: Importance is now increasingly placed on criminal accountability and the symbolic expressive function of a criminal sentence imposed on individuals responsible for sexual violence as a crime under international law. It is argued that a criminal conviction is necessary to make it unequivocally clear that such acts are a grave injustice that cannot be justified under any circumstances.

Since its creation, the International Criminal Court (ICC) has sparked great hopes for an internationally visible, game-changing path towards accountability for crimes of sexual violence in conflict situations. The ICC has often been lauded for its broad inclusion of sexual and gender-based violence as crimes under international law. Yet despite its robust legal framework, the actual enforcement of these provisions has—at least initially—been a source of disappointment for many observers.[34] The recent convictions in the cases *Ntaganda* and *Ongwen* shine a more promising light.[35]

In her contribution on "The International Criminal Court and Sexual Violence: Between Aspirations and Reality," Tanja Altunjan describes this path from great expectations to great disillusions but also recent rays of hope. She also analyzes how the ICC dealt with these setbacks and the criticism of its work and argues that the office of the prosecutor as well as the court have proven themselves to be learning institutions. In recent years, improvements in the prosecution of gender-based and sexual violence in conflict contexts can be witnessed at various levels. As a result, the gap between aspirations and reality has become smaller. However, for the future, Altunjan warns that a more comprehensive understanding of the nature of crimes violating the right to sexual autonomy is required.

Another means to address the problem of wartime sexualized violence is the principle of universal jurisdiction—specifically, the use of national criminal jurisdictions for the prosecution of crimes under international law including sexual violence. But here, too, the first trials have been a challenging experience: In general, third countries are very reluctant when it comes to prosecutions based on the universality principle but even where such criminal proceedings have taken place, sexual violence has only played a subordinate role, at least in legal terms. Why is that the case? And what can be done to overcome these deficits? Alexandra Lily Kather and Silke Studzinsky address these questions in their Article "Will Universal Jurisdiction Advance Accountability for Conflict-Related Sexualized Violence? A View from Within on Progress and Challenges in Germany." The Article is based on their professional experiences working as lawyers and activists towards accountability for sexualized and gender-based crimes under international law. The authors share their—sobering—observations of a trial involving crimes committed by the *Forces Démocratiques de Libération du Rwanda* (FDLR) militia in the Kivu

[33]Maria Eriksson Baaz & Maria Stern, Sexual Violence as a Weapon of War? Perceptions, Prescriptions, Problems in the Congo and Beyond 42 (2012).

[34]For a comprehensive analysis of the ICC's performance in this regard, see Louise Chappell, The Politics of Gender Justice at the International Criminal Court: Legacies and Legitimacy 52, 87, 104–106 (2016). *See also* Alexander Schwarz, Das völkerrechtliche Sexualstrafrecht: Sexualisierte und geschlechtsbezogene Gewalt vor dem Internationalen Strafgerichtshof 24, 104 (2019).

[35]Prosecutor v. Ntaganda, ICC-01/04-02/06, Judgment (Jul. 8, 2019), https://www.icc-cpi.int/CourtRecords/CR2019_03568.PDF; Prosecutor v. Ntaganda, ICC-01/04-02/06 A A2, Appeals Judgment (Mar. 30, 2021), https://www.icc-cpi.int/CourtRecords/CR2021_03027.PDF; Prosecutor v. Ongwen, ICC-02/04-01/15, Judgment (Feb. 4, 2021), https://www.icc-cpi.int/CourtRecords/CR2021_01026.PDF.

https://doi.org/10.1017/glj.2021.42 Published online by Cambridge University Press

region of the Democratic Republic of the Congo,[36] as well as trials involving crimes in Syrian torture prisons.[37] The German criminal justice system evidently shows difficulties similar to those of the ICC in the first ten years of its activity in dealing with conflict-related sexual violence and the victims of such crimes. The decentralized organization of the judicial processing of such crimes also seems to make institutional learning processes more difficult. Yet, Studzinsky and Kather also identify some advances in the German criminal justice system in the latest developments in the Syria proceedings.

II. Outlook

Our hope is that this Special Issue will serve as a starting point for an intensified transnational and interdisciplinary dialogue on sexual violence and criminal justice between academics, practitioners, and activists. One aspect that we are still grappling with are the limitations of our belief in the emancipatory potential of a criminal justice response to gendered violence. Under which conditions can such a belief be considered as justified? It seems to us that this question can only be answered on a case-by-case basis as it is contingent upon the design of the given criminal justice system as well as societal conditions. Relevant questions in this regard include: Is there an independent judiciary? Are the rights of the accused sufficiently guaranteed in the legal system and in practice? Are the penalties proportionate? How about law enforcement officials and the prison system, are there measure in place to ensure that they are not shaped by racialized biases and other discriminatory practices? And is there a critical media landscape that can expose and scandalize miscarriages of justice? The aim is not to conceptualize the ideal conditions for a utopian model of criminal justice, but to formulate realistic requirements for specific criminal justice systems under which it is generally acceptable to use criminal law to communicate central societal values while keeping in mind the overriding questions on socio-political power relations. We are convinced that a dialogue on these questions is central in order to understand and evaluate the different criminal policy demands in the area of sexual violence and criminal justice. With this in mind, we want to thank the authors of this Special Issue for sharing their perspectives and for the extremely enriching exchanges so far and hope that we will be able to continue and expand this conversation.

[36]Oberlandesgericht Stuttgart [OLG Stuttgart] [Higher Regional Court] Sept. 28, 2015, BeckRS 2012, 4214.

[37]Wolfgang Kaleck & Patrick Kroker, *Syrian Torture Investigations in Germany and Beyond: Breathing New Life into Universal Jurisdiction in Europe?*, 16 J. Int'l Crim. Just. 165 (2018).

Cite this article: Burghardt B, Steinl L (2021). Sexual Violence and Criminal Justice in the 21st Century. *German Law Journal* **22**, 691–702. https://doi.org/10.1017/glj.2021.42