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RAPE, AFFIRMATIVE CONSENT TO SEX, AND SEXUAL AUTONOMY: INTRODUCTION TO THE SYMPOSIUM

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The time is now propitious, as he guesses,
The meal is ended, she is bored and tired,
Endeavours to engage her in caresses
Which are still unreproved, if undesired.
Flushed and decided, he assaults at once;
Exploring hands encounter no defence;
His vanity requires no response,
And makes a welcome of indifference.[1]

We may have moved in the West toward a standard in which "no means no" has the force of criminal law behind it. But are we ready for a standard in which only "yes means yes?" And if so, getting to yes may be a winding path to follow. The concept of consent, some of the symposium authors note, is a far more complicated inquiry than many appreciate. Consider the Eliot quotation above: is it consensual if his exploring hands encounter no defense? Is indifference sufficient to establish consent and if not, should his act be considered criminal rather than just boorish? This is only one, among many, questions with which the symposium authors grapple.

This symposium, composed of international scholars, originated from two presentations at the Law and Society Conference in Berlin, Germany in July, 2007. Each group focused its presentations on the thorny issues arising from determining when sex is the product of free choice, when it is the result of force, and the legal and philosophical implications arising from those issues. Subsequently, the *Akron Law Review* decided that the subjects of the Berlin Conference would make

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1. T.S. Eliot, *The Waste Land*, *in* THE COMPLETE POEMS AND PLAYS, 1909-1950 (Harcourt, Brace & World 1952).

an interesting and topical Symposium. They invited the authors from the conference, along with a few other professors, to write for this edition.

To introduce this Symposium, I first discuss the issues related to the crime of rape, the idea of sexual autonomy, and the concept of affirmative consent to sex. Then, I briefly summarize the symposium authors' various approaches to these topics.

To echo Donald Dripps' sentiment, rape is an exceptional crime, one treated differently than other serious crimes.[2] There are many reasons for this exceptionalism. The historical burdens on rape victims to prove a rape occurred were unusual, draconian, and substantial.[3] It is only in the last several decades that the law has changed to bring rape into line with burdens approximating other crimes.[4] The exceptionalism may also arise from the complicated nature of sex: when engaged in voluntarily, sex may be a delightful, perhaps even transcendent experience.[5] In stark contraposition, sex against one's will is a horrific experience—a most brutal crime of violence.[6] Indeed, rape in war has been termed a form of torture.[7] Rape is not unbidden physical affection; it is the violent use of person against her will with no regard for her personal desires.[8]

Further complicating the crime of rape is the development of two distinct categories of rape: what some ironically call "real rape," where

2. *See* Donald Dripps, *After Rape Law: Will the Turn to Consent Normalize the Prosecution of Sexual Assault?*, 41 AKRON L. REV. 957 (2008). *See also* Susan Estrich, *Rape*, 95 YALE L. J. 1087, 1095 (1986)(discussing how the definition of nonconsent is unique in law).

3. *See* Dripps, *supra* note 2, at 960-66 (citing MATTHEW HALE, 1 HISTORY OF THE PLEAS OF THE CROWN 628, 628-35 (1646)).

4. *Id.* For a detailed discussion of some of the rape reforms, see Meredith J. Duncan, *Sex Crimes and Sexual Miscues: The Need for a Clearer Line Between Forcible Rape and Non-Consensual Sex*, 42 WAKE FOREST L. REV. 1087, 1095-1108 (2007).

5. *See, e.g.*, JOHN DONNE, *The Ecstasy*, *in* JOHN DONNE: THE MAJOR WORKS 121, 121-23 (1990).

6. Estrich, *supra* note 2, at 1087. ("Eleven years ago, a man held an ice pick to my throat and said 'Push over, shut up, or I'll kill you.' . . . A hundred years later, I jumped out of my car as he drove away."). *See* SUSAN BROWNMILLER, AGAINST OUR WILL: MEN, WOMEN AND RAPE, 347-74 (1975) (recounting rape narratives from victims).

7. *See* Hannah Pearce, *An Examination of the International Understanding of Political Rape and the Significance of Labeling it Torture*, 14 INT'L J. REFUGEE L. 534, 540-41 (2002) (discussing how the United Nations Convention Against Torture recognized rape as a form of torture during prosecutions involving the former Yugoslavia and Rwanda). For further discussion about rape during wartime, see BROWNMILLER, *supra* note 6, at 31-113.

8. *See generally* Pearce, *supra* note 7. "It is not passion or lust gone wrong. It is first and foremost an act of aggression with a sexual manifestation." Pearce, *supra* note 7, at 534 (quoting Catherine Niarchos, *Women, War, and Rape: Challenges Facing the International Tribunal for the Former Yugoslavia,* 17 HUM. RTS. Q. 649, 650 n.4 (1995)).

the victim is attacked by a stranger,[9] and acquaintance rape, where the victim knows the attacker.[10] While many scholars and rape researchers recognize that acquaintance rape is by far more common than stranger rape,[11] and often equally horrific for the victim,[12] prosecutors often decline to bring such cases for fear they cannot be won.[13]

For somewhat apparent reasons, proving the crime when it occurs between acquaintances is particularly fraught with difficulty since the defense raised is generally one of consent. Whom to believe? The legal, moral, philosophical, and practical implications of determining whether sex was voluntary or criminal are daunting. The competing considerations between fairness to both accused and victimized are substantial and difficult to resolve. What happens when the parties were drinking? Was consent legally possible? Was consent, or lack thereof, properly understood? Does anyone have an accurate recall of the events that occurred at the time in question? And additionally, the old standard rape myths—she shouldn't have gone home with him, women lie about rape, women are irresponsible temptresses, she must have wanted it if she was drinking with him[14]—affect prosecutorial decisions to bring cases and influence juror's decisions about such cases. All of these concerns and more are discussed in the symposium articles.

Among the first problems is the question of defining rape. Should

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9. Estrich, *supra* note 2, at 1088 (explaining how the police considered the attack that she suffered while exiting her car one night a "real rape"). *See also* SUSAN ESTRICH, REAL RAPE 11 (1987); Michelle J. Anderson, *All-American Rape*, 79 ST. JOHN'S L. REV. 625, 625-28 (2005) (discussing the two standards).

10. *See* Patricia Tjaden & Nancy Thoennes, *Extent, Nature, and Consequences of Rape Victimization: Findings from the National Violence Against Women Survey*, NAT'L INST. OF JUST. SPECIAL REPORT (U.S. Dep't of Justice, D.C.), Jan. 2006, at 21 *available at* http://www.ncjrs.gov/pdffiles1/nij/210346.pdf (distinguishing between stranger and acquaintance rape). The latter includes relatives, spouses, and acquaintances. *Id.*

11. *See* Tjaden & Thoennes, *supra* note 10 (noting that the vast majority of women who are raped by force or threat of force (83.3%) are victimized by someone they know—including relatives, spouses, and acquaintances). This survey only includes rapes accomplished with force or threat of force. *Id.*

12. *See, e.g.*, Michelle J. Anderson, *Negotiating Sex*, 78 S. CAL. L. REV. 1401, 1415-17 (2005) (discussing the psychological harm that acquaintance rape can cause).

13. *See* Dripps, *supra* note 2, at Section III (Why the Return to Consent Won't Normalize Rape Law). *See* Aviva Ornstein, *Special Issues Raised by Rape Trials,* 76 FORDHAM L. REV. 1585, 1590 (2007) (discussing how prosecutors winnow out weak cases from the system); Lisa Frohmann, *Convictability and Discordant Locales: Reproducing Race, Class, and Gender Ideologies in Prosecutorial Decisionmaking*, 31 L. & SOC'Y REV. 531, 531 (1997) (discussing ethnographic data from prosecutors on convictability in sexual assault cases).

14. *See* Dripps, *supra* note 2, at 972 (discussing the myth of "justified rape"). For a fuller discussion of the classic rape myths, see Morrison Torrey, *When Will We be Believed? Rape Myths and the Idea of a Fair Trial in Rape Prosecutions*, 24 U.C. DAVIS. L. REV. 1013, 1025-31 (1991).

the definition of rape require proof of force/threat of force, or should it only require proof that the sex was against one's consent? As the symposium authors discuss, the United States, Canada, and the United Kingdom each vary in their approaches. The Sexual Offences Act 2003, enacted in England and Wales, defines rape as non-consensual sex in which the defendant does not reasonably believe in consent.[15] Currently, United States rape statistics include only forcible rapes,[16] although some U.S. jurisdictions have changed the standard to eliminate the force requirement and to define rape as unconsented-to-sex.[17] Canada has gone further than most U.S. jurisdictions, moving toward a requirement that "only yes means yes."[18] The somewhat western movement toward a consent standard has generated a great deal of scholarship—and the authors in this symposium have various approaches to the issue, as detailed herein.

Another issue the writers in this Symposium tackle is whether, in consent-only jurisdictions, the consent must be verbal or may be assumed from silence or from actions. Should the law impose upon women the obligation to speak up and say "no", or should the law impose upon men the obligation to first hear the word "yes"? Requiring a man to obtain verbal consent, some scholars muse, comes close to criminalizing normal sexual behavior.[19] Many other scholars in this symposium agree with requiring affirmative consent.

The emergence of the so-called "hooking up culture"—where young adults (often college students) meet at bars or parties, drink to excess, and then go off to have a single night of sex together—has created a whole new set of complicated problems for the law, social science researchers, and legal theorists.[20] Has the culture changed so

15. *See* Vanessa E. Munro, *Constructing Consent: Legislating Freedom and Legitimating Constraint in the Expression of Sexual Autonomy*, 41 AKRON L. REV. 923, 935-947 (2008) (discussing the Sexual Offences Act 2003).

16. *See* Tjaden & Thoennes, *supra* note 10.

17. *See* Nicholas J. Little, Note, *From No Means No to Only Yes Means Yes: The Rational Results of an Affirmative Consent Standard in Rape Law*, 58 VAND. L. REV. 1321, 1341-44 (2005).

18. *See* Lise Gotell, *Rethinking Affirmative Consent in Canadian Sexual Assault Law: Neoliberal Sexual Subjects and Risky Women*, 41 AKRON L. REV. 865, 869 (2008).

19. *See* Richard Klein, *Am Analysis of Thirty-Five Years of Rape Reform: A Frustrating Search for Fundamental Fairness*, 41 AKRON L. REV. 981 (2008); Dan Subotnik, *Copulemus in Pace: A Meditation on Rape, Affirmative Consent to Sex, and Sexual Autonomy*, 41 AKRON L. REV. 847 (2008).

20. *See, e.g.*, William Flack, Jr. et al, *Risk Factors and Consequences of Unwanted Sex Among University Students: Hooking Up, Alcohol, and Stress Response,* 22 J. OF INTERPERSONAL VIOLENCE, 139, 139-41 n.2 (2007) (describing the concept of "hooking up"); Subotnik, *supra* note

substantially that current legal concepts of consent do not fit with the culture's behavior? Moreover, while it turns out that both young men and women are engaging in this type of sexual behavior with some degree of willingness, stereotypes of men-as-studs and women-as-sluts continue to inform the collective consciousness of these young people.[21] The writers of this symposium address the effects of persistent stereotypes and lay-person conceptions on legal decisions.[22]

Another stereotype that informs the law suggests that men are entitled, consistent with "tradition," to continue pursuing sex unless and until a woman says no or physically resists. This conception of woman as gatekeeper of virtue imagines a being who is passive up till the minute she resists. Is this a realistic view of how women behave? And, indeed, in asking these questions, have we conflated voluntary sexual activity with the violent crime of rape?

Yet, some scholars accurately note that even with the affirmative consent standard, both judicial and societal standards seem to demand the "ideal" victim—one who is responsible, security conscious, and careful to minimize her own risk.[23] The theme of women as irresponsible and in part to blame for their own rapes seems to arise anytime women drink, are overly flirtatious, or accompany men without chaperones.[24] Yet, is it reasonable, or indeed fair, for the law to expect women to engage in risk avoidance so that they do not become crime victims? Does this again turn the law on its head and provide another way of reformulating women as "gatekeepers of their virtue"? Or perhaps it merely recognizes the reality of adults assuming partial responsibility for their own decision-making.

Are women temptresses? Passive or assertive in setting boundaries? Sexual recipients rather than sexual aggressors? Chaste or slutty? In need of protection or considered as equal participants? Do women want sex or simply put up with it? The duality assumed in these questions often defines the contours and boundaries of rape law. Law and society's consideration of women-as-sexualized-beings often

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19, at 852-53 (discussing KATHLEEN A. BOGLE, HOOKING UP, SEX, DATING AND RELATIONSHIPS ON CAMPUS (N.Y.U. Press 2008)).

21. *See* Dripps, *supra* note 2, at 970.

22. *Compare* Gotell, *supra* note 18, *and* Sharon Cowan, *The Trouble with Drink: Intoxication, (In)capacity, and the Evaporation of Consent to Sex*, 41 AKRON L. REV. 899 (2008) *with* Dripps, *supra* note 2.

23. *See, e.g.*, Gotell, *supra* note 18, at 878-79.

24. Gotell, *supra* note 18, at 879. *See* Dripps, *supra* note 2, at 972-73; Cowan, *supra* note 22, at 906.

demand a virtuous, nearly flawless victim for the crime of rape to be taken seriously.

Dan Subotnik's article provides a critique of the affirmative consent doctrine, questioning whether it is a necessary or desirable change to the law of rape, particularly at a time when women seem to enjoy more sexual power than at any other time in history. Professor Subotnik's provocative argument considers the writing of sexually autonomous women, posing an alternative view of feminist sex, where women are powerful and in control of their sexuality. Subotnik's research reveals that a random sampling of female students do not fear rape to the degree that many feminist scholars believe; an interesting and possibly counterintuitive concept. Nonetheless, data suggest that the lack of fear may be misguided: according to extrapolations from the National Violence Against Women Survey conducted by the United States Department of Justice, one in six women will be forcibly raped.[25]

By contrast, Lise Gotell's article, delving into the Canadian law, explains how the affirmative and specific consent standard works and yet how the most vulnerable of women—the aboriginal, the homeless and the addicted—are still victimized both by rape and the interpretation of law. Far from viewing women as sexually autonomous and powerful, Professor Gotell provides a view of how women are now obligated to avoid "risky behavior," and to prevent the rape from occurring. "[C]onsistency, rationality, and risk-avoidance" she writes "constitute new markers of normative conduct against which the behaviors and credibility of actual complainants are measured and assessed."[26]

Dr. Sharon Cowan's article concerns the problem of intoxicated consent, focusing on United Kingdom cases, statutes, and policy. Dr. Cowan first examines the nature of consent, explaining the problems that flow from defining consent as either a function of mind (mens rea) or a function of physicality (acting or speaking as to convey permission). She suggests that the more accurate approach is not to separate mind from body but to consider both together. Nonetheless, the intoxicated victim poses a particular challenge in terms of defining consent. Dr. Cowan proposes more guidance for judges and juries on both the nature of intoxication and the problems of determining capacity to consent.

Vanessa Munro explains the philosophic and legal construction of the concept of consent. She argues that contemporary interpretations often fail to appreciate that women's consent, like that of workers in

25. Tjaden & Thoennes, *supra* note 10, at 7.
26. Gotell, *supra* note 18, at 881.

exploitive employment practices, may arise from necessity rather than free will. She describes the development of the Sexual Offences Act 2003, used in England and Wales, and considers both the merits and shortcomings of the Act in light of her underlying philosophical analysis. Professor Munro concludes that while the Act has much merit, additional legislative intervention, further judicial instructions, and education for juries on rape myths would result in more just conclusions.

Donald Dripps' article expresses concern that while the "elite,"—the legal and academic communities—continue to rework and refine rape law to make it easier to prosecute difficult, but potentially valid cases, juries refuse to convict in many of these same cases. Tracing the development of consent-only statutes in the law, he concludes that such a change will not normalize the law of rape because juries will still continue to be strongly influenced by firmly-held stereotypes that women who drink or who engage in flirtatious behavior are not blameless victims. Citing research, he states that "[p]opular opinion, confronted with a sexually active man and a sexually active woman, sees not two morally equivalent hedonists, but a stud and a slut."[27] The solution Professor Dripps devises is to create new statutes for sex-without-consent, which would provide misdemeanor-only jail time. This approach would allow these cases to be tried without juries. He recognizes that this solution poses numerous concerns but emphasizes that it provides some very concrete benefits.

Richard Klein considers affirmative consent in the context of the dramatic evidentiary changes in rape law, explaining the history of the legal development of the law in great detail. He concludes that when the changes to the law of rape are considered in their totality, the move toward affirmative consent is both unnecessary and unfair to defendants. Specifically, Professor Klein discusses the reduction in proof required to establish rape and the creation of a rape shield defense. Particularly pernicious, he argues, is the enactment of Federal Rule of Evidence 413, which permits the prosecution to introduce not only prior convictions for rape but also an unprosecuted complaint for prior sexual assaults. In addition, Professor Klein expresses concern that many rape cases have included somewhat questionable social science in the form of rape trauma syndrome evidence. This evidence is often introduced only to provide an explanation for behaviors alleged to be associated with rape, yet its very generality invites the jury to infer that this person was

27. Dripps, *supra* note 2, at 971.

raped—even though the expert never so testified. It is thus quite prejudicial but nearly impossible to effectively counter.

Kerri Lynn Stone's article focuses on the recidivist offender in the context of sexual harassment, explaining the contours of employer liability in those cases and providing a new framework for imposing liability. Professor Stone argues that pursuant to current United States Supreme Court law, employers can escape liability for serial sexual harassers by moving the harasser to a different part of the company, where he is free to harass, but the newly-harassed employee cannot sue successfully. To correct this problem, she urges courts to analyze these cases with an eye toward whether a harasser is a repeat offender—rather than focusing on whether the woman is a first-time victim.

The symposium participants offer thoughtful, interesting, and, indeed, challenging suggestions for resolving the many questions and concerns that the topics of rape, affirmative consent to sex, and sexual autonomy pose.