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Negotiating Sex: Would it Work?

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that J.F.K. rode in the car and that misrepresentation was material to the buyer. So how many material inducements will we have? False claims of love. Lies about marital status or one's religion. Deception about one's career. But these lies go both ways. It's certainly possible that a woman might deceive a man about, say, her age or her use of elective surgery. Does Anderson want to call the woman who lies about her breast augmentation to her "earthy crunchy granola" boyfriend, a rapist?

Perhaps Anderson will embrace this slippery slope. She states that "misrepresentations" are evidence of failure to negotiate.³ Our preservation of the mysteries of courtship comes at the expense of those who are deceived or violated. Rape no doubt remains a serious problem, and combating its incidence needs serious and creative answers. But before we shift the paradigm, let's make sure we like it.

3. Anderson core text at 301.

NEGOTIATING SEX: WOULD IT WORK?

ROBIN CHARLOW*

With so much good to say about Michelle Anderson's proposal on rape law reform one hesitates to offer any criticism at all. My pause in wholeheartedly embracing her idea stems mostly from hesitation about its implementation.

Anderson's proposal presents practical advantages over the current regime. Using prevailing definitions of rape, countless disputes arise over the meaning and nature of both core components, force and consent. Moreover, in the typical scenario, we need to know not only whether a woman consented, but also whether a man was cognizant in some fashion of her nonconsent, resulting in difficult contests regarding mens rea. By making consent turn on a particular kind of overt conversation, a defendant's subjective belief about consent becomes much less important.

So why hesitate? For one thing, the very virtue just mentioned could present a problem. By reducing or eliminating the significance of mens rea, the negotiation model runs counter to the general principle that the more serious a crime, the higher the required culpable mental state. This is meant to ensure sufficient blameworthiness to justify the level of punishment imposed. Thus, a serious crime (rape) usually necessitates proof of significant subjective awareness of the problematic nature of one's act. By obviating the importance of the defendant's subjective appreciation about consent, a negotiation model strays from the usual rules on mens rea. Some maintain that most American jurisdictions already

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effectively apply an objective, negligence standard regarding nonconsent for rape (which Taslitz champions), so the change to a negotiation model, in which the evidence regarding consent is put into stark terms, might not make much difference. But does all sex without negotiation, even with an apparently willing partner, necessarily suffice for the culpability associated with a serious felony?

In addition, criminal law is most successful when it attempts to reflect rather than shape social norms. Our general societal practice is not, and probably never has been, to negotiate noncommercial sex. Anderson states that most rapes involve people who have not previously been intimate with one another. Given the awkwardness of newer relationships, especially among the young, open discussion about the desire for intercourse might be less likely to occur in initial sexual encounters. Anderson's negotiation model would require it. Failing to do so would result in the commission of a serious crime. Are we going to imprison a generation of young men, for felony rape, until enough of them get the message?

Anderson suggests extensive popular education about the need for negotiation. At a minimum, such education should be a prerequisite for adopting her proposal, as should a delay in its implementation sufficient to publicize the rule and effect the education. But I'm not sure even that would serve to alter what is usually intimate, unwitnessed, undiscussed behavior, behavior that currently comports with near-universal social conventions. Possibly the most vulnerable population would be teens and young adults, who are notoriously resistant to teaching about social ills and consequences, even those involving crime (consider drug use or shoplifting). And since the certainty of conviction is what usually has greatest behavior-altering effect, the fact that the overwhelming majority of nonnegotiators would not likely face prosecution is not an encouraging sign. If education does not work, how many of those who failed to learn the lessons of public service announcements would end up in jail for long periods? Would they disproportionately be members of poorer socio-economic classes, or young African-American men, a population already experiencing high levels of imprisonment for behaviors that do not conform to criminally-enforced norms?

Finally, the negotiation proposal would not eliminate all disputes about rape. Controversies would remain over whether the required negotiation occurred, what the negotiating statements meant, or whether negotiated consent was coerced or withdrawn. Because Anderson posits that a pattern of engaging in sexual penetration would obviate the necessity for negotiation, disputes might also arise about implied consent between repeat partners. Hopefully, the number of disputes would decrease. But if behavior did not readily change, we might not see a marked reduction in the ambiguous situations that Anderson rightly decries, in which men believe they have consent and women believe they have not consented.

Perhaps the time has come to take a radical step forward and switch the default rule regarding who bears the burden of ambiguity about sex. If so, let's do it carefully, in a manner most likely to succeed, and without unwarranted or undesirable sanction.

CONVERSATION BEFORE PENETRATION?

SHERRY F. COLB*

In 1993, Antioch College adopted a "Sexual Offense Prevention Policy" that required express permission for each stage of sexual intimacy. Comedians and others ridiculed the policy and its implication that men would have to say things like the following to partners: "I would like to escalate our intimacy from kissing your mouth to licking your ear." Such seemingly bizarre scripting of sexual contact struck most people as political correctness run amok.

Students in a seminar I taught in feminist legal theory shared the negative assessments of Antioch's Code, with one notable exception. Most women in the class thought that men should have to obtain express permission before penetration. Smiling uncomfortably, women said that they did not believe that kissing and petting should be read as "consent" to intercourse. At the same time, women sensed that partners often felt entitled to penetration once intimacy had begun, seemingly uninterested in whether or not intercourse was mutually desired. Some women felt silenced and unable to say "no" and wondered why the law treated aroused men like runaway trains that simply move along their tracks if not stopped from the outside.

Michelle Anderson's wonderful core text reminded me of my students' reactions. The silence of which they spoke might well have reflected trauma resulting from a man's apparent obliviousness to his partner's wishes. A caring man would make a point of ensuring that he has accurately assessed his partner's desires. But for the narcissist, a rule that says "ask whether she wants you to enter her and refrain from acting unless she says yes" could be the only thing that protects a woman's bodily integrity from unwanted assault.

The difficulty with Anderson's proposed reform is that the criminal law can only be as effective as jurors' willingness to enforce it. Because explicit requests for consent are the exception rather than the rule, the men serving on juries might well see themselves reflected in the defendant "led on" by kisses and fondling. As prosecutors confirm, getting a conviction for acquaintance rape is not easy, even when the accused uses force and the victim explicitly says "no." Many people still believe that a woman who places herself in a compromising position "asks for" what she gets. In other words, many jurors and potential jurors have, in their own lives, implemented a "waiver" approach to the right against coerced sexual intercourse that excuses or even justifies forcible, nonconsensual rape when a woman invites a man into her home.

An older family friend of mine, a woman, indicated in the early 1990s that she was frightened for her son, a young man in his 20s. She was worried, she

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said, that an unscrupulous woman could seduce her son and then ruin his life with a false accusation. If she and others who share her worries sit on juries, one could expect an increase in jury nullification if rape were prosecuted under a negotiation statute. The odds of jury nullification would appear to be greatest when the law demands more of a defendant than jurors are prepared to demand of themselves (or their sons).

I believe that Andrew Taslitz is correct to suggest in his comment that much of what happens in coerced sexual encounters is the product of negligence and willful blindness. I also agree with both Anderson and Taslitz that it is fair to punish people harshly for disregarding a risk of grave harm in the pursuit of self-deception that strokes the offender's ego. I therefore do not share the worries about subjecting well-meaning people to prosecution for failing to negotiate consent.

What worries me is that we might, paradoxically, make it more difficult than it already is to get a conviction for acquaintance rape if the standard we present to the jury appears to condemn conduct of which jurors not only approve but in which they have likely engaged themselves.

Consider an analogy. I am a vegan. I believe that it is wrong to torture and kill animals for our consumption. I also suspect that many people who consume animals and animal products tell themselves that the animals are treated humanely. They are aided in this self-deception by the invisibility of slaughterhouses and feedlots that would expose the grotesque reality of farmed animals' lives. Yet for now I reject the idea of criminalizing the use of animal products.

Though the struggle for women's sexual autonomy has made greater progress than have efforts to protect nonhuman animals' freedom from torture and killing, the two movements may nonetheless share one limit in common: If the law advances too far ahead of social norms, it will likely be ignored, by jurors, by prosecutors, and ultimately by the perpetrators at whom it is aimed.

YOU CAN'T GET AWAY FROM CONSENT

MARIANNE WESSON*

I admire very much Michelle Anderson's thoughtful critique of various efforts to mend the law of sexual assault and her provocative alternative proposal. Her critique seems unanswerable, but even so I wonder if her proposal really solves the problem of acquaintance rape or merely relocates it. Lately I have come to believe that rape law may present a more intractable problem than its reformers have acknowledged.

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What would be the elements of rape under Anderson's definition? They would appear to be sexual penetration and failure to negotiate on the actus reus side (failure to negotiate being an omission for which liability may be imposed); but what, exactly, on the mens rea side? Andrew Taslitz's suggestion that rape ought to be treated as a crime of negligence is a helpful one, but if we accept this suggestion, what is gained by treating the "failure to negotiate" as the second actus reus element rather than "without consent"?

Of course the notion of "consent" is, as Gollum (in *The Lord of the Rings*) would say, tricky. The casebooks are full of cases that reinforce this point. But it appears to me that "failure to negotiate" is at least as slippery. Unless one is to follow the much-derided Antioch College proposal and require particular words to be employed, one must acknowledge (as Anderson does) that a variety of gestures, verbal and nonverbal, may be put forward with a plausible claim that they constituted "negotiation" (just as a variety of gestures have been argued to constitute, and not to constitute, consent).

Anderson refers to "custom between them" together with "body language" as possible proof of negotiation between a couple for whom it is not the first time, although she would require verbal negotiations for first-time sexual partners. But surely she is not suggesting that an act of penetration that has been preceded by a discussion can never constitute rape? It seems necessary to stipulate that some discussions would fail to legitimize an ensuing sexual encounter because one of the discussants chose to conclude the negotiation without consenting to the encounter. Apparently one cannot get away from "consent" and its dissatisfactions.

If this is the case, why do we not address the problem as satisfactorily as it can be addressed (which is not very satisfactorily, I agree) by defining rape as sexual penetration committed by one in the absence of consent by an actor who is (criminally) negligent about the victim's lack of consent? I wish there were some knife to cut this Gordian knot, but I do not think there is. I am unpersuaded that reformulating the lack-of-consent element as failure-to-negotiate simplifies the problem or leads to better outcomes.

REPLY

MICHELLE J. ANDERSON

Traditional rape law asks: What did she do to suggest acquiescence to penetration? It focuses on the victim. The Negotiation Model asks: What did he do to obtain her agreement before he penetrated her? It focuses on the actor. An actor would rape purposely or knowingly when he penetrated someone realizing that he had not engaged in negotiation leading to agreement beforehand. He would rape recklessly when he penetrated someone while consciously disregarding a substantial and unjustifiable risk that he had failed to negotiate an agreement

about penetration beforehand. He would rape negligently when he penetrated someone honestly but unreasonably believing that he had engaged in negotiation beforehand.

Taslitz elucidates the self-deception often involved in rape, and argues that it warrants “severe punishments,” with “periods of incarceration matching those for many kinds of murder.”¹ I agree with his analysis on self-deception, but note that nonnegotiated penetration deserves less punishment than rape exacerbated by an extrinsic attack (commonly known as rape by force). Ferzan claims the Negotiation Model is a “sex as contract” model, and wonders whether I wish to import contractual negotiation principles into the criminal law. I do not.² I only wish to emphasize the importance of mutual consultation. Ferzan argues further that the Negotiation Model establishes a “strict liability” crime with regard to the victim’s “subjective consent.” As indicated, however, rape law under the Negotiation Model continues to require customary mens rea. Like the No and Yes models of rape law reform, the Negotiation Model limits speculation about the victim’s state of mind. Scholars have criticized the traditional focus on subjective consent as tending to put the victim on trial instead of the defendant.

The core objection the commentators (Ferzan, Charlow, and Wesson) raise is, what happens to a man who has sex with a woman without negotiating the penetration but who nonetheless believes she consented? Here I split with (at least) Ferzan on what justifies penetration. I reject consent as requiring nothing but passive acquiescence. Honestly and even reasonably believing one has mere acquiescence on the part of one’s partner—she will not put up a fight—does not justify penetration. Penetration requires an assessment of active desire.

We also split on reasonable mistake. Although acquiescence may be inferred nonverbally, specific wishes ordinarily cannot. It is unreasonable to assume desire for penetration without consultation. Because people may become frozen in fear when they are assaulted, it is unreasonable to assume desire from passivity alone. Because men have a propensity to misread women’s nonverbal behavior (a point Taslitz augments with self-deception), and because people engage in lesser intimacy in place of penetration, it is unreasonable to assume desire for penetration from nonpenetrative intimacy alone. Specific wishes around penetration should be gleaned from mutual consultation.

Charlow and Colb both contend, however, that people do not consult with one another about whether they want sexual penetration. A shared premise leads them to opposite conclusions. Colb worries about underenforcement. She posits that a rape statute under the Negotiation Model might increase jury nullification.

1. Taslitz comment at 305.

2. Like the No and Yes Models of rape law reform, under the Negotiation Model, some fraudulent inducement, though not all, would establish rape. Wherever the line is drawn, however, it is safe to say that someone who “lies about her breast augmentation” to obtain sex, the hypothetical that Ferzan poses, would not be guilty of rape.

Charlow worries about overenforcement, particularly against poor and African-American young men.

First, I am not sure about the shared premise. Mores in this area are changing and people increasingly do consult with one another about whether they want sexual penetration. Eighty-four percent of sexually active adolescents and young adults have had a discussion with their partners about what they feel comfortable doing sexually.³ Negotiation need not even include a full discussion. A woman whispers that she wants to go down on her date and he whispers back, "Wow, that sounds like fun." Two men agree not to have sex because neither brought a condom with him. A boy tells his girlfriend, "You really turn me on but I don't want to have sex because we're too young," or "You really turn me on and I want to have sex with you," and in either case, she says, "I feel the same way." One may not think of these interactions as negotiations but they are exactly that. Anytime partners confer about sexual desires and boundaries regarding penetrative acts, they are engaging in mutual consultation.

Second, I am not sure that the Negotiation Model poses too great a risk of underenforcement or overenforcement. I advocate substantial education about the social and legal importance of discussing desires and boundaries before the Negotiation Model becomes law, which would help with both potential problems. Regarding underenforcement, juries, prosecutors, and judges may resist reform; some have resisted the No Model as it has been adopted. I do not see any reason, however, why rape law requiring mutual consultation would not earn the same acceptance over time. Regarding overenforcement, further rape reform will not likely exacerbate the disproportionate incarceration of men of color. Those incarcerated for rape are more likely to be White than those incarcerated for other offenses,⁴ which may speak to the devaluation of women of color victimized by this overwhelmingly intra-racial crime.⁵

Ferzan asks how one should balance the Negotiation Model's potential benefits against its potential injustices. The Model benefits those who consult with their partners before they engage in penetration. It burdens those who do not wish to express their own sexual desires, but the risk is that they will not get the sex they want. My guess is they will learn to speak or go without. It risks a rape conviction for those who penetrate without consultation. If they penetrate without consultation because they do not care about their partners' desires, they are culpable actors and conviction is not an injustice. In order to avoid the injustice

3. HENRY J. KAISER FAMILY FOUND., NATIONAL SURVEY OF ADOLESCENTS & YOUNG ADULTS: SEXUAL HEALTH KNOWLEDGE, ATTITUDES, & EXPERIENCES 19 tbl.13 (2003).

4. Lawrence Greenfeld, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, SEXUAL OFFENSES, AND OFFENDERS 21 (1997). Those incarcerated for sexual assault are substantially more likely to be white. *Id.*

5. In about 88 percent of reported rapes, the victim and the offender are the same race. *Id.* at 11.

of convicting someone who penetrates without consultation because he does not understand the process or importance of consultation, I advocate extensive education about how and why to negotiate sex. Unlike Charlow, I don't think youth are resistant to teaching on these issues. Studies indicate that young people want more education about how to engage in sexual communication.⁶

Unlike Charlow and Ferzan, who contend that the Negotiation Model is radically different from the status quo, Wesson believes it is more or less the same. She argues that failure to negotiate is just as slippery as nonconsent, pointing out that some dialogues between sexual partners will not suffice as negotiations leading to agreement, and disputes will arise around the content of those dialogues. She concludes that we cannot get away from consent. I agree that we cannot get away from all ambiguity in language, but I disagree that the Negotiation Model preserves the status quo. Mere acquiescence implied by nonverbal cues is how the law usually interprets consent. Requiring agreement forged through meaningful (presumptively verbal) communication is a step forward. The Negotiation Model provides a transformative lens to analyze these cases, getting to yes—or no—by a process of discourse.

6. Henry J. KAISER FAMILY FOUND., *supra* note 3, at 2.