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Disciplinary Brief

VIRTUE IN SEXUAL VIOLENCE LAW

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In her Theology Brief *The Virtues*, Professor Herdt explores the idea of the virtues of social practices and institutions. Just as the church and its varied practices can be conducive to the development and sustenance of virtues, so too we can consider whether institutions support the virtues of those who inhabit them. A legal system can be understood as a social institution capable of facilitating or hindering the development of virtues in its inhabitants (Giddens, 1984). As Professor Herdt notes, scholars of the law can be attentive to this dimension of law, and its role in 'shaping the character of citizens' and thereby contributing to 'the creation of communities of general human flourishing'.

The Evolution of Sexual Violence Law

In my own ongoing research on sexual violence, I am often engaging with the potential for law to both reflect and inspire the improvement of conditions for human flourishing. As to the former – looking back on the evolution of sexual violence law, we can see how the substantive and procedural rules relating to the sanctioning and condemning of rape and associated sexual crimes have over time become more expansive. Law's understanding of the harms and wrongs of rape has evolved to reflect what we might understand as improvements in social/communal commitment to certain virtues, such as justice in the sense of embodying fairness in our relationships with others; and love, respect, and genuine regard for the inherent dignity and worth of others. I recently described this as a gradual 'democratization' of sexual dignity (High, 2022). The harm of rape was historically framed as an affront to (white, landholding) male dignity, a violation of another man's wife or unmarried daughter (property). In this conservative theory of rape, women were not seen as equal in dignity to men, but rather their bodies were objectified as sites of harm done *to men.* The consequences of this framing for women were bleak – for example, the 'marital immunity' rule (that a man could not be guilty of raping his own wife, even if she did not in fact consent); the impunity with which men could rape an 'unchaste' or 'unvirtuous' victim. Over time, with increasing social commitment to autonomy, equality, dignity, the status of women has improved, and a more liberal understanding of rape has emerged, one which understands rape as an affront to the victim's autonomy and dignity. Previous marginal cases – the rape of married women, black women, gay women, slutty women – are no longer marginal, as sexual dignity has been re-theorized as universal, inherent, and

inviolable. And in tandem with these changing societal norms, our substantive and procedural rules have evolved, improving conditions for flourishing by sanctioning a wider range of non-consensual sex as criminal.

A Virtues Framework for Law Reform

Just as importantly, we can apply a 'virtues' framework to think about the potential for law reform to effect changes in societal norms. We might advocate for certain changes to law on the grounds that our law should be aspirational. Take affirmative consent, for example – the idea that the legal standard for consent, the dividing line between permissible and impermissible sex [1], should require some form of external (words or actions) expression of agreement. Various versions of sexual violence reforms have been implemented in various jurisdictions, most recently in Australia's states of Victoria and New South Wales Affirmative consent is frequently put forward as a means of ensuring greater mutuality, respect, and equality in sexual intimacy. Affirmative consent would require sexual instigators to look for an affirmative expression of consent (a clear 'yes' through words or actions from their partner) before proceeding, rather than, as historically been permissible, *assuming* a person is consenting until or unless that person clearly says 'no', whether through words or by physical resistance to the requisite degree.

But this gives rise to a tension. As critics of affirmative consent rightly point out, it is depressingly, empirically apparent that sex today is frequently *not* about mutuality, respect, and equality. Many people continue to assume consent, rather than looking for a clear 'yes' from their 'partner', on the basis that 'if she doesn't want this, it's on her to let me know'. This is not, I would argue, virtuous behaviour; it does not exemplify a genuine sense of fairness, respect and regard for the autonomy and wellbeing of other people.

Now, the tension. We may wish that our prevailing societal sexual norms were more virtuous; but is law reform an appropriate tool for moulding those norms? Will reforming our laws, to align with our aspirations of virtuous, morally good sexual behaviour, create 'sacrificial lambs' as we wait for socio-sexual norms to catch up with the law? By which I mean, if law is reformed to put the onus on instigators to ensure consent, to take better care with regard to the desires of others, and to proceed with sexual contact only where there is assurance it is based on mutuality, will people end up being punished for behaviour which is common and was previously permissible at law? And if the broader criminal system is a discriminatory one (a self-evident 'vice' in most legal systems), who are those sacrificial lambs likely to be? The use of law reform, such as affirmative consent reform, to shift behaviour and over time cultivate a virtuous society, in which more humans are likely to flourish, points to a cross-cutting tension in law: 'whether criminal law … is an appropriate tool of … cultural transformation' (Gruber, 445).

Looking Ahead: Aspirational Law Reform, Virtuous Society

Despite these questions and tensions, affirmative consent law reform projects are ongoing in numerous jurisdictions. Optimistically, we might posit that by changing our law to reflect the communicative, virtuous

socio-sexual norms to which we aspire, there will be a trickle-down effect, and those virtues will increasingly permeate socially. We can think of law as possibly ‘aspirational’ in this way, a tool for setting out the aspirations of a social group, even where norms of behaviour will continue inevitably to fall short in many instances from those ideals. Cynically, we might say this is tokenism, empty symbolism; what evidence do we have that embedding affirmative consent as a legal standard will cultivate more communicative, respectful socio-sexual behaviour? I tend to err on the side of optimism; I think that symbolism through law reform might just, albeit slowly, gradually, have a tangible effect in terms of shifting society’s ‘moral posture’ (Caringella, 203). But even adopting this optimistic position, such change will inevitably take time, and will require proactive educative measures. Perhaps in the meantime, affirmative consent really is about a political decision: what are the norms and values we choose to be symbolised in our legal construction of consent?

References

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Endnotes

[1] This is not the same as demarcating morally good from morally bad sex, just as the Virtues Brief reminds us that Virtues ‘enable us to move beyond a narrow focus on dos and don’ts’. On the difference between good, bad, and wrongful sex, see High 2016.

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