

"Girlfriends of the Court"

Amicae Curiae

consent, political discourse, rape, Women

What's so hard about consensual sex?

In law, legal rights, women on **August 22, 2012** at **12:56 pm**

Ahhh sex. There has been an unusual global confluence of sex and public life in recent weeks, culminating in an extraordinary display by political leaders (<http://www.guardian.co.uk/politics/2012/aug/21/george-galloway-rape-comments-respect>) and aspiring political leaders (<http://www.motherjones.com/mojo/2012/08/todd-akin-paul-ryan-redefining-rape>) around the world. This has caused me to ask: what sort of man wants to have or defend non-consensual sex with a woman?

Without going into too much detail about criminal law, in the broadest terms and as pointed out in this language blog, (<http://arnoldzwicky.wordpress.com/2012/08/20/rape-stories/>) rape involves non-consensual sex. (In legal terms, see eg Old Criminal Code, (http://www.austlii.edu.au/au/legis/qld/consol_act/cc189994/s349.html))

So, if a woman is asleep (<http://www.smh.com.au/world/assange-furore-sex-with-sleeping->

[women-not-rape-says-mp-20120821-24jae.html](http://www.austlii.edu.au/au/legis/qld/consol_act/cc189994/s348.html)), she cannot consent. The fact that she may have consented before does not imply consent. (Again, see eg [Old Criminal Code](http://www.austlii.edu.au/au/legis/qld/consol_act/cc189994/s348.html) (http://www.austlii.edu.au/au/legis/qld/consol_act/cc189994/s348.html.)

So, if a [woman is inebriated](http://www.thepunch.com.au/articles/gavin-king-victim-blamer-and-woman-shamer/) (<http://www.thepunch.com.au/articles/gavin-king-victim-blamer-and-woman-shamer/>), her capacity to consent is at best impaired. If a man has sex without her consent, he is at fault. Not her.

So, if a woman is not a woman but a girl, she is a minor for the purposes of the law, and cannot consent. In the same way, children are considered to lack capacity to make contracts and to commit criminal offences. There are exceptions to these cases, but in general terms, minors are not considered to have legal capacity. (See eg in [Queensland](http://www.austlii.edu.au/au/legis/qld/consol_act/lra1995123/s17.html) (http://www.austlii.edu.au/au/legis/qld/consol_act/lra1995123/s17.html.)

So, if a woman [becomes pregnant](http://www.washingtonpost.com/blogs/post-partisan/post/legitimate-rape/2012/08/20/8639006a-eac6-11e1-a80b-9f898562d010_blog.html) (http://www.washingtonpost.com/blogs/post-partisan/post/legitimate-rape/2012/08/20/8639006a-eac6-11e1-a80b-9f898562d010_blog.html) as a consequence of non-consensual sex, she has still been raped because it is consent and [not pregnancy](http://www.christianliferesources.com/article/rape-pregnancies-are-rare-461) (<http://www.christianliferesources.com/article/rape-pregnancies-are-rare-461>) that determines whether a rape has occurred.

So, if a [woman says no](http://www.greenleft.org.au/node/6205) (<http://www.greenleft.org.au/node/6205>), in fact, she means no.

Women have a right to bodily integrity and personal safety. Women are entitled to withhold consent to sex, and to have this withholding respected – in spite of what the leader of the opposition, [Tony Abbott](http://thewall.com.au/topics/84217-thinking-of-voting-liberal-a-womans-right-to), may say (<http://thewall.com.au/topics/84217-thinking-of-voting-liberal-a-womans-right-to>). The law recognizes this right through the law of rape. The law of rape is not designed to trap and emasculate men. It is designed to enforce societal norms associated with women's bodily integrity and safety. These norms reject non-consensual sex.

Sexual relations and relationships generally are difficult to navigate. Surely though, surely, men are able to conduct themselves in a respectful way. What can be so wrong with, or so hard about, a mutual, rather than a unilateral, sexual encounter? Let's take a stand for effective communication and emotional intelligence in working out whether a woman has consented or not. And I guess, if it's not clear, then as [Ben Pobjie](http://benpobjie.blogspot.com.au/2010/10/how-not-to-rape-people-handly-guide-for.html) (<http://benpobjie.blogspot.com.au/2010/10/how-not-to-rape-people-handly-guide-for.html>) points out in this helpful guide, don't have sex.

Why then are so many men standing up for non-consensual sex?

Image courtesy of <http://redlegsinsoho.blogspot.com.au/2010/09/vintage-dating.html>

[Kate Galloway](http://www.jcu.edu.au/law/staff/JCUCDEV_002672.html) (http://www.jcu.edu.au/law/staff/JCUCDEV_002672.html) teaches law at James Cook University. Follow her blog at [Curl](http://katgallow.blogspot.com/) (<http://katgallow.blogspot.com/>), and on twitter at [@KatGallow](https://twitter.com/#%21/katgallow) (<https://twitter.com/#%21/katgallow>)

► [7 Responses](#)

Blog at WordPress.com. Theme: [DePo Masthead](#) by [Automatic](#).

