A. Rape

1. Introduction

COMMONWEALTH v. BERKOWITZ

609 A.2d 1338 (Pa. Super. 1992), *aff'd in part, rev'd in part*, 641 A.2d 1161 (Pa. 1994)

PER CURIAM: . . . .

In the spring of 1988, appellant and the victim were both college sophomores at East Stroudsburg State University, ages twenty and nineteen years old, respectively. They had mutual friends and acquaintances. On April nineteenth of that year, the victim went to appellant's dormitory room. What transpired in that dorm room between appellant and the victim thereafter is the subject of the instant appeal.

During a one day jury trial held on September 14, 1988, the victim gave the following account during direct examination by the Commonwealth. At roughly 2:00 on the afternoon of April 19, 1988, after attending two morning classes, the victim returned to her dormitory room. There, she drank a martini to "loosen up a little bit" before going to meet her boyfriend, with whom she had argued the night before. Roughly ten minutes later she walked to her boyfriend's dormitory lounge to meet him. He had not yet arrived.

Having nothing else to do while she waited for her boyfriend, the victim walked up to appellant's room to look for Earl Hassel, appellant's roommate. She knocked on the door several times but received no answer. She therefore wrote a note to Mr. Hassel, which read, "Hi Earl, I'm drunk. That's not why I came to see you. I haven't seen you in a while. I'll talk to you later, [victim's name]." She did so, although she had not felt any intoxicating effects from the martini, "for a laugh."

After the victim had knocked again, she tried the knob on the appellant's door. Finding it open, she walked in. She saw someone lying on the bed with a pillow over his head, whom she thought to be Earl Hassel. After lifting the pillow from his head, she realized it was appellant. She asked appellant which dresser was his roommate's. He told her, and the victim left the note.

Before the victim could leave appellant's room, however, appellant asked her to stay and "hang out for a while." She complied because she "had time to kill" and because she didn't really know appellant and wanted to give him "a fair chance." *Id.* Appellant asked her to give him a back rub but she declined, explaining that she did not "trust" him. *Id.* Appellant then asked her to have a seat on his bed. Instead, she found

a seat on the floor, and conversed for a while about a mutual friend.[1] No physical contact between the two had, to this point, taken place.

Thereafter, however, appellant moved off the bed and down on the floor, and "kind of pushed [the victim] back with his body. It wasn't a shove, it was just kind of a leaning-type of thing." *Id.* at 32. Next appellant "straddled" and started kissing the victim. The victim responded by saying, "Look, I gotta go. I'm going to meet [my boyfriend]." *Id.* Then appellant lifted up her shirt and bra and began fondling her. The victim then said "no." *Id.*

After roughly thirty seconds of kissing and fondling, appellant "undid his pants and he kind of moved his body up a little bit." *Id.* at 34. The victim was still saying "no" but "really couldn't move because [appellant] was shifting at [her] body so he was over [her]." *Id.* Appellant then tried to put his penis in her mouth. The victim did not physically resist, but rather continued to verbally protest, saying "No, I gotta go, let me go," in a "scolding" manner. *Id.* at 36.

Ten or fifteen more seconds passed before the two rose to their feet. Appellant disregarded the victim's continual complaints that she "had to go," and instead walked two feet away to the door and locked it so that no one from the outside could enter.[2]

Then, in the victim's words, "[appellant] put me down on the bed. It was kind of like—he didn't throw me on the bed. It's hard to explain. It was kind of like a push but no...." *Id.* at 38. She did not bounce off the bed. "It wasn't slow like a romantic kind of thing, but it wasn't a fast shove either. It was kind of in the middle." *Id.* at 39.

Once the victim was on the bed, appellant began "straddling" her again while he undid the knot in her sweatpants. *Id.* He then removed her sweatpants and underwear from one of her legs. The victim did not physically resist in any way while on the bed because appellant was on top of her, and she "couldn't like go anywhere." *Id.* She did not scream out at anytime because, "[i]t was like a dream was happening or something." *Id.*

Appellant then used one of his hands to "guide" his penis into her vagina. *Id.* at 41. At that point, after appellant was inside her, the victim began saying "no, no to him softly in a moaning kind of way ... because it was just so scary." *Id.* at 40. After about thirty seconds, appellant pulled out his penis and ejaculated onto the victim's stomach. *Id.* at 42.

Immediately thereafter, appellant got off the victim and said, "Wow, I guess we just got carried away." *Id.* at 43. To this the victim retorted, "No, we didn't get carried away, you got carried away." *Id.* The victim then quickly dressed, grabbed her school

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[1] On cross-examination, the victim testified that during this conversation she had explained she was having problems with her boyfriend. N.T. 9/14/88 at 54.

[2] The victim testified that she realized at the time that the lock was not of a type that could lock people inside the room. N.T. 9/14/88 at 61.

books and raced downstairs to her boyfriend who was by then waiting for her in the lounge.

Once there, the victim began crying. Her boyfriend and she went up to his dorm room where, after watching the victim clean off appellant's semen from her stomach, he called the police.

Defense counsel's cross-examination elicited more details regarding the contact between appellant and the victim before the incident in question. The victim testified that roughly two weeks prior to the incident, she had attended a school seminar entitled, "Does 'no' sometimes means 'yes'?" *Id.* at 50, 74. Among other things, the lecturer at this seminar had discussed the average length and circumference of human penises. *Id.* at 50, 75. After the seminar, the victim and several of her friends had discussed the subject matter of the seminar over a speaker-telephone with appellant and his roommate Earl Hassel. *Id.* at 76. The victim testified that during that telephone conversation, she had asked appellant the size of his penis. *Id.* at 50, 76. According to the victim, appellant responded by suggesting that the victim "come over and find out." *Id.* at 76. She declined. *Id.*

When questioned further regarding her communications with appellant prior to the April 19, 1988 incident, the victim testified that on two other occasions, she had stopped by appellant's room while intoxicated. *Id.* at 51-52. During one of those times, she had laid down on his bed. *Id.* at 51. When asked whether she had asked appellant again at that time what his penis size was, the victim testified that she did not remember.[3]

Appellant took the stand in his own defense and offered an account of the incident and the events leading up to it which differed only as to the consent involved. . . .

Appellant testified that, on the day in question, he did initiate the first physical contact, but added that the victim warmly responded to his advances by passionately returning his kisses. *Id.* at 130. He conceded that she was continually "whispering ... no's," *id.* at 134, but claimed that she did so while "amorously ... passionately" moaning. *Id.* at 132-133. In effect, he took such protests to be thinly veiled acts of encouragement. When asked why he locked the door, he explained that "that's not something you want somebody to just walk in on you [doing.]" *Id.* at 139.

According to appellant, the two then laid down on the bed, the victim helped him take her clothing off, and he entered her. He agreed that the victim continued to say "no" while on the bed, but carefully qualified his agreement, explaining that the statements were "moaned passionately." *Id.* at 140-142. According to appellant, when he saw a "blank look on her face," he immediately withdrew and asked "is anything wrong, is something the matter, is anything wrong." He ejaculated on her stomach thereafter because he could no longer "control" himself. *Id.* at 144. Appellant testified that after this, the victim "saw that it was over and then she made her move. She gets

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[3] The victim was unsure of exactly what date these events took place. *See* N.T. 9/14/88 at 51.

right off the bed ... she just swings her legs over and then she puts her clothes back on." Then, in wholly corroborating an aspect of the victim's account, he testified that he remarked, "Well, I guess we got carried away," to which she rebuked, "No, we didn't get carried, you got carried away.' "

Questions. Did a *rape* occur in this case? Do you think everyone who reads these facts will answer this question in the same way? If you suspect that there might be systematic forms of disagreement, who do you think will perceive what and why? (Whom would the prosecution want on the jury? Whom the defense?) To what extent might such disagreements reflect different undestandings of what rape is as opposed to different understandings of what the facts were, in particular whether the complainant "consented" and whether the defendant "believed" she did, were? Would the disagreement about how such a case should be decided abate if everyone were instructed to apply the same legal definition of the offense?

Sticky Norms and the Dilemma of Rape Law Reform

This unit has two objectives. The first is to facilitate an understanding of the basic law of rape. The materials will acquaint you with the traditional, or "common law" definition of rape, a conception of the offense that remains the predominant one in American jurisdictions, and also with more recent "reform" variations. The second objective is to highlight the interaction of law and social norms. The development of rape law illustrates how social norms shape law and how they can constrain efforts to change law.

To make sense of the materials, it is useful to begin with two separate "rape prototypes," or basic factual scenarios that individuals have been shown to have in mind when they confront putative instances of that offense.[74] The first is the "stranger rape" prototype. When they think of a rape that fits this pattern, individuals typically imagine a sudden and violent assault, likely by a man of a woman he doesn't know, occurring, often, in a dimly lit alley, in the woods, or in some other remote location, and culminating in the forcible imposition of sex despite the frightened protests and pleadings of the victim. Obviously, there can be disputes over facts (including the perpetrator's identity) in cases that have features of this prototype. But when individuals agree about what the facts are, they rarely disagree about whether those facts do or don't amount to a "rape." Nor do they have any trouble concluding that facts that do fit the stranger rape prototype are covered by the law, however formulated.

The second prototype can be called "acquaintance rape." Here individuals typically imagine a man and a woman who know each other, who may have or have had a social relationship of some kind, and who may even have been socializing (perhaps

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74 *See generally* Laurie Bechhofer & Andrea Parrot, *What Is Acquaintance Rape* in Acquaintance Rape: The Hidden Crime 9 (1991).

dating) immediately before the rape. In this scenario, the man makes sexual overtures (perhaps verbal or perhaps only physical) that the woman verbally and perhaps physically resists. The man aggressively persists, and after prolonged verbal and perhaps physical pressure the woman relents, but does not *consent*, to sexual intercourse. Individuals are less likely to agree about whether any particular set of facts fits this prototype than they are to agree whether a particular set of facts fits the "stranger rape" prototype. They are also less likely to agree about whether facts that fit the former prototype are covered by the legal definition of rape.

The source of these disagreements is an intrinsically ambiguous and socially contested norm. That norm holds that a woman's expressed resistance to sexual intercourse is not always genuine — or that "no sometimes means yes." According to a traditional understanding of gender roles, women are and should be less interested in sexual activity than men. This expectation, it is thought, generates a conventional "social script" under which a (typically single) woman who desires sex with a (typically single) man will frequently profess an initial lack of interest, both to satisfy the expectation that she has "normal" feminine preferences and (relatedly) to assure the man that she is unlikely to pursue sexual activities with other men should the two enter into a committed relationship.[75]

This "no sometimes means yes" norm is intrinsically ambiguous insofar as it contemplates a degree of deliberate indirection in the communications of persons contemplating sexual relations. Because it announces that verbal and even physical resistance is not necessarily conclusive, the "no sometimes means yes" norm forces those who abide by it to converge on more subtle behavioral cues, which against the background of the norm are themselves potentially inconclusive.[76]

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[75] *See id.* at 21-22. *See generally* Michael W. Wiederman, *The Gendered Nature of Sexual Scripts*, 13 Family J. 496, 499 (2005) ("The female's task is to show enough sexual interest to communicate to the male that he is special to her, possibly warranting the risks that come with sex, but that she is not the type of female who engages in sexual activity indiscriminately."). *See also* Terry P. Humphreys, *Understanding Sexual Consent: An Empirical Investigation of the Normative Script for Young Heterosexual Adults*, in Making Sense of Sexual Consent 209 (M. Cowling and P. Reynolds ed., 2004) (British sample) (reporting generally negative reaction among sexually active young adults toward "Antioch Code," a set of guidelines that require express verbal permission at progressive "stages" of sexual activity).

[76] *See generally* Antonia Abbey, *Misperception as an Antecedent of Acquaintance Rape: A Consequence of Ambiguity in Communication Between Women and Men*, in Acquaintance Rape: The Hidden Crime 96 (1991). For studies examining conflicting interpretations of behavioral cues in cases in which women express verbal resistance to sex but do not engage in physical resistance, see Deborah R. Richardson & Georgina S. Hammock, *Alcohol and Acquaintance Rape*, in Acquaintance Rape: the Hidden Crime 83, 89 (A. Parrot and L. Bechhofer ed., 1991) (study subjects judge woman complaining of rape more negatively and more likely to perceive consent if she consumed alcohol); Michaela Hynie, Regina A. Schuller & Lisa Couperthwaite, *Perceptions of Sexual Intent: The Impact of Condom Possession*, 27 Psychol. Women Q. 75 (2003) (possession of condom increases likelihood that both female and male subjects will perceive consent when woman who said "no" possessed condoms) (Canadian sample); *See, e.g.*. Louise Ellison & Vanessa E. Munro, *Reacting to Rape: Exploring Mock Jurors' Assessments of Complainant Credibility*, 49 British J. Criminol. 206 (2009) (lack of physical resistance viewed as diminishing credibility of female) (British sample).

The norm is socially contested insofar as it is adhered to unevenly across subcommunities. It seems plausible to believe that the "no sometimes means yes" norm, grounded as it is in traditional morals and expectations, enjoyed greater assent in decades past. But it would probably be a mistake to assume that the norm has disappeared entirely from contemporary society. Social psychologists consistently find that a substantial minority — possibly as high as 25% to 40% — of sexually active, college-aged women report having engaged in behavior (characterized as "token resistance") consistent with the "no sometimes means yes" norm.[77] This research suggests systematic differences in moral outlooks among women who have and haven't engaged in such behavior,[78] as well as differences in attitudes about the purpose and desirability of engaging in it among those who acknowledge following the norm.[79] Studies have also shown that such characteristics also predict the interpretations observers (male and female) of whether a woman's professed non-consent to sex was genuine.[80] Public controversy when cases that fit this pattern result (or don't) in rape

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77 *See*, *e.g.*, Susan Sprecher *et al.*, *Token Resistance to Sexual Intercourse and Consent to Unwanted Sexual Intercourse: College Students' Dating Experiences in Three Countries*, 31 J. Sex Res. 125 (1994) (finding consistent with earlier studies that 42% of "nonvirgin" women in a sample of some 600 women drawn from five different universities throughout the United States answered yes to the question, have "you indicated that you didn't want to, although you had every intention to and were willing to engage in sexual intercourse. In other words, you indicated 'no' and you meant 'yes.' "); Lucia F. O'Sullivan & Elizabeth Rice Allgeier, *Disassembling a Stereotype: Gender Differences in the Use of Token Resistance*, 24 J. Applied Soc. Psych. 1035 (1994) (finding that 25% of women in college-aged sample reported having engaged in "token resistance" to some sort of sexual contact, most often including oral sex and sexual intercourse); Charlene Muelenhard & Carie S. Rodgers, *Token Resistance to Sex: New Perspectives on an Old Stereotype*, 22 Psych. Women Q. 443 (1998) (finding that respondent misunderstanding may exaggerate the percentages of men and women who indicate having engaged in "token resistance" but that over 15% of the women in college-aged sample composed narratives of personal experiences that clearly did qualify as examples of such behavior). You can access these studies and various other background materials on the course web site.

78 *See* Charlene L. Muehlenhard & Lisa C. Hollabaugh, *Do Women Sometimes Say No When They Mean Yes? The Prevalence and Correlates of Women's Token Resistance to Sex*, 54 J. Personality & Soc. Psych. 872 (1988) (women who are moderately but not extremely hierarchical and traditionalist in outlooks most likely to report token resistance behavior); O'Sullivan & Allgeier, *supra* note 77, at 1050 (finding that women who adhere to "more traditional sex-role ideologies" are significantly more likely to report having used "token resistance").

79 *See* Muehlenhard & Hollabaugh, *supra* note 78, at 875 (finding most commonly cited reasons to be reputational: "[I was in] [f]ear of [a]ppearing promiscuous"; "I didn't want to appear too aggressive or eager"; "I didn't want him to think I was easy or loose"; "I was afraid of his telling other people."); O'Sullivan & Allgeier, *supra* note 77, at at 1048 (finding that 72% of women who reported having engaged in "token resistance" found interactions involving it to be either "moderately" or "extremely pleasant" but that approximately 12% found such interactions either "slightly," "moderately," or "extremely unpleasant"); *id.* at 1046 (finding that 20% of women who reported engaging in "token resistance" did so for "practical reasons" including projection of appropriate "image," and that 26% did so either to assert "control" over their partner or to engage in "expressive game-playing"); Sprecher *et al.*, *supra* note 77, at 453-55 (identifying moral ambivalence toward sexual behavior, "adding interest to an ongoing relationship," and "wanting not to be taken for granted" as reasons for engaging in behavior).

80 *See* Martha R. Burt, *Rape Myths and Acquaintance Rape*, in Acquaintance Rape: the Hidden Crime 33 (A. Parrot and L. Bechhofer eds., 1991) (finding correlations between hierarchical and traditional attitudes and cluster of beliefs related to belief women feign resistance to sex); Karen S. Calhoun & Ruth M.

charges remain commonplace.[81] In sum, the "no sometimes means yes" norm is subject to dissensus, both behaviorally and morally.[82]

The traditional formulation of rape can be understood as accommodating the "no sometimes means yes" norm. Its distinctive *mens rea* and *actus reus* terms (as well as various traditional rules of evidence law applicable to rape cases) are geared toward confining conviction to cases in which factfinders can be confident that the woman's expressed lack of consent was "genuine" and not "feigned." Judges have typically resolved ambiguities in these terms in a manner that likewise reflects a concern to avoid condemning men who have internalized the "no sometimes means yes" norm, as opposed to those who are genuinely heedless of a woman's lack of consent.[83]

Tonwsley, *Attributions of Responsibility for Acquaintance Rape*, in Acquaintance Rape: the Hidden Crime 57, 63 (A. Parrot and L. Bechhofer ed., 1991) (describing research finding correlation between cultural outlooks and beliefs, perceptions, and attitudes about voluntariness of sex); *see also* Linda Kalof, *Rape-supportive Attitudes and Sexual Victimization Experiences of Sorority and Nonsorority Women*, 29 Sex Roles 767 (1993) (finding that such beliefs are more prevalent among college women who joining sororities than among those who do not join them); Brian P. Marx & Alan M. Gross, *Date Rape*, 19 Behavioral Modification 451 (1995) (finding that male subjects vary in perceptions of the communication of nonconsent based on differences in personal experiences and differences in attitudes relating to sex); Victoria Van Wie & Alan M. Gross, *Females' Perception of Date Rape: An Examination of Two Contextual Variables*, 1 Violence Against Women 351 (1995) (reporting similar findings for female subjects and also finding that women who themselves report having been subject to sexual aggression themselves perceive effective communication of nonconsent less readily than women who do not report having being subject to sexual aggression).

81 *See, e.g.*, *A Rape Case That's Not Going Away*, Inside Higher Ed, June 19, 2009 (reporting continuing controversy after school administrator characterizes allegation of rape against student athletes as victim of "date rape" rather than victim of "outright rape"); Barbara Brotman, *Campus Debate: at the University of Iowa, An Assault Case Has Raised Questions About Sex, Drinking and the Meaning of the Word "No,"* Chi. Trib., Dec. 18, 2002 (reporting campus controversy over date rape allegation); Jim Hughes, Adam Thompson, and Rick Baca, *Controversy Builds in CU Rape Case*, Denver Post, May 3, 2002, at B1 (reporting controversy over allegation of date rape and counter-allegations of racial stereotyping in case involving African-American football players).

82 *Compare* Gregg Easterbrook, *"No" Does Not Always Mean No; Time to Agree on a Phrase That Does*, New Republic Online, Oct. 9, 2003 ("[T]he reality of human interaction is that 'no' does not always mean no. Maybe half the sex in world history has followed an initial 'no,' or more than one 'no.' . . .What ends up as consensual sex, however unsatisfying, often begins with the woman saying 'no.'), http://209.212.93.14/easterbrook.mhtml?pid=832; and Page Rockwell, *No More "No Means No"?*, Salon, Mar. 11, 2006 (reporting roundtable discussion in which participants agreed that " 'no means no' is too reductive"), http://www.salon.com/mwt/broadsheet/2006/03/10/no/print.html, *with* Dahlia Lithwick, *No: "No Means No" Is Still A Pretty Good Rule*, Slate, Oct. 10, 2003 (taking issue with commentator Gregg Easterbrook's argument that proof of nonconsent must involve more than verbal resistance because "in the real world 'no' does not always mean no.' "), http://www.slate.com/id/2089687/.

83 *See* Susan Estrich, Real Rape chs. 3-4 (1997). *See* Catharine A. MacKinnon, Feminism, Marxism, Method, and the State: Toward Feminist Jurisprudence, 8 Signs 635, 649 (1983) ("The law . . . adjudicat[es] the level of acceptable force starting just above the level set by what is seen as normal male sexual behavior, rather than at the victim's, or women's, point of violation."). As one account that reflects the common law attitude put it:

> where the circumstances of the encounter differ from the stereotyped attack—as when the parties were previously acquainted, perhaps to the extent of a "dating" relationship, and the encounter occurred in an apartment to which they both went willingly—one cannot so easily assume the

The movement to reform rape law, in contrast, can be understood as attacking the "no sometimes means yes" norm. The norm has been subjected to considerable criticism, particularly by feminists, who see it as expressing and constructing hierarchical gender roles. Many women who adhere to the norm, they point out (and studies confirm), do so not because they identify with the expectations that underlie it but because they are concerned about the reputational repercussions of deviating from those expectations.[84] And even if some women do approve of the norm, the satisfaction they get from the types of interactions the norm enables is insufficiently valuable to outweigh the *harm* that persistence of the "no sometimes means yes" norm inflicts on women who *don't* conform to it and whose professions of genuine non-consent are misunderstood or ignored by men who force unwanted sex upon them, and thereafter by legal decisionmakers who judge the behavior of such men under the traditional formulation of rape law. Guided by this critique, statutory revisions to and certain judicial reinterpretations of the *mens rea* and *actus reus* elements of the traditional formulation (and related changes in evidence law) seek to oblige men, and decisionmakers, to take any expression of non-consent at face value — to make "no means no" the only norm operative in law, and ultimately in society.[85]

It's unclear, however, how successful these reforms have been. Even in jurisdictions that have changed the elements of rape in the way supported by reformers, it is perceived that juries still often refuse to convict, and prosecutors even to charge, in "acquaintance rape" cases in which the "no sometimes means yes" norm might lead someone who accepts it to discount a woman's professed non-consent to sexual intercourse. Social science studies seem to confirm that the adoption of reform statutes

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> woman's attitude of opposition. Here, the behavior of both parties must be more heavily relied on to evince the woman's attitude toward the act. The woman's behavior ordinarily may be an accurate guide to her attitude. But sometimes the behavior, controlled by personality forces other than those which determine the consciously perceived attitude, will contradict the woman's self-perceived disposition toward the act. When her behavior looks like resistance although her attitude is one of consent, injustice may be done the man by the woman's subsequent accusation. Many women, for example, require as a part of preliminary "love play" aggressive overtures by the man. Often their erotic pleasure may be enhanced by, or even depend upon, an accompanying physical struggle. The "love bite" is a common, if mild, sign of the aggressive component in the sex act. And the tangible signs of struggle may survive to support a subsequent accusation by the woman.

Comment, *Forcible and Statutory Rape: An Exploration of the Operation and Objectives of the Consent Standard*, 62 Yale L.J. 55, 66 (1952).

84 *See* Charlene L. Muehlenhard & Lisa C. Hollabaugh, *Do Women Sometimes Say No When They Mean Yes? The Prevalence and Correlates of Women's Token Resistance to Sex*, 54 Journal of Personality & Social Psychology 872, 877 (1988) ("token resistance may be a rational behavior for women in [a hierarchical] culture" even if they resent it); Charlene L. Muehlenhard & Marcia L. McCoy, *Double Standard/Double Bind*, 15 Psychol Women Quart 447 (1991) (finding that woments' perception of sexual attitudes and cultural outlooks of *male partner* strongly predict their reporting having used token resistance); Antonia Abbey, *Misperception as an Antecedent of Acquaintance Rape: A Consequence of Ambiguity in Communication Between Women and Men*, in Acquaintance Rape: the Hidden Crime 96, 103-04 (A. Parrot and L. Bechhofer ed., 1991); Robin Warshaw & Andrea Parrot, *The Contribution of Sex-Role Socialization to Acquaintance Rape*, in Acquaintance Rape: the Hidden Crime 73, 75 (A. Parrot and L. Bechhofer ed., 1991).

85 *See id.* at 98, 101-02.

do little to reduce the incidence of rape or rape convictions in cases that fit the "acquaintance rape" prototype.[86] In effect, the durability of the "no sometimes means yes" norm has seemed to constrain legal efforts to eradicate it. In the words of a law-enforcement official in one reform jurisdiction, departures from the traditional formulation inevitably fail because they are "messing with the folkways."[87]

Indeed, some critics of the traditional formulation of rape worry that failed reforms have actually reinforced the "no sometimes means yes" norm. Individuals' stances toward contested norms are naturally influenced by their perceptions of the attitudes of those around them. Reforms in rape law are meant to communicate that society has repudiated the "no sometimes means yes norm." But when in the aftermath of such reforms prosecutors still conspicuously refuse to charge, or juries to convict, men who disregard professions of non-consent, citizens conclude that the "no sometimes means yes" norm remains vital after all. They behave accordingly. The norm becomes further entrenched.[88]

As you read the materials in this section, reflect on this background. Try to identify how exactly the "no sometimes means yes" norm is reflected in the traditional elements of rape. Consider how reforms are intended to change the law's accommodation of this norm. Try to determine the practical means by which the "no sometimes means yes" norm still manages to influence decisionmakers — including juries and judges — despite these reforms. Think whether there might be alternative reforms that allow a jurisdiction intent on changing the "no sometimes means yes" norm to escape the constraining effect of the norm on laws meant to change it. And of course consider whether it's right, morally, for a state to attempt to use *criminal law* as an instrument for settling norm disputes of this sort.

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[86] *See generally* Jody Clay-Warner & Callie Harbin Burt, *Rape Reporting After Reforms: Have Times Really Changed?*, 11 Violence Against Women 150 (2005); Stephen J. Schulhofer, Unwanted Sex: the Culture of Intimidation and the Failure of Law ch. 2 (1998). In contrast to acquaintance rape, the primary target of the reform statutes, stranger rape is now much more likely to be reported than it was in in the 1970s and 1980s, *see* Clay-Warner & Burt, *supra*; and has apparently decreased in incidence roughly in tandem with the decline of other violent offenses in the U.S. in recent decades. *See* Bureau of Justice Statistics, Key Facts At A Glance, National Crime Victimization Survey Violent Crime Trends, 1973-2008, available at http://bjs.ojp.usdoj.gov/content/glance/tables/viortrdtab.cfm. Bear in mind, moreover, that focusing on appellate cases, as we will do in this section to understand the law of rape, risks overstating the ease with which convictions can be obtained in cases that fit the "acquaintance rape" prototype. Because the Double Jeopardy Clause prevents the prosecution from appealing an acquittal, cases resulting in acquittal — not to mention cases in which charges are never filed to begin with — never find their way into the appellate reporters.

[87] Jeanne C. Marsh, Alison Geist & Nathan Caplan, Rape and the Limits of Law Reform 107 (1982).

[88] *See* Schulhofer, *supra* note 86, at 258.*see also* Angela Harris, *Forcible Rape, Date Rape, and Communicative Sexuality: A Legal Perspective*, in Date Rape: Feminism, Philosophy, and the Law 58-59 (Leslie Francis ed., 1996) (concluding for this reason that attempts to change norms relating to consent through law are inefficacious).

Legal Definitions

4 William Blackstone, Commentaries *210 (1769)

. . . the carnal knowledge of a woman forcibly and against her will. . . .

Md. Criminal Code (eff. Oct. 1, 2002)

§ 304 Rape in the second degree

(a) A person may not engage in vaginal intercourse with another:

(1) By force, or the threat of force, without the consent of the other;

(2) If the victim is a mentally defective individual, a mentally incapacitated individual, or a physically helpless individual, and the person performing the act knows or reasonably should know that the victim is a mentally defective individual, a mentally incapacitated individual, or a physically helpless individual; or

(3) If the victim is under the age of 14 years, and the person performing the act is at least 4 years older than the victim.

(b) A person who violates this section is guilty of the felony of rape in the second degree and on conviction is subject to imprisonment not exceeding 20 years.[89]

NEW YORK PENAL LAW (1999)

SECTION 130.00. SEX OFFENSES; DEFINITIONS OF TERMS

4. "Female" means any female person who is not married to the actor . . . .

8. "Forcible compulsion" means to compel by either: (a) use of physical force; or (b) a threat, express or implied, which places a person in fear of immediate death or physical injury to himself, herself or another person, or in fear that he, she or another person will immediately be kidnapped.

SECTION 130.05. SEX OFFENSES; LACK OF CONSENT

1. Whether or not specifically stated, it is an element of every offense defined in this article, except the offense of consensual sodomy, that the sexual act was committed without consent of the victim.

2. Lack of consent results from: (a) Forcible compulsion; or (b) Incapacity to consent....

3. A person is deemed incapable of consent when he or she is: (a) less than seventeen years old; or (b) mentally defective; or (c) mentally incapacitated [by "a narcotic or

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[89] Under Maryland law, rape in the "first degree" involves forcible nonconsensual sexual intercourse with a weapon, by the infliction of serious physical injury, in league with one or more other persons, or in the commission of a burglary. It is subject to punishment by life imprisonment. Md. Crim. Code § 303.

intoxicating substance administered to him without his consent"] ; or (d) physically helpless....

SECTION 130.20. SEXUAL MISCONDUCT

A person is guilty of sexual misconduct when:

1. Being a male, he engages in sexual intercourse with a female without her consent.... Sexual misconduct is a class A misdemeanor [one-year maximum]....

SECTION 130.25. RAPE IN THE THIRD DEGREE

A person is guilty of rape in the third degree [four-year maximum] when:

1. He or she engages in sexual intercourse with another person to whom the actor is not married who is incapable of consent by reason of some factor other than being less than seventeen years old; or

2. Being twenty-one years old or more, he or she engages in sexual intercourse with another person to whom the actor is not married less than seventeen years old....

SECTION 130.30. RAPE IN THE SECOND DEGREE

A person is guilty of rape in the second degree [seven-year maximum] when, being eighteen years old or more, he or she engages in sexual intercourse with another person to whom the actor is not married less than fourteen years old.

A male is guilty of rape in the first degree [25-year maximum] when he engages in sexual intercourse with a female:

1. By forcible compulsion; or

2. Who is incapable of consent by reason of being physically helpless; or 3. Who is less than eleven years old.

WISCONSIN STATUTES (1999)

SECTION 940.225. SEXUAL. ASSAULT.

(1) First degree sexual assault. Whoever does any of the following is guilty of a Class B felony [40-year maximum]:

> (a) Has sexual contact or sexual intercourse with another person without consent of that person and causes pregnancy or great bodily harm to that person.
>
> (b) Has sexual contact or sexual intercourse with another person without consent of that person by use or threat of use of a dangerous weapon or any article used or fashioned in a manner to lead the victim reasonably to believe it to be a dangerous weapon. . . .

(2) Second degree sexual assault. Whoever does any of the following is guilty of a Class BC felony [25-year maximum]:

> (a) Has sexual contact or sexual intercourse with another person without consent of that person by use or threat of force or violence.

(b) Has sexual contact or sexual intercourse with another person without consent of that person and causes injury, illness, disease or impairment of a sexual or reproductive organ, or mental anguish requiring psychiatric care for the victim.

(c) Has sexual contact or sexual intercourse with a person who suffers from a mental illness or deficiency which renders that person temporarily or permanently incapable of appraising the person's conduct, and the defendant knows of such condition.

(cm) Has sexual contact or sexual intercourse with a person who is under the influence of an intoxicant to a degree which renders that person incapable of appraising the person's conduct, and the defendant knows of such condition.

(d) Has sexual contact or sexual intercourse with a person who the defendant knows is unconscious. . . .

(3) Third degree sexual assault. Whoever has sexual intercourse with a person without the consent of that person is guilty of a Class D felony [five-year maximum]. . . .

(4) Consent. "Consent," as used in this section, means words or overt actions by a person who is competent to give informed consent indicating a freely given agreement to have sexual intercourse or sexual contact. . . .

(6) Marriage not a bar to prosecution. A defendant shall not be presumed to be incapable of violating this section because of marriage to the complainant.

2. Mens Rea

Questions

1. What mental state with regard to the element of "without consent" in the common law and statutory formulations above? If the answer isn't clear from the text of those formulations, how should court decide this issue?

2. What *should* the mental state element be with respect to "without consent"? What is the best arguments in favor of knowledge, negligence, and strict liability? Is the selection of a mental state element likely to make a difference in cases that resemble the "stranger rape" prototype? In ones that resemble the "acquaintance rape" prototype? To the extent that there is social dissensus on the issue, whose understanding of what words or actions authoritatively lack of consent controls — the individual defendant's, the individual woman's, or the community's — under each standard?

REGINA v. MORGAN

House of Lords [1976] A.C. 182

[The defendant Morgan and three other defendants were convicted of the forcible rape of Morgan's wife. Morgan's liability rested on his having aided and abetted