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From No Means No to Only Yes Means Yes: The Rational Results of an Affirmative Consent Standard in Rape Law

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From No Means No to Only Yes Means Yes: The Rational Results of an Affirmative Consent Standard in Rape Law

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I. INTRODUCTION

2003 saw the arrest of the star basketball player Kobe Bryant on charges of forcing a woman to have sex with him, charges that were dropped in 2004.¹ This arrest is perhaps the most prominent in what has become a sordid procession of public shame: the charging of professional athletes with crimes of sexual assault.² As is common in rape charges, neither party denies that the sex took place. Instead the argument is based on whether the woman consented to it. In the apology Bryant issued that led to the dismissal of the charges, he admits that “[a]lthough I truly believe this encounter between us was consensual, I recognize now that she did not.”³

Central to the consideration of consent has been the much-affirmed concept that “no means no.” In short, the standard means that, if an individual verbally rejects sexual advances, that person must be seen as withdrawing consent to sexual contact. “No means no” has been a rallying cry for the on-campus feminist movement. Despite its utter simplicity and apparent reasonableness, supporters of “no means no” are still having to make their case on a daily basis, and apparently many still believe that a woman’s outright verbal rejection of sexual advances does not, in and of itself, create a case of rape against a man who engages in sexual intercourse with the woman. For example, columnist Gregg Easterbrook, examining the Kobe Bryant case, opines that “the reality of human interaction is that ‘no’ does not always mean no. Maybe half the sex in world history has followed an initial ‘no.’ ”⁴ Such opinions base themselves not infrequently on the findings of surveys such as that done in 1988 at Texas A&M University.⁵ This survey found that 39.3 percent of the female undergraduates surveyed sometimes said no, although they “had

1. The related civil trial later settled for an undisclosed amount. George Kimball, *Kobe Has His Out: Silence*, THE BOSTON HERALD, Mar. 3, 2005, at 94.

2. Similar examples include boxer Mike Tyson and footballer Mark Chmura. See *Tyson v. State*, 619 N.E.2d 276, 300 (Ind. Ct. App. 1993) (affirming Mike Tyson’s rape conviction by the Marion Superior Court); Shirley A. Wiegand, *Sports Heroes, Sexual Assault and the Unnamed Victim*, 12 MARQ. SPORTS L. REV. 501, 504-05 (2001) (discussing the rape accusations of Mark Chmura).

3. Kobe B. Bryant, Apology Statement to Accuser (Sept. 3, 2004), available at <http://www.thedenverchannel.com/kobebryanttrial/3700337/detail.html>.

4. Gregg Easterbrook, *No Does not Always Mean No; Time to Agree on a Phrase that Does*, THE NEW REPUBLIC ONLINE Easterblog, at <http://www.tnr.com/easterbrook.mhtml?week=2003-10-07> (Oct. 9, 2003).

5. See generally Charlene L. Muehlenhard & Lisa L. Hollabaugh, *Do Women Sometimes Say No When They Mean Yes?*, 54 J. PERSONALITY & SOC. PSYCHOL. 872 (1988) (describing methodology and results of survey questioning college students as to whether “no” always meant “no”).

every intention to and were willing to engage in sexual intercourse.”⁶ Although this and other studies showed that “no” does mean “no” for most women, some interpreting these results cite them as evidence that the word “no” confuses some men.⁷

The “no means no” standard, despite its apparent simplicity, is under attack by those who claim that it is simply not true—that in many dating cases “no” may not actually mean no. The intent of this Note is not to present such attacks as persuasive; they are not and were refuted in the 1998 Texas A&M University study, Muelenhard and Hollabough’s original work.⁸ They are still made, however, and these arguments show how the “no means no” movement has failed to establish itself as the common sense position it portrays itself as. That debate still exists about whether a woman has been raped, when she has explicitly stated that she does not wish to engage in sexual intercourse but was ignored by her partner, who proceeded to have sex with her, is a sign of the failure of “no means no” to come into the mainstream. More importantly, court decisions acquitting men of rape where there is no doubt that the woman has indeed said no to sexual intercourse indicate that “no means no” is far from being the accepted legal standard.⁹

The purpose of this Note, then, is to address the present situation regarding the law of rape in the United States and to advance the view that only a standard of affirmative consent can effectively grant women control over their participation in sexual encounters. The Note justifies the affirmative consent standard by looking at its effect on the behavior of men and women and on society at large. Far from creating a license for the vindictive behavior of a “woman scorned”¹⁰ as suggested by some commentators,¹¹ a requirement to obtain the affirmative consent of a prospective sexual partner acts as a protective barrier (or prophylaxis) against future

6. *Id.* at 873 (defining the term “yes” used in the study as “ha[ving] every intention to and were willing to engage in sexual intercourse”); *id.* at 874 (stating that 39.3 percent of women “reported saying no to sexual intercourse when they really meant yes”).

7. See STEPHEN J. SCHULHOFER, *UNWANTED SEX: THE CULTURE OF INTIMIDATION AND THE FAILURE OF LAW* 260 (1998) (“For most women, most of the time, ‘no’ does mean no. But sometimes it means maybe or ‘try harder to talk me into it.’ Sometimes, for some women, it means ‘get physical.’”).

8. Muelenhard and Hollabough, *supra* note 5, at 878 (arguing that “when a woman says no, chances are she means it . . . [and] regardless of the incidence of token resistance, if the woman says no and the man persists, it is rape.”).

9. See *infra* Part III.

10. “Heav’n has no Rage, like Love to Hatred turn’d / Nor Hell a Fury, like a Woman scorn’d.” WILLIAM CONGREVE, *THE MOURNING BRIDE* act 3, sc 1.

11. See, e.g., KATIE ROPHIE, *THE MORNING AFTER: SEX, FEAR & FEMINISM ON CAMPUS* 82 (1993) (discussing the need to maintain a differential between “bad sex” and rape).

unfounded claims of rape. It contends that the introduction of an affirmative consent standard would not only incentivize rational behavior on the part of both women and men in dating situations but that such a shift in the law would potentially shift public perceptions of women and their role in sexual relationships. Finally, this Note considers the primary criticisms leveled at the affirmative consent standard. An affirmative consent standard will not destroy intimacy and romance as many fear.¹² Such a requirement is already the norm in some less traditional forms of sexuality, such as sadomasochism, and may be defended as a path to greater closeness between partners in all forms of sexual relationships.¹³ Finally, affirmative consent standards are subject to attack from some more radical feminists, who argue that no consent to sex can ever be seen as genuine in a male dominated world.¹⁴

Section II attempts to define rape as it will be discussed in this Note. It starts with the traditional view of the crime of rape and briefly discusses the historical development of the crime, looking in particular at how that development has colored present attitudes towards consent standards. It then turns to what is the hidden majority of rape cases—"date" or "acquaintance rape." Section III looks to the present laws of three states¹⁵ and discusses cases from them that demonstrate the effects of different consent standards.¹⁶ Section IV considers how an affirmative consent standard would be justified, and how it would affect the behavior of men and women on an ongoing basis, as well as the effect such a standard would have on society. Finally, Section V addresses the most prevalent criticisms,

12. Matthew Silliman, *The Antioch Policy, a Community Experiment in Communicative Sexuality*, reprinted in DATE RAPE 167, 172 (Leslie Francis ed., 1996) (stating that "[a]ssociated with the charge of artificiality is the sense that being required to talk about intimacy while pursuing it is antiromantic and destructive of spontaneity.>").

13. Cf. Louis Pineau, *Date Rape: A Feminist Analysis*, reprinted in DATE RAPE 1, 17-20 (Leslie Francis ed., 1996) (supporting affirmative consent standards based on the belief that it is irrational for a woman to engage in sex without communication, and the lack of communication should be interpreted as a lack of consent).

14. See *infra* notes 231-242 and accompanying text.

15. There is perhaps more divergence between state laws regarding rape than on any other subject in criminal law. See generally Richard A. Posner & Katherine A. Silbaugh, *Rape and Sexual Assault*, in A GUIDE TO AMERICA'S SEX LAWS 5-34 (1996) (surveying each state's rape statutes).

16. Part III identifies and describes three legal frameworks through which rape is viewed. Pennsylvania is an example of the "traditionalist" camp of rape law. See, e.g., *Commonwealth v. Berkowitz*, 641 A.2d 1161 (Pa. 1994); *Commonwealth v. Mlarnich*, 542 A.2d 1335 (Pa. 1988). Maryland has a more modern view of consent but still may not provide a satisfactory degree of protection to women's bodily integrity. See, e.g., *State v. Rusk*, 424 A.2d 720 (Md. 1981). Finally, the New Jersey Supreme Court used statutory interpretation to introduce an affirmative consent standard. See *In the Interest of M.T.S.*, 609 A.2d 1266 (N.J. 1992).

both scholarly and popular, leveled at affirmative consent, and concludes that they are either invalid or insufficient to outweigh the benefits to all participants of such a standard.

II WHAT IS RAPE?

A. The Difficulty of Defining "Rape"

This Note treats rape as a crime committed by men against women. This intent is not to deny the existence of man-on-man rape. However, outside of institutions, particularly the prison system, the vast majority of rape falls into the male perpetrator/ female victim category.¹⁷ Rape committed by one man against another raises a whole wealth of issues beyond the scope of this Note.¹⁸ Indisputably, the overwhelming majority of rape in society is committed by men against women.¹⁹ It therefore makes sense that any discussion of what should constitute rape under the law at least starts from that perspective.

No other group of crimes inspires the degree of argument over what should constitute an offense as do sexual crimes, particularly rape. For example, there is general societal agreement over what constitutes theft and acceptance of what constitutes a homicide, notwithstanding some discussion as to what degree of murder that killing should be. Society's treatment of rape could not be more different. Indeed, even victims of sexual attacks that would constitute rape under the legal definition in the jurisdiction where the attack

17. Exact figures on the incidence of rape are not always available, not least because male sexual assaults on women have often been treated differently under the law than male assaults on other men. In officially released FBI statistics, rape refers only to attacks on women, as rapes of men are included as "assaults or sex offenses [a separate category to forcible rape] depending on the nature of the crime and the extent of injury." See FEDERAL BUREAU OF INVESTIGATION, CRIME IN THE UNITED STATES 2002: FORCIBLE RAPE (noting that rape data has traditionally only been collected for female victims), at http://www.fbi.gov/ucr/cius_02/html/web/offreported/02-nforciblerape04.html (last visited May 14, 2005). A report based on the FBI's National Incident-Based Reporting System, however, looking at Alabama, North Dakota, and South Carolina in 1991 saw about 90 percent of the incidents where the sex of both the offender and the victim were recorded were male on female attacks, 9 percent male on male, 0.8 percent female on female, and 0.2 percent female on male. JOHN M. MACDONALD, RAPE: CONTROVERSIAL ISSUES: CRIMINAL REPORTS, DATE RAPE, FALSE REPORTS AND FALSE MEMORIES 13 (1995).

18. See generally Linda McClain, *Inviolability and Privacy: The Castle, The Sanctuary, and The Body*, 7 YALE J.L. & HUMAN. 195, 229 n.168 (1995) (citing Wilbert Rideau, *The Sexual Jungle*, in WILBERT RIDEAU & RON WIKBERG, LIFE SENTENCES: RAGE AND SURVIVAL BEHIND BARS 73-107 (1992)) (discussing the recreation of male/female gender roles in same-sex rape).

19. See *supra* note 17 (discussing the statistical incidence and characteristics of rape).

occurred often fail to recognize that they have been raped.²⁰ If the victims themselves can, and frequently do,²¹ fail to classify their assault as rape, some would claim that they have not actually been raped, despite the governing legal standard.²² There is little wonder that much dispute exists over whether a particular encounter between a man and a woman is, and as importantly, should be, considered rape.

All agree a certain core of attacks constitute rape. Susan Estrich refers to such attacks as "simple rapes."²³ In these cases, a woman is violently confronted by a stranger and physically forced to engage in sexual intercourse. No one would dispute a rape has occurred in this scenario. For some, however, the definition of rape ends at this point. Certainly these are the cases that traditionally get prosecuted, largely because they are much easier for prosecutors to win than, for example, date rape cases.²⁴ In particular, prosecutors seek the "ideal" rape victim to maximize their chance of achieving a conviction.²⁵ Factors such as alcohol consumption, common in date rape allegations, are seen as muddying the waters.²⁶ Prosecutors are invariably judged according to their "win" rate, leading them to focus on the clearest cut cases, the "traditional' violent, stranger rape."²⁷

20. According to the famous *Ms.* survey, "only 27 percent of the women whose sexual assault met the legal definition of rape thought of themselves as rape victims." ROBIN WARSHAW, *I NEVER CALLED IT RAPE: THE MS. REPORT ON RECOGNIZING, FIGHTING AND SURVIVING DATE AND ACQUAINTANCE RAPE* 26 (1988).

21. *Id.*

22. See Lani Anne Remick, Note, *Read Her Lips: An Argument for a Verbal Consent Standard in Rape*, 141 U. PA. L. REV. 1103, 1142 (1993) (suggesting that an overbroad definition of rape results in situations where neither party is aware that a rape has occurred); *id.* at 1142 n.142 (discussing confusion as to whether witnesses in the William Kennedy Smith rape trial were accusing the defendant of "date rape or of being a cad").

23. SUSAN ESTRICH, *REAL RAPE* 4-7 (1987).

24. See generally LINDA A. FARSTEIN, *SEXUAL VIOLENCE: OUR WAR AGAINST RAPE* (1995) (discussing from a prosecutorial standpoint the elements that create a winnable rape face).

25. See JEANNE C. MARSH ET AL., *RAPE AND THE LIMITS OF LAW REFORM* 93 (1982).

26. See AILEEN MCCOLGAN, *THE CASE FOR TAKING THE DATE OUT OF RAPE* 61 (1996) ("Let's get some perspective here. We are allowed to drink within a legal limit and drive; surely we should be allowed to drink and talk to men? . . . It isn't women who use drink as an excuse to rape people."); MARTIN D. SCHWARTZ & WALTER DEKESEREDY, *SEXUAL ASSAULT ON THE COLLEGE CAMPUS: THE ROLE OF MALE PEER SUPPORT* 92 (1997) (arguing that this view ignores "the fact that women have a right to walk alone at night, the right to go on dates, the right to go to a bar or to drink alcohol").

27. Some prosecutors are very clear about these pressures when interviewed:

A female prosecutor said, "There is tremendous pressure on us to win every case. We are using the taxpayer's dollars to try a case, and there are too many complaints to take all of them to trial. This 'must win' mentality makes prosecutors reluctant to proceed with cases that have a low possibility of conviction." One of her male counterparts added, "It's as simple as this: district attorneys refuse a case if they don't think it is convincing. Our egos and reputations are at hand. We like to win."

The further removed from this supposedly paradigmatic case, the greater the degree of dissent over whether a scenario actually involves rape. If the attacker is known to the victim, but attacks in the same manner, most would still be willing to see the situation as being one of rape. Far from being the exception, this scenario describes the majority of rape cases.²⁸ If the assault is not an overtly physical one, but instead involves a threat, or even simply a menacing presence, has there been a rape?

When the surveyed attitudes of teenage boys are examined, it is clear that other factors play a central role in whether they feel entitled to “take” sex from the woman concerned.²⁹ When surveyed, some teenage males viewed sex as a male entitlement in the dating situation, a part of the normal progression of the evening. Once certain preconditions are met, such as the male’s payment for the evening’s entertainment or the occurrence of consensual petting, then sex becomes the expected result for the man, entitling him, in his mind, to take it if the female refuses to allow the “natural” progression of events.³⁰ Similarly, the same factors play a major role in whether juries, prosecutors, and even judges perceive a rape as having occurred.³¹ Where a dating relationship pre-exists the rape, “[j]udges have several graphic ways of describing [the] situation: ‘friendly rape,’

LEE MADIGAN & NANCY C. GAMBLE, *THE SECOND RAPE: SOCIETY’S CONTINUED BETRAYAL OF THE VICTIM* 95 (1989).

28. See ANN J. CAHILL, *RETHINKING RAPE* 21 (2001) (“[T]he majority of women raped in the United States knew their attacker in a social context (almost 75%, according to the latest numbers from the Department of Justice.)”; JUDITH ROWLAND, *THE ULTIMATE VIOLATION* 42 (1985) (estimating the number of women who knew their attacker in a social context at 80 percent).

29. See WARSHAW, *supra* note 20, at 120-21 (finding that 54 percent of the males aged 14-18 surveyed felt that it was acceptable to force sex in a dating situation where the girl has led him on and 51 percent felt it acceptable where she had sexually excited him). While the numbers of surveyed teenaged girls finding such forced sex acceptable were not as high, they were by no means insignificant. The same questions were answered affirmatively by 26 percent and 42 percent of the sample of teenaged girls respectively. This survey points markedly to a societal acceptance of the fact that women, in particular young women, do not have a right to full control over sexual access to their bodies.

30. *Id.*

31. See HARRY KALVEN & HANS ZEISEL, *THE AMERICAN JURY* 249-54 (1966); see also Farstein, *supra* note 24, at 133 (discussing “the archaic societal attitude, which remains so disturbingly pervasive, that sexual assaults are victim-precipitated crimes.”). Certainly one cannot say in every case where a prosecutor fails to bring charges that he has done so out of a refusal to believe rape occurred. Prosecutorial resources are limited and are rationally focused on the cases most likely to result in convictions, and the attackers most likely to strike again.

'felonious gallantry,' 'assault with failure to please,' and 'breach of contract.'"³²

B. Legal Definitions of "Rape"

Rape in the Anglo-American legal sphere has developed from this accepted core. In English common law, rape was initially seen as a property crime. Only virgins could be raped, and the crime was seen as the devaluation of the father's property.³³ A woman who was no longer a virgin was seen as impure, less marriageable, and therefore less likely to bring a dowry to her family. This phenomenon has continued to the present day in certain parts of the world. In Tanzanian refugee camps populated by the Congolese,

paying a dowry poses a serious challenge. As a result, rapes of young women have increased. Men sometimes rape women they want to marry in order to reduce the dowry price. Where as a bride's parents typically receive US\$1,000, a bride who has been raped is worth no more than US\$50.³⁴

Over time in the Western world, the requirement that a woman be a virgin to successfully charge rape was relaxed, but rape remained a property offense, and in particular an offense against men. A man could not legally rape his wife—her sexual favors were seen as his property.³⁵ Among unmarried women, rape was in practice restricted to the chaste. Previous sex with the alleged rapist was either an absolute or, more often, simply a practical, bar to a successful claim of rape.³⁶

As rape law became codified, two central elements of rape statutes became apparent. Rape occurred when a man compelled a woman to engage in sexual intercourse by means of force, without her

32. Carol Bohmer, *Judicial Attitudes Towards Rape Victims*, 57 JUDICATURE (1974) reprinted in FORCIBLE RAPE: THE CRIME, THE VICTIM, AND THE OFFENDER 164 (Duncan Chappell et al. eds., 1977).

33. MCCOLGAN, *supra* note 26, at 19.

34. Refugees International, *Refugees Voices: Violence Against Women and Dowry Pricing in Congolese Refugee Camps*, at <http://www.refugeesinternational.org/content/article/detail/1208> (August 29, 2001).

35. Such exemptions continued in both England and the United States until extremely recently. See, e.g., *R v. R*, 1 AC 599 (1992) (overturning England's spousal rape exemption); see also IDA JOHNSON AND ROBERT SIGLER, FORCED SEXUAL INTERCOURSE IN INTIMATE RELATIONSHIPS 22 (1997) (noting that, as of 1990, seven states had no law against marital rape). But see FORELL AND MATTHEWS, A LAW OF HER OWN: THE REASONABLE WOMAN AS A MEASURE OF MAN 232-34 (2000) (arguing that removal of the spousal rape exemption in several states has been ineffective in leading to successful prosecutions of men who rape their wives due to the broad judicial view of what constitutes a woman's consent to her husband).

36. See MCCOLGAN, *supra* note 26, at 19 (noting that concubinage, a legal defense barring a rape claim against a person with whom the victim had previously had sexual relations, existed in England until 1678).

consent. On the surface, these requirements appear to be repetitive, as a consensual sexual act need not be forced. The law, however, saw the two as separate elements, each requiring independent proof. Consent was the simpler of the two—as the crime required an absence of consent; the prosecution had the burden of proving that the victim did not consent. Force, on the other hand, was more difficult to prove. In the majority of cases, rape is a crime witnessed only by the perpetrator and the victim.

Facing this problem, rape law developed along lines very different from other criminal offenses. While the classic legal definition was simple—“[r]ape is sexual intercourse with a woman *by force and against her will and consent*”³⁷—the courts added extra requirements to prove a charge of rape that were not present in any other offenses. The first requirement placed on the victim was proof of resistance, which indicated that the force element was satisfied. Underlying this requirement was the concept that no woman would allow her virtue to be snatched away without a fight. Initially, such resistance was required to be to the utmost.³⁸ Over time, this resistance requirement morphed into requiring only what resistance was reasonable under the circumstances—a woman was not expected to risk death or serious personal injury to avoid rape, but she must still “put up a fight”; “[f]or the sexual intercourse can only be deemed rape if it was against the will of the woman, which fact is manifested by the struggle that she puts up against the penetration of her person.”³⁹

The resistance requirement, however limited, can be seen in some sense as an advance from the prior view that rape was, in the majority of situations, an impossibility. While the infirm and young were seen as prey to the advances of predatory men, healthy adult women were expected to prevent unwanted sexual advances. In a respected medical-legal treatise, Professor Beck wrote, “doubts exist whether a rape can be consummated on a grown female in good health and strength. . . . For a woman always possesses sufficient power by

37. *SEXUAL DEVIANCE AND SEXUAL DEVIANTS* 297 (Erich Goode & Richard R. Troiden eds., 1974)

38. Indeed, the tales of Catholic Saints are replete with stories of women so virtuous as to be willing to die to protect their chastity. See, e.g., Catholic Online, Saints and Angels, Largest Collection of Saint and Angel Information: Saint Arilda (describing the saint as a woman who “was slain while defending her chastity”), at http://www.catholic.org/saints/saint.php?saint_id=1540; see also Michelle J. Anderson, *Reviving Resistance in Rape Law*, 1998 U. ILL. L. REV. 953, 962-65 (1998).

39. MORRIS PLOSCOWE, *SEX AND THE LAW* 170 (1951).

drawing back her limbs and by the force of her hands to prevent the insertion of the penis while she can keep her resolution entire."⁴⁰

The law gradually accepted that threats of physical violence were sufficient to negate the resistance requirements in certain situations, such as when the woman is threatened with a gun or knife. In these cases, the necessary resistance is relative. There is no set level to which a woman must resist, "[r]ather, the resistance must be proportioned to the outrage."⁴¹ The practical effect of such recognition is limited. A jury may view even direct evidence of physical assault as insufficient to indicate that the victim did not consent.⁴² Women were thus presented with a Catch-22 situation when they reported their rape. If they resist, they face severe injury and potential death at the hands of an assailant who, on average, is taller, heavier, and stronger.⁴³ If they do not resist, and do not arrive in court bearing the scars of such resistance, they may be unable to convince a jury that any crime was committed against them.⁴⁴ "Even today, the degree of resistance is a measure of whether the victim 'consented' to sexual intercourse."⁴⁵

The force requirement was based on a fear that runs throughout the development of rape law: the bogeyman of the fabricated rape complaint. Perhaps the most widely cited comment on rape law is that of seventeenth century English legal practitioner Lord Chief Justice Matthew Hale, who stated that "[r]ape is an accusation easily to be made and hard to be proved, and harder to be defended by the party accused, though never so innocent."⁴⁶ Those who suggest that women are prone to false accusations of rape, and who thus oppose any liberalization of the requirements to establish a case of rape, have failed to demonstrate why the numbers do not bear out such a suggestion.⁴⁷ They also have not shown why women might be

40. *Id.*

41. *Id.* at 172.

42. See SUSAN BROWNMILLER, *AGAINST OUR WILL: MEN, WOMEN & RAPE* 373 (1975) ("But although evidentiary requirements on force and resistance may appear reasonable on paper, juries are influenced hardly at all by bruises and have the poorest understanding that the *threat* of violence might be sufficient to terrorize a woman into submission.").

43. See ESTRICH, *supra* note 23, at 22 (suggesting that requiring a woman to "resist an attacker who is likely to be larger and stronger [than her]" is absurd).

44. See MADIGAN & GAMBLE, *supra* note 27, at 94-95.

45. SEDELLE KATZ & MARY ANN MAZUR, *UNDERSTANDING THE RAPE VICTIM: A SYNTHESIS OF RESEARCH FINDINGS* 174 (1979).

46. BROWNMILLER, *supra* note 42, at 369.

47. *Id.* at 387; see also FARSTEIN, *supra* note 24, at 228-29 ("Obviously the overwhelming number of rape complaints are real - most law enforcement officials equate the amount of false reporting of sex offences with that of every other case, at approximately 5 per cent of the total number of reports.").

more prone to invent charges of rape than men might be to unjustly accuse people of other crimes (which do not carry the same evidentiary requirements).⁴⁸

Susan Brownmiller states that the deeply held fear that women frequently and vindictively falsely accuse men of rape “is based on the cherished male assumption that female persons tend to lie.”⁴⁹ This belief in the inherent mendacity of women is reflected, as seen above, in the apparent requirement that women sustain physical harm in order to be believed when they accuse a man of rape.⁵⁰ Indeed, Hale’s assumption appears to be based on shaky grounds. “Since four out of five rapes go unreported, it is fair to say categorically that women do not find rape ‘an accusation easily to be made.’”⁵¹

C. “Simple Rape” v. Acquaintance Rape

Rape law has thus focused predominately on “simple rape”—the overtly violent assault by a stranger on a woman. The numbers show, however, that the vast majority of rapists are men known to their female victims. A 1978 survey of 930 adult women by Diane Russell showed that, in rapes and attempted rapes suffered by the participants, 82 percent of the aggressors were men known to the victim.⁵² Indeed, even within the existing legal definitions for rape, there is no doubt that the traditional image of rape described above as “Simple Rape” is the anomaly, and that the statistically typical rape, involves a consensual date or social interaction, coupled with a man’s refusal to accept the boundaries placed on the encounter by the woman. A further shift with this acknowledgement of a differing view of the archetypal rape should be a change in the public conception of the stereotypical rapist. Far from being a noticeable miscreant in a

48. See *supra* Part V.A; see also *State v. Smith*, 372 A.2d 386, 389 (N.J. 1977) (“Critics [of the criminalization of marital rape] have argued that the creation of such an interdiction would increase the risk of fabricated accusations. . . . These are not totally persuasive arguments when one considers the law already furnishes an arsenal of such weapons to a woman bent on revenge.”).

49. BROWNMILLER, *supra* note 42, at 369.

50. See ROSEMARIE TONG, *WOMEN, SEX, AND THE LAW* 98 (1984) (“Because women are traditionally viewed as wily temptresses and incorrigible liars, skeptical police officers, prosecutors, and judges prefer it when the alleged rape victim resists her alleged rapist until she can resist him no more.”).

51. BROWNMILLER, *supra* note 42, at 369.

52. ESTRICH, *supra* note 23, at 12. To indicate the extent to which the official numbers underestimate the prevalence of rape, and in particular acquaintance rape, it is necessary to note that only 10 percent of these attacks were reported to the police. *Id.*

dirty raincoat lurking in the bushes, the typical rapist is likely to be literally the boy next door.⁵³

As stated above, many young males do not view a refusal to respect a woman's expressed limits as being rape.⁵⁴ In a survey of Californian teen males, over half thought forcing a woman to have sex was acceptable if she "leads him on," has got him sexually aroused (presumably through consensual petting), or changes her mind as to whether she wants sex.⁵⁵ A 1986 survey by Neil Malamuth of UCLA found that 30 percent of men admitted they would commit rape if they knew there was no chance of getting caught.⁵⁶ Even more disturbing, when the word "rape" was changed to "force a woman into having sex," the number soared to over 50 percent.⁵⁷

In theory at least, the law makes no distinction between rape by a stranger and rape by an acquaintance. The elements for the crime are the same—generally penetration by force in the absence of consent by the woman. This standard is far from neutral between the two types of rape mentioned above, "acquaintance" rape and "stranger" rape. A requirement for the victim to demonstrate both force and lack of consent will be much harder to meet in "acquaintance" rapes as opposed to "stranger" ones. Rape, especially in the environs of a dating relationship, will always be a difficult crime to prove, mainly because of the usual absence of witnesses.⁵⁸ Often, the jury will seize upon signs of physical force, choke marks, abrasions in the genital area, or torn and damaged clothing to indicate resistance by the woman. In the absence of such indicators, as may well be the case in a situation where a woman consents to a certain degree of

53. See *id.* (noting that stranger rapes occur less often than acquaintance rapes); see also CAHILL, *supra* note 28, at 33.

54. See *supra* notes 29-30 and accompanying text.

55. WARSHAW, *supra* note 20, at 120-21.

56. *Id.* at 97.

57. *Id.* At least 20 percent of men surveyed do not feel that forcing a woman to have sexual intercourse constitutes rape. This is calculated by taking the 50 percent of men who would force a woman to have sex if they were sure they would not be caught, and subtracting the 30 percent that say they would rape a woman in the same situation. This leaves us with 20 percent of men who would be willing to force a woman to have sex but not rape her, thus believing, it appears, that forced sex is not rape.

58. This is the case whether the crime is committed by a stranger or by an acquaintance. In the latter case, the victim may have voluntarily accompanied the attacker to a private area, such as an apartment. In the former case, the attacker will most likely plan his attack to minimize the likelihood of witnesses. In the acquaintance rape situation, however, the defendant is more likely to be able to provide witnesses indicating that the victim accompanied him voluntarily, creating an impression of consent for the jury. See Katharine K. Baker, *Sex, Rape, and Shame*, 79 B.U. L. REV. 663, 690-93 (1999) (discussing the problems of proof in date rape).

sexual interaction, the prosecution's case will rest on the credibility of the parties involved.⁵⁹

In the situation of a "stranger" rape, this claim of force and non-consent is likely to be plausible to the jury, especially since there is more likely to be physical evidence such as that mentioned above.⁶⁰ In the case of acquaintance rapes, however, the jury has less reason to believe that the sex was non-consensual. Indeed, a common reaction of jurors in such situations is that the victim got what she deserved.⁶¹ Rape in real life, is, of course, not as straightforward as the paradigmatic idea of simple rape portrays.⁶²

Even when people do recognize the experience of the acquaintance rape victim as constituting rape, the trauma may be discounted as somehow less than a "real" rape. If society views the archetypal rape as being one of brutal force imposed by a stranger, then it is no great logical step to see a "date" rape as being in some sense less traumatic. Even the name "date rape" suggests placing it into a different category. Such a premise lies behind many of the feminist critiques of the anti-date rape movement, which see many accusations of date rape arising when a woman regrets the previous night's encounter with a man.⁶³ Katie Roiphe focuses on situations where the sex was consensual, but the woman regrets her decision

59. Even if such evidence does exist, it may be less likely to be collected in cases of acquaintance rape. See WARSHAW, *supra* note 20, at 62 ("Many women do not want to undergo police or medical scrutiny immediately following a rape and therefore don't report their experiences. This group includes the vast majority of acquaintance rape survivors. They think the police won't believe their stories, will blame them, or not consider the episode rape.").

60. This of course assumes that the woman concerned is a 'good' victim. If the woman is a prostitute, or reputedly promiscuous, then the presumption of the jury may be very different indeed. See CATHARINE MACKINNON, *TOWARDS A FEMINIST THEORY OF THE STATE* 175 (1989) ("Daughters may not consent; . . . prostitutes are assumed to, and cannot but.").

61. See KALVEN & ZEISEL, *supra* note 31, at 278-79.

62. Susan Brownmiller relates an autobiographical story of rape that occurred before the blind date arranged by relatives of the participants had even occurred. While this in itself might seem close to the traditional view of rape, her behavior afterwards shows how no single model can define how rape occurs and how women later react:

I thought to myself, I wonder what happens now. I kept thinking about my mother, she'd never believe it. I'll tell you what happened next. We went out for dinner. We proceeded along with the date as if nothing had happened. I was in such a state of shock I just went along with the rest of the date.

BROWNMILLER, *supra* note 42, at 402.

63. See ROIPHE, *supra* note 11, at 54. There is no doubting that, as Roiphe quotes Majorie Metsch, Director of Peer Education at Columbia University, "when someone comes in and says 'I was really drunk and I shouldn't have had sex last night,' it isn't the same as saying 'I was raped,'" and that regret over bad sex is not rape. *Id.* But Roiphe fails to address the repeated surveys that show that men admit to ignoring a woman's absence of consent, as well as the sheer prevalence of women stating that their dates ignored their explicit statements that they did not wish for sex. *Id.*

later and falsely accuses the man of rape.⁶⁴ This situation represents the "nightmare scenario," backed by the belief mentioned above that women regularly lie about being raped, for vindictive reasons.⁶⁵ Novelist Martin Amis summed this up: "As far as I am concerned, you can change your mind before, even during, but not just after sex."⁶⁶ Roiphe, and similar critics fail, however, to demonstrate why false accusations might be more common in rape than other crimes, or to counter the evidence that this is not the case.⁶⁷

The available evidence shows that, while there are undoubtedly differences in impact between "acquaintance rape and "stranger" rape, one is not per se more damaging to the victim than the other.⁶⁸ Psychological research has shown that there is no correlation between the type of assault involved and the degree of post-traumatic stress disorder ("PTSD") exhibited by the victim.⁶⁹ In the case of a woman raped by someone she knows, while there may be less violence involved,⁷⁰ the woman is more likely to consider herself at least partially responsible for the attack that occurred. She is also less likely to be viewed as a victim by her social circle.⁷¹ As in a divorce, friends will often pick sides, and the victim may be deprived of the peer support that is essential for her emotional recovery. Such effects may be seen as even more devastating if, as in 80 percent of the acquaintance rape cases that actually go to trial,⁷² the defendant is acquitted.⁷³

64. *Id.*

65. See *supra* notes 46-51 and accompanying text.

66. MACDONALD, *supra* note 17, at 62.

67. See *infra* notes 206-220 and accompanying text.

68. See Bonnie L. Katz, *The Psychological Impact of Stranger Versus Nonstranger Rape on Victims' Recovery in ACQUAINTANCE RAPE: THE HIDDEN CRIME* 251-269 (Andrea Parrot & Laurie Bechhofer eds., 1991).

69. Catalina M. Arata & Barry R. Burkhart, *Post-Traumatic Stress Disorder Among College Student Victims of Acquaintance Assault*, in *SEXUAL COERCION IN DATING RELATIONSHIPS* 88-90 (E. Sandra Byers & Lucia F. O'Sullivan eds., 1996). Overall, one-third of sexual assault victims surveyed on campus exhibited symptoms of PTSD. *Id.* at 90.

70. This is of course not necessarily the case, as "date" rapes may be extremely violent over and above the violence inherent in the penetration, just as "stranger" rapes may be accomplished through forms of coercion other than physical assault.

71. Germaine Greer here writes, "The woman who is assaulted and raped by a total stranger may suffer less than the woman who endures constant humiliation at the hands of people she is trying to know and love." *SEXUAL DEVIANCE AND SEXUAL DEVIANTS*, *supra* note 37, at 329. At one extreme of this, the Kinsey Institute reported that "to be raped by a stranger makes one a martyr; to be raped by a friend makes one an object of suspicion." *Id.* at 301.

72. MCCOLGAN, *supra* note 26, at 76

73. Greer again states "If she fails to make her accusation stick, so that people assume that she is malicious or hysterical or that she enticed her rapist, she is in more serious psychic trouble than before." *SEXUAL DEVIANCE AND SEXUAL DEVIANTS*, *supra* note 37, at 330.

Given that the victim suffers great harm from assaults by acquaintances, such attacks should be included in the legal definition of rape.⁷⁴ As has been seen, however, the law's focus on force, resistance and non-consent is written to deal with 'simple' rape.⁷⁵ Even then, the high hurdle set by such requirements shows that "rape cases finding insufficient evidence of force reveal that acceptable sex, in the legal perspective, can entail a lot of force."⁷⁶

D. A Particularized Definition of Rape

This Note takes the stance that rape occurs whenever a woman is subjected to sexual intercourse to which she does not consent. The focus of the law should not be any previous relationship between the man and the woman, but instead it must center on "whether she wanted the *particular* act of sex on that *particular* occasion with that *particular* man."⁷⁷ Such a definition rightly focuses on the victim of the offense—the woman who has been attacked.⁷⁸ This outlook on rape marks a shift away from focusing on the behavior and intentions of the rapist, as well as the problematic resistance requirement. By requiring resistance, the present law accepts that some degree of force may be a natural part of sex.⁷⁹ Such a view, as embodied in the traditional law of rape, views women as passive receptors of male

74. While the law in theory includes such attacks within the definition of rape, the view as expressed in the popular media of charges of date rape indicate a popular unwillingness to view such attacks as rape. See generally MCCOLGAN, *supra* note 26. In particular, many think of such attacks as being in some way unworthy of consideration in the same category as "stranger" rapes. "One woman, raped by a stranger at knife point, says that although she feels bad for women raped by their former boyfriend (*sic*), she does not think their experience should be equated with hers." ROIPHE, *supra* note 11, at 82. Once again, Roiphe apparently attempts to diminish the gravity of "acquaintance rape". Those who talk of "acquaintance" rape are not attempting to equate it with "stranger" rape, but instead to indicate that both, while having different effects, are serious attacks on a woman's bodily integrity and both are worthy of being treated seriously by a legal system.

75. See *supra* notes 33-51 and accompanying text.

76. MCKINNON, *supra* note 60, at 173.

77. MCCOLGAN, *supra* note 26, at 49.

78. See BROWNMILLER, *supra* note 42, at 376:

To a woman, the definition of rape is fairly simple. A sexual invasion of the body by force, and incursion into the private personal innerspace without consent – in short, an internal assault from one of several avenues and by one of several methods – constitutes a deliberate violation of emotional, physical and rational integrity and is a hostile, degrading act of violence that deserves the name of rape.

79. See PLOSCOWE, *supra* note 39, at 170 (noting that "when the man attempts to impose his will a little too forcefully upon [the woman], [that] a charge of rape may be made.").

sexuality, who must be pursued and seduced.⁸⁰ The particularized definition suggested here looks instead at women as equal partners in a sexual relationship, capable of making independent choices, and fully deserving of having those choices respected by their freely chosen sexual partner.⁸¹

III. THE STATE OF THE LAW

A. Pennsylvania: The Traditional Legal Structure

The law in Pennsylvania is perhaps the most traditional of all states when rape is considered. The Pennsylvania Supreme Court has made clear that, for rape to have occurred under Pennsylvania law, not only must the victim prove that she demonstrated her non-consent, but also that she physically resisted her attacker, and that the attacker used actual physical force, or the threat thereof, to ensure compliance.

In *Commonwealth v. Berkowitz*, the victim was a college student who entered the room of her boyfriend. Inside, she found his roommate asleep on his bed, and decided to wait for her boyfriend to return.⁸² The girl refused to give the defendant a back rub, and declined to sit on the bed with him to talk.⁸³ Undeterred, defendant moved to the floor to massage her breasts, locked the door, pushed her on the bed, and sexually penetrated her.⁸⁴ The assailant did not consider himself to be raping the girl. After sex, "he stated, 'Wow, I guess we just got carried away.'" ⁸⁵

Rape in Pennsylvania requires both an absence of consent, and the presence of physical force (or threat thereof).⁸⁶ The court, therefore, found that "[a]s to the complainant's testimony that she stated 'no' throughout the encounter with Appellee, we point out that, while such an allegation of fact would be relevant to the issue of

80. See E. Sandra Byers, *How Well Does the Traditional Sexual Script Explain Sexual Coercion? Review of a Program of Research* (discussing the Traditional Sexual Script), in *SEXUAL COERCION IN DATING RELATIONSHIPS* 8-11 (E. Sandra Byers & Lucia F. O'Sullivan eds., 1996).

81. Interestingly, one of the most vitriolic attacks on such a view comes from the more radical feminists, such as Catharine MacKinnon and Andrea Dworkin, who view society as being so structurally oppressive toward women that no choice made by a woman to enter into a sexual relationship can ever truly be considered free. See *infra* notes 231-242 and accompanying text.

82. 641 A.2d 1161, 1163 (Pa. 1994).

83. *Id.*

84. *Id.*

85. *Id.* The victim was under no such illusions of consensual sex. She replied, "No we didn't get carried away, you got carried away" and pressed charges. *Id.*

86. See 18 PA. CONS. STAT. § 3121 (2004) (requiring "forcible compulsion").

consent, it is not relevant to the issue of force.”⁸⁷ While the court stressed that “[t]he victim of a rape need not resist”⁸⁸ it is difficult to see what else the victim is required to have done in order for rape to have occurred. The court acknowledged that defendant was lying on top of her, that the door was locked (though stressed that it could be unlocked easily from the inside), and that at no time did she consent to his sexual advances.⁸⁹

If there was no rape here because of a lack of force, the court is bringing the requirement for resistance in through the back door. The victim’s passivity thus prevents the finding of rape. If she had attempted to push defendant off her (in other words, if she had *resisted*), one of two things would have occurred. One outcome is that she would have succeeded, and not been raped. The alternative is that the defendant would have prevented her from pushing him off, and thus the force requirement would have been met. Rape would thus have occurred. Contrary to the court’s protestations,⁹⁰ it is the absence of resistance on the part of the victim here that determined whether rape had occurred. Just as the common law standard held an absence of resistance indicated an absence of force, the criminality of the assailant’s actions are determined by the actions of the victim.

A more shocking acquittal on rape charges can be seen in *Commonwealth v. Mlinarich*.⁹¹ The victim, a fourteen-year old girl, had previously been living with her brother.⁹² After a dispute over a ring belonging to his wife, the brother reported the victim to the police, and she was placed in a juvenile detention home.⁹³ Shortly thereafter, Mlinarich, a sixty-three-year old married neighbor (for whom the victim had worked as a cleaner) suggested that the victim could stay with him and his wife, and she was released into his wife’s custody.⁹⁴ From the day of her fourteenth birthday (after which time he could no longer be charged with statutory rape in Pennsylvania), Mlinarich subjected the defendant to a string of sexual assaults.⁹⁵ When his wife was out, he insisted that the victim undress. When she refused, he “threatened to send her back to the detention home if she

87. *Berkowitz*, 641 A.2d at 1164. This interpretation of the force requirement contrasts with New Jersey, where penetration itself is deemed sufficient to satisfy the force requirement to prove rape. See *infra* notes 138-148 and accompanying text.

88. *Id.* at 1163.

89. *Id.* at 1164.

90. *Id.* at 1163.

91. 542 A.2d 1335 (Pa. 1988).

92. *Id.* at 1336.

93. *Id.* at 1336-37.

94. *Id.* at 1337.

95. *Id.*

did not comply.”⁹⁶ Mlarnich twice failed to rape the victim, failing to achieve penetration, while she “experienced pain and ‘scream[ed], holler[ed]’ and cried.”⁹⁷ Eventually he succeeded in penetrating her, as well as forcing her to engage in oral intercourse, each time under the same threat of being sent back to the detention center.⁹⁸

While convicted by the trial court of rape, Mlinarich was acquitted of that charge on appeal, a decision that was affirmed by the Supreme Court of Pennsylvania. The court’s decision was based on an absence of force in the situation. While threats of force are sufficient to result in rape, those threats must be sufficient under an objective standard. The law required that the sexual intercourse be the result of “threat of forcible compulsion that would prevent resistance by a person of reasonable resolution.”⁹⁹ It was irrelevant to the court that the attacker here literally held the victim’s freedom in his hands. Only the threat of physical force would suffice to show the requisite force. No external factors, such as the victim’s relative age or any power relationship that might have existed between her and her assailant, were to be considered in this calculation.”¹⁰⁰ Thus any uniqueness in the emotional makeup of the victim is irrelevant in determining whether the threat possessed the requisite force to satisfy this element of the offense. What is germane is its impact on a person of reasonable resolve.”¹⁰¹

It is not necessary to debate here whether a ‘person of reasonable resolve’ would view the threat of incarceration as sufficient to overcome their resistance. What is most relevant is that the existence of an alternative (in this case loss of freedom) is sufficient according to the court to make the sexual encounter voluntary. However repugnant the alternative, “she was left with a choice, and therefore the submission was the result of a deliberate choice and was not an involuntary act.”¹⁰² In the court’s view, the fourteen-year old girl consented to sex with a sixty-three-year old man, and his power over her freedom in no way made the imposition of his will rape, despite her pain and screams. “Certainly difficult choices have a coercive effect but the result is the product of the reason, albeit

96. *Id.*

97. *Id.*

98. *Id.*

99. 18 PA. CONS. STAT. § 3121(2) (2004).

100. *Mlinarich*, 542 A.2d at 1339.

101. *Id.* at 1340.

102. *Id.* at 1341.

unpleasant and reluctantly made. The fact cannot be escaped that the victim has made the choice and the act is not involuntary."¹⁰³

B. Maryland: The Typical View

Maryland's law is typical of most states' rape laws. One case in particular demonstrates the extent to which the requirements for force and resistance can combine to overcome the efficacy of a woman saying no to sexual intercourse. In *State v. Rusk*,¹⁰⁴ the victim and a female friend were in a bar. Rusk spent time talking to both of the women, and requested a ride home from the victim.¹⁰⁵ As her friend appeared to know him, the victim consented and left the bar with him after midnight, making it clear that "I'm just giving a ride home, you know, as a friend, not anything to be, you know, thought of other than a ride."¹⁰⁶ The victim drove him to a part of town she did not know, and he invited her to come up to his apartment, an offer she refused repeatedly.¹⁰⁷ Rusk then leaned over and took her keys from the ignition and insisted she went up to his apartment. Frightened, she did so.¹⁰⁸

The victim again requested to leave, at which point Rusk pulled her onto the bed and undressed her.¹⁰⁹ Lying in a stranger's bed in an unfamiliar part of town with her car keys still in Rusk's possession, the victim begged to be allowed to leave. Rusk refused, and the victim began to cry.¹¹⁰ At that point, Rusk began to choke the victim lightly with his hands, and she said, "If I do what you want, will you let me go?"¹¹¹ Saying yes, Rusk made her perform oral sex on him, and then engaged in vaginal intercourse.¹¹² Rusk then returned her car keys and permitted her to go. The victim left, found a police car, and reported the incident to a police officer.¹¹³

After being convicted by the trial court, Rusk had his conviction reversed by the Maryland Court of Special Appeals.¹¹⁴ The court based its reversal on a determination that the victim did not

103. *Id.* at 1342.

104. 424 A.2d 720 (Md. 1981).

105. *Id.* at 721.

106. *Id.*

107. *Id.*

108. *Id.* at 721-22.

109. *Id.* at 722.

110. *Id.*

111. *Id.*

112. *Id.*

113. *Id.*

114. *Rusk v. State*, 406 A.2d 624, 628 (Md. Ct. Spec. App. 1979).

resist. "Force is an element of the crime and to justify a conviction, the evidence must warrant a conclusion either that the victim resisted and her resistance was overcome by force or that she was prevented from resisting by threats to her safety."¹¹⁵ This decision was in turn reversed by the Maryland Court of Appeals.¹¹⁶ They did so, however, on extremely narrow grounds. There was no attempt to challenge the central tenet of the appellate finding—that force in overcoming resistance was necessary for a rape conviction. The Court's holding rested squarely on the admittedly mild choking that occurred in Rusk's apartment.¹¹⁷ "Considering all the evidence in the case, *and with particular focus upon the actual force applied by risk to Pat's neck*,"¹¹⁸ the Court reversed.

From this decision, it is clear that the court did not accept that Rusk's actions, absent the choking, were sufficient for rape. Only a real and reasonably grounded fear of death or imminent bodily harm would be sufficient to remove the requirement that the victim resist.¹¹⁹ The fear instilled by Rusk taking the victim's car keys, combined with her repeated refusals to go to his apartment, the late time, and the total strangeness of the neighborhood, was not considered sufficient to justify the victim's non-resistance. While the court recognized the possibility that she might be "restrained by fear of violence,"¹²⁰ and stressed that a victim is not required to scream out or attempt to escape, the refusal to find the circumstances of this victim's ordeal sufficiently frightening indicates the limits of this concession. It is worth noting that even the Court of Special Appeals found Rusk's behavior sufficient to justify a conviction on a charge of assault, yet the sexual element was not sufficient to rise to the level of rape.¹²¹

C. New Jersey: A Progressive View of Rape

New Jersey's judicial interpretation of its sexual assault codes is among the most progressive in the nation. In 1992, the New Jersey Supreme Court announced its holding in *In the Interest of M.T.S.*¹²² M.T.S. was a seventeen-year old male, living in the house of the

115. *Id.* at 626 (quoting *Hazel v. State*, 157 A.2d 922, 925 (Md. 1960)).

116. *State v. Rusk*, 424 A.2d 720, 738 (Md. 1981).

117. While the choking here might have been mild compared to the violence suffered by many rape victims, there can be little doubt that being choked to any extent during sex is a frightening experience if not done pursuant to consent.

118. *Rusk*, 424 A.2d at 728 (emphasis added).

119. *Id.* at 726-27.

120. *Id.* at 728.

121. *Rusk v. State*, 406 A.2d 624, 628 (Md. Ct. Spec. App. 1979).

122. 609 A.2d 1266, 1280 (N.J. 1992).

victim's family.¹²³ M.T.S. slept downstairs on the couch, and frequently teased the 15-year old female victim, C.G., in a sexual fashion.¹²⁴ On the night of May 21, 1990, C.G. claimed that she awoke to see M.T.S. in her doorway.¹²⁵ She used the bathroom, and returned, falling back into a heavy sleep.¹²⁶ She woke up with M.T.S. on top of her, and found he had stripped her and sexually penetrated her.¹²⁷ She maintained that she slapped his face and yelled at him to leave, which he did. In the morning, she informed her mother, who had the victim call the police and file a complaint.¹²⁸

According to M.T.S., the encounter was a much more consensual affair. He claimed that "during the three days preceding the incident they had been 'kissing and necking' and had discussed sexual intercourse" and that C.G. "repeatedly had encouraged him to 'make a surprise visit to her room.'" ¹²⁹ He claimed that he did so on that night, and they kissed and moved to the bed, undressing each other, then began to have sex.¹³⁰ During intercourse, "C.G. pushed him off, she said 'stop, get off,' and he 'hopped off right away.'" ¹³¹

Like many rape charges, the situation appeared on the surface to be a case of "he said, she said."¹³² The trial court entered factual findings, which were left undisturbed by the higher courts that "the victim had consented to a session of kissing and heavy petting with M.T.S."¹³³ The court did not believe C.G. when she claimed to have been sleeping at the time of the assault, "but nevertheless found that she had not consented to the actual sexual assault."¹³⁴ M.T.S. was

123. *Id.* at 1267. Also resident there were the victim, her mother, three siblings, and several others, including M.T.S. and his girlfriend.

124. *Id.* at 1267-68. "She testified that M.T.S. had attempted to kiss her on numerous other occasions and at least once had attempted to put his hand inside of her pants, but that she had rejected all of his previous advances." *Id.*

125. *Id.*

126. *Id.*

127. *Id.*

128. *Id.*

129. *Id.*

130. *Id.*

131. *Id.*

132. While most commonly seen as a facet of rape, this can be seen in many other criminal situations. For example, it is a defense to a charge of theft of an automobile that the owner granted permission for its use. In the absence of other evidence, and with a contested claim by the accused that the owner granted such permission, this would be a 'he said, she said' matter of credibility for the jury to determine. Similarly, in the case of a brawl in an alley, with no witness, and each person claiming the other threw the first punch, the solution must come from the jury's assessment of the credibility of each party. Traditionally the credibility of the victim has been seen to be a greater problem in rape cases. *See supra* notes 46-51 and accompanying text.

133. *M.T.S.*, 609 A.2d at 1269.

134. *Id.*

adjudicated delinquent in the sexual assault.¹³⁵ The appellate court reversed the decision, stating "that there is no crime involving the penetration of a victim who does not give consent, but where there is no physical force or coercion."¹³⁶ Under the law as written, because there was no force involved in the sexual encounter, there could be no sexual assault.¹³⁷

The New Jersey Supreme Court reversed the appellate court in a finding viewed as one of the most controversial statements of rape law in the United States. The court held that "[t]he definition of 'physical force' is satisfied under *N.J.S.A. 2C:12-2c(1)* if the defendant applies any amount of force against another person in the absence of what a reasonable person would believe to be affirmative and freely given permission to the act of sexual penetration."¹³⁸ The court made clear that no force other than the act of penetration itself was needed for a rape to have occurred, thus reversing the finding of the appellate court.

The New Jersey Supreme Court found the holding of the appellate court to represent a return to the resistance requirement excised by the state legislature, with the effect of importing "into the sexual assault statute the notion that an assault occurs only if the victim's will is overcome, and thus [reintroducing] the requirement of non-consent and victim-resistance as a constituent material element of the crime."¹³⁹ The rapist would have no need to use force in excess of that involved in penetration were the victim not to resist. As such, any requirement of showing such 'further' force is an assertion that rape cannot have occurred unless the victim resisted, as that resistance is the *sine qua non* for the imposition of extra force.¹⁴⁰

Much has been made of this shift of what constitutes force under New Jersey law.¹⁴¹ For the very act of penetration itself to be seen as legally sufficient to constitute the required element of force is clearly a major shift in the development of rape law, and in the understanding of what rape actually involves. It has long been

135. As a minor, M.T.S. could not be convicted in the normal fashion. The court found that his behavior, if committed by an adult, would have constituted second degree sexual assault under the law of New Jersey. *Id.*

136. *In the Interests of M.T.S.*, 588 A.2d 1282, 1284 (N.J. Super. Ct. App. Div. 1991), *reversed* by 609 A.2d at 1280.

137. *M.T.S.*, 609 A.2d at 1269.

138. *Id.* at 1277.

139. *Id.* at 1279.

140. This does not, of course, mean that extra force and violence cannot be inflicted by the rapist even if the victim does not resist. Such infliction of pain, suffering and degradation may be the intent of the rapist in many situations.

141. A Westlaw search returns almost 100 secondary sources citing this New Jersey decision.

asserted that rape is a crime of violence and an expression of male power rather than a 'sexual' crime, and to recognize the act of penetration itself as forceful is a clear endorsement of this view.¹⁴²

What is perhaps more telling, however, is the definition of consent that the Court uses in its opinion. In order for an encounter to be consensual, the consent must be "affirmative and freely given."¹⁴³ The Court defined more precisely what they meant by such consent. "Persons need not, of course, expressly announce their consent to engage in intercourse for there to be affirmative permission."¹⁴⁴ The Court then explicitly stated they were not imposing a rigid, inflexible standard that required a form of question and answer session before any act of sexual intimacy. "Permission to engage in an act of sexual penetration can be and indeed often is indicated through physical actions rather than words."¹⁴⁵

This inclusion of non-verbal signals under the banner of affirmative consent can be viewed in two ways. On the one hand, it can be seen as a return to focusing on the actions of the victim. The court did make clear, however, that the supposedly consenting actions of the victim were to be viewed under an objective standard. "Permission is demonstrated when the evidence, in whatever form, is sufficient to demonstrate that a reasonable person would have believed that the alleged victim had affirmatively and freely given authorization to the act."¹⁴⁶

Alternatively, this broadening of what may constitute consent may be viewed more positively. It is consistent with a model of

142. See Eric Rothschild, *Recognizing Another Face of Hate Crimes: Rape as a Gender-Bias Crime*, 4 MD. J. CONTEMP. LEGAL ISSUES 205, 235. (Stating "rape is not simply a crime which happens to women, but an act of violence which is inflicted on a person because she is a woman."). The divorce between enforcement of a power hierarchy and sexual gratification is perhaps clearer in the case of male on male rape, where the perpetrators are rarely homosexuals. The National Center for the Victims of Crime, *Male Rape*, at <http://www.ncvc.org/ncvc/main.aspx?dbName=DocumentViewer&DocumentID=32361#7> (last visited May 16, 2005). It remains a fact, however, that the female victims of rape are overwhelmingly of child-bearing age, indicating the possibility of at least a subordinate element of sexual attraction in rape. Owen Jones, *Realities of Rape: Of Science and Politics, Causes and Meanings*, 86 CORNELL L. REV. 1386, 1387 n.3 (2001). Alternatively, such a prevalence of victims in a particular age bracket, when coupled with the recognition that acquaintance rape makes up a significant majority of all rapes, is a logical result, as that women of this age date with more regularity, and thus are much more available targets for acquaintance rapists.

143. *M.T.S.*, 609 A.2d at 1277. The holding should not be seen as an endorsement of the strictest forms of affirmative consent, such as the Antioch College Sexual Offense Policy. See *infra* notes 169-171 and accompanying text. See also DATE RAPE 135-75 (Leslie Francis ed., 1996) for a copy of the policy, and articles on its effects.

144. *M.T.S.*, 609 A.2d at 1277.

145. *Id.*

146. *Id.*

communicative sexuality proposed by Louis Pineau.¹⁴⁷ Central to Pineau's argument that communicative sex is better sex is the idea that people develop a way of communicating between themselves.¹⁴⁸ While a formal means of obtaining consent may be required early in a relationship, when these "signals" are as yet undefined, as an understanding grows, greater emphasis may be placed on such non-verbal, less explicit communication. New Jersey's idea of what may convey consent seems to take notice of the development of sexual relationships between individuals.

D. A Comparison Among the States

As the above discussion demonstrates, Pennsylvania, Maryland, and New Jersey have vastly different approaches to the social problem that is rape. New Jersey has addressed the problem head on and has instituted an affirmative consent standard. Pennsylvania, on the other hand, appears to cling to the common law definition of rape. Maryland plots a middle course. Both the Pennsylvania and Maryland cases involve behavior that cannot be considered as anything but rape when the everyday meaning of that term is used.¹⁴⁹ In all three cases, women who clearly did not wish to have sex with their assailants were compelled to do so by a variety of methods. In all three cases, such behavior would be more clearly prohibited by a shift to an affirmative consent standard. In each case there is no suggestion that the assailant attempted to ascertain whether the woman consented to sex, or whether she was even in a position to freely grant such consent. If the law of New Jersey were applied, there would be no need to consider the type of threat involved, nor the extent of force applied. The absence of freely given consent would be sufficient to constitute rape in each case.

These cases are not simply matters of "he said, she said." In all three cases, the court clearly believed what "she said," yet in two of them that testimony was insufficient to constitute rape. In the third, rape was only found because the assailant placed his hands lightly

147. Louis Pineau, *A Response to My Critics*, reprinted in DATE RAPE 65-67 (Leslie Francis ed. 1996).

148. Pineau, *supra* note 13, at 7-10. This view of communicative sex as more satisfying is the very crux of Pineau's analysis. Given that it is better, Pineau states that it would be irrational for a woman to consent to non-communicative sex, and therefore a presumption of non-consent in the absence of communication is thus a rational one for the legal system.

149. See *supra* Part III.A-B. "From this normal perspective, the central point about rape is that it is something which a woman is made to undertake against her will." Ross Harrison, *Rape - A Case Study in Political Philosophy*, reprinted in RAPE 52 (Sylvana Tomaselli and Roy Porter eds., 1986).

around the victim's neck at one point. If the New Jersey standard as articulated in *M.T.S.*¹⁵⁰ had been applied, all three would likely have resulted in convictions, as there can be no question based on the facts that the court accepted there was no "affirmative and freely given permission to the act of sexual penetration."¹⁵¹ An affirmative consent standard would therefore lead to the criminalization of behavior such as that in these three cases.

IV. THE EFFECTS OF AN AFFIRMATIVE CONSENT STANDARD ON INDIVIDUAL BEHAVIOR AND SOCIETAL ATTITUDES

A. Consent in Modern Sexual Interaction

An affirmative consent standard requires that, for sex to be considered consensual, it must have been consented to by the woman in advance. In short, if the instigator of a sexual interaction wishes to do anything, he or she must inquire whether his or her partner wishes that to be done, and that partner must receive freely given consent to continue.¹⁵² In the absence of such consent, the activity cannot be seen as voluntary for both parties.

It is important to note first what affirmative consent is not. It is not a silver bullet that will immediately prevent rape.¹⁵³ Nor will it result in all rapists being convicted. In many, if not all, cases, a rape trial will still result in a classic "he said, she said" situation. Especially with the advent of DNA analysis, rapists who actually did engage in sexual intercourse with their accusers rarely deny that they had sex with her. Instead, their defense is that the sex was consensual. The presence of physical damage on and in the woman's body is no bar to such a defense. Defendants in rape cases may in such cases assert that the sex was rough with the woman's consent.

150. *M.T.S.*, 609 A.2d at 1277.

151. *Id.*

152. Such a standard can be seen to apply to both men and women. As stated above, rape is overwhelmingly a crime committed by men against women. *See supra* note 17.

153. Research has shown that there are ways of reducing the level of rape in society. On college campuses, rape education programs have been shown to have a positive effect, especially when based around repeat sessions. *See generally* Kimberly Lonsway & Chevon Kothari, *First Year Campus Acquaintance Rape Education (FYCARE): Evaluating the Impact on Knowledge, Ideology, and Behavior* (ABF Working Paper No. 9720. "Until the problem is meaningfully addressed, therefore, we must provide rape education in the way that corrupt politicians want us to vote – early and often." *Id.* at 30.

Some, such as Pineau, dispute that consent to such sex can ever be considered rational.¹⁵⁴ Others, such as Catharine Wells, disagree.¹⁵⁵ To Wells, women make many different choices for many different reasons.¹⁵⁶ This, however, does not undercut Pineau's support for communicative sex: what is required for her view of rationality is that the woman communicates her desires. A woman may rationally consent to rough sex, or consent to being "swept off her feet," provided such consent is the result of a previous communication.¹⁵⁷

Other feminists argue that no consent to "rough sex" could ever be considered to be acceptable, as a result of the inherent discrimination of society against women.¹⁵⁸ This appears to be extremely limiting to female sexuality. Indeed, the voluntary participation of women in sadomasochistic activity belies this suggestion.¹⁵⁹ Further, the existence even of rape fantasies amongst women has been well documented.¹⁶⁰ Of course, it is critical to note that fantasizing about rape is in no way indicative of a desire to be raped. The "rape" of fantasies, much as the "submission" in consensual sadomasochistic activity, occurs in a situation where the woman maintains ultimate control—the fantasy is hers and she can determine what way it may go.¹⁶¹

154. See Pineau, *supra* note 13, at 17-23.

155. See Catharine Pierce Wells, *Date Rape and the Law: Another Feminist View*, reprinted in DATE RAPE 41-61 (Leslie Francis ed. 1996).

156. *Id.*

157. See Pineau, *supra* note 147, at 78-79.

158. Catharine MacKinnon & Andrea Dworkin can be seen as extending this to include all sex with men in a society riven with sexually based power differentials. Dworkin states that "[p]hysically, the woman in intercourse is a space inhabited, a literal territory occupied literally: occupied even if there has been no resistance, no force; even if the occupied person said yes please, yes hurry, yes more." Andrea Dworkin, *Intercourse*, reprinted in RAPE AND THE CRIMINAL JUSTICE SYSTEM 129 (Jennifer Tempkins ed., 1995). MacKinnon writes that "[p]erhaps the wrong of rape has proved so difficult to define because the unquestionable starting point has been that rape is defined as distinct from intercourse, while for women it is difficult to distinguish the two under conditions of male dominance." Catharine A. MacKinnon, *Rape: On Coercion and Consent*, reprinted in SEX, MORALITY AND THE LAW 421 (Lori Gruen & George Panichas eds., 1997).

159. See *infra* notes 224-229 and accompanying text. Of course, MacKinnon and Dworkin may simply respond that such a choice is irrational, the result of some form of false consciousness engendered by the male dominated system. Such an argument is, in the final analysis, irrefutable; it does however beg the question of what MacKinnon and Dworkin possess that allows them to defeat such false consciousness, but is not possessed by many other women of differing intelligence levels and social backgrounds.

160. See, e.g., NANCY FRIDAY, MY SECRET GARDEN: WOMEN'S SEXUAL FANTASIES 126-33 (1973); see also KATZ & MAZUR, *supra* note 45, at 146-47 (discussing the difference between a fantasy of being raped and a desire to be raped).

161. See KATZ & MASUR, *supra* note 45, at 146 ("In fantasy a woman can control the situation, whereas in actual rape she loses complete control of her body.").

Ultimately, the matter of whether a woman consented or not will come down to a matter of belief by the jury. Simply moving to an affirmative consent standard does not prevent the accused from claiming that he asked permission and the woman gave it to him. It is not, as some have suggested, a requirement that men carry permission slips that must be signed by the woman before sex.¹⁶² Instead, it holds that a man cannot take a woman's silence as indicative of a willingness to engage in sexual orientation.

The traditional system works on the assumption that consent can be presumed unless withdrawn by the women. The victim is therefore required to demonstrate to the jury's satisfaction that she made the man aware that she did not wish to engage in sexual intercourse. Under an affirmative consent standard, the law presumes that a woman does not grant consent unless she is asked. The onus will be on the male to demonstrate such consent if the woman, in her complaint, alleges no such consent was given; therefore, it will be *his* story of the events of the evening that is under examination by the court, rather than that of the woman. While the defendant may claim as an affirmative defense that his accuser indicated consent in a non-verbal manner, it will be up to him to demonstrate such non-verbal consent, and again it will be his story that is subject to cross examination.¹⁶³

What affirmative consent represents, then, is a shift in the way society, and in particular the courts, look at the process of consenting to sexual intercourse. It will not, despite the claims of its opponents, result in the death of romance or spontaneous sexuality. Society views sex as something men desire, and something to which women concede with varying degrees of willingness and for varying reasons.¹⁶⁴ Affirmative consent instead views sex as an act that should be entered into willingly by both parties. It announces to women that their opinion of whether sex should occur is equally valid in the eyes of the legal system as the man's.

162. Despite this, such evidence of consent would of course be extremely compelling in a court of law, and if the man concerned felt that it was necessary to obtain such a document, that would be his own choice. More practically, evidence such as an email from the woman describing the experience in positive tones would certainly go towards indicating a consensual encounter, though would not be dispositive if written after the event.

163. Pineau, *supra* note 13, at 23-25.

164. See Byers, *supra* note 80, at 8-11. Men are seen as initiators, oversexed, whose worth increases with sex. Women are viewed as receptors, undersexed, whose worth is diminished by sexual encounters. In the traditional view of the 'dating' scenario, a woman must preserve her chastity, while at the same time offering sufficient promise of future access to sexual favors to maintain the male interest, allowing her to achieve her aim of a stable long term relationship or indeed marriage. Women who walk the wrong side of this fine line are labeled as promiscuous, and jeopardize their value in the marriage market. *Id.*

While this may represent a change from the present view of a female's role in a sexual encounter, it is far from being a puritan one that will result in the end of sexual interaction between men and women.¹⁶⁵ At present, sexual relationships are still to a large extent defined by the aggressive acquiescence model of seduction.¹⁶⁶ Under this paradigm, men expect to pursue and women to be pursued. Overcoming resistance is part of the entire process of seduction. Women are supposed to be coy, to resist at first. This can be seen as explaining the results of Muehlenhard and Hollabaugh, that *some* women, *some* of the time, say "no" to sex when they really mean "yes."¹⁶⁷ Affirmative consent marks a move away from this model and towards a model of sexual interaction where both participants take responsibilities for their desires and actions.

Of course, there is no one standard of affirmative consent.¹⁶⁸ At its most basic, it is a requirement that the instigator of a sexual interaction ask the other party if he or she wishes to take part. Yet what form must this permission take? All believers in an affirmative consent standard require that it go further than the simple absence of opposition that has characterized rape law. On the one hand, we can see the extremely formal view of affirmative consent, as put forward in the Antioch College Sexual Offense Policy.¹⁶⁹ This policy required students to obtain consent at each stage of the process of sexual interaction in a very formalistic manner. "Asking 'Do you want to have sex with me?' is not enough. The request for consent must be specific to each act."¹⁷⁰ This policy was written to deal with the unique campus-dating situation, and may not be seen as an appropriate model for other situations.¹⁷¹ As Pineau suggests, we do communicate

165. Those who support such a standard are sometimes portrayed as representing a new wave of sexual repression, seeking to prevent women from enjoying sex in the name of protecting them from male predators. See ROIPHE, *supra* note 11, at 51-84. Nothing could be further from the truth. By recognizing women's active consent is a prerequisite to sex, the supporters of affirmative consent acknowledge women's rights to participate in sexual decision making, rather than merely acting as a passive receptacle for male desires, and so seem more akin to sexual liberators than puritans.

166. See Pineau, *supra* note 13, at 1-27.

167. See *supra* note 5 and accompanying text.

168. It is not necessary for the purpose of this Note to endorse any particular construct of an affirmative consent standard over any other. Some such proposals are compelling, however. See, e.g., Remick, *supra* note 22, at 1139-51; SCHULHOFFER, *supra* note 7, at 283-84.

169. Alan Guskin, *The Antioch Response: Sex, You Just Don't Talk About It*, reprinted in FRANCIS, DATE RAPE 135-54 (Leslie Francis ed., 1996).

170. *Id.* at 140.

171. Despite all the criticism the policy received in the media when first announced, it is interesting to note that it appears to have the support of those most directly affected by it, the students of Antioch College. "Daily, for over three months, television news cameras . . . roamed the small campus searching for yet a new 'angle' on this story. One national reporter, even more

in non-verbal ways, and once individuals have established a relationship it makes sense to include these forms of communication in any standard of affirmative consent.¹⁷²

Despite what some critics have suggested, affirmative consent need not turn rape into a strict liability offence.¹⁷³ While it is possible to establish an affirmative consent standard whereby failure to ask permission creates an irrevocable presumption of rape, this requirement is not the only way such a standard may be implemented. The burden still remains on the state to show that the defendant did not have the consent of the victim. If he can show he asked permission, and that the permission was granted, then the state will carry its burden. Failure to ask permission, however, does not lead to a per se finding of lack of consent. The state is still obliged to show that consent was not expressed in other ways—all that alters is that silence is no longer presumed to be consent.

B. The Effects on Male and Female Behavior

Affirmative consent is not a radical shift in the legal theory. It represents an attempt to bring the laws regarding rape in line with the rest of the legal system.¹⁷⁴ One of the strongest arguments for affirmative consent is the effect that it will have on the behavior of

cynical than the rest, couldn't quite believe the two days of interviews with students and their near uniform acceptance of 'their' policy." *Id.* at 156. Perhaps these students have realized that asking permission does not result in an end to the possibility of sex, and more, that if a situation exists where one partner would say no, a relationship is improved by determining that and respecting it.

172. Pineau, *supra* note 147, at 65-67.

173. SCHULHOFER, *supra* note 7, at 271.

174. A victim of theft is treated as a victim regardless of the circumstances that led up to the loss of his or her property. There is no requirement that a victim of robbery resist his assailant, and indeed this is rare. "[A study] reveals that only one in ten [robbery victims] responded by active resistance." KATZ & MAZUR, *supra* note 45, at 181. The condition of the robbery victim is also not considered relevant. This contrasts with the way in which drunk women who are raped often find themselves accused of asking for their treatment. "Do all criminals automatically get immunity from prosecution if they only prey on people who are drunk?" SCHWARTZ & DEKESEREDY, *supra* note 26, at 103. Force is not needed for the crime of theft, and indeed, a crime may have been committed even if the victim consents, if such consent is not seen as freely given. See, e.g., *People v. Ashley*, 267 P.2d 271, 275-78, 288 (Cal. 1954) (affirming the conviction for grand theft of a man who deceptively obtained loans from elderly women). In the sexual arena, however, a Montana high school principal who repeatedly required a seventeen-year old to have sex with him, threatening to prevent her from graduating if she refused, was not guilty of rape because no physical force was involved. *State v. Thompson*, 792 P.2d 1103, 1104, 1107 (Mont. 1990). For a detailed discussion of how affirmative consent brings the law of rape into line with other laws, such as those governing the requirements for surgeons to obtain informed consent from patients, see Stephen Schulhofer, *Taking Sexual Autonomy Seriously*, 11 L. & PHIL. 35, 74-75 (1992).

men and women, in particular in a dating situation. A shift to affirmative consent will be unlikely to deter the "simple" rapist. A man who waits in a dark alley for a passing woman so that he may compel her by violence to engage in sexual intercourse is unlikely to be swayed by a legal construct that requires that he ask permission first, and respect the answer given. Instead, it is within the dating scenario that the adoption of an affirmative consent standard will be most beneficial.

An affirmative consent standard will encourage men to engage in rational behavior by ascertaining and respecting the wishes of their prospective sexual partners.¹⁷⁵ Additionally, the affirmative consent standard will promote rational behavior in women by encouraging them to indicate directly their willingness to participate in sexual intercourse.¹⁷⁶ Affirmative consent, therefore, provides an incentive for both men and women to behave in a more rational manner.

1. Communication between Men and Women in the Dating Environment and the Advantages of Affirmative Consent

Affirmative consent, like the "no means no" campaign, encourages the idea that words be given their usual meaning in a sexual context. The problem with such a campaign is that there are many circumstances in which it appears that "no" may not, in fact, mean "no." This is the message of the much-cited Texas A&M survey¹⁷⁷, and the other campus surveys that essentially confirmed its result.¹⁷⁸ This communication problem is exacerbated by the fact that reasonable men and women may see a different message from the same signal.¹⁷⁹ A reasonable woman may think that she is clearly indicating a lack of consent, and the reasonable man she is with may think that she is consenting. Men place a much greater emphasis on certain behavioral acts, such as the mode of dress of the woman, her willingness to return to his apartment, and, in particular, her

175. See *infra* notes 195-197 and accompanying text.

176. *Id.*

177. See *supra* note 5 and accompanying text.

178. See *supra* note 7 and accompanying text. When roleplay sexual scenarios were studied, a majority of men told "no" believed it; 34 percent felt it meant stop, while 22 percent felt it meant stop, but try again on a future date. A further 29 percent felt they should try again later that evening, 6 percent felt they should stop, but try again immediately, while 9 percent felt that the women meant for them to continue regardless. Byers, *supra* note 80, at 14.

179. See Charlene L. Muehlenhard et al., *Beyond 'Just Saying No': Dealing with Men's Unwanted Sexual Advances in Heterosexual Dating Contexts*, reprinted in *SEXUAL COERCION IN DATING RELATIONSHIPS* 141, 141-65 (E. Sandra Byers & Lucia F. O'Sullivan eds., 1996) (studying the mixed sexual messages between men and women).

willingness to engage in petting short of sexual intercourse.¹⁸⁰ Men may seize on these facts as indicators of consent to sexual intercourse, even in a situation where the woman has said beforehand that she does not wish to progress to sex.¹⁸¹

One simple solution to such problems is to claim that there is no problem whatsoever. Survey data indicating the existence of a minority amongst women who say no, while meaning yes,¹⁸² bear little relevance to an individual situation where a man is told no. Even if he views all the other signals from the woman as indicating her willingness to engage in sex, he is not justified in ignoring the explicit refusal. Indeed, even under the numbers from the Texas A&M survey¹⁸³, men recognized in the majority of instances that “no” does indeed mean no. A legal system does not serve the interests of society when it extrapolates from the behavior of a minority a justification for ignoring the clearly expressed preference of the majority. If it is accepted that a “no means no” standard would be beneficial in such cases, however, then an affirmative consent standard that requires consent to be “affirmative[ly] and freely given”¹⁸⁴ can be seen to be even more effective.

The majority of men in dating situations do not want to be rapists by forcing their dates into unwanted sexual intercourse.¹⁸⁵ If such a situation does occur, it will frequently be the result of a misinterpretation of signals by the male, or by a belief that he knows what the female really wants in that situation.¹⁸⁶ Much of the vitriol directed at the concept of “date rape” has been from male commentators claiming that men will have no idea where the line between acceptable behavior and date rape is located, and that dating will become a way for men to open themselves to rape allegations.¹⁸⁷

180. *Id.* at 143-44.

181. *Id.*

182. See *supra* note 5 and accompanying text.

183. *Id.*

184. *In the Interests of M.T.S.* 609 A.2d 1266, 1277 (N.J. 1992).

185. Even if this presumption is not accepted, then the analysis holds for the effects on the behavior of those who do not wish to rape their date. Those who do are unlikely to be noticeably deterred by any reworking of the law. Affirmative consent will then still have benefits, though lower than those the author suggests.

186. The use of the word “misinterpretation” is not meant to indicate an absence of fault on the part of the male. If a simple alternative exists, such as asking the female whether she wishes to have sex, and the male refuses to take it, choosing to rely instead on signals that are by their very nature indefinite, then he cannot escape culpability for the results if the female is not, in fact “giving him the green light.”

187. See MCCOLGAN, *supra* note 26, at 6, discussing the reaction to prominent date rape trials in The United Kingdom and the United States, including that of heavyweight boxer Mike Tyson:

Such a claim is, however, unfounded. The surge in allegations of date rape is not the product of any necessary change in dating behavior. What has changed, however, is that women are no longer as willing to suffer such infringements of their right to control sexual access to their bodies, and so are reporting the violations in greater numbers.¹⁸⁸

Men continue to point to uncertainty in the dating situation, and the absence of a clear line separating acceptable dating behavior from acquaintance rape. A rule that informs a man that it is his responsibility, if he wishes to instigate sexual intercourse, to determine directly if the woman wishes that as well surely provides that bright-line rule that critics claim men are seeking.¹⁸⁹ Yet the reaction to the Antioch College code,¹⁹⁰ as well as to any suggestions of a more general affirmative consent standard, shows that many men are unwilling to be required to ask this question. Such unwillingness casts doubt on the desire for a bright line after all.

If men do not wish to force sexual intercourse on unwilling women, whether it is out of the concern that hurting another in that manner is unacceptable to their individual code of ethics, or simply out of the fear of the potential punishment and social stigma that accompany an accusation of rape, then surely requiring the receipt of affirmative consent before sex is not a great imposition. It appears odd that a requirement to ask permission before borrowing a roommate's car needs no further justification, yet asking permission from one's date to ensure that she too is willing to engage in sex is an imposition and the product of feminism run wild. In cases of uncertainty about an individual's desires, the rational course of behavior is to ask, and then to give words in the answer their normal meaning.¹⁹¹ In normal conversation, "no" is indeed taken to mean "no." Similarly, silence is

Something odd is going on here. Men acquitted of rape are elevated into symbols of "men oppressed by radical feminism." . . . Newspaper columns are filled with home truths about girls who play with fire, and the dangers of mixing flirting and drink; politicians promise reviews of this law or that, and men and women journalists alike thunder about how feminism has got completely out of hand. Somehow, we are told, we have come to a point where all men are being portrayed as rapists, and all sex as rape.

188. "Men are being accused of rape in circumstances where, until recently, women would have remained silent." *Id.* at 11.

189. See generally Remick, *supra* note 22 (discussing the "bright-line" rule).

190. See *infra* notes 169-171 and accompanying text (exploring the reaction to the Antioch College code).

191. In taking a Kantian approach to rape, Raymond Bellotti suggests "[i]f there is any doubt concerning whether or not someone has agreed to perform a certain sexual act with another, I would suggest that the doubting party simply ask the other and make the contract more explicit." CAHILL, *supra* note 28, at 181.

not taken as meaning consent in other fields, be they legal or otherwise.

2. The Effects of an Affirmative Consent Standard on Intimate Communication between Dating Partners

All that remains for those who oppose an affirmative consent requirement, then, is the argument that such a question is either difficult or inappropriate to ask. Neither of these problems, though, alters the fact that an affirmative consent standard incentivizes rational behavior in a dating situation. Indeed, by making it a legal requirement to gain the consent of one's prospective sexual partner the question becomes an easier and more appropriate one to ask. If such a question is seen as required by the law, then the stigma surrounding it will likely dissipate over time.¹⁹²

An affirmative consent standard provides an incentive to those men who do not wish to force their dating partners into sexual intercourse to act rationally by requesting permission. A similar effect can be seen on women facing the same situation. Society still suggests that women should be passive in sexual situations, and allow the male to take the lead. The most common explanation for the result of the Texas A&M survey is that saying "yes" too early or too easily results in a woman being labeled promiscuous.¹⁹³ Regardless of the reasoning behind such results, in situations where women say "no" but mean "yes," they are acting rationally, at least in that individual instance. The payoff women receive through these actions must be considered to be higher than simply saying yes initially, otherwise they would not follow such a path.

The first thing to be noticed in this situation is the continuing existence of a sexual double standard. Men who engage in sexual activity are considered successful, exalted by their peers, and see their "worth" rise. Women who engage in sexual activity more willingly than society deems appropriate are seen as "sluts," are denigrated by their social groups, and see their "worth" decrease.¹⁹⁴ An affirmative consent standard that incentivizes men to give words their normal

192. A similar effect can be seen with the spread of requiring identification to buy alcohol or tobacco products. The more prevalent this becomes, as a result of visible enforcement of the law, the more normal it seems both for the convenience store clerk or bartender requesting ID, and for the young person who is being asked to provide it. Further, if a person is willing to engage in an activity as intimate as sexual intercourse, it is somewhat strange to think that he should be embarrassed to ask if it is acceptable to his partner.

193. See Muehlenhard & Hollabaugh, *supra* note 5, at 872 and text accompanying note 5.

194. Byers, *supra* note 80, at 8-11.

meanings will also have the effect of incentivizing women to use words with their normal meanings.

A woman faced with sexual advances from her date will either want sexual intercourse or not want sexual intercourse.¹⁹⁵ The survey results indicate that, if the assumption of rationality is to hold, there must be situations in which the payoff to the woman from saying no while actually wanting sexual intercourse is perceived as higher than the more obvious solution of saying yes. In those situations, sex after a "no" can be seen as providing more benefit to the woman than sex after a "yes." Such a situation, though, creates intense communication problems. Male protestations aside, the male in such a situation is not capable of telling whether his partner who has said "no" or rejected his physical advances, actually means "no." Indeed, she may be expecting him to continue. In such an environment, mistakes will surely occur. By saying "no" in situations where the *real* answer is "yes," the likelihood of a later, genuine "no" being accepted is dramatically reduced.¹⁹⁶

The imposition of an affirmative consent standard encourages men to give women's answers in dating situations the same meaning as in general conversation. This standard alters the potential pay-off for the woman. If she wants sexual intercourse, she is now less likely to receive it if she says "no," or rejects her date's overtures. If her partner is encouraged by the legal standard to accept a "no" as "no," then the majority of women who mean for a date to stop when they say "no" are more likely to have their wishes respected. Additionally, the woman who actually wishes to engage in sexual intercourse is encouraged to use language within its usual meanings, and to give affirmative consent. The alternative for her is to say "no" while wanting sexual intercourse, and for her date to stop his advances

An affirmative consent standard not only brings the law of sexual interaction in line with other forms of social behavior, but can also be justified to the extent that it encourages both men and women in the dating environment to give words their normal meaning. This standard clearly benefits men, who purport to want more certainty in the dating process that their behavior is acceptable and desired by

195. Of course, the real world is not quite so simple. A woman may wish for sexual intercourse, but not right at that particular moment, or in that particular way. The resulting effects are still the same as described in the simplified version above, however, as such a feeling may be communicated to the male in response to a request for affirmative consent.

196. The effect here continues much further than ongoing relations between the couple involved. A man who receives a "false" refusal from a woman in a system that does not require him to affirmatively determine a woman's wishes, is not only less likely to accept a future "no" from *that* woman, but from *every* woman. What may be a desire on the part of the initial woman to have her date "try harder" can easily become a clear cut case of forcible rape for his later dates.

their date. Additionally, women, the majority of whom actually mean “no” when they say “no,” will also benefit from the affirmative consent standard.¹⁹⁷ It will reduce the likelihood that a man will continue in the face of a “no” from his date and will discourage women who actually do want sexual intercourse from saying “no” or resisting a man’s advances.

C. The Effects on Societal Attitudes

As stated above, the survey results that indicate a willingness of a minority of women to say “no” to sexual advances while meaning “yes” can be explained in part by examining common attitudes towards appropriate sexual roles in society. To this day, despite the advances made by the women’s movement, the sexual double standard is alive and well. Society still expects women to be recipients of male sexual advances, and to “defend their honor.” The media and modern entertainment are replete with images of women surrendering to male sexual aggression after a token (or more enduring) demonstration of resistance and later emerging happy and satisfied with the experience.¹⁹⁸ “A study published in *Ms.* magazine in 1990 found that one out of eight Hollywood movies depict a rape theme.”¹⁹⁹ Not surprisingly, the link between rape and pleasure for the victim is more direct in certain types of pornography. “Some porn movies provide a how-to guide for guys who later commit gang rape: the woman/victim is insatiable in her need for sex; she may resist rape, but once it happens, she loves it.”²⁰⁰

An affirmative consent standard would mark the law’s acceptance that women are full partners in a sexual encounter, and

197. See Muehlenhard & Hollabaugh, *supra* note 5, at 872 and text accompanying note 5. Under this survey, 61 percent of women, a clear majority, claim to have never said “no” when they mean “yes.” Indeed, the surveys ask if women have ever said no while meaning yes, rather than whether they do it all the time. As a result, it appears likely that in the massive majority of individual instances, a woman’s no actually means no, whether or not that woman or any other has at any one time said no while meaning the opposite. This further reduces the ability to point to such results as a justification for taking any given answer of no and assuming the woman concerned really means yes.

198. Perhaps the most famous of these is the scene from *Gone With The Wind*, where Scarlett and Rhett are fighting tooth and nail, only for her to be carried upstairs, emerging the next morning happy and content in her ravaging. *GONE WITH THE WIND* (Metro-Goldwyn-Mayer 1939). For a more modern example, the uproar over Janet Jackson & Justin Timberlake’s performance at Superbowl XXXVIII concentrated on the effect that a naked female breast would have on the morality of our nation’s children, while the effect of showing that a woman’s clothing can be removed without consent by a man was not considered detrimental.

199. BERNARD LEFKOWITZ, *OUR GUYS: THE GLEN RIDGE RAPE AND THE SECRET LIFE OF THE PERFECT SUBURB* 248 (Michael Kimmel ed., 1997).

200. *Id.*

that their wishes should be given equal weight to those of the male participant. By requiring that the initiator of a sexual encounter request affirmative consent, the law would encourage discussion of sexual desires and express a clear disapproval of the stereotypes mentioned above. Of course, in and of itself, a change in the legal standard would not alter deeply engrained societal values overnight; however, there are many occasions on which the law has led popular culture. The Civil Rights Movement in the 1950s and 1960s can certainly be seen as a time when the law was ahead of popular sentiment, and had the effect of changing popular culture to a greater or lesser extent.²⁰¹ A similar effect can be expected from affirmative consent. By requiring men (as the usual, and socially presupposed initiators) to gain consent for sexual activity from their partners, such open discussion of sexuality is likely to become more commonplace. It becomes harder for women to play the coy role that society expects and still engage in the sexual activity that they wish if men must ask permission. As such, it is likely that the social stereotype will start to break down, and women who consent to sex will be seen as the norm.

Such a change would benefit society. Even the United States Supreme Court has recognized that sexual intimacy is a center point of relationships,²⁰² and that intimate relationships are fundamental to our society.²⁰³ A communicative system that is based on words being given meanings opposite to their everyday use and, most importantly, that contributes to one of the highest levels of rape in the world,²⁰⁴ cannot be good for such relationships. A social structure that encourages women to play an equal role in the sexual relationship and encourages both partners to determine whether sex is actually desired by their partner is surely an advance. Of course, the effects will go further than simply a decline in the incidence of rape. "If affirmative consent becomes a cultural norm, we will see more than just an end to

201. See, e.g., *Brown v. Board of Education*, 347 U.S. 483 (1954). The extent to which this decision preceded the feelings of some parts of the country can be seen by President Eisenhower's use of the 101st Airborne Division to protect the rights of students wishing to attend Central High School in Little Rock. Over time, the support for educational integration caught up with the legal decisions.

202. See *Lawrence v. Texas*, 539 U.S. 558, 567 (2003) ("When sexuality finds overt expression in intimate conduct with another person, the conduct can be but one element in a personal bond that is more enduring. The liberty protected by the Constitution allows homosexual persons the right to make this choice.").

203. See *Zablocki v. Redhail*, 434 U.S. 374, 390 (1978) (invalidating a Wisconsin statute preventing the issuance of a marriage license to a man in arrears on child support); see also *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972) (holding that the decision in *Griswold v. Connecticut*, 381 U.S. 479, 485 (1965) (striking a law criminalizing the distribution of contraceptives) applied to unmarried couples as well as married couples).

204. See PEGGY REEVES, *A WOMAN SCORNED* 292 (1996).

the problem of sexual assault; a new cultural understanding of female sexuality will emerge, encouraging women to explore diverse paths of sexual subjectivity.”²⁰⁵

V. THE CRITIQUES OF AFFIRMATIVE CONSENT

Despite its apparent benefit of encouraging rational behavior, affirmative consent is widely criticized. The critiques break down into two apparent groups—those who see it as a license for unfounded allegations of rape by vindictive women and those who view it as unrealistic and destructive of both romance and spontaneity in the sexual relationship.

A. *The Bogeyman of the False Allegation*

The fear of a false accusation of rape is well documented.²⁰⁶ What is also well documented is the fact that false accusations of rape are no more prevalent than false accusations of other types of major crime.²⁰⁷ Indeed, when such false accusations do occur, they tend to be made by young women, and are dealt with rapidly and efficiently by the police.²⁰⁸ Prosecutors act as an effective screening mechanism here

205. *Id.* at 285.

206. See generally Comment, *Forcible and Statutory Rape: An Exploration of the Operation and Objectives of the Consent Standard*, 62 YALE L.J. 55 (1952) (suggesting that female rape allegations are untrustworthy).

207. Edward Greer in articles like *Awaiting Cassandra: The Trojan Mare of Legal Dominance Feminism (Part I)*, 21 WOMEN'S RTS. L. REP. 95 (2000) and *The Truth Behind Legal Dominance Feminism's "Two Percent False Rape Claim" Figure*, 33 LOY. L.A. L. REV. 947 (2000) purports to show that the reliance on the specific claim of 2 percent false accusation rates, the same as that of other major crimes, has no basis outside of Brownmiller's work. Yet he does not go on to provide any indications as to why rape might be more likely to be the basis of false accusations than, say, theft. Given the underreporting of rape, and the huge obstacles that face an accuser, the alternative seems likely. Greer is right in pointing out that anything that makes reporting rape easier is likely to encourage more false reporting, in that it reduces the costs associated with reporting in general. Without any analysis of why women might be more prone to falsely accuse than men, however, and why in particular they would be more likely to falsely accuse of rape, there is no reason to support not bringing rape law into line with other law through the imposition of an affirmative consent standard.

208. Farstein, *supra* note 24, at 229 (“Most of the teens who report in this manner never think their stories will result in criminal cases; they are just seeking to protect themselves from parental wrath. The truth usually outs the moment they hit the police station or prosecutor's office.”). It is important to note that a finding by the police or prosecution that a rape is “unfounded” is not the same as a finding that the accusation was “false.” “The term [unfounded] is a technical one, meaning only that police, for various reasons, have decided not to advise prosecution.” Camille LeGrand: *Rape and Rape Laws: Sexism in Society and Law*, reprinted in RAPE AND THE CRIMINAL JUSTICE SYSTEM 197, 206 (Jennifer Temkins ed., 1995). This may be for reasons of absence of evidence. It may, alternatively, be representative of decisions made by the police department about the “worthiness” of the victim. In Denver, cases where women engaged

as well—given the difficulty of convicting a rapist, they tend only to prosecute the clearest cut cases, where the chances of conviction are greatest.²⁰⁹

The problem is not that rape is over-reported, but instead that it is under-reported. The fact that rape is under-reported is hardly disputed.²¹⁰ To some extent, the under-reporting of rape can be seen as the result of the treatment victims receive at the hands of the legal system.²¹¹ It is common that women report a second, non-physical, violation, this time at the hands of the courts and defense attorney.²¹² Another explanation for under-reporting, however, is that many victims do not view what happened to them as a crime. The *Ms.* survey data indicate that only 27 percent of those whose experiences met the legal definition of rape considered themselves rape victims.²¹³ More disturbingly, 42 percent of those who had been raped reported later having consensual sex with the man who raped them.²¹⁴

Critics, such as Roiphe, argue that these numbers indicate that rape has not occurred at all in the situations considered.²¹⁵ An alternative view sees this response as the product of societal factors. "Rather, it is one where the moral lessons taught by society make it difficult for many women to understand when they have been the victim of rape."²¹⁶ Many believe that no woman would ever go back for another encounter with a man who had raped her. Such behavior, however, has been explained by a need to normalize the situation, especially when the initial rape occurred in a dating environment. By having later consensual sex with the rapist, the victim can be seen as attempting to regularize her world and regain a degree of control over the situation.²¹⁷

in some sexual contact with a man, then decided they did not wish to engage in intercourse, were counted by the police as "unfounded." KATZ & MAZUR, *supra* note 45, at 13. Even more surprisingly, a policeman "said that he considered some cases to be unfounded when 'women placed themselves in that position: hitchhiking at 2 a.m. or getting drunk at a bar and going home with him.'" MARSH ET AL., *supra* note 25, at 93.

209. See *supra* notes 24-27 and accompanying text.

210. See, e.g., ESTRICH, *supra* note 23, at 10-15.

211. While the imposition of rape shield laws have undoubtedly made the experience a less offensive one for many women, the process of reporting and prosecuting a rape is never going to be an easy one in a system that respects the rights of a defendant.

212. See generally MADIGAN & GAMBLE, *supra* note 27, at x ("We know what it feels like to be the target of sexually aggressive acts. We lived through the above experiences. We also know first-hand that reporting these acts can lead to even greater feelings of violation and trauma.").

213. WARSHAW, *supra* note 20, at 26.

214. *Id.* at 63.

215. ROIPHE, *supra* note 11, at 51-84.

216. SCHWARTZ & DEKESEREDY, *supra* note 26, at 23.

217. WARSHAW, *supra* note 20, at 63-64.

That a woman does not realize she has been raped does not, of course, mean that the rape has not occurred. The victim of theft by deception is still a victim of theft, whether she realizes it or not. More importantly, this under-recognition of rape by the victims themselves may be a result of societal factors. When women see the way other women who have been date raped are treated, they may not wish to place themselves in the same category, even on a subconscious level. Women raised in a society that does not teach girls they have the right to control access to their own bodies may, quite reasonably, not recognize that an action is rape.²¹⁸ After all, if society and the media do not consider such a thing to be rape, it is perfectly plausible that those who grow up under that influence will also not consider it to be rape.

Different groups within society clearly define what level of force is acceptable for a man to use in different ways. For example, 31 percent of women who expressed no religious affiliation claimed in the National Health and Social Life Survey that they had been forced to do something sexual by a male.²¹⁹ Only 17 percent of Catholics answered yes to the same question, along with 21-25 percent of Protestants.²²⁰ It appears likely that such a large differential is the result of a different definition of what constitutes force, as opposed to any difference between the men to whom the women interviewed are exposed.

B. Affirmative Consent as an "Attack on Intimacy"

Those who claim that affirmative consent will destroy sexual relations between men and women also have little evidence with which to support their charges. While it is true that an affirmative consent standard would likely cause a significant change in present sexual behavior, it is by no means apparent that such a change would result in less intimacy. Indeed, Pineau's work suggests that sexual intimacy will improve as a result of the increased communication that such a standard will incentivize.²²¹ It is counter-intuitive to suggest that an absence of communication will produce better sexual results

218. See Germaine Greer, *Seduction is a Four-Letter Word*, reprinted in *SEXUAL DEVIANCE AND SEXUAL DEVIANTS* 327 (Erich Goode and Richard Troiden eds., 1974) ("Women's helplessness is itself a part of the psychosis that makes rape a national pastime.").

219. WILLIAM RUBENSTEIN, 2004 UPDATE TO CASES AND MATERIALS ON SEXUAL ORIENTATION AND THE LAW 14 (2004) (citing Edward Laumann et al., Nat'l Health and Social Life Survey Statistics, *The Social Organizations of Sex: Sexual Practices in the United States* (1994)).

220. *Id.*

221. Pineau, *supra* note 13, at 23-25.

than two partners willingly discussing their individual preferences and desires.

Pineau has been criticized for the assumption that only communicative sex is a rational desire for women.²²² Such criticisms are to an extent circular. While women may not want a given sexual experience to be communicative, it is not plausible to suggest that such a desire should not at some stage be itself communicated. "Those who like rough sex may choose it. . . . But if she did not submit, and did not consent, the legacy of Scarlett O'Hara should not keep her from justice in the courtroom."²²³ The choice is then given to the woman, and she may enter into whatever form of sexual relationship she desires, provided, of course, she obtains the consent of her partner.

Affirmative consent is the norm already in at least one area of human sexuality. When the situation in sadomasochism is considered, it is possible to see that an affirmative consent standard is not only compatible with sexual expression, but is central to it. The law has always treated sadomasochism strangely, seemingly unable to comprehend that such behavior can be both consensual and rational. Despite the consent of all parties involved, the infliction of harm on each other is still considered criminal. Normally, the law is governed by the principle of *volenti non fit iniura*—a willing person may not be harmed.²²⁴ There are repeated cases, however, of consenting sadomasochists in the United States and abroad being charged with assault as a result of their sexual activities.²²⁵ There is no consent defense to a charge of assault; however, in the case of sadomasochism, it is clear that law enforcement may be overzealous in its application of existing laws, such as the definition of a large wooden spoon as a dangerous weapon in order to heighten the charges filed.²²⁶

While dispute exists in the legal community over whether such actions should be held to be criminal,²²⁷ the sadomasochistic community has responded with a strong emphasis on consent as a prerequisite for sexual activity. Indeed, sadomasochism is described as

222. See, e.g., David M. Adams, *Date Rape and Erotic Discourse*, reprinted in DATE RAPE 27-39 (Leslie Francis ed., 1996); Angela P. Harris, *Forcible Rape, Date Rape, and Communicative Sexuality: A Legal Perspective*, reprinted in DATE RAPE 52-61 (Leslie Francis ed., 1996).

223. REEVES, *supra* note 204, at 290.

224. R.A. Duff, *Harms & Wrongs*, 5 BUFF. CRIM. L. REV 13, 31 (2001).

225. See, e.g., Regina v. Brown, 1 A.C. 212, 213 (Eng. H.L. 1994) ("The Spanner Case"); Commonwealth v. Appleby, 402 N.E.2d 1051, 1054 (Mass. 1980).

226. Monica Pa, *Beyond the Pleasure Principle: The Criminalization of Consensual Sadomasochistic Sex*, 11 TEX. J. WOMEN & L. 51, 56 (2001).

227. See generally, e.g., Cheryl Hanna, *Sex is not a Sport: Consent and Violence in Criminal Law*, 42 B.C. L. REV. 239 (2001) ("challeng[ing] the liberal argument that one has a 'right' to engage in S/M by examining the practical application of the law of consent within this context.").

“highly negotiated and mutually satisfying. The credo of S/M sex is ‘Safe, Sane and Consensual.’ ”²²⁸ Importantly, the true voluntary nature of such consent is stressed, with the provision of “safe words” that the submissive partner may use to end the activity at any time and the existence of pre-negotiated limits that are mutually defined.²²⁹

While the need for such consent may be more apparent in a situation where one individual is granted control and power over the other and actual physical damage may be inflicted, such communication is indeed possible within a more conventional sexual relationship. The potential effects of sex are not secret—pregnancy, disease, and emotional dependence clearly may result. An argument, then, that requiring communication will decrease sexual intimacy appears to be unfounded.

C. The Feminist Critique of Affirmative Consent

Affirmative consent standards also receive criticism from the radical wing of the feminist movement. They argue that society is set up such that women are constantly oppressed and subordinated and, therefore, their consent cannot be a valid expression of willingness to take part in sexual activity. Indeed, a single mother who has no source of income may “consent” to provide sexual services to a man in exchange for shelter and food for herself and her child. Such a relationship, while not consensual in the most meaningful sense, would not be considered rape under any proposed affirmative consent standards.²³⁰ It is such an overbearing criticism of a male-dominated society that provides the opponents of affirmative consent with much of their ammunition. By defining rape so broadly, scholars such as Catharine MacKinnon have lost much of its meaning.

MacKinnon states that “[p]olitically, I call it rape whenever a woman has sex and feels violated.”²³¹ While much remains to be done to end economic discrimination against women and to grant women a

228. Pa, *supra* note 226, at 61.

229. *Id.* at 59-61. “Consent is required to be voluntary, knowing, explicit, and with full understanding of the previously agreed to parameters. The ongoing consent of the participants is required, and constructive consent is never sufficient.” *Id.* at 61.

230. This situation can be distinguished from that in *Commonwealth v. Mlarnich*, see *supra* Part III.A. One could argue, under our present legal structure, that a person has the right to freedom, which the assailant in *Mlarnich* threatened to remove from his victim by having her returned to the detention center if she did not engage in sexual intercourse with him. In the example here, one does not encounter a comparable right under our present sociolegal structure to receive food and shelter from a stranger. Therefore, a person who refuses to offer such food or shelter unless he receives sexual intercourse would not be seen as a rapist under this definition of rape, however morally reprehensible his actions might be.

231. CATHARINE MACKINNON, *FEMINISM UNMODIFIED* 82 (1987).

full and viable range of career options,²³² to suggest that one should not act in recognition of an imperfect world and that society should not criminalize as much non-consensual sexual intercourse as possible, appears to be sacrificing the happiness of many women for an ivory-tower ideal that can only be achieved over many generations.²³³ By her emphasis on the role of verbal attacks on women, and their equation with the physical nature of rape, MacKinnon has blurred and trivialized the violation women have suffered. There is "a very important distinction [that] should be made between an individual who 'feels violated' by unacceptable words and another who is physically raped."²³⁴

Yet the opponents of affirmative consent seize on these extreme views shunning even the possibility of a consent standard. By denying that women can make a rational choice, those who subscribe to the views of MacKinnon allow opponents of affirmative consent to paint themselves as the true feminists—those who are willing to trust women. Katie Roiphe makes clear that she views affirmative consent standards as demeaning to women. "The idea that only an explicit yes means yes proposes that women, like children, have trouble communicating what they want."²³⁵ Similar critiques may be found in the works of Wolf and Fox-Genovese.²³⁶ Such opponents of affirmative consent set up the MacKinnons of this world as the straw men they can oppose, allowing them to present themselves as the moderates. These reactions to the more extreme feminist arguments can be just as extreme. In attacking the perceived attempt to equate seduction and rape, Norman Podheretz opines, on the extremist shift in feminism, "One possible explanation is that the influence of *lesbians*

232. Interestingly, MacKinnon determines that certain options should not be available to women, even in a world where many other avenues for income generation are refused to women. In her campaigns for the censorship and criminalization of pornography, where she stands alongside such unlikely allies of the feminist movement as the Reverend Pat Robertson, MacKinnon has been criticized as denying women freedom of choice. See generally Nadine Strossen, *A Feminist Critique of 'The' Feminist Critique of Pornography*, 79 VA. L. REV. 1099 (1993) ("countering the Dworkin-MacKinnon pro-censorship position with an argument grounded in feminist principles and concerns").

233. A similar argument may be made over the use of the defense of Battered Women's Syndrome. While some claim that to acknowledge such a defense retards the progress toward an egalitarian society and true justice for women, it is also important to recognize that abandoning its use would condemn generations of battered and abused women to prison for their reactions, while society moved towards the goal of equal treatment.

234. Matthew Hogben et al., *Coercive Heterosexual Sexuality in Dating Relationships of College Students: Implications of Differential Male-Female Experiences*, reprinted in *SEXUAL COERCION IN DATING RELATIONSHIPS* 76 (E. Sandra Byers & Lucia F. O'Sullivan eds., 1996).

235. ROIPHE, *supra* note 11, at 62.

236. SCHULHOFER, *supra* note 7, at 261.

and other man-hating elements within the movement has grown so powerful as to have swept all before it.”²³⁷

Feminists such as MacKinnon argue that women, in the present world, are incapable of making a true consensual decision to engage in sexual intercourse.²³⁸ “According to MacKinnon, rape varies from normal heterosexual intercourse only in quantity (its violence is more palpable, its level of coercion more blatant and explicit), not in quality.”²³⁹ The entire purpose of an affirmative consent standard is the rejection of that view. The purpose of such a standard is to grant women the right to determine whether they wish to allow a “*particular* act of sex on that *particular* occasion with that *particular* man.”²⁴⁰ To view the standard as a restriction on a woman’s ability to communicate is a misinterpretation of its meaning. Instead, the affirmative consent standard opens a full range of sexual opportunities to the woman concerned and, more importantly, gives her a voice in the sexual decisionmaking process. According to Roiphe, this demeans women.²⁴¹ Affirmative consent is not based on the idea that women cannot communicate what they want; instead, it argues that, absent affirmative consent, women, or girls such as the fourteen-year old victim of *Mlarnich*,²⁴² have no legal basis on which to voice their objection to the use to the use of their bodies, let alone to communicate what they may want in a given situation.

VI. CONCLUSION

An affirmative consent standard is the best way to recognize legally that women are equal partners in any sexual interaction, and that their input is equally valid as that of the male participant. This

237. Norman Podhoretz, *Rape in Feminist Eyes*, reprinted in RAPE AND THE CRIMINAL JUSTICE SYSTEM 129 (Jennifer Tempkins ed., 1996) (emphasis added). The result of this move is, Podhoretz believes, destructive to both men and women:

To the extent that men are hulled or persuaded into following, or at least trying to follow, the ‘guidelines’ of the new sexual dispensation, the number of ‘wimps’ about whom women have been complaining ever since women’s lib was born (though without ever seeing any connection between the two phenomena) will multiply apace.

Id. at 133.

238. MACKINNON, *supra* note 60, at 169 (“Rape law assumes that consent to sex is as real for women as it is for men.”).

239. CAHILL, *supra* note 28, at 40.

240. MCCOLGAN, *supra* note 33, at 49.

241. See ROIPHE, *supra* note 11, at 62 (“The idea that only an explicit yes means yes proposes that women, like children, have trouble communicating what they want.”).

242. Commonwealth v. Mlarnich, 542 A.2d 1335, 1337 (Pa. 1988).

standard will bring rape law into line with the rest of criminal law.²⁴³ It will incentivize both men and women to behave rationally and to give words spoken in a sexual context their normal meaning. In particular, an affirmative consent standard will encourage effective communication in the sexual sphere by disincentivizing behavior like that reported in the Texas A&M survey.²⁴⁴ As Pineau has suggested, communicative sex is more fulfilling sex,²⁴⁵ and such a standard plays a role in moving society away from its preconceived conceptions of a woman's place in the sexual relationship.

The benefits of such a standard appear obvious. The present law essentially restricts a woman's ability to refuse sex. Immediately after the imposition of an affirmative consent standard, some young men and women may well be left confused and frustrated by the absence of sex that both of them wanted, yet for which neither was willing to seek permission; however, "[t]he woman who says no when she means yes and so loses a man she wants will find a way to see him again to tell him she meant yes all the time – *if she really did mean yes.*"²⁴⁶ The woman who did mean no, and whose no is now more likely to be respected by her date, is immeasurably better off than one who becomes another victim of the all too prevalent crime of acquaintance rape.

Perhaps the final word should be left to the Supreme Court of New Jersey, which saw the wisdom of such an affirmative consent standard. "[R]easonable people do not engage in acts of penetration without permission, and it is unlawful to do so."²⁴⁷

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243. The present situation "is as if a robbery victim, finding himself unable to prove he was not engaged in philanthropy, is told he still has his money." MACKINNON, *supra* note 60, at 180.

244. See *supra* note 5 and accompanying text.

245. Pineau, *supra* note 13, at 17-20.

246. Greer, *supra* note 218, at 342 (emphasis added).

247. *In the Interests of M.T.S.*, 609 A.2d 1266, 1279 (N.J. 1992).

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