

Reason and Guesswork in the Definition of Rape

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I want to thank Professors Berger, Thomas, and Wertheimer for their generous remarks. Our few disagreements are all either trivial or adequately discussed in our respective essays. But I will correct a couple of minor misimpressions that I may have created. I agree with Professor Wertheimer that (at least in most contexts) consent is better understood in objective rather than subjective terms. I think that my analysis suggested this, but my terminology probably did not. Perhaps I should have said “lack of desire” instead of “subjective nonconsent.” Concerning drinking, I’m not sure that Wertheimer and I disagree at all, except (apparently) in our hunches about whether, in a “substantial” number of drunken-victim cases, the victim is wholly passive.

Naturally, I welcome Professor Berger’s graceful retraction of her remarks about *Alston*. Professor Berger points out that Schulhofer’s parable about the doctor is not essential to the case for an affirmative-consent rule. I agree that it is not essential, but it may be decisive. At least in the abstract, everyone favors an affirmative-consent rule in the surgical context. Therefore, if Schulhofer’s analogy is valid, it follows that the same rule should be adopted in the sexual context. Professor Schulhofer himself goes so far as to suggest that the procedure for consent to a rectal probe is analogous to the proper procedure for consent to sex.¹ In other words, he

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1. Schulhofer notes that:

[w]hen a doctor asks if a patient wants a probe inserted into his rectum to check for tumors, we do not assume that the patient's silence indicates consent. The patient's willingness must be made explicit. And even then, because the doctor has a special duty of disclosure, the patient's permission is not sufficient until he considers the risks and gives “informed consent.”

Stephen J. Schulhofer, *Unwanted Sex: The Culture of Intimidation and the*

strongly implies that our failure to adopt an affirmative-consent rule is yet another example of discrimination against women. In different ways, other rape scholars regularly contend that the rules defining rape are discriminatory, because they are inconsistent with other rules of law, for example about whether one must resist a robber.² As I indicated in the article, I think that in this context the discrimination claim is unproven;³ left unanswered, it sounds conclusive.

Professor Thomas disputes my guess that the Supreme Court would strike down a law imposing “true strict liability” for rape. I probably shouldn’t have mentioned strict liability, even in passing, because as I define the term it’s a purely academic issue. By “true strict liability,” I meant liability without fault. In my opinion, forcible intercourse is per se culpable (at least negligent), except in the extremely rare case where the woman had previously and clearly authorized it. (In extreme cases, we might wish to prohibit even consensual force, but let’s put that aside.) Otherwise, to create a case of liability without fault we would have to imagine a jurisdiction that authorized conviction on the basis of (1) intentional sexual penetration plus (2) lack of subjective desire on the part of the victim, with no requirement concerning the victim’s manifestations or the perpetrator’s negligence. I cannot imagine such a law being adopted, enforced, or upheld. To be sure, many courts allow conviction for statutory rape even if the defendant made a reasonable mistake as to the victim’s age, but I think that those decisions are due to the unique horror with which we view pedophiles, plus an

Failure of Law 270 (1998).

Even in such a case, I am unsure that most of us would always favor criminal liability. Let me alter the facts. Would Schulhofer favor imprisoning a doctor who told his patient that, “I’m going to use a probe to check your rectum for tumors” and, after a pause and hearing no objection, proceeded to do so? I suspect that in practice we would employ something akin to a “no’ means no” test (at least for purposes of the criminal law) in this hypothetical.

2. See David P. Bryden, *Redefining Rape*, 3 *Buff. Crim. L. Rev.* 317, 372 (2000) [hereinafter *Redefining Rape*].

3. See *id.* at 385.

uncommonly strong fear that a mistake defense would be abused in this context. Even the much-criticized felony murder rule does not impose liability without fault: At worst, it leads to a grossly excessive penalty for what is usually an intentional and serious underlying felony. In many cases, the defendant was reckless as to the risk of death, and so might justly have been convicted of at least manslaughter even without the rule. As to guilt of murder, the rule sometimes does in a sense impose strict liability, and one may plausibly oppose it on that ground. But that is not what I meant by "true strict liability."

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I know that some readers will be disturbed by my relatively equivocal treatment of some issues whose solutions seem obvious to some other scholars. Without trying to restate everything that I said in the article, let me add a few words to clarify my point of view.

In discussing how to define the act (as opposed to the mens rea) of rape, I analyzed four alternative rules: (1) subjective nonconsent (lack of desire), (2) the force-resistance requirement, (3) "no' means no," and (4) affirmatively expressed consent. In my opinion, each of these is a plausible rule (albeit perhaps inferior to some or all of the others) if administered well. Whether it will be administered well depends on who administers it, more than on the terms of the rule.

My ranking of the four alternatives would be (1) "no' means no," (2) affirmatively expressed consent, (3) the force requirement, and (4) subjective nonconsent. I am not confident of this ranking, however, because to me the key issue is not so much which rule is best in principle as which would be best in practice. From that perspective, there are several empirical imponderables. We do not know how and to what extent perpetrators, victims, police, prosecutors, juries, and judges would behave differently under the various rules. Each has some potential advantages and some potential disadvantages.

This is not to say that our guesses are wholly

uninformed. We know, for example, that the force requirement has led to some unjust decisions—not in nearly as high a proportion of undesired sexual encounters as one might suppose after reading a casebook or a book on rape law, but some. The requirement sometimes enables men to have intercourse with women who have plainly indicated that they do not want it, if the man utters no threat and the woman does not physically resist. Although I do not believe that all women or even teenage girls are terrified of all men (and teenage boys), unquestionably and understandably some women are afraid to resist some men. Courts sometimes expect resistance when they should instead hold that the woman's failure to resist was reasonable. Even if the failure to resist was unreasonable, it may have been due to genuine fear. As I said in the article, undesired sex is a high price to pay for the rule's largely speculative benefits.⁴

The simplest rule would be to hold the man guilty if his companion did not desire sex, and he knew (or, as I prefer, should have known) it. This is the "subjective nonconsent" (lack of desire) rule. The rule is not as subjective as it seems because, when coupled with a mens rea rule requiring culpability (at least negligence), the subjective rule in effect becomes objective, since negligence presupposes a failure to heed some manifestation of the victim's desires, or at least of her uncertainty. As I stressed in *Redefining Rape*, the subjective nonconsent rule is psychologically unrealistic insofar as it implies that people always either desire or do not desire sex; in reality, of course, we are often ambivalent. Yet the prosecution's burden of proving nonconsent might be regarded as an adequate solution to that problem.

Another problem is that the jury may need more guidance than a subjective nonconsent rule would provide. One may speculate that, without additional guidance concerning the appropriate way for the woman to manifest her desire or lack of desire, juries will too readily convict

4. See *id.* at 386.

rape defendants,⁵ or too readily acquit them, or—a third possibility—that juries will behave more inconsistently under this rule than under one that specifies the requisite manifestations.

Perhaps juries would be less lenient if instructed that “no’ means no” or that consent must be affirmatively expressed, but this is uncertain. There is copious evidence that juries ignore rules of rape law in cases in which they don’t like the result produced by the rule.⁶ On the other hand, there may also be many rape cases in which they do as the judge instructs even though they don’t like the result. Scholarly investigations of such matters are inconclusive and often dated.

The danger of inconsistent verdicts seems to be greater under a subjective nonconsent test than under the relatively precise alternative rules, but it’s possible that juries, guided by their perhaps fairly consistent sense of justice, would behave more consistently under this rule than under a rule that tries to specify more precisely what manifestations are necessary and perhaps leads to frequent (but not uniform) jury nullification.

We do not know in what proportion of rape trials the judge’s instruction about the force requirement leads the jury to acquit a man they would have convicted under some other rule. In speculating about this, bear in mind that the usual defense in acquaintance cases is that the woman affirmatively expressed her consent. The claim of affirmative consent, if believed, would be a valid defense under any of the four rules. Whether it is believed will not depend on the governing law but rather on the evidence and the attitudes of the factfinders.

Analysis of the force requirement is further clouded by two pervasive problems in criminal jurisprudence. First: How many more guilty men will escape justice if we adopt Rule A instead of Rule B? (Conversely, how many more innocent men would be convicted under Rule B?) And

5. I described that fear as “more theoretical than real.” *Id.* at 385.

6. See generally David P. Bryden & Sonja Lengnick, Rape in the Criminal Justice System, 87 *J. Crim L. & Criminology* 1194, 1255-83 (1997).

second: How many escapes from justice are we willing to tolerate in order to prevent the conviction of a single innocent man? These questions obviously cannot be answered rigorously. Suffice it to say that, in most contexts, most criminal law professors seem to regard acquittals of many guilty men as a small price to pay for protection of that rare innocent defendant. I suspect that if men had not dominated our law-making institutions we never would have had a force requirement, but, as I reminded readers in my discussion of “corroborative rules,”⁷ the force requirement is not the only rule of criminal law that impedes conviction of the guilty, in order to protect the occasional innocent defendant.

What would happen under an affirmative-consent rule? In the short run, I doubt that it would be enforced, except in cases where the defendant’s culpability was thought to be greater than that required by the terms of the rule—where, for instance, the victim repeatedly said “no” or the circumstances were at least arguably intimidating. Indeed, one of the rule’s virtues is that it eliminates the need to appraise the reasonableness of the victim’s failure to flee or resist, in the kind of borderline case that is troublesome under the force requirement. But of course this virtue comes into play only after the jury decides that the prosecution has proved, beyond a reasonable doubt, that the woman did not affirmatively express consent. In other words, we can’t solve problems due to jurors’ biases and the burden of proof by adopting a new definition of rape.

Evidently, the affirmative-consent rule hasn’t had much effect so far in New Jersey.⁸ But in the long run, who knows? I also said that right now I don’t think it’s realistic to worry much about innocent men being convicted on false charges of rape, so any slight extra protection afforded by the force requirement seems unnecessary.⁹ Again, I don’t know whether that will still be true twenty-five or fifty

7. Redefining Rape, *supra* note 2, at 376-82.

8. See Schulhofer, *supra* note 1, at 97.

9. See Redefining Rape, *supra* note 2, at 385.

years from now.

As I noted in the article, rules that are rarely enforced create at least two dangers: discriminatory enforcement and (if they are used primarily in cases where the prosecutor suspects the defendant of some greater wrongdoing, but doesn't want to have to prove it) circumvention of the burden of proof.¹⁰ I do not know for certain whether those potential bad results of the rule outweigh its potential (but equally speculative) advantages as compared to, say, the "no' means no" rule that I endorsed.

When we try to compare a "no' means no" rule with an affirmative-consent rule, we are discussing an extremely narrow class of cases in which those rules are supposed to produce different results: cases in which the defendant was not a stranger, did not use force, did not threaten force, and in which the victim did not resist, did not give an affirmative or a negative signal, and was not too drunk or too young to be responsible. In other words, alleged acquaintance rapes where the perpetrator did not employ or threaten force and the putative victim was competent but both physically and verbally wholly passive. These are the only cases in which it matters, even in theory, which of the two rules applies.¹¹ If we subtract from these all the cases in which the actual outcome differs from the theoretical one because some key actor—the victim, the police, the prosecutor, the jury, or a court—ignores the fine distinction between the requirements of the two rules, what remains is probably a minute fraction of the total

10. See *id.* at 408, 410.

11. Depending on the required mens rea, the difference might be even smaller than I have indicated. Professor Schulhofer advocates a minimum mens rea of "gross" negligence coupled with his affirmative-consent rule. See Schulhofer, *supra* note 1, at 258-59, 284 (§ 203(b) of Model Act). This means that a defendant who was merely negligent as to whether his partner had affirmatively expressed her consent would not be guilty. One wonders how juries would interpret such an instruction in this context. They might decide that, unless the woman manifested her nonconsent, the man, even if negligent, was not "grossly" (or "criminally") negligent, thus collapsing the distinction between the affirmative-consent and "no' means no" rules.

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volume of undesired sex. That being so, it probably matters very little which rule we choose. Even the “educational” difference may be insignificant.

Such uncertainties are not, of course, unique to rape. I mention them, not to suggest that we should retain the force requirement, but to suggest that the problem of how to define rape is more complex, and involves more speculation, than some authors have implied.