

AFTER RAPE LAW: WILL THE TURN TO CONSENT NORMALIZE THE PROSECUTION OF SEXUAL ASSAULT?

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Rape is an exceptional area of criminal law. The offense is a serious one,¹ yet defined without any *mens rea* requirement beyond general intent.² Moreover, if the supposed victim consents, the object of the required general intent – sexual penetration – is not just permitted by the criminal code, but protected by the Constitution.³ We can forgive our first-year students some confusion when they try to line up the law of sexual assault with canonical tributes to the requirement of *mens rea* in our law.⁴

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1. See, e.g., *Payne v. Ward*, 21 Fed. App'x 852, 854 (10th Cir. 2001) (rejecting habeas petitioner's Eighth Amendment challenge to a sentence of 502 years on multiple rape convictions based on attacks of the same victim on twelve occasions). Less dramatic but still serious penalties attend less aggravated cases. Illustrative are sentences imposed by trial courts on rape charges that were subsequently reversed on appeal because proof of force was insufficient. See, e.g., *People v. Denbo*, 868 N.E.2d 347, 358 (Ill. App. 2007) (reversing the conviction and seven year prison sentence of a defendant, who shoved her hand into her lover's vagina, was pushed away, then inserted hand again); *Commonwealth v. Berkowitz*, 609 A.2d 1338, 1341-43 (Pa. Super. 1992) (sentencing a defendant, whose conviction was ultimately reversed in *Commonwealth v. Berkowitz*, 641 A.2d 1161, 1166 (Pa. 1994), to one to four years in prison).

2. Some jurisdictions excuse reasonable mistakes about consent, but they are a distinct minority and still impose severe penalties for simple negligence. See *infra* text accompanying notes 20-22.

3. See *Lawrence v. Texas*, 539 U.S. 558, 578 (2003) (holding that substantive due process protects noncommercial sexual intimacy in private between consenting adults).

4. See, e.g., *Morrisette v. United States*, 342 U.S. 246, 250 (1952) (“The contention that an injury can amount to a crime only when inflicted by intention is no provincial or transient notion. It

If the substantive law, with its harsh penalties, low threshold for criminal responsibility, and focus on the consent *vel non* of the victim is odd, the procedures attending rape prosecutions remain unique. Where once the prosecution labored to overcome prior sexual history evidence, now it is the defense that must counter expert testimony and character evidence, without the benefit of the victim-character-evidence rule that homicide and assault defendants may exploit.⁵ The old rape exceptionalism of privileged predation has given way to a new exceptionalism. We have compromised supposedly fundamental principles of criminal responsibility and procedural fairness to improve the efficiency of law enforcement.

This essay explores the new rape exceptionalism. My thesis holds that rape exceptionalism is rooted in a divide between elite opinion, reflected in statutes, court decisions, and academic commentary, and popular opinion, as reflected in jury verdicts. Elite opinion values sexual autonomy and suspects, when it does not despise, sexual aggression. Popular opinion supposes that sexual autonomy may be forfeited by female promiscuity or flirtation, and views male sexual aggression as natural, if not indeed admirable.

The substantive law is now phasing out the force requirement, with the objective of imposing criminal liability in those cases, typically acquaintance-rape cases, where the victim did not consent but the accused did not inflict or threaten serious bodily injury extrinsic to the sex act. Like the new exceptionalism in procedure, the substantive turn to consent aims to enable successful prosecution of men who commit what elite opinion regards as a serious crime, and what popular opinion regards as nature taking its course.

If an explicit statement be required, in the rape context (if not in some others, e.g., gun control) elite opinion is right and popular opinion is wrong. The turn to consent, however, is essentially lawless, because there is no determinate and widely-shared understanding of what constitutes consent. It will result in prosecutorial discretion to bring rape charges against men in far more cases than the system can manage, for wrongdoing that the legislature's intent to punish seems very doubtful.

If the rules of procedure enabled prosecutors to convict the great majority of those they choose to charge, the turn to consent might normalize rape law. In the "normal" criminal justice system, jury trial is

is as universal and persistent in mature systems of law as belief in freedom of the human will and a consequent ability and duty of the normal individual to choose between good and evil.").

5. See *infra* notes 32, 36, and 37.

an exotic departure from plea bargaining. In plea bargaining, prosecutors have plenary discretion to select charges from a vast menu of possible charges supplied by legislatures, enabling prosecutors to make functionally coercive plea offers.⁶ In effect, criminal liability is determined by prosecutors, with some judicial input at the sentencing stage.⁷

The turn to consent, however, has not and will not normalize the law of rape. Even with expansive reception of expert testimony for the prosecution, the admissibility of character evidence against the defendant, and the ban on character evidence about the victim, clever defense lawyers are able to play on popular opinion and invite nullification of the legislature's facial prohibition of sex without consent. Expanding the formal scope of the substantive law to cover cases where

6. Professor Davis, a leading expert on the problem of prosecutorial discretion, describes the normal process as follows:

Prosecutors decide whether and how to charge an individual. They decide whether to offer a plea to a lesser charge, set the terms of the plea, and assess whether the conditions have been met. In federal and state jurisdictions governed by sentencing guidelines, these decisions often predetermine the outcome of a case since the sentencing judge has little, if any, discretion in determining the length, nature, or severity of the sentence. The defendant certainly has the option of exercising her right to trial and leaving her fate in the hands of the jury or judge, but often she is not willing to run the risk of additional and more serious convictions and more prison time. Consequently, in most jurisdictions, plea bargaining resolves more than ninety percent of all criminal cases. Prosecutors on both the state and federal levels control this process.

Angela J. Davis, *The American Prosecutor: Independence, Power, and the Threat of Tyranny*, 86 IOWA L. REV. 393, 408-09 (2001) (footnotes omitted).

7. Professor Davis is a former public defender. Judge Lynch, a former prosecutor, has described the normal process in strikingly similar terms:

To me, the essence of this practice, and what radically distinguishes it from the adversarial litigation model embodied in textbooks, criminal procedure rules, and the popular imagination, is that the prosecutor, rather than a judge or jury, is the central adjudicator of facts (as well as replacing the judge as arbiter of most legal issues and of the appropriate sentence to be imposed). Potential defenses are presented by the defendant and his counsel not in a court, but to a prosecutor, who assesses their factual accuracy and likely persuasiveness to a hypothetical judge or jury, and then decides the charge of which the defendant should be adjudged guilty. Mitigating information, similarly, is argued not to the judge, but to the prosecutor, who decides what sentence the defendant should be given in exchange for his plea.

If I am correct in this description of the prevailing process, the defining characteristic of the existing "plea bargaining" system is that it is an informal, administrative, inquisitorial process of adjudication, internal to the prosecutor's office – in absolute distinction from a model of adversarial determination of fact and law before a neutral judicial decision maker.

Gerard E. Lynch, Comment: *Screening Versus Plea Bargaining: Exactly What are we Trading Off?*, 55 STAN. L. REV. 1399, 1403-04 (2003).

even elite opinion is divided, such as the proposal to require affirmative expressions of consent,⁸ is an academic exercise.

If we really want to normalize rape law, we must bypass the jury openly. We can't conceal the bypass under the fig leaf of plea bargaining, because defense lawyers know that juries are unlikely to convict. The Supreme Court permits such a bypass. "All" does not mean "all," at least in the Sixth Amendment. There's a catch; for convictions rendered without a right to jury trial, the maximum penalty is six months in jail.⁹ That might seem to trivialize the offense,¹⁰ but it is infinitely more than the nothing whatsoever that happens in most acquaintance rape cases.

Those of us who regard the "normal" operation of the criminal justice system with suspicion would still object to the concentration of power in prosecutorial hands and the routine punishment of exercising constitutional rights. If that's the best system of social control our society can achieve, however, it makes at least as much sense in rape cases as it does in drug cases. If and when we find ways to force elected representatives to make the hard choices about the substantive law, and to provide a fair, accurate, and affordable day in court for every defendant, we will have time to ask what the just punishment should be for sex without consent. Until then a special sex crimes court, sitting without a jury but with no jurisdiction to exceed the Supreme Court's six-month limit, makes sense as a prosecutorial option to the standard felony process.

I. RAPE EXCEPTIONALISM

Anglo-American law always has treated rape differently than other serious crimes. In the last three decades, however, the nature of that exceptionalism has changed. Under the common law and statutes derived from it, a conviction could be had only when the victim resisted,

8. For such proposals, see STEPHEN J. SCHULHOFER, UNWANTED SEX: THE CULTURE OF INTIMIDATION AND THE FAILURE OF THE LAW 271 (1998) ("For such [sexual] intrusions actual permission – nothing less than positive willingness, clearly communicated – should ever count as consent."); Michelle J. Anderson, *Negotiating Sex*, 78 S. CAL. L. REV. 1401, 1407 (2005) ("[T]he law should define 'rape' as engaging in an act of sexual penetration with another person when the actor fails to negotiate the penetration with the partner before it occurs.").

9. See *Baldwin v. New York*, 399 U.S. 66, 73-74 (1970) (upholding New York system of bench trials for misdemeanors against Sixth Amendment challenge).

10. For the argument equating sex-without-consent-without-force with sex-without-consent-with-force, see Michelle J. Anderson, *All-American Rape*, 79 ST. JOHN'S L. REV. 625 (2005). For my case against such equations, see Panel Discussion: *Men, Women and Rape*, 63 FORD. L. REV. 125, 139-141 (1994).

complained promptly, and was of “good fame.”¹¹ The defense could prove prior sexual acts, as well as reputation for promiscuity.¹² These rules, which had no counterpart in prosecutions for other crimes such as robbery, discouraged reporting and made convictions difficult even in clear cases.

Beginning in the 1970’s, a reform movement swept away the old rape exceptionalism.¹³ The old exceptionalism, however, was not replaced with normalcy. The old exceptionalism had reflected the perceived danger of false accusations, especially when brought by lower-class women against upper-class men.¹⁴ The new exceptionalism reflects the difficulty of persuading juries to convict, especially in two categories of cases prosecutors have trouble winning — cases in which the victim and the defendant have a prior social relationship, and cases in which the victim engaged in some sort of socially-recognized sexual misbehavior.¹⁵

The elimination of the resistance requirement created a new peculiarity in rape law. At common law, rape was a general intent crime; the defendant only needed to intend penetration.¹⁶ Since penetration does not occur by accident, there was no *mens rea* requirement with respect to the victim’s non-consent. The resistance requirement, however, stood in for *mens rea*. If the victim physically resisted, the defendant was put on notice of the absence of consent, at least absent exotic and creepy facts such as those in the notorious *Morgan* case.¹⁷

With the end of the resistance requirement, the legal treatment of

11. 1 MATTHEW HALE, THE HISTORY OF THE PLEAS OF THE CROWN, 633 (1646).

12. For the common-law rules, see *id.* at 628-35.

13. For an overview of the first reform movement, see, for example, SCHULHOFER, *supra* note 8, at 17-40.

14. See, e.g., HALE, *supra* note 11, at 634 (claiming that rape is “an accusation easily to be made and hard to be proved, and harder to be defended by the party accused, tho never so innocent”). After the abuse poured on this quotation for the last thirty years, I cannot help imagining Lord Hale indulging a grim smile as he watched TV coverage of the Duke Lacrosse affair from judicial Valhalla.

15. See *infra* text accompanying notes 57-61, and 63.

16. See, e.g., David P. Bryden, Forum on the Law of Rape: *Redefining Rape*, 3 BUFF. CRIM. L. REV. 317, 325 (2000) (“At common law, rape was a ‘general intent’ crime: The requisite intention was merely to perform the sexual act, rather than to have nonconsensual intercourse.”) (footnotes omitted).

17. See *D.P.P. v. Morgan*, 1976 A.C. 182 (finding that victim’s husband represented to defendants that victim enjoyed being sexually attacked and that defendants should understand victim’s verbal and physical resistance as indications of consent; held, defendants would not be guilty of rape if they believed husband’s representations, upholding conviction on ground that no jury could credit defendants’ claim of such sincere belief).

non-consent as a strict liability element in a general intent crime made rape a very strange felony indeed. Ordinarily, a general intent crime carries with it the standard common law rule that a reasonable mistake negates general intent.¹⁸ Even on the level of theory, however, this move implies a reasonable mistake defense only about intercourse, not about consent.¹⁹

Only a minority — but a substantial minority — of U.S. jurisdictions endorse this *per se* prohibition of instructing the jury on any defense of mistake about consent.²⁰ Other jurisdictions recognize a reasonable-mistake-about-consent defense, typically by statute, but these defenses, only recently recognized at all, have been cut back dramatically in their application. California, the fountainhead of the defense, now requires “substantial evidence of equivocal conduct that would have led a defendant to reasonably and in good faith believe consent existed where it did not.”²¹ The typical defendant who testifies that the alleged victim consented in fact is thus denied an instruction on the mistake defense. By contrast, the standard instruction on self-defense directs the jurors to acquit if the accused either acted in justified self-defense or honestly and reasonably believed that he did so.²²

Even where the defense is available, it has the effect of making grave criminal liability turn on simple negligence. A mistake is unreasonable when it would not have been made by a reasonable person.²³ There is no language in the opinions or the instructions about

18. See, e.g., JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW 155-56 (3d ed. 2001).

19. See, e.g., *Commonwealth v. Lopez*, 745 N.E.2d 961, 965 (Mass. 2001) (“Although the Commonwealth must prove lack of consent, the ‘elements necessary for rape do not require that the defendant intend the intercourse be without consent.’ . . . Historically, the relevant inquiry has been limited to consent in fact, and no mens rea or knowledge as to the lack of consent has ever been required.”) (citations omitted).

20. See *id.* at 968-69 (citing decisions from Illinois, Iowa, Maine, New Hampshire, Pennsylvania, Michigan, and Wisconsin).

21. *People v. Williams*, 841 P.2d 961, 966 (1992). For an explanation of the significance of this qualification, and the argument that it is wrong on principle, see Rosanna Cavallaro, *Criminal Law: A Big Mistake: Eroding the Defense of Mistake of Fact About Consent in Rape*, 86 J. Crim. L. & Criminology 815, 815-16 (1996).

22. See *People v. Watie*, 124 Cal. Rptr.2d 258, 270-71 (Cal. App. 2002).

The instructions given to the jury in connection with the murder charge and the instructions on self-defense and imperfect self-defense required the jury to consider and resolve defendant's claims of mistake of fact. The impact of the defendant's actual and reasonable belief, even if it was mistaken, was fully described by [the pattern self-defense instructions]. . . . The court thus had no sua sponte duty to provide a separate mistake-of-fact instruction.

Id.

23. See, e.g., *In re John Z.*, 60 P.3d 183, 187 (2003) (deciding whether post-penetration revocation of consent made continued penetration rape: the Court found “no reasonable person in

negligent mistakes being criminally negligent, no language about “gross negligence” or “gross deviation from the standard of care that a reasonable person would observe in the actor’s situation.”²⁴

Thus, liability for rape may be imposed for the same type of culpability that customarily exposes the actor to civil liability for injuries caused in an automobile accident (and many jurisdictions are less generous than that). What explains this aspect of the new exceptionalism? The explanation is straight-forward: the defense would be rarely justified but often claimed, inviting juries to acquit the guilty.

To the extent that the force requirement is read as retaining the resistance requirement in some form, the common-law arrangement still does a passable job of reconciling rape law with standard *mens rea* doctrine. The force requirement, however, is in the process of erosion. In jurisdictions where that erosion is far advanced, the accused faces decades in prison, and the stigma of being branded a rapist, for an offense in which the only required intent is the intent to have sex. *Lawrence v. Texas*²⁵ has the practical effect of making rape a strict-liability crime, as the intent to have consensual sex may not be punished as a crime.²⁶ The common-law judges could say that the defendant knew he was committing fornication or adultery (the marital exemption making non-adulterous, non-fornicative sex legal even when forced), and so deserved no sympathy.²⁷ In the modern world of element analysis of criminal statutes,²⁸ and the presumption against strict liability, rape law became an outlier. After *Lawrence*, it has become an extreme outlier.²⁹

defendant's position would have believed that Laura continued to consent to the act") (citing *Williams*, 841 P.2d at 965-66).

24. Cf. MODEL PENAL CODE § 2.02(d).

25. *Lawrence v. Texas*, 539 U.S. 558, 578-79 (2003) (holding state statute prohibiting same-gender oral and anal sex unconstitutional).

26. *See id.* at 578 (“[I]ndividual decisions by married persons, concerning the intimacies of their physical relationship, even when not intended to produce offspring, are a form of ‘liberty’ protected by the Due Process Clause of the Fourteenth Amendment. Moreover, this protection extends to intimate choices by unmarried as well as married persons.”).

27. Cf. *Regina v. Prince*, L.R. 2 Cr. Cas. Res. 154 (1875) (convicting defendant of taking underage female from her father, rejecting defendant's mistake of age consent because even if victim were over sixteen, defendant's conduct was still wrongful).

28. *See* Paul H. Robinson & Jane A. Grall, *Element Analysis in Defining Criminal Liability: The Model Penal Code and Beyond*, 35 STAN. L. REV. 681 (1983) (contrasting offense analysis, which mechanically used a single culpable mental state for all non-mental elements of charged offenses, with element analysis which assumes that there must be some, but not always the same, degree of culpability for each of the non-mental elements).

29. Professor Loewy makes the point with respect to mistake of age in statutory-rape cases, but the point holds for mistake of consent in forcible rape cases. *E.g.*, Arnold H. Loewy, *Statutory*

Another reason behind the denial of any mistake defense is the tension between the defense and the rape shield laws. If the defendant testifies that he formed his belief in the victim's consent based in part on what he had heard about her sexual propensities, or his reaction to her provocative attire, he can argue that the prohibition on such evidence in the shield law goes only so far as barring the evidence on the issue of consent in fact. If the evidence is relevant to show a belief however mistaken, he may have a constitutional trump on the shield law.³⁰

The shield laws³¹ themselves are a distinct point of rape exceptionalism. While the prohibition on past act evidence to show propensity to consent reflects generally applicable doctrine,³² the prohibition on reputation and opinion evidence does not. In a homicide case, for example, the defense may support a self-defense claim with proof that the deceased had an aggressive character, and that the defendant knew of specific acts of violence by the deceased.³³ The explanation again is straightforward: admitting character evidence would

Rape in a Post Lawrence v. Texas World, 58 S.M.U. L. REV. 77, 90 (2005):

But post-Lawrence, the landscape should change. In bygone days, we could say to [the defendant]: 'You knew that you were doing something wrong. The fact that your wrong was greater than you anticipated will not avail you. If you didn't want to take a chance, you could have abstained from sexual intercourse entirely.' Today, [the defendant] would answer: 'But what I believed I was doing was a constitutional right. Perhaps some people may consider it immoral, but that doesn't matter. The nation's fundamental charter protects what I reasonably thought I was lawfully doing.'

Id. The claim, discussed by Professor Loewy, to a constitutional right to a mistake defense, by analogy to the First Amendment overbreadth doctrine, is debatable. It would be difficult, however, to deny the proposition that *Lawrence* has undercut any reconciliation of modern rape law with bedrock principles of criminal responsibility, even if we conclude that those principles are not constitutionally enforceable.

30. See *Doe v. United States*, 666 F.2d 43, 48 (4th Cir. 1981) (holding reputation of victim known to defendant admissible to show belief in consent). Cf. Michael John James Kuzmich, Review of Selected 1998 California Legislation: Evidence: *Chapter 127 Prevents Evidence of Victim's Manner of Dress in Rape Cases to Prove Consent*, 30 MCGEORGE L. REV. 637 (expressing concern that manner-of-dress evidence might be admissible to support mistake defense); Sakthi Murthy, Comment: *Rejecting Unreasonable Sexual Expectations: Limits on Using a Rape Victim's Sexual History to Show the Defendant's Mistaken Belief in Consent*, 79 CAL. L. REV. 541, 544 (1991) (arguing that mistake founded on past sexual history is not reasonable).

31. See, e.g., FED. R. EVID. 412.

32. See, e.g., *id.* 404(a) ("Evidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion . . .").

33. See, e.g., *id.* 404(a)(2):

[Admitting that] [i]n a criminal case, and subject to the limitations imposed by Rule 412, evidence of a pertinent trait of character of the alleged victim of the crime offered by an accused, or by the prosecution to rebut the same, or evidence of a character trait of peacefulness of the alleged victim offered by the prosecution in a homicide case to rebut evidence that the alleged victim was the first aggressor . . .

discourage reporting and would give juries information they would be likely to mishandle.

The universal admissibility of rape trauma evidence is yet another somewhat surprising feature of modern rape law. An honest application of *Daubert*, let alone *Frye*, would at the very least generate a conflict among the jurisdictions.³⁴ Instead, legislators and judges sense the difficulty of winning convictions even when guilt is clear, and admit expert testimony to bolster the persuasiveness of the prosecution.³⁵ This practice may promote reliability in the sense of making accurate verdicts more likely, but this is an odd if not unique interpretation of reliability.

Federal Rule of Evidence 413, and its counterparts in those states that have followed the lead of Congress, is yet more unusual. Under Rule 413, the prosecution may prove the defendant's past specific acts of sexual assault to show propensity, even when these acts did not result in a criminal conviction.³⁶ Rule 413 was inspired by the acquittal of William Kennedy Smith, after a trial in which the judge quite correctly applied the standard character evidence rules to exclude proof of prior sexual attacks allegedly committed by Smith.³⁷ Casting aside the

34. See Jane Campbell Moriarty, *Wonders of the Invisible World: Prosecutorial Syndrome and Profile Evidence in the Salem Witchcraft Trials*, 26 VT. L. REV. 43, 98 (2001). Professor Moriarty writes:

In the last thirty years, there have been many studies conducted following up Burgess & Holstrom's initial work. According to current literature, the general stages of the RTS are not supportable, although the subsequent studies confirm the finding that 'rape survivors experience more depression, anxiety, fear, and social and sexual problems than do other women.' Yet, the wide-ranging testimony admitted under the rubric of RTS neither matches the RTS stages nor the recognition that rape survivors are more depressed or anxious than others. Rather, the testimony includes delays in reporting, reporting inconsistently about the rape, and recanting the claim of rape.

Id. (footnotes omitted).

35. See *id.*

The difficulty of prosecuting rape cases is well-established, and far too few victims seek to prosecute these cases because of the re-experience of trauma engendered by the trial. But in the desire to assist the victims of these crimes, courts have often disregarded the need to rigorously examine the connection between victims' alleged traumatically-induced behaviors and the crime.

Id. See also, Robert P. Mosteller, *Syndromes and Politics in Criminal Trials and Evidence Law*, 46 DUKE L.J. 461, 478-91 (1996) (tracing receptivity toward syndrome evidence to political concern that meritorious cases for the protection of vulnerable victims will be lost without the evidence).

36. See FED. R. EVID. 413(a) ("In a criminal case in which the defendant is accused of an offense of sexual assault, evidence of the defendant's commission of another offense or offenses of sexual assault is admissible, and may be considered for its bearing on any matter to which it is relevant.").

37. R. Wade King, Comment: *Federal Rules of Evidence 413 and 414: By Answering the Public's Call for Increased Protection from Sexual Predators, Did Congress Move too Far Toward Encouraging Conviction Based on Character Rather than Guilt?*, 33 TX. TECH. L. REV. 1167, 1169

standard distrust of propensity evidence, and the standard reluctance to open criminal trials to extensive proof of collateral matters, Congress and several states moved to reinforce the prosecution's case in light of the practical difficulties the Smith case so dramatically illustrated.³⁸

Sadly, these departures from basic principles of both criminal law and the law of evidence have done little to increase the prosecution's ability to win justified convictions. Conviction rates in rape cases remain the lowest for any of the serious felonies.³⁹ The system's stubborn resistance to convictions in rape cases encourages the current pro-government drift in the substantive law. The root problem, however, is the divide between elite and popular opinion about sexual mores and gender roles. Before suggesting a direct and principled procedural attack on the problem, I briefly sketch the growing eclipse of the force element and the emerging focus on consent in the substantive law.

II. THE TURN TO CONSENT

The late twentieth century reform movement did not alter the substantive law's traditional formula of sex-plus-force-plus-the-absence-of-consent. The abolition of the resistance requirement, however, posed a difficult challenge for the courts. On the one hand, the independence of the penetration and force elements suggested that force must be

(2002). King states that:

The acquittal of Kennedy Smith in the face of numerous media reports concerning his prior sexual misdeeds demonstrated to a watching public the effectiveness of evidence of prior sexual misconduct in a sexual assault trial. Responding to the public outcry fueled by these and other high-profile cases, Congress ignored the legal community's objection to the adoption of Rules 413 and 414, including them in the 1994 Act.

Id. (footnotes omitted).

38. Joyce R. Lombardi, Comment: *Because Sex Crimes are Different: Why Maryland Should (Carefully) Adopt the Contested Federal Rules of Evidence 413 and 414 that Permit Propensity Evidence of a Criminal Defendant's Other Sex Offenses*, 34 U. BALT. L. REV. 103, 116 (2004) ("Minus the celebrity and media attention, of course, the essential elements of the Kennedy Smith rape trial are found in every jurisdiction: accuser, accused, possibly forced sex, no witnesses, scant physical evidence. In response, the legislatures of ten states have, as of June, 2004, adopted their own versions of *Federal Rules of Evidence 413, 414, and 415.*") (footnotes omitted).

39. See, e.g., David P. Bryden & Sonja Lengnick, *Criminal Law: Rape in the Criminal Justice System*, 87 J. CRIM. L. & CRIMINOLOGY 1194, 1199 (1997) ("There is growing evidence that, while the performance of the justice system in rape cases may have improved, the legal reforms have generally had little or no effect on the outcomes of rape cases, or the proportions of rapists who are prosecuted and convicted.") (footnotes omitted); SCHULHOFER, *supra* note 8, at 38 ("A comprehensive study of six jurisdictions – Georgia, Illinois, Michigan, Pennsylvania, Texas, and Washington, D.C. – . . . found that only Michigan had any improvement in the reporting of rapes, and none of the jurisdictions had an increase in its conviction rates.").

extrinsic to the penetration. On the other hand, the end of the resistance requirement suggested the defendant need not inflict or threaten grievous bodily injury to commit rape. The general drift of the law is clear: the force requirement is either being eliminated or trivialized.

Different jurisdictions are taking different routes to the same destination. In Pennsylvania, the state courts gave the force requirement a pro-defense interpretation in *Commonwealth v. Berkowitz*,⁴⁰ and the legislature responded by adopting a statute making nonconsensual sex, absent force, a lesser felony.⁴¹ The Commonwealth's sentencing commission, however, "has assigned the offense of sexual assault to Level 5 of the sentencing guidelines, placing it in the same category as murder, voluntary manslaughter, rape, robbery, aggravated assault, kidnapping and arson."⁴² The reform statute thus has had the same practical effect that would have attended a judgment for the prosecution in *Berkowitz*.

The Pennsylvania model is fairly widespread; sixteen states now criminalize sex without consent and absent force, half of these classifying this offense as a misdemeanor.⁴³ Although these jurisdictions represent a minority, they also represent an important trend. Not only are more states criminalizing sex without consent as such; jurisdictions that retain the traditional force requirement are treating it with increasing hostility.

Apparently the New Jersey Supreme Court, which famously read the traditional force element to be established by proof of penetration without more,⁴⁴ still stands alone. Courts in many jurisdictions,

40. See *Commonwealth v. Berkowitz*, 641 A.2d 1161, 66 (Pa. 1994). The Westlaw notes associated with the case state that:

Evidence that victim stated 'no' throughout her encounter with defendant and that defendant pushed her on bed prior to having sexual intercourse with her was insufficient to establish 'forcible compulsion' necessary to support rape conviction; evidence indicated that victim was not restrained by defendant and that she could have attempted to leave room but did not.

Id. at WL KeyCite [2].

41. See 18 PA. CONS. STAT. § 3124.1 (2007) ("Except as provided in section 3121 (relating to rape) or 3123 (relating to involuntary deviate sexual intercourse), a person commits a felony of the second degree when that person engages in sexual intercourse or deviate sexual intercourse with a complainant without the complainant's consent").

42. *Commonwealth v. Celestin*, 825 A.2d 670, 681 (Pa. Super. 2003).

43. See Anderson, *supra* note 10, at 631-32 ("Sixteen states and the District of Columbia do criminalize sexual penetration that is non-consensual and without force. These states, however, impose less punishment upon non-consensual penetration, with greater than half of them categorizing these offenses as mere misdemeanors.") (footnotes omitted).

44. In *The Interest of M.T.S.*, 609 A.2d 1266, 1269 (N.J. 1992) (holding that repeal of resistance requirement implies that force element is satisfied by proof of penetration).

however, have found the force requirement satisfied by such acts as pushing the victim's hands away from her pants,⁴⁵ or pulling the victim's head toward the defendant's penis.⁴⁶ Different labels, such as "psychological force"⁴⁷ or "constructive force," appear in some of the opinions.⁴⁸ Some opinions simply conclude that physical contact

45. See *People v. Galvarino-Gonzalez*, No. G028091, 2003 WL 21214264, at *6 (Ca. App. 2003) (unpublished) (finding that the removal of secluded, mentally disabled adult victim's sweatpants held to satisfy force requirement).

46. See *People v. Sadler*, No. 904-2003, 2004 WL 2077780, at *2 (N.Y. Sup. Ct. 2004) ("Defendant's actions of grabbing the victim's arm and of pushing her head down towards his penis are sufficient to permit the jury to conclude that the defendant used 'forcible compulsion' to compel the victim to perform the sodomy. This is so even though the victim did not immediately cry out or suffer any actual physical injury.").

47. See, e.g., *State v. Haschenburger*, No. 05 MA 192, 2007 WL 969067, at *5 (Ohio App. March 27, 2007) (rejecting challenge to the following forcible-rape jury instruction where the evidence showed continuous sexual activity between defendant, an intimate friend of victim's parents, with victim, aged fourteen).

When the relationship between the victim and the defendant is one of child and parent or any other parental or elder authority figure, like an uncle or grandparent or stepfather, et cetera, the element of force need not be openly displayed or physical. It can be subtle. It can be slight. It can be psychological. It can be emotionally powerful. Evidence of an expressed threat of harm or evidence of significant physical restraint is not required in that circumstance.

Id.; see also *Commonwealth v. Pierce*, 34 Phila. Co. Rptr. 548, 553 (Pa. Com. Pl. 1997) (approving the following jury instruction in a prosecution of defendant for sexual assaults on his granddaughter victim, age thirteen or fourteen:

The force used or threat may be physical force or violence, but it does not have to be. It is legally possible for an individual to commit rape by using or threatening intellectual, moral, emotional or psychological force . . . I'm speaking of something very different from the sort of argument, persuasion or seduction that might induce a female voluntarily to consent to intercourse. A man's words or conduct toward a female cannot amount to the use of threat of intellectual, moral, emotional and psychological force unless they wrongfully impair her freedom of will and her ability to choose whether to have sex with the man.

Id.; *State v. Burke*, 522 A.2d 725, 735 (R.I. 1987) (holding "[a] threat may consist of the imposition of psychological pressure on one who, under the circumstances, is vulnerable and susceptible to such pressure").

48. For example, in *Commonwealth v. Martin*, 630 S.E.2d 291, 292 (Va. 2006), defendant, age fourteen, instructed victim, age eight, to masturbate defendant. The court upheld a conviction under a statute that made "sexual abuse" of one below the age of consent an aggravated form of "sexual abuse," sexual abuse being defined as forcing victim to touch defendant's intimate parts. *Id.* The opinion seems to conflate force with the absence of consent:

Equally long-standing is the principle that in the context of sexual crimes, an act undertaken against a victim's will and without the victim's consent is an act undertaken with force. Again, in the context of a rape prosecution, we held that constructive force exists if the victim could not legally consent to the act. Proof of the absence of legal consent provides "all the force which the law demands as an element of the crime." For these reasons, we reject Martin's contention that as used in *Code § 18 2-67.10(6)* "force" means actual force, and we conclude that "force" includes actual and constructive force

extrinsic to penetration establishes force on the facts of the instant case.⁴⁹ Whatever the doctrinal rhetoric, the theme remains that when consent is clearly absent courts will bend over backwards to find force.

Despite occasional reaffirmations of a robust force requirement,⁵⁰ the trend toward basing liability entirely, or at least primarily, on the absence of consent appears to be strong. In most of these cases there are aggravating circumstances, such as the youth (or even infancy) of the victim or the defendant's position of authority over the victim.⁵¹ The generous definition of force, however, is not restricted to these egregious

and that constructive force includes engaging in proscribed conduct with a victim who is under the legal age of consent.

Id. (citations omitted); *see also, e.g.*, *Commonwealth v. Fuller*, 845 N.E.2d 434, 442 (Mass. App. Ct. 2006) (summarizing that victim was mentally handicapped and intoxicated at defendant's apartment; the rape conviction was affirmed, court approving instruction that "if the jury finds that there was constructive or circumstantial force by reason of the total circumstances and the attributes of the person involved, including age, size, sophistication, location, and other circumstances, then the jury can find that there was constructive or circumstantial force."); *State v. Locklear*, 616 S.E.2d 334, 338 (N.C. Ct. App. 2005) (upholding rape conviction of defendant, father of victim, age fifteen, finding evidence sufficient to show "constructive force"); *Martin v. State*, 686 A.2d 1130, 1157-59 (Md. Ct. Spec. App. 1996) (explaining that Defendant, a police officer, armed, uniformed, and on duty, picked up victim, an intoxicated adult lost on the road; victim feigned sleep during foreign-object penetration; conviction upheld based on constructive force theory). *See also Powe v. State*, 597 So.2d 721, 728 (Ala. 1992) (concluding "a jury could reasonably infer that [the defendant] held a position of authority and domination with regard to his daughter sufficient to allow the inference of an implied threat to her if she refused to comply with his demands"); *People v. Bailey*, 675 N.Y.S.2d 706, 708 (N.Y. App. Div. 1998) (holding that a "jury could reasonably infer that the sexual contact was perpetrated by forcible compulsion" based on the size and age difference between the victim and the defendant and the victim's perception of the defendant's authority).

49. *See, e.g., Galvarino-Gonzalez*, 2003 WL 21214264, at *6; *Sadler*, 798 N.Y.S. 347, *2; *State v. Spencer*, 50 S.W.3d 869, 873-74 (Mo. Ct. App. 2001) (upholding forcible rape and forcible sodomy convictions against defendant, counselor of victim, age sixteen, known by defendant to be schizophrenic). The opinion notes:

Defendant also exerted actual physical force as to A.G. She testified that defendant touched her stomach and "proceeded to fondle" her breasts under her shirt. A.G. further testified that defendant grabbed her and "pulled" her up by her arms and then he "bent" her over the chair and unzipped her pants. Defendant exerted physical force by grabbing A.G.'s arm and pulling her up and bending her over a chair.

Id.

50. *See, e.g., Jones v. State*, 589 N.E.2d 241, 243 (1992) (explaining victim lived in a room in a house with defendant and defendant's wife; defendant asked victim to have sex three times; victim refused twice and finally "just let him have it;" conviction reversed for insufficient proof of force); *State v. Collins*, 508 S.E.2d 390 (Ga. 1998) (explaining defendant was convicted of forcible rape, statutory rape, and incest of victim, age twelve; forcible rape conviction reversed, as state must prove actual force to sustain conviction of forcible rape of underage victim).

51. For example, in *Galvarino-Gonzalez*, the victim was mentally handicapped. *See Galvarino-Gonzalez*, 2003 WL 21214264, at *1. In *Sadler*, the defendant was on the staff of a state-run juvenile facility where the victim was confined. *Sadler*, 798 N.Y.S. 347, at *1.

cases, as the statutory language is typically the same with respect to the force element of all of a jurisdiction's forcible sex offenses.⁵² The reported cases are almost all affirmances; the limiting factor is the willingness of juries to convict, not of appellate courts to reverse.

Indeed, the least radical innovation, from a doctrinal point of view, is really the most radical from a practical point of view. Consensual sexual encounters very often involve the sort of incidental pushing and pulling of clothes and limbs some of the cases characterize as force in the absence of consent. The effect is to expand criminal liability to cover a great many cases, perhaps most cases, in which consent is absent. Any record with sufficient proof of no consent is likely to contain sufficient evidence of force so construed.

There is, however, little agreement on just what "consent" means. State statutes typically use the term without defining it, and when statutes attempt to define consent explicitly they may muddy the waters even further.⁵³ There are fairly rigorous definitions in the theoretical literature,⁵⁴ but legislators can be counted on not to take sides on controversial issues they can avoid.

In large measure this accounts for the steady drift of the law away from force and toward consent. Who can be in favor of sex without consent? Legislatures can make sex without consent a crime and leave the difficult task of drawing lines and setting priorities to prosecutors. Appellate courts can do the same by expanding the meaning of "force." Appellate courts, moreover, are typically asked to broaden the meaning of force in cases where the absence of consent is patent and the defendant particularly odious; the cases involving forcible rape of children beneath the age of consent are illustrative.⁵⁵

Could this turn to consent normalize rape law? Could, that is, a general criminal prohibition on sex without consent make many times more people than the system can process facially guilty of serious crimes, so that the difficult normative judgments would be left to the

52. SCHULHOFER, *supra* note 8, at 27-40 (regarding rape law reforms).

53. See CAL. PENAL CODE § 261.6, (defining consent as "positive cooperation in act or attitude pursuant to an exercise of free will. The person must act freely and voluntarily and have knowledge of the nature of the act or transaction involved."). Isn't that helpful?

54. The rigorous definitions – performative, attitudinal, or normative – of course conflict with each other in some cases. See generally Symposium, *Consent and Sexual Relations*, 2 LEGAL THEORY 89 (1996).

55. State v. Haschenburger, No. 05 MA 192, 2007 WL 969067, at *5 (Ohio App. March 27, 2007); *Galvarino-Gonzalez*, 2003 WL 21214264, at *6; Commonwealth v. Martin, 630 S.E.2d 291, 292 (Va. 2006); State v. Locklear, 616 S.E.2d 334, 338 (N.C. Ct. App. 2005); People v. Bailey, 675 N.Y.S.2d 706, 708 (N.Y. App. Div. 1998).

opaque and unconstrained discretion of prosecutors? In the typical felony case, involving robbery or narcotics, the typical jury is at least as punitive as the typical prosecutor. As a result, the check of trial by jury — which the defendant can exercise only with the risk of additional years in prison for insisting on trial — is only a modest check on prosecutorial discretion.

Rape cases are different. Juries represent popular, rather than elite, opinion, and popular opinion in rape cases can be decidedly pro-defense. Nor does there seem any great likelihood of changing popular opinion, or overcoming it by changes in rules of evidence or procedure. I turn now to substantiating these assertions.

III. WHY THE TURN TO CONSENT WON'T NORMALIZE RAPE LAW

Popular opinion diverges from elite opinion about sexual mores and gender roles. Elite opinion celebrates autonomy — including female autonomy.⁵⁶ Popular opinion continues to regard male sexual aggression as natural and admirable, and to regard female sexual activity as dissolute and vulgar. The elite believe that what happens between two consenting adults in private is, in the famous phrase of the Wolfenden Report, “not the law’s business.”⁵⁷ Meanwhile popular opinion, confronted with a sexually active man and a sexually active woman, sees not two morally equivalent hedonists, but a stud and a slut.⁵⁸

In their monumental review of the literature, David Bryden and Sonja Lengnick concluded in 1997 that the available jury research confirmed the findings of Kalven and Zeisel’s work with jury deliberations back in the 1950’s: juries are reluctant to convict in acquaintance-rape and sexually-active-victim cases.⁵⁹ Sam Pillsbury, writing in 2002, observed that:

Other studies of public attitudes reveal the same bias: factors associated with traditional romance cut against any determination of rape. The more involved the relationship the man and woman had

56. See, e.g., *Lawrence v. Texas*, 539 U.S. 558, 578 (2003); SCHULHOFER, *supra* note 8; Anderson, *supra* note 8.

57. HOME OFFICE, REPORT ON COMMITTEE ON HOMOSEXUAL OFFENSES AND PROSTITUTION, 1957-8, Cmnd. 247, § 61 (John Wolfenden, Chair).

58. See, e.g., A.Y. Siu, *The Slut/Stud Double Standard*, available at <http://www.psychocats.net/essays/slutstuddoublestandard> (last visited November 1, 2007) (“Everyone – even backlash-prone, conservative anti-feminists – agrees that there is a slut-stud double standard.”).

59. See Bryden & Lengnick, *supra* note 39, at 1254-84 (reviewing research).

before the incident and the more romantic it appears, the more reluctant people are to characterize forced sex as rape. Evidence that the man paid for the woman's food or entertainment on a date also predisposes third parties to noncriminal judgments about allegations of forced sex. Evidence that the woman had been drinking or was dressed provocatively inclines decision makers against a criminal judgment. Nor do these factors operate simply as inferences about credibility concerning allegations of force. Many seem to use them in a normative fashion to judge comparative fault in a situation where something clearly went wrong. Many recognize a kind of provocation excuse for men, that where the woman acted in a sufficiently enticing way — if she indicated sexual interest, directly or indirectly, so provoking the man to full sexual arousal — the man's disregard of her non-consent to particular sexual activity thereafter should be legally excused.⁶⁰

Linda Fairstein, the well-known New York prosecutor, confirms the social science from a blood-under-the-nails perspective. She declared in 1993: "Although our laws now permit us to prosecute them, not until we are able to inform and educate the public — the men and women who serve on our juries — will we be able to convict more of the men who are guilty of acquaintance rape."⁶¹

The familiar jury myth of "justified rape" is very much still with us. When the victim met the defendant at a pick-up bar, or asked the defendant into her room, or accepts a ride home from him, jurors remain willing to believe that she asked for what she got. Such opinions, moreover, seem about as common among women as among men.⁶²

If the root problem is, as Professor Bryden concludes after deep research, jury reluctance to convict men accused of raping women who have violated traditional sexual mores, the turn to consent will fail to normalize rape law.⁶³ Prosecutorial discretion will be constrained not just by the cost of trial, a cost all felony defendants may bargain with, but also by a high risk of acquittal at trial, an asset most felony

60. Samuel H. Pillsbury, *Crimes Against the Heart: Recognizing the Wrongs of Forced Sex*, 35 LOY. L.A. L. REV. 845, 876-77 (2002) (footnotes omitted).

61. LINDA FAIRSTEIN, *SEXUAL VIOLENCE OUR WAR AGAINST RAPE* 136 (1993).

62. See Bryden & Lengnick, *supra* note 39, at 1204-08; FAIRSTEIN, *supra* note 61, at 137.

63. See Bryden, *supra* note 16, at 425.

At least until recently, jurors' biases against imprudent, norm-violating women have been a major obstacle to convictions in acquaintance-rape cases even when the man allegedly used considerable force. To the extent that legally improper prejudices are still a factor, changing the legal standard is not going to solve the problem.

Id. (footnotes omitted).

defendants do not enjoy. We can expect legislatures and courts to continue trying to help the prosecution by legal interpretations, and by evidentiary rules and rulings, that would not be forthcoming outside the sexual assault context. And we can continue to expect that these heterodox maneuvers will fail to secure convictions at anything like the levels that prevail for other types of felonies.

Might popular opinion some day come around? On civil rights issues generally there has been progress in popular, as well as elite, opinion. That progress, however, seems to have bypassed popular understandings of sexual morality. The Bryden and Lengnick literature review, for example, found that while the evidence is not unmixed, there was little change between the Kalven and Zeisel study, based on data going back to the 1950's, and research conducted in the 1990's.

Moreover, popular culture, the ally of progress on so many civil rights issues, sends very mixed signals indeed regarding gender roles and sexual autonomy. For every "Sex and the City" episode there is a misogynistic song lyric or the like. If we include *bona fide* pornography, advertising, and the publicity attending the sex lives of celebrities in the world of sports and entertainment, it would be a bright-eyed optimist indeed who expects a sudden sea-change in popular attitudes. It will probably happen eventually, but as John Maynard Keynes observed, "in the long run we are all dead."⁶⁴

IV. NORMALIZED RAPE LAW: A GAME WORTH THE CANDLE?

If popular opinion were somehow removed as a check on prosecutorial discretion, the turn to consent could indeed normalize rape law. It is worth dwelling at least briefly on what a normalized law of sexual assault would look like. Neither the legislators approving statutory penalties for nonconsensual sex, nor the appellate judges broadening the meaning of force, really believe that all sex obtained without the victim's consent should be criminal. And if they did, the resource constraints facing the criminal justice system preclude anything like even-handed enforcement of a consent-based regime.

Consider three examples. The first example is *quid pro quo* sexual harassment at the workplace. After *Lawrence*, it would seem unconstitutional to impose even civil liability for consensual sex. The positive law arguably accommodates *Lawrence* by requiring the plaintiff to prove that the proffered inducement was "unwelcome" even if the

64. JOHN M. KEYNES, A TRACT ON MONETARY REFORM 80 (1923).

plaintiff voluntarily accepted it.⁶⁵ So, it follows that actionable *quid pro quo* sexual harassment also violates those sixteen state statutes that criminalize sex without consent. Moreover, if the harasser had improper physical contact well before the penetration, or behaved in a badgering or threatening way, or moved the victim's limbs in the course of the sex act, the harasser might well satisfy the generous definitions of force in some of the cases.

Consider a second example. In many battering relationships, women initiate sex, or acquiesce in the abuser's advances, to avoid being beaten up. We can say clearly that the sexual harassment case is not consensual. Here there seems philosophical ground for debate (in one sense victim consents, but in another sense her consent is tainted by defendant's prior violence). One can find cases that go both ways.⁶⁶ If we do decide that sex against a background of domestic violence is rape, someone would have to select, from the millions of abusive but not celibate relationships in the country, which ones to prosecute as major felonies.⁶⁷

The third example is sexual fraud. Take the not uncommon case of statutory rape by a man who claims the victim misrepresented her age. The majority view is that mistake of age is no defense. That rule, however, does not insulate the female from liability for rape under a pure consent formula.⁶⁸ Had she told the (statutory) rapist her age, he

65. See *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 68 (1986) ("[T]he fact that sex-related conduct was 'voluntary,' in the sense that the complainant was not forced to participate against her will, is not a defense to a sexual harassment suit brought under Title VII. The gravamen of any sexual harassment claim is that the alleged sexual advances were 'unwelcome.'"). See also Elsie Mata, Note, *Title VII Quid pro Quo and Hostile Environment Sexual Harassment Claims: Changing the Framework Courts Use to Determine Whether Challenged Conduct is Unwelcome*, 34 U. MICH. J. L. REFORM 791, 810-15 (2001).

66. Compare *People v. Voymas*, 833 N.Y.S.2d 823, 824 (N.Y. App. Div. 2007) (upholding forcible compulsion conviction when defendant, a child, acquiesced because she had learned from experience that she would be hurt worse if she did not cooperate) with *State v. Alston*, 312 S.E.2d 470, 476 (N.C. 1984) (finding that defendant, at that time victim's boyfriend, had beaten victim months before charged rape; prior violence held insufficient to establish force).

67. See, e.g., Melanie Randall, *Deconstructing the "Image" of the Battered Woman: Domestic Violence and the Construction of "Ideal Victim": Assaulted Women's "Image Problems" in Law*, 23 ST. LOUIS U. PUB. L. REV. 107, 113 (2004) ("Research has consistently demonstrated that approximately one in four women has experienced some kind of physical violence or physical assault in an intimate relationship with a male partner.").

68. See Russell L. Christopher & Kathryn H. Christopher, *Adult Impersonation: Rape by Fraud as a Defense to Statutory Rape*, 101 NW. U. L. REV. 75, 76-77 (2007). The authors note:

By obtaining intercourse with the nineteen-year-old through a false representation of a significant or material matter, the fifteen-year old commits rape by fraud. The age of one's sexual partner is a crucially significant and material matter when it makes the difference between lawful intercourse and criminal intercourse (statutory rape).

would not have had sex with her (and perhaps he can prove this, by showing instances in which he shied away from other underage women in the past).

Misrepresentations to obtain sex are ubiquitous and increasingly susceptible of proof in this age of liaisons arranged via the internet. Which of these should be selected for prosecution? Under a pure-consent statute, *all* of the sexual harassers, *all* of the deceivers, and *many* of the abusers are facially guilty of rape. Yet these cases are not prosecuted. What explains the pattern of non-enforcement?

A number of factors are at work. One, probably more prominent than academic observers may realize, is the tremendous caseload pressure throughout the system. Sex crimes units struggle just to process the aggravated cases; until they have more resources than aggravated cases, only the aggravated cases will be charged.⁶⁹ Another is very likely prosecutorial perception of juror prejudice.⁷⁰ If prosecutors have a tough time winning convictions in the aggravated cases, why should they reach for cases in which guilty verdicts are even more unlikely?

The most likely explanation, however, is that prosecutors do not view sexual harassment, consent framed by an abusive relationship, or sexual fraud as crimes, even when the language of a local statute says otherwise. In this respect at least rape law is normalized even now; the existing penalty structure covers far more conduct, with far more severity, than any one wants to see actually imposed; legislatures have left the hard normative questions to prosecutors. Sex obtained by tactics that meet with elite acceptance are thus insulated from liability in the same way as other offenses enjoying elite acceptance, such as drug use by middle-class youth.

Rape exceptionalism persists in those cases — the acquaintance-rape and “justified rape” cases — where elite opinion would impose liability and popular opinion will not. There is a great deal of political irony in this. In the one area where trial by jury actually constrains prosecutorial discretion, it turns out that prosecutors are enlightened and

Exposure to criminal liability for statutory rape, and the possibility of punishment of up to twenty-years' imprisonment, or even imprisonment for life, is as significant and material as virtually any consequence imaginable.

Id.

69. See FAIRSTEIN, *supra* note 61, at 152 (discussing resource constraints on sex-crimes prosecutions).

70. See, e.g., Bryden & Lengnick, *supra* note 39, at 1246-55 (discussing reluctance of prosecutors to try long-shot rape prosecutions).

jurors are retrograde. The turn to consent will do nothing to change the outcomes in those cases, which are blocked now, not by the law, but by the unwillingness to enforce it. All the turn to consent will do is increase — vastly increase — the facial coverage of the criminal law.

It would be possible to define consent operationally, by, for example, a no-means-no statute that punishes sex in the face of expressed refusal. That type of statute would be narrowly drawn enough to cabin prosecutorial discretion; sexual cooperation obtained by debatable inducements would be presumed noncriminal until the legislature says otherwise.⁷¹ Even no-means-no laws, however, are at odds with popular sexual mores. If the meaning of consent were operationalized in a narrower way, as by deeming criminal even cooperation absent affirmative expressions of consent,⁷² we would be expanding the facial range of liability even more broadly than under current consent statutes, without any prospect of winning convictions from juries or of fairly selecting cases to be tried.

V. TAKING CONSENT SERIOUSLY

Depressing as the foregoing discussion undoubtedly is, it leads me to make a constructive proposal. The basic idea is straight-forward: where sex without consent is a separate crime (a lesser-included offense of forcible rape or its statutory equivalent), the legislature should authorize trial by the court in specialized tribunals with no authority to impose more than six months in jail. The Supreme Court's Sixth Amendment jurisprudence permits this procedure.⁷³

The advantage of this approach is the direct bypass of popular prejudice. Defense efforts to characterize the defendant's disregard of his victim's will could not so easily be painted as somehow justified by her misconduct, or earned by his prior intimacy with her. I see two objections, both plausible but neither persuasive.

The first is that the six-month sentence depreciates the seriousness of the offense (a point unfortunately emphasized by the "petty offense" rubric in *Baldwin*).⁷⁴ There are, however, three reasons to reject this

71. I previously advocated just such an approach, see Donald A. Dripps, *Beyond Rape: An Essay on the Difference Between the Presence of Force and the Absence of Consent*, 92 COLUM. L. REV. 1780 (1992), and continue to believe it offers the best doctrinal formulation for current circumstances. I have, however, come to agree with Professor Bryden that the root problem in this area is cultural rather than legal.

72. For such proposals, see, for example, SCHULHOFER, *supra* note 8; Anderson, *supra* note 8.

73. See *Baldwin v. New York*, 399 U.S. 66, 70-71 (1970).

74. See *id.* at 72-74.

argument. First, compared to what happens now in most acquaintance-rape and “justified rape” cases, the proposal dramatically increases the penalty likely to be imposed in practice. Prosecutors confident of winning a jury trial would remain free to file charges in the regular felony court. The special misdemeanor court would be an option, not a requirement.

Second, the six-month limit might be expanded by such approaches as consecutive sentences for distinct counts, recidivism enhancements, and use of convictions as predicates for classification under the sexual predator laws. One obvious possibility is to include hefty fines along with the jail sentence. Some of these options are dishonest, and some might not withstand constitutional scrutiny. Nonetheless the six-month limit on its face invites creative prosecutors to see what might be tacked on in cases that call for heightened punishment.

Third, U.S. sentences are the highest in the Western world.⁷⁵ Many of the challenges the system faces arise from desperate attempts to avoid imposing draconian maxima legislators routinely vote for but don’t want enforced. If we are going to have rape-law exceptionalism, we might as well include something, like reduced penalties coupled to simpler procedures, that might well make sense for the system at large in due time. At any rate, if the objection is that a proposed sentence is too lenient compared to our current practice, one good rejoinder is that our current practice is too harsh.

The second objection is that normalizing rape prosecutions would be a bad idea, because the normal system concentrates far too much power in the hands of prosecutors. This objection finds considerable support in the Duke lacrosse case.⁷⁶ It took very good defense lawyers working full-time, plus a stroke of luck, to prove that the prosecution

75. See, e.g., Alice Ristoph, *Criminal Law: Desert, Democracy, and Sentencing Reform*, 96 J. CRIM. L. & CRIMINOLOGY 1293, 1307 (2006):

As of June 2005, the United States had over 2.1 million inmates in its prisons and jails and the highest per capita rate of incarceration in the world – 738 inmates per 100,000 residents. The U.S. prison population has continued to rise even as crime rates have dropped. The size of the inmate population is largely a result of much longer prison sentences than those imposed in other Western democracies, and these longer sentences can be traced to changes in sentencing policy (as opposed to increases in criminal behavior). Specifically, longer prison sentences can be traced to mandatory sentences, increased penalties for drug crimes, the abolition of parole in many jurisdictions, and an increasing tendency to impose prison terms rather than non-carceral sentences.

Id. (footnotes omitted).

76. For a summary of the case, see, for example, Duke Office of News Communication, *Looking Back at the Duke Lacrosse Case*, <http://news.duke.edu/lacrosseincident> (last visited November 1, 2007) (official Duke permanent website about the case).

had withheld exculpatory evidence.⁷⁷ Most rape defendants won't have that kind of legal team or that kind of luck.

Indeed, prosecutorial misconduct is far from uncommon in the normal system. The Duke defendants had the benefit of an open-file discovery law passed after North Carolina prosecutors withheld exculpatory evidence in the capital murder prosecution of Alan Gell, who was acquitted after retrial and is apparently innocent.⁷⁸ The responsible prosecutors were reprimanded, but that was all.⁷⁹ Mike Nifong might have gotten away with gross misconduct, and he might have gotten away with prosecuting upper-class men accused of raping a lower-class woman. From a purely tactical perspective, his mistake was doing both of these things in the same case.

Prosecutorial misconduct is only one downside to the current scope of prosecutorial power. Even when prosecutors honor their various obligations to fair play, they still make momentous charging decisions, in secret, according to no public criteria. Even if jury sympathy for rape defendants is unjustified, it might be that removing this check on prosecutorial discretion would invite a still worse regime of arbitrary discrimination among similarly situated cases. Drug-law enforcement suggests a troubling analogy.

The objection is powerful, and indeed when lodged against the system as a whole, it is compellingly persuasive.⁸⁰ To deploy the objection to excessive prosecutorial power in the narrow context of sexual assault cases, however, is less compelling. The very power of the objection suggests that some new arrangements must be found, and therefore ultimately will be found, to regulate the concentration of power

77. For an account of how the defense managed to undermine the prosecution's case, see Samson Habte, *Prosecutorial Injustice Commonplace, Says Duke Lacrosse Rape Case Attorney*, VIRGINIA LAW, Oct. 18, 2007, http://www.law.virginia.edu/html/news/2007_fall/cooney.htm.

78. See *id.* for the proposition that:

The outcry provoked by Gell's case led to the passage of the Open File Discovery Law in the North Carolina legislature. "If it wasn't for that law, we'd be in the middle of a jury trial in Durham right now because there is no way Mr. Nifong would have given us evidence showing our clients were innocent," Cooney [George P. Conney III, one of the defense lawyers in the Duke case] said, "There is no way he would have shared the weaknesses of his files.

Id.

79. See, e.g., Joseph Neff, *N.C. Prosecutors Stifled Evidence: Lawyer Now Retreats from Testimony*, CHARLOTTE NEWS OBSERVER, Dec. 19, 2004, available at <http://www.newsobserver.com/208/story/249929.html> (modified October 23, 2005).

80. For an overview of the criticism of the current scope of prosecutorial power, and some possible response to the challenge that power presents, see Donald A. Dripps, *Overcriminalization, Discretion, Waiver: A Survey of Possible Exit Strategies*, 109 PENN. ST. L. REV. 1155 (2005).

in executive hands. Indeed, my proposal is animated in part by the hope that it might illuminate a path toward a new normal, in which reduced penalties, simplified procedures, and greater accountability restore a measure of the distinction between substance and procedure in criminal justice.

Even if no new normal emerged, a special sex-crimes court makes sense, given the gap between elite and popular opinion. There would of course be a price paid, in diminished legitimacy and enhanced executive power. I would be surprised (pleasantly surprised, but surprised nonetheless) if the prosecutions brought in the special proceedings I propose did not disproportionately target men from lower socioeconomic strata, with a corresponding racial tilt. We have been willing to live with this arrangement in the drug context on the theory that the distribution across classes of the benefits of enforcement tracks the distribution of the costs.⁸¹ In the context of sexual assault, the benefits seem less ambiguous, and the costs, given the six month limit, seem far less onerous.

Some prosecutors might very well push the envelope, by charging such conduct as *quid pro quo* employment discrimination. I suspect that this would be so unpopular that legislatures might be forced to make a few of the hard normative choices explicit in statutory language, or (more likely) that popular protest would induce prosecutors to stick to the type of aggravated cases they are bringing (and often losing) now.

I can imagine civil libertarians objecting to an end-run around trial by jury, but this objection is frivolous. Plea bargaining now denies almost all defendants trial by jury. At least defendants in the proceedings I propose could not be punished more than a few months in jail for electing to be tried. We might draw an analogy to the law's response to domestic violence. The now common civil protection order provides the predicate for criminal contempt charges that can be tried summarily. The CPO is not a panacea, but it has enhanced the physical security of countless women. It also rides roughshod over the tradition of trial by jury. If the substantive law be just, and the Constitution permits an instrumentally reliable procedure for vindicating that just substance, romantic appeals to ancient but dysfunctional institutions should not stand in the way.

81. See, e.g., William J. Stuntz, *Essay: Race, Class, and Drugs*, 98 COLUM. L. REV. 1795, 1798 (1998) ("The system's treatment of crack relative to other drugs is a kind of paternalism that purports to favor rather than harms black neighborhoods.").

VI. CONCLUSION: TOWARD A NEW NORMAL IN CRIMINAL JUSTICE

I have no general antipathy toward trial by jury. So far as I know, no nation with a system of trial by jury in criminal cases suffered a thorough-going police state during the twentieth century. Numerous and various are those lands without jury trial that succumbed to totalitarianism during the same period. To say that jury trial is a valuable hedge against tyranny, however, is not to say that jury trial should be had in every case. Its checking value will remain so long as the accused has a genuine option. The current system is flawed by making the alternative to jury trial a plea of guilty. We might do a much better job of accommodating the option of jury trial as a check on tyranny with the needless cost of jury trial in routine cases.

We might, for instance, offer some sort of hearing, according to appealable criteria, before the prosecutors who make the practically dispositive charging decision. We might, as an alternative, offer all defendants trial before a panel of a judge and two lay persons, with a fixed sentencing enhancement for those who elect and lose a trial by jury. Whatever approach we take, the turn to consent will put that approach to a difficult test. Can we devise an institutional arrangement that would either force legislatures to make the hard choices about the substantive law (what, really, do we mean by “consent”?), or one in which we trust prosecutors to make these decisions in the same way we trust administrative agencies to make the hard choices about business regulation and environmental protection? The prospect seems distant but far from hopeless. Perhaps the concentration of power in prosecutorial hands in a system that permitted bypassing the jury in sexual assault cases might be the catalyst that calls forth successful reforms far more general in scope.