

# NEGOTIATING SEX

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## INTRODUCTION

Adrienne had just turned thirteen. Late one autumn night, after her siblings and parents had fallen asleep, she crawled out of bed, walked downstairs to the basement, unlocked and opened the sliding glass door, and slipped outside.

It was Mike's idea. He was a varsity basketball player from a nearby high school. Mike proposed they both sneak out and meet on the street halfway between their houses. Wanting Mike to like her, Adrienne agreed.

Mike never showed.

At that hour, the suburban streets were still. Adrienne walked three miles to Mike's house, where she found him waiting in his front yard. He signaled for her to come into the house. "Don't make any noise because my parents are asleep," he said. "They'd kill me if they found us in here." So throughout the night, Adrienne remained silent.

Mike led her downstairs into the family room. Now that she was inside his house, a deep fear set in, and Adrienne panicked. In her words, "I just completely left my body."<sup>1</sup> She does not know how her clothes came off. All she remembers is coming back to the intense pain of Mike ramming inside her. He was ripping her apart. She blacked out.

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1. E-mail from Adrienne to Michelle Anderson, (June 24, 2004, 00:50:00 EST) (on file with author).

The next thing she remembers is being in another room. Mike was lying on a beanbag chair, her face was in his crotch, and he was palming her head like a basketball. Trapped and gagging, Adrienne thought she was going to choke to death. She blacked out again.<sup>2</sup>

It was early in the morning when Adrienne walked home alone, slid through the basement door, crawled into bed, and wept herself to sleep before anyone in our house stirred. Five years passed before my sister ended her silence and told someone what had happened that night.

Adrienne suffered flashbacks and acute psychological distress. For a while, she was suicidal. Her reactions are not unique. Many people respond to sexual trauma at the time it occurs with physical paralysis and mental dissociation.<sup>3</sup> Such trauma leaves many with fragmented memories.<sup>4</sup> Nearly a third of rape victims develop rape-related Post Traumatic Stress Disorder.<sup>5</sup> Approximately twenty-eight percent of rape victims experience suicidal ideation.<sup>6</sup>

Rape, particularly acquaintance rape, is so common today that most people are likely to have a family member or a friend who suffered something similar to what Adrienne experienced.<sup>7</sup> Despite the fact that Adrienne's story is in this sense ordinary, it is extraordinary to read because silence still tends to shroud the issue of sexual assault—we rarely hear such stories in legal scholarship or in the broader world. In this article, Adrienne's experience will therefore stand for many others like it that remain unspoken.

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2. When she tried to recall the rest of that night, Adrienne wrote:  
I don't remember anything, except those few, isolated moments. When I have tried to remember them [years later] in therapy, I just get VERY dizzy, feel like I am floating out of my body, and experience sheer panic. So much so, that I have had to stop trying to remember.

*Id.*

3. See *infra* notes 70–87 and accompanying text.

4. See *infra* notes 84–87 and accompanying text.

5. NATIONAL CENTER FOR VICTIMS OF CRIME & CRIME VICTIMS RESEARCH AND TREATMENT CENTER, RAPE IN AMERICA: A REPORT TO THE NATION 7 (1992) [hereinafter RAPE IN AMERICA].

6. Mary P. Koss, Thomas E. Dinero, Cynthia A. Seibel & Susan L. Cox, *Stranger and Acquaintance Rape*, 12 PSYCHOL. WOMEN Q. 1, 13 (1988).

7. Twenty percent of women have been forced to have sexual intercourse against their will at some point in their lives. See JOYCE C. ABMA, PH.D., ANJANI CHANDRA, PH.D., WILLIAM D. MOSHER, PH.D., LINDA S. PETERSON, M.A. & LINDA J. PICCININO, M.P.S., FERTILITY, FAMILY PLANNING, AND WOMEN'S HEALTH: NEW DATA FROM THE 1995 NATIONAL DATA SURVEY OF FAMILY GROWTH 5, 33 tbl.22 (National Center for Health Statistics, Vital and Health Statistics Series No. 23:19, 1997) [hereinafter FERTILITY AND WOMEN'S HEALTH]. A survey of 930 women in San Francisco found that 26% of women have been raped and 46% have been subjected to rape or attempted rape. Diana E. H. Russell & Nancy Howell, *The Prevalence of Rape in the United States Revisited*, 8 SIGNS 688, 690–692 (1983). Another survey found that one in four women have been subjected to rape or attempted rape. ROBIN WARSHAW, I NEVER CALLED IT RAPE 11 (1988).

The common law defined rape as a man obtaining sexual intercourse with a woman by force and without her consent. In his *Commentaries on the Laws of England*, William Blackstone explained that rape was the “carnal knowledge of a woman forcibly and against her will.”<sup>8</sup> “Forcibly” meant that the man used physical force or the threat of physical force to obtain sexual intercourse.<sup>9</sup> “Against her will” meant that the woman did not consent to having sexual intercourse with him, and the common law required that she resist him to the utmost of her physical capacity to express her non-consent.<sup>10</sup>

The abuse Adrienne suffered was not rape under the common law.<sup>11</sup> Mike did not have to employ physical force to penetrate her vaginally and orally. He never beat her or threatened her with a knife. Moreover, Adrienne did not resist Mike to the utmost of her physical capacity to express that his actions were against her will.

Despite some legislative and judicial tinkering at the margins, the statutes in the vast majority of states and the District of Columbia continue to reflect the requirements of the common law.<sup>12</sup> Rape statutes no longer formally require that a victim resist her assailant to the utmost of her physical capacity to express a lack of consent.<sup>13</sup> Nevertheless, statutes still overwhelmingly require both the defendant’s force and the victim’s non-consent before an act of sexual penetration becomes a felony,<sup>14</sup> and the way courts interpret these terms usually requires the victim’s “reasonable resistance.”<sup>15</sup> Although states have slightly broadened the kinds of coercion

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8. WILLIAM BLACKSTONE, 4 COMMENTARIES \*210.

9. SUSAN ESTRICH, REAL RAPE 59 (1987).

10. *Id.* at 29–38.

11. It was also not statutory rape. In 1275, when statutory rape became a part of English common law, the age of consent was twelve. Later, the law reduced the age of consent to ten. Elizabeth A. Wilson, *Child Sexual Abuse, the Delayed Discovery Rule, and the Problem of Finding Justice for Adult-Survivors of Child Abuse*, 12 UCLA WOMEN’S L.J. 145, 222 (2003). What happened to Adrienne was, likewise, not statutory rape under the laws of the state in which the offense occurred. Virginia defines statutory rape as having “sexual intercourse with a complaining witness . . . under age thirteen.” VA. CODE ANN. § 18.2–61(A) (West 2002). It defines in part forcible sodomy as engaging in “fellatio” when the “complaining witness is less than thirteen years of age.” *Id.* § 18.2–67.1(A).

12. See Michelle J. Anderson, *Reviving Resistance in Rape Law*, 1998 U. ILL. L. REV. 953, 962–68.

13. *Id.* at 966–67.

14. *Id.* at 1000–01.

15. See *id.* at 965–66. See also Michelle J. Anderson, *All-American Rape*, 79 ST. JOHN’S L. REV. (forthcoming 2005) (surveying state statutes).

that they are willing to recognize as unlawful force,<sup>16</sup> what Mike did to Adrienne still would not qualify within the current definition of force.

Academic proposals for rape law reform have moved well beyond where state laws linger. Arguing that requirements of a defendant's force and a victim's resistance are archaic and unfair, legal scholars have asserted that the crux of the crime of rape is sex without consent.<sup>17</sup> Scholars have offered two interpretive models for understanding non-consent as the crux of rape. I will call the first the No Model and the second the Yes Model.

Under the No Model, when a woman says "no" to a man's sexual advances,<sup>18</sup> she does not consent, and courts should recognize that sexual penetration after that point is rape.<sup>19</sup> In feminist lingo, "no means no."<sup>20</sup> Without a "no," the law presumes the woman consents, and sexual penetration therefore is not rape.<sup>21</sup> The No Model breaks from the common law in that it does not require the man to employ physical force to obtain sex, nor does it require the woman to physically resist her attacker to prove her non-consent.<sup>22</sup> Instead, it requires her to verbally express her refusal.<sup>23</sup>

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16. See, e.g., *Commonwealth v. Rhodes*, 510 A.2d 1217, 1226 (Pa. 1985) (holding force includes "not only physical force or violence but also moral, psychological or intellectual force used to compel a person to engage in sexual intercourse against that person's will"). *But see Commonwealth v. Titus*, 556 A.2d 425, 427 (Pa. Super. Ct. 1989) (holding no force was present where father had sex with 13-year-old daughter).

17. See, e.g., Lynne Henderson, *Getting to Know: Honoring Women in Law and in Fact*, 2 TEX. J. WOMEN & L. 41, 64 (1993) ("[R]ape is best defined in terms of nonconsent."); ESTRICH, *supra* note 9, at 103 ("[T]he threshold of liability . . . should be understood to include at least those nontraditional rapes where the woman says no . . ."); STEPHEN J. SCHULHOFER, *UNWANTED SEX: THE CULTURE OF INTIMIDATION AND THE FAILURE OF LAW* 254 (1998) ("Intercourse without consent should always be considered a serious offense.").

18. In this article, I usually refer to potential or actual rape victims as female, but occasionally I refer to them as male. I overwhelmingly refer to potential or actual rapists as male. I do not employ this nomenclature to reinforce the gender roles of male sexual aggression and female sexual victimization. Rather, I employ it to reflect the reality of rape. Girls and women are the most common victims of rape, although boys and men may also be victims. Those who engage in rape are overwhelmingly male. LAWRENCE A. GREENFELD, U.S. DEP'T OF JUSTICE, *SEX OFFENSES AND OFFENDERS: AN ANALYSIS OF DATA ON RAPE AND SEXUAL ASSAULT* 21 tbl.2 & 24 tbl.3 (1997).

19. ESTRICH, *supra* note 9, at 103.

20. *Id.* at 102 ("'Consent' should be defined so that no means no.").

21. *Id.* at 103.

22. *Id.* at 96 ("To use resistance as a substitute for intent unnecessarily and unfairly immunizes those men whose victims are afraid enough, or intimidated enough, or frankly smart enough not to take the risk of resisting physically.").

23. 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, 1804 (1992) [hereinafter Dripps, *Beyond Rape*] ("[T]he intent that matters should be the intent to engage in sex with a person who says she refuses.").

The trouble with the No Model is that it cannot account for the ways victims frequently react to sexual trauma. Like Adrienne, many respond with mental dissociation and physical paralysis. Just as the trauma of the situation can obliterate the power to resist physically, it can obliterate the ability to say “no.” Adrienne did not physically resist or verbally express her refusal to Mike’s sexual advances. He penetrated her while she remained profoundly passive, a mental runaway from pain she could not bear. Under the No Model, she thereby consented.

Under the Yes Model, by contrast, a man must obtain affirmative permission from his partner before he penetrates her.<sup>24</sup> If the woman does not express a “yes” of some kind, the law presumes the woman does not consent, and sexual penetration is rape.<sup>25</sup>

Defenders of the Yes Model make two important points. First, they emphasize that a woman’s silence alone cannot mean “yes.”<sup>26</sup> This is the Yes Model’s attempt to break from both the common law and the No Model. Second—and in some tension with the first tenet—they underscore that a woman can express a “yes” through her nonverbal behavior.<sup>27</sup> Stephen Schulhofer, architect of the Yes Model, argues that engaging in “sexual petting,” for example, can express a “yes” to sexual penetration.<sup>28</sup> “If she doesn’t say ‘no,’ and if her silence is combined with passionate kissing, hugging, and sexual touching, it is usually sensible to infer actual willingness.”<sup>29</sup> When things heat up, then, the Yes Model melts into the No Model, in which silence constitutes consent.

How does the Yes Model interpret what Mike did to Adrienne? Mike could not presume consent to penetration from Adrienne’s silence alone, to be sure. He had to obtain a “yes” to penetration from her words or nonverbal behavior. Because Adrienne never uttered a word, Mike was left to parse the tacit implications of her actions. Adrienne snuck out and walked three miles to his house late at night to see him. She followed him

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24. See Stephen J. Schulhofer, *The Feminist Challenge in Criminal Law*, 143 U. PA. L. REV. 2151, 2181 (1995) [hereinafter Schulhofer, *The Feminist Challenge*] (“Consent for an intimate physical intrusion into the body should mean in sexual interactions what it means in every other context—affirmative permission clearly signaled by words or conduct.”).

25. See SCHULHOFER, *supra* note 17 at 271 (“For [sexual] intrusions actual permission—nothing less than positive willingness, clearly communicated—should ever count as consent.”).

26. See, e.g., Schulhofer, *The Feminist Challenge*, *supra* note 24 at 2181 (“Silence and ambivalence are not permission.”).

27. See, e.g., *id.* (“There are many ways to make permission clear without verbalizing the word ‘yes,’ and permission certainly need not be in writing.”).

28. SCHULHOFER, *supra* note 17 at 272.

29. *Id.*

into his house alone. Although he informed her that his parents were within earshot, she did not call out to them. Her clothes came off in an isolated room. Her passive silence was combined with his “passionate kissing, hugging, and sexual touching.” Could Mike sensibly “infer actual willingness”?

At its core, the Yes Model relies on a man’s ability to infer actual willingness from a woman’s body language.<sup>30</sup> Yet study after study indicates that men consistently misinterpret women’s nonverbal behavior.<sup>31</sup> They impute erotic innuendo and sexual intent where there is none.<sup>32</sup> Any theory that relies on a man’s ability to intuit a woman’s actual willingness allows him to construct consent out of stereotype and hopeful imagination.

Moreover, the Yes Model assumes consent to sexual petting implies consent to sexual penetration. Because unprotected sexual penetration spreads sexually transmitted diseases (STDs), including the human immunodeficiency virus (HIV) that causes AIDS, people often engage in petting instead of penetration in order to minimize the potential health consequences associated with penetration.<sup>33</sup> Even if someone actively engages in “passionate kissing, hugging, and sexual touching,” it would therefore not be, as Schulhofer claims, “sensible to infer actual willingness” to penetration without a verbal objection. If two people are engaged in petting and one escalates the situation, mental dissociation and frozen fright can occur, paralyzing the victim’s ability to resist or say “no.”

Under the two main proposals for legal reform in rape law, what happened to Adrienne and so many others like her was probably just bad sex—an unfortunate misunderstanding that could have been avoided only if she had done something differently. Maybe she should have told him that she only wanted to spend time with him and kiss. Maybe she should have emphasized, “I do not want you to interpret my actions as actual permission for sexual penetration.” Maybe she should have yelled “no” and awoken Mike’s parents or, better yet, kicked him in the shins. Under either the No or Yes Model, the onus was on her to say and do more.

The fundamental problem with both the No and Yes Models of rape law reform is in the notion of consent itself. Traditionally, sexual consent has meant a woman’s passive acquiescence to male sexual initiative. Recently, many legal scholars have fought for a “refurbished version of

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30. *See id.*

31. *See infra* note 89 and accompanying text.

32. *See infra* notes 90–94 and accompanying text.

33. *See infra* notes 102–106 and accompanying text.

consent.”<sup>34</sup> If the No and Yes Models are the result of those efforts, it is time to give up that fight. Not only must rape law abolish the force and resistance requirements, it must abolish the non-consent requirement as well.

This article defines and defends a new model of rape law reform. It argues that the law should eliminate the requirement of non-consent. In its place, the law should recognize the centrality of negotiation, in which a person would be required to consult with his or her partner before sexual penetration occurs. Negotiation would not require a verbal contract for penetration. Instead, it would require only what conscientious and humane partners already have: a communicative exchange, before penetration occurs, about whether they want to engage in sexual intercourse.

Specifically, the 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. The law should define “negotiation” as an open discussion in which partners come to a free and autonomous agreement about the act of penetration. Negotiations would have to be verbal unless the partners had established a context in which they could reliably read one another’s nonverbal behavior to indicate free and autonomous agreement. Force, coercion, or misrepresentations by the actor would be evidence of a failure to negotiate.

The Negotiation Model would protect the values that rape law should be designed to protect. It would maximize autonomy and equality and minimize coercion and subordination. It would require people to treat their sexual partners with respect and humanity.

This Article analyzes the notion of consent and the two main rape reform proposals that rely on consent, the No and Yes Models. Part One critiques the use of consent to demarcate when sexual penetration is legitimate, analyzes the No and the Yes Models, and argues that they come with serious disadvantages. Part Two defines a Negotiation Model for rape law reform, differentiates it from the other reform models, discusses its advantages over them, and addresses its potential disadvantages.

## I. Considering Consent

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34. Martha Chamallas, *Consent, Equality, and the Legal Control of Sexual Conduct*, 61 S. CAL. L. REV. 777, 814 (1988) (“The feminist critique has prompted a refurbishment, but not an abandonment, of the concept of consent in the law of sex.”).

Both the No and Yes Models of rape law reform are founded on the idea of consent. The *Oxford English Dictionary* defines “consent” as “[v]oluntary agreement to or acquiescence in what another proposes or desires; compliance, concurrence, permission.”<sup>35</sup> In the consent model of sexual relations, the man desires and proposes sex and the woman voluntarily complies with his desire.

The legal world has concurred with the lay definition. Until 1999, *Black’s Law Dictionary* defined consent as “voluntarily yielding the will to the proposition of another; acquiescence or compliance therewith.”<sup>36</sup> It continued:

As used in the law of rape “consent” means consent of the will, and submission under the influence of fear or terror cannot amount to real consent. [T]here must be a choice between resistance and assent. And if a woman resists to the point where further resistance would be useless or until her resistance is overcome by force or violence, submission thereafter is not “consent.”<sup>37</sup>

When facing a sexual advance, therefore, a woman could either physically resist or assent. Passive yielding to that sexual advance would constitute permission to be acted upon, otherwise known as sexual “consent.”

A number of other areas in which consent is legally meaningful also involve permission to be acted upon by others. Consent to be searched under the Fourth Amendment, for example, means that a suspect voluntarily grants police or other governmental agents permission to search her person or effects. Informed medical consent means a patient grants a doctor permission to conduct a medical procedure upon her body. Consent, therefore is permission to be acted upon in some way. By itself, it suggests a passive response to the actions of another. To the extent that it indicates a “concurrence of wills,”<sup>38</sup> it does so through one’s voluntarily submission to the will of another.

A model for heterosexuality is thereby constructed. Men are active agents. Women are passive receptacles of male agency.<sup>39</sup> Men initiate

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35. OXFORD ENGLISH DICTIONARY 760 (2d ed. 1989).

36. BLACK’S LAW DICTIONARY 305 (6<sup>th</sup> ed. 1990). In 1999, *Black’s Law Dictionary* changed the definition of consent to “agreement, approval, or permission as to some act or purpose, esp. given voluntarily by a competent person.” BLACK’S LAW DICTIONARY 300 (7<sup>th</sup> ed. 1999). That definition remains in force in the current edition as well. BLACK’S LAW DICTIONARY 323 (8<sup>th</sup> ed. 2004).

37. BLACK’S LAW DICTIONARY 305 (6<sup>th</sup> ed. 1990).

38. *Id.*

39. See CATHARINE A. MACKINNON, TOWARD A FEMINIST THEORY OF THE STATE 177 (1989) (“[W]omen are socialized to passive receptivity . . .”). See also Henderson, *supra* note 17 at 42



sexuality; women surrender to male sexual initiation.<sup>40</sup> He wills a sexual act to happen; she willingly submits to his desire. “Man proposes, woman disposes. Even the ideal . . . is not mutual.”<sup>41</sup> Only if she physically resists, says “no,” or fails to display her compliance with his actions might the law deem the sexual penetration rape.

The No and Yes Models do not reject the passive acquiescence inherent in the notion of consent. Under the No Model, a man may sexually penetrate a woman as long as he does not employ force to do so, and she does not physically resist or say “no.” Advocates for the No Model argue that it would prevent sexual expropriation. Under the Yes Model, a man may not sexually penetrate a woman unless he obtains affirmative permission from her words or conduct. Advocates for the Yes Model argue that it would protect sexual autonomy. Based on how proponents have described these models in their scholarship, however, each replicates archaic gender norms from the common law and fails to prevent sexual expropriation or protect sexual autonomy.

#### A. THE NO MODEL

Susan Estrich advances the No Model of rape law reform in her 1987 book, *Real Rape*. In it, she dismantles the underlying wrongs of the common law of rape, analyzes the continued influence of the common law on modern rape statutes, and offers a set of “new answers.”<sup>42</sup> Her central thesis is, “‘Consent’ should be defined so that no means no.”<sup>43</sup> Rape law should focus on “the man’s blameworthiness instead of the woman’s.”<sup>44</sup> She argues for a standard of criminal negligence in rape liability, and argues that proceeding to penetrate someone in the face of a “no” is criminally negligent behavior.<sup>45</sup> She explains:

As for intent, unreasonableness as to consent, understood to mean ignoring a woman’s words, should be sufficient for liability. Reasonable men should be held to know that no means no; and unreasonable mistakes, no matter how honestly claimed, should not exculpate. Thus,

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(“A[n] . . . influential cultural belief is that female submission to male sexual dominance or aggression is natural, romantic, and erotic.”).

40. Carole Pateman, *Women and Consent*, 8 POL. THEORY 149, 164 (1980) (“The ‘naturally’ superior, active, and sexually aggressive male makes an initiative, or offers a contract, to which a ‘naturally’ subordinate, passive woman ‘consents.’”).

41. MACKINNON, *supra* note 39 at 174.

42. ESTRICH, *supra* note 9, at 92 & *passim*.

43. *Id.* at 102.

44. *Id.* at 96.

45. *Id.* at 97–100.

the threshold of liability—whether phrased in terms of “consent,” “force,” and “coercion” or some combination of the three—should be understood to include at least those nontraditional rapes where the woman *says* no or submits only in response to lies or threats which would be prohibited were money sought instead.<sup>46</sup>

In a 1992 essay, Donald Dripps delineates an updated version of the No Model.<sup>47</sup> Dripps advocates criminalizing two distinct sexual offenses. The first he calls “sexually motivated assault,” which he defines as “purposely or knowingly giv[ing] another person cause to fear physical injury, or purposely or knowingly inflict[ing] physical injury on another person, or purposely or knowingly overpower[ing] another’s physical resistance, for the purpose of causing any person to engage in a sexual act.”<sup>48</sup> Sexually motivated assault is similar to common law rape; it requires force, the threat of force, or overpowering a victim’s resistance to obtain sexual penetration.<sup>49</sup>

The second crime is a misdemeanor or minor felony Dripps calls “sexual expropriation.” He defines it as sexual penetration with any person unconscious or “known by the actor to have expressed refusal to engage in that act, without subsequently expressly revoking that refusal.”<sup>50</sup> Dripps describes this crime as the “nonviolent” taking of another person’s body for sexual purposes.<sup>51</sup>

As for the intent required for sexual expropriation, Dripps explains: The substantive law ought to punish the disregard of the sexual object’s words, without regard to their sincerity. Specific intent should remain the standard; but the intent that matters should be the intent to engage in sex with a person who *says* she refuses.<sup>52</sup>

This passage echoes Estrich’s analysis of intent. Dripps and Estrich italicize the same word when emphasizing the circumstances in which

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46. *Id.* at 103.

47. Dripps, *Beyond Rape*, *supra* note 23 at 1807. Although Dripps argues that, under his proposal, “consent to sex” would be “taken out of the law,” *id.* at 1805–06, his proposal in practice simply defines non-consent as physical or verbal resistance from the victim.

48. *Id.* at 1807.

49. Sexually motivated assault subjects the defendant to the same sentence as aggravated assault, unless it involves a deadly weapon, dismemberment or disfigurement, in which case it subjects one to the sentence previously associated with rape. *Id.*

50. *Id.*

51. *Id.* at 1800. Sexual expropriation is a misdemeanor or minor felony punishable by the maximum of a year and a day. *Id.* at 1807.

52. *Id.* at 1804. Lynne Henderson argues for a strong No Model under which the law would “impose strict liability as soon as the woman says no or indicates that she does not want to engage in sexual activity.” Henderson, *supra* note 17 at 68.

nonconsensual sex should be criminal: against a woman who *says* she refuses. The No Model thereby attaches great importance to the victim's words of sexual refusal. Unless the defendant employs force or the victim is unconscious or mentally incompetent, a victim has to express her refusal before a sexual act is criminal.

Dripps is confident that “[t]he partners will have time to object to sex acts they don’t like, typically before those acts occur, and in any event immediately upon their initiation.”<sup>53</sup> He emphasizes:

Women are expected to object when male advances exceed female preference. Unless a man either exploits an unconscious or incompetent victim, or induces a woman’s acquiescence by violence or some other wrongful pressure, this doesn’t seem like so much to ask.<sup>54</sup>

A verbal imperative is, therefore, on the victim. Women who are about to be penetrated either have to resist physically or to express their unwillingness verbally, or the penetration will not be deemed against their will. Under the No Model, therefore, sexual penetration is legal unless the woman physically or verbally opposes it.

#### B. THE YES MODEL

Unlike the No Model, under the Yes Model sexual penetration is illegal unless one’s partner physically or verbally grants permission for it.<sup>55</sup> In a series of law review articles culminating in his 1998 book, *Unwanted Sex: The Culture of Intimidation and the Failure of Law*, Stephen Schulhofer advances the Yes Model of rape law.<sup>56</sup> Like Dripps, Schulhofer advocates two separate sexual offenses. The first, a second-degree felony he calls “rape”<sup>57</sup> or “sexual assault,”<sup>58</sup> criminalizes the use of “physical force to compel another person to submit to an act of sexual penetration.”<sup>59</sup>

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53. Panel Discussion, *Men, Women and Rape*, 63 FORDHAM L. REV. 125, 146 (1994) [hereinafter Panel Discussion].

54. *Id.*

55. A 1993 comment by Lani Anne Remick in the *University of Pennsylvania Law Review* first advanced the Yes Model. Under this model, the lack of verbal permission should raise a presumption of non-consent, but the defendant may rebut this presumption by proving consent beyond a reasonable doubt based on the complainant’s nonverbal behavior. Lani Anne Remick, Comment, *Read Her Lips: An Argument for a Verbal Consent Standard in Rape*, 141 U. PA. L. REV. 1103, 1129 (1993). Remick’s burden-shifting proposal may not have persuaded other scholars, but her position that one must obtain either verbal or nonverbal consent to sexual penetration did.

56. SCHULHOFER, *supra* note 17

57. *Id.* at 105.

58. *Id.* at 283

59. *Id.*

This offense is analogous to Dripps's sexually motivated assault and common law rape.

The second crime, a third-degree felony he calls "sexual abuse," criminalizes "an act of sexual penetration with another person, when he knows that he does not have the consent of the other person."<sup>60</sup> He defines consent as "actual words or conduct indicating affirmative, freely given permission to the act of sexual penetration."<sup>61</sup> Schulhofer calls sexual abuse a "nonviolent interference with sexual autonomy."<sup>62</sup> This crime is analogous to Dripps's sexual expropriation. Both scholars conceptualize sex without consent as "nonviolent."

Schulhofer criticizes the No Model in its treatment of the passive or silent woman. He notes:

[H]er failure to protest in these circumstances *might* mean willingness. But it could just as well mean disorientation or fear. The assumption that silence means actual willingness is clearly untenable. And the assumption that it is fair to treat her *as if* she had consented simply ignores all the situational factors that might leave her unable to think clearly, act quickly, or speak forcefully at the crucial moment.<sup>63</sup>

As a result, Schulhofer advocates a requirement of actual permission to protect a person's sexual autonomy to be free from unwanted penetration. He explains:

A defendant could be convicted only if he knew he did not have the woman's affirmative permission or if he was criminally negligent in thinking that he did. But silence, ambiguous behavior, and the absence of clearly expressed *unwillingness* are evidence that affirmative consent was absent; they should no longer suggest, as they do in present law, that a defendant did nothing wrong in forging ahead to intercourse.<sup>64</sup>

Unlike the No Model, the Yes Model does not appear, at first blush, to demand that the potential victim of a sexual assault speak. Nor must the potential defendant speak. Schulhofer rejects the imposition of a verbal permission requirement. He assures his readers:

[A] verbal-yes rule is not mandated by a commitment to respect sexual autonomy. The central point is that sexual intimacy must be chosen freely. The first priorities are to stop insisting on proof of the woman's

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60. *Id.* Schulhofer also allows recklessness or criminal negligence to establish the mens rea of the crime, even though negligence moves the grading of the crime down a degree. *Id.* at 284.

61. *Id.*

62. *Id.* at 105.

63. *Id.* at 269.

64. *Id.* at 271.

opposition and to stop requiring her to take actions clear enough to overcome the law's presumption that she is always interested in sex—at any time, in any place, with any person. The legal standard must move away from the demand [under the No Model] for unambiguous evidence of her protests and insist instead that the man have affirmative indications that she *chose* to participate. So long as a person's choice is clearly expressed, by words or conduct, her right to control her sexuality is respected.<sup>65</sup>

In terms of the kind of “conduct” that should establish actual permission, Schulhofer notes:

Only unambiguous body language should suffice to signal affirmative consent, of course. Sexual petting does not in itself imply permission for intercourse, any more than does inviting a man in for coffee or permitting him to pay for dinner. A woman who engages in intense sexual foreplay should always retain the right to say “no.”<sup>66</sup>

So what kind of “unambiguous body language” should “suffice to signal affirmative consent”? Schulhofer's next sentence provides one example: “If she doesn't say ‘no,’ and if her silence is combined with passionate kissing, hugging, and sexual touching, it is usually sensible to infer actual willingness.”<sup>67</sup>

This analysis, however, is straight from the No Model. If she is silent and fails to say “no,” one may presume she consents to penetration. What happened to “actual permission” for penetration? Passionate kissing, hugging, and sexual touching supply it. Once she engages in kissing and petting, the No Model supplants the Yes Model and verbal resistance is again required.

As one scholar describes Schulhofer's notion of nonverbal consent, “While verbal permission will certainly do, so will cheerfully following someone into a bedroom and taking off one's clothes.”<sup>68</sup> Another scholar concurs: “A woman who after being propositioned, walks into her host's bedroom and disrobes, may not have given verbal consent. But she has ‘affirmatively’ manifested her intentions, and that should suffice.”<sup>69</sup> The

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65. *Id.* at 272–73.

66. *Id.*

67. *Id.*

68. Alan Wertheimer, *What Is Consent? And Is It Important?*, 3 *BUFF. CRIM. L. REV.* 557, 574 (2000).

69. David P. Bryden, *Redefining Rape*, 3 *BUFF. CRIM. L. REV.* 317, 398 (2000).

Yes Model, therefore, divines consent to sexual penetration from disrobing and sexual touch.

It is useful at this point to compare and contrast the No and Yes Models. The No Model purports to focus on the defendant's *mens rea* but requires no action or words from him. Instead, it demands physical or verbal resistance from her to supply the defendant with notice of the victim's actual refusal. Absent such notice, the defendant may penetrate her.

The Yes Model purports to focus on the victim's sexual autonomy but it also requires no actions or words from the defendant. The Yes Model rejects a requirement of verbal discourse between the partners in favor of allowing the man to interpret the woman's body language to supply him with permission. Under both models, then, "no" means no penetration. Under both models, a person's willingness to engage in other sexual contact, absent a "no," signals "yes" to penetration. Both models of rape law reform are substantially better than the law in most states. Unfortunately, neither fully justifies itself or fulfills its promise to prevent sexual expropriation or protect sexual autonomy.

### C. OBJECTIONS TO CONSENT

There are three main objections to the No and Yes Models of rape law reform. First, victims' lived experiences are inconsistent with both models. Second, men misinterpret female nonverbal behavior as indicative of consent, which undermines both models. Third, allowing consent to sexual penetration based on consent to heavy petting, which the Yes Model does, is inconsistent with sexual autonomy and health, particularly in an age of HIV.

#### 1. Victims' Trauma

Psychologists have conducted an extensive amount of research regarding the effects of trauma on human psychology and physiology. Most trauma research related to rape victims focuses on Post Traumatic Stress Disorder ("PTSD"), a debilitating condition that occurs after the victim

suffers a traumatic stressor event.<sup>70</sup> Nearly one-third of rape victims develop PTSD.<sup>71</sup>

More relevant to this article, however, are the various psychological and physiological reactions that individuals experience during a traumatic stressor event itself, their peritraumatic responses. One common reaction to the extreme stress of sexual assault is the deer-in-headlights effect.<sup>72</sup> Like other mammals, humans often respond to trauma with peritraumatic paralysis.<sup>73</sup> One study found that eighty-eight percent of victims of childhood sexual assault and seventy-five percent of victims of adult sexual assault experienced moderate or high levels of paralysis during the assault.<sup>74</sup>

A second common response to sexual trauma is an alteration in awareness, called peritraumatic dissociation.<sup>75</sup> A victim's nervous system can become overwhelmed as it undergoes great emotional distress.<sup>76</sup> During such an episode, she may dissociate from her body as an adaptive means to escape damaging sensory input.<sup>77</sup> As Judith Herman, clinical professor of psychiatry at Harvard Medical School and leading scholar in the field of trauma research, explains:

The person may feel as though the event is not happening to her, as though she is observing from outside her body, or as though the whole experience is a bad dream from which she will shortly awaken. These perceptual changes combine with a feeling of indifference, emotional

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70. AMERICAN PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 463 (4th ed. 2000). Symptoms of PTSD include hyperarousal (e.g., irritability or an exaggerated startle response), avoidance (e.g., social withdrawal or emotional numbing), and intrusion (e.g., recurrent thoughts, nightmares, or flashbacks). *Id.*

71. RAPE IN AMERICA, *supra* note 5, at 7.

72. In one study of college date rapes, the researcher chose to exclude a number of cases because the women were "literally immobilized with fear" and therefore could not communicate their non-consent. While the women in these situations were petrified, "the[] men were viewing themselves as successful seducers . . ." Eugene J. Kanin, *Date Rape: Unofficial Criminals and Victims*, 9 VICTIMOLOGY 95, 97 (1984).

73. Gail Abarbanel & Gloria Richman, *The Rape Victim*, in CRISIS INTERVENTION, BOOK 2: THE PRACTITIONER'S SOURCEBOOK FOR BRIEF THERAPY 93, 99-100 (Howard J. Parad & Libbie G. Parad eds., 1990). See also Sarah E. Ullman & Raymond A. Knight, *Women's Resistance Strategies to Different Rapist Types*, 22 CRIM. JUST. & BEHAV. 263, 280 (1995).

74. Robert Finn, *Paralysis Common Among Sexual Assault Victims*, FAM. PRAC. NEWS, Mar. 1, 2003, at 44.

75. RON ACIERNO, PH.D., NATIONAL VIOLENCE AGAINST WOMEN PREVENTION RESEARCH CENTER, MEASURING THE MENTAL HEALTH IMPACT OF VIOLENCE AGAINST WOMEN (2000) <http://www.musc.edu/vawprevention/research/measuring.shtml> (last visited May 30, 2005).

76. *Id.*

77. See John Briere & Marsha Runtz, *Post Sexual Abuse Trauma*, in LASTING EFFECTS OF CHILD SEXUAL ABUSE 85 (Gail Elizabeth Wyatt & Gloria Johnson Powell eds., 1988).

detachment, and profound passivity in which the person relinquishes all initiative and struggle. This altered state of consciousness might be regarded as one of nature's small mercies, a protection against unbearable pain.<sup>78</sup>

Symptoms of peritraumatic dissociation include confusion, time distortion,<sup>79</sup> and "depersonalization," or the "feeling of detachment from and being an outside observer of one's mental processes or body, or feeling like an automaton or as if in a dream."<sup>80</sup> Memory may be lost and pain thereby ignored.<sup>81</sup> Trauma-related amnesia often occurs.<sup>82</sup>

Adrienne's description of her rape ("I just completely left my body.") and her later attempts in therapy to overcome her amnesia and recall the forgotten details of the rape ("I just get VERY dizzy, feel like I am floating out of my body, and experience sheer panic.") are both consistent with peritraumatic dissociation.

Like physical paralysis, dissociation is a common reaction to sexual trauma.<sup>83</sup> In one study, nearly nineteen percent of rape victims exhibited high peritraumatic dissociation scores.<sup>84</sup> In another study of 234 female rape survivors who sought treatment, eighty-three percent experienced a sense of time distortion during the rape.<sup>85</sup> Seventy-two percent indicated that the experience seemed unreal, as if they were in a dream or watching a movie, and fifty-nine percent felt disconnected from their bodies or

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78. JUDITH LEWIS HERMAN, M.D., *TRAUMA AND RECOVERY: THE AFTERMATH OF VIOLENCE—FROM DOMESTIC ABUSE TO POLITICAL TERROR* 43 (1992).

79. *See id.*

80. AMERICAN PSYCHIATRIC ASS'N, *supra* note 70 at 530.

81. DISSOCIATION: CULTURE, MIND, AND BODY IX (David Spiegel, M.D. ed., 1994).

82. Such amnesia develops this way:

Often, a traumatized person cannot generate the kind of narrative memory that we can normally muster for an important experience. Their memories are often fragmented, out of sequence, and filled with gaps. They may recall very specific details for particular aspects of the experience, and recall little or nothing for others.

David Lisak, *The Neurobiology of Trauma*, in *UNDERSTANDING SEXUAL VIOLENCE: THE JUDICIAL RESPONSE TO STRANGER AND NONSTRANGER RAPE AND SEXUAL ASSAULT* Tab 3, at 2 (1994).

83. Paula K. Lundberg-Love, *The Resilience of the Human Psyche: Recognition and Treatment of the Adult Survivor of Incest*, in *THE PSYCHOLOGY OF SEXUAL VICTIMIZATION* 7 (Michele Antoinette Paludi, ed., 1999).

84. Michael G. Griffin, Ph.D., Patricia A. Resick, Ph.D. & Mindy B. Mechanic, Ph.D., *Objective Assessment of Peritraumatic Dissociation: Psychophysiological Indicators*, 154 *AM. J. PSYCHIATRY* 1081, 1083 (1997).

85. Miranda K. Morris, *Rape Victims' Peritraumatic Responses: An Examination of Their Relationship to One Another, Within-Assault Variables, and Early Victimization* 70 (2001) (unpublished Ph.D. dissertation, University of Missouri-St. Louis) (on file with author). Because the sample consisted of victims who sought treatment and excluded those who were suicidal, psychotic, or alcohol- or drug-dependent, the study's findings may not generalize to all rape victims. *Id.* at 47.



experienced other somatic distortions.<sup>86</sup> Forty-six percent experienced moments of blanking out or feeling they were not part of the experience, and thirty-eight percent felt as if they were a spectator or were floating above the scene.<sup>87</sup>

The No Model does not and cannot protect victims who suffer from peritraumatic paralysis or dissociation. A victim who has these common reactions is often cut off from her voice—either she is too shocked to speak or she has left her body entirely. Once the Yes Model collapses into the No Model, when individuals engage in kissing and petting, it suffers from the same deficiency.

## 2. Male Misinterpretation

A well-developed body of social psychology literature documents that men interpret women's body language as indicative of sexual intent when women have no such intent.<sup>88</sup> Employing numerous methodologies, scientists have concluded that this male perceptual error "transcends the method used to study it."<sup>89</sup> Men are more likely to misinterpret a woman's consumption of alcohol as conveying sexual intent.<sup>90</sup> Men misinterpret women's friendly body language as indicative of sexual intent.<sup>91</sup> When assessing interpersonal distance, eye contact, and casual touch, men rate women as more seductive and more promiscuous than women rate other women and themselves.<sup>92</sup> Men are more prone to interpret flirting as indicative of sexual intent, whereas women tend to view flirting as "relational development."<sup>93</sup> In short, the literature documents the male tendency to see female sexual consent where there is none.

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86. *Id.* at 69, 70.

87. *Id.* at 69.

88. See Martie G. Haselton & David M. Buss, *Error Management Theory: A New Perspective on Bias in Cross-Sex Mind Reading*, 78 J. PERSONALITY & SOC. PSYCHOL. 81 *passim* (2000).

89. *Id.* ("Men's sexual overperception has been reported by women in surveys of naturally occurring events and has been documented using a wide variety of methodologies, including laboratory studies of interactions between newly acquainted men and women, studies using photos and films as stimuli, and studies . . . using hypothetical scenarios.") (citation omitted). Men misinterpret women's sexual intent in terms of both their own overperceptions and women's self-perceived sexual intent. *Id.* at 88.

90. Antonia Abbey & Richard J. Harnish, *Perception of Sexual Intent: The Role of Gender, Alcohol Consumption, and Rape Supportive Attitudes*, 32 SEX ROLES 297, 310 (1995).

91. Antonia Abbey, *Sex Differences in Attributions for Friendly Behavior: Do Males Misperceive Females' Friendliness?*, 42 J. PERSONALITY & SOC. PSYCH. 830, 836 (1982).

92. Antonia Abbey & Christian Melby, *The Effects of Nonverbal Cues on Gender Differences in Perceptions of Sexual Intent*, 15 SEX ROLES 283, 295–96 (1986).

93. David Dryden Henningsen, *Flirting with Meaning: An Examination of Miscommunication in Flirting Interactions*, 50 SEX ROLES 481, 487–88 (2004).

Male misinterpretation leans only in one direction. Men do not tend to think women have no sexual intent when, in fact, they do. Many men, of course, resist the propensity to misinterpret in favor of consent. Men who teach college students about rape, for example, explain what interpreting female body language means in practice:

We have learned . . . to “read” body language, a too often self-fulfilling prophesy that invites us to hear and see only what *we* want to. How many of us think we can read our partners’ body language as confirmation of their desire for sexual contact and their (implied?) agreement with what we have in mind? Using body language this way is a sham; we’re merely justifying self-deception or pretending that we’ve established more than mere acquiescence or submission.<sup>94</sup>

Such an interpretive fallacy facilitates rape. Men who believe stereotypes about rape, such as “women who wear short skirts are asking for it,” are particularly likely to misinterpret women’s nonverbal cues as signs of sexual interest.<sup>95</sup> Studies indicate:

A man high in rape myth acceptance is more likely than other men to assume that a female companion who dresses up or kisses him has conveyed her interest in engaging in sexual intercourse. And once he has decided that she has expressed interest in sexual relations, a man high in rape myth acceptance will feel justified in forcing sex even if his companion refuses.<sup>96</sup>

Legal scholars routinely label male misinterpretation of women’s body language as “miscommunication,”<sup>97</sup> which suggests that the phenomenon is inevitable because of the natural limits of human understanding. As Schulhofer argues:

Sexual communication is so often indirect and contradictory that it is a wonder mistakes do not occur more often. What seems certain is that miscommunication about sexual desires is entirely commonplace. If we consider actual behavior of real people in our world as it stands, mistakes about consent, including mistakes about the meaning of “no,” are undoubt edly frequent.<sup>98</sup>

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94. Joseph Weinberg & Michael Biernbaum, *Conversations of Consent: Sexual Intimacy without Sexual Assault*, in TRANSFORMING A RAPE CULTURE 93 (Emilie Buchwald, Pamela R. Fletcher & Martha Roth eds., 1993).

95. Abbey & Harnish, *supra* note 90, at 309.

96. *Id.* (citation omitted).

97. See, e.g., DAVID ARCHARD, SEXUAL CONSENT 34 (1998) (discussing “cross-gender miscommunication”); Katharine K. Baker, *Sex, Rape, and Shame*, 79 B.U.L. REV. 663, 689 (1999) (discussing an “alarming level of miscommunication”); SCHULHOFER, *supra* note 17 at 6 5 (discussing “miscommunication about sexual desires”).

98. SCHULHOFER, *supra* note 17 at 65.

The “miscommunication” label suggests that the one sending the cues is as deficient as the one receiving them. It also suggests that each party, female and male, is trying to communicate an idea that the other misunderstands. In fact, however, women interpret men’s body language and sexual intent toward them “with reasonable accuracy.”<sup>99</sup> Men, by contrast, misinterpret women’s body language and infer sexual intent where there is none.

The No Model ignores male misinterpretation of female body language because it places the burden of stopping sexual penetration on the woman and assumes she can object whenever she wants. The Yes Model, though not ignoring the problem, does not attempt to solve it. Schulhofer concedes, as he must, that under the Yes Model, “Because ‘body language’ can still count as an expression of consent, this approach (for better or worse) doesn’t eliminate *all* the uncertainties of sexual communication.” But he notes happily, “A world without ambiguity in erotic interaction might be a very dull place, after all.”<sup>100</sup>

So what happens when there is “ambiguity in erotic interaction”? What happens under the Yes Model when a juror assessing such a case is not sure? Schulhofer answers that question with resort to the victim’s verbal and physical resistance:

[R]esistance will still be relevant, in some cases, to determining whether consent was given at all. A couple sits side by side necking on a sofa. While kissing his date, the man presses his body forward, so that the woman is pushed back to a reclining position. He then reaches under her dress to touch her genital area. The woman might or might not be consenting to these sexual contacts. If she says “no,” tries to sit up, and pushes his hands away, we are more likely to think she is unwilling than if she does none of these things. Resistance remains relevant when we are not sure whether the woman gave consent.<sup>101</sup>

Notice that here again the Yes Model collapses into the No Model once the man’s sexual initiatives begin.

Under the No Model, a man may misinterpret a woman’s body language to mean consent to sexual penetration. He has permission to penetrate her until she objects. Under the Yes Model, a man may also misinterpret a woman’s body language to mean consent to sexual

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99. Haselton & Buss, *supra* note 88 at 89.

100. SCHULHOFER, *supra* note 17 at 271–72. Schulhofer concludes that requiring men to clarify sexual ambiguity by verbal discourse is beyond what courts would be willing to do: “The verbal-yes rule may be worth its costs, but it seems many steps beyond the level of regulation that contemporary courts are likely to entertain.” *Id.* at 272.

101. *Id.* at 131.

penetration when there is kissing, hugging, and petting involved. He may then penetrate her until she objects.

Both models reward willful blindness. Without a requirement of verbal discourse placed on the defendant, each allows the defendant to avoid knowing whether his partner wanted to be penetrated. Unless his partner verbally objects, a man who deliberately avoids guilty knowledge by quietly and quickly penetrating a woman he is passionately kissing is a man with consent. Once one understands how sexual trauma can manifest itself as physical paralysis and mental dissociation, this position is no longer tenable.

### 3. Petting, Penetration, and AIDS

Because of the threat that HIV and other sexually transmitted diseases pose, many people are choosing to engage in sexual behavior that does not include penetration, particularly when they are enjoying casual sexual intimacy or sexual intimacy with a relatively new partner.<sup>102</sup> Young people, for instance, are engaging in more sexual petting and fellatio as a substitute for vaginal intercourse.<sup>103</sup> They often engage in fondling, fantasy role-playing, and fellatio under the belief that these practices maintain technical virginity, avoid pregnancy, and constitute safe sex.<sup>104</sup> The more diverse sexual experiences people participate in—experiences that deliberately do not include vaginal or anal penetration—the less those experiences suggest consent to vaginal or anal penetration. Now, more than ever, sexual penetration is a specific act that sexually active people negotiate.

Under the No Model, a man may assume that consent to sexual petting means consent to sexual penetration because he may assume consent unless he hears otherwise. He has permission to penetrate her unless she objects.

Under the Yes Model, a man may assume consent to sexual petting means consent to sexual penetration because, as Schulhofer says, “If she doesn’t say ‘no,’ and if her silence is combined with passionate kissing, hugging, and sexual touching, it is usually sensible to infer actual

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102. Alex Williams, *Casual Relationships, Yes. Casual Sex, Not Really*, N.Y. TIMES, Apr. 3, 2005, at 9.1 (“The courtship rites of this generation of urban singles seem to borrow from the mores of their grandmothers in the 1950’s (date lots of boys; smooch, spoon, nuzzle or neck to your heart’s content, but hold out for that pledge pin from Mr. Right”). See also *id.* (“‘We’ve had so much sex ed,’ [one woman] said. ‘With strangers, we are really cautious of the disease thing.’”).

103. Israel M. Schwartz, *Sexual Activity Prior To Coital Initiation: A Comparison Between Males and Females*, 28 ARCHIVES SEXUAL BEHAV. 63, 68 (1999).

104. Lisa Remez, *Oral Sex Among Adolescents: Is It Sex or Is It Abstinence?*, 32 FAM. PLAN. PERSP. 298, 298–301 (2000).

willingness.”<sup>105</sup> The Yes Model divines consent to sexual penetration from disrobing and sexual touch. “[C]heerfully following someone into a bedroom and taking off one’s clothes,”<sup>106</sup> however, indicates only that one wants to be naked with someone else. The Yes Model assumes that a woman consents to sexual penetration if she engages in heavy petting, when in fact she may be engaging in heavy petting in order to avoid penetration and the risks associated with it. The No and Yes Models, therefore, are inconsistent with sexual autonomy and sexual health, particularly in an age of HIV and other sexually transmitted diseases.

## II. CONSIDERING NEGOTIATION

This section offers a new model of rape law reform based on negotiation. It describes the Negotiation Model, applies it in different contexts, and analyzes potential objections to it.

### A. THE NEGOTIATION MODEL

The Negotiation Model requires consultation, reciprocal communication, and the exchange of views before a person initiates sexual penetration. It requires communication that is verbal unless partners have established a context between them in which they may accurately assess one another’s nonverbal behavior. The verbal communication must be such as would indicate to a reasonable person that sexual penetration has been freely and explicitly agreed to. The distinction between negotiation and consent is more than semantic.

#### 1. Negotiated Process

The *Oxford English Dictionary* defines “negotiate” as “[t]o hold communication or conference (*with* another) for the purpose of arranging some matter by mutual agreement.”<sup>107</sup> The lay definition of “negotiate,” therefore, suggests not the granting of permission for the actions of another (as “consent” does), but an active consultation with someone else to come to a mutual agreement. The legal world concurs with the lay definition. *Black’s Law Dictionary* defines “negotiate” as “to communicate with another party for the purpose of reaching an understanding.”<sup>108</sup> Instead of

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105. SCHULHOFER, *supra* note 17 at 272.

106. Wertheimer, *supra* note 68 at 574.

107. OXFORD ENGLISH DICTIONARY 303 (2d ed. 1989).

108. BLACK’S LAW DICTIONARY 1064 (8th ed. 2004). By adopting a model of criminal law reform based on negotiation, I do not mean to import other aspects of negotiation as practiced in

getting a woman to “voluntarily yield[] [her] will” to his sexual proposition,<sup>109</sup> a man should have to “communicate or confer with [his partner] so as to arrive at the settlement of [the] matter.”<sup>110</sup> Instead of obtaining “acquiescence” or “compliance,”<sup>111</sup> one should have to “arrive through discussion at some kind of agreement” with his partner about whether sexual penetration should occur.<sup>112</sup> Partners should have to communicate with one another to discern each other’s desires and limitations before sexual penetration occurs.

In contrast to consent, in which a woman allows a man to act upon her, negotiation requires persons (of whatever sex) who want to initiate penetration to engage their partners actively in a decision-making process before penetration occurs. The Negotiation Model would require that partners negotiate only penetrative acts, not each potentially romantic act.<sup>113</sup> Procedurally, negotiation requires consultation before penetration, which consent does not require. Although consent may include meaningful consultation and agreement, legally it is broad enough to include permission by default, submission out of fear, and acquiescence by virtue of a *fait accompli* rather than by joint communication. A negotiated agreement, by contrast, is a concurrence of the wills through mutual consideration and reciprocity of concern.

Recall that consent suggests a woman’s allowance or permission for a man’s sexual actions upon her. In essence, consent means, “She let him.” Under the No Model, for example, “she let him” do anything to which she did not verbally or physically object. Under the Yes Model, “she let him” do anything he believed she gave him verbal or nonverbal permission to do. The legal question under both models thereby becomes, “What did she let him do?”

Instead of asking, “What did she let him do?” the Negotiation Model asks, “Did the person who initiated sexual penetration negotiate with his or

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mediation and other alternative dispute resolution processes into the sexual relationship. For example, the Negotiation Model does not assume that partners are in an adversarial relationship with one another. The Negotiation Model also does not assume that partners will compromise in what they choose to do or that compromise is an appropriate goal in a sexual negotiation. Because of the serious importance of sexual autonomy, the person who wants the least amount of sexual intimacy should always be able to limit its level.

109. BLACK’S LAW DICTIONARY 305 (6th ed. 1990) (defining “consent”).

110. *Id.* at 1036 (defining “negotiate”).

111. OXFORD ENGLISH DICTIONARY 760 (2d ed. 1989) (defining “consent”).

112. BLACK’S LAW DICTIONARY 1036 (6th ed. 1990) (defining “negotiate”).

113. Requiring consent for each potentially romantic act was a policy adopted in 1990 by Antioch College and subsequently ridiculed in the media. PEGGY REEVES SANDAY, A WOMAN SCORDED: ACQUAINTANCE RAPE ON TRIAL 272–77 (1996).

her partner and thereby come to an agreement that sexual penetration should occur?" As a model, it seeks to maximize the opportunity for sexual partners to share intentions, desires, and boundaries. Negotiation manifests itself as mutual consultation and the expression of preferences. It ideally involves a discussion of the partners' tastes and an agreement to engage in mutually desired behaviors.

Alas, sexual penetration does not always happen ideally. The law cannot and should not criminalize all less than ideal penetration. Humans will at times choose to engage in sex for distasteful and sometimes odious reasons. The law cannot do anything about those who agree to unpleasant penetration from their husbands because they imagine it is their "wifely duty."<sup>114</sup> It cannot help a seventeen-year-old who agrees to sexual penetration that he does not desire because he hopes it will prove he is a man. The law cannot do anything about a young woman who agrees to dangerous, unprotected penetration in order to impress her friends. It cannot do anything for a person who, having suffered chronic sexual abuse as a child, comes to think of himself as his perpetrators thought of him, and so seeks to engage in degrading sexual acts.

The Negotiation Model does not mandate the content of sexual interactions, only the process by which persons agree to penetration. When one wants to engage in penetration, negotiation would minimally require a request for information about another person's desires and boundaries or an expression of one's own with an invitation to respond. Asking partners for their preferences gives them an opportunity to open or set the boundaries for a sexual interaction. This communication expresses an interest in the other person's perspective. It requests an interchange, an exchange of ideas. It is a conversation starter that expresses a willingness to consider the other person's inclinations and humanity. It expresses that the other person matters.

Negotiation as a process, therefore, involves an exchange of ideas between people. It does not assume that the male will initiate and the female will either acquiesce or object to what he wants. Unlike the traditional notion of consent, negotiation assumes reciprocal responsibilities between partners and equal authority to direct the sexual interaction, whatever the partners' genders and sexual orientation.

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114. Kathleen C. Basile, *Rape by Acquiescence*, 5 VIOLENCE AGAINST WOMEN 1036, 1046-47 (1999) (discussing a "perceived wifely duty" as a reason why some married women submit to unwanted sex).

The Negotiation Model is gender-neutral and does not assume heterosexuality. Both men and women may be guilty of raping either their male or female partners under this model. For example, a woman is liable for rape if she engages in sexual penetration without negotiating the act with her partner beforehand.

Sometimes people come to sexual interactions with a clear set of preferences about what they want to do. Other times, they have no set preferences but are open to exploration. A negotiated process is appropriate in both circumstances. For example, a girl may be willing to engage in fellatio but unwilling to engage in vaginal sex because she wants to preserve her technical virginity. Her boyfriend may say, "I want to have sex with you. Do you want that, too?" She may respond, "I'll go down on you, but that's all, because I want to save myself for marriage."

A woman may not be sure whether she wants to engage in penetration with her girlfriend, but may be open to the possibilities as they evolve during a romantic interlude. She might say, "I'm not really sure what I want to do, but I want to just go with the flow and see what feels good at the time. Would that be cool with you?" Her partner may respond, "Actually, I want to take it slow. I'm not really into having sex . . . but I'd love to make out."

The minimally required negotiation for penetrative acts needs to be specific, but it need not be formal. People rarely say anything like, "I agree to have vaginal sex with you. Let us now proceed." Instead, they say things like, "Kissing you is making me so hot. I want you to be inside me. Do you want that, too?" Though informal, this communication does all the work that negotiation requires. It states a desire and asks the other person for their position, providing the opportunity to express anything from mutual longing to aversion.

Silence would never be adequate to constitute a negotiation. A wink and nudge would not constitute one either. Meeting at a party, drinking alcohol, and making out would not constitute a negotiation for sexual penetration. Instead, partners would have to engage in a communicative process—a verbal discussion about what they wanted to do with one another—before penetration occurred.

## 2. Agreement

The Negotiation Model requires more than the communicative process of negotiation before sexual penetration. It also requires agreement. Agreement does not require a separate communicative process, however.



After partners have engaged in a negotiation regarding what they want to do together, each partner may assume the other agrees to engage in the penetrative acts they discussed fondly with one another. Partners need not recite, “I agree to have oral sex with you.” Having expressed their mutual preferences is sufficient when the partners engage in what both indicated they wanted between them.

Agreement between partners is dynamic and active. Agreements change over time, and must be sensitive to context and changed circumstance. People can and do change their minds. For example, if two men initially agree to engage in penetration with each other and then one of them changes his mind and expresses a verbal or physical “no” to it, then there is no longer agreement between them, and his partner must immediately stop the penetration. Here the Negotiation Model incorporates an important part of the No and Yes Models—the importance of verbal refusal—but only *after* the partners have agreed to sexual penetration itself. It does not assume penetration is appropriate without consultation.

### 3. Context for Nonverbal Negotiation

Can negotiation and agreement between two people regarding sexual penetration occur nonverbally? In terms of the heterosexual intercourse that men initiate, we have seen the risk in relying on men’s ability to interpret female body language. Relying on body language creates too many possibilities for mistake and is therefore ethically inadequate. When a sexual relationship is relatively new, whatever the sexual orientation of partners, verbal negotiation is the only principled course of action in an age of sexually transmitted diseases, unwanted pregnancy, and widespread sexual assault. Particularly when people are engaging in sexual penetration for the first time, verbal discourse is a necessity.

Most negotiations regarding specific activities that are to occur in the future happen verbally, of course. Language is ordinarily required to clarify one’s desires over time; however, an established custom between two people of engaging in mutually desired behavior in a certain way may itself constitute a negotiation. By repeating the mutually desired activity over time, partners may establish a pattern of sexual behavior that makes explicit discussions unnecessary.<sup>115</sup>

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115. As Katharine Baker has argued:

Communication based on physical clues and implicit understanding may be a goal worth working towards in long term sexually intimate relationships, but it is hardly a goal that we should expect people to be able to meet in their first few sexual encounters. First, the evidence is clear that there is no implicit understanding between new sexual partners; there is a great

After partners establish a pattern of engaging in sexual penetration that serves as the necessary negotiation, the Yes Model provides sufficient protection for sexual autonomy. Partners may proceed to follow the custom between them when they both indicate affirmative nonverbal agreement. A longer-term relationship, therefore, provides a context in which partners may reliably read one another's nonverbal behavior. Without a custom, however, partners have to negotiate penetration verbally.

Thus, the Negotiation Model acknowledges that the character of sexual interactions between partners may change over time as they come to know one another's desires and preferences. Sexual partners may over time establish a custom based on the comfort of shared mutuality, thus rendering verbal negotiations unnecessary.<sup>116</sup>

It is important to note that the risk for sexual assault is highest for people engaging in sexual penetration for the first time. According to a recent national crime victimization survey, the victim and the offender had not previously been intimate with one another in ninety percent of the rapes of females over the age of twelve, and one hundred percent of the rapes of males over the age of twelve.<sup>117</sup> Most stranger and acquaintance rapes are the only sexual interaction the two people will have. Therefore, the imperative of verbal negotiation for penetration is all the more powerful in newer relationships.

As a result, under the Negotiation Model, if a state charges someone with rape, the state must prove beyond a reasonable doubt that the defendant initiated and engaged in sexual penetration, and failed to negotiate and come to an agreement with his partner about such penetration before it occurred. The state would prove failure to negotiate by evidence

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deal of misunderstanding. Second, the misunderstanding results in serious harm to those who are less powerful physically. Third, it is wildly utopian to think that the model of Male/Aggression—Female/Passivity will ever change unless we talk about how it should change.

Baker, *supra* note 97 at 690. David Archard notes:

[A] loving couple may, over time, have developed a clear understanding of what each party sexually wants and is prepared to do. Such an understanding may rely on conventions which they, but no others, share. Their relationship is all the better for having these wordless, yet conventional understandings of what is agreeable to them both. In the first case strangers can explicitly negotiate and agree on sexual conventions; in the second a loving couple gradually develop such conventions.

ARCHARD, *supra* note 97 at 31–32.

116. This acknowledgment does not re-inscribe the law with a marital rape exemption. Marital rape remains as criminal as stranger rape.

117. CALLIE RENNISON & MICHAEL RAND, BUREAU OF JUSTICE STATISTICS NATIONAL CRIME VICTIMIZATION SURVEY 10 (2003). Additionally, for eight percent of women and girls, their first experience of sexual intercourse was involuntary. FERTILITY AND WOMEN'S HEALTH, *supra* note 7, at 5.

that the defendant did not discuss the act in question with the partner. Other relevant evidence would be if the defendant lied to obtain penetration, failed to discuss safe sex with the partner, treated the partner as if he or she were an object without independent feelings or desires, or initiated penetration rapidly without discussion. Negotiation between partners would have to be verbal unless they had established a context between them in which they could reliably read one another's non-verbal behavior.

#### B. NEGOTIATION APPLIED

The Negotiation Model provides an appropriate analytical framework for understanding the most common scenarios of acquaintance rape between teens or young people. Take the example of Adrienne's rape that opened this article. Mike refused numerous opportunities to communicate with Adrienne and to consider what she felt or wanted. The sex was not a misunderstanding. He did not attempt to understand. He proceeded as if he were the only human being in the interaction and used her for his own ends. Aggressively indifferent to her pain, he penetrated her without asking if she wanted to be penetrated. He palmed her head as if it were an object and did not care that she choked and thought she was going to die. He treated Adrienne with contempt, as if she were a nothing. He failed at every turn to legitimate his actions by consulting with Adrienne and considering her needs, feelings, and humanity.

Unlike the consent models, the Negotiation Model does not focus on the actions of the victim to repel or invite a man's sexual advances physically and verbally. Instead, the Negotiation Model focuses the legal issue where it should be: on what the defendant did to obtain an understanding of whether both partners wanted the sexual penetration to take place. The Negotiation Model understands the nature of sexual trauma—including physical paralysis and mental dissociation—and it is wary of the male propensity to misinterpret women's nonverbal behavior as indicative of sexual intent. It thereby sheds new light on a few important rape cases.

Two cases that show up in many criminal law casebooks are *Commonwealth v. Berkowitz*,<sup>118</sup> and *State v. M.T.S.*<sup>119</sup> They represent the two ends of a spectrum on the question of whether the defendant must employ extrinsic physical force beyond that required to engage in nonconsensual penetration before the act in question is rape.

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118. *Commonwealth v. Berkowitz*, 641 A.2d 1161 (Pa. 1994).

119. *In re M.T.S.*, 609 A.2d 1266 (N.J. 1992).

### 1. *Berkowitz*

Berkowitz and his female victim were twenty- and nineteen-year-old college students, respectively. On the afternoon of the incident, the victim went to Berkowitz's dorm room to find her friend. Berkowitz asked her to stay for a while, and she agreed. He asked her to give him a back rub, but she declined. He asked her to sit on his bed, but she refused and took a seat on the floor. Berkowitz then moved to the floor, lifted her shirt, and began massaging her breasts. She said "no" repeatedly. Berkowitz undid his pants and tried to put his penis in her mouth. She again said "no." Berkowitz then locked the door from the inside, pushed the victim down on the bed, straddled and pinned her, and removed her pants and underwear from one leg. He then penetrated her vagina with his penis, withdrew, and ejaculated on her stomach. Both parties agreed that the victim said "no" throughout the encounter.<sup>120</sup>

In assessing the case, the intermediate appellate court in Pennsylvania quoted extensively from the victim's testimony. It pointed out:

The victim did not physically resist in any way while on the bed because appellant was on top of her, and she "couldn't like go anywhere." She did not scream out at anytime because, "[i]t was like a dream was happening or something."<sup>121</sup>

Despite the fact that the Supreme Court of Pennsylvania found that the victim did not consent, it decided that there was no rape because Berkowitz did not employ force.<sup>122</sup>

Berkowitz did not need to employ force. By pinning and straddling his victim, Berkowitz made it clear that he intended to penetrate her despite her clear and repeated expressions of non-consent. He thereby intimidated her into a state of depersonalization, in which she felt as if she were in a dream.<sup>123</sup>

*Berkowitz* is an easy case for the No and Yes Models. Under the No Model, Berkowitz is guilty of sexual expropriation because the victim repeatedly said "no." Under the Yes Model, Berkowitz is guilty of sexual

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120. See *Commonwealth v. Berkowitz*, 609 A.2d 1338, 1339–42 (Pa. Super. Ct. 1992), *aff'd* by, 641 A.2d 1161 (1994).

121. *Berkowitz*, 609 A.2d at 1340.

122. *Berkowitz*, 641 A.2d at 1164. (referencing the fact that victim said "no" throughout encounter and noting, "while such an allegation of fact would be relevant to the issue of consent, it is not relevant to the issue of force").

123. AMERICAN PSYCHIATRIC ASS'N, *supra* note 70 at 530 (noting feature of episode of depersonalization is feeling "as if he or she is living in a dream or a movie").

abuse because he penetrated the victim when he knew he did not have her consent.

But what if the victim reacted to Berkowitz's escalating sexual advances with more powerful symptoms of peritraumatic dissociation? What if, as a result, she became deeply passive and said nothing? Under the No Model, if she said nothing there would be no crime. Under the Yes Model, Berkowitz would argue that he had "conduct indicating affirmative, freely given permission to the act of sexual penetration."<sup>124</sup> After all, the victim was drinking when she came into his dorm room, she had stopped by his dorm room intoxicated before, and on a previous occasion she asked him the size of his penis. These are the arguments Berkowitz would make under the Yes Model.

Under the Negotiation Model, however, *Berkowitz* changes shape. Berkowitz failed to negotiate with his victim about whether he could penetrate her. The fact that she said "no" throughout the encounter simply underscores Berkowitz's failure to consider her desires and boundaries. Even if she had never said "no," Berkowitz could not simply press ahead to intercourse based on her passive reaction to his advances and his fantasy about what she meant when she asked him the size of his penis. He would have to ask her whether she wanted to be penetrated, or tell her that he wanted to have sex with her and ask if she wanted that, too. His failure to negotiate with her and come to an agreement about the sexual penetration would constitute rape.

## 2. *M.T.S.*

Seventeen-year-old M.T.S. was temporarily living with fifteen-year-old C.G.'s family. C.G. accused him of sexual assault, but the two parties disputed the details of what happened on the instance in question.<sup>125</sup>

According to C.G., M.T.S. told her three or four times that he was going to make a surprise visit to her bedroom that night. She awoke early in the morning to find her shorts and underwear removed, and that M.T.S. had already maneuvered his penis inside her vagina. As soon as she realized what was happening, she slapped him and told him to get off her and get out, which he did.<sup>126</sup>

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124. SCHULHOFER, *supra* note 17 at 2 83.

125. *M.T.S.*, 609 A.2d at 1267-69.

126. *Id.*

According to M.T.S., by contrast, C.G. and he had engaged in “kissing and necking” during the three days before the instance in question. She encouraged him to make a surprise visit to her room late that night, which he did. They began to kiss and pet one another. They then engaged in consensual sex until the fourth thrust when C.G. told M.T.S. to stop, at which point he got off her. C.G. then slapped him.<sup>127</sup>

The trial court assessed the testimony in this way:

Faced with this sharply divergent testimony concerning the sexual activity, the trial judge made explicit factual findings. He determined that the couple had been [consensually] kissing and petting, had undressed and had gotten into the victim’s bed and then had sex, but that the actual sex act had not been consented to by the victim.<sup>128</sup>

The court also found that there was “no definite expressed refusal by the victim” at the time penetration occurred.<sup>129</sup>

On appeal, the New Jersey Supreme Court declared, “[A]ny act of sexual penetration engaged in by the defendant without the affirmative and freely-given permission of the victim to the specific act of penetration constitutes the offense of sexual assault.”<sup>130</sup> *M.T.S.* is an important case because it is the first in which a court adopted the Yes Model of rape law reform and, contrary to *Berkowitz*, did not require that the defendant employ a level of physical force beyond that required to engage in non-consensual penetration.

The New Jersey Supreme Court reinstated the disposition of juvenile delinquency for M.T.S.’s commission of sexual assault. It noted, “[T]he factfinder must decide whether the defendant’s act of penetration was undertaken in circumstances that led the defendant reasonably to believe that the alleged victim had freely given affirmative permission to the specific act of sexual penetration,” and noted that permission “can be indicated either through words or through actions.”<sup>131</sup>

Many legal scholars heralded the case as a major step forward. But when one applies the principles of the Yes Model to the specific circumstances in which C.G. and M.T.S. found themselves, it is clear that the case could easily have gone and perhaps should have gone the other way.

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127. *Id.*

128. *In re M.T.S.*, 588 A.2d 1282, 1283 (N.J. Super. Ct. 1991) *rev’d by*, 609 A.2d 1266 (1992).

129. *M.T.S.*, 609 A.2d at 1285.

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

131. *Id.* at 1278.

Under the facts as found by the trial court, C.G. consented to kissing and petting, got into bed with M.T.S., never said “no” or expressed any other form of refusal; and then M.T.S. penetrated her. Under the No Model, of course, without verbal objection there is no crime. Under the Yes Model, according to Schulhofer, “If she doesn’t say ‘no,’ and if her silence is combined with passionate kissing, hugging, and sexual touching, it is usually sensible to infer actual willingness.”<sup>132</sup> C.G. was engaged in exactly the kind of kissing and petting from which it would supposedly be “sensible” for M.T.S. to infer actual willingness. Under the Yes Model, therefore, without verbal objection, there was no crime. Despite the fact that the New Jersey Supreme Court deferred to the trial court in *M.T.S.*, it noted, “[C]ases such as this are inherently fact sensitive and depend on the reasoned judgment and common sense of judges and juries.”<sup>133</sup> Indeed, other judges and juries could have decided that M.T.S. had all the affirmative permission he needed to penetrate C.G.

Under the Negotiation Model, *M.T.S.* looks different. M.T.S. failed to discuss the sexual penetration with C.G. before he entered her. He neither told her what he wanted to do nor listened to her desires and boundaries. He could not interpret her wishes based on her body language. He could not rely on his assumption that necking meant consent to sexual penetration. He could not enter her without discussing it first. When two people engage in sexual penetration for the first time, negotiation is ethically and legally required.

### 3. Comparison of Models

The No Model permits a man to penetrate his partner rapidly as long as his partner does not object. In this sense, the No Model discourages negotiation, and instead encourages abrupt and unanticipated penetrative attempts. The Yes Model allows inexperienced teens enjoying sexual petting in their first “hookup”<sup>134</sup> to assume they have actual consent to sexual penetration. The Negotiation Model, by contrast, requires that these teens (or anyone else engaged in first-time penetration) negotiate the sexual penetration afresh with new partners.

The common law called frozen fright in response to sexual trauma consent. The No Model (and even the Yes Model at times) calls the

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132. SCHULHOFER, *supra* note 17 at 272.

133. *M.T.S.*, 609 A.2d at 1279.

134. See generally Elizabeth L. Paul, Brian McManus & Allison Hayes, “Hookups”: Characteristics and Correlates of College Students’ Spontaneous and Anonymous Sexual Experiences, 37 J. SEX RESEARCH 76 (2000).

situation an unfortunate misunderstanding, and then calls it consent. Only the Negotiation Model requires partners to negotiate sexual penetration verbally unless they have established a context between them in which they may reliably read each other's nonverbal behavior.

Sexual penetration requires negotiation. Those who want to engage in penetrative acts with someone else must communicate with their partners and consider their partners' desires, not just their own. Under the Negotiation Model, penetrating a person's body for one's own sexual gratification without communication and without consideration of that person's wishes is against the law.

The Negotiation Model would require more than any state currently requires from those who engage in sexual penetration. Instead of imposing on the victim a verbal imperative to object, as the No Model does, or allowing a man to imaginatively interpret a woman's body language, as the Yes Model does, the Negotiation Model would require a person who sought to initiate penetration with another to consult with his or her partner, at least until there is custom between them that would provide a meaningful context in which to interpret body language.

### C. OBJECTIONS TO NEGOTIATION

One could lodge a number of objections to the Negotiation Model of rape law reform. I will address three of them here: the notions that the Negotiation Model would criminalize all sex, face insuperable evidentiary hurdles, or kill romance altogether. Although each raises serious concerns, none should dissuade efforts to reform rape law based on the Negotiation Model.

#### 1. Criminalizing Sex

One objection to the Negotiation Model of rape law reform is that it would be inconsistent with social and sexual mores. Because people do not negotiate sexual behaviors with their partners, some might argue, the Negotiation Model would categorize almost all sex as rape.

Although the empirical data is limited, it indicates that negotiation of sexual practices between at least younger sexual partners is widespread. A nationally representative random sample survey of 1800 fifteen- to twenty-four-year-olds indicates that eighty-four percent of sexually active adolescents and young adults have had a conversation with their partners about what they feel comfortable doing sexually, and ninety-two percent have had a conversation with their partners about the use of birth control or



condoms.<sup>135</sup> In an age of sexually transmitted diseases, the vast majority of teenagers and young adults correctly feel the need to confer with their partners about sexual practices and the use of contraceptives.

But what about the remaining sixteen percent of sexually active young people, who have not had a conversation with their partners about what they feel comfortable doing sexually? Would they lack fair notice that negotiation would be legally required before sexual penetration would be legitimate? The due process clause in the Fourteenth Amendment and the ex post facto clause in Article I, Section Ten of the U.S. Constitution require that courts and legislatures impose criminal laws on defendants only prospectively. To maximize fair notice, before or once a rape law based on the Negotiation Model is passed in a jurisdiction, there must be widespread public education on television, in schools, and in the media about the ethical and legal importance of negotiating sexual penetration.

Because the vast majority of rapes occur when the victim is between the ages of twelve and twenty-four, there must be a particular focus on education in schools. States should employ sexual education classes to teach both the importance and the practice of sexual negotiation. Virtually all public schools provide some sexual education between the seventh and twelfth grades.<sup>136</sup> Sexual education classes provide a natural forum for teaching young people how to set sexual boundaries and express desires, as well as the significance of respecting their partner's boundaries. Many peer-education workshops on college campuses and sexual education classes in secondary schools already emphasize the importance of obtaining affirmative consent through talking with one's partner before engaging in penetrative acts.<sup>137</sup>

Currently, however, most sexual education in public schools leaves students sexually ignorant, particularly when it comes to negotiating sexual

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135. HENRY J. KAISER FAMILY FOUND., NATIONAL SURVEY OF ADOLESCENTS & YOUNG ADULTS: SEXUAL HEALTH KNOWLEDGE, ATTITUDES AND EXPERIENCES 19 tbl.13 (2003), [http://www.kff.org/youthhivstds/upload/14269\\_1.pdf](http://www.kff.org/youthhivstds/upload/14269_1.pdf) (last visited May 30, 2005) [hereinafter NATIONAL SURVEY OF ADOLESCENTS & YOUNG ADULTS].

136. HENRY J. KAISER FAMILY FOUND., SEX EDUCATION IN AMERICA: A SERIES OF NATIONAL SURVEYS OF STUDENTS, PARENTS, TEACHERS, AND PRINCIPALS 2 (2000), <http://www.kff.org/youthhivstds/loader.cfm?url=/commonspot/security/getfile.cfm&PageID=13531> (last visited May 29, 2005) [hereinafter SEX EDUCATION IN AMERICA]. Thirty-eight states and the District of Columbia mandate that their public schools teach sexual education, STD/HIV education, or both. ALAN GUTTMACHER INST., STATE POLICIES IN BRIEF: SEX AND STD/HIV EDUCATION (2005), [http://www.guttmacher.org/statecenter/spibs/spib\\_SE.pdf](http://www.guttmacher.org/statecenter/spibs/spib_SE.pdf) (last visited May 29, 2005). In the remaining twelve states, although sexual and HIV education are not mandated by statute, such education is nonetheless widespread. *Id.*

137. See SANDAY, *supra* note 113, at 266.

desires and boundaries. One-third of schools nationwide maintain a sexual education curriculum that is “abstinence-only,” and those schools with “comprehensive” sexual education still focus their message on sexual abstinence.<sup>138</sup> In 1999, for example, twenty-three percent of sexual education teachers taught sexual abstinence as the *only* method of preventing pregnancy and STDs, compared with just two percent who did so in 1988.<sup>139</sup>

Schools must substantially revise sexual education, therefore, to provide children with full and accurate health information on the realities and risks of sexual intimacy. It also must incorporate the sexual negotiation of desires and boundaries. The need to employ school sexual education programs to teach sexual negotiation could not be more urgent. By the time they graduate from high school, almost two-thirds of students will have engaged in sexual intercourse.<sup>140</sup> About a third of adolescents and young adults have experienced pressure to have sex.<sup>141</sup> Every year approximately 750,000 girls between the ages of fifteen and nineteen have an unintended pregnancy.<sup>142</sup> Nearly one-in-four sexually active young people contracts a sexually transmitted disease each year, and one-half of new HIV infections in this country occur among people under the age of twenty-five.<sup>143</sup>

Moreover, students want more education about sexual negotiation. Teens and young adults often feel awkward and uncomfortable when it comes to discussing sexuality, yet sexual education does not consistently teach negotiation skills.<sup>144</sup> Forty-six percent of students who have had sexual education say they need more information about how to talk to their

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138. SEX EDUCATION IN AMERICA, *supra* note 136, at 14; David J. Landry, Lisa Kaeser & Cory L. Richards, *Abstinence Promotion and the Provision of Information About Contraception in Public School District Sexuality Education Policies*, 31 FAM. PLAN. PERSP. 280, 283 (1999).

139. Jacqueline E. Darroch, David J. Landry & Susheela Singh, *Changing Emphases in Sexuality Education in U.S. Public Secondary Schools, 1988–1999* 32 FAM. PLAN. PERSP. 204, 209 (2000). Moreover, the decade between 1988 and 1999 saw a decline in the number of sexual education teachers who supported discussing topics such as homosexuality, abortion, and birth control. *Id.* at 206–07. Almost one in five students report that sexual education in their schools presents sexual intercourse as “something to fear and avoid.” SEX EDUCATION IN AMERICA, *supra* note 136, at 19. Approximately one fifth of sexual education classes teach that abortion (20%), homosexuality (18%), and masturbation (17%) are “immoral or wrong.” *Id.* at 20.

140. NATIONAL SURVEY OF ADOLESCENTS & YOUNG ADULTS, *supra* note 135, at 12.

141. *Id.* at 3. Nine percent of sexually active adolescents say they were 13 or younger when they first had sexual intercourse. *Id.* Seventy-six percent of people aged 15–24 report that sexual violence is a “very” or “somewhat” big concern facing people their age. *Id.* at 6 tbl.1.

142. HENRY J. KAISER FAMILY FOUND., IT’S YOUR (SEX) LIFE: YOUR GUIDE TO SAFE & RESPONSIBLE SEX 6 (2004), [http://www.kff.org/entpartnerships/upload/27993\\_1.pdf](http://www.kff.org/entpartnerships/upload/27993_1.pdf) (last visited May 30, 2005) [hereinafter IT’S YOUR (SEX) LIFE].

143. NATIONAL SURVEY OF ADOLESCENTS & YOUNG ADULTS, *supra* note 135, at 2.

144. SEX EDUCATION IN AMERICA, *supra* note 136, at 19.

partners about birth control and sexually transmitted diseases; the same percentage wants more information about how to deal with the emotional issues surrounding sex.<sup>145</sup> Fifty-five percent want more information about what to do if they or a friend have been raped or assaulted.<sup>146</sup> In short, young people “want more instruction on communicating effectively with partners about sensitive sexual concerns and relationship issues.”<sup>147</sup> It is time to give them that instruction. Along with education through television, newspaper, radio, and other media, enhanced sexual education in schools would be one mechanism to provide fair notice of the ethical and legal importance of sexual negotiation, so people could conform their conduct to the requirements of the law.

## 2. He Said/She Said

A second objection to the Negotiation Model of rape law reform is that it faces evidentiary problems. Under this view, allegations of rape would too often fall into the proverbial “he said/she said” quagmire. This problem is certainly not unique to the Negotiation Model, of course. Under status quo, for example, he often alleges that she willingly engaged in sexual intercourse while she alleges that he coerced her by pinning her down and forcing himself upon her. Under the No Model, he alleges that she willingly engaged in sexual intercourse and she alleges that she said “no” and he penetrated her in spite of her clear protests. Under the Yes Model, he alleges that she willingly engaged in sexual intercourse by giving him nonverbal permission for it and she alleges that her actions could not have been reasonably interpreted as an expression of consent. Unless the law requires physical evidence of force (bruises, knife wounds, broken bones, etc.), which would exempt the vast majority of rapes from legal purview,<sup>148</sup> the decision-maker in a rape case will invariably have to weigh the relative credibility of the affiants and decide whether or not the state has proven its case beyond a reasonable doubt.

Moreover, the law makes exactly these kinds of credibility determinations in other kinds of disputes and we do not imagine that justice has crumbled. In cases involving verbal contracts for the sale of goods, the directly conflicting testimony of the plaintiff and defendant may be the only evidence offered. Judges and juries are trusted to parse the evidence

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145. *Id.* at 5.

146. *Id.*

147. NATIONAL SURVEY OF ADOLESCENTS & YOUNG ADULTS, *supra* note 135, at 2.

148. Anderson, *supra* note 12 at 1003 n.298. (noting studies that indicate offenders in acquaintance rapes use high level of verbal abuse but little physical force).

carefully and determine whether the plaintiff has met the requisite burden of proof. In criminal cases involving fraud, robbery, conspiracy, assault, and extortion, for example, often the only evidence is the directly conflicting testimony of the alleged victim and the defendant. Judges and juries are trusted to determine whether the prosecution has proven its case beyond a reasonable doubt.

The Negotiation Model does not reach into the bedroom further than other models of rape law reform. The law is already in the bedroom, asking questions and trying to prevent abuse. The Negotiation Model simply asks a different question. Again, instead of asking, “What did she let him do?” because she failed to object or granted nonverbal permission with a wink and a nudge, the Negotiation Model asks, “Did the person who initiated sexual penetration negotiate with his or her partner and thereby obtain agreement that sexual penetration should occur?” The dispute would be about whether that kind of communication occurred, and decision-makers would have to assess the credibility of testimony around that question.

### 3. Killing Romance

A final objection to the Negotiation Model of rape law reform might be that requiring verbal negotiation between sexual partners, at least until they establish a custom between them, would kill the romance of sex. Here again, advocates for the No and Yes Models agree. Dripps argues that “insisting on express affirmative permission to exempt intercourse from moral or legal sanction” would result in a significant loss:

What would be lost is some of the spontaneity, some of the intensity, that gives sex its special pleasure. It is possible, after all, to be too diffident or too analytical in bed, whatever our gender or orientation. Call it “eroticized domination,” call it the “robust, uncomplicated lay”—call it whatever you like, but don’t deny that, from whatever causes, the loss of control is a central feature of sexual experience.<sup>149</sup>

Schulhofer concurs. The requirement of verbal discourse before sexual penetration would “impos[e] a degree of formality and artificiality on human interactions in which spontaneity is especially important.”<sup>150</sup>

The reality, however, is that AIDS killed the romance of uncommunicative sex twenty years ago.<sup>151</sup> Individuals mourned and

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149. Dripps, Panel Discussion, *supra* note 53 at 147.

150. SCHULHOFER, *supra* note 17 at 272.

151. In the words of one Antioch College student, “How can you communicate that you’re HIV positive if you don’t talk about sex?” SANDAY, *supra* note 113, at 275.

continue to bemoan the loss of spontaneity and the imposition of formality that the use of condoms has created,<sup>152</sup> but we have managed to overcome those objections without the death of Eros.

For some, employing language to communicate mutual preferences and boundaries may conflict ominously with their fantasies of how individuals should enact sexual desire. These people should probably negotiate sexual penetration well in advance of their trysts.

For others, words can be at least as exciting as silence. They may use negotiation itself as an opportunity to develop affection and heighten mutual desire. People will respond differently and creatively to the demands of verbal discourse in their erotic lives. Sexual passion will likely thrive, so less encumbered as it will be by the threat of rape.

## CONCLUSION

The Negotiation Model of rape law reform encourages sexual partners to treat each other with humanity, and it helps ensure that they agree to sexual penetration before it occurs. Coupled with extensive popular education, the Negotiation Model would help change sexual mores in a positive way. Particularly in an age of widespread sexual assault and sexually transmitted diseases, the law should require people to ask about sexual penetration with their new partners before penetration occurs.

Rape happens at an alarming rate. It causes devastating emotional and psychological harm. Yet by remaining focused on force and consent, the law has utterly failed to redress the crime. The intimate and serious nature of penetration is why negotiation is so crucial to its legitimacy. Still trained too often to acquiesce to male desire, a girl may go along physically with a boy beyond where she feels comfortable. Kissing leads to necking leads to fondling. It has now gone too far, and the girl knows it. She may freeze in terror, or mentally and emotionally leave the scene. At that point, under the common law, the boy may legally penetrate her because he did not have to use force to get there. Under the No Model, he may legally penetrate her because she failed to object verbally. Under the Yes Model, he may legally penetrate her because she engaged in kissing and heavy petting, a functional “yes” in his imagination. Under the Negotiation Model, he may

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152. See, e.g., UNIVERSITY OF MASS. LOWELL COUNSELING CTR., TALKING TO YOUR PARTNER ABOUT CONDOM USE (Dec. 1990), <http://www.uml.edu/student-services/counseling/condom/>; IT'S YOUR (SEX) LIFE, *supra* note 142, at 15.

not penetrate her, no matter the kissing and necking shared, nor his hopeful interpretation thereof, until he breaks out of his solipsistic universe and engages the girl—another human being whose desires and boundaries matter—in a conversation.