ARTICLE

CULTURE, COGNITION, AND CONSENT: WHO PERCEIVES WHAT, AND WHY, IN ACQUAINTANCE-RAPE CASES

DAN M. KAHAN[†]

*This Article uses the theory of cultural cognition to examine the debate over rape-law reform. "Cultural cognition" refers to the tendency of individuals to conform their perceptions of legally consequential facts to their defining group commitments. Results of an original experimental study (*N = *1500) confirmed the impact of cultural cognition on perceptions of fact in a controversial acquaintance-rape case. The major finding was that a hierarchical worldview, as opposed to an egalitarian one, inclined individuals to perceive that the defendant reasonably understood the complainant as consenting to sex despite her repeated verbal objections. The effect of hierarchy in inclining subjects to favor acquittal was greatest among women; this finding was consistent with the hypothesis that hierarchical women have a distinctive interest in stigmatizing rape complainants whose behavior deviates from hierarchical gender norms. The study also found that cultural predispositions have a much larger impact on outcome judgments than do legal definitions, variations in which had either a small or no impact on the likelihood that subjects would support or oppose conviction. This Article links conflict over rape-law reform to a class of controver-*

[†] Elizabeth K. Dollard Professor of Law, Yale Law School. I owe thanks to the Oscar M. Ruebhausen Fund at Yale Law School for generously funding the study described in this Article; to Kw Bilz and Donald Braman for advice on study design and methods; to workshop participants at UCLA School of Law and the University of Florida Fredric G. Levin College of Law for helpful feedback; to Meredith Berger for comments and editorial assistance; and to Katharine Baker, Scott Brewer, Samuel Buell, Marcella Chester, David Hoffman, Douglas Husak, Orin Kerr, Diane Klein, Adam Kolber, Jason Mazzone, Rebecca Mott, Jeff Rachlinski, Dan Simon, and Alex Stein for comments on an earlier draft.

sies that reflect symbolic status competition between opposing cultural groups, and it addresses the normative implications of this conclusion.

INTRODUCTION

Does "no" always mean "no" to sex? More generally, what standards should the law use to evaluate whether a woman has genuinely consented to sexual intercourse or whether she could reasonably have been understood by a man to have done so? Or more basically still, how should the law define "rape"? These questions have been points of contention within and without the legal academy for over three decades.[1]

The dispute concerns not just the content of the law but also the nature of social norms and the interaction of law and norms. According to critics, the traditional and still dominant common law definition of rape—which requires proof of "force or threat of force" and which excuses a "reasonably mistaken" belief in consent—is founded on antiquated expectations of male sexual aggression and female submission.[2] Defenders of the common law reply that the traditional definition of rape sensibly accommodates contemporary practices and understandings—not only of men but of many women as well. The statement "no," they argue, does *not* invariably mean "no" but rather sometimes means "yes" or at least "maybe." Accordingly, making rape a strict-liability offense, or abolishing the need to show that the defendant used "force or threat of force," would result in the conviction of nonculpable defendants, restrict the sexual autonomy of *women* as well as men, and likely provoke the refusal of prosecutors, judges, and juries to enforce the law.[3]

This Article describes original, experimental research pertinent to the "no means . . . ?" debate. In both law journals and law school classrooms, that debate is frequently brought into sharp focus—and sharp contention—by examination of a controversial case, *Commonwealth v. Berkowitz*.[4] In an experimental study, a large and diverse national sample of adults reviewed the key facts in *Berkowitz*, including

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[1] *See generally* SUSAN CARINGELLA, ADDRESSING RAPE REFORM IN LAW AND PRACTICE 12-27 (2009) (chronicling the development of the rape-reform movement that began in the mid-1970s).

[2] *See, e.g.*, JOANNA BOURKE, RAPE: SEX, VIOLENCE, HISTORY 50-82, 389-99 (2007) (discussing the history and cultural understandings of rape, as well as the legal system's current treatment of rape). *See generally* Catharine A. MacKinnon, *Feminism, Marxism, Method, and the State: Toward Feminist Jurisprudence*, 8 SIGNS 635, 651-55 (1983) (discussing the connection between the ideology of male dominance and female subordination and the definition of rape).

[3] *See, e.g.*, Douglas N. Husak & George C. Thomas III, *Rapes Without Rapists: Consent and Reasonable Mistake*, *in* SOCIAL, POLITICAL, AND LEGAL PHILOSOPHY 86, 107-09 (Philosophical Issues vol. 11, Ernest Sosa & Enrique Villanueva eds., 2001).

[4] 641 A.2d 1161 (Pa. 1994).

the uncontested fact that the victim in the case repeatedly said "no" immediately before and during intercourse with the defendant.[5] The subjects then indicated whether they believed the victim consented to sex or could reasonably have been understood to have done so by the defendant. Subjects also indicated how they believed the case should be decided after being supplied with the common law definition of rape or with one of several reform alternatives. The goal of the study was not merely to generate data on whether people perceive "no" as sometimes meaning "yes" to sex and on how different legal standards affect their willingness to convict a man of rape in a case presenting that question. The study also aimed to connect the "no means . . . ?" debate to a psychologically realistic account of how and why people form such perceptions and make such judgments.

"Cultural cognition" refers to the influence of group values on individuals' perceptions of facts.[6] The law often requires decisionmakers to infer facts they cannot directly observe: states of mind, causal links, risks, and the like. In such circumstances, individuals naturally gravitate toward factual perceptions that reflect their group commitments. People who share formative identities tend to apprehend facts in a similar way in part because they are likely to be drawing on common life experiences when interpreting the significance of various events. But more importantly, such individuals face strong psychological pressure to fit their perceptions of how the world *does* work to their shared appraisals of how the world *should* work: forming beliefs at odds with their core values exposes them to dissonance and risks putting them in conflict with others whose opinions of them affect both their material and emotional well-being.[7] As a result, even when individuals of di-

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[5] *Id.* at 1164.

[6] *See generally* Dan M. Kahan & Donald Braman, *Cultural Cognition and Public Policy*, 24 YALE L. & POL'Y REV. 149, 150 (2006) (defining "cultural cognition" as "the psychological disposition of persons to conform their factual beliefs about the instrumental efficacy (or perversity) of law to their cultural evaluations of the activities subject to regulation"); Dan M. Kahan, Paul Slovic, Donald Braman & John Gastil, *Fear of Democracy: A Cultural Evaluation of Sunstein on Risk*, 119 HARV. L. REV. 1071, 1072 (2006) (reviewing and criticizing CASS R. SUNSTEIN, LAWS OF FEAR: BEYOND THE PRECAUTIONARY PRINCIPLE (2005), for its inattention to the phenomenon of cultural cognition).

[7] *See* Geoffrey L. Cohen, *Party over Policy: The Dominating Impact of Group Influence on Political Beliefs*, 85 J. PERSONALITY & SOC. PSYCHOL. 808, 821 (2003); Dan M. Kahan, Donald Braman, John Gastil, Paul Slovic & C.K. Mertz, *Culture and Identity-Protective Cognition: Explaining the White-Male Effect in Risk Perception*, 4 J. EMPIRICAL LEGAL STUD. 465, 470 (2007) (introducing the theory of "identity-protective cognition" and arguing that individuals process information in a way that supports the beliefs associated with the groups to which they belong because challenges to such beliefs could hurt the individuals' well-being).

verse cultural values are exposed to the same sources of evidence—eyewitness statements, expert opinions, and even videotaped recordings of key events—they can hear and see very different things.[8]

The study found that exactly this dynamic is at work when individuals consider the evidence in a case like *Berkowitz*. The question whether the putative victim in that case effectively conveyed consent or the lack of it depends on the answer to another question—*who* is being asked. Individuals who adhere to a largely traditional cultural style, one that prescribes highly differentiated gender roles and features a commitment to hierarchical forms of authority and social organization more generally, are highly likely to believe that "no" did not mean "no" in *Berkowitz*. In contrast, persons who subscribe to a more egalitarian cultural style that denies the legitimacy of hierarchical forms of social organization, including those founded on gender, are much more likely to perceive that the complainant did not consent and that the defendant knew that. These competing perceptions cohere with opposing sets of norms and related scripts of sexual behavior, conformity to which apportions status within the cultural groups adhering to them.

The influence of culture on individuals' perceptions of fact is much stronger, the study found, than other factors that might be expected to affect the result in a case like *Berkowitz*. One such factor is the legal definition of rape. Subjects who were instructed to apply a standard reflecting one or another "reform" definition of rape were not more likely to convict than were subjects instructed to apply the traditional common law definition—or than those who were not supplied with any definition of rape at all. Subjects who were instructed that rape includes sex when a woman *says* "no"—regardless of what she might have meant to convey or what the man understood her to be communicating—were slightly more likely to convict. But the size of this increase was relatively small compared to the impact of cultural predispositions on subjects who received this or any other definition of rape.

Gender also mattered much less than culture—or, more accurately, mattered only in conjunction with it. Overall, women were no more or less likely to favor conviction than were men. However, women who

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[8] *See* Dan M. Kahan, David A. Hoffman & Donald Braman, *Whose Eyes Are You Going to Believe?* Scott v. Harris *and the Perils of Cognitive Illiberalism*, 122 HARV. L. REV. 837, 838 (2009) (using the varied responses to the online video posted in Scott v. Harris, 550 U.S. 372 (2007), to suggest that people are psychologically inclined to interpret facts in a manner consistent with their group identity); *see also* Dan M. Kahan & Donald Braman, *The Self-Defensive Cognition of Self-Defense*, 45 AM. CRIM. L. REV 1, 3-5 (2008) (suggesting that the political debate over self-defense should be attributed to individuals' inclination to form beliefs that support their core values and group commitments).

subscribed to the hierarchical cultural style—particularly older women who did—were more inclined to form a pro-defendant view of the facts. This result also reflects cultural cognition. Those who subscribe to traditional gender norms conceive of saying "no" but meaning "yes" as a strategy some women use to evade the stigma that these norms visit on women who engage in casual sex. Women who have earned high group status by conspicuously conforming to these norms are the ones most threatened by the prospect that women who use this strategy will escape censure. The former are thus the ones with the greatest psychological motivation to construe facts in a case like *Berkowitz* in a manner that focuses the condemnatory force of the law *against* women who can be depicted as saying "no" while meaning "yes."

The cultural-cognition account of who is likely to see "no" as meaning "yes," and why, does not logically entail a particular resolution to the debate over how the law should define rape. It does, however, cast considerable empirical doubt on the factual premises of certain normative arguments conventionally advanced within that debate.

One such premise is that the traditional common law definition reflects a distinctively "male" point of view. The "no means . . . ?" debate does not pit men against women, but rather pits men *and* women who adhere to one cultural style against men and women who adhere to another. Indeed, those with the greatest stake in preserving the law's attentiveness to the possibility that women who say "no" might be merely feigning lack of consent are women whose cultural identities endow them with resentment of other women whose behavior they regard as deviant and subversive.

At the same time, the cultural-cognition account also weakens the claim that modifying the traditional elements of rape risks unjust punishment of men who reasonably rely on social convention. Because of the strong tendency of individuals to conform their perceptions of fact to their cultural outlooks, legal definitions have relatively little impact on how actual cases are likely to be decided. Accordingly, even in jurisdictions that adopt reforms aimed at making "no" mean "no" without qualification, men who have internalized norms that members of their own communities share are unlikely to be judged differently from what they had reason to expect. The group that is likely to be most aggrieved by such a revision in the law consists of hierarchical women, whose concern is not with the impact that redefining rape law would have on their or anyone else's conduct, but rather with the message that such a redefinition would express about the norms on which their status depends.

For this reason, the primary normative issue posed by the cultural cognition of consent in acquaintance-rape cases is not behavioral but political. As a result of the formative impact of cultural outlooks on their perceptions, people are unlikely to behave differently, and legal decisionmakers to decide cases differently, if a jurisdiction replaces the common law formulation of rape with one or another reform standard. But precisely *because* individuals are conscious of the cultural significance of law, such reform is likely to be strongly advocated by those who want to overthrow traditional, stratified gender norms, and resisted by those who are committed to the same—all of whom will understand the stance the law takes as adjudicating the conflict between their worldviews. In this sense, the "no means . . . ?" debate is akin to numerous other debates that present themselves as empirical in nature (e.g., whether the death penalty deters murder, whether gun-control laws reduce crime, and whether global warming is a serious threat to human health and the environment) but that are at their essence expressive status conflicts between the adherents of competing cultural styles.[9] How to respond to such issues goes to the core of whether the law should strike a posture of liberal neutrality and what doing so would require in light of individuals' psychological disposition to impute harm to behavior that denigrates their visions of the best life and the ideal society.[10]

This Article will develop these points in three Parts. Part I uses the *Berkowitz* case to outline the "no means . . . ?" debate, identifying three distinct positions on how law and norms do and should interact in this area. Part II describes the experimental study undertaken to address the key empirical premises of those positions. Finally, Part III assesses the study's descriptive and normative implications.

I. THE "NO MEANS . . . ?" DEBATE

The Pennsylvania Supreme Court's decision in *Commonwealth v. Berkowitz*[11] furnishes an instructive focus for examining how the law responds to "acquaintance" or "date" rape. The facts not only highlight those aspects of the law that (in the overwhelming majority of jurisdic-

[9] For accounts of the nature of symbolic status competition in law, see JOSEPH R. GUSFIELD, SYMBOLIC CRUSADE: STATUS POLITICS AND THE AMERICAN TEMPERANCE MOVEMENT 1-24 (2d ed. 1986), and J.M. Balkin, *The Constitution of Status*, 106 YALE L.J. 2313 (1997).

[10] *See* Dan M. Kahan, *The Cognitively Illiberal State*, 60 STAN. L. REV. 115, 116-42 (2007).

[11] 641 A.2d 1161 (Pa. 1994).

tions) make proof of nonconsensual sexual intercourse with a person who verbally resists—who says "no"—insufficient to convict a man of rape. They also powerfully evoke the array of conflicting responses—perceptual, emotional, moral, and political—that account for the enduring debate over whether those features of the law should be changed.

A. Berkowitz

1. The Case

The defendant, age twenty, and the complainant,[12] age nineteen, were college sophomores.[13] They shared a group of friends and had casually socialized with one another.[14] One or more of their encounters had a sexual overtone originating, almost surreally, from a sexual-assault awareness lecture entitled, "Does 'No' Sometimes Mean 'Yes'?"

> Among other things, the lecturer at this seminar had discussed the average length and circumference of human penises. After the seminar, the victim and several of her friends had discussed the subject matter of the seminar over a speaker-telephone with appellant and his roommate Earl . . . . The victim testified that during that telephone conversation, she had asked appellant the size of his penis. According to the victim, appellant responded by suggesting that the victim "come over and find out." She declined.
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> . . . [T]he victim testified that on two other occasions, she had stopped by appellant's room while intoxicated. During one of those times, she had laid down on his bed. When asked whether she had asked appellant again at that time what his penis size was, the victim testified that she did not remember.[15]

The critical events occurred some two weeks after the speaker-phone conversation. As summarized by the intermediate appellate court, the complainant testified that

> [a]t roughly 2:00 [i]n the afternoon . . . , after attending two morning classes, [she] returned to her dormitory room. There, she drank a martini to "loosen up a little bit" before going to meet her boyfriend, with

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[12] I use "complainant"—the term employed in the Pennsylvania Supreme Court opinion in *Berkowitz* and now identified by statute as the appropriate designation at trial, *see* 18 PA. CONS. STAT. § 3101 (2008)—rather than "victim" or "alleged victim," as the latter have tendentious and distracting connotations.

[13] Commonwealth v. Berkowitz, 609 A.2d 1338, 1339 (Pa. Super. Ct. 1992) (per curiam), *aff'd in part and rev'd in part*, 641 A.2d 1161 (Pa. 1994).

[14] *Id.* at 1339, 1341.

[15] *Id.* at 1341 (citations omitted).

whom she had argued the night before. Roughly ten minutes later she walked to her boyfriend's dormitory lounge to meet him. He had not yet arrived.

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

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

Before the victim could leave appellant's room, however, appellant asked her to stay and "hang out for a while." She complied because she "had time to kill" and because she didn't really know appellant and wanted to give him "a fair chance." Appellant asked her to give him a back rub but she declined, explaining that she did not "trust" him. Appellant then asked her to have a seat on his bed. Instead, she found a seat on the floor, and conversed . . . . ["[D]uring this conversation she . . . explained she was having problems with her boyfriend."]

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

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

Ten or fifteen more seconds passed before the two rose to their feet. Appellant disregarded the victim's continual complaints that she "had to go," and instead walked two feet away to the door and locked it so that no one from the outside could enter. ["The victim testified that she realized at the time that the lock was not of a type that could lock people inside the room."]

> Then, in the victim's words, "[appellant] put me down on the bed. It was kind of like—he didn't throw me on the bed. It's hard to explain. It was kind of like a push but no . . . ." She did not bounce off the bed. "It wasn't slow like a romantic kind of thing, but it wasn't a fast shove either. It was kind of in the middle."
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> Once the victim was on the bed, appellant began "straddling" her again while he undid the knot in her sweatpants. He then removed her sweatpants and underwear from one of her legs. The victim did not physically resist in any way while on the bed because appellant was on top of her, and she "couldn't like go anywhere." She did not scream out at anytime because, "[i]t was like a dream was happening or something."
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> Appellant then used one of his hands to "guide" his penis into her vagina. At that point, after appellant was inside her, the victim began saying "no, no to him softly in a moaning kind of way . . . because it was just so scary." After about thirty seconds, appellant pulled out his penis and ejaculated onto the victim's stomach.
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> Immediately thereafter, appellant got off the victim and said, "Wow, I guess we just got carried away." To this the victim retorted, "No, we didn't get carried away, you got carried away." The victim then quickly dressed, grabbed her school books and raced downstairs to her boyfriend who was by then waiting for her in the lounge.
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> Once there, the victim began crying. Her boyfriend and she went up to his dorm room where, after watching the victim clean off appellant's semen from her stomach, he called the police.[16]

The defendant testified in his own behalf. He admitted that he did

> initiate the first physical contact, but added that the victim warmly responded to his advances by passionately returning his kisses. He conceded that she was continually "whispering . . . no's," but claimed that she did so while "amorously . . . passionately" moaning. In effect, he took such protests to be thinly-veiled acts of encouragement. When asked why he locked the door, he explained that "that's not something you want somebody to just walk in on you [doing.]"
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> According to appellant, the two then laid down on the bed, the victim helped him take her clothing off, and he entered her. He agreed that the victim continued to say "no" while on the bed, but carefully qualified his agreement, explaining that the statements were "moaned passionately." According to appellant, when he saw a "blank look on her face," he immediately withdrew and asked "is anything wrong, is something the matter, is anything wrong." He ejaculated on her stomach thereafter because he could no longer "control" himself. Appellant testified that after this, the victim "saw that it was over and then she made her

[16] *Id.* at 1339, 1340 & nn.1-2 (some alterations in original) (citations omitted).

> move. She gets right off the bed . . . she just swings her legs over and then she puts her clothes back on." Then, in wholly corroborating an aspect of the victim's account, he testified that he remarked, "Well, I guess we got carried away," to which she rebuked, "No, we didn't get carried, you got carried away."[17]

The defendant was charged with rape. Consistent with the common law, Pennsylvania law defined rape as "sexual intercourse with another person not his spouse: (1) by forcible compulsion; [or] (2) by threat of forcible compulsion that would prevent resistance by a person of reasonable resolution."[18] The jury returned a verdict of guilty, and the defendant was sentenced to a term of one to four years.[19]

The conviction was overturned on appeal. Affirming a decision by the intermediate appellate court, the Pennsylvania Supreme Court concluded in a unanimous decision that the evidence at trial was insufficient to support a finding of "forcible compulsion."[20] The court noted that the complainant "agreed that Appellee's hands were not restraining her in any manner during the actual penetration, and that the weight of his body on top of her was the only force applied."[21] "She testified that at no time did Appellee verbally threaten her," the court continued, and "the record clearly demonstrates that the door could be unlocked easily from the inside, that she was aware of this fact, but that she never attempted to go to the door or unlock it."[22] "As to the complainant's testimony that she stated 'no' throughout the encounter," the court reasoned, "such an allegation of fact would be relevant to the issue of consent, [but] it is not relevant to the issue of force."[23]

Nevertheless, the court found the evidence sufficient for conviction of the defendant on the lesser offense of "indecent assault."[24] Indecent assault required proof that a person engaged in "indecent contact"—"[a]ny touching of the sexual or other intimate parts of [another] person"[25]—"without the consent of the other person."[26]

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[17] *Id.* at 1341 (alterations in original) (citations omitted).

[18] 18 PA. CONS. STAT. ANN. § 3121(a)(1)-(2) (West 1983). *See generally* 2 WAYNE R. LAFAVE, SUBSTANTIVE CRIMINAL LAW § 17.1(a), at 605-06 (2d ed. 2003) (providing an overview of the common law definition of rape).

[19] 609 A.2d at 1341-42.

[20] Commonwealth v. Berkowitz, 641 A.2d 1161, 1165 (Pa. 1994).

[21] *Id.* at 1164.

[22] *Id.*

[23] *Id.*

[24] *Id.* at 1166.

[25] 18 PA. CONS. STAT. ANN. § 3101 (West 1983).

[26] *Id.* § 3126(1), *amended by* Act of Feb. 2, 1990, 1990 Pa. Laws 6, 8.

"Appellee himself," the court reasoned, "testified to the 'indecent contact.'"[27] Further, "the jury reasonably could have inferred that the victim did not consent to the indecent contact" from her undisputed testimony that "she repeatedly said 'no' throughout the encounter."[28] Accordingly, the defendant's conduct satisfied the elements of indecent assault notwithstanding the absence of "forcible compulsion."[29] For this offense—a misdemeanor under Pennsylvania law—the defendant received a sentence of six to twelve months; he was ultimately paroled after the minimum time served.[30]

2. The Controversy

The topic of "acquaintance" or "date" rape had been a matter of intense political controversy for the better part of two decades by the time *Berkowitz* was decided.[31] Women's rights groups argued that women were being punished for the exercise of sexual autonomy by laws and attitudes that licensed men to impose unwanted sex on women who engaged in supposedly "suggestive" behavior or who had engaged in consensual sexual relations on other occasions with other men.[32] The advocacy efforts of these groups led to legal reforms, including the near-universal adoption of "rape shield" evidentiary provisions, which prohibit rape defendants from introducing evidence of a woman's sexual history.[33] In some states, legislatures amended the definition of rape, although usually in ways that were ambiguous.[34] Such

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[27] 641 A.2d at 1166.

[28] *Id.* The court also affirmed the trial court's ruling excluding evidence that the source of the difficulty between the victim and her boyfriend was the victim's alleged infidelity. *See id.* at 1165-66 (holding that the Rape Shield Law was "specifically designed to protect victims" from "precisely th[at] type of allegation").

[29] *Id.* at 1166.

[30] *See* Mike Frassinelli & Mario F. Cattabiani, *Student in Controversy Paroled*, MORNING CALL (Allentown, Pa.), Feb. 1, 1995, at A1, *available at* 1995 WL 1984672 (reporting the release of the defendant after six months served).

[31] *See generally* STEPHEN J. SCHULHOFER, UNWANTED SEX: THE CULTURE OF INTIMIDATION AND THE FAILURE OF LAW 29-46 (1998) (describing reform efforts and debates from the mid-1970s onward).

[32] *See, e.g.*, Vivian Berger, *Man's Trial, Woman's Tribulation: Rape Cases in the Courtroom*, 77 COLUM. L. REV. 1, 22-32 (1977) (reviewing the negative effects of common myths and stereotypes about female sexuality on both social attitudes and judicial treatment of rape victims).

[33] *See, e.g.*, FED. R. EVID. 412.

[34] *See* SCHULHOFER, *supra* note 31, at 30-33 (summarizing reforms aimed at modifying the resistance requirement and at shifting emphasis from consent (a subjective state of mind) to "forcible compulsion" (an objective measure), but concluding that

hedging might well have been a deliberate response to the resistance that demands for reform also provoked. Social conservatives dismissed concern over date rape as a species of political correctness aimed at obliterating gender differentiation in social roles; a small group of eclectic feminists also dissented, arguing that the agitation over date rape was conditioning women to accept a disempowering "victimhood" identity.[35] Singled out for particular, and particularly effective, ridicule were campus sexual-conduct codes, such as Antioch College's, which required explicit verbal confirmation of consent at each "stage" of sexual activity (kissing, removal of clothing, touching of breasts, contact with genitals, and so forth).[36]

The decision in *Berkowitz* incited a predictable clash between those on both sides of the date-rape divide. Excoriating the "all-male Pennsylvania Supreme Court,"[37] women's rights advocates characterized the ruling as "one of the worst setbacks for the sexual assault movement in the last several years."[38] "What is it about the word 'no' they don't understand?" critics of the decision asked.[39] "Obviously the court has a difficult time comprehending the most unambiguous word in the English language. . . . Almost anyone would agree [the victim] had been raped."[40]

But in truth, not everyone did. Some denied *Berkowitz* was "even remotely about rape."[41] "Oh, please," commented date-rape skeptic

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"even when reform statutes seemed to protect women from sex without their consent, force almost always reentered the picture").

[35] *See, e.g.*, CAMILLE PAGLIA, Op-Ed., *Rape and Modern Sex War*, N.Y. NEWSDAY, Jan. 27, 1991, *reprinted in* SEX, ART, AND AMERICAN CULTURE 49, 49-50 (1992); KATIE ROIPHE, *The Rape Crisis, or "Is Dating Dangerous?"*, *reprinted in* THE MORNING AFTER: SEX, FEAR, AND FEMINISM ON CAMPUS 51, 56-84 (1st ed. 1993); CHRISTINA HOFF SOMMERS, WHO STOLE FEMINISM? HOW WOMEN HAVE BETRAYED WOMEN 242-46 (1994).

[36] *See* Mark Cowling, *Rape, Communicative Sexuality and Sex Education* (reproducing and critiquing the Antioch College Sexual Offense Policy), *in* MAKING SENSE OF SEXUAL CONSENT 17, 19-23 (Mark Cowling & Paul Reynolds eds., 2004).

[37] Robin Abcarian, *When a Woman Just Says "No,"* L.A. TIMES, June 8, 1994, at B10; *see also* Editorial, *Redefine Rape Law So that No Means No*, Hartford Courant, June 5, 1994, at D2, *available at* 1994 WL 4527718 ("In a ruling that can only be called outrageous, the all-male Pennsylvania Supreme Court held unanimously that a woman who merely says 'no' is not a rape victim . . . .").

[38] Dale Russakoff, *Where Women Can't Just Say "No,"* WASH. POST, June 3, 1994, at A1 (quoting Cassandra Thomas, President, Nat'l Coal. Against Sexual Assault).

[39] Editorial, *When "No" Means Nothing*, ST. LOUIS POST-DISPATCH, June 6, 1994, at 6B, *available at* 1994 WLNR 705949 (quoting Deborah Zubow, Women's Int'l League for Peace and Freedom in Phila.).

[40] *Id.*

[41] Nancy E. Roman, *Scales of Justice Weigh Tiers of Sexual Assault; State May Reform Rape Law*, WASH. TIMES, June 16, 1994, at A8, *available at* 1994 WLNR 231421 (quoting Camille Paglia, Professor, Univ. of the Arts).

Camille Paglia, "she goes into the room of a man who's in bed and sits on the floor with her breasts sticking up: What are we teaching our girls? . . . When you go into a man's room and stretch on the floor, you are sending a signal."[42] Other commentators described *Berkowitz* as representative of a class of "cases where there has been some overreaching, disrespect and abuse, but not the overwhelming life-threatening violence we think of traditionally in rape cases."[43]

The Pennsylvania legislature responded to this controversy exactly as one might predict: by ducking it.[44] After a year of debate, the legislature made two changes to the state's criminal code. The first expressly defined "forcible compulsion" for purposes of rape: "Compulsion by use of physical, intellectual, moral, emotional or psychological force, either express or implied. The term includes, but is not limited to, compulsion resulting in another person's death, whether the death occurred before, during or after sexual intercourse."[45] The second change added the new offense of "sexual assault," which was defined simply as "sexual intercourse . . . with a complainant without the complainant's consent."[46] This offense was graded as a second-degree felony and made punishable by a maximum term of ten years' imprisonment[47]—a penalty in between the twenty-year maximum for rape and the two-year maximum for indecent contact.[48]

One could view these changes as effectively overruling *Berkowitz*. Under this reading, the extension of "forcible compulsion" to "moral, emotional or psychological force" could be seen as permitting a rape conviction even when, as in *Berkowitz*, the defendant did not use or threaten to use physical force to overcome the victim's resistance. Moreover, even if a jury could not be induced to find such a man guilty of rape, the new legislation assured he would still be found guilty of a serious felony—"sexual assault"—rather than a mere misdemeanor.

Alternatively, one could view the legislation as effectively codifying *Berkowitz*. The new statutory definition of "forcible compulsion" mir-

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[42] *Id.*

[43] Tamar Lewin, *Courts Struggle over How Much Force It Takes to Be a Rape*, N.Y. TIMES, June 3, 1994, at B8 (quoting Stephen Schulhofer, Professor, Univ. of Chi. Law Sch.).

[44] *See generally* Theresa A. McNamara, Comment, *Act 10: Remedying Problems of Pennsylvania's Rape Laws or Revisiting Them?*, 101 DICK. L. REV. 203 (1996) (describing the legislative history of post-*Berkowitz* reforms and the new legislation's ambiguity).

[45] Act of Mar. 31, 1995, 1995 Pa. Laws 985, 985 (codified at 18 PA. CONS. STAT. § 3101 (2008)).

[46] *Id.* at 987 (codified at 18 PA. CONS. STAT. § 3124.1).

[47] *Id.* (codified at 18 PA. CONS. STAT. §§ 106(b)(3), 3124.1).

[48] *See id.* at 986, 989 (codified at 18 PA. CONS. STAT. §§ 106(b), 3121, 3126(b)).

rored one that existed in Pennsylvania Supreme Court case law predating *Berkowitz*.[49] If Berkowitz himself had not engaged in "forcible compulsion" as that court defined the term, why treat statutory absorption of that definition as permitting conviction of anyone who thereafter behaved as he did? Had the Pennsylvania legislature wanted to assure such a result, it could have done so unambiguously by eliminating the element of "forcible compulsion" altogether and by expressly indicating that proof of intercourse with a woman who says "no" is sufficient for proof of rape.

Indeed, because the legislature declined to indicate that such proof vitiates any inference of "consent," it left open a possible route of escape from liability even for the new "sexual assault" felony: *reasonable mistake*. In many states, the prosecution must show that the defendant knew or reasonably should have known that the complainant did not consent; a reasonable mistake is therefore a defense.[50] Such a defense might be of little practical consequence if the state is already obliged to prove force or threat of force: a man shown to have responded to a woman's resistance by resort to physical intimidation is not likely to be believed if he claims he honestly perceived the woman was feigning lack of consent, much less be given credit for reasonably perceiving that. But a man who overcomes professed verbal resistance to sex *without* force or threat of force might be credited, if the fact-finders themselves believe that women do sometimes say "no" when they are interested in sex. Accordingly, by (arguably) diluting the "forcible compulsion" element of rape and by dispensing with force altogether for "sexual assault," the post-*Berkowitz* reforms (arguably) increased the importance of assuring that such a mistake is understood to excuse a man from liability. Or so reasoned both the supreme-court-appointed drafters of Pennsylvania's standard jury instructions and the state's intermediate appellate court in a case after the reforms were enacted.[51]

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[49] *See* Commonwealth v. Rhodes, 510 A.2d 1217, 1226 (Pa. 1986) (construing "forcible compulsion" as including "not only physical force or violence but also moral, psychological or intellectual force").

[50] *See, e.g.*, People v. Mayberry, 542 P.2d 1337, 1345 (Cal. 1975); State v. Smith, 554 A.2d 713, 717 (Conn. 1989); State v. Koperski, 578 N.W.2d 837, 846 (Neb. 1998). In contrast, some states do not require proof of any mental state with respect to consent. *See, e.g.*, Commonwealth v. Lopez, 745 N.E.2d 961, 964-67 (Mass. 2001).

[51] The court quoted with approval the drafters' Subcommittee Note explaining that,

> In the opinion of the Subcommittee there may be cases, especially now that [forcible compulsion has been] extended . . . to psychological, moral and in-

Pacified, the antagonists in the *Berkowitz* controversy withdrew. But as a succession of similar controversies attests,[52] the debate over the significance the law should afford the word "no" has by no means been definitively resolved.[53]

> tellectual force, where a defendant might non-recklessly or even reasonably, but wrongly, believe that his words and conduct do not constitute force or the threat of force and that a non-resisting female is consenting. An example might be "date rape" resulting from mutual misunderstanding. The boy does not intend or suspect the intimidating potential of his vigorous wooing. The girl, misjudging the boys' [sic] character, believes he will become violent if thwarted; she feigns willingness, even some pleasure. In our opinion the defendant in such a case ought not to be convicted of rape.

Commonwealth v. Fischer, 721 A.2d 1111, 1117-18 (Pa. Super. Ct. 1998) (quoting Subcommittee Note, Pa. Suggested Standard Crim. Jury Instructions § 15.3121A). The court continued,

> It is clear that the Subcommittee gave extensive thought to the ever-changing law of sexual assault and our understanding of sexual behavior in modern times. We agree with the Subcommittee that the rule in [*Commonwealth v. Williams*, 439 A.2d 765 (Pa. Super. Ct. 1982),] is inappropriate in the type of date rape case described above. Changing codes of sexual conduct, particularly those exhibited on college campuses, may require that we give greater weight to what is occurring beneath the overt actions of young men and women. Recognition of those changes, in the form of specified jury instructions [requiring acquittal of a reasonably mistaken defendant], strikes us an appropriate course of action.

Id. at 1118.

The Pennsylvania Superior Court has also concluded that lack of force can still be relevant—extremely so—to the determination of whether a woman genuinely did not consent in a case in which she engaged only in verbal resistance. *See* Commonwealth v. Prince, 719 A.2d 1086, 1090 (Pa. Super. Ct. 1998). The defendant in *Prince* had been convicted of sexual assault but *acquitted* of rape for engaging in sex with his ex-wife despite her verbal resistance and screams of "stop" and "[y]ou're hurting me" made loudly enough to be "heard by her next door neighbor." *Id.* at 1088-89. Characterizing the case as "obviously . . . close on the issue of consent," the court stated that it was "imperative that the jury be instructed clearly and definitively as to where the burden lay on the issue of consent" in sexual assault cases. *Id.* at 1090.

[52] *See, e.g.*, Barbara Brotman, *Campus Debate: At the University of Iowa, an Assault Case Has Raised Questions About Sex, Drinking and the Meaning of the Word "No,"* CHI. TRIB., Dec. 18, 2002, § 8, at 1 (reporting on the campus controversy over a date-rape allegation); Jim Hughes, Adam Thompson & Rick Baca, *Controversy Builds in CU Rape Case*, DENVER POST, May 3, 2002, at B1, *available at* 2002 WLNR 478017 (reporting on the controversy surrounding an allegation of date rape and counterallegations of racial stereotyping in a case involving African-American football players); Ben Eisen, *A Rape Case That's Not Going Away*, INSIDE HIGHER ED, June 19, 2009, http://www.insidehighered.com/news/2009/06/19/assault (describing the controversy surrounding, among other things, a university spokesperson charactering the allegation of rape against student athletes as that of "date rape" rather than "outright rape").

[53] *Compare* Posting of Gregg Easterbrook to Easterblogg, *"No" Does Not Always Mean No; Time to Agree on a Phrase That Does* (Oct. 9, 2003) (on file with author) ("[T]he reality of human interaction is that 'no' does not always mean no. Maybe half the sex in

B. *Law and Norms: Three Positions*

Berkowitz furnishes a textbook treatment (literally) of standard doctrine.[54] Under the still-dominant common law definition of rape, proof that a man engaged in vaginal intercourse with a woman without her consent is legally necessary but not sufficient for conviction. The prosecution must show in addition that the man overcame the will of the victim by "force or threat of force."[55] Force is defined as behavior, extrinsic to the act of sexual penetration, that *overcomes resistance* on the part of the victim.[56] Such resistance, moreover, must be physical, not merely verbal.[57] Absent physical resistance, then, there can be no conviction for rape, unless the prosecution shows that the man induced passive acquiescence by "threat of force," which is defined as behavior that would put a woman in "reasonable fear" of physical injury.[58] Merely engaging in intercourse with a woman who does not consent and who says—repeatedly, loudly, even in tears—"no" is *not* rape under this account of the doctrine.[59]

Accordingly, the debate among legal commentators, at least, is less about whether *Berkowitz* was correctly decided than about whether the standard definition of rape that it enforced should be changed. These arguments can be synthesized into three positions: the standard feminist (or simply "standard") critique of the common law; the conventionalist defense of it; and the norm-reconstruction program.

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world history has followed an initial 'no,' or more than one 'no.' . . . What ends up as consensual sex, however unsatisfying, often begins with the woman saying 'no.'"), *and* Page Rockwell, *No More "No Means No"?*, SALON, Mar. 11, 2006, http://www.salon.com/mwt/broadsheet/2006/03/10/no/print.html (reporting a roundtable discussion in which participants agreed that "'no means no' is too reductive"), *with* Dahlia Lithwick, *No: "No Means No" Is Still a Pretty Good Rule*, SLATE, Oct. 10, 2003, http://www.slate.com/id/2089687 (taking issue with commentator Gregg Easterbrook's argument that proof of nonconsent must involve more than verbal resistance "because in the real world 'no' does not always mean no" (quoting Easterbrook, *supra*)).

[54] *See, e.g.*, KATE E. BLOCH & KEVIN C. MCMUNIGAL, CRIMINAL LAW: A CONTEMPORARY APPROACH 593 (2005) (using an excerpt of *Berkowitz* as a hypothetical); JOSHUA DRESSLER, CASES AND MATERIALS ON CRIMINAL LAW 423-32 (4th ed. 2007) (including *Berkowitz* in the discussion of rape); JAY M. FEINMAN, LAW 101, at 300-01 (2d ed. 2006) (same); MATTHEW LIPPMAN, CONTEMPORARY CRIMINAL LAW: CONCEPTS, CASES, AND CONTROVERSIES 341-42 (2007) (same).

[55] LAFAVE, *supra* note 18, § 17.1(a), at 605.

[56] *See id.* § 17.1(a), at 606, § 17.4(a), at 639-40.

[57] *See id.* § 17.4(a), at 640.

[58] *See id.* § 17.3(b), at 624-26.

[59] *See, e.g.*, *State v. Alston*, 312 S.E.2d 470, 475-76 (N.C. 1984) (holding that an absence of force defeats a rape conviction despite the victim having clearly articulated a lack of consent).

The standard critique links the common law definition of rape to stereotypes of male and female sexuality. Men, under this view, are depicted as naturally impelled by strong and near-continuous sexual urges. Women, in contrast, are thought to be ambivalent: they are normally uninterested in sex but aroused by aggressive sexual pursuit. Thus, a man who stubbornly persists despite signs, including verbal ones, that a woman does not desire sex is not acting abnormally; indeed, he is displaying exactly the sort of virility necessary to stimulate a normal woman's interest and pleasure.[60] Accordingly, the "force or threat of force" element excludes this sort of badgering, which is expected to be commonplace in ordinary sexual relationships, from the definition of rape.[61]

The sort of aberrational conduct that *is* encompassed by the common law definition usually occurs *outside* such relationships—typically, in fact, between strangers. In this situation, a man resorts to violence to obtain sex from a woman because he has no reason to think she will be aroused by his entreaties, however persistent. On the contrary, the ordinary rapist usually has good reason to know that the victim should not find *his* aggression arousing. Rape, according to the standard fe-

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[60] *See generally* BOURKE, *supra* note 2, at 67-76 (2007) (examining various examples of this understanding in popular media and in other nineteenth- and twentieth-century sources).

[61] *See* MacKinnon, *supra* note 2, at 649 ("The law . . . adjudicat[es] the level of acceptable force starting just above the level set by what is seen as normal male sexual behavior, rather than at the victim's, or women's, point of violation."). As one account that reflects the common law attitude put it,

> [W]here the circumstances of the encounter differ from the stereotyped attack—as when the parties were previously acquainted, perhaps to the extent of a "dating" relationship, and the encounter occurred in an apartment to which they both went willingly—one cannot so easily assume the woman's attitude of opposition. Here, the behavior of both parties must be more heavily relied on to evince the woman's attitude toward the act. The woman's behavior ordinarily may be an accurate guide to her attitude. But sometimes the behavior, controlled by personality forces other than those which determine the consciously perceived attitude, will contradict the woman's self-perceived disposition toward the act. When her behavior looks like resistance although her attitude is one of consent, injustice may be done the man by the woman's subsequent accusation. Many women, for example, require as a part of preliminary "love play" aggressive overtures by the man. Often their erotic pleasure may be enhanced by, or even depend upon, an accompanying physical struggle. The "love bite" is a common, if mild, sign of the aggressive component in the sex act. And the tangible signs of struggle may survive to support a subsequent accusation by the woman.

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

minist critique, is conceived of not as a violation of female sexual autonomy but as a usurpation of male prerogative—perhaps that of a woman's husband to exclusive sexual access or of men of appropriate social credentials (e.g., of a particular race) to seek such access to a particular unmarried woman.[62]

The standard critique views the common law of rape, so explained, as one means by which the state enforces male domination of women.[63] The understandings that inform the common law formulation reflect not women's actual desires but rather the desires men impute to women to rationalize control over women's sex lives.[64] As a result of the reciprocal action of the law and these rationalizations on one another, "women are . . . violated every day by men who have no idea of the meaning of their acts to women. To them, it is sex. Therefore, to the law, it is sex. That is the single reality of what happened."[65]

The law indulges male sexual aggression not just through the "force or threat of force" element but also through the reasonable-mistake defense. Because "men are systematically conditioned not even to notice what women want," the law views it as reasonable for men to perceive consent even when women plainly do not intend to convey it[66]—indeed, even when, as in *Berkowitz*, they plainly *tell* them, "no," they do not want to have sex. "Thus do legal doctrines, incoherent or puzzling as syllogistic logic, become coherent as ideology."[67]

Or so says the standard critique; according to the conventionalist defense, it's the claim that the common law reflects a "male point of view"[68] that is ideologically motivated. The reality, according to the

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[62] *See* MacKinnon, *supra* note 2, at 644 ("To the extent possession is the point of sex, rape is sex with a woman who is not yours, unless the act is so as to make her yours."); *id.* at 647 ("[R]ape, as legally defined, appears more a crime against female monogamy than against female sexuality."); *id.* at 653 ("[M]en . . . define rape as they imagine the sexual violation of women through distinguishing it from their image of what they normally do . . . . So rape comes to mean a strange (read Black) man knowing a woman does not want sex and going ahead anyway.").

[63] *See id.* at 655 (discussing how the ideal of "man initiates, woman chooses" favors men); *see also* JOAN MCGREGOR, IS IT RAPE? ON ACQUAINTANCE RAPE AND TAKING WOMEN'S CONSENT SERIOUSLY 62-63 (2005) (noting that rape law assumes an inherent degree of male force).

[64] *See* MCGREGOR, *supra* note 63, at 197-98; Andrew E. Taslitz, *Willfully Blinded: On Date Rape and Self-Deception*, 28 HARV. J.L. & GENDER 381, 395-97 (2005) (explaining how men may deceive themselves regarding women's true sexual desires).

[65] MacKinnon, *supra* note 2, at 652-53.

[66] *Id.* at 653.

[67] *Id.*

[68] *Id.* at 655.

conventionalists, is that "no" does not always mean "no" in the minds of women either.[69] Studies of college-aged women, they point out, show that a substantial proportion—approximately 40%—report having engaged in "token resistance," or saying "no" to sex even though they "had every intention to and were willing to engage in sexual intercourse."[70] In one such study, "68.5% of the total sample reported saying no when they meant maybe."[71] Still other studies have reported that majorities of college-aged women communicate interest in sexual intercourse through "indirect" or "nonverbal" cues such as "offer[ing] the man a drink, invit[ing] the man to a private place that has a romantic ambience,"[72] or, after initiation of sexual activity, "failing to resist genital fondling."[73] Popular reaction against the Antioch Code, which continues to evoke professions of incredulity when proposed to sexually active young adults,[74] confirms that express verbal permission is alien to contemporary conventions for expressing consent to sexual intercourse.

On this view, the common law definition of rape appropriately accommodates these conventions. Because "women sometimes say 'no' when they hope the man will continue," a man can be uncertain about a woman's intentions when she verbally indicates nonconsent but other circumstances (e.g., an invitation to be alone in her apartment, the

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[69] *See* Douglas N. Husak & George C. Thomas III, *Date Rape, Social Convention, and Reasonable Mistakes*, 11 LAW & PHIL. 95, 122 (1992) [hereinafter Husak & Thomas, *Date Rape*] (explaining that some women often say "no" for fear of creating a promiscuous image); Husak & Thomas, *supra* note 3, at 95-96.

[70] Charlene L. Muehlenhard & Carie S. Rodgers, *Token Resistance to Sex: New Perspectives on an Old Stereotype*, 22 PSYCHOL. WOMEN Q. 443, 444 (1998) (italics omitted) (internal quotation marks omitted); *see also* Husak & Thomas, *Date Rape*, *supra* note 69, at 122; Husak & Thomas, *supra* note 3, at 96. For examples of such studies, see Charlene L. Muehlenhard & Lisa C. Hollabaugh, *Do Women Sometimes Say No When They Mean Yes? The Prevalence and Correlates of Women's Token Resistance to Sex*, 54 J. PERSONALITY & SOC. PSYCHOL. 872, 873-74 (1988); Charlene L. Muehlenhard & Marcia L. McCoy, *Double Standard/Double Bind: The Sexual Double Standard and Women's Communication About Sex*, 15 PSYCHOL. WOMEN Q. 447, 457-58 (1991); and Susan Sprecher et al., *Token Resistance to Sexual Intercourse and Consent to Unwanted Sexual Intercourse: College Students' Dating Experiences in Three Countries*, 31 J. SEX RES. 125, 127-31 (1994).

[71] Muehlenhard & Hollabaugh, *supra* note 70, at 874.

[72] Husak & Thomas, *Date Rape*, *supra* note 69, at 116-17.

[73] Husak & Thomas, *supra* note 3, at 94.

[74] *See* Terry P. Humphreys, *Understanding Sexual Consent: An Empirical Investigation of the Normative Script for Young Heterosexual Adults* ("When presented with the Antioch sexual consent policy statement, the majority of both males and females [in the Canadian study] responded that they were against the rigidity of a formal policy which dictated personal sexual behaviour . . . ."), *in* MAKING SENSE OF SEXUAL CONSENT, *supra* note 36, at 209, 219.

couple's consumption of alcohol, willing engagement in foreplay) convey her interest in sexual intercourse.[75] In such a situation, it is consistent with social expectations for a man who has not engaged in threatening behavior to interpret the lack of physical resistance to continued sexual contact (kissing, touching, genital contact, and finally penetration) as a reliable confirmation of consent. The "force or threat of force" element, on this account, thus draws the line exactly where convention places it.[76]

Of course, because the conventions used to communicate consent are inherently ambiguous, it is possible that a man who treats a woman's actions, or lack of them, as a truer representation of her desires than her words will be mistaken as to consent. But if under the totality of the circumstances others would concur that he construed her behavior consistently with the cues "by which women actually express their agreements to have sex in the real world," he cannot be deemed morally culpable for his actions.[77] In that case, the reasonable-mistake defense appropriately shields him from criminal liability.[78]

Critics of the conventionalist position offer a number of responses. One is simple denial of its empirical premise. The token-resistance studies, some argue, suggest that the proportion of women who have stated "no" when they mean "yes" is too small to justify characterizing this form of verbal misdirection as a "convention" or to make it reasonable, statistically, for a man to assume that "no" means anything other than "no" on a particular occasion.[79] Others question whether responses obtained in the questionnaires used to compile data on the incidence of token resistance can be reliably interpreted.[80] It is unclear, for example, how closely the forms of indirection in which the respondents reported having engaged resembled the facts in *Berkowitz*. The studies, moreover, are old: none seems to have been conducted in the last decade.

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[75] Husak & Thomas, *supra* note 3, at 96.

[76] *See* Husak & Thomas, *Date Rape*, *supra* note 69, at 123-24.

[77] *Id.* at 95.

[78] *See* Husak & Thomas, *supra* note 3, at 87 ("[C]riminal law typically recognizes that persons who make reasonable mistakes of fact that rebut mens rea are not subject to punishment." (emphasis omitted)).

[79] *See, e.g.*, MCGREGOR, *supra* note 63, at 209-12 (arguing that such an approach "does not guard against the statistically large number of times that women are genuinely not consenting to sex").

[80] *See, e.g.*, Muehlenhard & Rodgers, *supra* note 70, at 448-51 (casting doubt upon previous studies by presenting data showing that respondents' narratives evinced a misunderstanding of the definition of token resistance).

The norm-reconstruction program, in contrast, accepts that token resistance has an enduring empirical basis—and is a source of potential confusion when men interpret women's intentions[81]—but denies that this practice justifies the common law definition of rape. It's true, the adherents to this position concede, that some women find it satisfying to engage in verbal misdirection of their sexual intentions.[82] But as the token-resistance studies show, a significant fraction of sexually active women don't engage in this behavior; when they say "no," they *always* mean "no." Women who refrain from the practice of token resistance are endangered by the behavior of women who engage in it because of the risk this practice creates in that men will genuinely misunderstand the intentions of women who say "no" and mean it—or that men will strategically exploit the disposition of others to credit specious claims of mistake. In this conflict, the law should side with the interests of the women who eschew token resistance. The benefit that women who participate in token resistance obtain from it, the norm reformers argue, is of insufficient social value to outweigh the harm suffered when women's genuine lack of consent is ignored.

Rather than passively reflect the norms underlying token resistance, then, the law should attack and change them. In the crime of rape, "'[c]onsent' should be defined so that no means no. . . . As for intent, unreasonableness as to consent, understood to mean *ignoring a woman's words*, should be sufficient for liability."[83] "The challenge we face in thinking about rape is to use the legitim[at]ing power of law to reinforce what is best, not what is worst, in our changing sexual mores."[84]

The conventionalists resist the norm-reconstructionist position, too. Because the "no means yes" script is "deeply embedded" in the expectations of men and women, "[t]here is bound to be a considerable lag between the time a law is passed and the time that conduct actually changes."[85] During this time, large numbers of men will be con-

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[81] *See generally* Antonia Abbey, *Misperception as an Antecedent of Acquaintance Rape: A Consequence of Ambiguity in Communication Between Women and Men* (acknowledging, after an analysis of the data, that "token resistance perpetuates miscommunication between the sexes and encourages date rape"), *in* ACQUAINTANCE RAPE: THE HIDDEN CRIME 96, 104-06 (Andrea Parrot & Laurie Bechhofer eds., 1991).

[82] *See, e.g.*, SUSAN ESTRICH, REAL RAPE 100 (1987) ("Women as well as men have viewed male aggressiveness as desirable and forced sex as an expression of love."); SCHULHOFER, *supra* note 31, at 63-64 ("[M]en are not the only ones who believe that 'no' can mean yes. Women sometimes share that vocabulary themselves.").

[83] ESTRICH, *supra* note 82, at 102-03 (emphasis added).

[84] *Id.* at 101.

[85] Husak & Thomas, *supra* note 3, at 106.

victed of felonies for acting, reasonably and in good faith, on the basis of "generalizations that describe how persons actually behave."[86] Indeed, the shocking spectacle of men losing their liberty for such behavior is precisely the mechanism contemplated for jolting people into the realization that "their accustomed ways of doing things" are now illegal.[87] In addition, once men "get the message" that they must presume "no" means "no" regardless of what they have reason to believe a woman intends, the sexual autonomy of *women* will also be constrained. Those who follow the "no means yes" script to experience the thrill of feeling overcome by passion will be denied experiences they find pleasurable.[88] Reconstructing norms by annihilating the liberty of nonculpable actors rather than through educating and persuading such persons to change their beliefs and desires, the conventionalists conclude, "is manifestly unjust."[89]

Indeed, coerced norm reconstruction, they maintain, is likely to be futile. "Commentators display both arrogance and naiveté in supposing that statutory change is likely to alter the way that persons relate to one another sexually."[90] At best, radical reform will be inert because of the disposition of decisionmakers to construe general statutory formulations in a manner that fits the law to their expectations about what behavior means.[91] Consider the fate of the post-*Berkowitz* reforms: when authoritative commentators and jurists observed that the Pennsylvania legislature had authorized an offender to be punished for sexual assault and possibly even rape without proof of physical force, they inferred that defendants in date-rape cases—ones in which a woman says "no" to sexual intercourse but does not physically resist—should be permitted to assert a "reasonable mistake of fact" defense.[92]

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[86] *Id.*

[87] *Id.*

[88] *See* Husak & Thomas, *Date Rape*, *supra* note 69, at 113-14 ("A proposal designed to make it more difficult for men to get away with rape might have the unanticipated effect of making it harder for some women to get what they want."); Husak & Thomas, *supra* note 3, at 109 (arguing that rape law should "allow persons to express or withhold their consent to sex by whatever means they choose").

[89] Husak & Thomas, *Date Rape*, *supra* note 69, at 126; *see also* Husak & Thomas, *supra* note 3, at 106-07.

[90] Husak & Thomas, *supra* note 3, at 106.

[91] *See* Husak & Thomas, *Date Rape*, *supra* note 69, at 110-11 (noting that reform statutes can be read consistently with the convention that treats behavior as trumping a verbal "no").

[92] *See supra* text accompanying notes 43-51; *see also* Reynolds v. State, 664 P.2d 621, 624-25 (Alaska Ct. App. 1983) (explaining that while "the legislature has substantially enhanced the risk of conviction in ambiguous circumstances by eliminating the re-

At worst, laws that frontally assault those expectations—by treating sex when a woman says "no" as rape despite the absence of any force and despite the presence of nonverbal cues that conventionally signify consent—will backfire. Police will refuse to arrest, prosecutors to charge, and juries to convict. Their conspicuous resistance, moreover, will be seen as confirming that the new law reflects not genuine changes in public mores but only the illegitimate responsiveness of the law to special-interest advocacy groups. That message will reinforce existing norms, including the "no means yes" script, in the mind of the public.[93] The apparent inefficacy of reform efforts in the small number of states that have significantly departed from the common law definition of rape[94] has been attributed to such dynamics.[95]

To mitigate the risk of backlash and the perceived unfairness of stigmatizing as "rapists" men who have internalized prevailing norms, some commentators have proposed creation of a separate, less severely punished offense for nonconsensual but nonforcible sexual intercourse.[96] This approach matches the outcome that the Pennsylvania Supreme Court achieved in *Berkowitz* when it affirmed the defendant's conviction for the lesser offense of "indecent assault" and the compromise that the Pennsylvania legislature codified when it created the new offense of "sexual assault."[97] Treating nonconsensual but nonforcible sex as a separate crime might be seen as an interim measure that would enable redefinition of rape law itself at a later time, after public expectations have adapted to the condemnatory message conveyed by the new crime.[98]

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quirement that the state prove 'resistance,'" requiring proof of "recklessness" as to lack of consent "counteract[s] this risk").

[93] *See* SCHULHOFER, *supra* note 31, at 104-05 ("[I]t seems plausible that a poor fit between legal terminology and ordinary language will tend to impede success in both directions of the legal-cultural dialogue. . . . The risk is nullification at all levels. Prosecutors and jurors may misunderstand the new message (it's not *really* force, not *really* rape). Other citizens may not even hear it.").

[94] *See generally* Jody Clay-Warner & Callie Harbin Burt, *Rape Reporting After Reforms: Have Times Really Changed?*, 11 VIOLENCE AGAINST WOMEN 150 (2005) (documenting empirically the lack of effects from reform).

[95] *See* Dan M. Kahan, *Gentle Nudges vs. Hard Shoves: Solving the Sticky Norms Problem*, 67 U. CHI. L. REV. 607, 623 (2000) ("The failure of rape law reform fits the profile of a self-defeating 'hard shove.' There is genuine societal ambivalence about the 'no means yes' norm.").

[96] *See, e.g.*, SCHULHOFER, *supra* note 31, at 105.

[97] *See supra* text accompanying notes 24, 46.

[98] *See* Kahan, *supra* note 95, at 624.

But other norm reconstructionists forcefully reject this proposal. Calling coerced sex—whether or not accompanied by force—anything other than "rape," they argue, "may obscure its unique indignity."[99] And far from nudging norms in the direction of attitudes toward condemnation, treating such behavior as a lesser offense would entrench the understanding that merely treating "no" as a "yes" isn't really rape.[100] Indeed, the Pennsylvania Superior Court's engrafting of a more liberal mistake defense onto sexual assault seems to confirm the inefficacy of the "lesser offense" gambit as a strategy of norm reconstruction.[101] Only "no means no" will work.

II. AN EXPERIMENTAL STUDY

Intertwined with the arguments of the standard critique, the conventionalist defense, and the norm-reconstruction position is a series of disputed empirical claims. Is there a convention for initiating consensual sex that involves saying "no"? Is it easily confused with what happened in *Berkowitz*? Is there a conflict between men and women on whether "no" ever means "yes" or "maybe"? Would reforming the common law definition of rape—by dispensing with the "force" element, by imposing strict liability on consent, or by stipulating that intercourse when someone says "no" is legally sufficient for conviction—have any effect in cases like *Berkowitz*? Might the effect be perverse—a resentful backlash *against* convicting in such cases? If such reforms increase the likelihood of conviction, will men who are acting consistently with "accustomed ways of doing things" be taken by surprise?[102] Would women welcome the resulting reconstruction of norms or instead be aggrieved by it?

Because those involved in the "no means . . . ?" debate do not necessarily agree on ends—on what states of affairs the law should pursue or on how different interests should be weighed and conflicts between them resolved—answers to these questions will not dictate a particular resolution to it. But they would clearly help to sharpen it by weeding out normative arguments that rest on misguided factual premises or that offer prescriptions unlikely to achieve their intended effect.

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[99] ESTRICH, *supra* note 82, at 81.

[100] *See* Susan Estrich, *Rape*, 95 YALE L.J. 1087, 1183 (1986) ("[F]orced sex should be a crime even when there is no weapon or no beating. . . . [W]e should be ready to announce to society our condemnation of coerced and nonconsensual sex . . . .").

[101] *See supra* text accompanying notes 46-51.

[102] Husak & Thomas, *supra* note 3, at 106.

In this Part, I will describe a study designed to generate insight into some of the disputed empirical issues in the "no means . . . ?" debate. That study was a mock-juror experiment, in which individual subjects read a detailed vignette patterned on *Berkowitz*, after which they indicated their views of the key facts and the correct verdict.

Such a study can be expected to deepen understanding of the "no means . . . ?" debate in three specific ways. Most obviously, despite the differences between it and an actual trial, a study of this form is highly predictive of how individual jurors are likely to decide a case like *Berkowitz*.[103]

Less obviously but more importantly, such a study can illuminate the bases of *political conflict* over acquaintance-rape cases. The vignette furnishes subjects with a picture comparable in completeness—or, more accurately, incompleteness—to the one that ordinary members of the public are exposed to when they learn about such a case from the media (not to mention the ones law students get when they read an opinion in a casebook). To make sense of it, subjects are forced to draw on the same sensibilities and experiences that provoke such intense and intensely polarized reactions to real-world acquaintance-rape controversies.

Finally, and most importantly, the study can be combined with other sources of empirical information to form a web of convergently validating results. Indeed, as will be explained, the study's hypotheses reflect a synthesis of insights from a variety of social science investigations of token resistance. These materials suggest an account of the "no means . . . ?" debate very different from the ones that animate the standard critique, the conventionalist defense, or the norm-

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[103] Comparative evaluations of different testing formats suggest that mock jurors' reactions to detailed trial vignettes is strongly predictive of how they respond to more vivid forms of proof, including the testimony of live witnesses. *See* Brian H. Bornstein, *The Ecological Validity of Jury Simulations: Is the Jury Still Out?*, 23 LAW & HUM. BEHAV. 75 (1999). In addition, the views of individual jurors after consideration of the evidence are generally thought to be highly predictive of how they'll vote at the conclusion of deliberations, *see* Dennis J. Devine, Laura D. Clayton, Benjamin B. Dunford, Rasmy Seying & Jennifer Pryce, *Jury Decision Making: 45 Years of Empirical Research on Deliberating Groups*, 7 PSYCHOL. PUB. POL'Y & L. 622, 690 (2001), although research suggests that it is generally easier for proacquittal factions to attain support through deliberations than it is for proconviction factions, *see* Robert J. MacCoun & Norbert L. Kerr, *Asymmetric Influence in Mock Jury Deliberation: Jurors' Bias for Leniency*, 54 J. PERSONALITY & SOC. PSYCHOL. 21 (1988). *See generally* Nicole L. Waters & Valerie P. Hans, *A Jury of One: Opinion Formation, Conformity, and Dissent on Juries*, 6 J. EMPIRICAL LEGAL STUD. 513, 537 (2009) (reporting that a survey study of actual criminal jurors supports findings on decisionmaking dynamics generated by mock-jury research but also suggests the importance of deliberations in overcoming dissenting views).

reconstructionist position. The theory of cultural cognition is used to link this account to a set of predictions about who will see what and why in a case like *Berkowitz*.

A. *Theoretical Background and Hypotheses*

1. Cultural Cognition

The cultural-cognition thesis posits that culture is prior to fact in law.[104] Individuals' group commitments determine not merely what significance they believe the law should attach to particular facts but also what they perceive to be legally significant facts.[105] Did a woman who shot her sleeping husband honestly believe she faced an immediate threat of death or great bodily harm?[106] Did the driving of a man who led the police on a high-speed chase put the public at risk of death or serious injury?[107] Does vaccination of schoolgirls against HPV promote promiscuous sex?[108] Do laws permitting citizens to carry concealed handguns increase violent crime or reduce it?[109] The beliefs people form about these and other empirical issues vary in patterns that reflect and reinforce their cultural worldviews.

Cultural cognition is a form of identity self-defense.[110] It is unsettling to be confronted with the claim that behavior revered in one's community is detrimental to society, or that behavior detested within one's community is benign or even socially beneficial. The costs of accepting such a claim can include emotional dissonance and alienation

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[104] Kahan, Braman, Slovic & Gastil, *supra* note 6, at 1083.

[105] *Id.*; *see also* Dan M. Kahan, Donald Braman, John Monahan, Lisa Callahan & Ellen Peters, *Cultural Cognition and Public Policy: The Case of Outpatient Commitment Laws*, 34 LAW & HUM. BEHAV. (forthcoming 2010), *available at* http://dx.doi.org/10.1007/s10979-008-9174-4 (finding that individuals conform their notions of policy-relevant facts to their personal cultural views).

[106] *See* Kahan & Braman, *supra* note 8, at 21-22 (presenting a study of how people use their cultural perceptions to judge self-defense cases).

[107] *See* Kahan, Hoffman & Braman, *supra* note 8, *passim* (using Scott v. Harris to investigate how perceptions of societal risk may differ with alternate visions of society).

[108] *See* Dan M. Kahan, Donald Braman, Geoffrey L. Cohen, John Gastil & Paul Slovic, *Who Fears the HPV Vaccine, Who Doesn't, and Why? An Experimental Study of the Mechanisms of Cultural Cognition*, 34 LAW & HUM. BEHAV. (forthcoming 2010), *available at* http://dx.doi.org/10.1007/s10979-009-9201-0.

[109] *See* Dan M. Kahan & Donald Braman, *More Statistics, Less Persuasion: A Cultural Theory of Gun-Risk Perceptions*, 151 U. PA. L. REV. 1291, 1299-1308 (2003) (confirming through testing that beliefs about gun control are derived from people's cultural perceptions).

[110] Kahan, Braman, Gastil, Slovic & Mertz, *supra* note 7, at 470.

from others whose support is essential to one's material and psychic well-being.[111] The consequences of *others'* widespread acceptance of the claim can include restrictions on behavior necessary to attain respect within one's own community and a diminishment of status for one's group in society at large.[112] Individuals who share a cultural identity are thus predisposed to selectively credit evidence of such claims in a manner supportive of their prior beliefs. For the same reason, people who subscribe to competing cultural identities tend to *disagree* about the validity of such evidence—creating visible forms of cultural conflict that reinforce the impression of all that the status of their respective groups is at stake in policy decisions that turn on disputed facts of this sort.[113]

2. The Cultural Logic of "Token Resistance"

The reason to suspect that cultural cognition might be at work in the "no means . . . ?" debate is the link researchers have established between beliefs about communication of sexual interest and "attitudes [that] represent an aspect of people's core identity."[114] The body of work on token resistance shows that the self-reported incidence of this behavior, as well as the distribution of perceptions related to it, correlates with competing cultural styles.[115]

Measured with a set of related attitudinal scales, these competing styles feature opposing gender norms. One, which is conservative, traditional, and hierarchical in its orientation, prescribes highly differentiated and stratified gender roles. Men demonstrate their virtue through competition in civil society at large. They are entitled to exercise authority over women, whose status depends on successfully dis-

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[111] *See* Cohen, *supra* note 7, at 821.

[112] *See* Kahan, Braman, Gastil, Slovic & Mertz, *supra* note 7, at 470 (connecting this dynamic to white hierarchical and individualistic males' skepticism of assertions that gun ownership and commercial activity—behaviors that are distinctively status enhancing for such individuals—pose societal risks); *see also* Cohen, *supra* note 7, at 821 (noting that dissonance resulting from a disparity in personal belief and group belief may be dissipated by either changing one's attitude to make it consistent with that of the group or reducing association with the particular group).

[113] *See* Kahan, *supra* note 10, at 126-30 (asserting that cultural cognition causes individuals to view "the State's adoption of instrumental policies . . . as adjudicating the competence and virtue of those who adhere to competing cultural outlooks").

[114] Martha R. Burt, *Rape Myths and Acquaintance Rape*, *in* ACQUAINTANCE RAPE: THE HIDDEN CRIME, *supra* note 81, at 26, 33.

[115] *See, e.g.*, Muehlenhard & Hollabaugh, *supra* note 70, at 878 ("[W]hat is important is not the woman's attitudes, but her perceptions of the attitudes held by the culture in general . . . .").

charging domestic responsibilities. Within this way of life, male promiscuity is tolerated—if not admired—but women are expected to be both chaste and faithful; a woman who engages in sex outside of marriage (or outside of a committed relationship likely to lead to marriage) is viewed with suspicion and contempt. The alternative style is more egalitarian in nature. It judges the character of men and women by a largely unitary measure and treats female sexuality as a legitimate expression of individual autonomy.[116]

Token resistance is a social script—a form of behavior recognized and performed because of its cultural meaning—that is distinctive of the hierarchical style.[117] It is not, however, *normative* within that way of life. On the contrary, it is conceived of as a behavioral strategy for *evading* the adverse consequences properly visited on those who defy hierarchical norms of female sexuality.

A woman who subscribes to this style but desires to engage in disapproved-of sexual behavior faces a dilemma. "She can either openly acknowledge her desire for sex and face negative sanctions"—including, ironically, the likely contempt of the man with whom she is interested in having sex—or "she can refuse and be labeled 'respectable.'"[118]

Token resistance can furnish a means to mitigate this conflict. By conforming to this script, a woman obtains the benefit of sex with a particular man while communicating that she does *not* have an appetite for casual or promiscuous sex generally.[119] If successful, this signal will

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[116] *See* Martha R. Burt, *Cultural Myths and Supports for Rape*, 38 J. PERSONALITY & SOC. PSYCHOL. 217, 222-23 (1980) (measuring the correlation between different attitudes and the acceptance of rape myths); Muehlenhard & Hollabaugh, *supra* note 70, at 874-76 (measuring the reasons that women engage in token resistance).

[117] *See* Burt, *supra* note 116, at 229 (finding that hierarchical and traditional attitudes correlate with a belief that women feign resistance to sex); Karen S. Calhoun & Ruth M. Townsley, *Attributions of Responsibility for Acquaintance Rape* (describing research finding that such attitudes correlate with blaming the victim), *in* ACQUAINTANCE RAPE: THE HIDDEN CRIME, *supra* note 81, at 57, 63; Muehlenhard & Hollabaugh, *supra* note 70, at 872 (stating that the belief in token resistance "is based on the traditional sexual script in which women's role is to act resistant to sex and men's role is to persist in their sexual advances despite women's resistance"); *see also* Linda Kalof, *Rape-Supportive Attitudes and Sexual Victimization Experiences of Sorority and Nonsorority Women*, 29 SEX ROLES 767, 773-74 (1993) (finding that acceptance of rape myths and interpersonal violence was more prevalent among college women who joined sororities than among those who did not join them).

[118] Muehlenhard & McCoy, *supra* note 70, at 449.

[119] *See* Michael W. Wiederman, *The Gendered Nature of Sexual Scripts*, 13 FAM. J. COUNSELING & THERAPY FOR COUPLES & FAMILIES 496, 499 (2005) ("The female's task is to show enough sexual interest to communicate to the male that he is special to her, possibly warranting the risks that come with sex, but that she is not the type of female who engages in sexual activity indiscriminately.").

be reassuring to a hierarchical man, whose virility is affirmed when a woman who has demonstrated (appropriate) reluctance to engage in sex generally is nonetheless unable to repress her desire to engage in sex with *him*.[120] His committed behavior toward her thereafter can also help to counter the perception among others that the consent of the woman to sex shows that she is of bad character. Accordingly, "token resistance may be a rational behavior for women in this culture" even if they find no intrinsic value in it or in fact resent it.[121]

This account of token resistance fits women's accounts of why they have engaged in it. Although some women report other reasons for saying "no" when they intended to have sex—such as to avoid being taken for granted, particularly by a man with whom they have been in a longer-term relationship—the most commonly cited reasons are reputational: "[I was in] [f]ear of [a]ppearing promiscuous"; "I didn't want to appear too aggressive or eager"; "I didn't want him to think I was easy or loose"; "I was afraid of his telling other people."[122]

The strategic character of token resistance is also strongly corroborated by the relationship of this behavior to women's perceptions of the cultural style of their sexual partners. If women engaged in token resistance because they found it intrinsically valuable, we might expect them to say "no" when they mean "yes" regardless of the moral outlooks of their sexual partners. But in fact research shows that women by and large tend to engage in token resistance only when they perceive the men with whom they are having sex subscribe to hierarchical gender norms.[123] Women who believe that their sex partners subscribe to the egalitarian style, in contrast, report *not* engaging in verbal misdirection about their sexual desires.[124] This pattern, too, suggests that women who conform to the token-resistance script do so mainly to avoid the adverse inference they believe others (the men they desire to have sex with and

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[120] *See id.* at 498 ("The greater sexual reluctance in women's sexual scripts makes achieving sexual activity with a new partner all the more rewarding for males.").

[121] Muehlenhard & Hollabaugh, *supra* note 70, at 878; *see also* Abbey, *supra* note 81, at 104 (discussing "the effects of gender-role stereotypes on women's sexual behavior"); Robin Warshaw & Andrea Parrot, *The Contribution of Sex-Role Socialization to Acquaintance Rape* (describing how women have been socialized to engage in token resistance), *in* ACQUAINTANCE RAPE: THE HIDDEN CRIME, *supra* note 81, at 73, 75-76.

[122] Muehlenhard & Hollabaugh, *supra* note 70, at 875.

[123] *See* Muehlenhard & McCoy, *supra* note 70, at 457.

[124] *Id.*

the people with whom those men might communicate) will draw about their character if they appear too interested in sex.[125]

Indeed, research on token resistance finds that women who report having engaged in it are themselves likely to be ambivalent toward the hierarchical style. This, too, fits the cultural logic of "no means yes." As one would expect, because they reject hierarchical norms without qualification, college-aged women who are highly egalitarian are very unlikely to report having said "no" when they meant "yes."[126] But the same is true of college-aged women who are the *most hierarchical* in their outlooks. These women have little occasion to engage in token resistance because, consistent with their dedication to hierarchical sexual mores, they report not being sexually active at all.[127] College-aged women committed to hierarchy but only weakly are the ones with the greatest incentive to engage in token resistance, because they are the ones who are unhappy with its norms against casual sex but who have reason to worry about what the effect of defying those norms will be on their standing among their peers.[128]

Whereas the correlation between a hierarchical cultural style and engaging in token resistance takes the form of an inverted "U," the association between a hierarchical style and *perceptions* that women engage in this behavior is more linear. Women who subscribe to the hierarchical style are not only more likely than moderately or extremely egalitarian women to believe that women sometimes say "no" when they mean "yes" to sex.[129] They are also much more likely to see behavior associated with indirect communication of sexual interest—such as having a drink with a man, accompanying him to his apartment, or wearing revealing clothing—as reason to discount explicit verbal protests.[130] The hierarchical style has been associated, too, with a disposition to blame women who engage in these forms of behavior for "leading men on" when those women assert that they have been raped.[131]

In other words, women who are strongly committed to hierarchy not only strongly believe that some women engage in token resistance

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[125] *See id.* at 449 (noting the "double bind" of women who desire sex but wish to avoid being labeled as "easy").

[126] *See* Muehlenhard & Hollabaugh, *supra* note 70, at 875 (finding that sexually experienced women who reported never having engaged in token resistance had the least traditional gender-role attitudes).

[127] *Id.*

[128] *See id.* at 876-78.

[129] *Id.* at 877.

[130] *See* Burt, *supra* note 116, at 229.

[131] *See* Calhoun & Townsley, *supra* note 117, at 63.

but are also very keen to detect and condemn it. The cultural logic of token resistance explains why. Women only weakly committed to hierarchy are attempting to attain the recognition and esteem afforded to women who comply with that cultural style's gender norms *without* genuinely adhering to its rules against gratification of casual sexual desire. From this point of view, the women who practice token resistance are resented for attempting to disguise their vicious characters so that they can wrongfully appropriate the status that should be afforded only to truly virtuous women.

This interest in separating the posers from the genuinely virtuous women—as the hierarchical cultural worldview identifies them—resonates with traditional explications of the "force or threat of force" element of rape. In particular, it captures why the common law jurists equated "force" with physical resistance on the part of the woman:

> While courts no longer require a female to resist to the utmost or to resist where resistance would be foolhardy, they do require her acquiescence in the act of intercourse to stem from fear generated by something of substance. She may not simply say, "I was really scared," and thereby transform consent or mere unwillingness into submission by force. These words do not transform a seducer into a rapist. She must follow the natural instinct of every proud female to resist, by more than mere words, the violation of her person by a stranger or an unwelcomed friend. She must make it plain that she regards such sexual acts as abhorrent and repugnant to her natural sense of pride. She must resist unless the defendant has objectively manifested his intent to use physical force to accomplish his purpose.[132]

On this logic, a woman must physically resist to *convincingly show us*—to make it "plain"—that she possesses the "natural sense of pride" that, in a virtuous woman, makes sex outside an appropriate relationship truly "abhorrent and repugnant." "Mere words" ("no," "stop") are just that—*mere words*, a form of cheap talk that a bad woman can easily use to disguise her lack of virtue. Men know that bad women strategically feign lack of consent for precisely this reason. As a result, "[t]hese words do not transform a seducer"—no hero, to be sure, but one whose indulgence of his natural male appetite for casual sex is excusable—"into a rapist," a man whose willingness to "violat[e]" a *truly* virtuous woman marks him out as unqualifiedly vicious.[133]

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[132] State v. Rusk, 424 A.2d 720, 733 (Md. 1981) (Cole, J., dissenting).

[133] *See generally* Kathryn M. Ryan, *Rape and Seduction Scripts*, 12 PSYCHOL. WOMEN Q. 237 (1988) (presenting scripts of what college students perceived to be typical rape and seduction scenarios, and noting that while dating scripts can "include manipulation, exploitation, and power," they generally lack the violence distinctive of rape scripts).

3. Hypotheses

Because token resistance is associated with contested cultural norms, the cultural-cognition thesis implies that individuals who hold opposing cultural outlooks will form different perceptions of the facts in a date-rape case like *Berkowitz*. As a result of varying experiences and forms of socialization, individuals of diverse cultural persuasions will have competing understandings of the conventions by which people communicate consent to sex. Even more importantly, as a result of varying emotional and social commitments, individuals of diverse cultural persuasions will acquire uneven identity stakes in the law's recognition (or rejection) of the norms that construct the cultural logic of token resistance. Individuals whose group status is bound up with their mastery of those norms will be psychologically motivated to construe legally consequential facts in a way that affirms these norms. Individuals whose status depends on opposing norms, in contrast, will be motivated to see the facts in exactly the opposite way, in part to protect the relative standing of their cultural community in society at large, and in part to protect their own personal standing within that group. We should thus expect date-rape cases to feature the same sort of cultural polarization over facts that characterizes issues like gun control and even climate change.[134]

This account suggests four concrete hypotheses:

First, the law will not matter very much in a case like Berkowitz. The cultural-cognition thesis holds that individuals form perceptions of fact that reaffirm their cultural values. Such affirmation occurs when the law takes a position the social meaning of which credits their norms over competing ones. Accordingly, if the legal doctrine applicable to a class of cases changes, individuals' factual perceptions are also likely to change in whatever way is necessary to assure a meaning-favorable outcome.[135] Thus, individuals' willingness to convict a man of rape in a case in which a woman said "no" should not depend on whether the individuals apply the common law or one or another reform definition of rape, including one aimed specifically at making the law less accommodating of the belief that "no" sometimes means "yes." Confirmation of this hypothesis would help explain why the

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[134] *See* Kahan, *supra* note 10, at 125-42 (describing cultural polarization surrounding numerous policy-related facts on these and other issues).

[135] *See generally* Vicki L. Smith, *Prototypes in the Courtroom: Lay Representations of Legal Concepts*, 61 J. PERSONALITY & SOC. PSYCHOL. 857, 868-69 (1991) (analyzing mock-juror experiments showing that lay perceptions of common crimes trumped legal definitions in jurors' decisionmaking).

adoption of such reforms appears to have had little or no effect on the incidence of rape.[136]

Second, culture will matter a lot. Cultural commitments furnish the norms that shape individuals' interpretations of others' sexual intentions and that psychologically motivate their perception of facts. Relative to the law and other influences, then, individuals' cultural identities should play a large role in explaining their disagreements about what happened in a case like *Berkowitz* and what the verdict should be.

Third, hierarchs and egalitarians will disagree. Again, studies suggest that the logic of token resistance is constructed by norms associated with a hierarchical style that emphasizes traditional gender roles. An outcome that recognizes the validity of the behavioral generalizations reflected in the token-resistance script and, more importantly, that expresses an appropriate judgment of condemnation for this perceived form of strategic norm-evasion is thus affirming of a hierarchical worldview. Individuals who have a hierarchical identity, then, can be expected to form the most pro-defendant fact perceptions and outcome judgments in a case like *Berkowitz*. By the same token, individuals who have egalitarian identities should be expected to form the most anti-defendant fact perceptions and outcome judgments. A verdict of guilty for rape (however the law defines it) is the outcome that most clearly expresses affirmation of egalitarian norms by visiting condemnation on a defendant whose behavior—taking "no" as "yes"—symbolizes hostility to female sexual autonomy.

The framework associated with the cultural-cognition thesis characterizes individuals' worldviews not only as either hierarchical or egalitarian but also as individualistic or communitarian. Individualistic norms tend to confer status on both men *and* women for mastery of market and professional roles.[137] But because communitarian norms reward men and women alike for resistance to acquisitive or self-seeking behavior, the individualist/communitarian dimension of cultural worldview does not oppose gender roles per se as strongly as the hierarchical/egalitarian dimension does. Accordingly, differences

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[136] *See* Carol Bohmer, *Acquaintance Rape and the Law* (discussing studies demonstrating little change in the rate of rape complaints, arrests, and convictions despite reformed rape laws), *in* ACQUAINTANCE RAPE: THE HIDDEN CRIME, *supra* note 81, at 317, 326; Clay-Warner & Burt, *supra* note 94.

[137] *See* Kahan, Braman, Gastil, Slovic & Mertz, *supra* note 7, at 493 (reporting the results of a study confirming that individualistic orientation led to similar effects "without regard to gender" for certain forms of risk associated with gender-specific roles within a hierarchical way of life).

along the former dimension cannot confidently be expected to explain a significant portion of the variance in views about how a case like *Berkowitz* should be decided.

Fourth, other individual characteristics will influence variance in a manner consistent with their relationship to cultural identities. People tend to define their cultural identities not only with reference to their preferences for how social relations should be organized but also with reference to membership in various sorts of groups that tend to be associated with worldviews of that type. Hierarchs, for example, tend to be politically conservative and are more likely to reside in the South; egalitarians are more likely to be liberal and live in the Northeast. Membership in these sorts of groups, then, can reasonably be expected to explain some variance in fact perceptions and outcome judgments in a case like *Berkowitz*, possibly even after cultural values themselves are controlled for.

Gender, on its own, should *not* be expected to be an important predictor of individuals' fact perceptions and outcome judgments. Culture divides women as well as men. As a result, women who subscribe to a hierarchical cultural worldview should, on this account, be disposed toward acquittal, at least relative to egalitarian men, who should be disposed toward conviction. Indeed, the cultural-cognition thesis furnishes reason to expect that hierarchical women might be even stronger in their pro-defendant perceptions and judgments than hierarchical men. As they see it, at least, hierarchical women are the ones whose status is being misappropriated by the women who use token resistance to try to disguise their imperfect commitment to the norms that entitle women to respect within the hierarchical worldview. They are the ones, then, who have the greatest cultural identity stake in aligning the expressive force of law toward condemnation of such behavior.

Thus, if gender *does* impact perceptions and outcome judgments in a case like *Berkowitz*, it should do so *in conjunction* with culture by making hierarchical women the individuals most disposed to believe that "no" meant "yes." This hypothesis fits awkwardly with both the standard feminist critique of the common law definition of rape and the conventionalist defense of it.[138] But it is consistent with the intui-

[138] It is neither at odds with nor supported, however, by past mock-jury studies. Such studies frequently find that women form judgments comparable to those of men in cases in which facts such as consent are in dispute. *See, e.g.*, Louise Ellison & Vanessa E. Munro, *Reacting to Rape: Exploring Mock Jurors' Assessments of Complainant Credibility*, 49 BRIT. J. CRIMINOLOGY 202, 206 (2009) (reporting that female subjects in British mock-

tion of experienced criminal defense lawyers that certain types of middle-aged women will be their very best jurors in a date-rape case.[139]

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juror experiments "[o]ften . . . took a prominent role, asserting that had they been in the complainant's position they would have resisted more forcefully"); Michaela Hynie, Regina A. Schuller & Lisa Couperthwaite, *Perceptions of Sexual Intent: The Impact of Condom Possession*, 27 PSYCHOL. WOMEN Q. 75, 78 (2003) (presenting results of a Canadian study in which both female and male subjects were more likely to perceive consent when the woman who said "no" possessed condoms).

One study (using American subjects) found that being female predicted a greater likelihood of supporting acquittal in rape cases in which consent is disputed. *See* John Stuart Batchelder, Douglas D. Koski & Ferris R. Byxbe, *Women's Hostility Toward Women in Rape Trials: Testing the Intra-Female Gender Hostility Thesis*, 28 AM. J. CRIM. JUST. 181 (2004). This study, however, used a nonrepresentative sample of subjects (over half of whom were working or had previously worked in law enforcement) who volunteered to participate. *See id.* at 188, 190. More importantly, the study furnished no insight into the source of gender differences. In fact, male and female subjects in the study were equally likely to support conviction, *see id.* at 190; gender was a significant predictor (the effect size of which is not reported in practically meaningful terms) only after controlling for prior jury service, past criminal victimization, past service as a law-enforcement officer, and membership in a crime-prevention group. No data were collected (or at least reported) on cultural attitudes, political ideology, or other demographic variables that might have shed light on differences *among* women (or simply wiped out any gender effect among subjects generally). The basic hypothesis of the study—that women would seek to minimize their own sense of vulnerability by discounting the credibility of female sexual-assault victims, or by otherwise attributing blameworthy behavior to the victim—presumably would *not* predict that hierarchical women are more likely than egalitarian ones to form proacquittal sensibilities, as is predicted by cultural cognition.

One mock-juror study that did use attitudinal variables measuring adherence to "rape myths" (e.g., "[a] woman who goes to the home or apartment of a man on their first date implies that she is willing to have sex") found that such measures did significantly predict acquittal in cases in which consent was disputed. *See* Martha R. Burt & Rochelle Semmel Albin, *Rape Myths, Rape Definitions, and Probability of Conviction*, 11 J. APPLIED SOC. PSYCHOL. 212, 216-18, 217 tbl.1, 225 (1981). That study did not find a significant relationship between gender and either adherence to such attitudes or willingness to convict. *See id.* at 223 tbl.3. The study did not investigate, however, whether individual differences in adherence to such attitudes had a larger impact on women than men. In a previous study, one of the same researchers had found that a hierarchical attitude is associated with acceptance of rape myths. *See* Burt, *supra* note 116. To the extent that cultural cognition predicts that hierarchical women will be distinctly inclined to support acquittal in acquaintance-rape cases, it implies either that hierarchical women are more likely to subscribe to rape myths or that hierarchical women are influenced more strongly by adherence to rape myths to support acquittal than are other individuals.

[139] *See, e.g.*, THOMAS THOMPSON, BLOOD AND MONEY 227 (1976) (referencing famous defense lawyer Richard "Racehorse" Haynes's preference for female jurors in rape cases); Bryan Robinson, *Finding the "Ideal" Michael Jackson Trial Juror*, ABC NEWS, Jan. 31, 2005, http://abcnews.go.com/Entertainment/LegalCenter/story?id=438095 (reporting jury-selection expert Neil Vidmar's statement that "some of the harshest critics of victims in [rape] cases have been shown to be women in their 50s").

B. *Design and Methods*

A study was designed to test these hypotheses. In the nature of a mock-jury experiment, the study analyzed subjects' perceptions of the facts and their outcome judgments in a date-rape case patterned on *Berkowitz*.

1. Sample

The study used a diverse, national sample of 1500 Americans aged eighteen years or older. The sample was assembled by Polimetrix, a leading online public-opinion firm, and the study was conducted using Polimetrix's Internet testing facilities.[140] A demographic-matching methodology assured that the sample was representative of the general American population. The sample was 52% female, 74% white, and 11% African-American. The average income level was between $40,000 and $40,999, and the average education level was "some college." The average age of the study subjects was forty-six. Subjects were tested between March 31, 2009, and April 8, 2009.

2. Vignette

Study subjects were advised that they would be assigned to "evaluate the evidence presented in a criminal rape trial" based on a "summary of the evidence . . . taken from a court opinion."[141] They then read a sixteen-paragraph vignette that consisted of a lightly edited version of the statement of the facts in *Berkowitz* as summarized by the intermediate appellate court,[142] which furnished a more detailed account of the trial testimony than did the Pennsylvania Supreme Court. The vignette presented the respective accounts of the defendant and the complainant (identified fictitiously as "Dave" and "Lucy"), who were described as agreeing that the complainant had repeatedly said "no" both before and during sexual intercourse.

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[140] Polimetrix conducts online surveys and experiments on behalf of academic and governmental researchers and commercial customers (including political campaigns). It maintains a panel of over one million Americans to construct representative study samples. For more information, including a description of the sampling methodology, see DOUGLAS RIVERS, SAMPLE MATCHING (n.d.), http://www.polimetrix.com/company/whitepapers.html (follow "Sample Matching: Representative Sampling from the Internet Panels" hyperlink).

[141] The study instrument is reproduced in the Appendix.

[142] *See supra* text accompanying notes 13-17.

Berkowitz was selected as the basis for the study vignette for several related reasons. One was the nexus between the case and contested aspects of rape law in scholarly commentary.[143] Another was the power of the case to provoke conflicting reactions, as demonstrated by the controversy the case occasioned when it was decided in 1994[144] and by the lively debate it continues to generate in law school classrooms.

Still another consideration was the presence of a variety of ambiguous facts in addition to the complainant's verbal protestations. For example, the parties had admittedly engaged in one or more conversations that could be understood as involving explicit sexual banter. Did this fact imply that the complainant was trying to communicate an interest in sex with the defendant? Or did her willingness to engage in bawdy conversation make it seem less plausible to believe (or accept that the defendant would believe) that she was someone who would feel constrained to engage in deliberate misdirection about her desire to have sex in order to avoid appearing unduly interested? The complainant had also consumed a strong alcoholic drink immediately before the alleged rape. Did this fact make it easier to believe that she was in a disinhibited state (possibly of her own design) and thus more open to consensual sex?[145] Or did it suggest that she might have been in a vulnerable condition that the defendant was likely to recognize and exploit by forcing sex on her? The complainant mentioned in her conversation with the defendant immediately before his sexual advances that she was trying to work out problems with her boyfriend. Did she do so to put the defendant on notice that she would not be receptive to a sexual overture, or instead to convey that she might be interested despite her existing relationship? Even if she did not tell the defendant about the problems with her boyfriend in order to invite his sexual overtures, might protecting her relationship with her boyfriend have given her a reason to lie to others about whether she consented—or even to deceive herself as to whether she had consented?

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[143] *See, e.g.*, MCGREGOR, *supra* note 63, at 2 (citing *Berkowitz* as a contemporary example of outmoded physical-resistance requirements); SCHULHOFER, *supra* note 31, at 70-72 (using *Berkowitz* to illustrate difficulties with "force" requirements).

[144] *See supra* text accompanying notes 37-43.

[145] *See* Abbey, *supra* note 81, at 102 (describing studies identifying a woman's consumption of alcohol as a "cue that signals a woman's sexual availability"); *see also* Deborah R. Richardson & Georgina S. Hammock, *Alcohol and Acquaintance Rape* (reporting that study subjects judged a woman complaining of rape more negatively and as more blameworthy if she had consumed alcohol), *in* ACQUAINTANCE RAPE: THE HIDDEN CRIME, *supra* note 81, at 83, 89.

One of the strangest facts in the case was the role of the complainant's attendance at a college-sponsored lecture entitled, "Does 'No' Sometimes Mean 'Yes'?" This fact, too, admits of competing inferences. Presumably the answer offered by the lecturer was "no"—"no" always means "no" to sex; events with this title were part of the effort of women's rights advocates to raise awareness of date rape and to combat the beliefs and attitudes thought to be contributing to it.[146] Accordingly, one could infer that the defendant, having been advised that the complainant had attended a lecture emphasizing this point, could not plausibly have understood the complainant to have meant "yes" when *she* said "no." Alternatively, the very need for the event underscored that there is—or is at least thought to be—a convention in which a woman interested in sex feigns resistance. Thus, one might see this fact as a reminder that the *complainant* might well have meant "yes" when she said "no." Indeed, for persons predisposed to react negatively to the perceived ideological motivations of those pressing for responses to date rape, the very existence of such a lecture might evoke resentment or skepticism inclining them toward a pro-defendant view of the facts. By the same token, persons committed, ideologically or otherwise, to opposing date rape would be cued by this fact to attend to facts supportive of identifying the coercive behavior characteristic of it. Because the ambiguous significance of the complainant's attendance at the lecture could be expected to evoke exactly this tangle of conflicting reactions—and because a decision to alter a material fact of the case would itself have presented difficulties—this feature of the case was retained in the vignette.

3. Experimental Conditions: Alternative Legal Standards

Subjects were randomly assigned to one of five conditions or groups. Those in one—the *no-definition condition*—were not furnished with any definition of rape before responding to items relating to the facts and case outcome.

In each of the other four conditions, subjects were supplied with a distinct definition of the crime before responding to those items.

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[146] *See* Andrea Parrot, *Institutional Response: How Can Acquaintance Rape Be Prevented?* ("For maximum attendance, the loaded terms 'date rape,' 'sexual harassment,' 'acquaintance rape,' or 'sexual assault' should not appear in the program title, because the students who are at risk for acquaintance rape involvement will probably not think these issues pertain to them. Good title choices would be interesting yet related, such as: 'Does No Ever Mean Yes?'. . . ."), *in* ACQUAINTANCE RAPE: THE HIDDEN CRIME, *supra* note 81, at 355, 361.

Members of the *common law condition* were advised that "[a] man is guilty of rape if he (a) uses force or the threat of force (b) to engage in sexual intercourse with a woman (c) without the woman's consent and (d) knows or can reasonably be expected to know the woman does not consent."[147]

Members of the *strict-liability condition* were advised that "[a] man is guilty of rape if he (a) uses force or the threat of force (b) to engage in sexual intercourse with a woman (c) without the woman's consent." They were also instructed explicitly that "a mistaken belief that the woman consented is not a defense."

Members of the *reform condition* were advised simply that "[a] man is guilty of rape if he (a) engages in sexual intercourse with a woman (b) without the woman's consent." They, too, were advised that "a mistaken belief that the woman consented is not a defense." In addition, "consent" was expressly defined: "'[C]onsent' means words or overt actions indicating a freely given agreement to have sexual intercourse." This definition tracks the language of a reform definition adopted by Wisconsin[148] and is similar to one adopted by Washington State.[149] It is intended to eliminate accommodation of the belief that "no sometimes means yes" both by dispensing with the force requirement and by defining consent objectively—as "words or overt actions *indicating a freely given agreement*"—as opposed to a subjective mental state that one might infer to exist despite the complainant's verbal manifestations of nonconsent.

Whereas in Pennsylvania nonforcible, nonconsensual sex is designated as "sexual assault" for the express purpose of distinguishing it from the crime of "rape," in Wisconsin both nonforcible, nonconsensual sex and forcible, nonconsensual sex are designated as forms of "sexual assault," presumably to avoid the inference that the former is different in

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[147] "Sexual intercourse" was defined in the common law condition (and in the other three conditions specifying an express definition of rape) as "the penetration of a woman's vagina by a man's penis."

[148] *See* WIS. STAT. ANN. § 940.225(3) (West 2005) ("Whoever has sexual intercourse with a person without the consent of that person is guilty of a Class G felony."); § 940.225(4) ("'Consent,' as used in this section, means words or overt actions by a person who is competent to give informed consent indicating a freely given agreement to have sexual intercourse or sexual contact.").

[149] *See* WASH. REV. CODE ANN. § 9A.44.060(1) (2009) ("A person is guilty of rape in the third degree . . . [w]here the victim did not consent . . . to sexual intercourse with the perpetrator and such lack of consent was clearly expressed by the victim's words or conduct . . . ."); § 9A.44.010(7) ("'Consent' means that at the time of the act of sexual intercourse . . . there are actual words or conduct indicating freely given agreement to have sexual intercourse . . . .").

kind, as opposed to degree, from the latter.[150] In Washington, nonforcible, nonconsensual sex is designated as a lesser degree of "rape."[151]

For this study, nonforcible, nonconsensual sex was designated as "rape" and was not identified as a less aggravated alternative to a forcible, nonconsensual version of the crime. The point of this feature of the design was to enable testing of the conventionalist claim (shared by some norm reconstructionists) that a definition of rape that assimilates nonforcible, nonconsensual sex to forcible nonconsensual sex can be expected to provoke resistance from decisionmakers.

Finally, members of the *no-means-no condition* were also advised that "[a] man is guilty of rape if he (a) engages in sexual intercourse with a woman (b) without the woman's consent." In this condition, however, subjects were also instructed that "sexual intercourse is 'without the woman's consent' if the woman communicates by actions or by words, including the uttering of the word 'no,' that she does not consent to sexual intercourse." In addition, they were advised that "if [the man] knows that the woman has said 'no,' a mistaken belief that the woman consented is not a defense." A standard akin to this has been advocated by some critics of the common law definition,[152] but no state has adopted statutory language this definitive on the significance afforded to the word "no."

4. Measures

a. *Cultural Worldviews*

As in previous studies of cultural cognition,[153] individuals' cultural values were measured with "agree/disagree" attitudinal items forming two scales: Hierarchy/Egalitarianism (Hierarchy) and Individual-

[150] *See* Estrich, *supra* note 100, at 1183 (describing how categorizing violent rape as a different type of offense than nonforcible, nonconsensual sex might be considered distinguishing a "crime of violence" from "something else").

[151] *Compare* WASH. REV. CODE ANN. § 9A.44.040 (defining first-degree rape as forcible, nonconsensual sex), *and* § 9A.44.050 (defining second-degree rape as forcible, nonconsensual sex without the aggravating factors of first-degree rape), *with* § 9A.44.060 (defining third-degree rape as nonforcible, nonconsensual sex).

[152] *See, e.g.*, ESTRICH, *supra* note 82, at 100 (arguing that even an honest mistake as to consent is still unreasonable).

[153] *See, e.g.*, Kahan, Braman, Monahan, Callahan & Peters, *supra* note 105 (testing hypotheses about how worldviews affect attitudes toward outpatient-commitment laws and generally explaining the Hierarchy/Egalitarianism and Individualism/Communitarianism scales); Dan M. Kahan, Donald Braman, Paul Slovic, John Gastil & Geoffrey Cohen, *Cultural Cognition of the Risks and Benefits of Nanotechnology*, 4 NATURE NANOTECHNOLOGY 87, 87 (2009); Kahan, Hoffman & Braman, *supra* note 8, at 849-60.

ism/Communitarianism (Individualism). The former measures how favorably or unfavorably disposed individuals are toward a social order that features differentiation and stratification of social roles based on observable and largely fixed characteristics (including race, gender, sexual orientation, and class). The latter measures how favorably or unfavorably disposed individuals are toward a social order that treats individuals as responsible for securing the conditions of their own flourishing without collective assistance and that resists collective interference with individual strivings. Scale reliability was high (Hierarchy, $\alpha = 0.89$; Individualism, $\alpha = 0.91$).[154]

Hierarchy is comparable but not identical to the attitudinal measures used to characterize subjects' gender-norm attitudes in studies of token resistance. Like those measures, Hierarchy includes items that relate to traditional gender roles and sexual equality (e.g., "[s]ociety as a whole has become too soft and feminine"; "[p]arents should encourage young boys to be more sensitive and less rough and tough"[155]). However, it also includes items that relate to other dimensions of social stratification unrelated to the gender-norm measures used in those studies (e.g., "[i]t seems like the criminals and welfare cheats get all the breaks, while the average citizen picks up the tab"[156]).

Because the reliability of Hierarchy as a latent attitudinal measure indicates a high degree of affinity between hierarchical gender attitudes and hierarchical attitudes generally, there is no conceptual difficulty in using Hierarchy to test hypotheses related to the former. Indeed, positive results obtained by the use of Hierarchy are arguably *stronger* than ones based on gender-role attitudinal scales. Hierarchy measures a disposition more general than those measured by gender-role scales and is conceptually more remote from the study's dependent variables, which themselves relate to perceptions of sexual behavior.[157]

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[154] Cronbach's alpha (α) is a statistic for measuring the internal validity of attitudinal scales. In effect, it measures the degree of intercorrelation among various items within a scale; a high score suggests that the items can be treated as a valid measure of a latent attitude or trait that cannot be directly observed and measured. Generally, $\alpha \geq 0.70$ suggests scale validity. *See generally* Jose M. Cortina, *What Is Coefficient Alpha? An Examination of Theory and Applications*, 78 J. APPLIED PSYCHOL. 98, 103-04 (1993) (describing the meaning and proper interpretation of coefficient alpha).

[155] Kahan, Braman, Monahan, Callahan & Peters, *supra* note 105, app. B.

[156] *Id.*

[157] *See generally* Paul Slovic & Ellen Peters, *The Importance of Worldviews in Risk Perception*, 3 RISK DECISION & POL'Y 165, 168-69 (1998) (asserting that the influence of distal variables is ordinarily smaller but more important than the influence of proximal variables).

b. *Other Individual Characteristics*

Data relating to the individual characteristics of the subjects were also collected. These included conventional socio-demographic characteristics, such as gender, race, age, religious affiliation, household income, education, community type of residence (urban or non-urban), and region of residence. They also included liberal/conservative ideology and political party affiliation.

c. *Response Measures*

After reading the vignette and the legal definition (if any) corresponding to their experimental condition, subjects indicated the intensity of their agreement or disagreement with a series of statements. Most statements asserted propositions of fact: "Despite what she said or might have felt after, Lucy really did consent to sexual intercourse with Dave" (CONSENT); "Lucy would have tried to push Dave off of her if she had really meant not to consent to sexual intercourse" (NORESIST); "Dave believed that Lucy consented to sexual intercourse" (HONEST); "Given all the circumstances, it would have been reasonable for Dave to believe Lucy consented to sexual intercourse" (REASONABLE); "By saying 'no' several times, Lucy made it clear to Dave that she did not consent to sexual intercourse" (NOMEANSNO). An additional item related to the fairness of a rape conviction in the case: "It would be unfair to convict Dave of a crime as serious as rape" (UNFAIR). The final item related to the outcome: "Dave should be found guilty of rape" (GUILTY).

5. Statistical Analyses

It was anticipated that the results would be analyzed in two steps. Preliminary analyses would consist of the computation of simple response frequencies and means across groups of interest. Thereafter, multivariate analyses, including ordered logistical regression and statistical simulation,[158] would be used to test hypotheses relating to the effect of legal definitions, cultural identities, and other influences.

[158] *See* ANDREW GELMAN & JENNIFER HILL, DATA ANALYSIS USING REGRESSION AND MULTILEVEL/HIERARCHICAL MODELS 137-66 (2007) (explaining how to use statistical inferences and probability models as well as how to check statistical procedures and model fits); Gary King, Michael Tomz & Jason Wittenberg, *Making the Most of Statistical Analyses: Improving Interpretation and Presentation*, 44 AM. J. POL. SCI. 347, 349-54 (2000) (recommending and explaining an approach based on statistical simulation).

Statistical simulations add substantial value to nonlinear multivariate regression. One of the benefits is clarity. The practical upshot of the conventional elements of a regression output—including regression coefficients (whether or not standardized), one or another measure of error (such as standard errors or *t*-statistics), and notations of the presence of specified levels of statistical significance—defy straightforward interpretation, even by those who know what they signify. Through the use of simulations, in contrast, a researcher can derive very precise, universally comprehensible, and practically meaningful estimates of how particular explanatory variables (say, gender, education level, and cultural worldview) influence a quantity of interest (say, the likelihood that a person will take one position or another on a contested issue of fact at trial).[159] Such estimates, moreover, often lend themselves to graphic presentation that conveys relevant information much more readily than regression-output tables do.[160]

In addition, simulation permits a researcher to extract a greater quantity of information from a regression analysis.[161] Normally, evaluation of regression outputs consists simply of noting the presence and sign of statistically significant coefficients. In simulations, variables that fall short of a specified level of statistical significance can (and should) be included in a researcher's estimates.[162] Often it will be worthwhile to generate estimates based only on variance in nonsignificant variables so that readers can make their own assessments of the practical relevance of influences whose confidence intervals suggest that their effect is highly likely to be different from zero—not to men-

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[159] *See* King, Tomz & Wittenberg, *supra* note 158, at 347 (describing how statistical simulations based on multivariate regression "(1) convey numerically precise estimates of the quantities of greatest substantive interest, (2) include reasonable measures of uncertainty about those estimates, and (3) require little specialized knowledge to understand").

[160] *See* Lee Epstein, Andrew D. Martin & Matthew M. Schneider, *On the Effective Communication of the Results of Empirical Studies* (pt. 1), 59 VAND. L. REV. 1811, 1827-34 (2006) (describing how statistical regressions often do not convey as much substance as a graphical depiction of estimates does); Lee Epstein, Andrew D. Martin & Christina L. Boyd, *On the Effective Communication of the Results of Empirical Studies* (pt. 2), 60 VAND. L. REV. 801, 841-42 (2007) (describing the benefits of graphs over regression estimates); Andrew Gelman, Cristian Pasarica & Rahul Dodhia, *Let's Practice What We Preach: Turning Tables into Graphs*, 56 AM. STATISTICIAN 121, 121 (2002) (asserting that graphs are superior to tables for making comparisons).

[161] *See* King, Tomz & Wittenberg, *supra* note 158, at 347.

[162] *See generally* Michael Tomz, Jason Wittenberg & Gary King, *Clarify: Software for Interpreting and Presenting Statistical Results*, J. STAT. SOFTWARE, Jan. 5, 2003, at 1, 19, http://www.jstatsoft.org/v08/i01/paper (stating that inclusion of nonsignificant predictors in simulation "is not problematic because the true quantities of interest are usually the predicted values, . . . not the coefficients themselves").

tion different at the specified level of significance from some pertinent value other than zero.[163] Simulations can also be used to show that variables the effects of which are nonsignificant on their own are statistically (and practically) significant when aggregated in combinations that are relevant to research hypotheses.[164]

The size of the sample furnished adequate power to detect even small effect sizes (e.g., $r = 0.10$) with a probability well over 0.80 at $p \leq 0.05$.[165] This degree of power minimized the risk of Type II error in the testing of hypotheses that involved the absence of a statistically significant and practically meaningful effect.[166]

To facilitate multivariate analyses, missing data were replaced (for the multivariate analyses only) by multiple imputation.[167] Five imputed data sets were used, more than ample for the observed rate of missing data (< 2%).[168]

C. *Results*

Response measures consisted of three types: one item relating to *outcome judgments*; eleven items relating to *fact perceptions*; and one item relating to the perceived *fairness* of conviction. Preliminary analyses—

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[163] *See id.* (explaining that because "even coefficients that are not statistically significant can provide important information[—]after all, a coefficient that is not significantly different from zero will probably [be] significantly different from almost all other numbers"—it is more sensible "to focus on the confidence intervals [the simulation] reports for each quantity it computes than the standard errors of coefficients").

[164] *See* GELMAN & HILL, *supra* note 158, at 42, 69, 141-42 (identifying standards for use of combinations of predictors in nonlinear predictive models and advocating use of simulation for testing their effects); Kahan, Hoffman & Braman, *supra* note 8, at 871.

[165] *See* JACOB COHEN, STATISTICAL POWER ANALYSIS FOR THE BEHAVIORAL SCIENCES 36 tbl.2.3.5, 92 tbl.3.3.5 (2d ed. 1988) (displaying power-value tests run after the experiment is performed).

[166] *See generally* David L. Streiner, *Unicorns* Do *Exist: A Tutorial on "Proving" the Null Hypothesis*, 48 CAN. J. PSYCHIATRY 756, 759 (2003) (noting that more power is needed to avoid a Type II error when there are small or no differences between the two things being tested).

[167] *See generally* Gary King, James Honaker, Anne Joseph & Kenneth Scheve, *Analyzing Incomplete Political Science Data: An Alternative Algorithm for Multiple Imputation*, 95 AM. POL. SCI. REV. 49, 52-54 (2001) (introducing multiple imputation as an algorithm for analyzing political science data when there are missing values); Roderick J.A. Little & Donald B. Rubin, *The Analysis of Social Science Data with Missing Values*, 18 SOC. METHODS & RES. 292, 303-06 (1989) (describing multiple imputation as a method for analyzing social science data sets when some data are missing).

[168] *See* Paul T. von Hippel, *How Many Imputations Are Needed? A Comment on Hershberger and Fisher (2003)*, 12 STRUCTURAL EQUATION MODELING 334, 334 (2005) (concluding that two to ten imputed data sets "suffice under most realistic circumstances").

simple frequencies and means—and multivariate analyses are reported for each type separately.

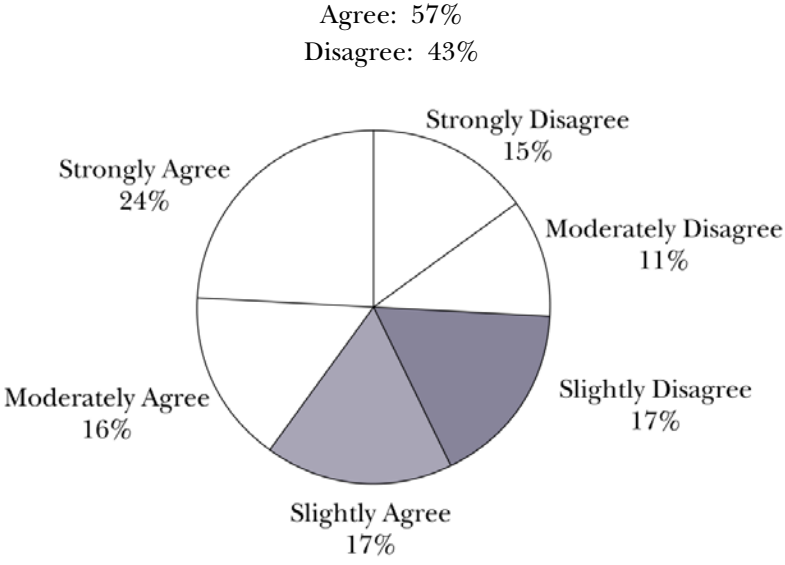
1. Outcome Judgments

a. *Preliminary Analyses*

Outcome judgments were highly varied, as shown in Figure 1. Aggregation of responses across the conditions shows that 57% of the subjects agreed and 43% disagreed at some level of intensity with GUILTY ("Dave should be found guilty of rape"). Moreover, over one-third of the subjects (34%) indicated that they leaned one way or the other only "slightly," as opposed to "moderately" (27%) or "strongly" (39%).

Figure 1: Across-Condition Responses to GUILTY

"Dave should be found guilty of rape."

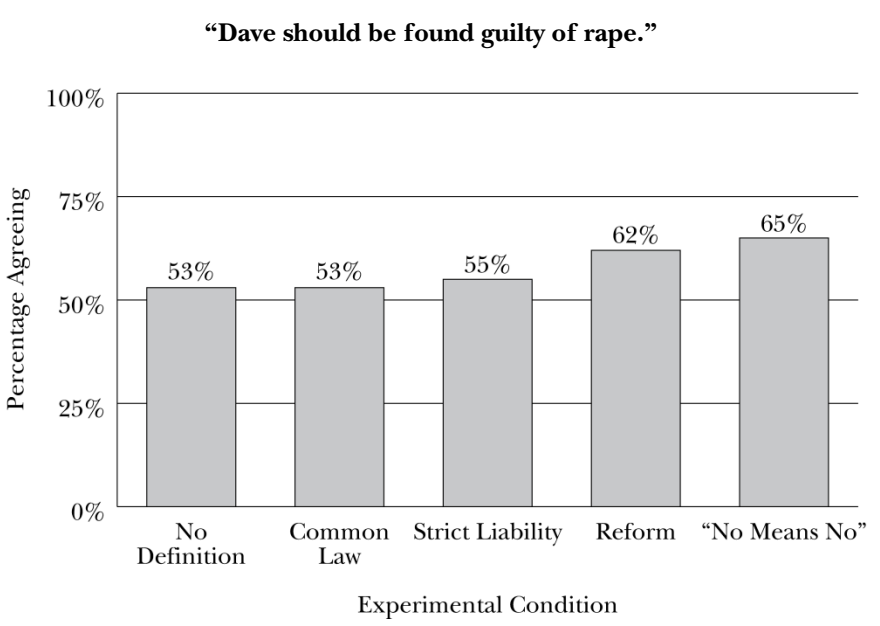


Note: $N = 1497$. Slices indicate percentage of subjects who gave indicated response to GUILTY, all experimental conditions combined.

As Figure 2 shows, disagreement was also pronounced within each of the experimental conditions. Fifty-three percent of the subjects in the common law condition agreed at some level that Dave should be

found guilty; the proportion was the same in the no-definition condition. In the strict-liability condition, 55% agreed, and in the reform condition, 62% did. The proportion agreeing with GUILTY climbed to 65% in the "no means no" condition.

Figure 2: Within-Condition Responses to GUILTY

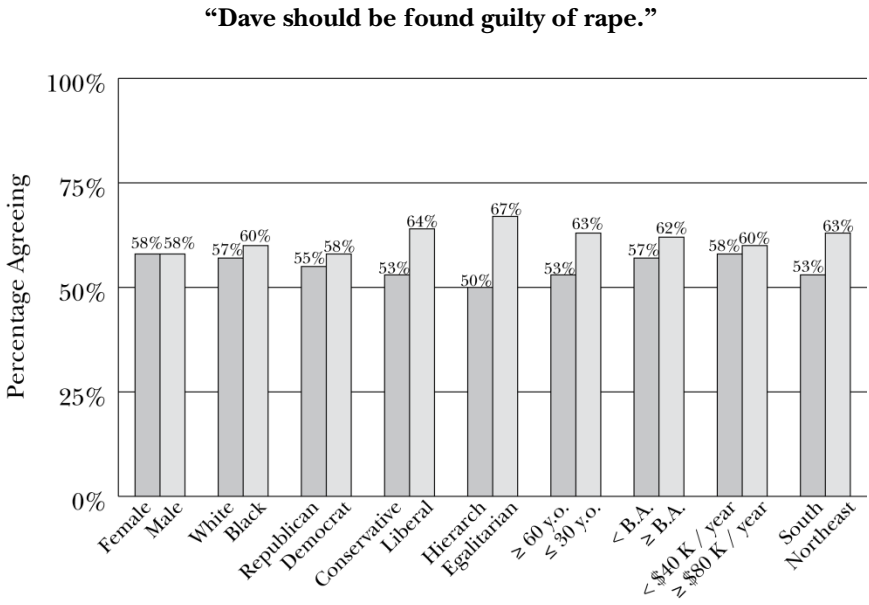


Note: Bars represent percentage of subjects in each experimental condition who either "slightly," "moderately," or "strongly" agreed with the statement, "Dave should be found guilty of rape."

Examination of individual differences revealed disagreement along a variety of lines, as Figure 3 indicates. Moderately egalitarian subjects were more inclined than moderately hierarchical ones to agree that Dave should be found guilty. Similarly, subjects who identified themselves as liberals were more inclined to agree with GUILTY than were subjects who identified themselves as conservatives; the difference among self-identified Democrats and self-identified Republicans, however, was quite small. Northeasterners were more inclined to agree that Dave should be convicted than were southerners, as were relatively young subjects (thirty years old or under) compared to relatively old ones (sixty years old or over). Subjects having graduated

from college were also more inclined to agree than were subjects lacking a college degree.

Figure 3: Individual Differences (Across Conditions) on GUILTY



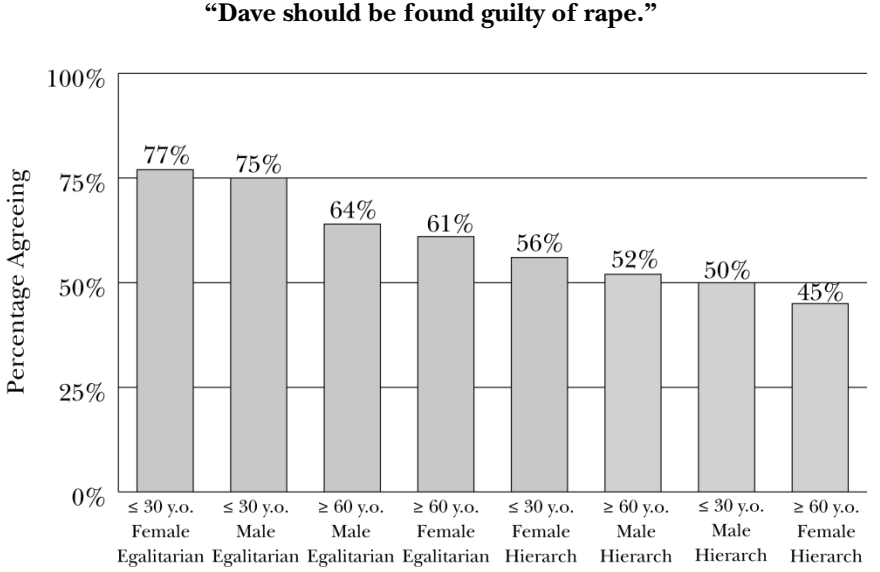
Note: Bars represent percentage of subjects defined by specified characteristic who either "slightly," "moderately," or "strongly" agreed with the statement, "Dave should be found guilty of rape." "Hierarchs" comprise subjects whose score on the Hierarchy scale places them in the top one-third of the sample; "Egalitarians," those whose score places them in the bottom third. Liberals included subjects who selected either "liberal" or "very liberal" on the five-point political-ideology scale; Conservatives, subjects who selected either "conservative" or "very conservative."

Examination of simple response frequencies revealed no meaningful gender or race differences. Aggregating responses across conditions, 58% of both men and women agreed with GUILTY, while 60% of African-Americans and 57% of whites did.

As displayed in Figure 4, there were signs of disagreement, however, between groups defined by combinations of gender, cultural worldview, and age. Only 45% of relatively hierarchical female subjects aged sixty or over agreed with GUILTY. This was a level of support for conviction lower than that expressed by younger hierarchical female subjects (56%) and by both relatively young and relatively old hierarchical male subjects (50% and 52%, respectively). Levels of

support for conviction among relatively egalitarian subjects were comparable for men and women, but lower among relatively older ones (men 64%, women 61%) than among relatively younger ones (women 77%, men 75%).

Figure 4: Individual Differences (Across Conditions) on GUILTY by Age, Gender, and Worldview



Note: Bars represent percentage of subjects defined by characteristic who either "slightly," "moderately," or "strongly" agreed with the statement, "Dave should be found guilty of rape." "Hierarchs" comprise subjects whose score on the Hierarchy scale places them in the top one-third of the sample; "Egalitarians," those whose score places them in the bottom third.

Individual differences within conditions were comparable to those across them. Moderately egalitarian and moderately hierarchical subjects, for example, divided 68% to 54% and 68% to 62% in the reform and "no means no" conditions, respectively, while men and women divided 62% to 61% and 66% to 65% in those two conditions, respectively.

b. *Multivariate Analysis*

In an ordered logistic regression, the experimental conditions and the subjects' individual characteristics (including their worldview scores) were treated as predictors of subjects' responses to GUILTY. The results, reported in Table 1, Model 1, reflect the impact of each predictor when every other predictor is held constant at its mean. To facilitate testing of the study hypotheses, the underlying regression formula was used to derive and compare estimates of the effects of differences in individual predictors and relevant combinations of them, as shown in Figure 5.[169]

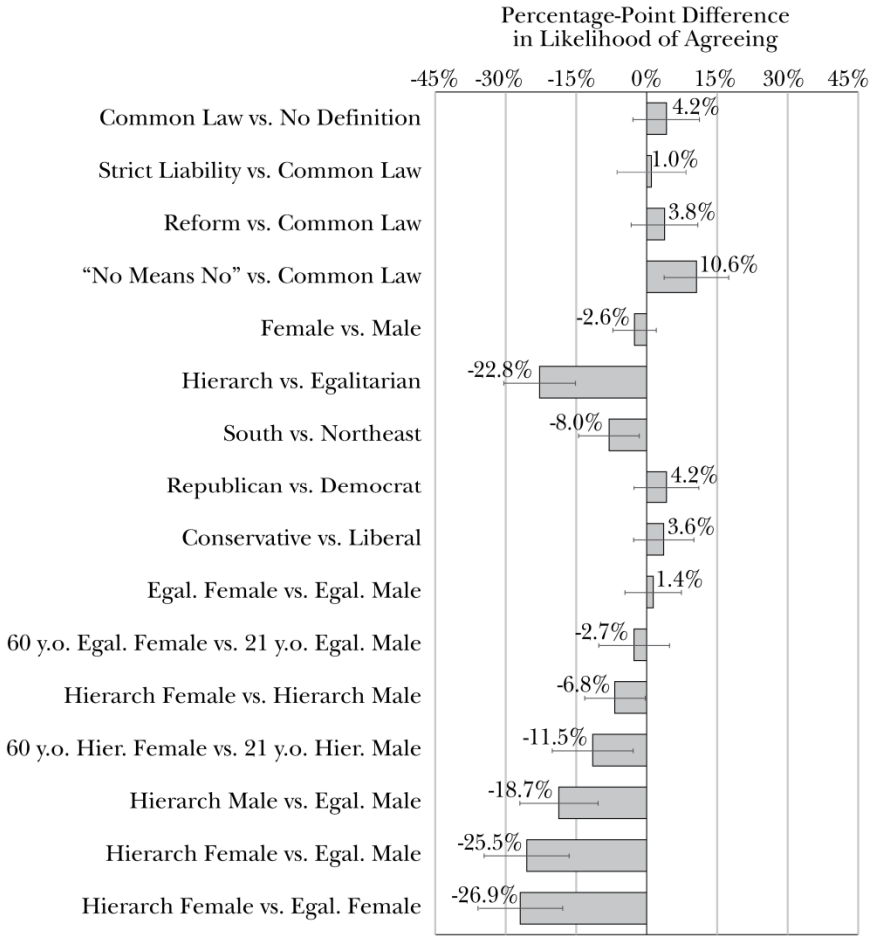
[169] *See generally* GELMAN & HILL, *supra* note 158, at 137-66 (explaining the use of simulation, or "summarizing inferences by random numbers," as a way to analyze regressions and linear models); Kahan, Hoffman & Braman, *supra* note 8, at 870-72 (describing the benefits of using Clarify statistical software over "conventional regression analysis"); Tomz, Wittenberg & King, *supra* note 162 (explaining how to use Clarify statistical software). To facilitate straightforward interpretation, the simulations were used to compute the probabilities, with associated standard errors and confidence intervals, that a subject would agree at any level ("slightly," "moderately," or "strongly") or disagree at any level in response to GUILTY and other individual items.

Table 1: Multivariate Regression Analyses

	1 GUILTY		2 DEF_FACTS		3 CONSENT		4 UNFAIR	
No Definition	-0.17	(0.15)	0.01	(0.10)	0.05	(0.15)	0.12	(0.15)
"No Means No"	**0.44**	(0.15)	**-0.28**	(0.10)	**-0.43**	(0.15)	**-0.46**	(0.15)
Strict Liability	0.04	(0.14)	-0.05	(0.10)	-0.10	(0.15)	-0.15	(0.15)
Reform	0.16	(0.15)	-0.07	(0.10)	0.02	(0.15)	-0.15	(0.15)
Male	-0.41	(0.31)	**0.46**	(0.20)	**0.89**	(0.32)	0.45	(0.31)
White	0.05	(0.17)	-0.16	(0.11)	-0.21	(0.17)	-0.26	(0.17)
Other Minority	0.04	(0.20)	-0.16	(0.13)	-0.04	(0.20)	-0.18	(0.20)
Age	-0.01	(0.00)	0.00	(0.00)	0.00	(0.00)	0.01	(0.00)
Income	-0.03	(0.02)	0.00	(0.01)	-0.02	(0.02)	0.00	(0.02)
Education	0.07	(0.04)	**-0.05**	(0.02)	**-0.13**	(0.04)	-0.06	(0.04)
Urbanicity	0.00	(0.09)	-0.01	(0.06)	-0.05	(0.09)	-0.01	(0.09)
Jewish	0.20	(0.37)	-0.06	(0.24)	-0.11	(0.39)	-0.15	(0.37)
Protestant	0.04	(0.14)	-0.08	(0.09)	-0.13	(0.15)	-0.12	(0.14)
Catholic	-0.10	(0.15)	0.05	(0.10)	0.24	(0.15)	0.07	(0.15)
Other Christian	0.04	(0.16)	-0.05	(0.10)	0.07	(0.16)	-0.12	(0.16)
Non-Jew/Christ	-0.07	(0.19)	0.01	(0.13)	0.16	(0.19)	0.04	(0.19)
Northeast	**0.33**	(0.14)	**-0.21**	(0.09)	**-0.38**	(0.15)	**-0.44**	(0.14)
Midwest	0.10	(0.12)	-0.07	(0.08)	-0.21	(0.12)	-0.21	(0.12)
Far West	**0.31**	(0.14)	-0.12	(0.09)	-0.15	(0.14)	**-0.33**	(0.14)
Mountain	-0.03	(0.19)	0.04	(0.13)	-0.07	(0.19)	-0.21	(0.19)
Libcon	0.07	(0.07)	-0.06	(0.04)	**-0.12**	(0.06)	**-0.15**	(0.06)
Democrat	-0.18	(0.15)	0.17	(0.10)	0.24	(0.16)	0.17	(0.16)
Other Party	-0.49	(0.25)	0.33	(0.16)	0.35	(0.24)	0.46	(0.24)
Independent	0.03	(0.14)	-0.04	(0.09)	-0.07	(0.14)	-0.03	(0.14)
Hierarch	**-0.49**	(0.09)	**0.40**	(0.06)	**0.66**	(0.09)	**0.50**	(0.09)
Individ	0.04	(0.07)	0.02	(0.05)	0.05	(0.08)	0.09	(0.07)
Hierarch x Male	0.15	(0.09)	**-0.13**	(0.06)	**-0.26**	(0.09)	-0.15	(0.09)
R^2	0.07		0.09		0.11		0.08	

Note: $N = 1500$. Models 1, 3, and 4 are ordered logistical regressions (logit coefficients). Model 2 is an OLS linear regression (unstandardized beta weight coefficients). Bolded coefficients are significant at $p \leq 0.05$. Standard errors are in parentheses. R^2 for models 1, 3, and 4 reflects McKelvey and Zavonia pseudo R^2.

Figure 5: Effect of Individual Characteristics on Agreement with GUILTY



Note: $N = 1500$. Derived from multivariate regression (Table 1, Model 1). Bars indicate percentage-point difference in likelihood of agreeing (either "slightly," "moderately," or "strongly") with GUILTY when predictors in the regression are set at the indicated values on the left-hand side of "vs." as opposed to the indicated values on the right-hand side of "vs." (controlling for all other predictors). Confidence intervals reflect 0.95 level of confidence. Values for "egalitarian" and "hierarchical" are set one standard deviation from the mean in the specified direction on the Hierarchy/Egalitarianism scale. Values for "liberal" and "conservative" are set one standard deviation from the mean in the specified direction on the liberal/conservative ideology scale.

The first study hypothesis was that the law would not matter very much—that is, that subjects' outcome judgments would be fairly insensitive to the experimental condition to which they were assigned. This hypothesis was borne out with respect to the reform and strict-liability conditions. Relative to being assigned to the common law condition, being assigned to either of these conditions had no statistically significant (or practically meaningful) effect on the likelihood that a subject would agree (at any level) rather than disagree (at any level) with GUILTY. Nor did being assigned to the common law condition predict a significant (or meaningful) difference in the likelihood of agreeing with GUILTY relative to being assigned to the no-definition condition.

Being assigned to the "no means no" condition, however, *did* predict a significant (and arguably meaningful) difference in the likelihood of conviction. All else equal, being assigned to that condition predicted a 10.6 percentage-point increase in the likelihood of agreeing with GUILTY (± 6.9%),[170] relative to being assigned to the common law condition.

Consistent with the second study hypothesis, however, the effect associated with individuals' *cultural identities* was substantially larger. All else equal, the difference between being moderately hierarchical and moderately egalitarian in outlooks (that is, having worldview scores that rank one standard deviation from the mean in the specified direction on the Hierarchy/Egalitarianism scale) was 22.8% (± 7.6%). Consistent with the third study hypothesis, being hierarchical predicted *disagreement* with GUILTY, and being egalitarian, *agreement* with it.

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[170] The "±" margin of error in this and other textual references indicates the location of the upper and lower bounds of the 95% confidence interval for the estimated probability. Accordingly, there is a 95% chance that the "true" probability is within the range between the upper and lower bounds of the confidence interval. Confidence intervals are more informative than simple *p*-values, both because they convey the precision of estimates that are significantly different from zero and because they enable meaningful information to be gleaned about estimates that are *not* "significantly different" from zero (e.g., that values outside a confidence interval that crosses zero are unlikely). Jacob Cohen, *The Earth Is Round (*p < *.05)*, 49 AM. PSYCHOLOGIST 997 (1994). Because the confidence interval reflects the standard error of the estimate, not all values within the range are equally likely; values become more likely as they approach the estimated value—which is the best or most likely estimate—and progressively less likely as they approach the extremes of the confidence interval. *See generally* JACOB COHEN, PATRICIA COHEN, STEPHEN G. WEST & LEONA S. AIKEN, APPLIED MULTIPLE REGRESSION/CORRELATION ANALYSIS FOR THE BEHAVIORAL SCIENCES 42-44 (3d ed. 2003) (explaining how to determine a 95% confidence interval for a regression coefficient).

The fourth study hypothesis was that other individual characteristics would affect outcome judgments, if at all, consistently with the relationship they have with hierarchical and egalitarian cultural styles. In line with this hypothesis, being a southerner rather than a northeasterner predicted an 8.0% (± 6.4%) increase in the likelihood of disagreeing with GUILTY. Once other variables were controlled for, neither liberal/conservative ideology nor party affiliation—characteristics that correlate with, but usually are less consequential than, cultural worldview[171]—predicted a significant (or practically meaningful) difference in the likelihood of agreeing that Dave should be convicted. Race also did not significantly influence responses to GUILTY.

Once other variables were controlled for, neither age nor education—characteristics that seemed to matter in an examination of simple response frequencies—was statistically significant on its own. When aggregated, however, these influences did predict a significant effect: all else equal, a twenty-one-year-old just graduated from college is 9.7 percentage points (± 7.7%) more likely to agree with GUILTY than is a sixty-year-old who has only a high school degree.

The influence of gender fit the study hypotheses. On its own, gender did not meaningfully influence responses to GUILTY. Controlling for other influences, being female rather than male predicted a 2.6% *decrease* in the likelihood of agreeing that Dave should be convicted, but with margin of error (± 4.6%) that rendered that effect nonsignificant.

Gender did exert a meaningful effect, however, in conjunction with culture. A Hierarchy-gender interaction term—Hierarch x Male—was included in the analysis to test the hypothesis that subscribing to hierarchical values would incline *women* to favor acquittal even more than men. The negative sign of the interaction coefficient—indicating that hierarchical values influence subjects toward acquittal less powerfully when they are male—is consistent with this hypothesis. The effect of Hierarch x Male is only marginally significant on its own ($p = 0.08$), but because its impact depends on its joint effect with Hierarchy and Male, the consequence of the gender-culture interaction is more reliably and meaningfully tested by statistical simulation.[172] Such analysis showed that, all else equal, being moderately hierarchical and female as opposed to moderately hierarchical and male predicted a 6.8%

[171] *See* Kahan, Braman, Monahan, Callahan & Peters, *supra* note 105 (arguing that cultural values affect attitudes toward outpatient-commitment laws and other policy issues).

[172] *See* GELMAN & HILL, *supra* note 158, at 94 (justifying the inclusion of borderline-significant interactions in the simulation of a logistic regression model).

(± 6.4%) *decrease* in the likelihood of favoring conviction. Being moderately egalitarian and female as opposed to moderately egalitarian and male, in contrast, did not have a statistically (or practically) significant effect (a 1.4%, ± 6.0%, increase in likelihood of agreeing). In other words, all else equal, among hierarchical subjects gender disposed women to be more proacquittal than men but had no meaningful effect among egalitarians. By the same token, the difference associated with being hierarchical as opposed to egalitarian was larger for women (-26.9%, ± 8.9%) than for men (-18.7%, ± 8.3%).

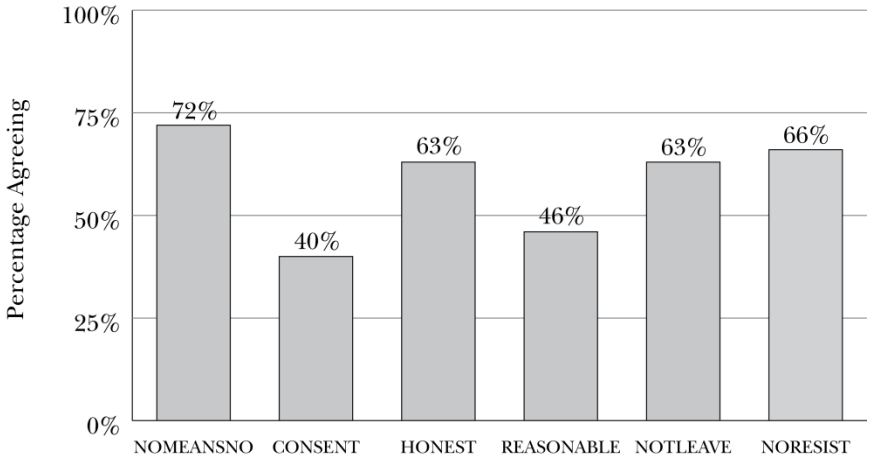
The impact of gender in conjunction with both hierarchy and age, moreover, was also statistically significant. Whereas neither being a woman rather than a man, nor being sixty rather than twenty-one years old, affects outcome judgments, being a hierarchical sixty-year-old woman as opposed to a hierarchical twenty-one-year-old man predicts an 11.5% (± 8.6%) decrease in the likelihood of agreeing with GUILTY, all else equal. The impact is larger still—a 30.2% (± 10.8%) decrease in likelihood—when the subject is a hierarchical sixty-year-old woman as opposed to an *egalitarian* twenty-one-year-old man, all else equal. (Being a sixty-year-old egalitarian woman as opposed to a twenty-one-year-old egalitarian male, in contrast, does not meaningfully affect the likelihood of supporting conviction.) A defendant in a date-rape case, then, might well be better off with an older, traditional woman on his jury than with one of his own peers.

2. Fact Perceptions

a. *Preliminary Analyses*

Disagreement on the fact items was uneven, as Figure 6 shows. Across conditions, a relatively large majority—72%—agreed that "[b]y saying 'no' several times, Lucy made it clear to Dave that she did not consent to sexual intercourse." Nevertheless, majorities also agreed that "if [Lucy] had really meant *not* to consent to sexual intercourse" she "would have tried to push Dave off of her" (66%) and "would have tried to leave the dormitory room" (63%). Sixty-three percent also agreed that "Dave believed that Lucy consented to sexual intercourse," and 46% agreed that "[g]iven all the circumstances, it would have been reasonable for Dave to believe Lucy consented to sexual intercourse."

Figure 6: Across-Condition Responses to Fact Items



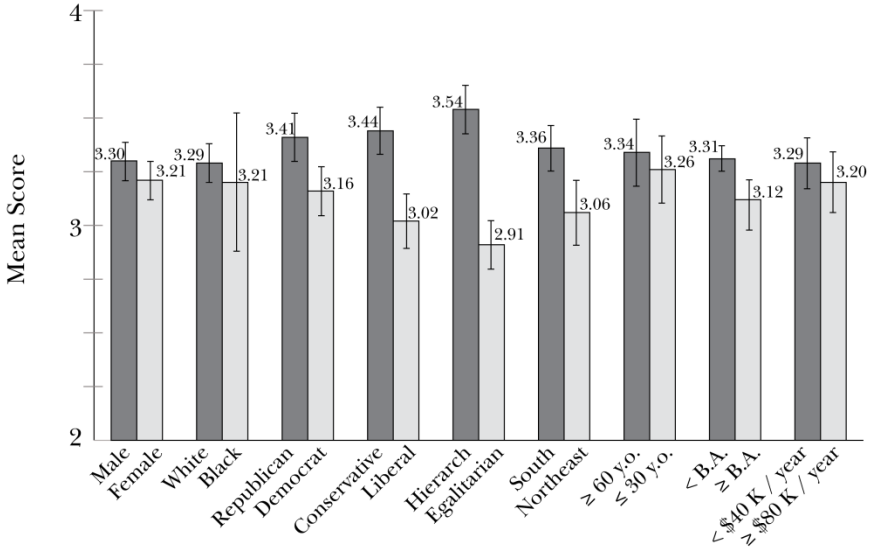
Note: Bars indicate percentage of subjects in all conditions combined who either "slightly," "moderately," or "strongly" agreed with the indicated item.

Overall, then, the responses seem to indicate ambivalence, stemming from the absence of physical resistance, about whether Lucy's "no" communicated lack of consent. Indeed, 40% of the subjects, across conditions, indicated that they agreed that "[d]espite what she said or might have felt after, Lucy really did consent to sexual intercourse with Dave."

Ambivalence notwithstanding, responses to the eleven fact items formed a highly reliable six-point scale ($\alpha = 0.93$), the coherence of which would not have been increased by the exclusion of any of the items. The scale was assigned the label "DEF_FACTS," which measures on a six-point scale how disposed subjects are toward a generic pro-defendant understanding of the facts.

As reflected in Figure 7, differences in mean scores on DEF_FACTS—the composite scale comprising the various fact-perception items—parallel those in outcome judgments. Relative to subjects who were hierarchical, conservative, Republican, or southern, subjects who were egalitarian, liberal, Democrat, or northeastern all formed anti-defendant factual views. Well-educated subjects were also more disposed toward an anti-defendant view of the facts. Differences were small (and statistically nonsignificant) among men and women, among whites and African-Americans, and among relatively young and relatively old subjects.

Figure 7: Individual Differences in Fact Perceptions



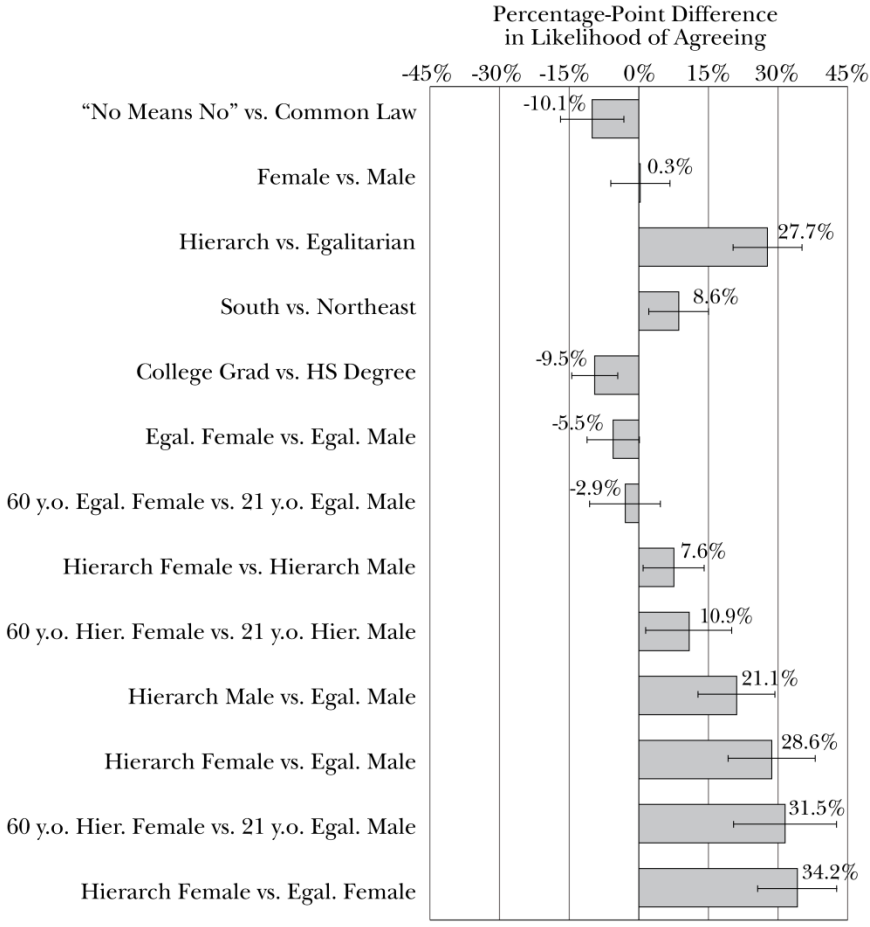
Note: Bars indicate group mean on 6-point DEF_FACTS scale (all experimental conditions combined). Confidence intervals reflect 0.95 level of confidence. "Hierarchs" comprise subjects whose score on the Hierarchy scale places them in the top one-third of the sample; "Egalitarians," those whose score places them in the bottom third. Liberals included subjects who selected either "liberal" or "very liberal" on the five-point political-ideology scale; Conservatives, subjects who selected either "conservative" or "very conservative."

b. *Multivariate Analyses*

Multivariate analyses were performed on subjects' factual perceptions as well. Model 2 of Table 1 reports a linear regression analysis, in which subjects' scores on the DEF_FACTS scale were regressed on the experimental conditions and on subjects' individual characteristics. The practical upshot of these effects is easier to comprehend, however, by examining how they influence the probability that subjects will agree or disagree with particular fact items. Such an examination is facilitated here by an additional ordered logistic regression analysis and statistical simulation of responses to CONSENT—"[d]espite what she said or might have felt after, Lucy really did consent to sexual intercourse with Dave"—the results of which are reported in Model 3 of Table 1 and Figure 8.

Figure 8: Effect of Individual Characteristics on Agreement with CONSENT

"Despite what she said or might have felt after, Lucy really did consent to sexual intercourse with Dave."



Note: $N = 1500$. Derived from multivariate regression (Table 1, Model 3). Bars indicate percentage-point difference in likelihood of agreeing (either "slightly," "moderately," or "strongly") with CONSENT when predictors in the regression are set at the indicated values on the left-hand side of "vs." as opposed to the indicated values on the right-hand side of "vs." (controlling for all other predictors). Confidence intervals reflect 0.95 level of confidence. Values for "egalitarian" and "hierarchical" are set one standard deviation from the mean in the specified direction on the Hierarchy/Egalitarianism scale.

Results largely paralleled the ones observed in the analysis of subjects' outcome judgments. Thus, a hierarchical worldview disposed subjects toward a relatively pro-defendant view of the facts; an egalitarian one, toward a relatively anti-defendant view of the facts. All else equal, a subject was 27.7 percentage points (± 7.8%) more likely to agree that Lucy in fact consented, notwithstanding her verbal resistance, when that subject was moderately hierarchical rather than moderately egalitarian in outlook. This result is consistent with both the second study hypothesis—that cultural identity would have relatively strong effects on subjects' fact perceptions—and with the third, which related to the valence of those effects.

Multivariate testing also largely supported the fourth study hypothesis—that other individual characteristics would have either no influence or would reinforce cultural differences. Race had no significant or meaningful impact on DEF_FACTS score. Nor did party affiliation or ideology. In a pattern consistent with the hypothesized effect of cultural styles, being from the Northeast as opposed to the South predicted anti-defendant fact perceptions. Increased education also had anti-defendant impact, an effect not specifically hypothesized.

Again, consistent with the fourth study hypothesis, the influence of gender was conditional on culture. The negative (and statistically significant) coefficient for Hierarch x Male in the multivariate regression model for DEF_FACTS indicates that the influence of hierarchy on fact perceptions was smaller for men than for women. Being simultaneously *hierarchical and female*, in other words, generates the most potent predisposition to see the facts in a pro-defendant light.

The practical importance of the gender-culture interaction can be most easily comprehended by examining its effect on subject responses to CONSENT, in particular, as shown in Figure 8. By itself, and controlling for other influences, gender did not exert a meaningful impact on the perception that "Lucy really did consent to sexual intercourse with Dave" despite saying "no." But conditional on cultural worldview, gender *did* matter: all else equal, being a moderately hierarchical woman rather than a moderately hierarchical man predicts a 7.6% increase (± 6.6%) in the belief that Lucy actually consented. This margin again increases slightly with age, to 10.9% (± 9.3%), for a sixty-year-old moderately hierarchical woman as opposed to a twenty-one-year-old moderately hierarchical man. There is no meaningful difference associated with that age differential (all else equal) between moderately egalitarian women and men. When age is controlled for, being moderately egalitarian and female as opposed to moderately

egalitarian and male predicts a nonsignificant decrease (-5.5%, ± 5.6%) in the likelihood of agreeing with CONSENT.

Indeed, the analysis suggests not only that gender conflict on perceptions of consent is highly *culture* specific, but also that the degree of conflict between cultural types is highly *gender* specific. All else equal, being moderately hierarchical rather than moderately egalitarian did make men more likely to agree (21.1%, ± 8.3%) that Lucy "really did consent." But the impact of being moderately hierarchical rather than moderately egalitarian was substantially larger (34.2%, ± 8.6%) among women.

As it did in responses to GUILTY, only assignment to the "no means no" condition had an impact on subjects' perceptions of the facts relative to the ones that subjects formed in the common law condition. Consistent with the effect it had on outcome judgments, assignment to the "no means no" condition disposed subjects, all else equal, to an anti-defendant attitude toward the facts. Relative to being assigned to the common law condition, being assigned to the "no means no" condition predicted a 10.1 percentage-point difference (± 6.8%) in the likelihood that subjects would agree (either "slightly," "moderately," or "strongly") with CONSENT.

The impact of the "no means no" definition in arousing anti-defendant fact perceptions was not anticipated. The first study hypothesis—that law would make relatively little difference—was concerned primarily with the influence of law on outcome judgments. The basis of this hypothesis, however, was the expectation that individuals would be psychologically motivated to conform their perceptions of legally consequential facts in a manner that permitted them to reach a culturally congenial outcome no matter what legal definition of rape they were instructed to apply. This prediction implied that individuals culturally predisposed to favor acquittal would experience the greatest pressure to adopt a pro-defendant interpretation of the facts in the "no means no" condition. By the same token, individuals disposed to favor conviction would experience the least pressure to adopt an anti-defendant interpretation in the "no means no" condition because that definition required conviction even assuming the absence of force by Dave, the existence of a reasonable mistaken belief on his part that Lucy was willing to engage in sex despite her words, and even the presence of such willingness on her part—so long as it was found (as both parties testified) that she said "no." Accordingly, it would have been more consistent with the first study hypothesis for subjects' fac-

tual perceptions, all else equal, to be *more* pro-defendant, not less, in the "no means no" condition.

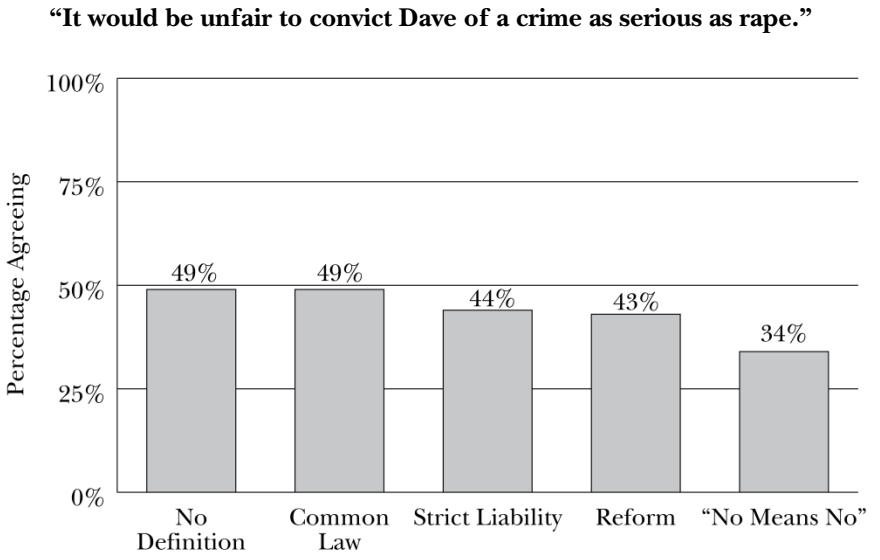
Testing failed to disclose any significant or meaningful interaction between the experimental-condition variables and Hierarchy. In other words, the impact of hierarchical values in inclining subjects toward a pro-defendant view of the facts and egalitarianism in inclining them toward an anti-defendant one was essentially uniform across the conditions. There was thus no support for the hypothesis that subjects would react to changes in legal definitions by shifting their perceptions of fact. Indeed, the analysis supports the conclusion that being assigned to the "no means no" condition influenced relatively hierarchical subjects to form an *anti*-defendant view of the facts to the same extent as it influenced relatively egalitarian ones to do so.

3. Fairness

a. *Preliminary Analyses*

Not surprisingly, responses to UNFAIR—"[i]t would be unfair to convict Dave of a crime as serious as rape"—were highly correlated (r_s = -0.80) with GUILTY. That is, subjects who agreed that "Dave should be found guilty of rape" generally perceived that this outcome would be fair, while those who perceived that convicting him would be unfair generally disagreed that he should be convicted. This pattern might suggest that subjects conformed their outcome judgments to their independent view of the just outcome.

Figure 9: Within-Condition Responses to UNFAIR



Note: Bars represent percentage of subjects in each experimental condition who either "slightly," "moderately," or "strongly" agreed with the statement, "It would be unfair to convict Dave of a crime as serious as rape."

But such an interpretation would be in tension with the unanticipated pattern of responses to UNFAIR within conditions, shown in Figure 9. Whereas close to half (49%) of the subjects agreed that it would be unfair to convict in the common law condition, and nearly that many did in the strict-liability (44%) and reform conditions (43%), only about one-third (34%) took that view in the "no means no" condition. Combined with the finding that a greater percentage of subjects agreed with GUILTY in the "no means no" condition,[173] this result suggests that subjects in that condition conformed their perception of *the fairness* of convicting the defendant to their *outcome judgment*, which was in turn affected, at least to some degree, by the specified definition of rape.

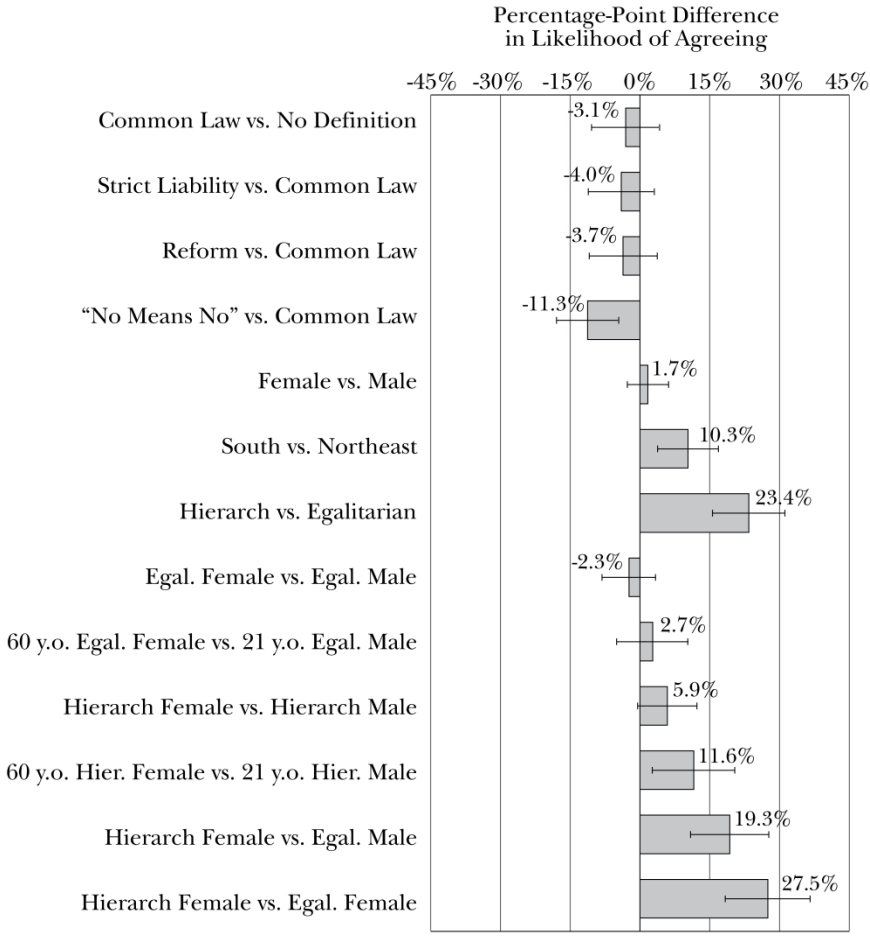
[173] *See supra* Figure 2.

b. *Multivariate Analysis*

This interpretation is also supported by a multivariate analysis that regresses UNFAIR on the study's various predictor variables. The analysis is reported in Model 4 of Table 1 and used to simulate predicted likelihoods of agreement as shown in Figure 10. All else equal, being assigned to the "no means no" condition predicted a decrease of 11.3 percentage points (± 6.6%) in the likelihood that a subject would agree that convicting Dave of "a crime as serious as rape" would be "unfair." Rather than rebel against the additional pressure to convict associated with the expansive "no means no" definition, then, subjects adapted by forming an attitude more supportive of conviction.

Figure 10: Effect of Individual Characteristics on Agreement with UNFAIR

"It would be unfair to convict Dave of a crime as serious as rape."



Note: $N = 1500$. Derived from multivariate regression (Table 1, Model 4). Bars indicate percentage-point difference in likelihood of agreeing (either "slightly," "moderately," or "strongly") with UNFAIR when predictors in the regression are set at the indicated values on the left-hand side of "vs." as opposed to the indicated values on the right-hand side of "vs." (controlling for all other predictors). Confidence intervals reflect 0.95 level of confidence. Values for "egalitarian" and "hierarchical" are set one standard deviation from the mean in the specified direction on the Hierarchy/Egalitarianism scale.

Moreover, tests failed to disclose any interaction between UNFAIR, the "no means no" condition variable, and Hierarchy. In other words, being assigned to "no means no" generated as great a disposition to see conviction as fair among subjects disposed to a hierarchical worldview as it did among subjects disposed toward an egalitarian one.

In other respects, responses to UNFAIR largely paralleled those to the fact-perception items. A moderately hierarchical, as opposed to a moderately egalitarian, worldview predicted a 23.4% (± 7.8%) increase in the likelihood that a subject would view conviction as unfair, all else equal. Being hierarchical and female as opposed to egalitarian and female increased the likelihood of agreeing that conviction was unfair by 27.5% (± 9.1%). A sixty-year-old hierarchical woman was 11.6% (± 8.9%) more likely to agree than was a twenty-one-year-old hierarchical male.

III. RECONCEPTUALIZING AND REFOCUSING

Largely consistent with the study hypotheses, the experiment results suggest that public beliefs about consent and verbal resistance to sex are more subtle and more complicated than is contemplated by the major positions in the "no means . . . ?" debate. I now consider the empirical and normative implications of these results.

A. *Interpreting the Empirical Evidence*

As a positive matter, the study suggests two principal conclusions. The first is that beliefs about the significance of verbal resistance to sex are culturally polarized. As predicted, reactions to a case like *Berkowitz* divide individuals of opposing cultural styles. The more egalitarian an individual's worldview, the more inclined that person is to find that the defendant in such a case committed rape, while the more hierarchical an individual's worldview, the more inclined that person is to find that he did not. Other characteristics that cohere with these cultural styles—such as region of residence and political ideology—point in the same direction (although the effect of the latter does not persist once cultural outlooks are controlled for). Certain characteristics not clearly associated with these styles—such as education and income—also matter, but not nearly as much.

As the cultural-cognition thesis implies, cultural differences in outcome judgments reflect cultural differences in perceptions of the facts. Individuals who subscribe to a hierarchical cultural style are more likely than those who subscribe to an egalitarian style to believe that the

complainant in a case like *Berkowitz* did consent and that the defendant honestly and reasonably believed she did. Hierarchically disposed subjects are also more likely to believe that the defendant did not engage in force or put the complainant in fear. The evidence supports the hypothesis, then, that individuals are motivated to form perceptions of fact that assure a congenial relationship between the expressive judgment of the law and the norms these persons use to evaluate the character of the parties in an alleged acquaintance-rape scenario.

This finding does not fit comfortably with the premises of any of the major positions in the "no means . . . ?" debate. Contrary to the standard feminist critique,[174] disagreements over the significance of "no" cannot be attributed to a conflict between opposing male and female "points of view." Because cultural differences cut across gender, there is not a meaningful difference among men and women per se on what the facts are or on what the outcome should be in a case like *Berkowitz*.

Indeed, the individuals most inclined to form pro-defendant perceptions are hierarchical *women*, particularly older ones. This finding also fits the cultural-cognition thesis. Within the hierarchical worldview, token resistance to sex is understood as a strategy by women who desire casual sex to disguise their lack of virtue relative to women who faithfully adhere to hierarchical norms against forming and acting on such desires. Women who are strongly committed to a hierarchical worldview, then, are disposed more readily to perceive that women are saying "no" while meaning "yes"—and to condemn them for that—because women who have succeeded in fulfilling gender-role expectations within a hierarchical way of life are the ones with the greatest identity-protective stake in law's affirmation of hierarchical norms. Thus, far from reflecting a dispute among women and men, contestation about the significance of the word "no" in cases like *Berkowitz* features a conflict primarily *among* women on how the indulgence of the desire for sex outside of relationships sanctioned by hierarchical norms should affect women's social status.

This account also fits uneasily with the conventionalist and norm-reconstructionist positions.[175] The cultural logic of token resistance makes it odd to describe it as a convention. Not only do hierarchs and egalitarians attach different significance to the same words and actions, but even among hierarchs the perception that "no" means some-

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[174] *See supra* text accompanying notes 63-67.

[175] *See supra* text accompanying notes 68-78 (for the conventionalist viewpoint) and 81-84 (for the norm-reconstructionist position).

thing other than "no" is most vivid in the minds of women (disproportionately women well beyond "dating" age) who form this ing *not* to perfect their own ability to convey their intentions to potential sex partners but rather to help identify other women whose behavior threatens their status.

Of course, the conflict that the "no means . . . ?" debate provokes *among* women by no means implies that exoneration of men like the defendant in *Berkowitz* is compatible with gender equality. From a feminist perspective, hierarchy *is* a cultural way of life that subordinates women.[176] Cultural cognition shows only that one of the mechanisms by which hierarchy promotes this state of affairs is by shaping the factual perceptions of women, as well as men, who subscribe to a hierarchical worldview. Far from undermining the feminist critique, this insight should be understood to fortify it by furnishing a psychologically realistic account of why members of a group whose well-being is disserved by a legal institution or practice might nevertheless form beliefs, attitudes, and preferences that perpetuate it.[177]

The second major conclusion of the experimental study is that variations in the *legal* definition of rape have a minimal influence on the judgment that rape either did or did not occur in a case like *Berkowitz*. In fact, the two most commonly proposed and adopted reforms of the traditional common law definition—dispensing with the "force or threat of force" element and eliminating any "mistake" defense—have no effect: there was no meaningful difference in the outcome judgments of subjects instructed to apply the "strict liability," "reform," or "common law" formulation, on the one hand, and those furnished no definition of rape at all, on the other. This result is consistent with the general finding that legal definitions exert less force than do lay prototypes of common crimes.[178]

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[176] *See* Catharine A. MacKinnon, Desire and Power, Talk at the Conference on Marxism and the Interpretation of Culture at the University of Illinois at Champaign-Urbana (July 11, 1983), *in* FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW 46, 52-53 (1987); Catharine A. MacKinnon, Difference and Dominance: On Sex Discrimination, Speech at Harvard Law School (Oct. 24, 1984), *as reprinted in* FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW, *supra*, at 32, 32-45 (1987).

[177] *See generally* JON ELSTER, MAKING SENSE OF MARX 1-5, 18-22, 459-68 (1985) (criticizing classic accounts of ideology for adopting a functionalist assumption that individual actions can be explained by the contribution they make to the ends of collective entities, and proposing that social-psychological mechanisms be used to make the concept of "ideology" compatible with "methodological individualism"). I am indebted to Devon Carbado for making me aware of both the unmistakable importance of this point and the importance of stating it unmistakably.

[178] *See* Smith, *supra* note 135.

Not adopted in any jurisdiction, a definition that treats proof the complainant said "no" as sufficient to establish lack of consent and (when the defendant heard her) the requisite mens rea did increase the proportion of subjects who agreed the defendant had raped the complainant. However, the modest size of the increase—around 10%—only underscores how resistant individuals' outcome judgments are to legal override. In the vignette, the parties both testified that the complainant repeatedly said "no" before and during intercourse; as a result, there was seemingly no basis under the "no means no" definition for disputing the defendant's guilt. Nevertheless, more than one-third of the subjects instructed to apply the "no means no" definition—about 75% as many as were instructed to apply the common law definition—continued to believe the defendant should not be found guilty.

Indeed, the study suggests the impact of the "no means no" definition could well be dominated, as a practical matter, by the cultural predispositions of the jurors. The "no means no" definition would be unlikely to affect outcomes in a jurisdiction in which citizens share relatively egalitarian worldviews, because jurors in such a community would be highly likely to convict even under the common law definition. In a jurisdiction dominated by individuals subscribing to relatively hierarchical worldviews—especially one in the South—the difference a "no means no" definition would make would likely be too small to overcome the strong resistance to conviction in a case like *Berkowitz*. In a jurisdiction in which potential jurors might be either egalitarian or hierarchical, lawyers would continue to recognize jury selection, as they do now, as the decisive stage of the case.

Nonetheless, the study also furnished little support for the idea, advanced by conventionalists and accepted by some ambivalent norm reconstructionists, that a reform as radical (legally speaking) as "no means no" would generate a self-defeating backlash.[179] As indicated, subjects instructed to apply this definition were modestly more likely to agree that the defendant should be convicted of rape. Even more important, there was no evidence that those who might have favored acquittal under the common law definition regarded conviction under the "no means no" standard as unjust. On the contrary, subjects who received the "no means no" instruction were *more* likely than those who received the common law, strict-liability, or reform definitions (or no definition at all) to concur in the fairness of such an outcome.

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[179] *See supra* text accompanying notes 92-95.

This result, moreover, was uniform across subjects of all worldviews, hierarchical as well as egalitarian.

This finding suggests some degree of support for norm reconstructionists' belief that legal reform can be effective in changing sexual mores. Subjects assigned to the "no means no" condition adapted their moral assessment of the defendant's behavior to their legal assessment of it, probably to avoid the cognitive dissonance associated with having to acknowledge a conflict between following the law and adhering to their values.[180] No such effect was hypothesized, and this finding marks an important qualification on the cultural-cognition thesis, which in its strongest form predicts that individuals will conform their perceptions of the facts as well as their resulting outcome judgments to their cultural predispositions for identity-protective reasons.

In the experiment, this effect is real but small. How large it would be were the "no means no" formulation actually adopted in the real world would likely depend on social influences.[181] Exposure to peers who are moved by the "no means no" formulation to change their moral assessments of the behavior of a man like the defendant in *Berkowitz* could cause a similar change in perspective among those who wouldn't have modified their view in isolation. If that happened, such a reform might succeed in effecting a significant change in norms even among hierarchs. Or perhaps those who are inclined to change their views inside the lab wouldn't outside of it if they were exposed to peers or culturally influential opinion leaders who continued to believe that a case like *Berkowitz* wasn't "even remotely about rape"[182] even if the *law* insists that "no" always means "no."

Additional studies aimed at assessing how cultural cognition interacts with social influences, particularly when individuals deliberate, are necessary to determine which of these scenarios is more probable. Nevertheless, the existence and valence of the norm-shaping effect observed in this study suggests that the risk that "shoving" norms with the law will provoke a self-reinforcing wave of resistance is not as great as some commentators have warned.[183]

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[180] *See generally* Kenworthey Bilz & Janice Nadler, *Law, Psychology, and Morality* (surveying literature on the impact of law on formation of individual moral outlooks), *in* 50 THE PSYCHOLOGY OF LEARNING & MOTIVATION 101 (Daniel M. Bartels et al. eds., 2009).

[181] *See* Dan M. Kahan, *Social Influence, Social Meaning, and Deterrence*, 83 VA. L. REV. 349, 353-58 (1997) (explaining the cumulative effects of group influence).

[182] *See supra* text accompanying notes 41-42.

[183] *See* Kahan, *supra* note 95, at 623.

B. *Reconsidering What's at Stake*

The dominant concern of the normative debate over rape-law reform has been individual autonomy: how to balance the interest of women in avoiding being misunderstood when they say "no" against the interests of men who could go to jail for misunderstanding them. The impact of cultural cognition on perceptions of consent suggests the debate should also be focused on something else: how the law should respond to cultural status competition over disputed claims of fact.

The conventionalist defense of the common law reflects a basic misapprehension about how perceptions of token resistance are distributed. The conventionalists' concern about the liberty of nonculpable defendants assumes that men who rely on conventions for initiation of consensual sex might misunderstand a woman like the complainant in *Berkowitz* when she says "no." The study's results, however, suggest that young, sexually active men and women, particularly ones who share cultural styles, are unlikely to misunderstand each other in that situation; such persons form comparable impressions when they consider the facts in *Berkowitz*. The individuals most likely to perceive that "no" means "yes" in such a case are older hierarchical women, many of whom are motivated by a form of status anxiety to perceive token resistance. These women might well be surprised were the law to take the position that a defendant in that sort of case is guilty of rape. The occasion for *their* surprise, however, will not likely be any miscommunication between them and their sexual partners, much less a miscommunication that unexpectedly puts *them* at risk of criminal punishment!

For the same reason, it is hard to credit the conventionalist anxiety that rape-law reform would abridge the sexual autonomy of women. The persons most likely to oppose a legal rule that treats the word "no" as dispositive evidence of the lack of consent and the absence of mistake—older, hierarchical women—are not motivated by an expectation that such a rule would interfere with a ritual women find sexually pleasurable; rather, they are intent on conserving the contribution that law makes to the stigmatization of women they perceive as seeking pleasure in casual sex.

At the same time, there is also no strong basis for believing that rape-law reform enhances the autonomy of women who say "no" and mean it. The standard critique and norm-reconstruction positions ignore the dominance of culture over law. Being committed to a hierarchical worldview strongly disposes persons (particularly women) to perceive that a woman who says "no" is merely feigning nonconsent. *Neither* of the

dominant forms of rape-law reforms—eliminating the "force or threat of force" element and treating rape as a strict-liability crime—would appear to make those persons (or anyone else, for that matter) any more likely to find the defendant guilty in a case like *Berkowitz*.

It's conceivable, the study's results suggest, that the more radical reform of treating the word "no" as dispositive proof of the complainant's lack of consent and the defendant's mens rea would increase the willingness of even hierarchs to convict in such a case. However, the effect of this formulation remains weak compared to the strength of cultural styles. Whether it would increase the likelihood of conviction enough to overcome the even stronger influence of decisionmakers' cultural predispositions (either immediately or over time through norm reconstruction) is at best a matter of conjecture.

The only certain effect of any sort of reform is expressive. Laws have meanings as well as consequences.[184] By securing enactment of any type of "reform" statute—whether in a hierarchical jurisdiction or an egalitarian one in which conviction is already likely under the common law—supporters of such a measure attain a powerful token of the political community's repudiation of hierarchic gender norms. "Affirmation through law and governmental acts expresses the public worth of one subculture's norms relative to those of others, demonstrating which cultures have legitimacy and public domination";[185] "[w]hatever its instrumental effects,"[186] law's expressive function "enhances the social status of groups carrying the affirmed culture and degrades groups carrying that which is condemned as deviant."[187] By the same token, avoiding symbolic defeat of that sort, and visiting it instead on their egalitarian adversaries, supplies the opponents of the standard reforms with motivation to resist the elimination of the "force or threat of force" element and the mistake defense—whether or not such changes in the law will have any behavioral impact. This sort of symbolic status conflict is what impels cautious elected officials, concerned with their self-preservation, to seek refuge in the sort of ambiguity that characterized Pennsylvania's post-*Berkowitz* reforms.

The *political* "no means . . . ?" controversy can be assimilated to a class of legal and policy disputes that feature cultural polarization over

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[184] *See* Lawrence Lessig, *The Regulation of Social Meaning*, 62 U. CHI. L. REV. 943, 948 (1995) (examining how the "law helps construct social reality").

[185] *See* Joseph R. Gusfield, *On Legislating Morals: The Symbolic Process of Designating Deviance*, 56 CAL. L. REV. 54, 58 (1968).

[186] *Id.* at 59.

[187] *Id.* at 58.

disputed *facts*. Rape-reform laws are obviously not the only form of regulation the consequences of which are heatedly disputed. Individual citizens lack the means to figure out on their own whether the death penalty deters murder;[188] whether private ownership of guns will increase or decrease crime;[189] whether reducing carbon emissions will have any beneficial effect on climate change (is that a real threat, by the way?) or instead only hamper attainment of the wealth necessary to perfect climate-cooling technologies (will *those* work? aren't *they* unacceptably risky?);[190] and like questions. To avoid dissonance, they tend to be drawn to the answers that fit best with (or at least avoid doing violence to) their fundamental values.[191] They might (indeed, almost certainly will) try to compensate for their lack of personal knowledge by seeking out the views of informed and trustworthy experts.[192] But, not surprisingly, the experts whom they are most likely to

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[188] *Compare* Hashem Dezhbakhsh, Paul H. Rubin & Joanna M. Shepherd, *Does Capital Punishment Have a Deterrent Effect? New Evidence from Postmoratorium Panel Data*, 5 AM. L. & ECON. REV. 344, 373 (2003) (using empirical data to conclude that the deterrent effect of the death penalty is "significant"), *with* John J. Donohue & Justin Wolfers, *Uses and Abuses of Empirical Evidence in the Death Penalty Debate*, 58 STAN. L. REV. 791, 794 (2005) (describing the existing evidence for deterrence as "surprisingly fragile").

[189] *Compare* JOHN R. LOTT, JR., MORE GUNS, LESS CRIME: UNDERSTANDING CRIME AND GUN-CONTROL LAWS 117 (2d ed. 2000) (confirming the "deterrence effect of concealed-handgun laws"), *with* Ian Ayres & John J. Donohue III, *Shooting Down the "More Guns, Less Crime" Hypothesis*, 55 STAN. L. REV. 1193, 1201 (2003) (arguing that "the statistical evidence that these laws have reduced crime is limited, sporadic, and extraordinarily fragile"). *See generally* COMM. TO IMPROVE RESEARCH INFO. & DATA ON FIREARMS, NAT'L RESEARCH COUNCIL, FIREARMS AND VIOLENCE: A CRITICAL REVIEW 150 (Charles F. Wellford et al. eds., 2005) (summarizing the literature on right-to-carry laws and concluding that "with the current evidence it is not possible to determine that there is a causal link between the passage of [such] laws and crime rates").

[190] *Compare* AL GORE, THE ASSAULT ON REASON 212 (2007) (asserting that "[w]hen there is no effort to restrain the global warming pollution gases, then global warming gets worse"), *and* Richard Monastersky, *Climate Crunch: A Burden Beyond Bearing*, 458 NATURE 1091 (2009) (reviewing studies showing the benefits of reducing carbon emissions), *and* Oliver Morton, *Climate Crunch: Great White Hope*, 458 NATURE 1097 (2009) (evaluating the utility of geoengineering as a response to the climate-change crisis), *and* D.P. Van Vuuren et al., *Temperature Increase of 21st Century Mitigation Scenarios*, 105 PROC. NAT'L ACAD. SCI. 15,258, 15,262 (2008) (finding that "even the lowest scenarios available . . . lead to considerable increases in global mean temperature"), *with* ROY W. SPENCER, CLIMATE CONFUSION: HOW GLOBAL WARMING HYSTERIA LEADS TO BAD SCIENCE, PANDERING POLITICIANS, AND MISGUIDED POLICIES THAT HURT THE POOR 161 (2008) (arguing that "most of the currently proposed policies for 'doing something' about global warming destroy wealth and are ineffective").

[191] *See* Kahan & Braman, *supra* note 6, at 150.

[192] *See* Arthur Lupia, *Who Can Persuade Whom? Implications from the Nexus of Psychology and Rational Choice Theory* (arguing that "a cueseeker's perception of a cue-giver's

view as credible in this sense are ones who share their worldviews—and who, as a result, face similar psychological and emotional pressure to favor conclusions congenial to their basic moral outlooks.[193] Seeing that these debates, though overtly focused on disputed issues of fact, pit those who share their cultural style against those whom they know harbor competing commitments, citizens on each side dismissively reject the empirical claims of the others as the product of bad faith and self-delusion.[194]

The symbolic cultural dispute that the "no means . . . ?" debate most closely resembles is the one over abortion. That controversy, Kristin Luker has shown, does not pit men against women so much as it pits women of one cultural style against women of another. Those on the "pro-life" side consist disproportionately of women committed to hierarchical norms that confer esteem on women who successfully master domestic roles such as wife and mother. They see abortion rights as denigrating those norms and thus as threatening their status: "abortion on demand" connotes a societal commitment to enabling women to escape the constraints motherhood places on the pursuit of professional and market success and to enjoy the pleasure of sex outside of relationships in which women are dependent on men. *Because* abortion rights bear these social meanings, moreover, "pro-choice" activists consist disproportionately of women committed to an egalitarian style.[195] These are, of course, the same groups of women in conflict over rape-law reform. Their conflicting values are admittedly closer to the surface in their dispute over abortion than in their dispute over acquaintance rape. Nonetheless, even in the former context they (and to a lesser extent the men who share their cultural values) are divided on policy-consequential *facts* such as whether abortion poses mental or physical health risks to women and whether removing legal restrictions on it deters crime.[196]

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knowledge and interests affects a statement's persuasiveness"), *in* THINKING ABOUT POLITICAL PSYCHOLOGY 51, 57 (James H. Kuklinski ed., 2002).

[193] *See* Kahan, Braman, Cohen, Gastil & Slovic, *supra* note 108.

[194] *See, e.g.*, GORE, *supra* note 190, at 242-44 (arguing that public discourse in the United States has become less focused and reasoned); SPENCER, *supra* note 190, at 85-102 (depicting the lack of constructive dialogue in the global-warming debate).

[195] *See* KRISTIN LUKER, ABORTION AND THE POLITICS OF MOTHERHOOD 176 (1984) (asserting that from a pro-choice activist's point of view, reproductive rights and control are essential for women to be treated as equals).

[196] *See* Kahan, Braman, Gastil, Slovic & Mertz, *supra* note 7, at 489-90 (presenting evidence that hierarchical women are predisposed to see health risks from abortion); *see also* John J. Donohue III & Steven D. Levitt, *The Impact of Legalized Abortion on Crime,*

Cultural conflicts over facts pose a distinctive challenge to the fundamental commitments of a liberal political order. On one influential account of liberalism, the state is forbidden to use law as an instrument for promoting a cultural orthodoxy; it must instead confine law to the attainment of ends that persons of diverse cultural outlooks could affirm, paradigmatically the prevention of harm.[197] The enforcement of this principle, however, is not psychologically straightforward. Because of cultural cognition, citizens (including lawmakers and judges) naturally conform their perceptions of the sources of harm, and of how harms can be abated, to their values. Accordingly, even when they honestly attend to collective welfare (public health, national security, economic prosperity, and the like), individuals are naturally impelled to advocate repression of behavior that transgresses their moral norms. Those subject to such regulation are likewise impelled to resist—both by their (psychologically naïve) perception that their behavior is (*obviously*) benign and by their (psychologically realistic) suspicion that any belief to the contrary originates in moral aversion to their way of life.[198] The resulting competition to attain the law's endorsement of one or another culturally partisan understanding of fact impedes liberalism in exactly the same way that self-conscious competition to impose a cultural orthodoxy does: by investing the outcome of policy and legal debates with a meaning that makes it impossible for losers to see the outcome as compatible with respect for their identities.

This is the cognitively illiberal state.[199] Because the disputed factual claims featured in the "no means . . . ?" conflict derive from the cultural identity of those advancing them, the issue of rape-law reform

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116 Q.J. ECON. 379, 391-407 (2001) (presenting evidence that legalizing abortion reduces crime).

[197] *See, e.g.*, W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943) ("[N]o official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion . . . ."). *See generally* JOHN STUART MILL, ON LIBERTY 51-52 (Edward Alexander ed., Broadview Press 1999) (1859) (elaborating upon the self-protection principle); JOHN RAWLS, POLITICAL LIBERALISM 175, 217-18 (1993) (proposing political limitations on moral conceptions of justice in order to protect democratic citizenship).

[198] *See generally* Robert J. Robinson, Dacher Keltner, Andrew Ward & Lee Ross, *Actual Versus Assumed Differences in Construal: "Naive Realism" in Intergroup Perception and Conflict*, 68 J. PERSONALITY & SOC. PSYCHOL. 404, 414 (1995) (documenting that individuals tend to correctly perceive that those who disagree with them on contentious issues of fact are motivated by group commitments but assume incorrectly that their own beliefs are free of group influence).

[199] *See* Kahan, *supra* note 10, at 117.

cannot be completely addressed without taking a position on how the law should respond to status competition of this sort.

What position the law should take, moreover, is as open to debate as any other issue—whether of fact or value—in the rape-reform debate. The dilemma of cognitive illiberalism certainly cannot be avoided by rejecting or adopting any particular position on what the definition of rape should be. As currently framed, the case for reform—whether the removal of the "force or threat of force" element, the elimination of the "reasonable mistake" defense, or the adoption of the more radical "no means no" standard—bears unmistakable expressive hostility to cultural norms integral to the hierarchic way of life. But opposition to reform is just as symbolic of cultural partisanship, in light of the antagonism between the social meaning of the common law definition and egalitarian norms.

One response would simply be for the law to pick sides. One might believe, for example, that the law ought to endorse egalitarian norms and repudiate hierarchic ones. If so, the only adjustment one would need to make in order to present a cogent and candid critique of the common law would be to acknowledge that imposing cultural orthodoxy through law justifies reform in the face of factual uncertainty about whether or how such reform would influence behavior. One could escape cognitive illiberalism, in other words, by becoming *consciously antiliberal*.[200]

But for citizens—of any cultural persuasion—who believe the law should aspire to meaningful neutrality, matters are more complicated. Our society is reasonably well accustomed to dealing with the open invocation of culturally partisan values; our political and legal discourse is well stocked with strategies that enable avoidance of such appeals and with norms that conduce to the marginalization of the expressive zealots who feel no compunction against resorting to them.[201] The language we use for debating politics and law is not nearly so well

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[200] *See* Dan M. Kahan, *Two Liberal Fallacies in the Hate Crimes Debate*, 20 LAW & PHIL. 175, 189-92 (2001) (arguing that participants in the hate-crimes debate should adopt explicit expressive stances and forgo question-begging claims about harm prevention).

[201] *See, e.g.*, STEPHEN HOLMES, PASSIONS AND CONSTRAINT: ON THE THEORY OF LIBERAL DEMOCRACY 234 (1995) ("To win otherwise unattainable cooperation, people voluntarily muzzle themselves about divisive topics."); RAWLS, *supra* note 197, at 214 (advocating that "public reason" impose limits on discussions regarding "constitutional essentials" and "questions of basic justice"); CASS R. SUNSTEIN, LEGAL REASONING AND POLITICAL CONFLICT 41 (1996) (explaining how "incompletely theorized agreements" are valuable for "reducing the political cost of enduring disagreements" and accommodating changes in facts or values over time).

equipped with idioms for steering the state away from endorsement of culturally partisan perceptions of fact. Indeed, one of the devices legal and political actors routinely use to try to mute overt reliance on partisan values—the use of consequentialist frameworks ("deterrence," "cost-benefit analysis," "efficiency") that elide contested social meanings—is exactly what creates the polarization over facts that thereby become infused with cultural significance.[202]

Ironically, the best response to cognitive illiberalism, in this setting and in others, might involve the inversion of the usual remedy for conscious illiberalism. Whereas "public reason"—the paramount liberal discourse norm—prescribes denuding the law of social meaning as a strategy for inoculating it from culturally partisan values, the way to protect the law from the pathologies associated with endorsement of culturally partisan perceptions of fact might be to multiply such meanings. By striving to formulate laws in a manner that admits of a variety of potential—even potentially contradictory—cultural justifications, officials can furnish persons of diverse persuasions with the resources necessary to see affirmation of their identities no matter what position the law takes.[203] The strategic ambiguity of the Pennsylvania legislature after *Berkowitz* might well harbor, from a liberal standpoint, a morally commendable form of obfuscation.

CONCLUSION

This Article has described a study aimed at investigating the contribution that cultural cognition makes to the controversy over how the law should respond to acquaintance rape. The results of the study suggest that common understandings of the nature of that dispute and what's at stake in it are in need of substantial revision.

All of the major positions, the study found, misapprehend the *source* of the "no means . . . ?" debate. Disagreement over the significance the law should assign to the word "no" is not rooted in the self-serving perceptions of men conditioned to disregard women's sexual autonomy. Nor is it a result of predictable misunderstanding incident to conventional indirection (or even misdirection) in the communica-

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[202] *See generally* Dan M. Kahan, *The Secret Ambition of Deterrence*, 113 HARV. L. REV. 413, 415 (1999) (suggesting that the value of deterrence is really "to quiet illiberal conflict between contending cultural styles and moral outlooks").

[203] *See* Kahan, *supra* note 10, at 145-53 (defending expressive overdetermination, a new discourse norm that "seeks to contain cognitive illiberalism not by stripping it of partisan social meanings but by infusing it with so many that every cultural group can find affirmation of its worldviews within it").

tion of consent to sex. Rather it is the product, primarily, of *identity-protective cognition* on the part of women (particularly older ones) who subscribe to a hierarchic cultural style. The status of these women is tied to their conformity to norms that forbid the indulgence of female sexual desire outside of roles supportive of, and subordinate to, appropriately credentialed men. From this perspective, token resistance is a strategy certain women who are insufficiently committed to these norms use to try to disguise their deviance. Because these women are understood to be misappropriating the status of women who are highly committed to hierarchical norms, the latter are highly motivated—more so even than hierarchical men—to see "no" as meaning "yes," and to demand that the law respond in a way (acquittal in acquaintance-rape cases) that clearly communicates the morally deficient character of women who indulge inappropriate sexual desire.

This account also unsettles the major normative positions in the "no means . . . ?" debate. Because older, hierarchical women are the persons most likely to misattribute consent to a woman who says "no" and means it, abolishing the common law's "force or threat of force" element and its "reasonable mistake" defense would not create tremendous jeopardy for convention-following men. Nevertheless, there is also little reason to believe that these reforms would enhance the sexual autonomy of women whose verbal resistance would otherwise be ignored. Cultural predispositions, the study found, exert such a powerful influence over perceptions of consent and other legally consequential facts that no change in the definition of rape is likely to affect results.

This conclusion, however, does not imply that the outcome of the "no means . . . ?" debate is of no moment. On the contrary, the role of cultural cognition helps to explain *why* the debate has persisted at such an intense level for so long. The powerful tendency of those on both sides to conform their perceptions of fact to their values suggests why thirty years worth of experience has not come close to forging consensus on what the consequences of reform truly are. Over the course of this period, the constancy of the cultural identities of those who plainly see one answer in the data and those who just as plainly see another has driven those on both sides to form their only shared perception: that the position the law takes will declare the winner in a battle for cultural predominance.

This particular battle, moreover, occupies only a single theater in a multifront war. Like the debate over rape-law reform, continuing disputes over the death penalty, gun control, and hate crimes all feature

clashing empirical claims advanced by culturally polarized groups who see the law's acceptance or rejection of their perceptions of how things work as a measure of where their group stands in society. Indeed, the same can be said about a wide range of environmental, public-health, economic, and national-security issues.[204] It is impossible to formulate a satisfactory response to the debate over rape-law reform without engaging more generally the distinctive issues posed by illiberal status conflict over legally consequential facts.

[204] *See* Dan Kahan, *Fixing the Communications Failure*, 463 NATURE 296 (2010).

APPENDIX: STUDY INSTRUMENT

A. *Vignette*

Now we would like to know how you would evaluate the evidence presented in a criminal rape trial. The summary of the evidence is taken from a court opinion. The names of the parties have been changed. After you read a summary of the evidence, we will ask you how you would assess the facts and decide the case if you were on the jury.

1. The Case

Dave, age twenty, and Lucy, age nineteen, are both college sophomores. Dave is accused of raping Lucy in his dormitory room. The key evidence consists of Dave's and Lucy's respective accounts of what happened.

2. Summary of Lucy's Testimony

Lucy and Dave have mutual friends and acquaintances, and had interacted with one another on various occasions. One such occasion was roughly two weeks before the alleged rape, after Lucy and some friends attended a school-wide seminar on sexual assault entitled, "Does 'No' Sometimes Mean 'Yes'?" After the seminar, Lucy and several of her friends discussed the seminar over a speaker-phone with Dave and Dave's roommate Evan. During that conversation, someone brought up that a lecturer at the seminar had described the average size of a man's penis. Lucy asked Dave what his penis size was. Dave responded by suggesting that she "come over and find out." Lucy declined.

On two other occasions, Lucy had stopped by Dave and Evan's dormitory room while intoxicated. During one of those times, she had laid down on Dave's bed. Questioned whether she had asked Dave how large his penis was then, Lucy said she did not remember.

At roughly 2:00 p.m. on the afternoon of the alleged sexual assault, Lucy returned to her dormitory room after attending class. She had a Martini to "loosen up a little bit," she explained, before going to meet her boyfriend, with whom she had argued the night before. When she walked to her boyfriend's dormitory lounge ten minutes later, he had not yet arrived.

Having "nothing else to do" while she waited for her boyfriend, Lucy decided to go to Dave's room to look for Evan. She knocked on

the door several times but received no answer. So she decided to write a note to Evan, which read, "Hi Evan, I'm drunk. That's not why I came to see you. I haven't seen you in a while. I'll talk to you later." She testified that in fact she had not felt any intoxicating effects from her alcoholic drink, and had written the note "for a laugh."

Lucy tried the knob on Dave's door and, finding it open, walked in. She saw someone lying on the bed with a pillow over his head, whom she thought was Evan. After lifting the pillow, she realized it was Dave. She asked Dave which dresser was Evan's. He told her, and Lucy left the note.

As she turned to the door, Dave asked her to stay and "hang out for a while." She agreed because she "had time to kill" and because she didn't really know Dave and wanted to give him "a fair chance." Dave asked her to give him a backrub but she declined, explaining that she did not "trust" him. Dave then asked her to have a seat on his bed. Instead, she sat on the floor and talked with him. During the conversation, Lucy explained she was having problems with her boyfriend.

After about ten minutes, Dave moved off the bed and onto the floor, and, according to Lucy, "kind of pushed me back with his body. It wasn't a shove, it was just kind of a leaning-type of thing." Next, Dave "straddled" and started kissing Lucy. Lucy responded by saying, "Look, I gotta go. I'm going to meet my boyfriend." Then Dave lifted up Lucy's shirt and bra and began touching her. Lucy then said "no."

Lucy testified that after roughly thirty seconds of kissing and touching, Dave "undid his pants, and he kind of moved his body up a little bit." Lucy was still saying "no" but testified she "really couldn't move because Dave was shifting his body so he was over me." Dave then tried to put his penis in her mouth. Lucy did not physically resist, but rather continued to verbally protest, saying "No, I gotta go, let me go," in what she described as a "scolding" manner.

Ten or fifteen more seconds passed before the two rose to their feet. Dave disregarded Lucy's repeated complaints that she "had to go," and instead walked several feet away to the door and locked it so that no one from the outside could enter. Lucy testified that she realized at the time that the lock was not of a type that could lock people inside the room.

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

Once Lucy was on the bed, Dave began "straddling" her again while he undid the knot in her sweatpants. After removing her sweatpants and underwear from one of her legs, he used one of his hands to "guide" his penis into her vagina. Lucy testified that as these actions took place she repeatedly said "'no, no' to him softly in a moaning kind of way because it was just so scary." Lucy did not physically resist while on the bed because Dave was on top of her, and she "couldn't like go anywhere." She did not scream out at anytime because, "it was like a dream was happening or something." After about thirty seconds, Dave pulled out his penis and ejaculated onto Lucy's stomach.

Immediately thereafter, Dave got off Lucy and said, "Wow, I guess we just got carried away." Lucy responded, "No, we didn't get carried away, you got carried away." Lucy then quickly dressed, grabbed her school books and immediately went downstairs to meet her boyfriend who was by then waiting for her in the lounge.

Once there, Lucy began crying. She went with her boyfriend to his dorm room where, after watching Lucy clean off Dave's semen from her stomach, her boyfriend called the police.

3. Summary of Dave's Testimony

Dave offered his own account of the incident. Dave agreed that he initiated physical contact, but maintained that Lucy responded by "passionately" returning his kisses. He also admitted that Lucy was continually "whispering 'no's,'" but claimed that she did so while "amorously and passionately moaning." Dave testified that he construed Lucy's words and actions as encouraging him to continue. When asked why he locked the door, he stated that "that's not something you want somebody to just walk in on you doing."

According to Dave, Lucy "reclined backwards onto the bed" as he "leaned into" her. He testified that Lucy shifted and turned her body in a manner that helped him to remove her clothing and insert his penis into her vagina. He agreed that Lucy continued to say "no" while on the bed, but explained the statements were "moaned passionately." According to Dave, when he saw a "blank look on Lucy's face," he immediately withdrew and asked "is anything wrong, is something the matter, is anything wrong." He then ejaculated on her stomach because, he said, he could no longer "control" himself. Dave testified that Lucy then "got right off the bed—she just swings her legs over and then she puts her clothes back on." Corroborating Lucy's account, he testified that he then remarked, "Well, I guess we got car-

ried away," to which she replied, "No, we didn't get carried, you got carried away."

B. *Experimental Conditions: Legal Instructions*

1. No-Definition Condition

[Proceed to Part III.]

2. Common-Law Condition

a. *Legal Rules*

The following legal rules apply in this case:

i. Rape

A man is guilty of rape if he (a) uses force or the threat of force (b) to engage in sexual intercourse with a woman (c) without the woman's consent and (d) knows or can reasonably be expected to know the woman does not consent.

ii. Sexual Intercourse

As used in the above definition of rape, "sexual intercourse" means the penetration of a woman's vagina by a man's penis.

3. Strict-Liability Condition

a. *Legal Rules*

The following legal rules apply in this case:

i. Rape

A man is guilty of rape if he (a) uses force or the threat of force (b) to engage in sexual intercourse with a woman (c) without the woman's consent.

ii. Sexual Intercourse

As used in the above definition of rape, "sexual intercourse" means the penetration of a woman's vagina by a man's penis.

iii. Mistake

If a man engages in conduct that satisfies the above definition of rape, a mistaken belief that the woman consented is not a defense.

4. Reform Condition

a. *Legal Rules*

The following legal rules apply in this case:

i. Rape

A man is guilty of rape if he (a) engages in sexual intercourse with a woman (b) without the woman's consent.

ii. Sexual intercourse

As used in the above definition of rape, "sexual intercourse" means the penetration of a woman's vagina by a man's penis.

iii. Consent

As used in the above definition of rape, "consent" means words or overt actions indicating a freely given agreement to have sexual intercourse.

iv. Mistake

If a man engages in conduct that satisfies the above definition of rape, a mistaken belief that the woman consented is not a defense.

5. No-Means-No Condition

a. *Legal Rules*

The following legal rules apply in this case:

i. Rape

A man is guilty of rape if he (a) engages in sexual intercourse with a woman (b) without the woman's consent.

ii. Sexual Intercourse

As used in the above definition of rape, "sexual intercourse" means the penetration of a woman's vagina by a man's penis.

iii. Without the Woman's Consent

As used in the above definition of rape, sexual intercourse is "without the woman's consent" if the woman communicates by actions or by words, including the uttering of the word "no," that she does not consent to sexual intercourse.

iv. Mistake

If a man engages in conduct that satisfies the above definition of rape, and if he knows that the woman has said "no," a mistaken belief that the woman consented is not a defense.

C. *Response Items*

Now you will read certain statements relating to the case. In some of the statements, the term "sexual intercourse" is used. As used in these statements, "sexual intercourse" means the penetration of a woman's vagina by a man's penis. Please indicate how strongly you disagree or agree with these statements. [The options are: strongly disagree, moderately disagree, slightly disagree, slightly agree, moderately agree, and strongly agree.] If you need to refer back to either the summary of the trial testimony or to the legal rules, you may do so.

1. Fact Items [Randomized Order]

CONSENT. Despite what she said or might have felt after, Lucy really did consent to sexual intercourse with Dave.

NOCONSENT. Dave engaged in sexual intercourse with Lucy without her consent.

HONEST. Dave believed that Lucy consented to sexual intercourse.

REASONABLE. Given all the circumstances, it would have been reasonable for Dave to believe Lucy consented to sexual intercourse.

DISHONEST. Dave knew that Lucy had not consented to sexual intercourse with him.

FORCE. Dave used force to overcome Lucy's lack of consent to sexual intercourse.

THREATENING. Dave's threatening behavior would have made a woman in Lucy's situation too frightened to use physical resistance to try to stop him from engaging in sexual intercourse with her.

NOMEANSNO. By saying "no" several times, Lucy made it clear to Dave that she did not consent to sexual intercourse.

NOTLEAVE. Lucy would have tried to leave the dormitory room if she had really meant not to consent to sexual intercourse.

NORESIST. Lucy would have tried to push Dave off of her if she had really meant not to consent to sexual intercourse.

TRUECHARGE. There is no reason to believe Lucy would falsely accuse Dave of rape.

UNFAIR. It would be unfair to convict Dave of a crime as serious as rape.

2. Outcome Item

GUILTY. Dave should be found guilty of rape.