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## Two Truths and a Lie: *In re John Z.* and Other Stories at the Juncture of Teen Sex and the Law

Michelle Oberman

*Laws governing adolescent sexuality are incoherent and chaotically enforced, and legal scholarship on the subject neither addresses nor remedies adolescents' vulnerability in sexual encounters. To posit a meaningful relationship between the criminal law and adolescent sexual encounters, one must examine what we know about adolescent sexuality from both the academic literature and the adults who control the criminal justice response to such interactions. This article presents an in-depth study of In re John Z., a 2003 rape prosecution involving two seventeen-year-olds. Using this case, I explore the implications of the prosecution by interviewing a variety of experts and analyzing the contemporary literature on sexual norms among youth. I also relate a series of interviews conducted with the major players in the prosecution. Examining this case from a variety of perspectives permits a deeper understanding of how the law regulates adolescent sexual encounters and why it fails.*

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**Michelle Oberman** is Professor of Law at Santa Clara University (moberman@scu.edu). This article lived in me for several long years, during which time I was fortified and buoyed by many colleagues and friends. In particular, I thank Anne Coughlin for her comments and insights and the growth they inspired. Thanks also to my many readers: Kathy Baker, David Ball, Pam Cohen, Steve Cohen, Kyle Graham, Larry Marshall, Mike Newdow, Hanna Oberman, Ariella Radwin, Ticien Sassoubre, Bob Weisberg, Stephanie Wildman, and my teenagers, present day and former, for commenting on various drafts. Many thanks to Susan Messer and the reviewers at *Law & Social Inquiry* for their superlative assistance. Thanks to participants at Southwestern Law School Faculty Colloquium, Stanford Law School's Law and the Biosciences Workshop, and the University of California at Santa Cruz's Graduate Workshop in Psychology. Enormous thanks to Jessica Harkins Brown, Santa Clara University School of Law, J.D. 2012, and to Jennifer McAllister, Santa Clara University School of Law, J.D. 2011, for fabulous editing and research assistance.

## TWO TRUTHS AND A LIE?

This is Laura's story <sup>1</sup>	This is John Z.'s story <sup>2</sup>	This is the California Supreme Court's story <sup>3</sup>
<p>Juan called me after school, while I was at work. I was happy because we had only hooked up for the first time a couple of weeks before, so it was good to know he was thinking of me. He asked if I could drive him to a party.</p> <p>"I have to go to this church thing," I told him, "so I can't take you home."</p> <p>I got to his house, and he told me how to get to his friend John Z.'s. When we got there, he was like, "Well, are you coming in?" And so I did. There were two guys there, and that was it. They wanted me to drive them to get some beer, and I said, "Sure. But I'm not going to party or anything, because I still have to go to church."</p> <p>When we got back to John's house, Juan whispered to me, "Let's go into the bedroom." And so we did. It felt great. At least at first it did. We were lying there</p>	<p>Here's what I remember about March 23, but it isn't much. My buddy Juan came over with this girl, Laura. I had just gotten out of Juvie that day, so we were celebrating. She was real cool at first—she drove him to my place, then drove us over to Justin's stepbrother's so he could buy us some beer and then brought us back home. I didn't expect her to come in with us, but she did.</p> <p>Juan and her went in my parents' bedroom, and Justin and I were just hanging out and having some beers. Juan came out after awhile, and we gave him the thumbs up, but he was all pissed.</p> <p>"She won't do anything," he said, and he went to the can.</p> <p>Then Laura came out of my bedroom and stood there looking at the TV like she was really interested in the game we were watching.</p>	<p>"During the afternoon of March 23, 2000, 17-year-old Laura T. was working at Safeway when she received a call from Juan G., whom she had met about two weeks earlier. Juan wanted Laura to take him to a party at the minor's home and then return about 8:30 p.m. to pick him up. Laura agreed to take Juan to the party, but since she planned to attend a church group meeting that evening she told him she would be unable to pick him up.</p> <p>"Sometime after 6:00 p.m., Laura drove Juan to the minor's residence. The minor and Justin L. were present. After arranging to have Justin L.'s stepbrother, P. W., buy them alcohol, Laura picked up P. W. and drove him to the store where he bought beer. Laura told Juan she would stay until 8:00 or 8:30 p.m. Although</p>

1. This is my best guess at the story she would have told the state, based on what I have learned about the case from others and how I read the facts today, as a straight woman who passed through adolescence some thirty-five years ago, as a feminist rape scholar, as a mother of teenaged daughters, and as a stepmother of adult sons and daughters.

2. This is my guess at the story he would have told his defense lawyer, based on what I've learned and who I am, which means that it is unlikely to be his actual story, given that I never was a teenage boy. I tell both John Z.'s and Laura's stories in the first person to underscore, from the start, my faith in psychologist Jerome Bruner's insight regarding the way humans use narratives to make sense of their experience (see note 15 for a description of Bruner's theory and its applicability to the law). This article is full of stories, and those rendered in the third person, such as the court's opinion, are no more true for having employed the omniscient narrator. I think of Ernest Hemingway's preface to *A Moveable Feast*: "If the reader prefers, this book may be regarded as fiction. But there is always the chance that such a book of fiction may throw some light on what has been written as fact" (1964, ix).

3. This really is the court's story, drawn from the California Supreme Court opinion, *In re John Z.*, and includes some facts from Justice Janice Brown's dissent (2003, 764).

This is Laura's story	This is John Z.'s story	This is the California Supreme Court's story
<p>together in the dark, rolling over each other with all our clothes on and kissing and stuff. We hadn't been together in a bed before; only in the car. Juan kept wanting to go farther, putting his hands down my pants and stuff. I just kept pushing him away.</p> <p>Then it was like he got pissed off or something because he just got up all of a sudden and said, "I gotta pee."</p> <p>After a few minutes I got it that he wasn't coming back, and I tried to fix my hair, and I went out there and sat with John and Justin on the couch where they were drinking beers.</p> <p>"How come you won't do stuff with Juan?" Justin asked me.</p> <p>"Yeah," said John, "He really wants to do it with you."</p> <p>"Well I'm just not ready for that," I told them.</p> <p>Juan came back into the room. I couldn't find my keys. I said I needed to go home, but I hung out there for another hour or so. Then I decided to leave, so I told John I really needed my keys.</p> <p>John asked if he could talk to me first. We went into his bedroom. "Juan's a lousy boyfriend," he said. "He doesn't really like you, not the way I would if I was your boyfriend."</p> <p>He put his hands on my shoulders when he said this, tilting his head and moving it close, but not too.</p> <p>Then Juan knocked on the door and came in.</p>	<p>Justin asked her, "How come you don't want to do nothing with Juan?"</p> <p>"I'm just not ready," she said. Her hair was a fucking mess. It was pretty funny, really.</p> <p>She sat down on the couch next to me. She didn't leave or nothing, and I know she probably wasn't all that into our conversation. We were tossing around her keys, and playing with her, telling her she was stuck with us. She was laughing, I think. Either way, she stayed.</p> <p>Finally, when it was all dark outside, she gets up like to go or something, and so I figured I'd see if she was more into me than Juan.</p> <p>"Don't go yet," I said, "I wanna talk to you alone."</p> <p>We went into my room.</p> <p>"You should be my girlfriend," I told her. "Juan doesn't even like you. I want you to be my girlfriend."</p> <p>Just then, Juan came in and it was the three of us in the darkness. It was a little tense, so I said, "Is it your fantasy to have two guys?" She said no, but she didn't go nowhere. We started getting into it with her. I mean, Juan was taking off her shirt and I was playing with her boobs and shit. She was into it. You could tell. She let us take off her panties and finger her and all that.</p> <p>Juan wanted to fuck her, so he kicked me out of the room. I don't know what happened with them, but when he came out, I figured she already liked me well</p>	<p>the minor and Juan drank the beer, Laura did not.</p> <p>"During the evening, Laura and Juan went into the minor's parents' bedroom. Juan indicated he wanted to have sex but Laura told him she was not ready for that kind of activity. Juan became upset and went into the bathroom. Laura left the bedroom, and the minor and Justin asked her why she 'wouldn't do stuff.' Laura told them that she was not ready.</p> <p>"About 8:10 p.m., Laura was ready to leave when the minor asked her to come into his bedroom to talk. She complied. The minor told her that Juan had said he did not care for her; the minor then suggested that Laura become his girlfriend. Juan entered the bedroom, and the minor left to take a phone call.</p> <p>"When defendant returned to the bedroom, he and Juan asked Laura if it was her fantasy to have two guys, and Laura said it was not. Juan and defendant began kissing Laura and removing her clothes, although she kept telling them not to. At some point, the boys removed Laura's pants and underwear and began 'fingering' her, 'playing with [her] boobs' and continued to kiss her. Laura enjoyed this activity in the beginning, but objected when Juan removed his pants and told defendant to keep fingering her while he put on a condom. Once the condom was in place, defendant left the room and</p>

This is Laura's story

"I gotta make a call," said John, and he was gone.

Juan started kissing me, and then, before you know it, John was back in the room and it was the two of them and me in the dark.

John came up and touched my back. "Is it your fantasy to have two guys at once?" he asked.

"No," I said.

But they weren't really listening. They were like touching me, and Juan's hands were on my boobs and John's were on my ass. And it was sort of scary but sort of cool, at the same time. I mean, it's hard to describe. But then they started taking off my clothes and I told them no. It started to feel more and more scary. "Please stop," I kept saying, "cut it out." They took off my pants. I was naked and they had their clothes on.

"Get out," Juan told John. He laid me down onto the bed and started trying to put his dick inside of me.

I told him, "Don't. I'm not ready to do this." I kept trying to push him off me, but he was laying on me and holding me with one arm. He kept rubbing himself but his dick kept coming out.

"Maybe this is a sign we shouldn't be doing this," I said. I wanted to get my clothes and leave. I didn't want him to think I hated him or anything, but I was so sad.

"Fine," he said and walked out of the room.

I was sitting there in the dark trying to find my

This is John Z.'s story

enough that, you know, I could have a turn, too.

I took off my clothes so she wouldn't feel weird or anything when I went in there. She was sitting on the bed, so I sat down next to her and gave her a kiss. She kissed me back, so I figured it was okay to lie back on the bed together.

I told her, "You have a really beautiful body." To be honest, we weren't talking all that much. We were kissing the whole time.

Then, I put a rubber on and started fucking her. I remember the rubber kept falling off.

I kept talking to her, and saying nice things like, "Do you want to be my girlfriend?" I remember asking her that: "Will you be my girlfriend?"

After a while, like maybe five or ten minutes, she said "I really need to go home now."

I was about to come, so I said, "Just gimme a little more time."

"If you really cared about me, you wouldn't be doing this," she said, which was really crazy because then she kept on making out with me for another ten minutes.

Finally, she said, "I have to go home now," and I could tell she meant it. She was a fucking head case—couldn't figure out what she wanted. So I rolled off her. I helped find her clothes and her keys. Then she left. I figured I'd never see her again.

This is the California Supreme Court's story

Juan got on top of Laura. She tried to resist and told him she did not want to have intercourse, but he was too strong and forced his penis into her vagina. The rape terminated when, due to Laura's struggling, the condom fell off. Laura told Juan that 'maybe it's a sign we shouldn't be doing this,' and he said 'fine' and left the room.

"Laura rolled over on the bed and began trying to find her clothes; however, because the room was dark she was unable to do so. Defendant, who had removed his clothing, then entered the bedroom and walked to where Laura was sitting on the bed and 'he like rolled over [her] so [she] was pushed back down to the bed.' Laura did not say anything and defendant began kissing her and telling her that she had 'a really beautiful body.' Defendant got on top of Laura, put his penis into her vagina 'and rolled [her] over so [she] was sitting on top of him.' Laura testified she 'kept . . . pulling up, trying to sit up to get it out . . . [a]nd he grabbed my hips and pushed me back down and then he rolled me back over so I was on my back . . . and . . . kept saying, will you be my girlfriend.' Laura 'kept like trying to pull away' and told him that 'if he really did care about me, he wouldn't be doing this to me and if he did want a relationship, he should wait and respect that I don't want to do this.' After about

This is Laura’s story

underpants when John walked back in. He was naked except he was putting on a condom.

“Oh my god,” I thought. I was shaking. I couldn’t find my clothes.

He touched my face like they do in the movies, and he started kissing me. “You have a beautiful body,” he kept saying. I kept trying to get away from him, but he was so much bigger. He pushed me down onto the bed and he shoved his dick inside of me. He was holding onto me, but the condom kept falling off, so he kept having to stop and put it back on.

“Do you wanna be my girlfriend?” he kept asking me.

“Stop,” I said, “I need to go home.”

“Just give me a little time.” He rolled me over so he was completely on top of me. I couldn’t move.

“If you really cared about me, you wouldn’t be doing this to me. I mean, you should wait and respect that I don’t want to do this.”

“Just give me a few more minutes.”

“No. I have to go home.”

Finally he stopped. Without turning on the lights, he found my underwear, my jeans, my shirt and my keys and passed them to me.

I walked out of the house alone and drove home.

This is John Z.’s story

This is the California Supreme Court’s story

10 minutes, defendant got off Laura, and helped her dress and find her keys. She then drove home.

“On cross-examination, Laura testified that when defendant entered the room unclothed, he lay down on the bed behind her and touched her shoulder with just enough pressure to make her move, a nudge. He asked her to lie down, and she did. He began kissing her and she kissed him back. He rolled on top of her, inserted his penis in her and, although she resisted, he rolled her back over, pulling her on top of him. She was on top of him for four or five minutes, during which time she tried to get off, but he grabbed her waist and pulled her back down. He rolled her over and continued the sexual intercourse. Laura told him that she needed to go home, but he would not stop. He said, ‘Just give me a minute,’ and she said, ‘No, I need to get home.’ He replied, ‘Give me some time,’ and she repeated, ‘No, I have to go home.’ Defendant did not stop, [h]e just stayed inside of me and kept like basically forcing it on me.’ After about a ‘minute, minute and [a] half,’ defendant got off Laura.”

## INTRODUCTION

Adolescents are a tricky population. Contemporary neuroscience research confirms what we always knew, having been teenagers ourselves: teen brains are wired for risk taking, not yet fully equipped to understand the link between cause and effect (Steinberg 2008; Chein et al. forthcoming). Until they do, teens live in the thrill of the present moment.

Contemporary laws governing adolescent sexuality are internally incoherent and chaotically enforced. Contemporary legal scholarship on the subject is all but irrelevant to the reality of most adolescent sexual encounters—particularly as these encounters intersect with the criminal justice system. Let me say a bit about both.

By definition, the law presumes minors are incompetent, distinct from adults and in need of the state's protection. A web of protective and restrictive laws governs teens' sex lives (Mutcherson 2005; Phillis 2011). Minors are permitted to obtain most reproductive health care services, including contraception, without parental involvement.<sup>4</sup> Yet, statutory rape laws typically preclude those defined as underage from consenting to sexual contact of any sort (Oberman 1994, 15, 24–42).

That said, statutory rape law enforcement largely is a paper tiger, as it must be in a society in which adolescent sexual activity is widespread, if not completely condoned. The law as prosecuted today is useful in chasing down moral outliers: the stepfathers, teachers, or other readily agreed-upon modern-day Lotharios (Oberman 2000).<sup>5</sup> The occasional statutory rape prosecution that comes to the public's attention invariably is an outlier of a different sort—newsworthy because it seems unjust to punish the man in the case for having sex. It is hard to blame those who decried the arbitrariness of the 2005 conviction of Genarlow Wilson, who was sentenced at age seventeen to ten years in prison for having what by all accounts seems to have been a consensual encounter involving oral sex with a fifteen-year-old.<sup>6</sup> It is easy to condemn Wilson's conviction, but doing so should not lead us to ignore the ways in which adolescents are vulnerable to sexual abuse or coercion.

Likewise, contemporary acquaintance rape law, which should be of central importance to adolescent victims, provides limited protection at best. In spite of more than forty years of effort by the rape law reform movement to increase prosecution and conviction of rapists who know their victims (fully 73 percent of rapists) (US Department of Justice 2005), little has changed in the pattern of underreporting,

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4. See [www.guttmacher.org/statecenter/spibs/spib\\_MACS.pdf](http://www.guttmacher.org/statecenter/spibs/spib_MACS.pdf) for a comprehensive chart of state laws governing minors' access to contraception and reproductive health services as of February 1, 2011.

5. In reality, statutory rape laws likely are more useful in getting plea bargains out of defendants facing acquaintance rape charges involving underage victims. See notes 20, 24, 39–41, and 57, describing my conversations with various former prosecutors, and noting the outcome of the prosecution against John Z.'s codefendant. The term "Lothario" refers to a womanizing seducer in the play *The Fair Penitent* (1703) by Nicholas Rowe. Every era produces its own terms to describe such men: Don Juan, Casanova, man-whore, masher, lounge lizard. Because the newest terms will be old before this article reaches you, I went with the oldest.

6. The Georgia Supreme Court ultimately overturned Wilson's conviction in *Humphrey v. Wilson* (2007). Some critics of the prosecution focused on its irony, given that state law at that time prohibited oral copulation but not vaginal intercourse (New York Times 2006). Others went much further, condemning the act as evidence of institutionalized racism (Rosen 2007).

underprosecution, and underconviction of rape cases between acquaintances (Bryden and Lengnick 1997; Pillsbury 2002).<sup>7</sup>

The underenforcement of the law in cases involving acquaintance rape is a problem disproportionately borne by adolescents, who, according to the National Crime Victimization Survey, constitute 44 percent of all rape victims (US Department of Justice 2004). It is no great surprise that teens constitute a large portion of rape cases. Because they lack impulse control and are susceptible to peer pressure, teens are particularly vulnerable to coercion in sexual contexts. Their relative inexperience, coupled with the high value they place on peers' opinions of them, hinder their ability to protect themselves from unwanted sexual encounters. Society's inability to embrace a strong criminal law norm in response to coercive sexual encounters between acquaintances renders teens' sexual exploitation more a rite of passage than a crime.

This article endeavors to shed light on the intersection between coercive adolescent sexual encounters and the criminal justice system via an in-depth study of *In re John Z.*, a 2003 rape prosecution involving two seventeen-year-olds. In some ways, the case is extraordinary. It appears in numerous criminal law casebooks in the United States, including the one adopted by 60 percent of all criminal law teachers.<sup>8</sup> It is also went forward despite the presence of facts that typically would persuade a prosecutor to stay his or her hand: the case featured alcohol use, teens who were acquaintances, and an alleged victim who had had prior sexual contact with one of the perpetrators.<sup>9</sup> Finally, in spite of the prosecution problems, it resulted in a conviction that the state supreme court upheld and that embraced a definition of rape the trial court judge never contemplated.<sup>10</sup>

The factors setting the case apart are minor, though, when compared to the ways in which *In re John Z.* epitomizes problematic adolescent sexual encounters. The encounter occurred between newly acquainted partners, without the victim's affirmative consent, and with scant verbal communication between parties. As is consistent with the narratives that dominate social science literature on acquaintance rape, the defendant asserted that the victim's conduct indicated her consent.<sup>11</sup> As is also typical in acquaintance rape cases, the perpetrators used veiled threats to coerce the victim into acquiescing rather than departing the scene (Lisak and Roth 1990; Lisak & Miller 2002). Even though cases with two perpetrators instead of one may be unusual, the fact pattern evokes a question commonly leveled in acquaintance rape settings: "Why did

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7. Ample literature documents the underprosecution of alleged acquaintance rapes. The best study of this pattern remains the landmark work of Bryden and Lengnick (1997). See also Pillsbury (2002) for a description of the "reality" of force in sexual interactions between acquaintances. The United States is not alone in its tendency to discount rape cases between acquaintances. For a study based on UK data, see Temkin and Krahe (2008).

8. I refer here specifically to Joshua Dressler's criminal law casebook (2010). Both Moritz College of Law's website (<http://moritzlaw.osu.edu/faculty/bios.php?ID=19>) and the American Bar Association (2011) (<http://www.abanet.org/legaled/approvedlawschools/approved.html>) note that 60 percent of criminal law teachers have adopted this book.

9. See notes 26 and 27, and accompanying text, discussing the barriers to prosecution in similar cases.

10. See note 52, regarding the trial judge's explanation for convicting the defendant.

11. Baker (1999, 685) summarizes the research on gender and communication in the context of acquaintance rape. See also the well-known acquaintance rape cases included in many criminal law casebooks: *Rusk v. State* (1979, 1981) and *Commonwealth v. Berkowitz* (1992).



she stay?" (Mahoney 1992).<sup>12</sup> The answer is readily found in the rich body of research on adolescent girls and their vulnerability to exploitation (Oberman 1994).<sup>13</sup>

Thus, *In re John Z.* is simultaneously unusual for a rape prosecution, yet typical of adolescent sexual encounters gone awry. In my endeavor to explore why the law fails so spectacularly in responding to adolescent sexual coercion, I employ a *Rashomon*-like approach to the case of *In re John Z.* My project proceeds from the premise that to develop solutions to the problem of adolescent sexual coercion we must recognize the broad range of truths that inform the responses of various players to a given encounter. Indeed, my project reaches beyond the specific encounter, seeking the responses of lawyers and nonlawyers, adults and youth alike, for all voices are necessary if we are to articulate a better response to the things that go wrong at the juncture of teen sex and the law.

Before embarking on our journey, a word about the stories I have told, and those I will tell. Like almost all scholarly endeavors, the literature surrounding sexual coercion, rape, and the law is predominantly rendered in the analytical voice of academic discourse. Much can be said for endeavoring to think and speak rationally about topics that provoke emotional responses. Toward that end, decades of scholars have provided us with theories on which we might base the law governing sexual interactions.

The problem with privileging a theoretical approach to regulating unwanted sex is that these theories are silent about, and at times completely out of touch with, the varied emotional responses stories about sex trigger in us. A chasm lies between the world of stories and the world of theory. I made you jump it just now when I followed my retelling of the three stories at the start of this article with a series of paragraphs discussing adolescent development and sex. In order to make that jump, you and I both left our emotional responses to the stories on the far side, as if they were unnecessary baggage.

We will need to reclaim those emotional responses now, for as you will see, they are at the core of how each of us thinks about sex and rape. Our sexual experiences and our responses to the stories of others' experiences frame what we deem normal and abnormal, moral and immoral, acceptable and unacceptable.<sup>14</sup> It is hard to speak about the

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12. As Martha Mahoney argues persuasively, this same question is raised in reference to women's tolerance of inappropriate and unwanted male behavior in a variety of settings: workplace sexual harassment and domestic violence, to name two others. "If abuse is asserted, 'failure' to exit must then be explained. When that 'failure' becomes the point of inquiry, explanation in law and popular culture tends to emphasize victimization and implicitly deny agency in the person who has been harmed. Denying agency contradicts the self-understanding of most of our society, including many who share characteristics and experiences of oppression with the person who is being harmed. . . . The privatization of assaults on women makes it particularly difficult to identify a model of oppression and resistance, rather than one of victimization and inconsistent personal behavior" (1992, 1285). In short, to the extent that the "exit" question does not receive a satisfactory answer, a conviction can be difficult to secure.

13. Oberman (1994) offers a general description and summary of the literature. Authors have suggested that the socialization process may be as difficult, although with different manifestations, for adolescent boys as it is for adolescent girls (Pipher, 1995, 203–31; Pollack, 2000, 12–24; Sommers, 2000, 17–44).

14. I am by no means the first to invoke the power and importance of narrative methodology in lawyering and legal discourse. In this case, though, I am making a point that is at once substantive and process driven: the stories are important because they inform the laws we have, even if we do not acknowledge the extent to which they do. They are central to rape law and its reform because each of us has different stories, and because our capacity to make sound and enforceable rape laws requires that we attend to the competing narratives underlying these laws.

titillation, the fear, the disgust, the envy—in short, the broad range of feelings evoked in us by stories about sex, let alone about rape. And yet to the extent we ignore those feelings, we tell only half-truths, and diminish our capacity to evaluate and critique the lines our rape laws draw.

## MY JOURNEY FROM KNOWING TO UNKNOWNING

I learned of *In Re John Z.* shortly after the California Supreme Court decided the case in 2003.<sup>15</sup> I lived in Chicago then, and was invited to discuss the case on a local public radio show. The segment was dedicated to analyzing the implications of John Z.'s rape conviction.

From the first reading, the case pulled me in. The victim's story of what happened when she was the only girl in a house with three boys, two of whom she had never met, was familiar and outrageous. As an expert on adolescent sex and the law, I read it as a story of two teenage boys who coerced a girl into having intercourse with them.

How strange, then, to parse the opinion and find the case was not about statutory rape, even though the victim and the perpetrators all were minors. And it was not about acquaintance rape either. Instead, the case stood for the principle that one has the right to withdraw consent to sexual intercourse.

And so, even though I could not see how either boy might reasonably have inferred Laura's consent to sex, I took to the air defending women's right to withdraw consent to intercourse, even after penetration. It was much easier to talk about the case this way. I could ignore difficult questions that the facts raised for me.<sup>16</sup>

A caller suggested that once he gets going, it is impossible for him to stop. "It's a guy thing," he said, "I don't really expect you to get it."

"Ah, so you're saying there should be a right to ejaculate inside of a woman who is saying no, just because it's too hard for you to pull out and come on the sheets?" I responded.

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In interweaving narrative and theory, this article draws on the insights of psychologist Jerome Bruner, whose work on storytelling begins with the observation that humans use narratives to make sense of their experience. Anne Coughlin's work on interrogation illustrates the relevance of Bruner's theories in making sense of crimes.

[Bruner observes that] when things "are as they should be," narratives are not necessary. The community has certain expectations for human conduct in certain contexts . . . and, when people conform and behave in the ways everyone takes for granted, there simply is nothing whatsoever to remark, hence no reason to talk at all—let alone to tell stories, about their actions. By contrast, when folks deviate from or flout the norms, bystanders begin buzzing. Our narrative impulse arises most strongly when—and because—we encounter and need to understand conduct that is extraordinary. . . . Of all conceivable "deviations" from our "canonical" expectations, the human actions . . . deemed to be crimes are among those we most fear and whose meaning we feel compelled to seek most urgently. (2009, 1619–21)

15. The show *Odyssey*, hosted by Gretchen Helfrich, aired on Chicago Public Radio between 1998 and 2005. The episode in which I participated aired in January 2003. Unfortunately, the WBEZ archives of *Odyssey* are no longer available.

16. What did Laura want to happen with Juan G.? Might she have wanted attention from one or both boys? Even if I was right that the story was about Laura not having the experience or self-confidence to extract herself from an unwanted sexual encounter, did Laura feel like both boys raped her? Did I think they were guilty of rape?

I said these words aloud. On the radio. The naughtiness in me stretched and found a bit of comfort in saying words like “ejaculate” and “come” in my prim school-teacher voice to ridicule his view of sex and of fair play. I left for another day the puzzle of what really happened between John Z. and Laura T.

Several years later, *In re John Z.* appeared in a new edition of the casebook I use in teaching criminal law (Dressler 2010).<sup>17</sup> As before, the case puzzled me. Why did the prosecutors charge John Z. with felony rape?<sup>18</sup> I also wondered, more than before, about what really happened that night. I saw two competing narratives beneath the facts. Both read to me as plausible truths.

I asked my students to tell the story from the defendant’s point of view (Brown n.d.). It was easy for them to do. Even my female students could imagine the boys interpreting Laura’s decision to stay with them as an indication of sexual availability. They could see how the boys might have understood her silence as they undressed and stroked her body as willingness to have sex.

The students found it equally easy to tell the story as they imagined it from Laura’s perspective. They imbued her with a mix of terror, desire, and hunger for approval. They felt her hopeful response to the boys’ flattery, her confusion as she tried to discern the truth in their words, and then her too-late recognition that she could not control what was happening, that she would just have to survive it.

In her dissent, Justice Brown called *In re John Z.* a “sordid, distressing, sad little case” (2003, 765). I am inclined to agree that it is distressing and sad. If she used the word “little” because she found the case mundane, commonplace, then, again, I agree; this sort of thing happens all the time. As John McLean, one lawyer who prosecuted the case commented to me: “It’s either kids fooling around, or it’s rape” (interview with author, Sacramento, CA, June 23, 2009). But I could not disagree more with the assertion that because it is mundane, the story is “little.” On the contrary, John Z.’s case is interesting because of how big it is: it raises all the core questions about why, how, and when the law should respond to adolescent sexuality.

All of us—children, adolescents, and adults—have a stake in how we interpret what happened in John Z.’s mother’s house on the night of March 23, 2000. This case asks more of us than to ratify or reject a prosecution for rape; it begs us to notice and reassess the terms of sexual engagement. It demands that we reconsider the law’s role in regulating sexual encounters found in the gray area between the sex our culture celebrates—fully consensual, mutually desired, and pleasurable—and the sexual encounters we readily condemn as rape.

*In re John Z.* beckoned like a glossy travel guide, inviting me to learn more about the aspirations and limitations of the law’s efforts to regulate teen sex. At first, I considered trying to track down John Z., Juan G., and Laura T. The thought of bargaining

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17. Dressler uses *In re John Z.* to illustrate what he sees as the far end of the spectrum of rape cases, entitling its subheading “One Final Wrinkle” (2010, 477). His chapter on rape law begins with older cases that found no rape unless that state proved the victim had resisted to the utmost, and ends with John Z.’s conviction for having failed to withdraw after his partner changed her mind. Situated this way, the case’s message is linear and raises the issues of how little force is needed to constitute rape.

18. They had an easy alternative under California Penal Code § 261.5 (2008), which criminalizes all sexual contact with or between minors under age eighteen.

into their lives bothered me, though. They deserved the illusion of privacy afforded them by the juvenile court system.<sup>19</sup>

Even if I managed to figure out what actually happened by talking with John Z. and Laura about the event—an unlikely result, to be sure—I realized that, as a matter of law, their versions of what happened were not nearly as important as were those of the lawyers and judges who interpreted their stories. When it comes to *regulating* teen sex, what ultimately matters is the story adults see in teenagers' sexual encounters. The adults' versions determine the law, the interpretation of the facts, and the extent to which we are willing to apply the law to condemn or condone the acts we believe took place.

What follows is a chronicle of my journey through John Z.'s prosecution and my endeavor to determine the extent to which it served justice.

## TEEN SEX, SOCIAL NORMS, AND PROSECUTORIAL DISCRETION

I began my journey with the question I had spotted from the start: Why was this case prosecuted when so many like it are not?<sup>20</sup> I decided it would help to talk with a prosecutor from outside the jurisdiction about the factors that shape such decisions. I was lucky, because I had a friend in the business.

Sandy Nowack is a lawyer and former district attorney of Dane County, Wisconsin. For over a decade, Sandy had been in charge of prosecuting sex crimes in Madison, Wisconsin. Now that she was no longer a prosecutor, I hoped we could have an honest conversation about the considerations that animated her selection of cases.

### A Conversation with a Former Prosecutor

Sandy and I met for dinner early in July 2009, to talk about the *John Z.* case. Sandy brought her friend Judy Munaker. Like Sandy, Judy was a former sex crimes prosecutor.<sup>21</sup>

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19. I did try to get a copy of the trial transcript by petitioning the El Dorado County Superior Court (Petition for Disclosure of Juvenile Court Records, Welfare and Institutions Code, § 827, no. PJ1281B). The petition was denied on July 1, 2009 (denial on file with author).

20. Ample literature documents the underprosecution of alleged acquaintance rapes. Levine (2006, 693) lists numerous studies demonstrating patterns in selective and underenforcement of acquaintance rape. The Department of Justice reports that between 1992 and 2000, only 36 percent of rapes, 34 percent of attempted rapes, and 26 percent of sexual assaults were reported (2010). I spoke with Catherine Carroll, the executive director of the Sexual Violence Law Center, to see what she thought of the decision to prosecute this case. I sent her the full California Supreme Court opinion, and then we spoke by phone.

"What did you make of the case?" I asked.

"Truthfully," she replied, "it was amazing to even read *John Z.*, because most prosecutors won't touch alcohol cases or cases involving minors. In my Seattle office, we had a case involving a college student who was raped outside a bar with witnesses. The prosecutors wouldn't even take the case. She had a rape kit, she went to the emergency room afterwards, and still the prosecutor said, 'In my 22 years we've never prosecuted a case like this; it's not going anywhere'" (author's phone interview with Catherine Carroll, June 2009).

21. I did not tape the interviews I conducted in the course of this project. Nonetheless, for the sake of readability, the conversations and interviews I relate in this article are written as dialogues, complete with quotation marks (original interview notes on file with author).

"What I'd like to know," said Sandy, "is how this case got through the first-level screening in the DA's office. There were so many proof problems. All John had to say was that she never said no. And she stayed in the bedroom while other boys, including her supposed boyfriend, were outside. She never called out. All the corroborating evidence goes against her. And there was alcohol involved. And, if it's a withdrawn-consent case, how realistic is it to expect control from a relatively sexually inexperienced teen? And man, even contemplating the threesome thing taints her credibility. This would have to be a VERY compelling victim to persuade a jury."<sup>22</sup>

"Actually," Judy said, "I think the threesome thing makes it seem like the guys had it premeditated."

"No," said Sandy, "sex these days grows out of the Internet. It's like they're acting out scripts for how to get fast and easy pleasure."

"Yeah, and girls are not equipped to say no anymore," agreed Judy. "They don't have a script for it. Today, it's all girls servicing boys. Even among girls who don't see themselves as victims, sex isn't about their desire for anything other than a boyfriend."

We picked at the cold pad thai in the middle of the table a while longer.

"Obviously we need laws to protect kids from sexual exploitation," Sandy said, "and I'm not saying that John Z. shouldn't have been prosecuted. But here the bad facts made it inevitable that the victim would be revictimized on the stand. Was she warned about that?"

"Let's assume she wasn't. Was it bad that it got prosecuted?" I asked.

"No," she said, looking out the window. "There was a lot of courage in bringing this case. These cases send a message. But use the football quarterback to make a point in a case like this. Don't bring it against a young Mexican guy and his buddy."

### *In re John Z. as a Case Involving Teen Sex*

Our conversation confirmed my hunch that even though the court had framed the case as a rape crime involving withdrawn consent, the *John Z.* case was fundamentally about teen sex. I considered the source of the messiness in Laura's case. First I thought about Sandy's notion that the state picked the wrong defendants if its goal was to send a general message. Angela Davis's work on racial bias in criminal prosecutions is directly on point: "[O]ne of the most significant contributing factors [to unwarranted racial disparities in the criminal justice system] is the exercise of prosecutorial discretion," she writes (2007, 202).

I hated the story of John Z. and Juan G.'s behavior not because it was uniquely barbaric, but because it was so familiar. Who were these defendants, and why did they get charged with this crime when so many others get away with similar acts? I could not help but wonder whether the prosecutors had an easier time charging Juan, whose name led me to presume he was Latino, than they would a white defendant under similar circumstances.

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22. Her reaction was not unreasonable. Estrich discusses the reasons why "prior relationship" cases are often dismissed or downgraded (1993–1994, 1776–79).

Then I mulled over the prosecution itself. Had Laura said no more directly, the law would have been easier to apply. She would have been a more “believable” victim.<sup>23</sup> But the “Laura” described in the judicial opinions was so passive, it was hard to imagine her saying no; that is what got her into trouble in the first place.

I realized the three of us had not really talked about teen sex. We did not talk about why Laura might have gone into the house, why she stayed, and what we might have done when we were her age. Of course, in looking back on it all—Laura’s choices, our own choices, the choices of friends we once knew—the risk of sexual violence seems obvious. For better or worse, we expect women to worry about this whenever they are alone in a house with three guys they scarcely know. But what about the countervailing risks and desires? About the risks, philosopher Marilyn Frye put it this way: “[Y]ounger women are in a bind where neither sexual activity nor sexual inactivity is all right. If she is heterosexually active, a woman is open to censure and punishment for being loose, unprincipled or a whore. The ‘punishment’ comes in the form of criticism, snide and embarrassing remarks, being treated as an easy lay by men, scorn from her more restrained female friends. . . . On the other hand, if she refrains from heterosexual activity, she is fairly constantly harassed by men who try to persuade her into it” (1983, 3).

So perhaps Laura’s desire to avoid seeming prudish or scared led her to stay. But maybe Laura wanted to stay for any number of reasons—to hang out with her new boyfriend and his friends, to fool around a little, to see how it felt to be the only girl in the house. Maybe she felt no fear at all, and the fear her story triggered in the three of us is borne of a different era, or of our years of experience. Perhaps things have changed, and few of her peers would have felt fear in her circumstances.<sup>24</sup>

To evaluate what happened in John Z.’s mother’s house—the unwritten terms of engagement—I realized I needed to know more about the rules governing teen sex in the new millennium.

## SEXUAL TEXT, SUBTEXT, AND CONTEMPORARY LAW

There are lots of reasons to suspect that a revolution in sexual norms has occurred in the past fifty years or so. First, there is the ubiquitous sexual imagery of contemporary culture. Material once restricted to hidden stashes now appears with the slightest prompting (or by accident) on one’s computer screen and on mainstream television shows. Popular music could scarcely be more explicit in its celebration of sex.<sup>25</sup> Research

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23. “[E]ven the most well-meaning, ‘feminist’ jurors may find that they have reasonable doubt about the . . . rape case . . . if the tale told fits cultural stories about ‘sluttish women’” (Taslitz 2007, 155).

24. Is it possible that girls have more male friends these days, so the fear of being alone with a boy (and of what it might lead to) has decreased? And might the risks for a girl of staying alone with a group of new male acquaintances remain high, even if the fear has decreased?

25. Even the “clean” versions of many popular songs are cringe worthy if you are listening to them in the car with your eleven- and thirteen-year-old daughters. Try explaining why 50 Cent’s *In Da Club* (“I’m into having sex, I’m not into making love”) offends you (Shady Records/Aftermath Records/Interscope Records 2003), or why you laugh at Mickey Avalon’s “My dick is like supersize, your dick looks like two fries . . . P.S. We got dicks like Jesus” (Interscope Records 2006). And, of course, girls are singing too. Kelis’s



shows at least half of all adolescents are sexually active by age eighteen (Centers for Disease Control and Prevention 2010a, 2010b). And what has come to be known as the “hookup culture” embraces a norm of casual sexual encounters between individuals who have no express or implied commitment to one another (England, Shafer, and Fogarty 2008, 531–47).

Over 75 percent of young people in one survey said they engaged in at least one such encounter during college, typically after meeting someone at a social event and almost always accompanied by alcohol (England, Shafer, and Fogarty 2008, 533). Although the methodology is less scientifically rigorous than academic studies on the subject, *Seventeen* magazine’s online survey of ten-thousand of its younger readers (ostensibly ages twelve through twenty-one) echoes these findings.<sup>26</sup> The survey found not only that the majority engaged in hookups, but also that 40 percent “have told a guy/girl that you’re okay with just a hookup when you really wanted a relationship” (Seventeen 2006).

These two findings—that hooking up is commonplace and that girls<sup>27</sup> might hook up in the hopes of furthering a relationship—may help us to understand both John Z. and Laura’s thoughts about their encounter. Because the research suggests the normalization of casual sex, as well as its instrumental use by both girls and boys, it also supports my sense that the sexual encounters between Juan G., John Z., and Laura may be typical of negative adolescent sexual encounters. If hookup sex is no big deal, then maybe John Z. was not the predator he seemed to me to be.<sup>28</sup> And rather than being clueless when she went into the house with three boys, Laura might simply have been a girl who was willing to hook up with Juan because she wanted a deeper relationship with him.<sup>29</sup>

I am still unclear whether Laura might initially have welcomed John Z.’s sexual advances. Legally, though, what matters is what John Z. thought was going on between them. The crime of rape, like almost all crimes, focuses on the defendant’s acts and state of mind. California law defines rape as “an act of sexual intercourse accomplished with a person not the spouse of the perpetrator . . . [w]here it is accomplished against a person’s will by means of force, violence, duress, menace, or fear of immediate and unlawful bodily injury on the person or another” (Cal. Penal Code § 261(a)(2) 2010; LaFave 2010, 913–17). Insofar as the law is concerned, Laura’s state of mind and reactions are relevant only to the extent that they constitute evidence of whether John Z. was justified in thinking she consented to their encounter (LaFave 2010, 891).

When a rape defendant claims the victim consented, California law requires him to prove both that he honestly believed she consented and also that his belief was

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song *Milkshake* (“My milkshake brings all the boys to the yard”) (Arista Records, Inc. 2003) was quite inspirational, I’m told, for a generation of B-cup and higher girls.

26. *Seventeen* is both the oldest and the most widely read magazine among US teenage girls.

27. Assuming *Seventeen*’s readership is overwhelmingly female.

28. In fact, one of my favorite male colleagues, a self-described feminist fellow traveler, read the case that way. He thought John Z. was just a bumbling teenage boy. He even thought John might have been sincere when he told Laura he wanted to be her boyfriend. “Puh-lease,” I responded. But it is possible.

29. Tolman (2000, 70) and others are quick to note the possibility that girls invoke a romance narrative because it remains taboo for them to express sexual desire. Renowned sociologist Michelle Fine has devoted much of her career to documenting the underpinnings of what she terms teenage girls’ “missing discourse of desire.” She notes that as a result of messages conveyed in both formal and informal sex education, girls have little permission to express sexual desire (Fine and McClelland 2006, 298).

reasonable (*People v. Dominguez* 2006).<sup>30</sup> The facts summarized in the court opinions enable us to get a sense of John's version of their encounter. John Z. told Laura he wanted to be her boyfriend and complimented her on her beauty. They kissed, and she let him roll her back onto a bed where they had sexual intercourse. While they were having sex, Laura said she needed to go home, but she did not indicate a need to leave immediately. After he climaxed, he helped her gather her clothes and keys so she could go home.

Of course, no one but John can know what he was thinking at the time. Did he mean what he said when he told her she was beautiful and that he wanted to be her boyfriend? Did he think she understood his meaning? What did he think she meant when she said she needed to leave?

When I read the California Supreme Court's opinion today, I doubt that John had a subjective belief in her consent.<sup>31</sup> But my dubiousness about his sincerity comes from my lived experience; none of John Z.'s "player" moves indicate his awareness that Laura did not want to have sex with him—that he knew he was forcing her to do so. And although California law allows a conviction on the grounds that John Z. should have known she did not agree to have sex with him,<sup>32</sup> I know from the way my students read the facts of the excerpted case that reasonable minds can differ on this issue.

All these concerns made me wonder, once again, why John Z.'s prosecutors did not charge John Z. with the lesser crime of unlawful sexual intercourse (otherwise known as statutory rape), of which John Z. plainly was guilty (Cal. Penal Code § 261.5).<sup>33</sup> And so, with these questions in mind, I set out to learn what I could from John Z.'s prosecutors.

## CHOOSING TO PROSECUTE

Sean O'Brien, now a private defense lawyer, had been head of the sex crimes division in El Dorado County's District Attorney's Office at the time of the trial. When

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30. California's use of a negligence standard for determining *mens rea* (which, incidentally, is atypical), is reiterated in *People v. Dominguez*: "As we explained in *People v. Williams* (1992), 4 Cal.4th 354, the *Mayberry* defense 'has two components, one subjective, and one objective. The subjective component asks whether the defendant honestly and in good faith, albeit mistakenly, believed that the victim consented to sexual intercourse. . . . Regardless of how strongly a defendant may subjectively believe a person has consented to sexual intercourse, that belief [also] must be formed under circumstances society will tolerate as reasonable in order for the defendant to have adduced substantial evidence giving rise to a *Mayberry* instruction'" (2006, 1148). For more on rape and *mens rea*, see LaFave (2010, 891).

31. Maybe he did not want to understand her positive or negative cues. Taslitz notes that date rapists "engage in cognitive strategies to block their conscious minds from learning the truth" (2007, 149).

32. See note 34 and accompanying text, which discusses California's objective standard in rape cases.

33. Unlike many state laws, which delimit the reach of statutory rape by requiring a minimum age difference between perpetrators and victims, California's punishes even age mates, albeit less severely than partners whose ages diverge. As such, seventeen-year-old John Z. was both a victim and a perpetrator of statutory rape under California's gender-neutral law. This puzzle—that one can be both victim and perpetrator of statutory rape—is provocative. The application of the law is perhaps equally thought provoking, in that practically speaking, the law distinguishes victim from perpetrator by virtue of reporting: The victim is the one whose parents first complain to the police.



I tracked him down, he was happy to talk about why his office had taken the case (phone interview with author, June 15, 2009).<sup>34</sup>

### **A Conversation with Sean O'Brien, Former Head of Sex Crimes Prosecution Unit**

I was surprised by how clearly he recalled John Z.'s prosecution, now that he was a criminal defense lawyer practicing at the other end of the state.

"This sort of crime might not have been brought in a bigger town. We had John Z. on our radar already."

"Still," I said, "these were hard facts. How did you decide to take this particular case?"

"When I pick cases, I ask myself three things: Do I believe the victim? Is she able to handle a trial? Does the case need to be brought to justice?"

"So what persuaded you to try John Z.?"

"Linda Sue, the deputy DA who was my new assistant, and I were in the middle of a fairly aggressive program to ramp up rape prosecutions. Guys were doing this all over the place . . . pin them down, don't listen, rape them, and it's seen as socially acceptable. John Z. was known throughout the high school for doing it every chance he got."

"What were you hoping to accomplish by prosecuting these cases?"

"Girls at the high school in this situation get a lot of grief from boys and girls. The fact that John was sent away for doing it helped the victim, I'm sure. That and the judge believing her; it must have been a big deal. And prosecuting made an example of these boys. The story went around the high school and created a chilling effect."

"And what about the defendant? Was the outcome what you'd hoped for?"

"I'm not a big believer in programs to help kids like John change. That's not why I took the case," he said. "And John didn't learn his lesson. I wasn't at all surprised to see his name on the adult felony docket later on. Any experienced prosecutor knows which kids are likely to be recidivists."

Sean told me his deputy, Linda Sue Campbell, had tried the case. She no longer was practicing law. I heard back from Linda Sue within an hour of my e-mail.

### **Meeting Linda Sue Campbell, John Z.'s Prosecutor**

Like Sean O'Brien, Linda Sue Campbell vividly recalled John Z.'s case. Even before we met for our August lunch, I sensed that the case rankled her. Here is her reply to my initial e-mail (e-mail to author, June 17, 2009).

I would love to speak to you regarding John Z. . . . I caution you that the facts you mentioned [in your e-mail] seem to be derived from Justice Rogers-Brown's dissent.

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34. As with the other interviews reported in this article, I have rendered the interview into a conversation for ease of reading. The quoted words reflect my understanding of Mr. O'Brien's comments, as drawn from the notes I took during our interview.

Although it is true that Laura did agree to all the statements cited by the dissent, those statements actually came after a horrendously drawn out cross-examination by two experienced defense counsel. . . . In my opinion they did everything short of water-boarding her. It has been years since I saw the transcript, but I remember Judge Smith saying in his closing that he discounted all the testimony that suggested that Laura ever consented to anything with John Z.

Linda Sue and I met over lunch in downtown Sacramento. We talked for two hours (interview with author, August 5, 2009).

"Tell me how you came to prosecute this case," I asked.

"I'd known both these boys for years. Each of them had a long record of petty crimes. They were best friends, but John was the leader. He'd been in trouble since he was 12. I swear, he worked harder to get Laura undressed than he'd ever worked on anything in his life."

"So in your mind, were the boys guilty of different things?"

"Laura liked Juan. Probably more than he liked her. Prior to the event, Juan and Laura had been flirting for several months. She'd had her eye on him. Finally, they hooked up. John's party was to celebrate his release from Juvenile Hall. Laura went because she liked Juan; she'd never met John before."

"What happened to Juan?" I asked.

"He pled guilty."

"He pled?" I asked. "When?"

"After Laura was done testifying, Juan turned to his lawyer. He was one of those tall, good-looking, smooth-talking types who could have convinced a jury of almost anything. Juan said, 'If everything she said is true, then did I commit a crime?' His lawyer said, 'yes.' 'Well then,' said Juan, 'I need to change my plea.'"

"No way," I said.

"That's one of the amazing things about juvenile court," she said. "You put these kids on the stand and swear them in, and some of them really believe they have to tell the truth."

"What happened to John Z. after that?"

"Well, his lawyer and the judge wanted me to give him Juan's same deal—probation in exchange for a guilty plea—but I wouldn't."

"Why not?"

"Even though they were best friends, John was different. He was calculating. He used a condom that night with Laura, and then afterwards, as he was flushing his condom down the toilet, he told Justin, 'Oh, I busted a fat nut in there.'"

"A 'fat nut'?" I asked, but it didn't really need translation.

As we prepared to go, I asked, "Why do you think she stayed? There were so many red flags. She was the only girl there. Juan was pushing her to have sex and then got mad and told the other boys she wouldn't. How could she have stayed?"

Linda Sue was quiet for a minute, and then said, "Laura was very vulnerable, which made her a perfect victim. She had a hard time knowing what to think about what had happened. One of her friends remembered Laura saying she'd had sex with Juan, and then John had forced her to have sex with him. Another girl said Laura told her both boys had raped her. They urged her to report it to the police."

"When did she finally call?"

"She didn't. Her parents did. But it took them forever to notice something was wrong with her. Laura was pretty and intelligent, from a religious family, but her parents had just decided to divorce. There were terrible arguments at home, no one was paying any attention to her; her dad was sleeping on the couch.

"She was doing poorly in school for the first time. She couldn't fall asleep at night, and began sleeping in a bag on her parents' floor. Juan stopped talking to her. She started sleeping with lots of boys. When her parents finally noticed she was acting weird, she told them about the rape. They went to the police."

"Did Laura support your decision to prosecute the boys?"

"Laura wouldn't have reported Juan. She didn't want to hurt his record. But as it turned out, a teacher had overheard Laura talking about the incident, so there was going to be a report about Juan anyway. Laura cooperated, but reluctantly. She didn't want a big deal made."

"Did she feel better or worse after John was convicted?"

"Laura went through a classic interrogation. She was exhausted on the stand; she started agreeing with everything the defense said, just to get the cross over with. Just like teenage boys do during interrogation. They break down and agree when they're promised it'll be over with as soon as they admit it."

"So do you regret having taken the case to trial?"

"A district attorney's job is to know which kids are headed for trouble. When John Z. got out, he reoffended against a 14-year-old. By then, he was an adult, and he got adult time."

### John Z.'s Story, According to the Prosecution

My conversations with Sean and Linda Sue helped answer the question of why John Z. was prosecuted. He was not a random victim of a new policy targeting date rape; he was a kid the prosecutors already knew. They understood the story of his interaction with Laura through the lens of his long history of breaking the rules. Professor Angela Davis's work on racial fairness in the criminal justice system illuminates why these particular boys were prosecuted for a crime that, by the prosecutors' own assessment, was rampant. John Z. and Juan G. were relatively easy targets. They had records, albeit only a small one for Juan G., so they already were on the state's radar.<sup>35</sup> They were from the "wrong side of the tracks," so that prosecuting them for this crime would be unlikely to create a public outcry. John Z. was not a member of a historically subordinated ethnic group, but he was a troubled kid from a broken working-class family.

To my mind, the more interesting factor is the prosecution's determination to take on the acquaintance rape problem in the local high school population. Alafair Burke terms this sort of determination "prosecutorial passion," and notes the way in which a prosecutor's subjective determinations about the case can shape its arc (2007, 183). Her research suggests that in any given case, prosecutors may be motivated not simply by

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35. Davis (2001, 408–09; 2007, 202) describes the manner in which a prior criminal record may play decisions to prosecute a given offense.

rational decision-making factors such as the strength of the evidence and the likelihood of securing a conviction, but also by the extent to which they feel personally invested in the prosecution (2007, 192–94).

Both Sean O'Brien and Linda Sue Coleman were personally invested in prosecuting John Z. Sean saw the case as a way to send a message regarding appropriate norms surrounding casual sexual encounters. In addition, both Sean and Linda Sue knew John from his past criminal activities. They wanted to see him punished in this case.

In terms of the crime itself, Linda Sue was convinced John, along with Juan, wanted to have intercourse with Laura, regardless of what she wanted, and they were willing to use as much pressure as they needed to get what they wanted from her.<sup>36</sup> In Linda Sue's mind, the boys' indifference to Laura's expressed preference not to have sex constituted rape.

I was inclined to support Linda Sue's conclusion. She knew John and Juan, and even though I did not, I had known boys who acted the way they had. And I had been raised on the old-school notion that, when it comes to sex, boys are out to get what they can.<sup>37</sup> But the two-dimensional script rendering all boys predators cannot be any more accurate than the script that divides girls into virgins and whores.

Linda Sue's story, coupled with the facts in the appellate court opinions, seemed to depict John and Juan as indifferent to Laura's preferences.<sup>38</sup> I am not convinced, though, that either of them intentionally had sex with her against her will.

The ambiguity regarding the legal standard for evaluating an alleged perpetrator's claim that the victim consented goes to the heart of the controversy. Old common law would have required the state to show that Laura "resisted to her utmost" in order to secure rape convictions in this case. Those laws were changed decades ago, when law enforcement officials and rape victim advocates showed that such standards were arbitrary, nearly impossible to prove, and resulted in putting the victims on trial (LaFave 2010, 914–15). In their place came a host of state laws attempting to protect victims and facilitate convictions by focusing on sex acts accomplished by force and against the victim's will, where force might be little more than the act of penetration (2010, 906). And yet, even though the laws have changed, conviction rates have not (Bachman and

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36. On the subject of instrumental rape among acquaintances, Baker cites studies that find men are so motivated to have sex that they will engage in date rape if necessary, and notes that "date rapists use rape instrumentally to obtain sex" (1999, 666–71). One older study found that almost a quarter of the college males questioned answered in the affirmative to the question: "Have you ever been in a situation where you became so sexually aroused that you could not stop yourself even though the woman didn't want to?" (Koss and Oros 1982, 455–57).

37. For more on the notion that boys are socialized to pursue sex and to view intercourse as an accomplishment, see Baker, who notes that boys are "cast by culture into the role of pursuer" (1997, 600), and Pillsbury, who comments that "the man pursues a single aim of sexual conquest" (2002, 865).

38. For instance, all John Z. knew about Laura was that she had first refused to have sex with Juan, and then later permitted them both to fondle her. When he entered the darkened bedroom, wearing no clothes, he likely assumed she had had sex with Juan. When he initiated sexual contact with her, she did not scream or fight him off. John's indifference might be found in the fact that he ignored her words ("I need to go," "Stop. I need to go home," "I don't want to do this"), even though they unambiguously indicated her lack of desire to have sex. His defense seemed to be that her body language ("kissing him back") indicated a willingness to proceed and that he stopped when he realized she was serious about not wanting to do so. But even that explanation is hard to credit because he waited until after he ejaculated before he withdrew and let her go.

Paternoster 1993, 555; Spohn and Horney 1996, 862; Schulhofer 1998, 38; Jones 1999, 830; Dripps 2008).<sup>39</sup> Juries want proof that the perpetrator knew he was raping her before they call him a rapist.

This proof problem is what generally permits John Z. and others like him to have intercourse without fear of criminal sanction with a partner who gives no sign of desire, needs to be held down and cajoled into staying, and/or says she needs to go home.<sup>40</sup> Experts have written a lot about the gray area between forcible rape and consensual sex. Some scholars suggest that the perpetrators consciously or subconsciously disregard their partners (Taslitz 2005, 381). Others describe instrumental, undetected rapists—those who use only as much force as needed to accomplish their goal of having intercourse, using subtle, escalating forms of pressure that make it hard to detect their crime.<sup>41</sup>

Because of the foregoing, John Z.'s conviction emerges as something of a puzzle. In spite of the fact that he lied or at least misled Laura, the criminal justice system typically would have countenanced his behavior; the prosecutors, the former prosecutors, and the rape victim advocates with whom I spoke all agreed that the odds of getting a conviction against him were slim. I wanted to talk to the defense lawyer and the trial judge to see if I had missed something that made John Z.'s conviction particularly likely.

## DEFENDING JOHN Z.

Talking to a defense lawyer about a former case is not a straightforward proposition. Professional ethics limit the extent to which they can discuss their case, arguably even after it ends.<sup>42</sup> And even if they are no longer ethically barred from such discussions, they might understandably continue to filter the facts through the lens of their

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39. "A comprehensive study of six jurisdictions—Georgia, Illinois, Michigan, Pennsylvania, Texas, and Washington, D.C.— . . . found that only Michigan had any improvement in the reporting of rapes, and none of the jurisdictions had an increase in its conviction rates" (Schulhofer 1998, 38). Jones (1999, 830) notes that although reformers expected to see increases in rape reports, arrests, convictions, and imprisonment rates, research suggests law reform has not produced such results. Dripps (2008, 957) has a nice overview of the (failed) endeavor to increase rape law enforcement via law reform.

40. Many rape cases resulting in acquittals have facts that suggest even more clearly the victim's nonconsent. Criminal law casebooks feature a variety of cases in which the victims were crying, the defendants pulled them by their hair, locked the doors, pushed them down on beds, and nonetheless were found not guilty because they believed their victims consented to intercourse (Kahan 2010, 743; LaFave 2010, 899).

41. For instance, notice the escalating tactics John Z. used to gain sexual access to Laura. First, he used shame and humiliation. "Why won't you do things with Juan?" he asked, forcing her to defend her decisions against the tacit allegation that she was a prude. Then he tried kindness, telling her he wanted to be her boyfriend—that he liked her and would treat her better than Juan had. Next, John used flattery. "You have a beautiful body," he told her repeatedly. Finally, after Juan finished having intercourse with Laura, John entered the room naked, leaving no doubt about his intention to have sex. He took the initiative, pushing her onto the bed, but no harder than he needed to in order to climb on top of her. This pattern of escalating pressure is a textbook illustration of what David Lisak terms "instrumental rape" (Lisak and Roth 1990, 277–78).

42. Pursuant to the American Bar Association's Model Rules of Professional Conduct Rule 1.9(c)(2), even when information regarding a former client has been made public, the lawyer is not permitted to "reveal information relating to the representation except as these Rules would permit or require with respect to a client."

commitment to their former client. And of course they might feel a natural defensiveness about having lost the case. All in all, I expected Don Heape, John Z.'s original defense lawyer, to be defensive. I did not seek him out to find out what really happened that night in March 2000. Instead, I wanted to know why he thought John had been prosecuted and convicted.

We sized each other up as we walked from his office in Placerville to lunch at the Old Town Grill, a tablecloth restaurant in an otherwise empty tourist mall.

"How did you get involved with John Z.'s case?" I began.

"I knew the mother, the kid," he answered. "I'd represented him on some priors. Nothing about sex; just some kid stuff. . . . God I hate this case."

"How come?"

"The facts screamed, 'This has to be an acquittal.' I couldn't ever get my mind around the forcible rape charge. They were kids acting like kids without a mind for tomorrow."

"You run a general defense practice. Do you do a lot of rape work?"

"Yes. And this was not at all a typical rape case. I've represented serial rapists, pedophiles, whatever."

"But California law was pretty clear in this case, right? I mean they were all under the legal age of consent."

I looked up and realized that I had almost lost him. The "Oh my god what planet does this lady live on?" look was there before I exhaled. Heape picked up his fork then put it back down.

"It's like this. I spent 14 years as a prosecutor myself, and I know the pressure in a rural community. In small places, district attorneys have to know everyone: the cops, the investigators, the new deputies. They know them by name. They train them. So sometimes a case just has to get tried."

"Is that what you think happened here?" I asked.

"My client was not a real bright light; the DAs had seen him before."

"So they were out to get him?"

"No, it wasn't like that. It's just that all the players knew one another."

"So maybe they got it right?"

"My client wasn't the nicest guy in the world, but this girl was no innocent. She called the sex with Juan consensual, even though it had some messy facts. He tried to get his way with her and couldn't. But she called John Z.'s same acts rape."

I focused on my breath. I was not going to be able to persuade him that the same act could indeed be sex with one partner and rape with another. And besides, Mr. Heape really wanted to talk about this case, and I really wanted to know what he made of it.

"This victim didn't seem anything like other victims, I'll tell you, especially during the cross. There were no tears, no sense of fear or outrage. I didn't even need to worry about the sensitive, solicitous tone. The only alleged rape victim I've ever had on the stand who said, 'Yes. I enjoyed the encounter initially.' It's not like she was being assaulted, hurt, or battered. Just at some point declared, 'I have to go home.'"

Heape shook his head, rolled his eyes and finished. "All I can say is, it's terrible precedent. That, and I'll always believe that this is a case I should have won."

I drove home fast after my lunch with Don Heape feeling pursued by my gut sense that the majority was on his side. He was outraged that his client was prosecuted and

that he lost. But he was also angry about the way the outcome changed the unwritten rules that govern the distinction between sex and rape.

I wondered what he would have said if I had asked him whether he thought Laura enjoyed her sexual encounters with the boys. I had refrained because I did not want to hear any more of his conclusions about her. What mattered to him was that she did not seem to mind too much, at least not until the end, and that in convicting the boys, the state blurred a line that had once been clear.

And if the district attorneys did take the case to send a message to others, then maybe Don Heape was right. The message was not the neatly packaged “sexual contact with anyone under age 18 violates California law.” It was more: “Be sure your partner is willing before you proceed.”<sup>43</sup> Not a bad message in theory; I imagine Don and I could have agreed on that. In practice, though, how does one ascertain the full array of a partner’s feelings, especially when the people scarcely know one another’s names? The answer lay exclusively with the trial judge.

## CONVICTING JOHN Z.

As a minor, John Z. was tried by a judge, who filled both the jury’s role of determining the facts and the judge’s role of applying the law (Cal. Rules of Court, Rule 5.502 [2010]).<sup>44</sup> In short, the judge’s role was to be the neutral arbiter.

### The Judge’s Story

When I met him, Judge Thomas Smith had recently retired from the local bench. He had become a circuit rider, filling in when needed in courtrooms throughout California’s central valley. He invited me to join him at his new home in a gated golf community in El Dorado Heights. We chatted a bit, sipping lemonade and nibbling on the fruit and cheese his wife set on the table.

“I’ve thought about this case a lot since I decided it,” he said, “But I haven’t reread the transcripts, so I’m just going to tell you what I remember thinking about it at the time.

“Laura was this mentally immature kid, working at Safeway after school when Juan called her. She’d only known him for two weeks, but he was her ‘boyfriend.’ The second time they met, he asked her to give him a blow job, and she did. Now he was calling to ask her to drive him to some party and then to come back later and pick him up.

“She brings Juan to the party, and it turns out there’re two other boys there who she’s never met before, and they want her to drive them to get beer. The whole thing looks like a set up to me—with the boys waiting for her. But she was clueless, and she went along with them the whole time.

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43. This was before the case was reframed as one involving withdrawn consent, and the message it sent became something entirely different, if easier to implement: If she says no, even if she said yes beforehand, it is rape.

44. In *McKeiver v. Pennsylvania* (1971), the US Supreme Court held that juveniles have no due process right to a jury trial in state juvenile proceedings.



"Back at John's house, after they'd gotten their beer, she went into John's bedroom with Juan, and they started making out. He wanted to have intercourse, but she wouldn't do it; she told him she 'wasn't ready for that sort of thing.' In her mind, oral sex was just like kissing, but vaginal intercourse was different.

"Juan gave up and came out of the bedroom, told the other guys she wasn't putting out, and maybe it all could have ended there. But she was immature, like I said, and didn't know how to make her way out of the situation. She just sat down there with them, like they were old friends or something.

"So of course the boys tried again with her. Did you take the first no? I never did, as a kid. And this time, there were two of them in the room with her together, touching her and taking off her clothes, and all the while she's saying, 'stop it,' and 'I don't want to do this.'

"Then Juan puts on a condom and kicks John out of the room, although I don't know why he suddenly wants privacy. He pushes her on the bed, moves her legs apart and puts himself inside of her. All the while, she's saying, 'we shouldn't be doing this,' and he's trying to keep his condom from falling off. Finally, he gives up and leaves her alone.

"She's fumbling around for her clothes when the defendant, John, comes into the room. He's already naked, and there's no doubt what he wants. He tells her whatever he thinks he needs to say to get his way. 'You have a beautiful body.' 'Will you be my girlfriend?' But in the meantime, he's already pushed her back onto the bed, spread her legs, and stuck himself inside of her. And all the while, she's saying, 'Stop. I don't want to do this. I need to go. If you really wanted me to be your girlfriend, you wouldn't be doing this.' Finally, he does his business and pulls out."

The judge leaned back and exhaled, shaking his head. "I never saw this as a case of withdrawn consent," he said. "It seemed to me, at the time, that John used sufficient force to accomplish the rape, even if it was not the worst rape ever. The Supreme Court just used facts from the cross-examination to suggest consent and withdrawal of consent. Of course, I do the same thing as a trial court judge, picking the facts to support my outcome.

"What bugs me about the case, though, is this issue of force. The Supreme Court dissent gives me pain today. When I read it over, I think Justice Brown makes a good point that we never really proved she was forced. And for there to be rape, the defendant has to forcibly continue even after the victim withdraws consent. He's not guilty if he actually and reasonably believed the victim consented.<sup>45</sup>

"In my mind, so many facts seem mushy now, so I'm less sure. Based on the record, I made a finding of force. But if the same case was before me today, I'm not sure I'd

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45. The judge's formulation is reflected less in the California statute governing rape than in the patterned state jury instructions. California law on rape and consent reads: "In prosecutions under Section 261, 262, 286, 288a, or 289, in which consent is at issue, 'consent' shall be defined to mean positive cooperation in act or attitude pursuant to an exercise of free will. The person must act freely and voluntarily and have knowledge of the nature of the act or transaction involved" (Cal. Penal Code § 261.6 [2008]). Yet the jury instructions on consent in a rape case are as follows: "In the crime of unlawful [forcible rape] . . . criminal intent must exist at the time of the commission of the [assault]. There is no criminal intent if the defendant had a reasonable and good faith belief that the other person voluntarily consented to engage in [sexual intercourse]" (CALJIC 10.65, Belief as to Consent—Forcible Rape [2004]).



decide it the same way. Or if they'd been adults. And I'm sure that, had John Z. been presented to a jury, probably the best outcome for the district attorney would have been a hung jury. It would have been very unlikely to get a conviction. John Z. was a hard case."

### Reasonable Doubt?

It had not been much of a conversation, I realized, as I headed toward the door. More like a justification. I thanked the judge and drove away, thinking of how he spoke as though his decision was something quite independent from him—perhaps no longer even supported by him. I guess what I tell my students is true: All you can do as a lawyer is bring your best skills to bear in arguing for your client because on any given day, in any given courtroom, applying a set of facts to a particular law will not necessarily yield the same outcome.

Also the role proximity plays in the criminal justice system struck me. Judge Smith had met the victim and perpetrator; he heard both Laura and John tell their stories in person. Unlike those who read the testimony on paper, those who listened to Laura in person believed her. Those who listened to John in person thought he had used whatever force he needed to make her have intercourse with him. Those who simply read the transcript, as Justice Brown had, and those who read the appellate court opinions, as my friend Sandy Nowack or my students had, were more dubious. Even Judge Smith doubted himself in retrospect, valuing the power of logic offered by Justice Brown's dissent over his own assessment of the veracity and credibility of the parties.

Honestly, though, my primary response to our conversation was emotional. The judge's uncertainty, nine years later, about John's guilt depressed me. I wanted him to respond to the story, even today, with outrage at how John Z. forced himself on Laura. I wanted his reassurance that the law was confident in its condemnation of sexual coercion. In my ideal system of justice, only Don Heape, John Z.'s lawyer, would have argued that these were kids innocently screwing around.

And yet, even I could tell a persuasive and exculpatory story about how John Z. might have seen things that night. And so did the California Court of Appeals, which changed the story Linda Sue Campbell told (and Judge Smith believed) into a story in which Laura initially consented to have sex with John Z., and only later withdrew her consent.

Linda Sue Campbell remembered throwing in a withdrawn-consent argument in closing. She told me that she made the argument in every acquaintance rape case, just to provide an alternative route to conviction (interview with author, August 5, 2009). But Tom Smith did not even remember considering the possibility of withdrawn consent; he called it nonconsensual sex, and in retrospect worried only about whether the law required more force than John Z. had used.

I decided to track down the appellate lawyers so I might understand how they came to see the case as involving withdrawn consent, and to hear what they thought happened that night.

## THE APPEALS

Finding the names of the lawyers who argued John Z.'s case in the appellate courts was easy; they appeared on the published opinions. But because the case involved a juvenile, the briefs and transcripts were sealed. The only way to learn why the incident was framed as withdrawn consent was to convince the lawyers to speak with me about the case.

### A Conversation with John McLean, Deputy Attorney General

Unlike the prosecutors, who chose to press charges, Assistant Attorney General John McLean inherited the case and the obligation to argue in favor of upholding John's conviction. I wondered whether he would even remember the case, let alone want to talk about it.

"Sure I remember it," he said, greeting me after I cleared the X-ray checkpoint that guarded the courthouse where he worked. We made our way to his office on the eleventh floor overlooking the Sacramento Valley. Sitting behind an orderly desk, tall and clean cut, he oozed confidence.

"The AG's office is an appeals mill," he said. "They parcel out cases to sixty deputies in Sacramento alone, and there are several hundred of us statewide. I didn't have any real expertise in the subject matter."

"What made this case memorable for you?"

"It got a lot more publicity than most things I've worked on. I remember friends wanting to talk about it at parties. My kids were teenagers at the time, and they knew about it. *Playboy* even wrote an article about it [Peterson 2003, 50]. The kids loved that."

We laughed.

"Did you feel comfortable supporting the conviction?"

"How else could we rule? What's the scenario in which it'd be okay to continue having sex with a woman once she's withdrawn consent? A jury might be uncomfortable with the outcome. But I swear, there was this line in the defendant's brief about how there's no stopping a man 'when a beast gets his passion up.' Something like that. I quoted it back in my brief. Who'd want to be associated with that?"

"Why do you think this case got so much attention, then?"

"What's tough about the case is that we can imagine ourselves or our kids in these situations. It's out on the edge. It could be prosecuted, but on the other hand, it might not even have been reported. DAs don't pursue most cases like this because they know they can't get 12 people to convict. I guess it wasn't an accident that it was a juvenile case and had to go before a judge."

"So was the judge out of step with society's norms in this case?"

"I don't know. The law can't keep up with changing norms around kids and sex. It's all moving at warp speed. Now at 7 p.m. there's a Viagra commercial on TV. 'What's an erection that lasts four hours, Daddy?'" he mimicked in a high voice, then rolled his eyes.

"Kids can't be sheltered from it. They're inundated. So I guess I think 'you give 'em all a gun, you'd better teach 'em how it works and when not to use it.'"

"This case was about sending a message, then?" I asked.

"Yes and no," he answered. "An awful lot of cases are about sending messages. Prosecutors are acting on behalf of the people, trying to keep some sense of order in society. The El Dorado County district attorneys clearly tried to send a signal to this kid."

"And how does that make you feel, as the lawyer arguing the appeal?"

"Most of the time, I have no second thoughts about the cases I see. I don't lose any sleep over ninety-nine percent of them. Most of what I see is guys who had lots of chances and didn't straighten out. There's no doubt about prison for them. In this case, even though in the abstract these facts sound questionable and might let you think, 'Why ruin his life?' the truth was that he'd had lots of chances. Lots of stuff happened before this case was brought."

"So you're okay with having secured his conviction?"

"I don't know. This case is in the one percent of uncertainty for me. I ask myself, 'Do we really want this kid in the system? Would the world end if he wasn't prosecuted?' Remember this felony counts as a strike, so it carries significant consequences for the defendant for rest of his life.<sup>46</sup> And the harm in this case may be less than with a stranger or a nonconsent rape. Still, I guess I'm okay. From a public policy line-drawing perspective, there's no other rational line to draw."

John McLean did not recall why the case was framed as one involving withdrawn consent. He introduced me to Janet Neeley, the head of the sex crimes unit within the attorney general's office, and I asked her. She remembered that the facts showing force were relatively weak (phone interview with author, October 18, 2010). As such, she suspected that John McLean had reiterated Linda Sue Campbell's withdrawn-consent argument, and for similar reasons: it provided a backup route to upholding a conviction.

I was wrong, then, that her office had chosen the withdrawn-consent theory because California lower courts were split as to whether there could be rape if the victim initially consented,<sup>47</sup> "We're always worried about sufficiency arguments in rape cases," Neeley said. "The hardest cases are those in which there's no proof of violence because the girls were paralyzed by fear."<sup>48</sup>

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46. "If a defendant has two or more prior felony convictions, as defined in paragraph (1) of subdivision (b), that have been pled and proved, the term for the current felony conviction shall be an indeterminate term of life imprisonment" (Cal. Penal Code § 1170.12(c)(2)(A) [2010]).

47. Contrast *People v. Vela* (1985), where the court found no rape committed, with *People v. Roundtree* (2000), where the court found rape had been committed.

48. Indeed, her office is working on articulating an intermediate offense—something less severe than rape, but still a crime. "It's been hard getting the legislature to abolish the force or violence requirement," she said, "but perhaps we could get them to pass a law like Pennsylvania's, perhaps making it a misdemeanor to have sex without both parties' affirmative consent." See 18 Pa. C.S. § 3124.1 (2010): "Except as provided in section 3121 (relating to rape) or 3123 (relating to involuntary deviate sexual intercourse), a person commits a felony of the second degree when that person engages in sexual intercourse or deviate sexual intercourse with a complainant without the complainant's consent." Additionally, Section 3107 states that the victim need not show resistance; such a showing was required to prosecute rape under Pennsylvania law until 1976.

Withdrawn-consent arguments, it turns out, are a compromise between competing narratives. Withdrawn consent is another way of saying that even if the alleged perpetrator was entitled to think the victim consented at first, beyond a certain point, he can no longer credibly claim consent.

This compromise may seem to be no more than a matter of semantics. After all, whether the conviction is based on nonconsensual sex or on withdrawn consent, John Z. is guilty of rape. But, as lawyers would expect, the semantic is substantive, and Laura bears the substantive brunt of this distinction.

By relying on withdrawn consent, the court holds that John was entitled to walk naked into the bedroom right after Juan left, push Laura down on the bed, and put his penis inside of her. It did not become rape until some moments or eons later, when the proof of her nonconsent (her saying “stop,” over and over again, I suppose) outweighed the “proof” of consent (her failure to leave, scream, or push him off).

I am outraged that the law permits John Z. to presume consent under these circumstances. But a small voice in me suggests I am missing some information. I cannot know what Laura was feeling when John Z. came into the room. One can want and not want at the same time.<sup>49</sup> Could Laura have been flattered, and maybe a little curious, frightened, and only later revolted and humiliated? And if I cannot know for sure what she felt, how could I possibly know what John Z. thought she felt?

John McLean and Janet Neely did not worry about these questions. They viewed the law from thirty-thousand feet, noticing that withdrawn-consent arguments facilitated convictions. Standing with them, I could see that what mattered were this ruling’s implications for the entire landscape of similar cases. Yet the twice-upheld conviction was predicated on what both sides seemed to view as a concocted story of withdrawn consent. I wondered what the appellate defense counsel made of it all.

### **Carol Foster, Appellate Defense Lawyer**

After several failed attempts, I finally met Carol Foster, John’s appellate defender, one August morning in the downtown office suite she shares with several other lawyers. Silver-framed family ski photos lined her oversized mahogany desk.

“Thanks so much for making the time to meet with me,” I said. “I can tell you’ve got lots going on in your life.”

“It’s nothing unusual. Just the mother/lawyer balance, and then you add a sick parent, and something has to give.”

“How old are your kids?”

“They’re boys, 14 and 18. Do you have kids?”

“A bunch,” I answered. “And I still don’t have a clue what the law should be doing about bad teen sex.”

We both laughed. Although I had not ventured to define it, I had unwittingly admitted to the possibility of good teen sex.

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49. For an interesting discussion of ambivalence in adolescent sexuality, see Muehlenhard and Peterson (2005, 16–18).

"What I can't stand about this case is the way it treats women," she started, as I got out my pen. "Like they have no responsibility to speak up. What does it mean to put boys in charge of anticipating girls' feelings and desires?"

"Do you think John and Juan thought Laura wanted to have sex with them?"

"It's as possible as anything else. You have to remember that words mean different things to kids. Context shapes everything. Teen-speak is its own language. Like 'Maybe it's a sign.' Does that mean no? Yes? Something else entirely?"

"The way I read the facts," I said, "Laura seemed pretty naïve. It's hard to imagine she wanted to have sex with them."

"I see it differently. Laura wasn't really a victim. She drove herself there. How much brainpower do you need to know, when you're the only female in the house? C'mon. It was a post-facto conflict for her. Her old identity versus her new one. What did this experience make her?"

I thought about it. In my day, it would have made her a slut. Paula England's research suggests it still might mean the same (England, Shafer, and Fogarty 2008, 538–39). Even if it did not make her a slut, I am pretty sure it made her feel weak, scared, and ashamed—things completely out of her control—and she was hurt. Carol and I agreed about one thing. Regardless of the law, the encounter had different social implications for Laura than it did for Juan and John Z.

"I've raised two teenage boys," Carol added, "and I know there are plenty of girls who are the aggressors in relationships. Kids have so few limits these days. Sexual images completely saturate the media. There aren't any boundaries."

"Did you ever meet John Z. or his family?"

"No. They weren't even involved in the appeal. They didn't want to pay for it; I was appointed by the state."

"So do you think we should get rid of statutory rape altogether?" I asked, forgetting this was not a statutory rape case.

"I'd save prosecution for cases in which the girl was clearly naïve," she answered, forgetting, too. It was easy to forget; John only served eight weeks at the boy's ranch for his crime.

"In the ideal world," Carol continued, "the public defender, the district attorneys, and the judges would work together to set guidelines on what would be prosecuted and how to handle these cases."

"So then cases like this wouldn't be prosecuted?" I asked.

"Right," said Carol.

"Anything else come to mind?"

"Well, there's just this thing. I practiced really hard for this argument. I thought lots about what to expect from the various justices. I pegged my argument toward the centrist woman justice, because I figured she would be sympathetic to the defendant, or at least to the repercussions for women of taking rape law this far. Ironically, at oral arguments, she ripped me side to side. She was so aggressive it made me think she must have had some history."

"Don't we all have some sort of experience that shapes how we react to cases like this?"

Hearing Carol say she thought John Z. and cases like his should not be prosecuted reinforced my discomfort with the withdrawn-consent theory of the case. The real issue

in cases like this one is not where the law draws the line between coercive, yet legal, sex and rape, it is who gets to draw that line.

Carol believes women and girls would be better served by a rule requiring them to say no, even if social science research demonstrates that many, if not most, girls struggle with saying no unequivocally, as they are socialized to avoid confrontation and disappointment (MacKinnon 1989, 177; Pettinato 2007, 116).<sup>50</sup> Her position would permit John Z. to infer Laura's consent to intercourse based on the theory that when John Z. kissed her, Laura "kissed him back." Because this phrase is in the dissent and came from John Z.'s testimony, it is a version of the story that Judge Smith rejected as not credible.<sup>51</sup> Even if one credits it, we still do not know what "kissing back" means, and why Laura's doing it permitted John to presume she thereby consented to intercourse.

I disagree with Carol and think we need a rule that presumes nonconsent in close cases. But my argument is based on principle rather than on experience. Juries seem no more likely to convict rape defendants in jurisdictions that require affirmative consent.<sup>52</sup> Moreover, the truth remains that girls' responses to boys' sexual overtures may be ambiguous.

I read the facts as indicating Laura did not want to have intercourse with either boy. To the extent she was unclear, I think it was because she tried to say no in a way that preserved her relationship with Juan. As Linda Sue Campbell said, girls were "raped out of being too polite" (interview with author, August 5, 2009). When I discussed this case with my criminal law class, a student who was born in India but raised in the United States said the story reminded him of eating with his Indian relatives. After finishing the first helpings, he was full.

"Would you like some more?" his aunt asked.

"No, thank you, I'm fine. It was delicious," he responded.

She proceeded to heap a second serving onto his plate. He ate it, not wanting to seem impolite.

"Oh, I see you like it," she said. "Have some more."

"No, please. It's quite good, but I'm full."

His aunt served him another helping, smiling at his appetite.

He ate it.

She lifted the ladle to his plate for a fourth time, at which he lost all pretense of manners, and said, "No. Don't give me any more. I can't eat it."

"Oh," she said. "Why didn't you say so?"<sup>53</sup>

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50. MacKinnon argues that "women are socialized to passive receptivity" and might comply to avoid "the escalated risk of injury" (1989, 177), while Pettinato discusses how girls are taught to "avoid sexual aggressiveness and general self-assertion and/or cultivat[e] an ideal image of femininity" (2007, 116). Complicating the challenge for the law is evidence that yes or no may often mean "kind of." How can we task girls with expressing, or boys with recognizing, a lack of consent when girls might not really know what they want at the time? See also Muehlenhard and Peterson (2005).

51. I never saw the transcript, but Linda Sue Campbell noted in an e-mail to me (dated June 17, 2009) that in announcing his verdict, Judge Smith stated he discounted all the testimony suggesting that Laura ever consented to anything with John Z.

52. See note 46 and accompanying text, discussing rape law reform and its general failure to alter enforcement and conviction rates.

53. Many thanks to Gowri Ramachandran for thoughts on the wisdom of placing the burden of stopping an unwanted encounter, be it with food or with sex, on the person offering the connection. In so

## PONDERING THE CONVICTION

At the end of my interviews, I was a little proud of my sleuthing success in uncovering new facts, questionable assertions, and flat-out mistakes in the California Supreme Court's opinion (e.g., Juan G. pled guilty; the trial judge now had reasonable doubt; the appellate courts were wrong about which boy had used a condom: it was John Z., not Juan G., who did). Perhaps I could solve more mysteries. I still wondered what the parties themselves would have told me, had I chosen to track them down. But even if I had found them and they did want to share their versions of what happened that night, I stand by my initial observation that the law renders the kids' versions almost beside the point. Instead, the law is interpreted and enforced by the adults into whose hands their case fell. I could have tried talking to more people who were involved with the case: the appellate court judges, and even the California Supreme Court justices. But I knew they would not have the answer to the question that haunted me most: How should the law determine what constitutes unwanted sex, let alone punish it, particularly among minors?

Looking back on all I had learned about John Z.'s prosecution, I see not only the stories I expected to find—the complicated versions of a bad adolescent sexual encounter—but also two others: a story about what might be called cognitive bias and a story about prosecution as a norm-setting endeavor. Let me touch briefly on both because, it turns out, taken together, they explain where and how I ended my journey with this case.

### How We See Things

When I began thinking about John Z.'s case, I turned to the emerging literature on cognitive bias and the law (Kahan and Braman 2006, 156–57; 2008, 1; Kahan, Hoffman, and Braman 2009, 837; Kahan 2010, 732; Secunda 2010, 107). To date, this work does little to illuminate the depth of the problem of bias, focusing instead on cultural patterns of bias.<sup>54</sup> This article reveals a bias problem that is both more basic and more far-reaching. The individuals with whom I spoke universally drew on their personal experiences when explaining whether they thought John Z. was legally blameworthy. The tendency of adults involved in regulating sex among minors to see the subject through the eyes of their own sexual experiences and values threatens a criminal justice system predicated on impartiality, and yet it seems inevitable.<sup>55</sup> We all come to the topic of sex with our own baggage.

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doing, the law assumes a level of intuition that the individual making the offer might lack, or perhaps that might conflict with social norms. In the end, it may be more efficient to require the person who does not want what is offered to voice his or her objection. So doing may itself violate social norms that presume consent to what is being offered. But once you violate those norms with a loud refusal, no one is likely to mistakenly assume assent, at least not with you, in the future.

54. Instead, it exposes the tendency of certain subpopulations to share core values, and suggests these shared values may influence their perceptions of justice. For a brilliant critique of contemporary work on cultural cognition or social and cultural norms in the criminal law context, see Weisberg (2003, 467).

55. Recall Coughlin's explanation of the manner in which humans default to storytelling and personal narrative when seeking to explain behavior that deviates from the norm, or at least from the rule of law (2009).



Among my favorite observations is Anaïs Nin's remark that "[w]e see things not as they are, but as we are" (1961, 124). How well her insight captures and explains the melancholy nostalgia that animated the conversations I have reported here. Almost everyone with whom I spoke referenced their own pasts and/or their moral visions surrounding sex, when justifying their perspectives.

Tom Smith, the trial judge, noted that as a kid, he would "never taken the first no." Linda Sue Campbell spoke about the harm Laura suffered, and the emotional vulnerability that led to Laura's victimization in the first place. She also voiced her outrage about how hard it was to get judges to take acquaintance rape seriously. This belief infused her with a sense of acting on behalf of all rape victims—a sense echoed by her supervisor, Sean O'Brien. Don Heape, the defense lawyer, viewed the prosecution as offensive, motivated by a need to please the police officers or the criminal investigators, or perhaps by the state's determination to put his client behind bars. He could not conceive of the encounter between his client and Laura as a rape. To him, it was just "kids being kids." He bolstered his assertion by noting that Laura did not act like the sort of rape victims he had seen in the past.

The appellate lawyers also brought their pasts along in making sense of this case. John McLean, the attorney general who argued the appeals, said: "What's tough about the case is that we can imagine ourselves or our kids in these situations." Carol Foster, the appellate defense lawyer, used her sons' stories of sexually aggressive female classmates to inform her view that Laura shared responsibility for what happened to her that night. She felt so strongly about the negative implications of this conviction for women's equality that she could not fathom why a woman judge would see it differently, unless perhaps she had had some experience that colored her perception of the facts.<sup>56</sup>

Of course, reflecting on one's life experiences in considering how to evaluate a story is not necessarily a bad thing.<sup>57</sup> Nor can we avoid doing so, for we give meaning to our own experiences by telling stories to others and to ourselves.<sup>58</sup> The legal implications of personal bias are varied.

My conversations with the defense lawyers revealed their belief that John Z. was not guilty of rape, and that he should not have been prosecuted. Their versions of what happened between John Z. and Laura—versions that inspired their zealous defense of their client—were informed by each of their personal stories, by conclusions they drew from their life experiences. The trial judge's foray into his personal past, coupled with his sense, ten years later, that the defendant might not have been guilty, might be more troubling, legally speaking. And yet, when the parties were before him, he set aside his

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56. Carol's suggestion is actually a sort of "bias within bias," in that Carol makes sense of what she sees as the judge's irrationality by assuming the judge was biased as a result of her personal experience.

57. Indeed, because I believe such bias is inevitable, self-awareness seems to me to be the only antidote. I know reasonable minds differ on this issue, as well, as was seen in the furor then-nominated, but not yet approved, Justice Sonia Sotomayor created when she said she saw cases as "a wise old Latina" (CNN.com 2009). Sotomayor was accused of bias; her remark contrasted with Chief Justice John Roberts's assertion that he is an impartial umpire who "calls them as he sees them" (CNN.com 2005). We want our legal system to give us a fair shake, and prefer to imagine our judges, if not predisposed to be sympathetic to our version of justice, then at least to seem neutral.

58. See Coughlin (2009), describing Jerome Bruner's studies of humans' employment of narrative in making sense of the unexpected or abnormal.



mindset, in which he never took the first no seriously, and heard a new story. He convicted John Z. even though Laura might not have looked to him like a typical rape victim. Our pasts may shape us, but they do not always control us.

Most interesting to me is the prosecutors' personal gaze in this case. Legally speaking, it is the one that truly matters because it determined whether the case would be brought into the criminal justice system in the first place. Even if the prosecutors' point of view had not prevailed and John Z. had been acquitted, the prosecutors were responsible for attempting to shift the line between sex and rape in this particular case. And even more than the others with whom I spoke, the trial-level prosecutors were animated by a deeply felt mix of passion for justice and passion for change.<sup>59</sup> A rich literature explores the law-making function of prosecution (Stuntz 2001, 506; Davis 2007, 202). The reality is that district attorneys' offices serve as factories in which the criminal law meets the reality of limited resources and the "real" crimes become articulated.

John Z.'s prosecutors showed me a more nuanced version of prosecutorial discretion than I had anticipated.<sup>60</sup> Just like defense lawyers and judges, jurors, and everyone else, prosecutors form their opinions about cases in part by reference to their personal narratives. And the story they tell themselves about a given incident determines whether they will invest their energy in prosecuting it as a crime.

### Prosecution as a Norm-Setting Endeavor

John Z.'s prosecutors made no secret that, for them, John Z.'s prosecution was about more than one defendant and his crime. Sean O'Brien referred to the prosecution as part of an "aggressive program" to send a message.<sup>61</sup> His hope was that the message his office sent might not only vindicate the victim, but also herald a change in social norms (interview with author, June 15, 2009).<sup>62</sup> Pressing charges was harder than ignoring a case like this one. The prosecutors must have been tempted to look the other way, or perhaps duck the challenging issues by simply charging John Z. with statutory rape. Instead, they fortified themselves by believing prosecution mattered beyond the courtroom. They justified the downsides of this prosecution—that Laura was likely to be retraumatized in the process, that John Z. was being unfairly singled out for committing what were commonplace bad acts in the community—by not only their sense that he was a serial offender, but also their belief that punishing him might shift community norms.

A lengthy discussion of prosecutorial discretion is beyond the scope of this article, but I will briefly explore two sets of questions inherent in the notion that ramping up

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59. As such, this case study illustrates the phenomenon so aptly described in Burke's work (2007) on the relationship between prosecutorial decision making and the psychological mindset.

60. Levine (2005, 1177) discusses the reluctance of prosecutors to work with "difficult" victims.

61. Prosecution was his response to his understanding that "[g]uys were doing this all over the place . . . pin them down, don't listen, rape them and it's seen as socially acceptable."

62. "[P]rosecuting made an example of these boys. The story went around the high school and created a chilling effect."

the prosecution of sex crimes might alter entrenched social norms such as those surrounding sexual interactions.<sup>63</sup> The first involves the issue of proof: How do we define and measure successful norm change? And the second is, assuming prosecution can change sexual norms, how great are the costs of such an endeavor, and who should bear them?

### *How Might Prosecution Change Norms?*

In his work on norm setting, Dan Kahan (2000, 607, 617) has argued that prosecution sometimes can change cultural norms. His theory, which he is quick to note lacks empirical support, is that the impact prosecution might have on a given norm depends on the degree to which it is accepted or entrenched by society. In the case of particularly deep-seated negative social behaviors—what he terms “sticky norms”—he reasons that “gentle nudges” might work better than more condemnatory ones (“hard shoves”) (2000, 633–34).<sup>64</sup>

For instance, studies measuring the varying patterns of prosecuting domestic violence lend tentative—but only tentative—support to a link between aggressive prosecution and specific deterrence (Mendes 2004, 59). At best, the studies demonstrate that individuals who are prosecuted for domestic violence are less likely to reoffend. These studies do not, however, support a finding that community norms around domestic violence change. Moreover, evidence is insufficient to determine whether the frequency or the severity of the punishment triggers even the specific-deterrent effect (Kleck et al. 2005, 623).

Even without empirical support, however, I sympathize with the notion that prosecuting acquaintance rape might send a message. There is a solemnity inherent in gearing up the criminal justice system. It makes sense to imagine both victim and accused feeling as though their story is bigger and more serious as a result of it being told in public.

Yet, even assuming we all agreed that John Z.’s behavior was reprehensible and merited punishment, and that treating it as a crime might prompt a community-level recognition of the harm in forcing someone into sexual conduct, a question remains: Is it worth the cost?

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63. I leave for others the task of answering a third question: Might norms more readily be changed were prosecutors to charge prominent, “upstanding” members of the community with relatively commonplace crimes like the one John Z. committed? Sandy Nowack thought so, suggesting that a prosecution intent on making a statement in a case like this should charge the high school quarterback, not the “poor Mexican kid and his buddy.”

64. Kahan contrasts the successful norm shift regarding cigarette smoking over the past few decades (how a series of “gentle nudges” from various government agencies slowly changed the way the United States views smoking), with the more entrenched norms around drinking and driving. He considers the factors associated with the reduction in drunk driving in recent decades, which include increasingly severe penalties, but admits that no one knows whether these penalties have changed the propensity to drink and drive. Indeed, without research on whether the *level* of law enforcement has changed over time, we cannot know whether the law has played any role in reducing drunk driving rates.

### *Is Prosecution Worth It?*

A conversation I had with Jessie Mindlin, senior legal counsel of the Victim Rights Law Center and former senior staff attorney for the Center for Law and Public Policy on Sexual Violence, put a fine point on the question of the cost of prosecution from the victim's perspective.

"I'd never have advised Laura to prosecute," she said, after I shared the case with her. "But then, we almost never suggest prosecution unless the victim really, really wants to go that way. It's so much better for her to focus on what she needs: safety in her school, just say. We can use civil orders to make that happen" (phone interview with author, May 12, 2009).<sup>65</sup>

Catherine Carroll, the executive director of the Sexual Violence Law Center—the one who explained how unusual it was to see a prosecution in a case like Laura's—agreed. The first thing she said when I asked her what she made of the case was, "Oh god, they've just raped her twice" (phone interview with author, June 2009). So did Brandy Davis, the former head of Breaking the Cycle, a national organization focused on teen dating violence: "Prosecution likely didn't help Laura," she said. "Prosecution is all about punishing the offender, which might benefit all victims, but it's not clear how it benefited this victim. She's likely to have been retraumatized by the prosecution's interviewing process, not to mention by the trial. She already experienced a loss of control, a loss of freedom, most of which won't be addressed by court system. And it's not really going to help stop the cycle of violence for perpetrators" (phone interview with author, May 19, 2009).

I knew Brandy was right. Linda Sue Campbell, the original prosecutor, told me Laura's parents had arranged to take service of the petitions when John Z.'s case was appealed. Laura was so devastated by the trial they did not want her to know the case was continuing (Linda Sue Campbell's interview with author, August 5, 2009). So far as Linda Sue and I know, Laura has no idea that her case went up to the California Supreme Court, that her story is discussed in law school classrooms around the country, that she "won," and that John's conviction was upheld. Moreover, she might not even recognize the story told in the opinion we read: that she consented to have sex with John and then changed her mind. That was never her story.<sup>66</sup>

If I think for a moment about how the trial must have felt for Laura, I recognize the exorbitant price we demanded from her in this prosecution.<sup>67</sup> She had to sit on the witness stand and hear her words twisted back at her by grown men who asked whether she enjoyed having the boys play with her tits. Who could answer such a question in

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65. Several authors have addressed the subject of civil remedies in acquaintance rape cases (Casarino 1996, 185; Baker 1999).

66. For what it is worth, I have spent hours wondering what Laura would think were she to read this article. Would reading my version of her story feel like yet another rape? And if so, should I stop writing it?

67. Laura's humiliation resonates through long decades of research about rape victims' retraumatization in court, and about the manner in which fear of public shaming contributes to the underreporting and underprosecution of sex crimes (Katz and Mazur 1979, 198–99; Estrich 1987; Furby, Weinrott, and Blackshaw 1989, 27; Wilkinson 1990; Marcus and McMahon 1991, 1049–50; Estrich 1993–1994; Wiehe and Richards 1995, 32). Wilkinson's article, published in the *Los Angeles Times*, discusses the findings of a Los Angeles study showing that rape or attempted rape is reported only 3 percent of the time.

front of her parents and the boys who forced themselves on her and the judge and a court reporter?

## CONCLUSION: TWO TRUTHS AND A LIE, REMIXED

In the end, the stories I found and recounted for you have many truths. There is Laura's truth of how she came to be coerced into having sex one night with Juan G. and John Z. But even if I have the coercion part right, I do not know where her story ought to begin. Does it matter that her parents were divorcing? That she wanted a boyfriend, or this particular boyfriend, for a long time? That her parents were evangelical Christians and thus were likely disinclined to countenance premarital sex?

There is John Z.'s truth (or the lie about him I concocted from my interviews, the court opinions, and my reading of the facts) of how he came to be convicted by a judge for a crime that might not even have been prosecuted in other jurisdictions or against other defendants. Should I have begun by mentioning the things the defense lawyer said about John's parents, long divorced; about his father, who worked for the state prison system, and who reportedly told John he expected to see him there some day?

There is the California Supreme Court's truth, which is untrue in so many big and small ways: that Laura consented to sex with John Z. and then withdrew her consent; that John Z. raped her at that point, by failing to stop. There is Justice Janice Brown's truth, echoed by the trial judge's comments, that this was a little story, "not the worst rape ever."

Here is one truth of which I am certain: What happened the night of March 23, 2000, was not merely a little story. Sexual coercion is not only "sordid, distressing, and sad" (*In re John Z.* 2003, 764); it is all but normative in adolescent relationships. As many as 54 percent of high school girls report having experienced it on a date, as do 63 percent of college women. And girls are not the only victims; in one study, 50 percent of college-aged men reported it (Teten, Gordon, and Capaldi 2009, 574).<sup>68</sup>

If the majority of teens experience sexual coercion, then the story of John Z. is not little. It is epic. Laura's story is so universal that I can scarcely tell it without triggering responses from listeners about their own stories, and the stories of their friends. Some tell of near misses. Others speak of their long journeys from pleasing others to pleasing themselves. One of my friends was raped by her prom date. Powerful in her forty-year-old lawyer body, she still reddened when she told me her story. Decades later, her shame seemed to outweigh her outrage.

The high school reunion rituals, now rendered by the Internet into tantalizing advertisements to reconnect with old classmates, make me suspect that most of us think pleasant thoughts when we remember those heady years. We remember the yearning, but not the agony. When it comes to recounting teen sex, adults appear to be unreliable narrators. How then can we be trusted to articulate and enforce just laws—laws that would protect Laura and those like her from being coerced into unwanted sex?

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68. Nor is it harmless. Studies of male and female victims evidence a range of short- and long-term consequences for survivors of sexual aggression, some of which are profound and life altering (Teten, Gordon, and Capaldi 2009, 574).

Indeed, I wonder why I think the law, articulated and enforced by adults, is capable of offering a solution to the underlying conditions that led to Laura's humiliation. What John Z. did to her was bad. No one with whom I spoke defended it, morally. But his conviction did not clearly help Laura. Moreover, to the extent that it helped society, it likely did so only in the narrow sense of priming him with a criminal record so that his later offense could be punished more severely than it otherwise would have been.

This being a conclusion, you might expect me to suggest alternatives, such as education or media campaigns or a call for research into how we might permit kids to come of age while avoiding unwanted sexual encounters. But I cannot generate the faith needed to believe in my own proposals. The truth seems to be that no one cares all that much about the messy details of teen sex once they have found (or at least set off in search of) their adult sexual bliss.

Perhaps the best solution I can offer for now is that teens read stories like Laura's and John Z.'s and that they talk to one another, in mixed age groups, and try to imagine how that long-ago evening might have ended differently. They should share their notes.

I wonder if they would accept this invitation from us if they knew that adults, with all their collective years of experience, have no answers. All we have is the certain knowledge that to reach the promise of sexual pleasure, many teens will bleed from walking over the glass shards that line their pathway.

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