*Maryland v. Rusk*: The Silent Problem of Sex

By Jessica Zou

Although rape cases have recently received a lot of attention at the trial level, they are often largely overlooked at the appellate level. That is not to say, however, that discussions of sex and consent are less important in higher courts. In fact, due to the often unspoken nature of consent and the textually reliant nature of appellate courts, rape cases should receive more attention upon appeal.

*Maryland v. Rusk* was one such case that went to both the Maryland Court of Special Appeals and the Maryland Court of Appeals. Edward Salvatore Rusk had been convicted of the rape of an unnamed twenty-one year old woman in the Baltimore Criminal Court, but the Court of Special Appeals had overturned that decision before being reversed two years later by the higher Court of Appeals.[[1]](#footnote-2) While these cases discussed proper standards of appellate restraint and the different roles of trial and appellate level courts, they also revealed a very interesting understanding of the cultural language, or lack thereof, of sex.

*Maryland v. Rusk* was an acquaintance rape case. Rusk had met a young woman, recently separated from her husband, at a bar and asked her for a ride home. In the woman’s version of the story, upon arriving outside his apartment, she had declined to go upstairs with him until he had frightened her with his insistence and taken her car keys. In his bedroom, he undressed her, demanded oral sex, and forced himself upon her, even starting “lightly to choke” her at one point.[[2]](#footnote-3) Rusk, however, claimed that the entire situation was consensual and that the supposed victim had been all over him at the bar and eager to go up to his apartment with him to have sex. Based on the evidence presented at trial, the jury convicted Rusk of assault and second-degree rape.

So if a jury found that there was enough evidence to convict, what was the problem with the case at the appellate level that led the Court of Special Appeals to overturn the decision? The issue lies at the heart of the very procedural system of appellate courts. While it is difficult enough to determine consent in rape cases at the trial level when the judge and jury have all of the witnesses and every piece of evidence in front of them, it becomes still more problematic for an appellate court that must rely solely on written transcripts from the trial court and assess the situation from two degrees of separation. Given then the silent nature of sex in our culture and peoples’ seeming unwillingness to explicitly say what they want or do not want, what is left unsaid in trial transcripts is often just as important as—if not more so than—what is recorded by the court stenographer.

In the trial transcripts, both the prosecuting witness and the accused defendant showed a distinct discomfort with explicitly using the word “sex.” Describing the moment when she realized Rusk was intent on raping her, Pat, as Justice Wilner of the Maryland Court of Special Appeals named Rusk’s victim, said that she knew he wanted to “rape me, but I didn’t say that.”[[3]](#footnote-4) Instead, she referred to sex twice as “what you want” – what Rusk wanted.[[4]](#footnote-5) Even in a situation where niceties and clean language had become completely irrelevant, Pat was clearly uncomfortable explicitly speaking about sex. It seems that sex, or at least talking about sex, still remained very much “shrouded in the taboos and myths of a Victorian Age,” in the words of Justice Wilner.

Avoiding this straightforward discussion of sex is not restricted to the injured party, however. Rusk, the aggressor, does very much the same thing. It is clear through Rusk’s testimony that he was interested in having sex with Pat that night from the moment he got in her car for her to give him a ride home. And yet, he never explicitly informed her that he wanted to have sex with her. Rather, he suggested that she come up to his room, he insisted that she stay in the room, and he asked that she get on his bed with him. In a different context, his words would have been completely innocent. In this one, however, they were clearly understood as sexual invitations without being explicitly stated as such.

Just as Rusk’s sexual invitations were implied, Pat’s reactions were often vague and not clearly rejections of his advances. In his dissenting decision, Justice Wilner mentioned the Uniform Crime Reports compiled by the FBI and how they indicated that women were more likely to react to a potential rapist with “passive resistance”—for example, “crying, being slow to respond, feigning an inability to understand instructions, or telling the rapist they are pregnant, diseased or injured”—rather than an active physical struggle. [[5]](#footnote-6) Pat exhibited this passive resistance when she told Rusk that she could not go upstairs with him because it “might cause marital problems” with her recently separated husband or suggested that he did not need to do anything to her when he was pulling her onto his bed because he could “get a lot of other girls down there for what [he] want[ed].” [[6]](#footnote-7) Interestingly, even before leaving the bar, Pat had already begun to imply that she was not interested in sex. She told him very clearly that she was only “giving a ride home, you know, as a friend, not anything to be, you know, though of other than a ride.” [[7]](#footnote-8) Despite never explicitly stating, “No, I do not want to have sex with you,” Pat’s subtle rejections and her pointed clarification in her awareness that her actions could be misconstrued indicated her lack of interest in having sex with Rusk.

Even the justices of the appellate courts recognized how much sex relies on implicit suggestions. Although Justice Cole of the Maryland Court of Appeals had sardonically stated that Pat “certainly had to realize that they were not going upstairs to play *Scrabble*” to emphasize her lack of resistance, his mentality reveals that sex rests heavily upon assumptions. [[8]](#footnote-9) At that point, neither Pat nor Rusk had mentioned sex. Rusk had merely asked for a ride home and Pat had stated clearly that she was offering a ride home and nothing more. And yet, Justice Cole—and Rusk and Pat, as well—understood that Rusk’s invitation upstairs was not an invitation to play board games or have tea or chat but an invitation to have sex.

When our culture demands that the language of sex is so silent and unspoken then, people must turn to nonverbal cues to understand what is being offered and what is being accepted. The problem with this, however, is that it leaves a lot of room for interpretation and misinterpretation, ranging anywhere from reasonable to completely preposterous. In this case, for example, Rusk explained that, at the bar, Pat had “looked at me, and she smiled” first, initiating contact and implying interest—but what differentiates between a friendly smile and a seductive smile and how does one tell? [[9]](#footnote-10) Moreover, how does one translate that difference into a written court transcript that must be passed up to the appellate level?

When Pat testified in trial, she stated that she was so frightened in Rusk’s apartment not because of anything that he did, but “more the look in his eyes.”[[10]](#footnote-11) That is not something that can be described in court, much less described in writing. At least at the trial level the jury and the judge had the opportunity to listen to the witnesses testify and hear the emotion in their voice as they recounted the events. Appellate court justices, however, had only the transcripts and thus a very barebones understanding of what actually happened in the courtroom. Rude interruptions by attorneys became mere dashes and hesitant pauses became commas. Fear and terror in the victim’s voice could have disappeared entirely into the uniform black-and-white of ink on paper. Justice Wilner questioned the wisdom of an appellate court assessing a rape case on its facts by pointing out everything that the court would not know about the case:

“We don’t know what the inflection was in [appellant’s] voice as he dangled [Pat’s] car keys in front of her. We can’t tell whether this was in a jocular vein or a truly threatening one. We have no idea what his mannerisms were.”[[11]](#footnote-12)

While trial courts may not have a complete understanding of what happened in the case, they were still, at the very least, able to incorporate verbal testimony with visual evidence. Appellate courts, however, can only judge words—written words that may lack all of their meaning without the nonverbal actions they are supported by.

As a result, with only text to rely upon, appellate court justices can extrapolate very different conclusion from the same set of statements. For example, Pat’s reticence and ambiguous excuses for not having sex were used as evidence both for and against her consenting to have sex with Rusk. While Justice Wilner at the Court of Special Appeals and Justice Murphy at the Court of Appeals had both claimed that Pat exhibited passive resistance by making a number of excuses for not wanting to go up to Rusk’s room to have sex with him that night, Justice Cole suggested that this was rather an example of what is known as “token resistance,” a social script where a woman refuses sex while actually desiring it in order to mitigate society’s judgment of her promiscuous behavior. [[12]](#footnote-13) Justice Cole wrote that Pat’s actions followed “a pattern of conduct consistent with the ordinary seduction of a female acquaintance who at first suggests her disinclination.”[[13]](#footnote-14) Thus, from the same trial transcript, appellate courts can either conclude the case with a convicted rapist and a terrified victim or a wrongly accused young man and a loose soon-to-be single mother.

Although Rusk’s case and his subsequent appeals took place from 1977 through 1981, his story is not yet entirely irrelevant. While there has been a very significant push to portray consent as an active agreement rather than a passive acquiescence, it is an uphill battle against a culture that has traditionally marked talking about sex as a major taboo. This silence, however, can have potentially disastrous consequences. Whether in mistaken assumptions between parties or in a court reporter’s inability to record nonverbal actions, the unspoken nature of sex and consent still persists as a major obstacle in rape trials.

Works Cited

Kahan, Dan M. “Culture, Cognition, and Consent: Who Perceives What, and Why, in ‘Acquaintance Rape’ Cases.” Working Paper No. 29, University of Pennsylvania Law Review, 2013. <http://ssm.com/abstract=1437742> (accessed November 30, 2013).

1. Edward S. Rusk v. State of Maryland, 43 Md. App. 472, 406 A.2d 624, LEXIS 398 (1979); State of Maryland v. Edward Salvatore Rusk, 289 Md. 230, 424 A.2d 720, LEXIS 165 (1981). [↑](#footnote-ref-2)
2. Rusk v. Maryland, 2. [↑](#footnote-ref-3)
3. Ibid., 7. [↑](#footnote-ref-4)
4. Ibid. [↑](#footnote-ref-5)
5. Ibid., 10. [↑](#footnote-ref-6)
6. Ibid., 8. [↑](#footnote-ref-7)
7. Ibid., 7. [↑](#footnote-ref-8)
8. Maryland v. Rusk, 14. [↑](#footnote-ref-9)
9. Ibid., 4. [↑](#footnote-ref-10)
10. Rusk v. Maryland, 2. [↑](#footnote-ref-11)
11. Ibid., 7. [↑](#footnote-ref-12)
12. Dan M. Kahan, “Culture, Cognition, and Consent: Who Perceives What, and Why, in ‘Acquaintance Rape’ Cases,” Working Paper No. 29 (University of Pennsylvania Law Review, 2013), <http://ssm.com/abstract=1437742> (accessed November 15, 2013). [↑](#footnote-ref-13)
13. Maryland v. Rusk, 14. [↑](#footnote-ref-14)