FOUNDATION PRESS

CRIMINAL LAW STORIES

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FOUNDATION PRESS
2013

THOMSON REUTERS™

1 New York Plaza, 34th Floor
New York, NY 10004
Phone Toll Free 1–877–888–1330
Fax 646–424–5201
foundation–press.com
Printed in the United States of America

ISBN 978–1–59941–439–3

Mat #40682961

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Jeannie Suk

"The Look in His Eyes": The Story of *Rusk* and Rape Reform

> The thing is, most of the time when you're coming pretty close to doing it with a girl ... she keeps telling you to stop. The trouble with me is, I stop. Most guys don't. I can't help it. You never know whether they really *want* you to stop, or whether they're just scared as hell, or whether they're just telling you to stop so that if you *do* go through with it, the blame'll be on *you*, not them. Anyway, I keep stopping. The trouble is, I get to feeling sorry for them. I mean most girls are so dumb and all. After you neck them for a while you can really *watch* them losing their brains. You take a girl when she really gets passionate, she just hasn't any brains. I don't know. They tell me to stop, so I stop.
>
> —J.D. Salinger, *The Catcher in the Rye*

The thoughts of Holden Caulfield, the most popular adolescent character in American letters, have been read by virtually every young student coming of age in America. These words, published in 1951, capture something of the expectations about sex between men and women that prevailed into and beyond midcentury. Starting in the 1970s, under the influence of feminism, social attitudes changed significantly.

Like many guys of his time, Edward Salvatore Rusk of Baltimore, Maryland didn't take a girl's "no" to sex as necessarily meaning he had to stop, when he otherwise thought she was interested. He was convicted of rape at the cusp of legal transformation, when sexual behavior that had been commonplace and tolerated by the law was rapidly being recast as criminal. The story of *State v. Rusk* is the story of when and how a set

of social norms of sex and dating became unacceptable. It is a story of the legal role and consequences of that social change.

September 21–22, 1977

The prosecuting witness was a twenty-one-year-old woman known as Pat. One Wednesday evening in the fall of 1977, she attended an alumnae meeting at the Catholic girls' high school from which she graduated. The Archbishop Keough School was on thirty acres of rolling land on the outer edge of Baltimore City. She worked as a secretary at an insurance company and had a two-year-old son. She was married but recently separated from her husband and living with her mother and child in the white middle-class suburb of Parkville, right outside the city. When the meeting wound down, it was still early and her classmate Terry Norman, whom she'd known since before high school, asked if she wanted to go down to Fell's Point with her.[1]

In downtown Baltimore, Fell's Point was a waterfront harbor district established in the colonial era. Cobblestone streets, quaint street lamps, and eighteenth- and nineteenth-century buildings provided the atmospheric backdrop for a busy commercial area teeming with shops, bars, and restaurants. On the National Register of Historic Districts, though not gentrified as it is today, Fell's Point by night was the place for young people to party. The noisy bars and clubs were frequented by students from Johns Hopkins, Goucher, and Loyola. Young professional, working-class, local, and suburban folks mixed there too. In the 1990s Fell's Point would become familiar to television audiences as the setting for the NBC series *Homicide: Life on the Street*.[2]

From a telephone booth, Pat called her mother, who was babysitting her son, to say she was going to Fell's Point with Terry but wouldn't be late. The two women drove in separate cars and arrived around 9:45 at a bar called Helen's, where Terry ordered Pat a screwdriver. After an hour of talking, the two friends decided to walk a few blocks to a different place, The Horse You Came In On, a two-hundred-year-old saloon where folk music was playing. After a half hour, they thought they would try another bar. At E.J. Bugs, they found a large crowd and a band playing.[3]

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1. Unless otherwise indicated, the underlying story in this chapter is drawn from: State v. Rusk, 424 A.2d 720 (Md. 1981); Rusk v. State, 406 A.2d 624 (Md. Ct. Spec. App. 1979); Trial Transcript of Sept. 19–20, 1978, State v. Rusk (Baltimore City Crim. Ct. Part X) (No. 27732702/1977); Sentencing Transcript of Oct. 20, 1978, State v. Rusk (Baltimore City Crim. Ct. Part X) (No. 27732702/1977). When relying on sources other than these, I cite them at the end of a paragraph or several sentences containing the information used.

2. Telephone Interview with James Salkin, Attorney (Dec. 4, 2009) [hereinafter Salkin Interview I].

3. The trial transcript's misspelling of the establishment as "E.J. Buggs" was repeated in the judicial opinions.

Pat stood against a wall holding but not finishing her third screwdriver of the evening when she saw a man of medium height and build come over and say hi to Terry. Terry was talking to a guy she had met, but she glanced over to say "Hi Eddie" and resumed her conversation.

Eddie Rusk was a thirty-one-year-old veteran of the National Guard, which he had joined to avoid the Vietnam draft.[4] He had worked as a television repairman, and was trying to get his own shop. In the meantime, he was searching newspaper ads for used cars to buy, and fix up, to sell. The son of a wallpaper hanger, he was raised in an Irish–Italian family in a lower-middle-class East Baltimore neighborhood that became riddled with drugs over the years. Since separating from his wife, who had their child at seventeen and had drug abuse problems, he often stayed at his parents' house, where he had grown up. Eddie's parents had adopted his little daughter, who was a toddler.[5]

Eddie was out that night with his buddies Mike Trimp and Dave Carroll, friends since their teenage years when Eddie was the "Casanova of Woodlawn High" and the neighborhood boys had a club called "the Animals."[6] A mile away from his family home, Eddie rented a room with Mike for $80 a month in an apartment house they called their "pit stop." That night they were trying "to pick up some ladies." Eddie drank a couple of Millers. While his friends were getting something to eat, he stayed in the bar and saw a girl smiling at him. He walked over and struck up a conversation. They quickly discovered what they had in common: each was married and separated, and each had a two-year-old child.

According to Pat, after ten or fifteen minutes of talking to Eddie, she decided it was time for her to head home because she didn't want to stay out late. It was midnight, and she'd have to get up early with her toddler. As she was getting ready to leave, Eddie asked if she wouldn't mind dropping him off at home on her way. Thinking her friend Terry knew him, she agreed to give him a ride home. As they walked to her car, she told him, "I'm just giving a ride home, you know, as a friend, not anything to be, you know, thought of other than a ride."

Eddie, however, recalled that as Pat was getting ready to leave the bar, he asked her to go home with him. She said she couldn't because she had her car with her. He suggested they both take her car to his

4. *Deaths, Central Florida*, Orlando Sentinel, Nov. 10, 2006, at B6; Telephone Interview with Jo Ann Riccobono, Sister of Edward Rusk (Dec. 15, 2009) [hereinafter Riccobono Interview].

5. Riccobono Interview, *supra* note 4; Telephone Interview with Gina Sell, Daughter of Edward Rusk (Dec. 15, 2009) [hereinafter Sell Interview].

6. Riccobono Interview, *supra* note 4.

place and she agreed. Eddie's friends said they saw Pat walking down the street "snuggling up to him" and "hanging all over him."

During the twenty-minute drive, the two talked more about their children and separation from their respective spouses. According to Eddie, she suddenly asked, "You're not gonna rape me, are you?" Taken aback, he asked why she would say that, and she confessed she was raped once before. He sympathized, "It's a drag." She then asked, "You are not gonna beat me up, are you?" and explained that her husband used to beat her up. Again he said, "That's a drag."

Pat pulled up across the street from Eddie's apartment on the 3100 block of Guilford Avenue, a row of Romanesque turn-of-the-century stone houses, now divided into humble multiple dwellings. Charles Village, near Johns Hopkins University, was a residential area where students and young people lived, and it bordered an unsafe area.[7] Pat was unfamiliar with the neighborhood. Leaving the ignition on, she said "Well, here, you know, you are home." He invited her up to the apartment. She recalled the invitation being repeated and declined several times, and even explaining she couldn't even if she wanted to because she wasn't yet legally divorced and a private detective could be watching her movements. It was about 1:00 a.m.

Pat and Eddie each remembered what happened next differently. She recalled that he reached over, turned off the ignition, and took the keys. He got out, walked around to her side, opened her door, and said, "Now, will you come up?" She now felt she was in trouble and feared he was going to hurt her. She followed him upstairs to his room on the second floor of the apartment house. The building seemed dark, quiet, and empty, and she didn't see any lights on in the adjacent units.

Eddie, though, recalled that it was Pat herself who turned off the ignition, and he denied taking her keys. They sat in the car for a few minutes making out and then went upstairs to his room, she as willing to go up as he was to have her come up. He unlocked his door, offered her a seat, and left for a few minutes to use the bathroom, which was outside the apartment and down the hall. When he returned, she was still in the chair next to the bed. He switched off the light, because she said it was too bright. He sat on the bed across from her, and they started to kiss and caress, falling back on the bed together.

Pat recalled that when Eddie returned from the bathroom, she asked him, "Now, I came up. Can I go?" But he said he wanted her to stay. He still had her keys. He began to undress her and asked her to remove both their trousers, which she did. When they were both un-

7. Telephone Interview with David Eaton, Retired Public Defender, Office of the Public Defender for Baltimore City (Dec. 3, 2009) [hereinafter Eaton Interview]; Salkin Interview I, *supra* note 2.

dressed on the bed, she begged him to let her leave: "you can get a lot of girls down there, for what you want." He kept saying no. She was scared, not because of what he said, but because of "the look in his eyes." She asked, "If I do what you want, will you let me go without killing me?" When she began to cry, he put his hands on her throat and started "lightly to choke" her. She asked, "If I do what you want, will you let me go?" and he said yes. She performed oral sex and had sexual intercourse.

According to Eddie, it was true that he suggested taking their clothes off, but she readily agreed. He denied putting his hands on her throat or choking her, lightly or otherwise. There seemed to be nothing wrong until after sex. It was only then that she "got uptight" and started to cry, saying, "You guys are all alike, just out for one thing." He tried to calm her down but she just wanted to leave. He walked her to her car and asked if she wanted to go out with him again. She said yes, having no intention to see him again, and when he asked for her telephone number, she said, "No, I'll just see you down Fell's Point sometime." She asked him for directions out of the neighborhood.

Pat stopped at a gas station to use the bathroom and then drove home. As she parked the car, she began to turn over in her mind what had happened, and what would have happened if she hadn't done what Eddie wanted. After sitting in the car thinking, she decided to go to the police. She drove to the nearby town of Hillendale, found a police car, and reported the incident. She went with an officer to Guilford Avenue where he spoke with Eddie's landlady and located his room.

Eddie had fallen asleep after Pat left. His friend Mike came in soon thereafter, around 2:00 or 2:30 a.m. Soon after that, Eddie was awakened by the police at his door. He was dumbfounded when he gathered the officer was there to arrest him for what had happened with Pat.[8] The next day, the landlady threw Eddie and his friend out of the apartment.

An examination at Baltimore City Hospital revealed semen on Pat's vagina but no unusual stretching or tearing. Her underpants and Eddie's bed sheets had semen but not blood.

Trial

James Salkin was a thirty-six-year-old prosecutor with the State's Attorney for Baltimore City. Born and raised in middle-class Jewish northwest Baltimore, he graduated from the University of Baltimore Law School after years of working in city government. His reputation as a prosecutor was intense and aggressive, but physically he was reed-thin, slight of stature, and asthmatic since childhood. In his Savile Row

8. Telephone Interview with Ira C. Cooke, Former Attorney (Dec. 7, 2009) [hereinafter Cooke Interview]; Eaton Interview, *supra* note 7; Riccobono Interview, *supra* note 4.

bespoke suits, custom-tailored shirts and bench-made shoes—acquired on trips to London with savings from his salary—he cut an unusual figure in the rough-and-tumble world of criminal court. He joked that Brooks Brothers was Mecca to him and he'd want to be buried there.[9]

In six years in the trial division, Salkin had prosecuted every imaginable kind of criminal case. He got Eddie Rusk's case on a routine assignment. He met the victim and heard her story. She seemed ordinary and unremarkable, if a bit foolish to go to a Fell's Point nightclub where guys were obviously looking to get laid. But she was sincere, even adamant about what happened. He thought that a jury would believe her. She wasn't weird or dislikable, as key trial witnesses sometimes were. Baltimore City was a tough place to win criminal trials because of the great distrust of law enforcement among the jury pool. Given his credible witness, the case was worth trying, but he told her the jury might well not convict. He charged Eddie with rape and with assault.

David Eaton was a seasoned public defender. Salkin thought of him as "a straight arrow, salt of the earth." Tall and preppy, he was an understated lawyer, even genteel in his manner. Hearing the story, Eaton did not think Eddie raped the woman. It was difficult to see what her intention was when she chose to give a ride to a man she'd just met at a Fell's Point bar, if not to go home with him. Perhaps she regretted having sex that night, and perhaps Eddie was not a gentleman, but without force, regrettable sex was not rape. Eaton thought the jury would see it this way.[10]

Salkin and Eaton were friendly in the small world of the Criminal Court of Baltimore, and they thought well of each other. Both saw the case as serious but routine, one of many they had together, and one of many in front of Judge Robert Karwacki, who knew them both by first name. Karwacki was a tough judge with a fine reputation. He moved dockets along and did not dawdle. You knew not to ask for postponements.[11]

Around the courthouse at this time there was a film shooting, *And Justice for All*, an Oscar-nominated courtroom drama starring Al Pacino as an attorney blackmailed into defending a corrupt judge accused of rape.[12] Salkin befriended the casting director and asked if he could be an extra. He was told to come the next morning to shoot a scene on the steps of the Baltimore War Memorial. But Salkin was supposed to start a felony arson trial that afternoon and the jury hadn't yet been selected.

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9. Interview with James Salkin, Attorney, in Baltimore, Md. (Dec. 12, 2009) [hereinafter Salkin Interview II].

10. Eaton Interview, *supra* note 7.

11. *Id.*; Salkin Interview I, *supra* note 2.

12. *And Justice for All* (Columbia Pictures 1979).

In all likelihood the trial would continue the next morning. When he realized the trial was with Karwacki, though, he explained to the judge what he needed. Karwacki told him to start voir dire—he would make it happen. Three and a half hours later, the trial was completed and the jury's guilty verdict was in. Salkin was able to show up to shoot his part in the film's final scene, in which he walks by carrying a briefcase behind Pacino.[13]

At the start of Rusk's trial, both lawyers were called up to the bench and asked, "What's this case about?" Salkin recalls that after hearing a bit, Judge Karwacki said, "Jimmy, get rid of this piece of crap." When Salkin insisted it was a serious case and that he intended to try it, the judge simply said, "Fine, let's go." And so two days of trial began.

The jury had at least five women. Four jurors had police or corrections officers in their families. Two other jurors worked for the police. One of those was a police officer who worked in the same unit of the Baltimore City Police Department as the officer who had arrested Eddie. That juror was the only one Eaton challenged for cause, but Judge Karwacki denied the challenge based on the juror's statement that he'd be able to be fair and impartial.

Once the jury was seated, Salkin began his opening argument. "If this was a Perry Mason mystery, it would be the case of a foolish victim," he said. He focused on how Pat "volunteered to give [Eddie] a ride home," and he called her "a very, very foolish young lady" who was "stupid to get herself into this fix. But it's up to you to decide what happened after she was stupid and foolish," Salkin continued, "and whether it was rape, or not." The issue, he said, was whether "she volunteered to everything, or did she volunteer to things to a point, that is, to drive him to his place." Salkin argued that "she volunteered for nothing that took place thereafter." He asked the jurors to use common sense, and to ask themselves "what anyone has to gain, or lose, by testifying the way they do."

Eaton opened by stating, "Quite frankly, there is only one issue in this case: ... was there a rape, or wasn't there?" Describing the events, Eaton told the jury that the room Eddie rented was "a place to socialize with members of the opposite sex if the occasion arose." Eaton said, "The evidence will be clear that there was an entirely voluntary situation on the part of these two adults; and there was no force, no violence, no threats, nothing involved. This was, to use a slang term, a pickup."

Pat was just as credible as Salkin expected her to be. In her testimony, she said she only agreed to give Eddie a ride home because she thought her friend knew him, and it was just a ride, nothing more.

13. Salkin Interview I, *supra* note 2.

She said he continued to insist she come up to the apartment even when she repeatedly declined. Finally he took her car keys from the ignition. When asked why she didn't try to run away instead of walking inside with him, she said, "I didn't know what to do. I was scared." She explained that once she was undressed, "I was really scared, because I can't describe, you know, what was said. It was more the look in his eyes."

Pat testified that she asked whether he would let her go without killing her if she did what he wanted. "Because I didn't know, at that point, what he was going to do; and I started to cry; and when I did, he put his hands on my throat, and started lightly to choke me." Several times during her testimony Salkin asked her to speak up because the jury could barely hear her. He asked, "As unpleasant as it may be, and I have discussed this, you have to tell the ladies and gentlemen exactly what took place. Tell us what he did. We're all adults." She said, "He made me perform oral sex, and then sexual intercourse."

Eaton's cross-examination began by questioning whether she had stayed out all night in the past. She said, "I stayed at a girlfriend's." He asked whether she had previously met people at Fell's Point. She said, "I've never met anybody I've gone out with. Met people in general, talking in conversation, most of the time people that Terry knew, not that I have gone down there, and met people as dates." He asked what her purpose was in going to Fell's Point that night. She said, "Just to have a few drinks with Terry. The reason we picked that, because she lived at the opposite end of town than I did, and it's midway between the two of us." Efforts to suggest she was a party girl didn't take.

She testified, "I even brought the subject up that even if I wanted to come up, which I didn't want to come up, I was separated. It would cause marital problems. I tried everything. I did not want to go up. I was very explicit in that." Asked if she feared her husband would find out she was with another man, she answered, "No, not as much as I was fearful that maybe I had someone following me that, you know, it can be an innocent thing. I'm driving someone home, and I told him, if I come up, you know, for a drink, I would be in trouble." She said it was a "likelihood" that she was being followed.

Eaton asked why she did then go up. She explained:

> At that point, because I was scared, because he had my car keys. I didn't know what to do. I was someplace I didn't even know where I was. It was in the city. I didn't know whether to run. I really didn't think, at that point, what to do.
>
> Now, I know that I should have blown the horn. I should have run. There were a million things I could have done. I was scared, at that point, and I didn't do any of them.

"What were you scared of?" She said, "Him."

"What were you scared that he was going to do?"

"Rape me, but I didn't say that. It was the way he looked at me, and said, 'Come on up, come on up'; and when he took the keys, I knew that was wrong. I just didn't say, are you going to rape me."

Asked why she removed her clothes, she said, "Because he told me to."

Finally, Eaton touched on divorce and custody. "Isn't it true that after you had sex with Mr. Rusk, you told him that you could lose your child, because of what you had just done; isn't that true?" She responded, "I said I could lose my child if that were taken—I don't remember what I said. I don't remember. I said something about losing my child. I don't remember what." That was Eaton's last question of Pat.

Pat's friend Terry Norman testified that she knew Eddie's face and name, "but I honestly couldn't tell you—apparently I ran into him sometime before. I couldn't tell you how I know him. I don't know him very well at all." It was rare for Pat to go out with her, she said. Pat's "mother didn't let her go out too often," and she "always had to leave around midnight." Terry also testified that Pat "doesn't usually drink. She usually just gets a drink, and plays with it. She rarely finishes it." Officer Hammett, the police officer who arrested Eddie, testified that Pat was sober at the time of the complaint.

At the end of the state's case, Eaton made a motion for judgment of acquittal, saying "there is no evidence of any weapon, any striking, any intimidation, from a physical standpoint. I think she said that she looked at him, and knew from looking at him, that she was going to be raped." Judge Karwacki denied the motion, citing evidence of "a taking of the car keys forcibly, a request that the witness accompany the Defendant to the upstairs apartment," and "a look in his eye which put her in fear." He also cited her "begging him to let her leave. She was scared. She started to cry. He started to strangle her softly she said. She asked the Defendant, that if she'd submit, would he not kill her, at which point he indicated that he would not."[14]

The next morning, the defense case began with Eddie's friend, Mike Trimp, who testified that at E.J. Bugs, "Eddie scored on a—you know, he picked up a chick." He explained that while Eddie "was rapping with a chick," he and Dave left Eddie at the bar. He later saw "Eddie walking down the street with a lady," and "she had both arms around him."

14. Pat's testimony, however, did not indicate that Eddie had actually answered her question whether he would let her go without killing her if she did what he wanted. She did testify, however, that Eddie responded "yes" to her question whether he would let her go if she did what he wanted her to do.

"She was all over him, man," Mike said. "I figured he scored," he explained, "You go out with three guys. Somebody scores, you know. That's the way it is." He testified that when he later returned to the apartment he shared with Eddie, "no questions were asked, you know. We just laughed, and cut up a little bit, and that was about it."

Eddie's other friend, Dave Carroll, also testified, "She had her arms around him, and he had his arms around her; and she was kind of like, you know, snuggling up to him like." He indicated that when Mike called him the next day to tell him that Eddie was arrested for rape, "I couldn't believe it, you know. I said, 'That's crazy.' "

Eaton thought Eddie's friends, who had motley criminal records for assault, drunk driving, alcohol possession, and marijuana smuggling, made a horrendous impression on the jury. Eaton had put on their testimony to establish that Pat was behaving amorously when she left the bar with Eddie, but Mike's testimony especially made Eddie look like a jerk.[15]

Eddie then chose to take the stand. According to his testimony, he asked Pat to go home with him, she agreed, and they walked out of the bar with their arms around each other. En route, in the midst of talking about their children, she asked if he was going to rape or beat her, confessing that she had been raped before and that her husband had beaten her. He testified that she had the car keys the entire time, readily came up to the apartment after making out in the car, and had sex; only afterward did she get upset and cry. He said that he never threatened or attempted to strangle her. He testified that in addition to her complaint about guys being "all alike" and "just out for . . . one thing," she "said something about her child. We had a discussion earlier in the car on the way to my apartment about her kid; and she said that she was going through some kind of proceeding about getting her child, and then I think she said something about losing her child." He denied ever taking the car keys, giving threatening looks, or choking her.

Salkin asked Eddie about his criminal record, using the permissible formula for inquiring about criminal convictions to impeach a witness's credibility: "Since the age of 18 when you had a lawyer, or told the judge you didn't want a lawyer, have you ever been convicted of any crimes?" Eddie answered, "Possession of marijuana, and a battery, possession and transporting." Salkin did not elicit further details in front of the jury, such detailed questioning about priors was impermissible.[16] In fact, Eddie was referring to three previous crimes: In addition to a marijuana possession conviction, he had a federal jury conviction for smuggling and transporting marijuana from back when he had moved to California and

15. Eaton Interview, *supra* note 7.

16. Salkin Interview II, *supra* note 9.

recruited his neighborhood buddies to come out and bring drugs from Mexico to Baltimore, in his ambition to make money as a drug dealer.[17] On a separate occasion he was also convicted by a jury of battery, "for grabbing someone."[18] Salkin asked Eddie who a certain "young lady" who was present in the courtroom was, and Eddie answered that she was his girlfriend.

Salkin thought that when Pat agreed to give Eddie a ride, Eddie's mindset was that he was going to "get some action," and then he wouldn't take no for an answer. There could be a thin line between consent and non-consent, and Salkin believed Eddie crossed it that night. Eddie appeared to think he was God's gift, and he had an attitude that such a big deal was being made over a one-night stand. In contrast, Pat came across as guileless, demure, and unfamiliar with the ways of the city. Salkin thought it was believable that this girl was truly scared in the circumstance she described.[19]

Salkin's closing argument repeated his refrain that

> this was the case of a foolish victim ... She was dumb. She was stupid, and you may all say to yourselves, she asked for it. She got what she asked for. Any person who has a little common sense wouldn't get themselves in this predicament. It was almost foreseeable what Mr. Rusk was after, when he asked her to give him a ride home. It was predictable, what was going to happen. Nonetheless, it happened and what happened was a crime.

He also said, "It's easy to cry rape. It's hard to prove, and rape is an unprosecuted crime, because of what you have to go through to press charges against someone for rape, the humiliation of the whole thing, to go before your peers, and tell all of those gory details that took place." Salkin recited the many things Pat could have done to get away from Eddie that night. But he asked the jurors not to decide based on what they, "sitting here calmly and collectively" knew they "could have done." Instead he asked them to consider decisions in their own lives that they had regretted. "We can all reflect back and see the errors of what we did; but it's at the time what you are capable of doing to alleviate the situation. What's going through your mind."

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17. *See* Rusk v. U.S., 425 F.2d 262, 263 (9th Cir. 1970) (per curiam) (indicating that Rusk was "convicted by a jury of conspiracy to smuggle and transport, and with smuggling of marihuana into the United States"); Telephone Interview with Rigg Kennedy, First Cousin of Edward Rusk (Dec. 17, 2009) [hereinafter Kennedy Interview]; Riccobono Interview, *supra* note 4.

18. This battery conviction apparently arose from a fight with a man in a bar, not a domestic incident or violence against a woman. Cooke Interview, *supra* note 8; Kennedy Interview, *supra* note 17; Riccobono Interview, *supra* note 4.

19. Salkin Interview I, *supra* note 2.

Eaton too attempted to conscript common sense. His closing argument asked,

> Now, basically, what is the testimony here to make any case at all? I have scratched my brain to figure it out; but the only thing I can think of in the testimony is that . . . Mr. Rusk was lightly strangling her. Now, I ask you to use your common sense here. A person who is strangled lightly—I'm not sure what that means.... They were kissing, and hugging, and I think that's exactly what happened.

Eaton emphasized the absence of "force, or violence, or anything that would lead you to believe that this act was done against somebody's will or consent. So why are we here?" Eaton then explained that the "only thing that leads me to think that we are here for a purpose is that [Pat] was in a divorce situation of some sort." He explained,

> It was after the sexual act was finished, and completed, and she was leaving that she realized that she had done a foolish thing, that it may have cost her custody of her child or whatnot. That, ladies and gentlemen, is the only motive that I can think of for calling the police and telling that she had been raped.

When Salkin came back for rebuttal, he reemphasized, "It's so easy to second guess people sitting at home, sitting in a jury, calmly and deliberatively, with no pressure on you.... But every time a woman drives a man home, do you have to presume that sex is going to take place? Is that an absolute natural consequence of that?" Salkin argued that it didn't make sense that Pat would tell Eddie in the car that she had been raped and beaten before, and even ask him if he was going to rape her, but then still agree to have sex with him.

> Why did he take the keys out of the ignition? Why is one and one two? He wasn't about to take no for an answer, when he asked her to go up to the apartment.
>
> Macho, that's why he's here today. He's got macho with him. His manhood was insulted. That's what this case is all about. So he took the keys out of his ignition. I forgot to ask how tall he is, and how much he weighs; and you can guess yourselves. She's no equal to him. He's certainly going to dominate her physically.

He asked the jury not to condemn her simply because "she did not act the way that you would like her to act.... Sure you know what to do now. Sure she knows what to do now; but she didn't do it." Why in the world would she subject herself to this trial if she had not in fact been raped? Salkin dismissed the child custody motivation that Eaton had raised by pointing out that Pat had reported the incident that very night and had not waited to see if her husband found out about it. Finally,

Salkin said, "It's just as much a rape case as when you are dragging somebody off the street, or breaking into their home, and raping them."

Salkin knew that a trial was like playing cards—you got dealt a hand and you played it. A good trial lawyer won some cases he wasn't supposed to win based on the cards he was showing. In this case he felt he had no more than an even chance.[20]

Twelve Hungry Men[21]

In the jury instructions on the rape charge, Judge Karwacki explained:

> Submission to a compelling force or as a result of being put in fear is not consent. A woman is not expected to resist an attack at the expense of her life, or at the risk of serious bodily harm.... The kind of fear in the mind of the victim, which would reasonably render resistance unnecessary to support a conviction of rape, includes ... a fear so extreme as to preclude resistance, or a fear which well might render her incapable of continuing to resist, or a fear that so overpowers her that she does not dare resist.

After Judge Karwacki sent the jurors to deliberate, they sent him two questions. First, "Did the victim have to verbally let the Defendant know that the act was against her will in order for him to know it was a rape?" Judge Karwacki answered no. Second, "When the victim was testifying, and she said something about, if I do what you want me to do, will you give me my keys back. What did she say his reply was?" The clerk read aloud the relevant portion of Pat's testimony, which indicated that Eddie had answered yes to her question, "If I do what you want, will you let me go?"

After three and a half hours of deliberation, the jury returned guilty verdicts on both the rape and the assault charges. Eaton was surprised. Ninety percent of cases he tried could go either way, depending on the jury. Here the verdict was due to Salkin's skill, he thought. With another jury, the verdict could easily have gone the other way.

At the sentencing hearing a month later, Eaton moved for a new trial, because the case was "devoid of any real indicia of force or violence.... [F]rankly, I think it was Mr. Salkin's eloquence in closing arguments that swayed the jury." Eaton told the Court, "I frankly was quite surprised at the verdict. I know the Defendant was surprised; and frankly, I think that the jury had to really stretch awfully far to come back with a guilty verdict in this case." The only evidence of force was the light choking, but Eaton suggested that in an embrace, Eddie "may

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20. Salkin Interview II, *supra* note 9.

21. With thanks to my colleague Mark Roe.

have in fact had his hands around her neck in a caress . . . and I would submit that this lady may have just considered this in her own mind to have been a threat." Judge Karwacki denied the motion.

In the sentencing hearing, it came out that Eddie had omitted to mention at trial two other prior convictions for possession of drug paraphernalia. Eaton admitted that Eddie had had drug problems which "emanated from his attempt to make some money." But Eddie was now attempting to establish himself in business with his own store. Eddie was "not in true fact a rapist," he said, as he had no "pattern" of "sexual deviation problems, or emotional problems which would lead to the acting out form of rape." Eaton said, "This man has learned what can happen when you pick up somebody in a bar in Fell's Point and take her home." Eddie then spoke: "I know I've been in a lot of trouble but I feel that . . . if you were to send me to do any time, it wouldn't help me at all; . . . I'm just starting to get myself together. I've got the shop, and things are starting to go good for me."

Salkin told the Court that Eddie had been "diagnosed as being of an anti-social personality." Assuming that the Court would not be inclined to give the maximum sentence of twenty years, Salkin recommended, considering Eddie's "very, very poor background, as a Defendant in criminal cases, and as a person, and as the individual he is," that he be sentenced to fifteen years in prison. Eaton, however, argued that "to put him in jail . . . would be a waste, because this man knows now that risks are attached to being alone with a young lady." He submitted that the Court should give Eddie a suspended sentence. Eaton argued, "If he goes to jail now, he loses his business. He loses his girlfriend, his personal life, it's gone; and I don't know what might happen to him. So I would ask the Court to make him the holder of his own jail cell key, and let him decide whether he can make it or not."

Judge Karwacki sentenced Eddie to ten years imprisonment for the rape, and five years for the assault, to be served concurrently. He said Eddie had "demonstrated a pattern of anti-social conduct, since he was in his late teens." The instant offense fit the pattern of "demanding constant gratification for each of his current whims." He said, "He wanted something, and he took it. What he took in this case was something that the lady involved did not want to give. It was her province to make that decision. It's a very serious thing." Judge Karwacki said Eddie would have to "resolve his behavior," and that "he's only going to be able to do that with some real development of insight into who he is, and who he wants to be. Because, if he's released on the streets at this time, in my judgment, he's a danger to the community."

Some members of the jury that convicted him were horrified. One juror, Sallie Boswell, eventually confessed to the *Sun* paper that there

was "no question in my mind that the man was innocent." She recounted that when jury deliberations started at 12:30 in the afternoon, the first poll was 7–5 for conviction. It became a "knock-down, drag-out fight" between this elderly female juror arguing for acquittal and a young male juror arguing for conviction. This division, in which a woman favored acquittal and a man favored conviction, was not anomalous. Indeed, the somewhat surprising conventional legal wisdom is that female jurors tend to judge female rape complainants more harshly than do male jurors.[22]

Eventually four jurors, and then finally Boswell, the last holdout for acquittal, gave in.[23] According to this final juror, the jury would not have convicted if only it had eaten lunch. As deliberations wore on for hours with no lunch break offered, she was starving. In an uncanny echo of the victim's testimony of submission to pressure, the juror told the *Sun*:

> By 4 o'clock, with nothing in my stomach since the night before, I finally caved in.... I know I shouldn't have given in. I know now that I should have spoken up in the courtroom. I should have insisted on getting lunch, but I didn't know what else to do, so I voted for conviction. I didn't think he'd get such a heavy sentence.

A court official the *Sun* questioned about the jurors' hunger claimed that skipping lunch was "one of the tactics judges use to discourage unnecessarily lengthy deliberations." Judge Karwacki denied this, however. He didn't give the *Rusk* jury a break before the start of deliberations because "not everybody has his lunch hour at 12:30." He would have sent the jurors food had they requested it.

The hungry juror was pricked by conscience. She said, "I couldn't sleep for months afterwards, I felt so bad. I've even had dreams about it. I just can't get over it." She and another juror "felt so guilty about sending him to jail when we knew he was innocent." She prayed Rusk would win his appeal.

Intermediate Appeal

Bond pending appeal was set at $5,000. Tommy Braden was the clerk in the courtroom throughout the trial. He was shocked when the jury returned a guilty verdict. He thought Eddie got a raw deal and

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22. *See, e.g.*, Sandra Benlevy, *Venus and Mars in the Jury Deliberation Room: Exploring the Differences That Exist Among Male and Female Jurors During the Deliberation Process*, 9 S. Cal. Rev. L. & Women's Stud. 445, 449–50 (2000) (examining jurors' post-verdict interviews and authored accounts, and finding that "female jurors were unsympathetic toward rape victims when the victim's character was at issue").

23. *See* Matt Seiden, *Juror Regrets Hunger Led to Rape Conviction*, The Sun (Baltimore), Oct. 22, 1979, at C1 (quoting juror Sallie R. Boswell) (internal quotation marks omitted).

wanted to help him. As Eddie was about to be taken to jail, Tommy got on the phone to Barry Udoff, a bail bondsman with an office nearby, and asked him to help. Udoff would come right away, even if the defendant couldn't pay him immediately. Clerks generally did not refer bonds—that was certainly frowned upon—so Udoff took the unusual phone call as an indication of how strongly the clerk felt that he'd seen an injustice. He bailed Eddie out and sent him home.[24]

Based on Tommy's perception that Eddie was railroaded, Udoff wanted Eddie to have a top-flight lawyer for his appeal. Udoff's friend was Ira Cooke, an ambitious new associate at the prominent Baltimore law firm, Melnicove, Kaufman & Weiner. Udoff and Cooke lived in the same apartment building, had kids of similar ages, and often socialized together. A Manhattan native, Cooke had settled in Baltimore as a high school English teacher and guidance counselor at the Park School, and then completed law school at the University of Baltimore. Just starting his legal career, he had already assisted in his firm's high-profile criminal defense of Democratic Governor Marvin Mandel—the first Jewish governor of Maryland—in a trial that ended with a mail fraud and racketeering conviction (he would be pardoned by President Reagan and eventually have his conviction reversed).[25] Cooke hadn't yet had a jury trial or appellate case of his own. He jumped at the chance to have his first appellate argument, and took Eddie's appeal without expecting payment.[26]

Eddie's story amazed him. Cooke believed rape was a crime of violence, not a sexual act. Yet there wasn't any violent behavior in this story. Why didn't Pat use the telephone in the room to call for help when Eddie left for several minutes to go to the bathroom? Why didn't she knock on adjacent neighbors' doors? At least four other people lived on the same floor and a dozen in the apartment house. He thought if these questions had been highlighted at trial, the jury would have acquitted.[27]

Worse, he believed Eddie really was innocent. Cooke viewed what happened in sociological terms, as a severe culture clash between a white-bread, middle-class suburban Catholic school girl and a rougher blue-collar wise guy. It also didn't help that the Guilford Avenue place had been depicted as a pad that Eddie rented just for luring and hooking up with girls, though in reality Eddie was living there much of the

24. Telephone Interview with Barry Udoff, President, Fred W. Frank Bail Bonds (Dec. 15, 2009).

25. *See* Robert Timberg, *Mandel Portrait Hung in State House*, The Sun (Baltimore), Oct. 14, 1993. http://www.baltimoresun.com/news/maryland/politics/bal-portrait101493,0,134817.story

26. Cooke Interview, *supra* note 8.

27. *Id.*

time.[28] But the charge was second degree rape, which was vaginal intercourse "by force or threat of force against the will and without the consent of the other person."[29] It simply could not be correct that Pat's completely subjective fear was enough to convict Eddie of the crime of rape.

Cooke's brief in the Court of Special Appeals of Maryland argued there was insufficient evidence to support a rape conviction. The encounter was "an attempted seduction," not rape. Despite "not a single threat nor a scintilla of force," the woman "did nothing but docilely and voluntarily accompany" Rusk to the apartment. Her fear was "simply an unreasonable subjective reaction by the prosecutrix to a situation in which *she placed herself*." The brief focused on how Pat could have avoided the compromising situation, such as screaming, fleeing, or calling for help. Cooke wrote, "She elected to do nothing. She acquiesced. She agreed.... She offered no resistance despite the total, complete and abject absence of any force or threats of force." If she acted from fear, that fear was "unreasonably exaggerated," not reasonable.[30]

In November 1978, soon after Rusk's conviction, a dynamic new attorney general had won election in Maryland. Stephen Sachs was an unabashed liberal progressive who hired, promoted, and mentored record numbers of female attorneys during his tenure. Out of a dozen and a half criminal appellate lawyers in his office, Kathleen Sweeney, a young assistant attorney general only three years out of the University of Baltimore Law School, was assigned to argue the case on behalf of the state. A liberal feminist (though, as she explains, not the "bra-burning" kind), she was on the board of the Women's Law Center, a Maryland legal services organization devoted to advancing women's rights through litigation and community education.[31]

Rusk was a routine appeal in which a convicted defendant argued that the evidence was legally insufficient to support a conviction. Sweeney's argument in response was straightforward: It was the province of the jury as finder of fact to believe or disbelieve witnesses, observe their demeanor, and judge their credibility. The jury heard the evidence and believed the defendant forced the victim to have sex. Moreover, Cooke's brief all but ignored a crucial fact, namely the testimony that right

28. Cooke Interview, *supra* note 8; Riccobono Interview, *supra* note 4.

29. State v. Rusk, 424 A.2d 720, 720 (Md. 1981) (quoting Md. Code art. 27, § 463(a)(1)). First degree rape was the same, but with the presence of one or more aggravating factors including use of a weapon, infliction or threat of serious physical injury, and assistance by one or more other persons. Md. Code Ann. art. 27, § 462 (Supp. 1976).

30. Brief of Appellant at 9, 12, 21, Rusk v. State, 406 A.2d 624 (Md. Ct. Spec. App. 1979) (No. 1249).

31. Telephone Interview with Kathleen M. Sweeney, Associate Judge, District Court of Maryland, District I, Baltimore City (Dec. 2, 2009) [hereinafter Sweeney Interview].

before intercourse, Rusk lightly choked her—that was force. That the victim had opportunities to avoid her fate was not the point. He had taken her car keys; was she supposed to flee into the night in an unfamiliar neighborhood? Even short of screams or escape attempts, the evidence was sufficient for a rape conviction. It was also tellingly inconsistent that Rusk was appealing his rape conviction on the theory of insufficient evidence of force, but he wasn't appealing his assault conviction—an implicit admission that the encounter involved force. Sweeney didn't think the appellate court would have difficulty affirming the conviction.[32]

But after oral argument before a three-judge panel of the Court of Special Appeals came the surprising news that rather than issuing a panel decision, the Court would rehear the case en banc. The panel had voted 2–1 to affirm the conviction, and though most panel decisions went unreported, the judge who voted to reverse submitted the case for publication. The entire court then conferenced the case—a procedure designed to ensure that a case that would be binding precedent not be decided by only two judges—and determined that all thirteen judges should rehear the case.[33] Only a few times since the court's creation in 1966 had the entire court sat en banc. This unusual step meant *Rusk* was becoming a more significant case than the lawyers had realized.[34]

Sweeney's friend Deborah Chasanow (then Deborah Handel), a mere four years out of Stanford Law School, became chief of criminal appeals under Attorney General Sachs. The two women were aware that women were still somewhat of a novelty and unwelcome in some quarters of the legal profession. In Sachs's office, they were entrusted with a lot of responsibility, particularly in criminal cases. It was a heady place to be a young lawyer.[35]

Chasanow helped Sweeney prepare for oral argument. They wanted to keep the Court focused on the province of the jury.

At oral argument, in front of the thirteen judges, not one of them a woman, Cooke argued that the victim was unreasonable to feel so afraid that she had to submit to sex. He suggested that what the victim saw as light choking could have been a "heavy caress." He was trying to shift the issue from the *credibility* of what she said at trial to the *reasonableness* of how she perceived and reacted to the situation. This move had its

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32. *Id.*; Brief of Appellee at 7, Rusk v. State, 406 A.2d 624 (Md. Ct. Spec. App. 1979) (No. 1249).

33. Telephone Interview with Alan M. Wilner, Retired Judge, Court of Appeals of Maryland (Dec. 3, 2009) [hereinafter Wilner Interview].

34. Cooke Interview, *supra* note 8; Sweeney Interview, *supra* note 31.

35. Telephone Interview with Deborah K. Chasanow, Judge, U.S. District Court for the District of Maryland (Dec. 3, 2009) [hereinafter Chasanow Interview].

lineage in the tradition of putting the rape victim on trial. It took enormous courage for a victim to report a rape because she was often scrutinized, blamed, and discredited in the legal process. Questioned by the judges whether the law of rape demanded that the victim's fear be reasonable, Sweeney criticized Maryland precedents that did so require and asked the Court to overrule them. The rapist took his victim as he found her.

Sweeney and Chasanow stood over the fax machine as it slowly pulsed out the decision of the en banc appellate court. As the two women read one page after another, they looked at each other in shock. They had lost. Not only had the Court reversed Rusk's conviction. The tone of the majority opinion was stunning.[36]

The Court's decision split 8–5. Writing for the majority was Judge Charles Awdry Thompson (he was nearly seventy years old and died three years later). Considering whether the light choking and being in a strange part of town late at night were "sufficient to overcome the will of a normal twenty-one year old married woman," Judge Thompson wrote, "We are not impressed with the argument." The "prosecutrix" said she was afraid and submitted because of "the look in his eyes." The Court supposed that the light choking could have been, as Cooke had suggested, a "heavy caress." All these facts and circumstances were insufficient "to cause a reasonable fear which overcame her ability to resist." Such lack of resistance meant there was insufficient evidence of the force necessary for a rape conviction.

Baltimore lawyers often associated judges' sensibilities with their geographical origins. Those from Maryland's urban areas tended to be more liberal and have less of the good-old-boy feel than those from rural areas. As if to reflect this basic social split of a small state, Judge Thompson hailed from the conservative Eastern Shore, and Judge Alan Wilner, who wrote for the five dissenters, came from a liberal Jewish neighborhood in northwest Baltimore City.[37]

The dissent began by stating "profound conviction" that the majority had "made a serious mistake."[38] The court's "baby" judge at forty two, Wilner was appointed to the bench from service as chief legislative aide to Democratic Governor Mandel.[39] When Maryland ratified the Equal Rights Amendment in 1972, the Governor had appointed Wilner

36. Sweeney Interview, *supra* note 31.

37. *Id.*; Cooke Interview, *supra* note 8; Wilner Interview, *supra* note 33.

38. *Id.*

39. *See* Lawrence F. Rodowsky, *Judge Alan M. Wilner, Public Servant: The Man Who Needs No Sleep*, 66 Md. L. Rev. 835, 838 (2007); David A. Maraniss, *Mandel Chief Aide Wilner Named to Appeals Court*, Wash. Post, June 23, 1977, at C2.

to a commission to implement it.[40] With that experience, he got a sense of the women's movement's goals, particularly the legal reform of sex offenses, one of the main projects of the commission.[41]

Judge Wilner, who had teenage daughters, had seen some rape cases before *Rusk* and was appalled at how judges often treated them, with little regard for what the victim was facing. The mindset of many older judges and lawyers was not much different from Sir Matthew Hale's seventeenth-century pronouncement that "rape is ... an accusation easily to be made and hard to be proved, and harder to be defended by the party accused, tho never so innocent."[42] When Judge Wilner read the circulated majority opinion, he thought enough was enough. The zeitgeist of the time was to reconsider many of the traditional views in the law. It was obvious the case would go up to the state's highest court, so it was important for him to lay out the other side.[43]

Judge Wilner's dissent focused on two points. The first was appellate restraint. In reversing the conviction, the majority substituted its own judgment of the evidence and invaded the province of the jury and trial judge. He wrote:

> We know nothing about Pat and appellant. We don't know how big they are, what they look like, what their life experiences have been. We don't know if appellant is larger or smaller than she, stronger or weaker. We don't know what the inflection was in his voice as he dangled her 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. The trial judge and the jury could discern some of these things, of course, because they could observe the two people in court and could listen to what they said and how they said it.

The second point was that the majority gave "new life to myths about the crime of rape that have no place in our law today." Wilner rebuked the majority for insinuating that Pat was "on the make," and that someone who had to wonder whether to report such an incident hadn't really been raped. Indeed Pat had explained that her hesitation was because she "didn't want to go through what I'm going through now." It was precisely the kind of callous attitude evinced in the majority opinion that made victims reluctant to report rape.

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40. Rodowsky, *supra* note 39, at 838.

41. Wilner Interview, *supra* note 33. *See Legislation: Rape and Other Sexual Offense Law Reform in Maryland 1976–77*, 7 Balt. L. Rev. 151, 151 n.3 (1977).

42. 1 Matthew Hale, *The History of the Pleas of the Crown* *635 (1778).

43. Wilner Interview, *supra* note 33.

Judge Wilner held courts responsible for "ignorance and misunderstandings" about rape. He explained that while courts expected a rape victim to resist when attacked, studies showed that resistance was dangerous. Even government pamphlets advised that fighting back could provoke severe bodily harm. Thus Pat "offered the very type of verbal resistance that is prudent, common, and recommended by law enforcement agencies." Whether the fear that prevented her from resisting in other ways was reasonable was for the jury to determine, not the appellate court.

Finally, Judge Wilner said the majority "countermanded the judgment of the trial court and jury and declared Pat to have been, in effect, an adulteress." This criticism of the mention of her marital status brushed up against the story Eaton had told at trial about Pat's incentive to think of what happened as rape. This alleged motivation grew out of the mutually exclusive legal relation of rape and adultery—a byproduct of the traditional regulation of sex in which no legal sex could be had outside of marriage. If the sex was not rape, it would instead be consensual sex outside marriage, that is, adultery. Conversely, if it was rape, it would not be adultery.[44] As Eaton had explained, the trial testimony revealed that the distinction may have been important to Pat because she suspected her husband of trying to catch her in adultery, so as to win an advantage in a child custody fight.[45] Legally, the only way the events of that night would not be adultery for child custody purposes was if she was raped.

Though Rusk's trial had passed without notice outside the courthouse, the reversal of his conviction immediately drew public attention. For days the *Sun* paper ran articles reporting both criticism and praise of the decision.[46] Jurors who convicted Rusk, including the forewoman, came forward to say they were glad to see his conviction reversed.[47] Much press attention focused on the ambiguity of whether the facts of the case could be interpreted as seduction rather than rape. One reporter called Rusk's taking the keys out of the ignition "a little stunt I've seen a dozen times in the movies and since incorporated in the male hand-

44. *See* Anne M. Coughlin, *Sex and Guilt*, 84 Va. L. Rev. 1 (1998) (arguing that rape law's suspicion of rape complainants reflects the traditional legal regulation of sex, in which rape was a defense available to relieve women of criminal responsibility for consensual nonmarital sex—adultery and fornication).

45. *See, e.g.*, Davis v. Davis, 372 A.2d 231, 235 (Md. 1977) (holding that adultery is a relevant consideration in child custody awards but does not result in a presumption of parental unfitness).

46. *See, e.g.*, J.S. Bainbridge, Jr., *Rape Guilt Rules Set by High Court*, The Sun (Baltimore), Oct. 11, 1979, at D1.

47. *See* Seiden, *supra* note 23.

book of sexual etiquette."[48] Was he dangling them like "a suave Clark Gable," or more like a terrifying "Anthony Perkins"?[49]

The Court's decision was called "a major setback for the women's movement in its fight against the crime of rape."[50] Law enforcement and rape counseling organizations raised alarm that the decision would make rape convictions more difficult and deter women from reporting an already underreported crime.[51] Most rapes occurred in precisely this situation, between people who came into contact voluntarily. It was now the standard advice of rape prevention programs not to fight a rapist lest the victim be more seriously hurt or even killed.[52] The national trend was decidedly moving away from the traditional inquiry into whether the victim resisted.[53] But the Court was now saying women had to fight or else they wouldn't be considered rape victims, even if they did just what experts thought was appropriate.[54] Judge Wilner's dissent was immediately praised.[55] Women's groups even sent him letters of appreciation.[56]

Some time after Eddie won his appeal, he was walking down a Baltimore street. When he saw Pat, he traversed the street to face her. Angrily, he told her that his parents were forced to spend a fortune on his appeal because of her.[57] To the reporter who had written an article about his case in the *Sun* titled "Court Was Right to Throw out Rape Conviction,"[58] and also exposed the story of the hungry juror,[59] Eddie promptly wrote a letter:

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48. Richard Cohen, *"Reasonable Fear" Ruling on Rape is Shocker*, Wash. Post, Oct. 16, 1979, at B1.

49. *See* Matt Seiden, *Court Was Right to Throw Out Rape Conviction*, The Sun (Baltimore), Oct. 22, 1979, at C1. One recalls Clark Gable's leading man in *Gone With the Wind* (Selznick Int'l Pictures 1939), and Anthony Perkins's title role in *Psycho* (Paramount Pictures 1960).

50. Seiden, *supra* note 49.

51. *See* Sandy Banisky, *Court's Rape Ruling Angers Counselors: "Reasonable Fear" Proviso Attacked*, The Sun (Baltimore), Oct. 12, 1979, at D1; Saundra Saperstein, *Md. Ruling Will Restrict Provable Rape Cases, Lawyers Say*, Wash. Post, Oct. 12, 1979, at C1.

52. *See* Banisky, *supra* note 51.

53. *See* Scott Flander, *Rape Ruling Condemned Locally*, Evening Capital, Oct. 13, 1979, at 1; Saperstein, *supra* note 51.

54. *See* Banisky, *supra* note 51.

55. *See, e.g.*, Leigh Bienen, *Rape III—National Developments in Rape Reform Legislation*, 6 Women's Rts. L. Rep. 170, 181 n. 66 (1980) (calling Wilner's dissent "knowledgeable").

56. Wilner Interview, *supra* note 33.

57. Kennedy Interview, *supra* note 17.

58. Seiden, *supra* note 49.

59. Seiden, *supra* note 23.

> I'm glad that their [sic] was someone concerned enough to look past their nose at the circumstances of my case. What a nightmare. For the past two years you can't imagine what I've been through. My friends stuck behind me all the way. But it's funny how people who don't even know you personally, can make you feel like you have a contagious disease.[60]

He asked the reporter for help finding information about a fund that would help pay his legal bills in the event he'd have to defend against a further appeal:

> It cost me a lot of money to get this far. Now their [sic] is talk by the Wemon's [sic] Movement to take my case to the Supreme Court. If this is true I have to pay my own way. "I don't think it's fair." A friend told me about the Playboy Foundation. It's suppose [sic] to be an organization set up by Playboy magazine to help people like myself.

The reporter answered his letter in two days, saying he would see what he could find out about the Playboy fund and promising, "If I've got any news for you, I'll give you a call."[61]

Highest Appeal

In the Attorney General's Office, Sweeney and Chasanow wrote a petition for certiorari to the state's highest court. The Court of Appeals's conference discussion on whether to grant cert in *Rusk* was very contentious. The custom was to reserve cert grants for cases of legal importance, but *Rusk* was a fact-bound appeal asking the Court to find there was insufficient evidence for a conviction. The case did not appear to present a significant broader issue of law. But the case was garnering a lot of press coverage, indicating important public interest. Three out of seven judges voted to grant cert, which was all it took.[62]

The two women assistant attorneys general proposed that Sachs argue the case in the Court of Appeals himself. Having the Attorney General personally argue a seemingly run-of-the-mill appeal arising from a two-day criminal jury trial would send a strong message that much was at stake. There were some old men on that court and they needed to be educated. *Rusk* was one of only a handful of cases Sachs chose to argue personally in the Court of Appeals during his tenure as attorney general.

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60. Letter from Edward S. Rusk to Matt Seiden (Oct. 22, 1979) (on file with author).

61. Letter from Matt Seiden to Edward S. Rusk (Oct. 24, 1979) (on file with author).

62. Telephone Interview with John C. Eldridge, Retired Judge, Maryland Court of Appeals (Dec. 29, 2009) [hereinafter Eldridge Interview]; *see also* Md. Code Ann., Cts. & Jud. Proc. § 12–203 (West 2009) (providing that the Court of Appeals shall grant certiorari if it finds review "desirable and in the public interest," and that the number of judges required to grant "may not exceed three").

which otherwise consisted of arguments in federal court, including three successful ones in the U.S. Supreme Court.[63]

The position of attorney general in Maryland was traditionally filled by someone who essentially ran as a running mate to the candidate for governor. Sachs however had won election on his own, without being the "French Fries to a Big Mac." The former U.S. Attorney for Maryland, he ran for attorney general with the campaign slogan, "I'm *your* lawyer." He promised a new, proactive kind of attorney generalship representing the people.

Sachs thought the *Rusk* jury reached the right result, but he recognized it was a close case under current law. It was a case with which to confront the mistreatment of victims that haunted the administration of rape law. The strength of his case lay in the invocation of traditional judicial principles of appellate restraint and respect for the institutional role of jury. But Sachs's principal interest was not in these procedural points. Rather it was in the substantive law and policy at issue: women were entitled to be respected and believed, as victims of rape no less than any other crime. As an elected official who would soon run for governor, he knew the case was politically good for him to take on. The women's movement was in flower, and women's groups were an important constituency. Though ten years earlier he might have thought the movement was a fad, he was now an unapologetic feminist. He was married to a feminist lawyer and he had a daughter. He was proud that three generations of his family's women—wife, daughter, and mother-in-law—marched together for abortion rights.

When the opposing sides set out to write an agreed statement of facts for briefing in the Court of Appeals, they disagreed about how the statement should refer to Pat. Cooke called her the "prosecutrix." But Sweeney thought she should be called the "victim"—to Sweeney's ears, "prosecutrix" was derogatory. Courts had the habit of using the term for rape complainants but almost never for other kinds of crime victims. It perversely sounded like a prosecutorial version of a dominatrix, yet it referred to a woman who was far from that, a victim of sexual domination. The term proved to be more of a sticking point than the facts. The two sides eventually compromised on something more neutral: they would call Pat the "prosecuting witness."[64]

The Attorney General's brief strongly emphasized Pat's alarm, terror, intimidation, paralysis, and helplessness. It played up Eddie's commandeering of her car keys, and repeatedly mentioned the strange,

63. Telephone Interview with Stephen H. Sachs, Retired Partner, WilmerHale (Dec. 4, 2009).

64. *See* Brief of Appellant at 3, State v. Rusk, 424 A.2d 720 (Md. 1981) (No. 142); Sweeney Interview, *supra* note 31.

threatening, menacing "look in his eyes." The brief acknowledged the existence of several plausible interpretations of events. But "[i]t was the jury . . . which was best able to weigh the impact of 'the look in his eyes' because it was the jury which saw those eyes. It was only the jury which could evaluate the meaning of 'light choking.' " The reasonableness of her fear could not be gauged from a cold transcript; the jury had effectively found her fear reasonable. The brief attacked the intermediate appellate court for belittling the light choking, for mocking her hesitation to report the crime, and for "skepticism drawn from its own experience, imagination and preconceptions in order to supplant the jury's judgment with its own." This was judicial activism.[65]

Cooke began to receive invitations to speak publicly about *Rusk* and was often greeted by highly critical audiences. Egocentric by his own account with a sense of invincibility, he began to realize this was becoming a significant case of social policy, rising well beyond his client's conviction—but Eddie himself hadn't had a clue in the world that he was committing rape. Cooke had not seen a judicial opinion making as much use of non-legal sources as Judge Wilner's dissent. Cooke perceived the Attorney General as a cutting-edge liberal activist, and this case was for the left wing of his constituency. Eddie was getting caught in a perfect storm of a social movement.[66]

Cooke took a close look at the seven judges on the Court of Appeals and set out to tailor his argument to the ones he could win. Rita Charmatz Davidson was the first and only woman on the Court—a dyed-in-the-wool feminist out of liberal Montgomery County. Harry Cole was the first and only African American judge on the Court, and very liberal. Lawrence Rodowsky was known to be close with Rusk's trial judge, Karwacki, a fellow Pole. Cooke expected to lose these three judges' votes. But he expected to pick up the remaining four judges, who he thought were good-old-boy types.

With women's groups and rape-counseling organizations in attendance at oral argument, he stood and said, "May it please the Court, my name is Ira C. Cooke." Judge Rita Davidson cut him off, he recalls. "I know who you are, Mr. Cooke, and I've been waiting for a year to have this conversation with you." He saw that the judges expected the lone woman on the Court to take the active lead in questioning. She chastised him for suggesting that "light choking" or even a "heavy caress" in a moment of passion was not force. Cooke got softballs from the rest.

Attorney General Sachs knew all the judges personally, some very well. He'd been friends with Rita Davidson for over a decade, from before her judicial appointment. Both were left-wing Jews in Maryland

65. *See* Brief of Appellant at 12–17, State v. Rusk, 424 A.2d 720 (Md. 1981) (No. 142).

66. Cooke Interview, *supra* note 8.

Democratic politics who attended Yale Law School, she in the 1940s and he in the 1950s. There was no question how she would vote here.[67]

At oral argument, Sachs was particularly sensitive to the presence of Judge Rodowsky, his former law partner from private practice, and Chief Judge Robert Murphy, whom he knew well from public service. He thought those two were the "real lawyers" on the Court and would be receptive to his institutional argument about the roles of juries and appellate courts.[68]

He was right. The Court of Appeals' decision was 4–3 to reinstate the conviction. The majority opinion by Chief Judge Murphy explicitly embraced Judge Wilner's dissent in the intermediate court. While it was correct to require that a victim's fear be reasonable, the Court held, the question of reasonableness was for the jury, and a jury could rationally find the elements of rape established here, "with particular focus on the actual force applied by Rusk to Pat's neck." A victim's resistance was unnecessary where she was restrained by fear of violence. "Just where persuasion ends and force begins in cases like the present is essentially a factual issue."

Judge Cole's impassioned dissent is now infamous:

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

Judge Cole thought there was no evidence here inconsistent with "ordinary seduction of a female acquaintance who at first suggests her disinclination." He belittled her testimony that Rusk " 'started lightly to choke' her, whatever that means." Judge Cole didn't see evidence that the fear that constrained her from resisting was created by anything the defendant did. He said, "[T]his was not a child. This was a married woman with children, a woman familiar with the social setting in which these two met." Getting out of her car and walking up to his room,

67. Telephone Interview with Stephen H. Sachs, Retired Partner, WilmerHale (Jan. 8, 2010) (hereinafter Sachs Interview).

68. *Id.*

"[s]he certainly had to realize that they were not going upstairs to play Scrabble."

Despite the vocal mobilization of women's groups around the case after his victory below, Cooke had thought the Court of Appeals would decide in his favor. As expected, Cooke lost Davidson and Rodowsky, but he couldn't understand how he lost good-old-boys Murphy and Eldridge. He thought Davidson, the Court's first woman, must have lobbied them to make up the majority.[69] Unbeknownst to Cooke, however, Eldridge was one of the judges who had voted to grant certiorari in *Rusk*, and was no stranger to the women's movement. As Governor Mandel's chief counsel in the early 1970s, Eldridge had taken a leading role in making Maryland one of the first states to ratify the federal Equal Rights Amendment and to pass its own, which he drafted.[70]

The unexpected dissent by Judge Cole, the first African American on the Court, was also intriguing. Cole was generally protective of the rights of criminal defendants, but it was a surprise to Cooke that that tendency would predominate here.[71] Cooke thought the Court was engaged in a most dangerous sort of judicial activism. It seemed that rape had in effect become a strict liability offense. A woman's subjective fear was now enough to convict a man of rape—even a guy who had no idea he was doing anything wrong. By recasting regular dating behavior as the crime of rape, the forces of the women's movement, in concert with legal elites, were flipping the rules of engagement. They flipped them on Eddie Rusk.

After the Case

Women's groups prominently celebrated the Court of Appeals decision in the press. It was called a "vote in favor of women being believed."[72] The president of the Women's Law Center called the decision "terrific," because it "recognizes the current-day realities of life."[73] Cooke told the *Sun* that Rusk was "a victim of changing social times and changing social attitudes about relationships between men and women.... Rusk is a guy caught in the middle of a changing time. That's his only crime."[74]

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69. Cooke Interview, *supra* note 8.

70. Eldridge Interview, *supra* note 62.

71. Cooke Interview, *supra* note 8.

72. Scott Flander, *High Court Reversal in Rape Case Hailed*, Evening Capital (Annapolis), Jan. 14, 1981, at 33 (quoting Karen Goldman Lyon, head of the Sexual Offense Crisis Center) (internal quotation marks omitted).

73. *Women's Groups Praise Court's Ruling on Rape*, The Post (Frederick), Jan. 15, 1981, at D–8 (quoting Sally Gold) (internal quotation marks omitted).

74. Michael Olesker, *Edward Rusk: Rapist or Victim?*, The Sun (Baltimore), Mar. 1, 1981, at B1 (internal quotation marks omitted).

Eddie's cousin, a struggling actor in Hollywood, attempted to pitch a biopic about him to some screenwriters he knew.[75] Popular liberal *Sun* columnist Michael Olesker got a pitch from an "agent" who told him:

> This guy is hot. He's a character. He's crazy. You gotta meet him, you'll love him. You gotta write about him. What we're gonna do, we're gonna make a commodity out of him. We're gonna market him. We're gonna do a book, right? And then we're gonna do a movie. We figured it out already. For the movie, we want Cindy Williams as the girl, and Donald Sutherland to play Rusk.... Rusk's the victim, man.[76]

Cooke was about to take Eddie to surrender himself for his prison sentence but still had not relinquished the thought that he could get him a new trial. Olesker's *Sun* column gave him an idea.[77] The column included an interview with the victim. Pat was quoted saying she was "easily frightened" and that she left her husband "because he kept beating me up." She said that night with Rusk she couldn't scream because he choked her to keep her quiet; the only reason she testified in court that the choking was "light" was that the prosecutor told her not to bring up the choking because she didn't have any marks on her neck.[78] In her first public mention of the marks, she now claimed the police didn't note the marks because "they were getting ready to get off duty. They were changing shifts. They were in a rush to get off, and they really didn't care."[79] Prosecutor James Salkin, however, told the *Sun* that the victim said even that night there were no marks, and that he instructed her not to embellish the story in court.[80]

The column quoted Rusk as well: "Look, she didn't give in a hundred percent. I mean, what girl does? I mean, she didn't just lay down and say, take me. It was like, you know, you've been to bed with women, and they have second thoughts." Asked about the choking, he said "I might have had my hands anywhere ... I was just getting down with her.... But I didn't rape her. I don't do that. I could bring in a thousand girls I've known and didn't rape."[81]

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75. Kennedy Interview, *supra* note 17.

76. Michael Olesker, *Convicted Rapist Gets Agent—Watch For Movie at Your Local Theater*, The Sun (Baltimore), Feb. 8, 1981, at B1 (quoting Rusk's agent) (internal quotation marks omitted).

77. Cooke Interview, *supra* note 8.

78. Olesker, *supra* note 76 (internal quotation marks omitted); Olesker, *supra* note 74.

79. Olesker, *supra* note 76 (internal quotation marks omitted).

80. Olesker, *supra* note 74.

81. Olesker, *supra* note 76. (internal quotation marks omitted).

With little popular sympathy for his client, and outflanked by the power of both the state and the press, Cooke seized on deviations of Pat's printed interview from her trial testimony. He filed a motion for a new trial claiming she had recanted her testimony, and he sought access to Olesker's notes of the interview. Cooke felt overwhelmed when the *Sun*'s top First Amendment lawyers came to court to oppose his request for the notes. The judge came up with a Solomonic ruling: Olesker had to answer questions on the stand and read aloud from his notes, but Cooke was not allowed to examine the notes himself.[82]

Olesker thought this litigation was a desperate publicity stunt.[83] But Cooke believed (and still believes) that had the *Sun* produced those notes, he could have gotten Eddie a new trial.[84] After three decades as a respected and provocative columnist, Olesker resigned from the *Sun* in 2006 when it came to light that some of his columns used language from other journalists' work without attribution.[85] Cooke now suspects that the column about *Rusk* embellished the victim's words to make the incident seem more violent.

Some time after *Rusk*, Maryland's appellate judges—the thirteen on the Court of Special Appeals, and the seven on the Court of Appeals—were all invited to a party at the Governor's house. Judge Wilner, author of the dissent in the intermediate court, recalls that Judge Cole, the dissenter in the highest court, approached and started "giving him the business" about his opinion in *Rusk*. That is, until Mrs. Cole overheard and started giving her husband the business about *his* opinion in the case.[86]

One morning as Eddie was preparing to begin his prison sentence, his aunt called and told him to turn on the television. Pat was on a talk show talking about *his* case.[87]

A Crime of Violence

State v. Rusk came at the turning point of a massive legal revolution in relations between American men and women.[88] In the period between

82. Cooke Interview, *supra* note 8; Telephone Interview with Michael Olesker, Writer (Dec. 17, 2009) [hereinafter Olesker Interview].

83. Olesker Interview, *supra* note 82.

84. Cooke Interview, *supra* note 8.

85. Howard Kurtz, *Sun Columnist Dismissed; Attribution Issues Cited*, Wash. Post, Jan. 5, 2006, at C4.

86. Wilner Interview, *supra* note 33.

87. Riccobono Interview, *supra* note 4; Email from Ira C. Cooke, Former Attorney, to Jeannie Suk, Assistant Professor of Law, Harvard Law School (Dec. 20, 2009) (on file with author).

88. Cassia Spohn & Julie Horney, *Rape Law Reform: A Grassroots Revolution and Its Impact* 17 (1992) ("In the past twenty years, we have witnessed a virtual revolution in rape

the 1977 incident in the Guilford Avenue apartment and the 1981 decision of the Maryland Court of Appeals, the women's movement was making major progress nationally in the reform of rape law.[89] Feminist critique of the 1970s had brought attention to rape and the myriad problems of traditional sexism that beset its adjudication.[90] By the time *Rusk* was decided in 1981, every state had considered and most states had passed some rape reform laws.[91] Among the basic reforms debated was the substantive definition of the crime and how the crime was proven. These reforms implicated fundamental questions of what sexual relations between men and women should be.

Rape at common law was "carnal knowledge of a female forcibly and against her will."[92] Proof of the required elements of force and nonconsent inevitably focused factual inquiry on whether the woman physically resisted the man's advances. Without evidence of her "utmost resistance," "earnest resistance," or at least "reasonable resistance," the prosecution would fail to establish either or both of the required elements, making it difficult to almost impossible to get a rape conviction.[93] Though eventually most states eliminated the *requirement* that a rape victim resist her attacker, her resistance or lack thereof was still relevant in the proof of force or nonconsent.

Abolition of the resistance inquiry was one of the rape reform movement's most important goals.[94] Advocates were increasingly convincing legislatures, courts, and law enforcement officials that the victim's resistance should be not only unnecessary to prove rape, but also discouraged because it increased her risk of bodily harm or death.[95] Many legal actors, institutions, and scholars were adopting the view that resistance was dangerous.[96] This became the position of many police

law in the United States."); *cf.* Jeannie Suk, *At Home in the Law: How the Domestic Violence Revolution is Transforming Privacy* (2009).

89. Spohn & Horney, *supra* note 88, at 20 (calling rape reform "a key item on the feminist agenda").

90. *See, e.g.*, Susan Brownmiller, *Against Our Will: Men, Women, and Rape* (1975). Major targets of feminist critique of rape law included the requirement that a rape victim resist her attacker; the requirement that a rape victim's testimony be corroborated by another witness; the refusal to punish rape by a husband; the impeaching of victims' testimony with evidence of prior sexual conduct; and the definition of rape to require physical force. For a review of rape reform goals, see Spohn & Horney, *supra* note 88.

91. *See* Bienen, *supra* note 55, at 171.

92. 4 William Blackstone, *Commentaries* *210.

93. *See* Michelle J. Anderson, *Reviving Resistance in Rape Law*, 1998 U. Ill. L. Rev. 953, 962–65.

94. *Id.* at 974.

95. *See id.* at 968–69.

96. *See id.* at 968–80.

departments, the U.S. Department of Justice, and the American Law Institute.[97]

Judge Wilner's dissent in the Court of Special Appeals reflected this tide against a proof-of-resistance requirement in rape law. But today Judge Wilner believes his opinion's reliance on then existing studies purporting to show that resistance was inadvisable has turned out to be incorrect; later studies have purported to show that fighting back rather than remaining passive increased chances of avoiding rape, and that victims of completed rape were more seriously injured than victims of attempted rape.[98] Studies have also claimed that victims' resistance, compared to passivity, is correlated with decreased psychological injury.[99] It is, however, open to serious question whether empirical studies (particularly those purporting to use quantitative data), given their inherent limitations, could provide sound support for a resistance doctrine or for instructions on whether to resist a would-be rapist.[100]

Shifting empirical claims notwithstanding, reformers' initial beliefs about the dangers of resistance served a more general rape reform agenda, which was to move the focus of inquiry away from what the victim did or did not do, and toward the conduct of the defendant. The systematic mistreatment of rape complainants, in the tradition of putting the victim on trial and suggesting her dubious sexual virtue, provoked the reform movement for passage of rape shield laws that now limit the extent to which victims can be cross-examined about their sexual history.[101]

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97. *See* Nat'l Inst. of Law Enforcement and Criminal Justice, *Forcible Rape: A National Survey of the Response by Police* 22 (1977) (reporting results of a study indicating that "[r]ape victims who resisted were more likely to be injured than ones who did not"); Rusk v. State, 406 A.2d 624, 635 n.15 (Md. Ct. Spec. App. 1979) (citing a police pamphlet advising that "attempts at self-defense, such as screaming, kicking, scratching . . . usually have provoked the rapist into inflicting severe bodily harm on the victim"); Model Penal Code § 213.1 (1980) ("[R]esistance may prove an invitation to danger of death or serious bodily harm.").

98. Wilner Interview, *supra* note 33. *See also* Anderson, *supra* note 93, at 981–82 (citing Pauline B. Bart & Patricia H. O'Brien, *Stopping Rape: Successful Survival Strategies* 33, 35, 42–43 (1985); M. Joan McDermott, U.S. Dep't of Justice, *Rape Victimization in 26 American Cities* 38, 40, 43 (1979); Gary Kleck & Susan Sayles, *Rape and Resistance*, 37 Soc. Probs. 149, 160 (1990)).

99. *See* Anderson, *supra* note 93, at 987–91 (citing studies).

100. Studies comparing injuries suffered by victims of completed rape to those suffered by victims of attempted rape may provide little information about whether encouraging potential victims to resist reduces injury. The links from such encouragement to physical resistance to a reduced chance of a completed rape are difficult to study. For example, it is hard to see how statistical techniques could adequately account for the possibility that women who would be inclined to resist may be inherently less likely to suffer physical or psychological injury than those who would be inclined to be passive.

101. *See, e.g.*, Michelle J. Anderson, *From Chastity Requirement to Sexuality License: Sexual Consent and a New Rape Shield Law*, 70 Geo. Wash. L. Rev. 51 (2002); Vivian D.

The lingering attitude that such reforms meant to address was on display in Judge Cole's dissent, which found Pat's behavior to fall short of that of a genuine rape victim. His litany of what a woman "must" do if she was legally to "transform a seducer into a rapist" demanded that she "follow the natural instinct of every proud female to resist, by more than mere words, the violation of her person," and "make it plain that she regards such sexual acts as abhorrent and repugnant to her natural sense of pride." Twenty or perhaps even ten years earlier, these sentiments might have been in the judicial mainstream. By 1981, they were becoming antiquated and time has not been kind to them since. Indeed a common reaction of today's readers to Judge Cole's recounting of the victim's testimony that Rusk " 'started lightly to choke' her, whatever that means," and his remark that she "certainly had to realize that they were not going upstairs to play Scrabble," is revulsion at how recently and openly judges evinced such dismissive and disrespectful attitudes.

Still, the ideas embedded in these sarcastic formulations implicate the problems with which rape reformers have grappled. Reformers noticed that the law did not prohibit much intercourse that many women experienced as nonconsensual where the intercourse did not involve what the law deemed to be force or threat of force. There was too often a discrepancy between female experience and the law's definition of rape—especially among acquaintances. If the traditional rapist was an armed stranger in a dark alley, rape reform raised the salience of the unwelcome sexual advance by a date or a friend. Moreover, a range of socially acceptable, even expected, male dating behavior—nonviolent intimidation, aggressive pressure to have sex, sex with an intoxicated woman, sex with an unequal in power—might be criminally regulated, as rape or a lesser sex crime, to change these sexual mores.

Rusk exemplifies its era's project to redefine and expand the range of conduct that falls under the criminal rubric. The Maryland Court of Appeals' view that there was sufficient evidence of "force" on facts that would not satisfy traditional rape law concepts of force was a victory for the feminist reform agenda then gaining momentum. Consistent with expansion of the meaning of "force" to enable more conduct to be criminally punished, some reformers advocated that the force requirement in criminal rape or sexual assault statutes be eliminated. Some state legislatures have done so, while most states have seen courts broaden what is considered forcible.[102] The anxiety of judicial activism

Berger, *Man's Trial, Woman's Tribulations: Rape Cases in the Courtroom*, 77 Colum. L. Rev. 1 (1977).

102. *See, e.g.*, Fla. Stat. § 794.011(5) (providing that a person commits a felony of the second degree if he commits "sexual battery" without consent and "does not use physical force and violence"); N.Y. Penal Law § 130.25(3) (defining rape as sexual intercourse without consent); Wis. Stat. § 940.225(3) (making sexual intercourse without consent a

visible in *Rusk* reflected a general post-Warren Court era anxiety about judges, as opposed to legislatures, making major social changes. This unease led feminist reformers to focus more on legislative reform.

A cultural shift in emphasis that emerged was from physical violence, to forms of not-necessarily-violent power that might nonetheless be conceivable as "force."[103] But this development has also produced some tension with the well-known 1970s feminist idea that rape is "a crime of violence," not sex.[104] For some who have taken seriously (or literally) the notion that rape is a crime of violence, it seems odd that sex without at least the threat of physical violence might be punished as rape. But what we have seen is the socio-legal transformation of the notion of violence itself, so that forms of power in sexual relationships—physical, emotional, psychological, intellectual, or economic—can be thought of as violence by other means.[105] Relatedly, some feminists have critiqued the idea of rape as a crime of violence, not sex, instead emphasizing precisely the sexual subordination entailed in the injury and thus the importance of nonconsent to sex, with or without physical

felony); *See also* Michelle J. Anderson, *All-American Rape*, 79 St. John's L. Rev. 625, 629–33 (2005) (finding that nonconsensual sex without force is a felony in fourteen states and a misdemeanor in eight states). In New Jersey, the statutory requirement of "force" is satisfied by the force inherent to sexual penetration. In the Interest of M.T.S., 609 A.2d 1266, 1277 (N.J. 1992).

103. *See* State v. Rusk, 424 A.2d 720, 726 (Md. 1981) ("[F]orce may exist without violence." (quoting Hazel v. State, 157 A.2d 922, 925 (1960))). *Compare, e.g.*, Commonwealth v. Mlinarich, 498 A.2d 395, 400 (Pa. Super. 1985) ("The term 'force' ... when used to define the crime of rape, [has] historically been understood by the courts and legal scholars to mean physical force or violence."), *with id.* at 413 (Spaeth, J., dissenting) ("[T]he legislature did not mean force in the limited sense of 'to do violence to,' and *did* mean force in the more general sense of 'to constrain or compel by physical, moral, or intellectual means or by the exigencies of the circumstances.' "). Self help books encouraged women to see non-violent coercion as force. *See The Boston Women's Health Book Collective, The New Our Bodies, Ourselves: A Book By and For Women* 103 (1984) ("Men use different kinds of force against women, from pressuring us for a 'good night kiss,' to withdrawal of economic support from wives, to using weapons.").

104. *Compare, e.g.*, Brownmiller, *supra* note 90, at 376 (arguing that women experience rape as an "act of violence"); Cassandra Wilson, *Interview with a Feminist Lawyer*, *in* Rape: The First Sourcebook for Women 137, 140 (Noreen Connell & Cassandra Wilson eds, 1974) (explaining that reframing rape as a crime of physical assault would help eliminate obstacles to prosecuting rape), *with* Catharine A. MacKinnon, *Feminism Unmodified* 86 (1987) ("So long as we say that [normal forms of sexuality] are abuses of violence, not sex, we fail to criticize what has been made of sex, what has been done to us *through* sex, because we leave the line between rape and intercourse ... right where it is."); Stephen J. Schulhofer, *Unwanted Sex* 114 (1998) (criticizing rape law's "narrow focus on violence rather than on sexual autonomy").

105. Pennsylvania, for example, has legislatively defined the "forcible compulsion" required for rape explicitly to encompass "physical, intellectual, moral, emotional or psychological force, either express or implied." 18 Pa. C.S.A. § 3101.

violence.[106]

Several decades after *Rusk*, the idea that a woman's acquiescence to not-quite-violent pressure may make a man a rapist is still difficult for many to stomach. Perhaps that explains the Maryland Court of Appeals' "particular focus on the actual force applied by Rusk to Pat's neck"—the only explicit suggestion of physical violence.[107] The state's decision to prosecute Rusk, though, likely did not hinge on that detail, given the other facts such as the taking of the keys, the intimidating look, and the affirmative answer to Pat's question whether he would let her go if she did what he wanted.[108] The light choking was a remnant of the kind of physical force that rape law traditionally demanded, in a case that became important for the suggestion that physical force or threat thereof, light or otherwise, might be unnecessary to establish "force" in rape. *Rusk*'s double-speak, suggesting rape could be nonviolent ("the look in his eyes") but also emphasizing the one existing violent detail (light choking), implicitly recognizes that when law shifts basic social concepts—here, the notion of violence entailed in the term "force"—and thereby resists people's ordinary intuitions, they may not buy it.[109]

In that vein, the ambivalence of *Rusk*'s signals bears note. First, *Rusk* ultimately affirmed the rape conviction, but a majority of the twenty-one judges at the three different levels of adjudication did *not* think there was legally sufficient evidence of rape.[110] Second, the story of the hungry jurors makes it at least ironic that *Rusk* featured such emphasis on appellate deference to the jury. Third, Rusk's appeal based on insufficiency of the evidence seemed to the lawyers and judges to be highly fact-bound, and centered on factual details like the taking of the car keys, the light choking, and the "look in his eyes"; but *Rusk* nevertheless became a case of legal importance involving the changing understanding of concepts like force and reasonableness in rape law.

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106. *See* MacKinnon, *supra* note 104, at 86; Schulhofer, *supra* note 104, at 280.

107. *Cf.* Susan Estrich, *Rape*, 95 Yale L.J. 1087, 1113 (1986); Stephen J. Schulhofer, *Taking Sexual Autonomy Seriously*, 11 L. & Phil 35, 47 (1992) (wondering what "would have been the result if this one factual detail had been missing").

108. *See* Email from Stephen H. Sachs, Retired Partner, WilmerHale, to Jeannie Suk, Assistant Professor of Law, Harvard Law School (Dec. 29, 2009) (on file with author) ("[E]ven absent 'lightly choking' I believe there was a rape, although it was a much closer case. Yes, I would have argued this hypothetical case in the COA."); Email from James Salkin, Attorney, to Jeannie Suk, Assistant Professor of Law, Harvard Law School (Dec. 30, 2009) (on file with author) (indicating that "light choking" might have come up "pre trial or for the first time while [the victim] was on the witness stand").

109. *Cf., e.g.*, Jeanne C. Marsh, Alison Geist & Nathan Caplan, *Rape and the Limits of Law Reform* (1982) (finding Michigan's 1975 rape reform statute relatively unsuccessful in its goal of extending criminal prohibition to behavior that was previously permissible).

110. Estrich, *supra* note 107, at 1113.

Fourth, even if *Rusk* vindicated the rape reform position by affirming the rape conviction, the Court of Appeals remained fixated on force as physical force, and did not eschew the requirement that the victim's fear have been reasonable. That is why the decision somewhat disappoints the reformist challenge to traditional rape law. Perhaps this is why *Rusk*'s most quoted opinion is not the majority, but rather Judge Cole's dissent, which seemingly embodied the traditional sexism of rape law. For many, the dissent's dismissal of the victim's fear is the most salient aspect of the case, drawing repeated comment—so much that it is often treated as if it, rather than the vindication of rape reform, were *Rusk*'s legacy.[111]

Finally, though, even the meaning of this dissent was complicated, coming as it did from the first African American judge to serve on Maryland's highest court. "Traditional sexism" does not suffice to provide its context. Having grown up in segregation-era Baltimore and become a veritable pioneer as a state senator and judge, Judge Cole was attuned to the serious bias against African American defendants in criminal courts, and the notorious racial politics of prosecutions against African American defendants falsely accused of raping white women.[112] Coming of age in the South, he no doubt knew the ease with which African American men could be falsely convicted. This is not to say that Judge Cole's race can, by itself, explain his views here, but his experience alters somewhat the meaning of his insistence that the accuser should have manifested robust resistance. From this perspective, the concern might be that making it easier to prove rape by eroding the resistance requirement could aggravate intransigent and troubling race bias in rape law. Even deeper, though, this perspective might lend itself to greater sensitivity to the interests and rights of those accused of rape. It also highlights a split in the Left that feminist law reform revealed, between feminists and champions of criminal defendants' rights. The interaction of race and rape was not on the surface of *Rusk* because both the defendant and the victim were white, but nevertheless it is an unseen dimension of Judge Cole's dissent that was instantly understood, even if inchoately, by judicial colleagues and lawyers in the case.[113]

111. *See, e.g.*, Coughlin, *supra* note 44, at 40 (discussing *Rusk* as an "infamous example" of a rape victim being judged for putting herself in a situation where she was likely to be pressured to have sex); Estrich, *supra* note 107, at 1113–14 (criticizing the dissenters' view of the reasonable woman as demanding that she not be "a woman at all" but a "real man").

112. Telephone Interview with Alan M. Wilner, Retired Judge, Court of Appeals of Maryland (Dec. 29, 2009). Judge Cole died in 1999.

113. *E.g.*, *id.*; Sweeney Interview, *supra* note 31; Cooke Interview, *supra* note 8; Sachs Interview, *supra* note 67.

Epilogue

State v. Rusk was a routine trial that evolved into an important test of the bounds of social and legal change. At trial, prosecutor and public defender alike had no inkling of implications beyond the jury's verdict, let alone the cause of feminism and the rape reform movement.[114] The trial judge says he does not remember the case at all.[115] But what began as an ordinary criminal-court jury trial came through the appellate process to herald legal transformation in relations between the sexes.

The trajectories of the judges and lawyers involved seem eerily to reflect the morality tale of shifting power in an epochal struggle. Judge Robert Karwacki moved on from the trial court to serve on the state's intermediate appellate court and eventually its highest court. Judge Alan Wilner became chief judge of the intermediate appellate court, and then was elevated to the highest court of Maryland. His *Rusk* dissent has been one of his most noted opinions.[116] Today the author of the Court of Appeals majority opinion, the late Chief Judge Robert Murphy, has his name on the courthouse, and *Rusk* is considered part of his contribution to defining and clarifying Maryland's substantive criminal law.[117] Judge Lawrence Rodowsky served as chair of the Maryland Select Committee on Gender Equality. His efforts to eliminate gender bias in the judicial system, especially in the education of judges and attorneys about domestic violence, family law, and sexual harassment, have been celebrated by bench and bar as highlights of his career.[118] Judge Rita Davidson, Maryland's first female appellate judge, was lionized as a judicial pioneer after her untimely death from cancer.[119] Four women judges have followed her on the Court of Appeals.

Attorney General Stephen Sachs was reelected to office the year after his success in *Rusk*. He later ran for governor of Maryland, in a Democratic primary in which both he and the winning candidate sought the support of women's groups. He is now a retired litigation partner at WilmerHale where he had a criminal, tax, and securities practice.[120] The

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114. Eaton Interview, *supra* note 7; Salkin Interview I, *supra* note 2.

115. Telephone Interview with Robert Karwacki, Retired Judge, Maryland Court of Appeals (Dec. 2, 2009).

116. *See, e.g.*, Kim Lane Sheppele, *Legal Storytelling*, 87 Mich. L. Rev. 2073, 2095 (1989).

117. Lawrence F. Rodowsky, *The Opinions of Chief Judge Robert C. Murphy*, 56 Md. L. Rev. 626, 628 (1997).

118. Peter F. Axelrad et al., *Tributes to Judge Lawrence F. Rodowsky*, 60 Md. L. Rev. 785, 790–97 (2001); *Judge Rodowsky Awarded for Exemplary Efforts to Achieve Gender Equality*, 2.4 Justice Matters: A Publication of the Maryland Judiciary 4 (1999).

119. *A Tribute to Judge Rita C. Davidson*, 19.5 Md. Bar J. 13 (1986).

120. Sachs Interview, *supra* note 67; http://www.elections.state.md.us/elections/1986/candidates_1986/primary_gov.html; http://www.wilmerhale.com/steve_sachs/.

two women Assistant Attorneys General who worked with him on *Rusk* are both judges. Within a decade of the case, Kathleen Sweeney became a Maryland district court judge in Baltimore,[121] and Deborah Chasanow a federal magistrate judge. President Clinton then appointed Chasanow to the Federal District Court for the District of Maryland, of which she is now chief judge.[122] In 2004, she received the highest honor of the Women's Bar Association of Maryland, an award named for Judge Rita Davidson.[123] Before leaving the State's Attorney's Office for private practice in Baltimore, Rusk's prosecutor Jimmy Salkin was promoted to the Violent Crimes Unit. There he worked dozens of homicide cases with Ed Burns, the homicide detective who would later co-produce *The Wire*, an HBO television series about the Baltimore worlds of drug rings, police, politics, public schools, and the media.[124]

Eddie Rusk's lawyers have not fared as well. Both have been disbarred. After retiring from a long career as a respected public defender, David Eaton shocked the Baltimore legal community when he was accused of stealing funds from a mentally retarded friend for whom he was a longtime financial guardian. Eaton pleaded guilty to perjury and theft in 2002, and received a three-year suspended sentence.[125]

Ira Cooke kept in touch with Eddie, visited him in prison, and even invited him to his home after he got out. In addition to his career as a litigator, Cooke's prominent portfolio came to include lucrative lobbying for unpopular interests such as bail bondsmen, mortgage lenders, landlords, and the gaming industry. A powerful but controversial figure in Maryland, he was troubled over the years with substance abuse, bankruptcy, accusations of forgery and fraud, and a contempt ruling for misreporting finances in one of his divorces. In 2004, he was convicted by a California jury of conspiracy, grand theft, and commercial bribery for allegedly participating in a kickback scheme that defrauded a mental health clinic for which he was consulting.[126] His conviction was reversed on appeal due to multiple trial errors including prosecutorial misconduct.[127] At the time of this writing, he was doing volunteer work at a

121. *See* http://www.msa.md.gov/msa/mdmanual/32dc/html/msa11860.html.

122. *See* http://www.mdd.uscourts.gov/publications/JudgesBio/chasanow.htm.

123. *See* http://www.wba-md.org/RCDaward.aspx.

124. Salkin Interview I, *supra* note 2.

125. Laurie Willis, *Disbarred Lawyer is Sentenced in Theft: He Controlled Funds of Learning-Disabled Man*, The Sun (Baltimore), Feb. 8, 2002, at 3B.

126. Jeffrey Anderson, *California Scheming: Maryland Lobbyist Ira Cooke Indicted in California on Charges of Conspiracy, Theft, and Bribery*, Balt. City Paper, Oct. 29, 2003, http://www2.citypaper.com/eat/story.asp?id=4652; Van Smith, *Un-Cooke-d*, Balt. City Paper, Feb. 2, 2005, http://www2.citypaper.com/printStory.asp?id=13069.

127. People v. Cumberworth, No.F047243, 2006 WL 3549939 (Cal. App. 5 Dist. 2006).

men's halfway house and awaiting the decision of the Court of Appeals (the same court in which he lost *Rusk*) on his reinstatement to the Maryland bar so he could practice law again.[128] His daughter is a Baltimore Legal Aid lawyer who represents battered women.[129]

Until they were contacted for this story, none of the lawyers and judges involved in *Rusk* realized they had played a role in such a long-lasting legacy—a case studied closely by students and teachers of criminal law and feminist legal theory. So how did it become a canonical case?

At the time of *Rusk*, the crime of rape was barely taught in law schools, despite being one of the most controversial social issues of the day.[130] Stephen Schulhofer, then a recently tenured University of Pennsylvania professor, was joining a new edition of Sanford Kadish's dominant Criminal Law casebook as coauthor.[131] As part of the law-and-society movement, Schulhofer strongly believed that the teaching of law should be connected to real social problems, not abstracted from realities of social life. When he came across *Rusk* in the advance sheets of the Criminal Law Reporter, he realized it was "the perfect vehicle" for bringing a discussion of modern date rape into the curriculum, and getting beyond the traditional teaching of rape just as an instance of the mistake of fact doctrine.[132]

His senior coauthor, who had co-written the first edition of the casebook in 1962,[133] initially resisted his proposal to create a whole chapter devoted to the crime of rape. No other casebook had such a chapter; criminal law pedagogy at the time had moved away from treating specific substantive crimes and toward general principles of just punishment. Also, the topic of rape was broadly considered too explosive for the dispassionate pedagogy of the law school classroom. But Kadish was soon persuaded and the 1983 edition made *Rusk* the centerpiece of its new chapter. Schulhofer recalls that "the decision to include rape was very controversial at the time and triggered much protest from the then-

128. Van Smith, *Lobbyist Ira Cooke Wants His Law License Back*, Balt. City Paper, Oct. 3, 2008, http://www2.citypaper.com/news/story.asp?id=16805; Telephone Interview with M. Albert Figinski, Attorney, Law Offices of Peter G. Angelos (Dec. 4, 2009); Email from Ira C. Cooke, Former Attorney, to Jeannie Suk, Assistant Professor of Law, Harvard Law School (Dec. 25, 2009) (on file with author).

129. Cooke Interview, *supra* note 8.

130. *See* Susan Estrich, *Teaching Rape Law*, 102 Yale L.J. 509, 509–10 (1992).

131. Sanford H. Kadish, Stephen J. Schulhofer & Monrad G. Paulsen, *Criminal Law and Its Processes: Cases and Materials* (4th ed. 1983).

132. Email from Stephen J. Schulhofer, Robert B. McKay Professor of Law, New York University School of Law, to Jeannie Suk, Assistant Professor of Law, Harvard Law School (Jan. 12, 2010) (on file with author).

133. Sanford H. Kadish & Monrad G. Paulsen, *Criminal Law and its Processes* (1962).

older generation of criminal law teachers."[134] One longtime user of the casebook even took Schulhofer aside at a conference to explain that he had stopped teaching from it because the chapter caused trouble: if he skipped rape, students objected, and if he taught rape, it went badly.[135] But soon other casebooks and teachers followed in using *Rusk* to open up serious consideration of rape as a substantive crime.[136]

Susan Estrich was a young Harvard professor who had been the first female president of the Harvard Law Review—and before that, a victim of rape. She made her first major scholarly contribution in 1986 with a *Yale Law Journal* article, "A Study of Rape Law as an Illustration of Sexism in the Criminal law."[137] She used the story of Pat and Eddie to criticize the law's demand that the rape victim be "reasonable"—in effect, "one who does not scare easily, one who does not feel vulnerability, one who is not passive, one who fights back, not cries." In short, "not a woman at all," but "a real man."[138] The *Rusk* dissent, she said, showcased this male perspective on how women should react when faced with unwanted sex. She also criticized the typical judicial inability to "understand force as the power one need not use," and hence the majority's need to emphasize the "light choking" to see the encounter as a rape.[139] Since then, *Rusk* has been a flashpoint for criminal and feminist legal scholars.

Pat's own later story is not known. Perhaps it is to be expected, even by design, that a rape complainant, whose surname was not in the judicial opinions, and whose identity was obscured in her contemporaneous press interviews, would remain inaccessible. We are left to surmise how her life went after the media flurry when she dropped out of public view. As far as we know, she and Eddie never encountered each other after he got out of prison, and she would be fifty-two years old at the time of this writing. Perhaps she went on to have a relatively normal life, and did not lose custody of her son in her divorce as she had feared. If we were to project on her some common tropes associated with rape victims, we might imagine years of rape counseling, relationship problems, and bouts of fear and anxiety. Whether or not the experience affected her inner life, because of our developed social norms of shielding

134. Email from Professor Schulhofer, *supra* note 132.

135. Telephone Interview with Stephen J. Schulhofer (Jan. 15, 2009).

136. *See, e.g.*, John M. Brumbaugh, *Criminal Law and Approaches to the Study of Law* (1986); John Kaplan & Robert Weisberg, *Criminal Law: Cases and Materials* (1986); Lloyd L. Weinreb, *Criminal Law: Cases, Comment, Questions* (4th ed. 1986).

137. Estrich, *supra* note 107, at 1090.

138. *Id.* at 1114. *See also* Susan Estrich, *Real Rape* 63 (1987) (calling *Rusk* "one of the most vigorously debated rape cases in recent volumes of the case reporters").

139. Estrich, *supra* note 107, at 1115.

rape victims from exposure, the case in which she played a pivotal role as a young woman need not have been salient to her social persona afterwards, or even known to friends. Those expectations of privacy (or shame), particular to the social construction of *rape* victimhood, also prevent this story from providing a richer picture of her life.

In letters from prison, Eddie maintained he was innocent of rape. To his cousin, Eddie wrote of his daughter, who was six when he began his prison sentence. "She's really growing up fast! I haven't seen her for 4½ years—I only get to see her in photos. It's a real drag watching her grow up in pictures. I don't want her to know I'm in prison, especially for a charge like this." About his conviction, he said in the same letter: "I'm hopeful of clearing myself of these charges. An old girlfriend of mine just hired an attorney for me. He's an investigative lawyer. He's looking into this girl's background. He says he believes he can get a new trial for me. He's already talked with the girl's ex-husband who says the girl's a total bitch and says he'll testify for me in court if I get a hearing."[140]

Back when his appeal was pending, Eddie's parents had moved away with his daughter from their Baltimore home to Florida, in part to get away from the embarrassment of their son's rape conviction. He was able to get a transfer to serve the last part of his sentence in a Florida prison near his family. His daughter remembers visiting him there as a young child and being told that her dad couldn't be home with her because he was in the army.[141] He served a total of six and a half years and was released in 1987, just as his encounter with Pat was beginning to shape the teaching of rape law in classrooms all over the country.

When Eddie got out of prison, he resumed buying and selling cars for a living in Baltimore. His daughter, who was twelve, continued to grow up with his parents in Florida, though he sometimes sent money for her support and she occasionally visited him. In prison he had become unhealthily overweight. In 2000 when he became so sick with diabetes and dystonia (a neurological movement disorder) that he could no longer work, he moved to Florida to live with his parents, sister, and daughter. He was now on disability and abusing narcotics and prescription drugs. He badgered family members for money. His daughter, a dental assistant who had a young son, felt her father "brought a lot of stress" when he moved in. People close to him thought he had a kind and generous heart, but he was often angry. He was occasionally violent when he'd been drinking. Both his sister and his daughter reported domestic violence incidents to the police. His daughter eventually got a trespass warrant barring him from the home.[142]

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140. Letter from Edward Rusk to Rigg Kennedy (Jun. 7, 1985) (on file with author).

141. Sell Interview, *supra* note 5.

142. Kennedy Interview, *supra* note 17; Riccobono Interview, *supra* note 4; Sell Interview, *supra* note 5.

After serving time for rape, Eddie had a number of additional convictions, for battery, petty theft, reckless driving, and cocaine possession, but he did not go to prison again. Just three months before his death, he was arrested for domestic assault. To the end, he remained bitter about doing the years in prison for a crime he didn't think he committed. He believed the rape conviction ruined his life. Eddie died at age fifty-nine, alone in a rented trailer in Port Orange, Florida. A week later, neighbors smelled his corpse and called the police. His little grandson, who loved and looked up to him, was told that grandpa died and went to heaven.[143]

143. Sell Interview, *supra* note 5.