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THE TEXAS 'CONDOM-RAPE' CASE: CAUTION CONSTRUED AS CONSENT

Carla M. da Luz* and Pamela C. Weckerly**

*Blaming the victim in a rape case is insulting, illogical, and, unfortunately, all too common. People persist in labeling this act of violence as an act of sex. They cling to the notion that unless a woman has been beaten bloody by a rapist, she must have consented.*¹

In the fall of 1992, an ostensibly routine Austin, Texas rape case garnered national attention.² The case was splashed across headlines of major newspapers and discussed on television programs.³ The incident was particularly notable because it involved traditional issues that surround the crime of rape with a modern twist. Ultimately, the case illustrated the potential legal and emotional ramifications that persisting antiquated attitudes of rape have on its modern survivors.

I. FACTS OF THE CASE

On September 30, 1992, a Travis County, Texas grand jury comprised of seven women and five men refused to indict Joel Rene Valdez, a rape suspect who complied with a woman's request that he wear a condom.⁴ Not surprisingly, the accuser and the accused have different versions of what took place during the alleged attack.

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1. *Doing the Right Thing*, USA TODAY, Oct. 21, 1992, at 14A.

2. Debbie M. Price, *One More Time: No Woman Invites Rape*, ST. PETERSBURG TIMES, Oct. 18, 1992, at 1D.

3. After the incident, over 50 news accounts and editorials appeared in the major papers of the United States, including the *New York Times*, *Washington Post*, and *USA Today*. The case was also the subject of a "Phil Donahue" television program.

4. Ross E. Milloy, *Furor Over a Decision Not to Indict in a Rape Case*, N.Y. TIMES, Oct. 25, 1992, at A30.

However, both parties have acknowledged some facts of the incident. Both agreed that Valdez entered the woman's apartment, uninvited, through an open patio door at approximately 3 a.m.⁵ Valdez admitted to drinking before entering the woman's apartment and acknowledged that he was probably drunk during the incident.⁶ After entering the apartment, Valdez found a knife on the kitchen counter, picked it up, and proceeded upstairs. Both have stated that when Valdez encountered the woman, he had the knife in his hand. The survivor said that Valdez then ordered her to take off his pants. Valdez denied this.⁷ According to both parties, the woman then pleaded with Valdez to wear a condom. He told her, "Don't worry, I don't have AIDS." She replied, "How do you know that I don't?"⁸ He did not have a condom, so she provided him with one. The woman claimed that intercourse ensued and the incident lasted for about an hour. Afterward, she grabbed the knife and ran naked to her neighbor's apartment, screaming for help.⁹ The following day, Austin police arrested Valdez, pursuing a tip that Valdez was bragging about getting drunk and raping a woman.¹⁰

After reviewing the complaint, a Travis County grand jury rejected the District Attorney's request for an indictment. The District Attorney's office was shocked by the grand jury's refusal to indict. They believed that they had a straightforward rape case.¹¹ First Assistant District Attorney Steve McCleery said, "It was

5. According to the survivor, she did not know Valdez. However, Valdez claims that she could have recognized him because they were neighbors in the same apartment complex. *Donahue* (NBC Television Broadcast, Nov. 3, 1992). At most, the victim might have seen Valdez before; they were not, however, acquainted.

6. Roy Bragg, "Condom Rape" Suspect: Fear Made Him Pull Knife, *HOUSTON CHRON.*, Nov. 25, 1992, at A19.

7. According to the woman, she locked herself in the bathroom and attempted to call 911. While she was doing this, she claims that Valdez broke the door down and took the phone away from her. Valdez does not deny that he entered the woman's home during the night, confronted her with a knife, and had sex with her while holding the knife to her. He claims he entered the apartment through an open door while very intoxicated. According to Valdez, when he heard a noise in the apartment, he grabbed a knife from the kitchen counter and went upstairs where he encountered the woman. Valdez then claims the woman took off his pants, made a remark about AIDS, and placed a condom on him, without him using any force. Milloy, *supra* note 4.

8. *Id.*

9. Bragg, *supra* note 6.

10. Elizabeth Hudson, *Decision Not to Indict in Rape Case is Protested*, *WASH. POST*, Oct. 14, 1992, at A2.

11. *No Bill in Rape Case Prompts Outrage; Suspect Wore a Condom at Woman's Request*, *HOUSTON CHRON.*, Oct. 10, 1992, at A30 (hereinafter *No Bill in Rape Case*).

against the weight of logic. It wasn't just. It seemed so cut and dried. That's why we were surprised."¹²

While the grand jury's reasoning could not be made public, the decision seemingly turned on the issue of the woman's request for the accused rapist to wear a condom. Indeed, one participant, when elaborating on the rationale of the other jurors, said that the "woman's act of self-protection might have implied her consent."¹³ Given the circumstances of the case and the statement of the juror, it is likely that the grand jury considered the woman's request for Valdez to wear a condom as her consent to sex. Valdez, arguing that the sex was consensual, also incorporated the condom into his defense. "She liked it," he said, "She gave me two rubbers. If she didn't like it, she wouldn't have given me two rubbers."¹⁴

Although this case seems unusual, it is not an anomaly. This case was not the first, nor the only, case in which an accused rapist relied upon the use of a condom to demonstrate consent. A Long Island appellate court of four male judges overturned a rape conviction because they found the woman's testimony unbelievable. The defendant took the woman to a deserted athletic field and raped her repeatedly while wearing a condom. The prosecutor said,

When the case was appealed, the judges were very 'skeptical' of the victim's testimony, and one even asked, 'Who ever heard of a rapist that uses a condom?' . . . In his 17 years as a prosecutor, the case of the condom wearing rapist was the only one he has seen reversed because an appeals court simply did not believe the victim.¹⁵

More recently, in Pinellas County, Florida, a rape victim asked her attacker to use a condom, but he refused. At trial, the public defender claimed that her request for him to wear a condom suggested consent. "She would not have asked [her attacker] to use a condom if she were not willingly going to have sex with him."¹⁶ The jury was not persuaded and convicted the accused rapist. The incident, however, still illustrates the tendency to judge an act of self-protection as consent.

12. Elizabeth Hudson, *Decision Not to Indict Suspect in Condom Rape Case is Protested*, WASH. POST, Oct. 14, 1992, at A2. McCleery lead the prosecution the second time the case was brought before a grand jury.

13. *Second Jury to Hear Condom Rape Case*, ST. PETERSBURG TIMES, Oct. 25, 1992, at A10.

14. Bragg, *supra* note 6.

15. David Olinger, *Twice the Victim*, ST. PETERSBURG TIMES, Nov. 15, 1992, at 1D.

16. Laura Griffin, *Condom Figures in Rape Verdict*, ST. PETERSBURG TIMES, Nov. 20, 1992, at 11.

II. CONSENSUAL SEX AND RAPE

Consent is a key issue in rape cases because rape is defined primarily as non-consensual sex.¹⁷ If a defendant claims the woman consented and the prosecution fails in their burden of proving non-consent, the grand jury may refuse to indict.¹⁸ The issue of consent is not exclusive to the crime of rape. However, how courts define and determine consent in rape cases is distinctive.¹⁹

Historically, resistance was an actual element of the crime of rape.²⁰ It also served to provide evidence for other elements of the crime such as consent and use of force. The element of resistance ensured the legitimacy of the woman's claim.

Rape law has thus traditionally emphasized the victim's actions as evidence of her lack of consent, the defendant's use of force, and his intent. If the victim vigorously resisted, this meant that she did not consent, that the defendant needed to use force to overcome her resistance, and that her resistance informed him of her lack of consent so that when he forced her, he must have intended to rape her.²¹

Most states have now excluded the element of physical resistance from their rape statutes.²² While the statutes no longer have this formal requirement, courts still rely on the presence of physical resistance to find non-consent.²³ In essence, courts require more than lack of consent; courts require "affirmative-non-consent."²⁴ Evidence that the woman did not physically resist is effective in

17. MODEL PENAL CODE § 213.1 (1985).

18. Dana Berliner, *Rethinking the Reasonable Belief Defense to Rape*, 100 YALE L.J. 2687, 2693 n.43 (1991). Some states include lack of consent as a statutory element to the crime of rape. Therefore, if the prosecution fails to prove the element of non-consent beyond a reasonable doubt, a defendant will be acquitted. In most states, however, the defendant must raise the issue of consent as a defense before the prosecution must prove lack of consent beyond a reasonable doubt.

19. When someone enters the land of another, even if the owner just stands and watches, consent will not be implied, and that individual can be liable for trespassing. For rape, non-consent must be shown affirmatively. It is not enough to not consent, the victim must make it clearly known that she is not consenting. *Id.*

20. *Id.*

21. *Id.* at 2691-92 (footnotes omitted).

22. *Id.* at 2692.

23. *Id.*

24. Susan Estrich, *Rape*, 95 YALE L.J. 1087, 1098 (1986). This requirement is rooted in the traditional consideration of women and sex, denying their autonomy and maturity. "In matters of sex, the common law tradition views women ambivalently at best: Even when not intentionally dishonest, they simply cannot be trusted to know what they mean or what they say." *Id.* at 1122. So to make sure they mean "no", and to protect men who believe that when a woman says "no," she may mean "yes," the courts require affirmative non-consent.

placing doubt as to whether or not she consented or if the attacker had reason to believe that she consented.²⁵ Therefore, since consent is the key issue in rape cases and the court relies on a woman's resistance to determine non-consent, the court primarily focuses on the woman's actions and intent rather than her assailant's.²⁶

Valdez's defense was also based on consent. Indeed, as Valdez's lawyer, Mack Nettles explained, "Consent is the only issue in a rape case, and my client feels that the use of a condom implied consent."²⁷ While the use of consent as a defense in rape cases is not unusual, the use of the defense in this case is particularly striking. The facts in this case fit even the most narrow definitions of rape.²⁸ After all, this was not a murky date rape situation in which intercourse occurred, a condom was used, and intentions were more likely to be blurred. This was a situation in which an intruder entered a home during the night and had a knife in his hand when he encountered the woman.

Valdez claimed that the sex was consensual because the survivor provided him with a condom and because he wore it at her request. He argued, "If she didn't want to, why would she give me the condoms?"²⁹ This explanation apparently persuaded the first grand jury. Using resistance as a measure of consent, the jury may have reasoned that the woman not only failed to resist, but she seemingly complied with his intent to have intercourse by providing him with a condom. With this perspective, the jury's determination of consensual sex rests wholly on the woman's actions. By not indicting, the grand jury allowed the woman's one act to overshadow all of Valdez's actions. The jury apparently believed that the woman consented despite the implausibility of an individual con-

25. "...[C]ourts have interpreted submission or lack of resistance to mean that the victim consented and that the defendant did not force her." Berliner, *supra* note 18, at 2692. See, e.g., *People v. Barnes*, 42 Cal. 3d 284, 303 n.19, 228 Cal. Rptr. 228, 240 n.19, 721 P.2d 110, 121 n.19 (1986). ("Absence of resistance may also continue to be probative of whether the accused honestly believed he was engaging in consensual sex.").

26. "[T]he defendant's intent and actions are not used to assess his culpability. Instead the law looks to the victim's actions and asks whether she properly demonstrated non-consent." Berliner, *supra* note 18, at 2692.

27. Milloy, *supra* note 4.

28. Courts usually consider the use of a deadly weapon sufficient to establish non-consent. Estrich, *supra* note 24, at 1131. Because Valdez had a knife during the attack, there should have been ample evidence of non-consent. See, e.g., *State v. Smith*, 638 P.2d 1, 4 (Colo. 1981) ("[S]tatute prohibits conduct which by its very nature negates the existence of the victim's consent."). Therefore, the defense of consent is not available where there is force or threat of force with a deadly weapon.

29. Price, *supra* note 2.

senting to sex with a knife-carrying stranger who has broken into her home.

A far more likely explanation is that the survivor was reacting to a threatening situation. According to her police statement, she believed that she had no choice; he was going to rape or even kill her.³⁰ In requesting Valdez to use a condom, the woman was acting to protect herself from sexually contracted diseases, especially the fatal disease AIDS. As her statements to Valdez illustrate, she was thinking about the possibility of AIDS during the incident. In fact, she used the threat of AIDS to convince Valdez to wear a condom.³¹

One may liken this to any natural act of survival or means of protection a woman may use when she is threatened. The woman's request for Valdez to wear a condom is similar to other victims' pleas of "Don't kill me and I'll do what you want" or "Don't hurt my children and I'll comply." Non-resistance or compliance with the attacker's request has proven to be a way to protect oneself from additional and often more severe abuse.³² Indeed, rape counselors advise women to do whatever is necessary to protect themselves from physical injury and to save their lives.³³ Accordingly, "[a]sking an attacker to wear a condom is in itself an act of resistance to death and is evidence of a powerful determination to survive."³⁴ The Texas survivor acted, in light of a dangerous situation, to best protect herself and ensure her survival.

The grand jury did not perceive the woman's act as an act of survival. Instead, the grand jury used it against her³⁵, discouraging women from protecting themselves because their actions may be used to imply consent. The grand jury's message is an archaic one—unless the survivor is severely beaten or physically resists her attacker, no rape has occurred. By having the presence of mind to protect herself in a potentially deadly situation, the Texas survivor merely followed the advice of modern rape experts. However, because of the courts' view of consent, which still focuses on the vic-

30. Milloy, *supra* note 4.

31. In the conversation before intercourse, Valdez told the victim that she did not have to worry because he did not have AIDS. She strategically convinced him to use the condom by calling to his attention the possibility that she might have AIDS. See *supra* notes 7-8 and accompanying text.

32. Berliner, *supra* note 18, at 2692.

33. *Doing the Right Thing*, *supra* note 1.

34. R.G. Ratcliffe, *Grand Jury Indicts Man in "Condom Rape"*, HOUSTON CHRON., Oct. 28, 1992, at A1 (quoting Travis County District Attorney Ronnie Earle).

35. Milloy, *supra* note 4.

tim's rather than the assailant's actions, the grand jury presumably used the woman's savvy and ingenuity against her.

III. THE THREAT OF AIDS

AIDS has given the ancient crime of rape a new, deadly dimension. The "trauma of being raped—the pain, the ordeals of physical exam and criminal investigation, the emotional shock, the nightmares—is accompanied today by a separate nightmare: fear of AIDS."³⁶ In the past, along with the emotional scars of a rape, women feared repercussions such as pregnancy and the transmission of diseases. A woman who survives the trauma of rape today has to face the possibility of contracting AIDS, turning a rape into a death sentence.

Although there has been no documented case of AIDS being transmitted from a rapist to a victim, it is "virtually certain that there are rape victims in America who will die of AIDS as a result."³⁷ The significance of AIDS, however, is not just in the statistics, but in the very real and legitimate fear it creates for rape victims. A woman who was raped in Florida has been haunted by the possibility of AIDS for months. "She still fears the rapist infected her body. Day after day, the illness reminded her of a question that would not go away. It is a question rape crisis centers hear routinely now: Am I going to die of AIDS?"³⁸ Therefore, the Texas survivor's contention that she requested the condom out of fear of contracting AIDS is certainly plausible. By asking Valdez to wear a condom, she was taking steps to protect her life.

36. *Id.*

37. *Id.* For several reasons, the statistics do not report the reality of this situation. Many women may not know that they have contracted AIDS/HIV because, even if they did actually report the crime, many crisis centers do not advise their clients to be tested for AIDS. Further, if a woman does test positive for AIDS/HIV, it is difficult to prove contraction from a particular incident. "He may not have been arrested or tested. She could have been carrying the virus already. In any case, the AIDS antibodies detected in a victim's bloodstream do not carry a chemical signature that forensic experts can trace to another person." *Id.*

Statistically it is virtually certain that there are rape victims in America who will die of AIDS as a result. The number of people raped in the United States each year is variously estimated between 100,000 and 700,000. About one in every 100 men in America is believed to be carrying the AIDS virus, and a woman's risk of being infected from a single encounter with a carrier has been estimated at 1 in 500. Those numbers would suggest that each year, several rape victims in the United States are infected with the AIDS virus.

Id.

38. *Id.*

Fear of AIDS is growing among rape victims.

One nationwide study reported this year that people raped within the last five years were four times as likely to be 'somewhat or extremely concerned' about AIDS or HIV, the virus that causes AIDS. Other national surveys found that almost half of recent rape victims worry about AIDS afterward, and that service agencies cited 'contracting HIV/AIDS' as the fastest-growing concern among rape victims in the last year.³⁹

The fact that there is no documented case of the disease being transmitted from a rapist to a victim is a small comfort to women who have to be tested every six months for the HIV virus and are told that they should practice "safe sex" in the meantime.⁴⁰ As one survivor explained, "I just don't know. That's the scariest part. Right now I don't know if I have AIDS."⁴¹ Despite the current lack of statistical evidence regarding the contraction of AIDS through rape, the fear of acquisition cannot be discarded as a paranoid or unreasonable response. Anyone with even a limited AIDS awareness understands the risks of intercourse with a total stranger and the protection a condom offers. With AIDS, a rape survivor could find herself facing death several years after the attack. Given the opportunity, who would not take steps to avoid this fate?

AIDS has also had an impact on the behavior of rapists. In the past, a rapist may have worn a condom because it allowed him to leave no evidence of semen in the victim's body.⁴² Although today most rapists still do not wear condoms, a few may wear them both for protection from disease as well as for the evidentiary benefits a condom may afford.⁴³

IV. IMPLICATIONS OF THE CASE

Once the Texas case caught the attention of the nation, the first grand jury's findings became controversial. Several newspapers wrote editorials critical of the grand jury and many demonstrations

39. *Id.*

40. The Los Angeles Commission on Assault Against Women (LACAAW) advises survivors of rape to be tested for AIDS and to practice "safe sex" until they receive the results of their AIDS test.

41. Olinger, *supra* note 15.

42. After the publicity of the Valdez case, another woman said that she accused a man of rape two years ago in a similar situation. The suspect wore a condom, though not at the woman's request. The Travis County grand jury did not indict. This woman said that prosecutors told her that an indictment was not possible for lack of evidence—because the attacker was wearing a condom, there was no evidence of semen. *No Bill in Rape Case*, *supra* note 11.

43. Olinger, *supra* note 15.

took place.⁴⁴ While the public outrage was somewhat reassuring and the district attorney's office successfully brought the case before a second grand jury⁴⁵, the case still illustrates some chilling realities.⁴⁶ If the media had not been attracted to this story, the District Attorney's office may not have presented the case to the second grand jury. It is disturbing when media pressure is necessary for justice to be served. This is especially alarming in light of increased education and awareness about sex crimes.

The case reiterates that the justice system is still unresponsive to charges of rape. These outdated attitudes are also not unique to men. Seven women and five men comprised the first grand jury in the Texas case.⁴⁷ Because the judicial circumstances of rape victims have not changed substantially, the focus remains on the woman, instead of her attacker. With a jury scrutinizing the woman's rather than the accused's actions, there is a tendency to believe that "she somehow asked for it."⁴⁸ Director of the Austin Rape Crisis Center, Lynn Thompson Haas, explained that the Texas case illustrates that "[w]e still have a long way to go destroying the myths that women are asking to be raped or deserve to be attacked."⁴⁹

The first grand jury's refusal to indict demonstrates a willingness to scrutinize the actions of a rape survivor while ignoring the actions of the accused assailant. The judicial actors search for any possible indication of consent in the woman's actions, no matter how incidental they may be to the entire crime. As the survivor in the Texas case explained: "I'm not the little victim the grand jury expected. I'm not beaten up or maimed or even infected with the AIDS virus or pregnant. I find it sickening that in a very aware city with very aware people, the fact that I took extreme measures to protect my life means that I deserve to get raped."⁵⁰

44. Ratcliffe, *supra* note 34.

45. The trial jury found Valdez guilty of rape and sentenced him to 40 years in prison. Christy Hoppe, *Rapist Gets 40 Years; Consent Defense in Condom Case Unsuccessful*, DALLAS MORNING NEWS, May 15, 1993, at 33A.

46. Ratcliffe, *supra* note 34. In October, a group of people, mostly women, protested at the Travis County Courthouse to pressure the district attorney's office to put the case before a new grand jury. The second grand jury indicted Valdez. It was the first time since 1976 that Travis County District Attorney Ronnie Earle had taken a case to a second grand jury. *Id.*

47. *Id.*

48. Price, *supra* note 2.

49. Robert Davis, *Condom-Rape Case Brings an Outcry*, USA TODAY, Oct. 13, 1992, at 2A.

50. Milloy, *supra* note 4.

The system condemns women for taking any action to assert some form of control, for acting smart. In essence, the refusal to indict amounts to a persistent reluctance to believe women who say they have been raped. The woman in Texas had the presence of mind to protect herself in a deadly situation. Unlike many rape victims, she found a way to increase her chances of survival. Her caution should not be construed as consent.