

**The Resource Newsletter**  
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## **Consent and the Court of Public Opinion**

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The surge of media attention surrounding high profile sexual assault cases in the last few years has brought the question of what the crime of sexual assault really means to the forefront of our minds and into our conversations. Attitudes and opinions held by the public have fueled a lively debate on this topic. These ideas and beliefs held by the public reflect what the court of public opinion believes about this crime. Many of the jurors who ultimately decide these cases in a courtroom spend time debating the issue in the court of public opinion first.

Much of the debate centers on what consent really means in the context of sexual encounters. Consent is a widely employed, if not implicit, defense in non-stranger sexual assault cases that brings us into direct confrontation with society's fears, myths and misconceptions. It is interesting, albeit disheartening, to watch people grapple with the reality of how consent means something obvious in the course of daily life, but something entirely different in the context of sex. The true depth of the double standard that our culture holds stands startlingly bright in the spotlight of some of these criminal cases.

Consider the definition of consent as defined by sexual assault law in Colorado. (CRS 18-3-403) It reads in pertinent part, "Consent means cooperation in act or attitude pursuant to an exercise of free will and with knowledge of the nature of the act. A current or previous relationship shall not be sufficient to constitute consent. Submission under the influence of fear shall not constitute consent."

This definition is replete with common sense, especially when one considers it in light of our every day experiences. We all know what it means to consent to something; we do it every day. We know what cooperation looks and feels like. Can I borrow your car? Will you loan me \$50? Can you give me a ride to the soccer game? We can all picture what it is like to consent to the above examples. We can also picture what it looks like to not consent, or to withdraw consent in these examples, and if coerced, threatened or forced into them, we understand the situations as non-consensual.

The challenge arises when we change the backdrop from the every day examples to one of a sexual encounter. It seems that the standard changes. Most sexual assault cases are won or lost in the court of public opinion. And, public opinion suggests that, unlike virtually any other crime in our culture, victims are to blame, in whole or in part, for the crime that happens to them. They either brought it on themselves by unwise conduct that preceded the assault, or they are imperfect and not worthy of the kind of credibility required to hold the rapist accountable. This unique standard draws attention to the conduct, past or likability of the victim, often forgoing any fair analysis, criticism, or judgment of the person charged with committing the crime.

Have you ever heard or witnessed the expression of the sentiments of the court of public opinion? Consider comments made by jurors in criminal cases that resulted in acquittals such as, "she consented as soon as she got drunk with him" and "what did she think would happen when she went up to his room?" How do we respond to this kind of sentiment in a way that might make sense to the person uttering these comments? We ask why someone would say such things about a victim who is adamant that she did not consent to what happened to her? Perhaps it is because of what is at stake to the members of the court of public opinion. It is a risk to look beyond judging the victim to judging the actions of the rapist. Who wants to believe that this

crime happens in the extremely high numbers that it does, that people who we know, like and date or marry are capable of such a horrible act? It is easier to blame what happened on a misunderstanding, alcohol, or victim conduct.

How do we articulate a response to the powerful force of public opinion? Perhaps a starting place is in naming the faulty logic and double standard when we hear it. The double standard jumps out when we consider how victims of other crimes are treated. Does a business owner consent to theft by allowing people to browse in the store? What if the shop owner displays flashy and desirable items for sale in the window? Is he not asking for the theft by advertising his goods? Does a drunk on the street who is passed out from alcohol consent to having his wallet stolen, after all, he should have known what would happen to him? Does a person consent to kidnapping if they accept a ride from someone they believe they can trust who ends up holding them against their will? Does a person consent to theft if they agree to give a friend \$50, but the "friend" takes \$100 instead? Does a home owner consent to burglary because they left their door unlocked when they left for work that day?

To not only meet the consent defense, but in a more imperative sense, to take control of it, we must investigate and express the victim's sexual assault with these questions in mind: Why was the victim's voice silenced? Why didn't she say no? Why couldn't she say no? Why wasn't no good enough? We must come to know the victim's singular reality before, during and subsequent to the sexual assault. Sensory and attendant emotional detail provides a dynamic link with juror's own experience and tools for assessing credibility. We must also come to know the offender as the victim initially knew him as well as the stranger he became during the sexual assault. We must be aware of the offender's high potential for other related acts of violence which will provide a truer look at the context of this crime. Evidence of patterns or plans which otherwise appear situational can be seen more realistically as premeditated and predatory. Stalking is very frequently a component of offender planning.

When we as prosecutors take our case to the jury in courtrooms across our country, based upon our broadened investigation and focus on the singular reality of rape experienced by a victim, we communicate beyond our courtrooms in what has become the court of public opinion and in the context of the life experience of members of our society. Consent or agreement is something we should be free to do or not do, as we choose. We should be free to change our minds. What we do is up to us. When we bring home to the jury the reality of the crime of rape committed by an offender who knew the victim, we will eloquently emphasize the deeper reality that the victim didn't know him. He was a stranger. Why was the victim's voice silenced? We have answered that question--because of the person who she was changed when her life was removed from her control. We ask for accountability as does she. Our work is to give the jury in the courtroom and in the vast court of society, the truth, the reality of rape beyond stereotypes: the stereotypes of consenting victims and the stereotypes used by offenders to mask their identities.

Applying common sense to rape cases is the key to bringing justice to both victims and offenders. Victims of rape, who find the courage to go through our criminal justice system deserve our thanks and support for their willingness to endure the painful process. As we improve our ability to listen to the victims' voices, hold their offenders accountable, and bring fairness and common sense to the court of public opinion, we will evolve as a culture, and justice will make its home in the reality of truth rather than myth.

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