

# When Does Unwanted Sex Become Rape?

In ambiguous encounters, students and colleges try to find the line

By ROBIN WILSON

**A**FTER A long Saturday of drinking, a female student was hanging out with a male classmate she'd been flirting with for years. He was charming but also a player. They'd talked about his various sexual conquests, and she didn't want to be one.

But that night they started mak-

## SEXUAL ASSAULT

ing out. It was exciting, she said, fun. When he grabbed a condom, though, she realized she didn't want to have sex. But she kept quiet, flashed him an occasional fake smile, and stared at the ceiling waiting for it to be over.

"Maybe I didn't want to disappoint him," she wrote a few months ago for the website Total Sorority Move. "It was easier to just do it." But part of her thought she'd been violated, she said. She described "this weird place in between consensual sex and rape," calling it "rape-ish."

Common understandings of rape tend to involve force, coercion, or victims who are passed-out drunk. Many students have come forward in recent years to share such experiences. Last summer, *The New York Times* published a front-page article on an alleged rape at Hobart and William Smith Colleges in which several people looked on as a football player assaulted a young woman bent over a pool table.

Other cases are less clear. Sexual interactions can be ambiguous, especially if students have been drinking but aren't incapacitated. Research shows that women engage in sex they don't want for a variety of reasons—including to avoid conflict, because they don't want to be labeled a tease, and because they feel obligated. A response to the Total Sorority Move story on the website Her Campus says rape is "a big word," but "less rapey" situations "should still be acknowledged."

As campuses grapple with preventing and responding to sexual assault, how students and colleges define rape is pivotal. And the definition may be evolving. What some people, including researchers, have seen as unwanted sex, others may consider rape. But conflating ambiguous sexual encounters and misconduct, some observers say, dilutes the concept of assault, and makes it hard for students to learn where the boundaries are.

At Washington and Lee University last winter, a couple of students were drinking at an off-campus party before going back to the young man's fraternity house. The young woman allegedly said she didn't usually agree to have sex with someone she had just met. But according to a lawsuit the man later filed, she took off her clothes and got into his bed. They had sex, the lawsuit states, later exchanged Facebook messages that they'd had a good time, and had sex again the next month.

Seven months after that, according to the lawsuit, the female student filed a report to campus officials alleging that the first encounter was assault. It is common, advocates for victims say, for someone to take days or months to come to view a sexual experience as traumatic.

In the ensuing case at Washington and Lee, the young man was found responsible for nonconsensual sex and expelled. He then sued the university. Officials there said in a written statement that their policies were consistent with federal regulations and that they were committed to treating all students fairly.

The long-held notion of rape as violent is slowly shifting, says Estelle B. Freedman, a scholar of women's history and feminist studies at Stanford University. "Most people think that to be raped you had to have bodily harm," she says. "We aren't quite used to naming coercive nonconsensual sex that doesn't involve physical harm as a crime. It still has the aura of a bad experience."

The level of drinking can be crucial. "Enough alcohol to call it rape?" the *Yale Daily News* asked in November in reporting on an alleged assault involving neither force nor the word "no." A young woman drinking with friends had exchanged text messages with a for-

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mer sexual partner over the course of an evening last March, telling him she was getting drunk and mentioning the possibility of sex. "Don't let me try to seduce you," she wrote. "Sex is awesome ... and I might try to get it from you. But I shouldn't. I don't think."

The two ended up having sex twice that night and once the next morning, according to a Yale investigation the student newspaper obtained. The female student charged her male classmate with assault. He had inferred consent, he said, based on her texts and actions. But she was "too intoxicated," according to her account in a university fact-finder's report, "to have the cognitive or emotional ability to find another solution and simply capitulated."

Even when both partners are sober, says Kathleen A. Bogle, an assistant professor of sociology and criminal justice at LaSalle University, it can be difficult for one to know the other is uncomfortable if that remains unspoken.

"My concern is that as advocates push for every scenario counting as assault, including ones where a person was secretly in their mind having doubts about it but didn't communicate that, it's problematic," says Ms. Bogle. "It will undermine

the whole movement of getting people to take rape seriously."

## 'DANCE OF AMBIGUITY'

Sexual communication is full of ambiguity. Researchers say that in consensual or even unwanted encounters, both partners are often unclear about their preferences.

Women are socialized to be gatekeepers when it comes to sex, says Kristen N. Jozkowski, an assistant professor of public health who teaches human sexuality at the University of Arkansas. If they come right out and say they'd like to have sex, they can be seen as sluts. Even if they want to, she says, women may feel they have to wait for men to initiate sex.

Men communicate in code, too, her research shows. "They say, 'If it's 2 a.m., and I text her, 'What's Up?'" she knows that means I'm interested," says Ms. Jozkowski. "That way, no one has to say 'sex.'"

Sexual interest and consent tend to be expressed through innuendo, says Deborah Davis, a social-psychology professor at the University of Nevada at Reno. "Many attempts to reject sexual advances are performed through hints, nonverbal signs of uninterest, ignoring advances, and other indirect signals," she writes with two co-authors in a chapter of a book to be published by Oxford University Press.

They call this the "dance of ambiguity," and say it serves both parties. "The initiator can try to advance the sexual agenda, but with plausible deniability that can protect the ego in case the advance is rejected," they write. "The target can accept the sexual advance without having to explicitly admit it is wanted or can reject it without explicitly rejecting the suitor."

The problem comes when people ignore or miss those signals. After an encounter, Ms. Davis says, a woman "might falsely remember saying things that she thought about but did not say to stop the situation," and a man may "falsely remember doing things that he did not do to verify the woman's consent."

But assault isn't a matter of miscommunication, victims' advocates argue. It's about one partner disrespecting and violating the other. In a study published last month, about a third of college men said they would force a woman to have sex if there were no consequences. Only 14 percent said they would consider that "rape."

## 'YES, EXCLAMATION POINT'

Researchers and advocates for victims say the only solution to stop unwanted sex is caution. And the responsibility for exercising that caution, they seem to agree, falls on men.

"What we hear a lot is that the space between consensual sex and rape is a gray area," says Nicole E. Conroy, a Ph.D. candidate at Syr-



PHOTO ILLUSTRATION BY TONY CENICOLA, THE NEW YORK TIMES, REDUX

Sexual interest and consent are often expressed through innuendo and nonverbal signals, researchers say. That can make it difficult to determine what qualifies as assault.

acuse University who has studied why women may acquiesce to unwanted sexual activity even without pressure from a partner. "But if you think there are mixed signals, err on the side of caution. If the man notices his partner just isn't into it, or she is just laying there or giving token resistance, that's an indication the partner doesn't want it."

Many colleges have recently adopted affirmative-consent policies that require students to ask their partners whether they want to be intimate and to wait for a clear response—either a verbal yes or unambiguous body language. Students should obtain consent each time the encounter escalates to a new form of physical activity, some policies say.

Wesleyan University, which has a policy that requires "mutually understandable words and/or actions that clearly indicate a willingness to engage in sexual activity," suspended a male student last spring for nonconsensual kissing. Two female students had reported him: In one case, the university found him responsible, in the other not. He has sued Wesleyan. In a statement, the university said it was confident that it had handled the proceedings appropriately.

No matter the campus rules, victims' advocates say students should be crystal clear about what they want. "A policy is never going to fit perfectly onto the complexity of human emotions," says Alexandra Brodsky, founding co-director of Know Your IX, a network "empowering students to stop sexual violence." All students, she believes, should strive to achieve affirmative consent in intimate interactions. Any mixed messages mean no, she

says. "You want your partner to say yes, exclamation point."

In the case at Yale—where the young woman said she never consented to sex but was too drunk to have the cognitive or emotional ability to object—a university panel decided that the encounter was not assault. Even though she had been drinking, the panel said, in a decision published in part in the *Yale Daily News*, the young woman was aware of her actions. "Alcohol may have reduced [her] inhibitions on the night of 22 March, but her actions, taken as a whole, do not indicate that she lacked the ability to make or act on considered decisions," the panel said.

Learning to deal with mixed feelings about sex is part of becoming more mature, some experts argue. Carol Tavris, a social psychologist and a fellow of the American Psychological Association, says it's natural for a person who ends up feeling a sexual interaction was unwanted to try to find fault. And campuses are encouraging students to do that, she says, rather than to take responsibility for themselves.

"When people do something they later see as being foolish or wrong, or they were drunk, or they regret it, the easiest route of resolution is to blame the other guy," says Ms. Tavris, who speaks and writes about sexual communication. But blame is not always the best outcome, she says. "Many young women and men don't understand that when it comes to sexual interactions they need to learn and experiment. Sometimes they will make the wrong decision, in which case they are better off saying: 'That was a stupid thing to do. What was I thinking?'"