

to cause another individual to engage in sexual intercourse. The physical effort required is not required? Professor Wayne LaFare observes that the physical effort required first is the **extrinsic force** approach that requires an act of force by the perpetrator to accomplish penetration. This ensures that the penetration is without the victim's consent. The **intrinsic force** standard only requires the amount of force required to achieve penetration. The intrinsic force standard is based on the insight that there may be a lack of consent despite the fact that the perpetrator employed little or no force to achieve penetration.

The next cases represent these two approaches to force. *Commonwealth v. Berkowitz* represents the extrinsic force standard. You should contrast this with *In the Interest of M.T.S.*, which illustrates the intrinsic force standard.

Was Berkowitz guilty of rape?

Commonwealth v. Berkowitz, 609 A.2d 1338
(Pa. Super Ct. 1992), 641 A.2d 1161 (Pa. 1994)

Facts

Robert Berkowitz... was convicted in the Court of Common Pleas, Monroe County, of rape and indecent assault and he appealed. The Superior Court, Philadelphia, reversed the rape conviction. The Commonwealth appealed to the Pennsylvania Supreme Court.

In the spring of 1988, appellant and the victim were both college sophomores at East Stroudsburg State University, ages twenty and nineteen years old, respectively. They had mutual friends and acquaintances. On April 19 of that year, the victim went to appellant's dormitory room. What transpired in that dorm room between appellant and the victim thereafter is the subject of the instant appeal.

During a one day jury trial held on September 14, 1988, the victim gave the following account during direct examination by the Commonwealth. At roughly 2:00 on the afternoon of April 19, 1988, after attending two morning classes, the victim returned to her dormitory room. There, she drank a martini to "loosen up a little bit" before going to meet her boyfriend, with whom she had argued the night before. Roughly ten minutes later she walked to her boyfriend's dormitory lounge to meet him. He had not yet arrived.

Having nothing else to do while she waited for her boyfriend, the victim walked up to appellant's room to look for Earl Hassel, appellant's roommate. She knocked on the door several times but received no answer. She therefore wrote a note to Mr. Hassel, which read, "Hi Earl, I'm drunk. That's not why I came to see you. I haven't seen you in a while. I'll talk to you later, [victim's name]." She did so, although she had not felt any intoxicating effects from the martini, "for a laugh."

After the victim had knocked again, she tried the knob on the appellant's door. Finding it open, she walked in. She saw someone lying on the bed with a pillow over his head, whom she thought to be Earl Hassel. After lifting the pillow from his head, she realized it was appellant. She asked appellant which dresser was his roommate's. He told her, and the victim left the note.

Before the victim could leave appellant's room, however, appellant asked her to stay and "hang out for a while." She complied because she "had time to kill" and because she didn't really know appellant and wanted to give him "a fair chance." Appellant asked her to give him a back rub but she declined, explaining that she did not "trust" him. Appellant then asked her to have a seat on his bed. Instead, she found a seat on the floor, and conversed for a while about a mutual friend. No physical contact between the two had, to this point, taken place. The victim testified on cross-examination that she explained that she was having problems with her boyfriend.

Thereafter, however, appellant moved off the bed and down on the floor, and "kind of pushed [the victim] back with his body. It wasn't a shove, it was just kind of a leaning-type of thing." Next appellant "straddled" and started kissing the victim. The victim responded by saying, "Look, I gotta go. I'm going to meet [my boyfriend]." Then appellant lifted up her shirt and bra and began fondling her. The victim then said "no."

After roughly thirty seconds of kissing and fondling, appellant "undid his pants and he kind of moved his body up a little bit." The victim was still saying "no" but "really couldn't move because [appellant] was shifting at [her] body so he was over [her]." . . . Appellant then tried to put his penis in her mouth. The victim did not physically resist, but rather