

A Man Jumps Out of a Tree

David Chambers

The year is 1971. Nick Dulac perches on the edge of the desk at the front of the lecture hall, fifteen minutes to go in this morning's class in criminal law, which, sad to say, is going to end badly. At the moment, however, everything's proceeding smoothly—students prepared, a couple of challenging cases discussed, insights reached, moments of laughter, the good mood in the room bolstered by President Nixon's announcement the day before that forty-five thousand more American troops will be brought home from Vietnam. Some of Nick's students have served in the war. Others have been among the tens of thousands across the country marching in protest of U.S. involvement. Nick helped plan some of the marches. He's only a few years older than most of his students. Like him, nearly all are white and male. Like him also, many, including some of the veterans, have shoulder length hair and smoke marijuana.

At the moment Nick is finishing an exchange with Fred Bonder about the law of criminal attempts. "Thank you, Fred," he says. "Do you have anything more you want to add?"

"No," says Fred. "I'm glad to be off the hook."

Everyone laughs. Nick laughs, too. He looks down at his notes. "This is our last session on attempts."

Students pick up their pens, sensing that Nick is going to lecture.

"I want to talk about an oddity in the law of attempts that relates to sentencing. In nearly every state, statutes prescribe much lower maximum sentences for attempted crimes than for completed ones. If, for example, A plans to kill Z and fires a gun at Z's heart at close range and Z dies, A is guilty of murder and, in this state, would receive a mandatory sentence of life in prison. But if by some miraculous medical intervention, Z survives the wound, then A is guilty at most of attempted murder or of assault and battery with a deadly weapon, and the maximum sanction would be twenty years imprisonment. In fact, a judge could elect to impose a sentence of just one year. Similar huge differences in permissible sanctions occur under the laws in every state." Nick glances out at the sea of moving ballpoints, rises from the desktop, and continues.

"These differences in sanctions don't make sense. They surely can't be justified on the belief that A is a less dangerous person when Z lives than when he dies, or that A or other potential killers are in less need of deterrence. The

only explanation for the difference is retribution. Despite A's vile intentions, most people feel less retributive when Z pulls through. No eye for an eye if the eye isn't actually lost.

"Now, as we've discussed many times, there's nothing wrong with retribution as a justification for punishment. Some of us, for example, wish retribution against Vice President Agnew for some of his recent disgusting remarks, and I regard that as healthy. But when retribution is the *only* justification that can be offered for a sanction then we should ask ourselves whether other functions of criminal laws, such as deterrence or prevention, should be given more weight and call for treating attempts more like completed crimes. If you'll look at page 538 in your casebook, you'll see that the drafters of the Model Penal Code recommend that the sanction for attempt be the same as that for the completed crime."

Nick strides back and forth across the platform. He enjoys being informative, provocative and entertaining. "The more general point the Model Penal Code makes is this. Many crimes require a particular undesired result: murder requires a death; robbery requires that something gets taken by force. The Code's proposition, and mine as well, is that society should impose as tough a sanction when the result doesn't occur as when it does, so long as the offender wanted to achieve the result and went a long way toward carrying it out. I would go even further. Let's discuss a different sort of crime than homicide." He looks down at the seating chart. "I want to get someone new involved in the discussion. Ellen Campbell?"

Ellen looks up. She's one of only eight women among the ninety students in Nick's course. Two years ago, when he began teaching, there were only three women in his class. They're still a novelty at the school.

"Ellen, consider the law of rape, a crime that, like murder, requires that the perpetrator have a certain state of mind and achieve a certain result, but, unlike murder, also requires that the object of the behavior, the victim, have a certain state of mind. We'll use A again as our villain. A is in a public park late at night. He climbs a tree and perches on a limb about seven feet off the ground. He hopes a woman will pass underneath so that he can leap off and sexually assault her. Miss Z enters the park and passes beneath the tree. A jumps and pins her to the ground. She struggles fiercely, but he succeeds in having intercourse with her. If rape is defined as sexual penetration achieved by force and without consent, A has clearly committed rape. Are you with me so far?"

Ellen nods.

"But let's assume a variation. Let's assume Miss Z is a very strange person, depressed perhaps. She enters the park believing that she deserves to be attacked. She notices A up in the tree but walks right under. A leaps on her as before. He tears off her clothes. She pretends to struggle, but she believes she's getting what she deserves, getting what she expects, even wants."

A few men snicker. Nick notices but doesn't comment. "In this case, A cannot be convicted of rape. The supposed victim is not a victim because she was actually consenting and absence of consent is a required element of rape. A can at most be convicted of attempted rape, even though he believed Miss Z was not consenting and wanted her not to be consenting. Thus, because of a fortuitous circumstance outside of A's control, the judge can impose only a much lower sentence than for rape. Does a lower sanction seem justified in these circumstances?"

Ellen shakes her head tentatively, but doesn't speak. She seems embarrassed and uncomfortable, which surprises him. She's spoken many times in class, worked before law school on Capitol Hill, has always seems self-assured. He won't force her to speak, but he has a point he wants to make. He waits.

Several moments pass. A hand rises near the back. It's Marcia Epstein. Marcia was one of the organizers of a teach-in on campus racism at which Nick spoke.

"Marcia?"

"Nick," she says. Unlike his colleagues, Nick invites students to call him by his first name, though they rarely do. At the mention of "Nick," everyone perks up. "I think you need to understand that the hypothetical you just gave is offensive. It perpetuates a dangerous misconception about women. Deep down most men believe women want sex whenever men want it. They believe it even when women resist. Let me tell you. Women do not go into parks late at night seeking to be attacked."

The room falls silent. More than silent. Silenced. Nick is taken aback and blushes behind his beard. "That's not what I meant, of course. I said, I think, that the woman was strange."

Marcia sits up even straighter. "Even strange women don't want to be raped," she says.

No one laughs, but Nick notices tiny, wry smiles on several men's faces. He suspects they're directed partly at Marcia, but at least as much at him. They're enjoying seeing him get a dose of the embarrassment they feel when they say something wrong in class. They're also getting to watch a lefty under attack from one of his own.

The room falls silent again. Another woman's hand goes up. He looks at the chart. Nancy Cummings. Nancy has never raised her hand in class. He hopes she will speak to his good intentions. "Nancy."

Nancy's voice quavers as she speaks. "I think it was unfair of you to call on a woman to respond to a question like this. You put Ellen in an extremely awkward position. That's all I wanted to say." Nick can feel Nancy's anger. He also can sense her anxiety in confronting him.

He shakes his head. "The reason I called on Ellen was because hers was the first name I saw on the chart. I realized my hypo was unrealistic, which simply made it like lots of hypos I use—for example, like someone getting shot

through the heart but surviving.” Even as he’s saying it, he doubts himself. He wonders whether he was unconsciously drawn to call on Ellen because she’s a woman, a particularly attractive woman, older than most of the class, just about his own age.

Nick looks out across the room. He notices that the women aren’t looking at him or at their male classmates. They’re looking at each other, checking each other’s reactions, gauging their solidarity. He’s shaken.

One of the men, Jeff Wiglan, raises his hand. Jeff has been assertive in class; he voices opinions bluntly.

Nick dreads to hear what Jeff has to say. “Jeff.”

“Hey, we know you weren’t deliberately seeking to offend, but many of us men didn’t appreciate your tree-jumper story either.”

Nick nods. He believes it’s probably true that some men in the room were bothered by his hypothetical, but he suspects that most were not, that most enjoyed its raunchy edge and were as caught off guard as he was by the women’s reactions. Still, at the moment he feels alone and exposed. He looks out. Oil portraits of dead professors—dead, white and male, many dead for more than half a century—line the walls. They appear exposed as well.

The wisest course to take, he realizes, is simply to apologize and shut up, but he cannot resist explaining himself. “Just so all of you understand that I take sexual assaults on women quite seriously, let me make clear the underlying point I was trying to make. Just as we should not impose a lower sanction on A when his victim survives a bullet through the heart, so here we should impose no lower sanction when the woman he has sex with turns out contrary to his belief to have been consenting. Miss Z’s subjective state of mind ought to be irrelevant to A’s criminal liability and to the sanction that can be imposed on him. We have a dangerous sexual assailant on our hands.”

Nick senses that no one is listening to his subtle point about the law. Worse, he fears that some students will understand him to be saying that victims’ feelings are irrelevant, unworthy of concern.

One more hand goes up. It’s Ellen.

“Ellen.”

“I just wanted to say that I thought it was okay for you to ask me the hypo you did. It was just a hypo. I should have just answered your question. I’m disappointed in myself that I couldn’t speak. I shouldn’t have let my emotions overwhelm me and I’m sorry.”

Nick hasn’t expected this response, but he feels no better. What she’s really saying, he realizes, is that she should have been capable of responding like one of the men, that she shouldn’t have responded as a woman, as herself. That’s not what he wants. He believes that law professors routinely and unwisely squelch students’ emotional responses to the issues they discuss in class. He starts to say so, but stops because he realizes that on this occasion he had in fact wanted a detached, unemotional response from Ellen. He realizes for the

first time that he wants students to be emotional only when he invites them to be emotional. He's still trying to figure out what to say when the bell rings. Even more quickly than usual, the men in the room close their casebooks and notebooks, start shuffling chairs.

Nick looks out across the departing faces, bends his head and looks at his notes. He understands what he has to do. He has to apologize, to Ellen and to the class as a whole. He has to admit that he should have known better than to have used the hypothetical. He will do that. He will reestablish the good feelings that have been in this room. Still, he's despondent that he's inflicted pain on a student, despondent also that he has humiliated himself. And something more has happened, something less transitory, less possible to repair. His confidence has been shaken in his intuition about what will work in class. Even worse, his confidence has been shaken that he can remain in the political vanguard at the law school, that he will always be the one out front spotting new concerns, organizing the troops.

As he steps down from the platform, he notices that he's looking to see where he puts his feet. He recalls with a shock that he's about to turn thirty. I'm getting old, he says to himself. I'm getting old.

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A novel, *The Old Whitaker Place* (Miami University Press), was published in 2010.