

# PUTTING THE FOCUS WHERE IT BELONGS: *MENS REA*, CONSENT, FORCE, AND THE CRIME OF RAPE

Craig T. Byrnes<sup>†</sup>

I. INTRODUCTION .....	277
II. PAST AND CURRENT SCHOLARSHIP .....	282
III. A DEFINITION OF NONCONSENT .....	286
IV. WITH NEGLIGENCE TOWARD THE WILL: THE SECOND ELEMENT.....	292
V. USE OF FORCE .....	298
VI. APPLYING THE DEFINITION.....	300
A. <i>State v. Rusk</i> .....	301
B. <i>State v. Alston</i> .....	302
C. <i>People v. Barnes</i> .....	303
VII. CONCLUSION .....	304

## I. INTRODUCTION

This Article redefines the law of rape. It reconstructs the law, starting with the elements of the crime. This Article is the logical result of various reform efforts, most notably the Michigan statute,<sup>1</sup> but is identical to none of them. It focuses on the defendant's *mens rea*, eliminating the inaccurate and redundant use of force requirement, and consequently vindicates the concept of sexual autonomy.

Hardened veterans of rape reform efforts will likely either guffaw loudly, or will have stopped reading by now. They recognize one inevitable fact: the law can only do so much.<sup>2</sup> It can redefine rape, but it cannot reshape attitudes. The law can promote intellectual consistency, but it cannot ensure that all crime

---

<sup>†</sup> J.D. expected May, 1999, The Ohio State University College of Law. This Article would not have been possible without the contributions of many individuals. I especially thank Professor Douglas Berman, without whose support, willingness and ability to engage in prolonged discourse, and review of countless editorial and revisional changes, this Article would not be nearly what it is. Professor Sharon Davies and Sharna Byrnes also offered valuable comments. Finally, the thoughtful and evocative discussions from the students in Professor Alan Michaels's 1996 Criminal Law class germinated many of the ideas expressed herein.

1. See MICH. COMP. LAWS ANN. §§ 750.520a-.5201 (West 1991). The Michigan statute, passed in 1975, enacted sweeping reform in the realm of rape law. It eliminated the element of consent, and concentrated only on the defendant's actions and mental state. Commentators at the time called it "the most important model for reform." Leigha Bienen, *Rape III - National Developments in Rape Reform Legislation*, 6 WOMEN'S RTS. L. RPTR. 171, 172 (1980). While it has been criticized for keeping the element of force, it has also been praised for shifting the inquiry away (at least in theory) from the victim, and toward the actions and mental state of the defendant. See Susan Estrich, *Rape*, 95 YALE L.J. 1087, 1147-57 (1986).

2. The wave of rape reform efforts in the 1970s and 1980s failed, by and large, to produce any demonstrable increase in arrests or convictions. See Estrich, *supra* note 1, at 1157-61 (citing various studies that indicated little quantifiable change, despite statutory reform). The only statistically significant change seemed to be in Michigan, but the data collection somewhat obfuscated the true results, see *id.* at 1160, 1184 n.242, prompting the conclusion that "the law has very little impact on the system's approach to sexual assault cases." *Id.* at 1160.

law can promote intellectual consistency, but it cannot ensure that all crime victims are treated fairly. Ultimately, rape law reform is an intellectual exercise. It is an exercise performed in the hope that attitude will follow action. That is the true goal of this Article. It will not cure the ills manifested in law enforcement, prosecutorial, and judicial circles whenever rape law is implicated. Perhaps, though, it will encourage examination of a subject that remains one of criminal law's worst-treated. If this Article creates a pattern for a new statute, or at least gets people wondering why the law of rape is so inconsistent with that of other crimes, it will have accomplished a major feat.

Currently, the law against rape is in shambles. It has the wrong focus, casts its net both too widely and too narrowly, and yields inconsistent results. The common law definition, "carnal knowledge of a woman by force and without her consent,"<sup>3</sup> has impacted many current statutes, codifying and exacerbating the problems above. First, rape law's focus often ignores the culpable mental state, or *mens rea*, of the defendant, in favor of examining whether the prosecuting witness consented to the act.<sup>4</sup> This can, and often still does, result in the practice of scrutinizing the prosecuting witness's sexual history. This practice has no logical relevance to the guilt or innocence of the accused. Because of rape law's misguided focus, it casts its net too widely, ensnaring defendants with no culpable mental state.<sup>5</sup> Rape law also casts its net too narrowly. Many states still require the state to show that force was used in compelling the prosecuting witness's compliance. This practice fails to recognize the existence of non-violent means of coercion, and thus exculpates defendants whom society would justly prefer to convict.<sup>6</sup> Finally, results of rape trials are inconsistent, due largely to the nebulous definitions of the elements of the crime.

The law of rape has the wrong focus because it centers on the prosecuting witness's conduct. In civil actions, voluntary participation by a plaintiff in the challenged activity often constitutes a complete defense.<sup>7</sup> This is not true in

---

n.242, prompting the conclusion that "the law has very little impact on the system's approach to sexual assault cases." *Id.* at 1160.

3. Timothy W. Murphy, *A Matter of Force: The Redefinition of Rape*, 39 A.F. L. REV. 19, 19 (1996) (citing *Commonwealth v. Burke*, 105 Mass. 376 (1870)).

4. See *People v. Pugh*, 667 N.Y.S.2d 465, 467 (1998) (mentioning "victim's sordid past upon which she was extensively cross-examined" in the defense's effort to show she had traded sex for drugs).

5. See *State v. Reed*, 479 A.2d 1291, 1296 (Me. 1984) ("The legislature . . . clearly indicated that rape compelled by force or threat requires no culpable state of mind.").

6. See *Commonwealth v. Berkowitz*, 641 A.2d 1161, 1164-65 (Pa. 1994) (holding that complainant, who had a bad back and was outweighed by 60 pounds, must have fought the defendant off for him to be convicted of first-degree rape).

7. See CLARENCE MORRIS & C. ROBERT MORRIS, *MORRIS ON TORTS* 24-39 (2d ed. 1980). It may be argued that there are rare exceptions, such as the principle of unconscionability in contracts. Note, however, that proponents of that principle often require the plaintiff to have been at some type of significant disadvantage in negotiations, thus limiting any true voluntariness on the plaintiff's part. See OHIO REV. CODE ANN. §1345.03(B)(1) (considering, in the unconscionability calculus, "[w]hether the supplier has knowingly taken advantage of the inability of the consumer reasonably to protect his interests because of his physical or mental infirmities, ignorance, illiteracy, or inability to understand the language of an agreement"); see also Melvin Aaron Eisenberg, *The Bargain Principle and its Limits*, 95 HARV. L. REV. 741, 752 (1982) ("[M]uch of the

criminal law, wherein we seek the defendant's state of mind to determine culpability.<sup>8</sup> The aims of criminal law are different from those of contracts or of torts. While all seek to deter particular conduct, criminal law also seeks to determine whether an accused party is morally blameworthy and, therefore, guilty.<sup>9</sup> Thus, crimes can and do exist which hold a defendant culpable even though all participants are willing.<sup>10</sup> Society has determined that an act is criminal only when reproachable, and is reproachable only when the *defendant* is in some way responsible for its commission.<sup>11</sup>

Clearly, then, rape law's focus on the prosecuting witness's conduct has neither parallel nor justification. It is tangential to the basic inquiry: did the defendant have a culpable mental state, the required *mens rea*, to be convicted of a heinous crime?

By similar reasoning, current rape law casts its net too widely, ensnaring defendants with no culpable mental state. The primary concern is often the prosecuting witness's state of mind.<sup>12</sup> It is easy, therefore, to envision a case in which the prosecuting witness doesn't communicate that state of mind to the defendant. He,<sup>13</sup> then, cannot have acted negligently, recklessly, knowingly, or

---

scholarly literature and case law concerning unconscionability has emphasized the element of unfair surprise, in which a major underpinning of the bargaining principle—knowing assent—is absent by hypothesis.”).

8. See AMERICAN LAW INSTITUTE, MODEL PENAL CODE AND COMMENTARIES, Part I, at 229 (1985) (“[Section 2.02 of the Model Penal Code] expresses the Code’s basic requirement that unless some element of mental culpability is proved with respect to each material element of the offense, no valid criminal conviction may be obtained . . .”).

9. See ABA STANDARDS FOR CRIMINAL JUSTICE: SENTENCING 10 (3d. ed. 1994) (“Today, a number of states have identified punishment or the meting out of ‘just deserts’ as the central objective of their sentencing laws.”). Again, some may point to the extraordinary remedy of punitive damages in torts as an example of a finding of civil blameworthiness. Inquiries into the awarding of punitive damages substantially mirror that of criminal culpability. See, e.g., *Moskovitz v. Mt. Sinai Medical Center*, 635 N.E.2d 331, 342 (Ohio 1994) (stating that defendant’s malicious intent must be shown for court to award punitive damages). Thus, the exception proves the rule: actions taken to punish must stem from a finding of moral blameworthiness.

10. So-called “victimless crimes” include prostitution, drug use, suicide, and sodomy. For arguments discussing the proper legal status of “victimless crimes,” see Albert W. Alschuler, *Rediscovering Blackstone*, 145 U. PA. L. REV. 1, 55 n.269 (1996) (presenting both libertarian rationales against, and political collectivity arguments for keeping “victimless crimes” illegal); Randy E. Barnett, *Bad Trip: Drug Prohibition and the Weakness of Public Policy*, 103 YALE L.J. 2593, 2593-96 (1994) (claiming that drug prohibition increases the violent nature of crime, costs too much to enforce, and increases corruption of public officials); Martha Chamallas, *Consent, Equality, and the Legal Control of Sexual Conduct*, 61 S. CAL. L. REV. 777, 826-30 (1988) (arguing that no theoretical or practical basis exists for keeping prostitution illegal).

11. But see *United States v. Dotterweich*, 320 U.S. 277 (1943). Defendant Dotterweich was found guilty of introducing adulterated or misbranded drugs into interstate commerce. While *Dotterweich* seemingly approves of crimes in which “consciousness of wrongdoing [is] totally wanting,” as the corporation president and general manager, Dotterweich had “at least the opportunity of informing [himself] of the existence of conditions imposed for the protection of consumers.” *Id.* at 285. Even here, it seems, a form of blameworthiness was imputed to the defendant.

12. See, e.g., CAL. PENAL CODE § 263 (West 1988) (“The essential guilt of rape consists in the outrage to the person and feelings of the victims of the rape.”).

13. Because of the statistical realities of the crime of rape, this Article will refer to defendants in the masculine, and to prosecuting witnesses in the feminine. See The National Victim Center, *Sexual Assault and Rape Statistics* (visited Feb. 21, 1998), <<http://www.nvc.org/edir/rapestat.htm#vc>> (showing that, as of 1994, 94.1% of rape victims were women); Donald Dripps, et al., *Men, Women and Rape*, 63 FORDHAM L. REV. 125, 128 n.29 (1994) (citing studies which show the prevalence of women as rape victims); Brande Stellings, Note, *The Public Harm of Private Violence: Rape, Sex Discrimination, and Citizenship*, 28 HARV. C.R.-C.L.

purposefully.<sup>14</sup> Yet such a defendant may be found guilty if the law pays heed not to his culpable mental state, but rather to the prosecuting witness's state of mind.<sup>15</sup>

Rape law today inculcates the prosecuting witness as well. The law's obsession with the state of mind of the woman has led to the irrelevant and maligned courtroom tactic of placing her sexual history at issue.<sup>16</sup> Although most states,<sup>17</sup> and the federal government,<sup>18</sup> now have "rape shield laws," this has not ended the practice.<sup>19</sup> Indeed, such laws have been challenged as violative of the defendant's right to a fair trial and his right to confront the witnesses testifying against him.<sup>20</sup>

At the same time, current rape law casts its net too narrowly, acquitting those defendants who might otherwise be found guilty. Some states include force or the threat of force as a necessary element of the crime, presuming the victim is

L. REV. 185, 186 n.3 (1993) (citing various studies estimating that rape victims comprise from 90-99.4% women).

14. Of course, strict liability offenses do exist, but for the most part do not include imprisonment as a possible punishment. See, e.g., MODEL PENAL CODE AND COMMENTARIES, Part I, § 2.05, (noting that the Model Penal Code does not "abrogate strict liability completely, but . . . provide[s] that when conviction rests upon that basis the grade of the offense is reduced to a violation [which carries no jail time].").

15. Such cases exist beyond the merely hypothetical. See, e.g., *People v. Barnes*, 721 P.2d 110, 110-13 (Cal. 1986) (focusing on prosecuting witness's beliefs, which defendant asserted led to his reasonable belief in prosecuting witness's assent).

16. Some commentators have argued that, so long as male bias remains in the judiciary, a *mens rea* element will always be misapplied:

Concentrating on the defendant's *mens rea* as to consent may bring back another nightmare: the survivor's sexual history. . . . Traditionally, the premise underlying the use of this type of evidence has been that unchaste women are liars and should not be believed. A more recent premise is that if a woman previously consented to sex, she likely consented this time.

Lynne Henderson, *What Makes Rape a Crime?*, 3 BERKELEY WOMEN'S L.J. 193, 214 (1988). On the other hand, Estrich maintains that it is the lack of culpability analysis that leads to the examination of the defendant's sexual history. See Estrich, *supra* note 1, at 1099-1100 ("[T]he inquiry into the victim's nonconsent puts the woman, not the man, on trial. Her intent, not his, is disputed; and because her state of mind is key, her sexual history may be considered relevant . . .").

17. Forty-nine states have either a statute or a rule of evidence limiting the admissibility of a prosecuting witness's prior sexual history during a rape trial. See James A. Vaught & Margaret Henning, *Admissibility of a Rape Victim's Prior Sexual Conduct in Texas: a Contemporary Review and Analysis*, 23 ST. MARY'S L.J. 893, 928 n.10 (1992); Pamela J. Fisher, Comment, *State v. Alvey: Iowa's Victimization of Defendants Through the Overextension of Iowa's Rape Shield Law*, 76 IOWA L. REV. 835, 895 n.10 (1991) (listing the 49 states and their respective rape shield statutes or rules of evidence). Arizona, the only state without such a statute or rule, follows a common law rule limiting the admissibility of such evidence. See, e.g., *State ex rel Pope v. Superior Ct. of Arizona*, 545 P.2d 946 (Ariz. 1976) (restricting use of prosecuting witness's prior sexual history for evidentiary purposes).

18. See FED. R. EVID. 412.

19. See *State v. Everidge*, 702 So.2d 680, 685-86 (La. 1997) (holding that exclusion of evidence of prosecuting witness's prior sexual history with defendant was reversible error); *State v. Johnson*, 908 P.2d 770, 775 (N.M. Ct. App. 1995), *rev'd*, 944 P.2d 869 (N.M. 1997) (reversing defendant's conviction on the grounds that evidence that prosecuting witness had previously engaged in prostitution should have been admitted); *State v. Rooker*, 1993 WL 120580 at \*1 (Ohio Ct. App. 1993) (discussing defense attorney's attempts, prior to state's objection, to suggest past sexual activity on part of 13-year old prosecuting witness).

20. See, e.g., Shawn J. Wallach, Note, *Rape Shield Laws: Protecting the Victim at the Expense of the Defendant's Constitutional Rights*, 13 N.Y.L. SCH. J. HUM. RTS. 485 (1997); Fisher, *supra* note 17, at 835-37, 868.

conscious, competent to give or withhold consent, and of a given statutory age.<sup>21</sup> The inclusion of force as an element of rape is fallacious because it is an indirect, inaccurate way of assessing the real issue—the communication of the woman's nonconsent to the sexual act. This has historically been the reason for the requirement of a showing of force to convict.<sup>22</sup> Yet it is neither the best way, nor even a particularly accurate way, to accomplish this task.<sup>23</sup>

Finally, current rape law produces results that cannot be reconciled with one another and outcomes that most people would find unsavory. In a recent unreported case in Florida, the defendant was acquitted, despite the prosecution's contention that he held his victim at knifepoint while raping her. Jury members

---

21. States can be divided into three broad categories: (1) those that require force to be used for all rape-type convictions; (2) those that require force for felony convictions but not for misdemeanors; and (3) those with no force requirement at all.

(1) Force required:

Arkansas (ARK. CODE ANN. § 5-14-103 (Michie 1993)), California (CAL. PENAL CODE § 261 (West 1988)), Georgia (GA. CODE ANN. § 16-6-1 (Harrison 1972)), Idaho (IDAHO CODE § 18-6101 (1997)), Illinois (720 ILL. COMP. STAT. ANN. 5/12-13 (West 1993)), Indiana (IND. CODE ANN. § 35-42-4-1 (West 1986)), Kansas (KAN. STAT. ANN. § 21-3502 (West 1995)), Kentucky (KY. REV. STAT. ANN. § 510.040 (Michie 1990)), Massachusetts (MASS. GEN. LAWS ch. 265, § 22 (Law. Co-op. 1992)), Michigan (MICH. COMP. LAWS ANN. § 750.520b (West 1991)), North Carolina (N.C. GEN. STAT. § 14-27.2 (1997)), Oklahoma (OKLA. STAT. ANN. tit. 21, § 1111 (West 1983)), Oregon (OR. REV. STAT. tit. xvi, § 153.375 (1991)), Rhode Island (R.I. GEN. LAWS § 11-37-2 (1994)), S.C. CODE ANN. § 16-3-652 (Law. Co-op. 1976)), South Dakota (S.D. CODIFIED LAWS § 22-22-1 (Michie 1988)), Virginia (VA. CODE ANN. § 18.2-61 (Michie 1996)), West Virginia (W. VA. CODE § 61-8B-7 (1997)), Wisconsin (WIS. STAT. ANN. § 940.225 (West 1996)), and Wyoming (WYO. STAT. ANN. § 6-2-302 (Michie 1997)).

(2) Force required for a felony, but not for a misdemeanor offense:

Alabama (ALA. CODE § 13A-6-61 (1994)), Connecticut (CONN. GEN. STAT. ANN. § 53a-70, 53a-73a (West 1994)), Maryland (MD. CODE ANN. art. 27, § 464c (1994)), Nebraska (NEB. REV. STAT. § 28-320 (1995)), New York (N.Y. PENAL LAW § 130.20 (1998)), Texas (TEX. PENAL CODE ANN. § 528 (West 1994)), and Utah (UTAH CODE ANN. § 76-5-402 (1995)).

(3) Force not required (i.e. a felony can be charged without force having been used):

Alaska (ALASKA STAT. § 11.41.410 (Michie 1996)), Arizona (ARIZ. REV. STAT. ANN. § 13-1406 (West 1991)), Colorado (COLO. REV. STAT. ANN. § 18-3-403 (1979)), Delaware (DEL. CODE ANN. tit. xi, § 773 (1995)), Florida (FLA. STAT. ANN. § 794.011(c) (West 1992)), Hawai'i (HAW. REV. STAT. § 707-730 (1985)), Iowa (IOWA CODE ANN. § 709.4 (West 1993)), Louisiana (LA. REV. STAT. ANN. § 14.43.1 (West 1997)), Maine (ME. REV. STAT. ANN. tit. 17A, § 255 (West 1983)), Minnesota (MINN. STAT. ANN. § 609.3451 (West 1987)), Mississippi (MISS. CODE ANN. § 97-3-95 (1994)), Missouri (MO. STAT. § 566.040 (1979)), Nevada (NEV. REV. STAT. ANN. § 200.366 (Michie 1997)), New Hampshire (N.H. REV. STAT. ANN. § 632-A:2 (1996)), New Jersey (N.J. STAT. ANN. § 2C:14-2 (West 1995)), New Mexico (N.M. STAT. ANN. § 30-90-1 (Michie 1978)), North Dakota (N.D. CENT. CODE § 12.1-20-07 (1997)), Ohio (OHIO REV. CODE ANN. 2907.03 (Banks-Baldwin 1997)), Pennsylvania (18 PA. CONS. STAT. ANN. § 3124.1 (West 1983)), Tennessee (TENN. CODE ANN. § 39-13-505 (1997)), Vermont (VT. STAT. ANN. tit. 13, § 3252 (1974)), and Washington (WASH. REV. CODE § 9A.44.060 (West 1988)).

22. See Estrich, *supra* note 1, at 1130-32.

23. The courts have shown themselves to be uncomfortable with the force requirement. In *State v. Rusk*, 43 Md. App. 476 (1979), for example, although the record shows no indication that the defendant made any verbal threats, the fact that he "lightly choked" the prosecuting witness was sufficient to fulfill the force element. Ohio courts have expressed their discomfort with the statutory requirement of force by all but judicially eliminating it for cases in which the defendant and prosecuting witness are related. See *State v. Schaim*, 600 N.E.2d 661 (Ohio 1992) (stating *per se* rule that the issuance of a command by a father to his daughter implied punishment and threat of force if the command were not followed); *State v. Eskridge*, 526 N.E.2d 304 (Ohio 1988) (initiating variable standard of force, depending on relationship between parties, as well as age, weight, and physical strength differential); *State v. Fowler*, 500 N.E.2d 390 (Ohio 1985) (finding sufficient force to support rape charge by man telling his 14-year old stepdaughter not to tell anyone about their intercourse).

were interviewed by the media after the trial. The jury foreman stated, quite candidly: "We felt she asked for it the way she was dressed. . . . The way she was dressed with that skirt, you could see everything she had. She was advertising for sex."<sup>24</sup> Presumably, the jury found that the defendant believed the act to be consensual, based upon his observation of the prosecuting witness's clothing. Conversely, in *People v. Barnes*,<sup>25</sup> the defendant's beliefs were never examined. The prosecuting witness testified that she felt threatened by the defendant's statements and actions, including his "displaying the muscles in his arms," "lectur[ing] her," and "look[ing] at her 'funny.'" After intercourse, the prosecuting witness fell asleep in the defendant's home. She reported the incident to the police the day after that. The defendant was convicted at trial of rape. This conviction was overturned at the appellate level, and later re-instated by the state Supreme Court. Unlike the court in Florida, the *Barnes* court looked exclusively at the prosecuting witness's desires, regardless of her success or effort at communicating them to the defendant.

Clearly, then, a new definition of rape is in order. This Article offers the following as a model statute:

Rape:

1) Sexual Intercourse

2) With negligence toward the prosecuting witness's will.

DEFINITION: If the prosecuting witness verbally refuses sexual intercourse, the defendant has acted negligently *per se*.

This statute makes several conceptual changes, each of which will be discussed. Section II discusses current concepts in rape law, as described in prominent scholarship. Section III argues that the prosecuting witness's actions are largely, albeit not completely, irrelevant and must therefore be given limited attention relative to the defendant's *mens rea*. This reduction of the inquiry results in the elimination of force as an element of the crime and the *per se* unreasonableness of the admissibility of a defendant's sexual activity in the face of the prosecuting witness's verbal refusal. Section IV will develop the statute's second element, arguing the appropriateness of a reasonable man standard. To be convicted of rape, the defendant must be shown to have acted negligently toward the prosecuting witness's willingness. Section V will expand on the idea that the force requirement is not a helpful indicator either of a lack of consent, or of the defendant's mental state, concluding that it must therefore be relegated to the role of an aggravating circumstance. Finally, Section VI will summarize the new definition of rape, and, by applying it to difficult cases, show how it mitigates and eliminates existing problems with the law.

---

24. *Jury: Woman in Rape Case "Asked for it"*, CHICAGO TRIB., Oct. 6, 1989 at 11. The incident occurred in Fort Lauderdale, Florida.

25. 721 P.2d 110 (Cal. 1986).

## II. PAST AND CURRENT SCHOLARSHIP

Much of the literature has focused on an accurate indicator of when a woman consents to intercourse. In common law, courts required the defendant to have used physical force to overcome the will of the prosecuting witness.<sup>26</sup> Often, to prove that the woman truly did not consent, she had to "resist to the utmost" against her attacker,<sup>27</sup> even to the point of endangering her safety beyond the implications of the sexual assault.<sup>28</sup>

Such definitions of consent struggled with finding a balance between protecting women against crime, and protecting men against false accusations of rape. That the latter played an exceedingly important role in the formulation of the common law is well-documented.<sup>29</sup> Thus, many courts used manifestations of physical resistance by the victim as a substitute for lack of consent.<sup>30</sup> Upon the assumption that a virtuous woman would defend her virtue until physically overcome,<sup>31</sup> courts made the counter-assumption that failure to resist implied consent. The need for resistance, of course, implies that force must be present as a target for that resistance. By extension, then, for the victim not to have consented to intercourse, the defendant must have used force.

Professor Estrich attacks this concept on many grounds. Primarily, she asserts that prevailing notions of force and resistance in criminal law are male-driven. That is, the law recognizes "force as most schoolboys do on the

---

26. See CASSIA SPOHN & JULIE HORNEY, RAPE LAW REFORM 21 (1992) (defining the common law of rape as "carnal knowledge of a woman, not one's wife, by force and against her will").

27. *Id.* at 17.

28. See *State v. Muhammad*, 162 N.W.2d 567, 568-70 (Wis. 1968) (holding that victim who was pinned, with defendant's hand placed over her nose and mouth so that she was unable to breathe, did not resist sufficiently for defendant to be convicted).

29. See *Reidhead v. State*, 250 P. 366, 366 (Ariz. 1926) ("[W]hen a verdict of guilty is returned on the evidence of the prosecutrix alone, her story must be reasonable, consistent, and not inherently impossible or improbable to a degree that would make it incredible to the ordinary man."); *Witt v. State*, 233 P. 788, 788 (Okla. Crim. App. 1925) ("[Rape] arouse[s] the passions and prejudices of jurors, and for that reason . . . [if] there is inherent evidence of improbability or indications that the prosecution is maliciously inspired, the court should not permit a conviction to stand."); 1 MATTHEW HALE, THE HISTORY OF THE PLEAS OF THE CROWN 635 (1778) ("Rape is . . . an accusation easily to be made and hard to be proved, and harder to be defended by the party accused, tho never so innocent.").

30. See *State v. Colestock*, 67 P. 418, 420 (Or. 1902) ("The importance of resistance is simply to show two elements in the crime—carnal knowledge by force by one of the parties, and nonconsent thereto by the other."); Note, *Forcible and Statutory Rape: An Exploration of the Operation and Objectives of the Consent Standard*, 62 YALE L.J. 55, 66 (1952) ("When her behavior looks like resistance although her attitude is one of consent, injustice may be done the man by the woman's subsequent accusation.").

31. See *People v. Dasey*, 242 P. 876, 878 (Cal. Ct. App. 1925) (refusing to overturn the trial court's instruction that victim must resist to the utmost at all times in order to avoid presumption of consent); 2 JOEL PRENTISS BISHOP, COMMENTARIES ON THE CRIMINAL LAW 625 (7th ed. 1882) ("[T]he will of the woman must oppose the act, and . . . any inclination favoring it is fatal to the prosecution."); IRA M. MOORE, A PRACTICAL TREATISE ON CRIMINAL LAW AND PROCEDURE IN CRIMINAL CASES BEFORE JUSTICES OF THE PEACE AND IN COURTS OF RECORD IN THE STATE OF ILLINOIS § 435 (1876) ("Nature had given [the prosecutrix] feet and hands with which she could kick and strike, teeth to bite, and a voice to cry out. All these should have been put in requisition in defense of her chastity.").

playground: Force is when he hits me; resistance is when I hit back."<sup>32</sup> What the law of rape fails to recognize, says Estrich, is that force may be perceived and responded to in various ways, some of which are primarily gender-specific. Where a court of male judges may expect that a nonconsenting party would be overcome only by force, a female in a threatening situation may simply say "no," and cry as she is penetrated.<sup>33</sup> The common law's failure to recognize the range of possible responses to force makes force an imperfect substitute for nonconsent.

Compelling as Estrich's argument is, it is not the most compelling one for eliminating the use of force as an element of rape. To make her point, Estrich must rely on her contentions of sexism in the law.<sup>34</sup> To accept her argument, one must believe that men and women perceive different situations as threatening, and respond, by and large, differently to those situations. While this may seem intuitive, it is not provable. It can be accepted only insofar as we believe the testimony of the prosecuting witness after the alleged sexual assault. In other words, to accept Estrich's argument, we must believe that a prosecuting witness really did not consent to intercourse, often with her word as the only indicator of the truth of her statement. Yet it is the common law's distrust of her word which the force requirement initially sought to address. It is no answer to say that we believe her because men and women are different, and that we know this to be true because women tell us so.

Lest the reader now regard this work with utter distaste, be assured that I come to the final conclusion that "no means no," and that the act of sexual intercourse in the face of verbal refusal is criminally culpable. But if we are to

32. Estrich, *supra* note 1, at 1105.

33. See, e.g., *State v. Alston*, 312 S.E.2d 470, 486 (N.C. 1984). In *People v. Jansson*, 323 N.W.2d 508, 511 (Mich. 1982), after the victim said she did not want sexual intercourse, the defendant pulled her to the ground, took her clothes off, and penetrated her. Although the record showed no use of force beyond that, the victim stated that she was frightened, did not know what to do, and did not physically resist.

In *State v. Rusk*, 406 A.2d 624 (Md. 1979), the dissenting judge quoted extensively from a report prepared by the Battelle Memorial Institute:

Perhaps because most women's experience and expertise with violence tends to be minimal, they are unlikely to engage in physical combat or succeed when they do. Many women employ what is referred to as "passive resistance." This can include crying, being slow to respond, feigning an inability to understand instructions or telling the rapist they are pregnant, diseased or injured. While these techniques may not always be successful, their use does suggest that the victim is surely not a willing partner.

*Id.* at 634 (Wilner, J., dissenting) (quoting *Rape and its Victims: A Report for Citizens, Health Facilities, and Criminal Justice Agencies*, L.E.A.A. (1975)).

34. Those contentions are, of course, well-supported. As Professor Martha Field points out: [The law's presumption that the prosecuting witness is lying] is buttressed by nothing more substantial than a view that women are foolish creatures who do not have a good grasp of reality. "Fantasies of being raped are exceedingly common in women, indeed one may almost say that they are probably universal. . . ." As late as 1970, a respected law review, without any empirical support, declared: "Women often falsely accuse men of sexual attacks to extort money, to force marriage, to satisfy a childish desire for notoriety, or to attain personal revenge. Their motives include hatred, a sense of shame after consenting to illicit intercourse, especially when pregnancy results, and delusion."

MARTHA A. FIELD, *Rape: Legal Aspects*, *ENCYCLOPEDIA OF CRIME AND JUSTICE* 1336, 1361-62 (Sanford H. Kadish ed., 1983) (citations omitted).



achieve an intellectually honest result, the issue must be addressed logically and dispassionately. We cannot find refuge in answers that seem intuitive and are socially palatable, but logically circular. Only if the logic is clean can it achieve ultimate acceptance, and, hopefully, codification in law.

A better argument points out the obfuscation caused by using force as an element. As shown before, force is commonly used as a surrogate for nonconsent. But those statutes which include force as an element evince a clear redundancy by also including nonconsent.<sup>35</sup> These statutes betray a failing that appears throughout the common law as well: a failure to define nonconsent in a meaningful way.<sup>36</sup> Despite this definitional failing, courts and legislatures have retained nonconsent as an element, and sought to rectify the problem of its nebulous definition by maintaining a requirement of force. In effect, the element of nonconsent appears twice: once as nonconsent, and again as the use of force. What results is a confusion between the element and the method of proving it. If an element of the crime of rape is victim nonconsent, then proof of nonconsent, properly defined, should be dispositive. Force need not and ought not enter into the elemental equation, except as proof of the element of nonconsent.

Professor Dripps points out another problem with the dual requirements of force and nonconsent. Regardless of the use of force, if a jury finds consent, then no crime has occurred.<sup>37</sup> Dripps cites *State v. Lord*, discussed previously, as an example.<sup>38</sup> In *Lord*, the defendant was acquitted, despite having threatened the woman with a knife, because she was found to have dressed provocatively, implying her consent. If the criminal law examines the defendant's *mens rea* and his conduct, then a jury's inference of consent by the victim should not be dispositive. Otherwise, examination into the conduct of the woman becomes the logical consequence of the conjunction of force and consent.

The fact that the common law has used force as a model for nonconsent implies that force itself is not the fundamental harm the law of rape seeks to address. If it were, so much time and energy would not be spent explaining why force shows the prosecuting witness's lack of desire. The use of force would be enough, without it having to imply anything else. Rape would be merely a form of assault, aggravated by the concurrent sex act. No jurisdiction defines rape as an aggravated form of assault.<sup>39</sup> Therefore, the use of force to obtain sex is somehow different than the use of force alone, and it is different because some harm other than assault has been inflicted on society.

There are two possibilities to explain this. The first is that sexual intercourse by force is worse than the use of force alone, implying, as discussed above, that

---

35. See *supra* note 21 for a list of rape statutes.

36. See RICHARD A. POSNER & KATHARINE B. SILBAUGH, *A GUIDE TO AMERICA'S SEX LAWS* 6 (1996) (discussing lack of definition in rape statutes).

37. See Donald A. Dripps, *Beyond Rape: An Essay on the Difference Between the Presence of Force and the Absence of Consent*, 92 COLUM. L. REV. 1780, 1793-94 (1992).

38. For information on this unreported case, see *supra* note 24 and accompanying text.

39. See *supra* note 21 for a list of rape statutes.

assault is a lesser-included offense of rape. Sexual intercourse would be an aggravating element of assault. The second is that rape is different than assault, incomparable, and constitutes a wholly separate offense. This implies that rape causes a harm to society that is different than the mere use of force. If this is true, then force is not an integral part of the harm of rape, because otherwise rape would be one aggravated crime on a spectrum of assault crimes.

I suggest that rape is different than assault, and that rape can therefore be committed without force. I further suggest that the fundamental harm of rape lies in the removal of choice from the victim, and in the influencing of that choice by whatever coercive means the actor may employ.<sup>40</sup> The means do not define the harm. The means are merely the implement by which the harm is caused, and the harm may be caused independently of the means employed.

Therefore, if nonconsent can be defined properly, it should be sufficient to convict. The definition of nonconsent must incorporate inquiry into the defendant's *mens rea* and it must also be defined in such a way that the law protects not only bodily integrity, but the right to refuse sexual activity as well.

### III. A DEFINITION OF NONCONSENT

This section begins to develop the definitions necessary to construct a new rape statute. Notions of consent, and communication of nonconsent are explored first. As opposed to "willingness," which I address in Section IV, "consent" is the prosecuting witness's verbal agreement to have sex. The "definition" section of the statute, given in Section I, comprises the nonconsent element.

To create a usable definition of consent, it is necessary to understand what the law of rape seeks to accomplish by its inclusion of nonconsent as an element. Estrich contends that nonconsent must protect the sexual autonomy of women—the right of women not to engage in sex.<sup>41</sup> In her view, the law must shield women from unwanted sexual activity, and at the same time leave them free to engage in sex, with a willing partner, in a manner of their choosing. "[A] consent standard," says Estrich, "that allowed the individual woman to say 'yes' as well as 'no,' . . . would be a means of empowering women."<sup>42</sup> Dripps, on the other hand, maintains that the relativeness of sexual autonomy makes it impossible to evaluate morally, and, therefore, impossible to implicate criminally.<sup>43</sup>

Dripps proposes that bodily integrity should be analogized to property, and

---

40. Analogously, robbery is usually defined as the taking of another's property by force or fear. See, e.g., MODEL PENAL CODE § 222.1 (Proposed Official Draft 1962). Force is therefore not necessary for a robbery to have occurred.

41. Professor Dripps refers to this as "negative sexual autonomy," as opposed to "positive sexual autonomy." The latter would exist in a world where anyone could have sex with anyone else of their choosing, without the right of the other to refuse. Obviously, it is the right to say "no" that the law of rape protects. See Dripps, *supra* note 37, at 1785.

42. Estrich, *supra* note 1, at 1132.

43. See Dripps, *supra* note 37, at 1788-92.

that the purpose of the law should be to protect this property interest.<sup>44</sup> His theory is problematic on a number of levels. The analogy, of course, is not complete, as other authors have pointed out. Bodily integrity is not like property,<sup>45</sup> and is not alienable in the same way. Also, the law presumes against a charitable donation of property,<sup>46</sup> yet the intangible benefits of meaningful sex foreclose such a presumption in that arena. Furthermore, Dripps' use of bodily integrity as property implies no requirement of physical contact; there is no logical distinction, in Dripps' definition, between the voyeur who expropriates a view of the victim's body, and the rapist.<sup>47</sup>

Both Estrich and Dripps come to the same conclusion when they both insist that "no must mean no,"<sup>48</sup> and this conclusion is clearly correct. What is not clear is the right or interest that this rule would legitimize. I think the ultimate answer must lie in the woman's right to say no, and the law's infusion of that statement with the power of criminal consequence. If this is the same as sexual autonomy, so be it. While it is not within the realm of the criminal law to dictate how sex should be conducted, it certainly may proscribe certain conduct. Laws of assault and extortion prohibit forcible and coercive conduct, for the mere reason that they are undesirable and wrong.<sup>49</sup> Arguments may be made about property rights, autonomy, or ultimate benefit to society, but the real, visceral reason for these laws is that people have a right to refuse interactions with others. It is, as Brandeis put it, the "right to be let alone"<sup>50</sup> that the law protects, and the coercive violation of that right that the criminal law must punish.

Once it is agreed that "no" must mean "no," it follows that a defendant who ignores the proper communication of that preference must be found culpable. Otherwise, further inquiry would imply that no sometimes means yes, if only we can find a certain set of circumstances.

This has been rape law's consistent quagmire. A nagging suspicion remains

---

44. See generally Dripps, *supra* note 37.

45. See Margaret J. Radin, *Market-Inalienability*, 100 HARV. L. REV. 1849, 1921-25 (1987) ("Thinking of rape in market rhetoric implicitly conceives of as fungible something that we know to be personal, in fact conceives of as fungible property something we know to be too personal even to be personal property. Bodily integrity is an attribute and not an object.").

46. See, e.g., WILLIAM P. HOGOBOOM & DONALD B. KING, CALIFORNIA PRACTICE GUIDE: FAMILY LAW 8-513 (1997) (stating that, generally, donative intent must be proved by specific facts such as the donor's declarations).

47. See Dripps, *supra* note 37, at 1806 n.60.

48. See Dripps, *supra* note 37, at 1804 ("The substantive law ought to punish the disregard of the sexual object's words, without regard to their sincerity. . . . [T]he intent that matters should be the intent to engage in sex with a person who says she refuses."); Estrich, *supra* note 1, at 1127 ("Were the purpose of the consent requirement really to afford autonomy to women, there is no reason why a simple but clearly stated 'no' would not suffice to signify nonconsent.").

49. Many examples exist in criminal law of distinctions that are made without any apparent underpinning in rights or privileges. Yet these distinctions are rarely argued because there is societal agreement that they should exist. For example, United States Sentencing Guidelines add two levels to a kidnapping sentence if the victim was elderly. See U.S. SENTENCING GUIDELINES MANUAL § 3A1.1(b) (1997). Yet there is no clear argument that an elderly person has a greater right or privilege against kidnapping than anyone else. The guideline is fueled by our sense of moral outrage, not by an articulatable distinction.

50. *Olmstead v. United States*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting).

that women really do mean "yes" when they say "no,"<sup>51</sup> at least sometimes, and so there is the consequent fear of convicting an innocent man. If the premise is to be believed, then the fear is a real one. If a woman cannot be trusted to say what she means, then a conviction on the basis of her word could truly be viewed as unjust.

A close examination of these concerns reveals two underlying issues: the man must be placed on notice about the woman's nonconsent and he must be protected from a lying accuser. Works expressing concern about false convictions generally deal with one or both of these issues.<sup>52</sup> Because the matter of the lying prosecuting witness is more easily dealt with, it will be addressed first.

As mentioned before, the concern about a lying accuser is dealt with properly by the normal requirements of conviction. The need for proof beyond a reasonable doubt adequately addresses the case of the lying prosecuting witness.<sup>53</sup> Even assuming against the evidence that rape complainants have a higher incidence of false reporting than do complainants in other crimes,<sup>54</sup> there is no reason to expect that such claims will be believed by juries any more

51. None of these same sources propose that women also say "yes" when they really mean "no." Apparently, women's ambivalence was always presumed to mask sexual desire, and not a lack thereof. *See, e.g.*, Note, *supra* note 30, at 67-68 (stating "where such an attitude of ambivalence exists, the woman may, nonetheless, exhibit behavior which would lead the factfinder to conclude that she opposed the act. . . . [F]airness to the male suggests a conclusion of not guilty, despite signs of aggression, if his act was not contrary to the woman's formulated wishes.").

52. *See, e.g.*, MODEL PENAL CODE § 213.6 (Proposed Official Draft 1962) (defending the corroboration requirement as "a particular implementation of the general policy that uncertainty should be resolved in favor of the accused."); SUSAN ESTRICH, *REAL RAPE* 43-47 (1987) (giving examples of jurists and scholars who believed women either didn't know what they wanted, or lied about it afterward); SPOHN & HORNEY, *supra* note 26, at 24 ("Traditional wisdom, reflected in common law, held that rape should be treated differently from other crimes because of the danger of false charges by vindictive or mentally disturbed women."); 3 JOHN H. WIGMORE, *EVIDENCE IN TRIALS AT COMMON LAW* § 924a (3d ed. 1940) ("No judge should ever let a sex-offence charge go to the jury unless the female complainant's social history and mental makeup have been examined and testified to by a qualified physician."); GLANVILLE WILLIAMS, *TEXTBOOK OF CRIMINAL LAW* 238 (2d ed. 1983) ("A little still she strove, and much repented/And whispering, 'I will ne'er consent'—consented") (quoting Lord Byron); Glanville Williams, *Corroboration—Sexual Cases*, *CRIM. L. REV.*, Oct. 1961, at 662-71 ("[S]exual cases are particularly subject to the danger of deliberately false charges, resulting from sexual neurosis, phantasy, jealousy, spite, or simply a girl's refusal to admit that she consented to an act of which she is now ashamed."); Note, *supra* note 30 at 67-68; Note, *Corroborating Charges of Rape*, 67 COLUM. L. REV. 1137, 1138 (1967) ("Surely the simplest, and perhaps the most important, reason not to permit conviction for rape on the uncorroborated word of the prosecutrix is that that word is very often false.").

53. *See* FIELD, *supra* note 34, at 1356 ("For the most part, both courts and state legislatures have come to recognize that a special corroboration rule for rape cases is unjustified. Rape defendants, like other criminal defendants, are fully protected by the general principle that guilt must be proved beyond a reasonable doubt.").

54. Reliable statistics on false reporting of crimes are hard to obtain, due to the nature of ascertaining falsity. Data reported are generally estimates and range widely. One recent study estimated that five percent of rape reports are false, not far from the two percent average for other violent crimes. *See* LINDA A. FAIRSTEIN, *SEXUAL VIOLENCE: OUR WAR AGAINST RAPE* 228-29 (1993). Susan Brownmiller offers a frequently-quoted statistic of only two percent false rape reports when female police officers are used. *See* SUSAN BROWN MILLER, *AGAINST OUR WILL: MEN, WOMEN AND RAPE* 410 (1975). The basis for this statistic may not be scientific, and has come under recent attack. *See* David R. Throop, *Refutation of Brownmiller's 'Only 2% are False' Claim* (visited Mar. 8, 1998) <<http://ftp.vix.com/men/falsereport/refbrownm.html>>. However, a more recent study seems to lend support to the two percent statistic. *See* JULIE A. ALLISON & LAWRENCE S. WRIGHTSMAN, *RAPE: THE MISUNDERSTOOD CRIME* 11 (1993).

readily than any other,<sup>55</sup> Lord Hale's admonition<sup>56</sup> notwithstanding.

There will always remain those who, regardless, truly believe that rape charges are somehow uniquely prone to falsification and erroneous convictions. Although it will be cold comfort, the fact is that corroboration requirements were of minimal effect anyway. Judges tended to interpret them narrowly, such that "a scintilla of corroboration was satisfying."<sup>57</sup> Any legislative delineations of corroborative proof would be doomed to failure—the multitude of cases, and the infinite ranges of available, probative proof, defy cataloguing. Even when corroboration requirements were removed, those jurisdictions experienced little effect either way on conviction rates for rapes.<sup>58</sup>

In any event, it is far more consistent with other crimes to deal with the matter on an evidentiary, rather than on a definitional basis. The corroboration requirement for rape stood alone among crimes.<sup>59</sup> Given the system's usual reliance on the reasonable proof standard, such evidentiary determinations are rightly left to the jury.<sup>60</sup> Those who assert otherwise should be required to have substantial evidence at their disposal, for their desire to retain a corroboration requirement for rape runs counter to the normal propositions of the law.

The issue of notice is more genuinely problematic. If, as I and others before me have contended, "no" must mean "no," then the proper communication of nonconsent must be sufficient for conviction. The only issue is how to determine what constitutes proper communication.

Dripps is pessimistic about attempts to codify definitions of consent.<sup>61</sup> His outlook, though, is based on failings of two previous attempts. The first is that most states have muddled the waters by including conduct-related language in

---

55. If anything, people tend to disbelieve charges of rape in disproportionate numbers. See Martha R. Burt, *Cultural Myths and Supports for Rape*, 38 J. PERSONALITY & SOC. PSYCHOL. 217, 230 (1980) ("[A majority of adults sampled] think that 50% or more of reported rapes are reported as rape only because the woman was trying to get back at a man she was angry with, or was trying to cover up an illegitimate pregnancy."). An overwhelming number also disagree with Lord Hale's notion that rape is hard for a defendant to disprove. See Morrison Torrey, *When Will We Be Believed? Rape Myths and the Idea of a Fair Trial in Rape Prosecutions*, 24 U.C. DAVIS L. REV. 1013, 1018 (1991) (citing study that shows from 65-98% of those surveyed, depending on race and gender, believe that men can commit rape and readily get away with it).

56. See HALE, *supra* note 29.

57. SPOHN & HORNEY, *supra* note 26, at 162 (quoting a judge who participated in the survey).

58. This is so because of the discretion built into the criminal justice system. Prosecutors will not indict when they do not feel they can win a conviction. The existence of corroborative evidence plays a substantial role in these determinations by prosecutors. Many officials believed that an explicit instruction to the jury, explaining that corroborative evidence is not required for a conviction, would have a significant effect; however, this has not been shown since many jurisdictions do not require such an instruction, and many prosecutors do not request it. See *id.* at 163-64.

59. See Dawn M. DuBois, Note, *A Matter of Time: Evidence of a Victim's Prompt Complaint in New York*, 53 BROOK. L. REV. 1087, 1098 n.70 (1988) ("Prior to rape corroboration rules, the testimony of a single victim-witness was legally sufficient evidence upon which the jury could find a verdict.") (citing 7 J. WIGMORE, EVIDENCE § 2034, at 259 (3d ed. 1940)).

60. See Kathy Mack, *Continuing Barriers to Women's Credibility: A Feminist Perspective on the Proof Process*, 4 CRIM. L.F. 327, 332 (1993) ("The corroboration rules pertaining to women alleging rape contrasted sharply with the usual common law rule that the jury was entitled to convict on the unsupported testimony of one witness.").

61. See Dripps, *supra* note 37, at 1787 n.30.

their definitions of consent.<sup>62</sup> Dripps rightly criticizes this practice as failing to advance the matter: if consent is defined in terms of conduct, the prosecuting witness's actions will still figure prominently in the investigation, leading us right back to the current mess. The second failing, as Dripps points out, is that vague words given by the prosecuting witness lead to vague analyses. "Are 'oh, all right' the kind of 'actual words' that manifest 'freely given agreement'?"<sup>63</sup> This, as Dripps agrees, is not an insurmountable problem: a second element, involving an independent examination of the defendant's *mens rea*, cures the defect. If the words are ambiguous, we can take a "pass" on determining their true meaning, confident that the second half of our inquiry will ensnare the culpable and free the innocent.

This is the approach of this Article. Consent is defined broadly, analyzed quickly, and soon dispensed with. In this way, minimal attention is paid to the conduct of the prosecuting witness. Force is given to the woman's words, for they are an undeniable, completely objective indicator of what she wants. Therefore, *consent must be defined as a verbal manifestation by the woman of her desire for intercourse.*

The matter, however, cannot rest there. We must determine whether *consent* is truly an element of the crime of rape, or whether the relevant issue is *nonconsent*. The difference is more than semantic. If we were to define consent alone, and rape could be proved by a lack of consent, then a defendant could be convicted upon proof of the woman's mere silence. Defining nonconsent as an element, however, means that the woman must, in a positive way,<sup>64</sup> express her nonconsent. Now the real issue becomes manifest: must a woman say "yes" for a man to be absolved of rape? or must she say "no" for him to be convicted? And what does silence mean? In other words, there are three possibilities for a consent standard. At one extreme, the woman must verbally agree to sex for the act not to be criminal. This would imply that silence on the part of the woman inculcates the man. At the other end of the spectrum, the woman would have to refuse intercourse verbally, and the man would then have to engage in intercourse with her, for a crime to be committed. Under this rubric, silence would be exculpatory.

In arguing that a "yes" must be obtained for a defendant to be exculpated, feminists have asserted that this is the only way to validate women's sexual autonomy. If, the argument goes, the woman's consent is the issue, then it is her perspective that determines whether the man acted culpably.<sup>65</sup> The only way for a jury to be sure that the woman truly consented is if she positively agreed to sex.<sup>66</sup> Commentators have analogized to other crimes, as well as to property,

---

62. See *id.* (quoting the Washington statute, WASH. REV. CODE ANN. § 9A.44.010(7) (West Supp. 1992)), providing that consent "means that at the time of the act of sexual intercourse there are actual words or conduct indicating freely given agreement to have sexual intercourse" (emphasis added)).

63. *Id.*

64. By "positive," I do not mean "certain" or "unequivocal." I mean positive in the sense of a logical positive: the negative communication must be effected by saying "no."

65. See Lois Pineau, *Date Rape: A Feminist Analysis*, in DATE RAPE 25-26 (Leslie Francis ed., 1996).

66. See *id.*

contracts and torts to show that a positive manifestation of consent is needed.

This argument fails on two important levels. To give effect to a woman's words, we must be able to convict based on those words. To convict, an element of the defendant's *mens rea* is necessary. This necessarily implies that consent or nonconsent be examined from the vantage point of the defendant.

For commentators such as Lois Pineau, this syllogism may be far too glib. If, as she contends, courts have historically implemented sexist, male-biased notions of consent, examinations from the man's perspective merely perpetuate the problem. Furthermore, if the woman's consent is the central issue, then logically it is her perspective that must control.

Each of these points has been addressed. To answer Pineau, perceived male bias in the judiciary (and society in general) is circumvented by an objective standard. Consent must be defined such that, if the woman says "no," the defendant is culpable. It is defined in terms of a presence of "no," and not an absence of "yes," because, again, the defendant's liability, *not* the woman's viewpoint, is the central issue. "Since the basis of criminal liability is intentionally wrong or unreasonable conduct, fairness seems to require that we do not disregard his viewpoint entirely."<sup>67</sup> Indeed, if the woman's words are enough to convict, then consent has essentially been made a strict liability element. That is, no *mens rea* element is necessary to convict if the prosecuting witness said "no." The law presumes against taking away a person's freedom, and we must therefore insist on proof so persuasive that no reasonable person could have misconstrued—more, that no reasonable *man* could have done so. The best and only way to do this is to require that the woman say "no" for the defendant to fulfill the element of nonconsent.

It will be no answer that the man had an ongoing relationship with this woman, that a dozen or a thousand times before, she truly meant "yes" when she said "no." A man who proceeds under those circumstances does so at his own risk, and the law will post no sympathy.<sup>68</sup>

The second level on which Pineau's argument fails is its assumption on the proper role of criminal law. Many people, I think, would support a law which defines when sex is criminal; far fewer would support a law which dictates how sex *must* occur. There is a logical difference. While "no means no" may be an enforceable concept, "only yes means yes" is not. The latter defines the point after which sexual intercourse would be criminal. The former creates a positive requirement for sexual intercourse not to be criminal. Communication is an intricate, imprecise matter, and although we seek to give effect to a woman's words, we do not seek to limit the method of her expression so severely. As Estrich says,

---

67. Catharine Pierce Wells, *Date Rape and the Law: Another Feminist View*, in DATE RAPE 44 (Leslie Francis ed. 1996). In responding to Pineau, Wells gives a strong articulation of the preceding argument.

68. Professor Dripps puts it more eloquently: "The law should demand no more from anyone than the expressed refusal to engage in sex, and should punish the disregard of that expressed refusal even if the expressed refusal is proved by twenty bishops to have been insincere." Dripps, *supra* note 37, at 1804.

[T]he consent standard could be viewed as a means to afford women their deserved freedom to engage in sex however they choose. . . . The harm of rape, or part of it, is the denial of that freedom. Indeed, a consent standard that allowed the individual woman to say "yes" as well as "no," to define all the limits of permissible sex for herself and then to have that definition incorporated and respected in law, would be a means of empowering women.<sup>69</sup>

One who does not view a positive requirement for sex as beyond the scope of criminal law must still consider the level of intrusiveness engendered by both options. It is axiomatic that, effectiveness and other considerations held equal, criminal law should limit the level of its intrusion into everyday life.<sup>70</sup> It is obviously far more intrusive to place a positive requirement on every act of sexual intercourse than to establish a negative limit on the (relatively infrequent) acts of rape.

In summary, "consent" is defined as the verbal manifestation of the woman's willingness to engage in intercourse. Criminal conduct occurs when the woman has refused sex, and the defendant engages in sex with her in spite of this refusal. Such continuance in the face of objective refusal is sufficient for conviction. Since the law is defined in a way no reasonable person could fail to understand,<sup>71</sup> i.e. "no" means "no", the statute's definition section imposes a strict liability

---

69. Estrich, *supra* note 1, at 1132. I do not mean to imply that Estrich would agree with my conclusion that silence should not implicate the defendant. I am quite certain she would not. *See id.* ("The insistence that men are entitled . . . to presume consent from silence . . . makes all too clear the law's absolute determination not to empower women at all."). Despite her theoretical leanings, she regretfully admitted the reality of the situation, at least as it was in 1987:

If we are not at the point where it is appropriate for the law to presume nonconsent from silence, and the reactions I have received to this Article suggest that we are not, then at least we should be at the point where it is legitimate to punish the man who ignores a woman's explicit words of protestations.

*Id.* at 1182. Perhaps Estrich would be satisfied with this Article's suggestion that silence not only fails to implicate, but also demands a subsequent investigation into the defendant's mental state.

70. Those who hold this principal less than axiomatic will find an excellent argument for its support in Nadine Strossen, *The Fourth Amendment in the Balance: Accurately Setting the Scales Through the Least Intrusive Alternative Analysis*, 63 N.Y.U. L. REV. 1173 (1988). Strossen points out the erosions of the Fourth Amendment caused by subjective "totality of the circumstances" and "reasonable means" tests and shows the unprincipled nature of the Supreme Court's decisions in this area. Strossen notes that a "least intrusive means" test is used in virtually all other types of constitutional analyses, such as privacy in one's bodily integrity, procedural and substantive due process, free speech, association, freedom of the press, religious exercise, political participation, right to travel, privileges and immunities, and the commerce clause. *See id.* at 1210. Furthermore, courts regularly limit the law's right to intrude upon the body and bodily functions. *See also* *Roe v. Wade*, 410 U.S. 113, 155 (1973) (requiring compelling state interest, embodied in a narrowly-drawn statute, to overcome fundamental constitutional right to privacy); DOUGLAS N. HUSAK, *PHILOSOPHY OF CRIMINAL LAW* 34-49 (1987) (discussing the public rights that place limitations on the coercive power of the state to enforce criminal law); Thomas K. Clancy, *The Role of Individualized Suspicion in Assessing the Reasonableness of Searches and Seizures*, 25 U. MEM. L. REV. 483, 588 n.505 (noting common law limitations on involuntary blood and urine samples). The courts have often considered such intrusions as "a basic offense to human dignity." Clancy, *supra*, at 588 n.505. (quoting *Storms v. Coughlin*, 600 F. Supp. 1214, 1224 (S.D.N.Y. 1984)).

71. *But see* Jeffrey S. Parker, *The Economics of Mens Rea*, 79 VA. L. REV. 741, 785-87 (1993) (discussing traditional judicial reluctance to strict liability crimes).



element.<sup>72</sup>

#### IV. WITH NEGLIGENCE TOWARD THE WILL: THE SECOND ELEMENT

If the woman does not establish that she verbally refused intercourse, a second element must be considered: what the defendant knew, or reasonably could have known, about the woman's true wishes. I call the woman's true wishes "willingness" in order to distinguish this subjective matter from the objective consent standard.<sup>73</sup> Therefore, "consent" is the woman's outward, objective manifestation of her subjective, inward "willingness." "Willingness" is subsumed in the second element of rape.

There will be times when the woman may be silent,<sup>74</sup> give an ambiguous response,<sup>75</sup> or may say "yes" in an atmosphere of coercion.<sup>76</sup> It should be immediately intuitive that, while the fulfillment of the nonconsent element can convict, its nonfulfillment does not necessarily exonerate. Any of the above responses to a request for intercourse could be the result of coercion. Each must be examined for culpability on the defendant's part.

This approach offers something to those who believe that sex is noncriminal only when the woman has positively assented.<sup>77</sup> While they may not grant the

72. In a way, nonconsent is a combination of strict liability and a reasonable man standard. By making it a strict liability element, we make a *per se* judgment that no reasonable man could misunderstand a woman's "no." The assumption of this proposition is critical. If it could ever truly be proven otherwise, the definition of consent as a strict liability element would constitute a gross injustice. Furthermore, any jurisdiction implementing this concept would be well-advised to publicize it, giving notice that words now have power and give rise to legal consequence.

73. "Consent" is defined in BLACK'S LAW DICTIONARY 210 (6th ed. 1991) as synonymous with willingness. In civil law, "[c]onsent is implied in every agreement." *Id.* In the law of rape, a woman must "resist to the point where further resistance would be useless or until her resistance is overcome by force or violence" to be deemed as having not consented. *Id.* The considerations of the actions of the woman, and the requirement of force, are of course the very propositions this Article seeks to overcome.

74. In *United States v. Booker*, 25 M.J. 114 (1987), the prosecuting witness went to a motel room with a group of Navy servicemen. The record shows she was intoxicated. After having sex with her companion for the evening, she fell asleep on the bed. Each of the servicemen in the group, including the defendant, then proceeded to have sex with her. At some point she woke up, and, during sex with the defendant, spoke the name of her original companion aloud. The defendant maintained that, prior to her saying the name of the other man, he had a reasonable belief in her consent to intercourse.

In its charge to the jury, the court instructed them on the nature of "implied consent." Said the judge, "[Y]ou could imply that . . . [the victim] gave her consent by the way she moved her body around." *Id.* at 117. In other words, silence could imply consent in this military jurisdiction.

75. The most famous example of an ambiguous response is *Rusk*, *supra* note 33. Pat, the prosecuting witness, drove defendant Rusk home from a bar. Rusk left the car, and took her car keys from the ignition. Pat testified that she unwillingly went to Rusk's apartment, where they had sex. Prior to intercourse, Pat asked Rusk, "If I do what you want, will you let me go without killing me?" and "If I do what you want, will you let me go?" *Id.* at 733. By the objective definition of this Article, this was not a situation of nonconsent. Pat never said, "I don't want to have intercourse." Some courts, using Part III's definition of nonconsent, may find her statements to have been a substantial equivalent. As will be shown in Part VI, however, this analysis falls more properly within the second element. *Rusk* is also considered more fully in Part VI.

76. In an extreme example, *Agard v. Portuondo*, 117 F.3d 696, 700-01 (2<sup>nd</sup> Cir. 1997), the prosecuting witness testified that she "consented" to oral sex after being abused verbally and physically, and then watching the defendant load a handgun in her presence when she offered resistance.

77. Some commentators assert that, because women are at a socioeconomic disadvantage, all sex is nonconsensual. Sex, the argument goes, is the most valuable commodity a woman has to offer in a patriarchal

ambiguity of silence, they must certainly concede that silence is less an indicator of consent than positive agreement.<sup>78</sup> Given the requirement of proof beyond a reasonable doubt, and a reasonable man standard, it would be unacceptable to convict on the basis of silence alone. Therefore, while the strict liability nature of the nonconsent element requires a strict definition, it cannot be the end of the story. The second half of the culpability decision must examine what the defendant knew, or reasonably should have known, about the woman's willingness.

In creating the second element, a *mens rea* requirement for the defendant, the first step is to decide between an objective and a subjective test. Those who argue for a subjective test may point to the vagueness of willingness issues as making objectivity impossible. How, it may be asked, can we use an objective standard when a woman can express willingness (even if not consent) in ways other than words?<sup>79</sup> Some commentators simply find it facially unacceptable to convict for rape without proving intent.<sup>80</sup>

Even granting that communication can be ambiguous, an objective standard is still feasible. The use of a reasonable man standard affords protection to the defendant, for the jury will be instructed to adopt a male perspective of reasonableness. Yet it imposes reasonableness and societal standards<sup>81</sup> on the

---

power structure. Therefore, even a woman who says "yes" accedes to the act only as a consequence of her inferior bargaining position. See Robin L. West, *The Difference in Women's Hedonic Lives: A Phenomenological Critique of Feminist Legal Theory*, in *AT THE BOUNDARIES OF LAW* 115, 133 (Martha A. Fineman & Nancy S. Thomadsen eds., 1991) ("If what we need to do to survive . . . is have heterosexual penetration three to five times a week, then we'll do it, and if the current ethic is that we must not only do it, but enjoy it, well then, we'll enjoy it.").

78. Consistency demands this concession. If the feminist stance is that sex is consensual only when positively agreed to, it must be so because the words have meaning. See, e.g., Cheryl Siskin, *Criminal Law—No. The "Resistance not Required" Statute and "Rape Shield Law" May Not Be Enough*, 66 TEMP. L. REV. 531, 561 (1993) (arguing that a woman's verbalization of "no" should be sufficient for conviction). If a woman's words have meaning, they must have more meaning than if she had said nothing. Furthermore, the claim that conduct cannot be used to infer consent must also mean that conduct less persuasively implies nonconsent as well.

79. Not all communication is verbal. How much is actually communicated non-verbally is a favorite topic of popular culture. See, e.g., Wendy Martin, *The Sexually Satisfied Woman*, 222 COSMOPOLITAN, April 1, 1997, at 211 ("So how best to go about asserting and communicating your needs? If you're not comfortable just telling your partner what you want, try body language."); see also The Heilbron Report, *Report of the Advisory Committee on the Law of Rape* 10 (1976) (Cmd. 6352), discussed in Dolly F. Alexander, Comment, *Twenty Years of Morgan: A Criticism of the Subjectivist View of Mens Rea and Rape in Great Britain*, 7 PACE INT'L. L. REV. 207 (1995). The Heilbron Report was an English legislative study. It was commissioned after the landmark case of *Regina v. Morgan*, 2 All E.R. 347 (1975), to examine various issues of rape law. The report concluded, among other things, that the complex nature of sexual relations required a subjective standard of *mens rea*.

80. In *Morgan*, Lord Halisham wrote for the majority,

[T]o insist that a belief must be reasonable to excuse it is to insist that either the accused is to be found guilty of intending to do that which in truth he did not intend to do, or that his state of mind, though innocent of evil intent, can convict him if it be honest but not rational.

*Morgan*, 2 All E.R. 347, at 357. Lord Halisham rejected this possibility, because it was to him "abundantly clear" that conviction could not be had without intent. See *id.* This circular reasoning assumes the answer to the question, and does not advance the issue.

81. For different views about what constitutes societal attitudes, compare Douglas N. Husak & George C. Thomas III, *Date Rape, Social Convention, and Reasonable Mistakes*, 11 LAW AND PHILOSOPHY 126 (1992) (arguing that it is "manifestly unjust" to punish persons whose "behavior is reasonable according to

extremes of behavior.<sup>82</sup>

An examination of the history of rape law leads inevitably to an objective test. The objective nature of the "consent" standard was directed partly at circumventing demonstrable sexism within the criminal law system,<sup>83</sup> and partly at validating sexual autonomy.<sup>84</sup> To use a subjective test for the defendant's mental state in the second element would re-introduce the sexism that we have striven so greatly to remove. It would prevent a jury from convicting a man who honestly held unreasonable sexist beliefs. In failing to punish that unreasonableness, it would allow its continuance at the expense of victimizing women. It would mean that, no matter how clearly the victim communicated her unwillingness (short of saying "no"), a defendant's honest mistake about what she wanted would constitute a complete defense. Such honest mistakes may be truly held, but they are nonetheless intolerable in a society that insists on reasonable behavior in human interactions.<sup>85</sup>

There are also practical difficulties with a subjective test, or even an "honest mistake" defense. The Fifth Amendment of the Constitution requires that the defendant be allowed to use the "honest mistake" defense without taking the stand.<sup>86</sup> This means that a jury would have to evaluate what the defendant believed without his ever testifying about what he believed. Furthermore, in practice, courts have circumvented the subjective nature of the test by asking whether a reasonable person *could* have believed as the defendant claims he did. If a reasonable person could have so believed, the courts have then made the leap that he in fact did. This essentially collapses the subjective test into an objective one, eliminating the subjective examination altogether.<sup>87</sup> It results in a test that is less strenuous than either a subjective or an objective one. As one commentator has said,

---

existing conventions") with *ESTRICH*, *supra* note 52, at 101 (arguing that "[w]e can use the law to push forward").

82. Even the strongest advocates of a subjective test hedge at the extremes. The Heilbron Report concluded that a man should be convicted based on his own, individual culpability, not "the intention of a purely hypothetical reasonable man." Heilbron Report, *supra* note 79, at 8. In so holding, the Heilbron Report staunchly defended even stupid mistakes, so long as intent was not present. *See id.* Even so, the report backpedaled significantly when it said that one should not be acquitted for an honest mistake "no matter how ridiculous his story might be." *See id.* at 11. This logically undercuts the rest of the argument. Used this way, the term "ridiculous" is an objective standard, just as much as "reasonable" and "unreasonable" are.

83. Alternatively, it could be viewed as circumventing the entire question of whether such sexism exists in the criminal justice system or not. For those who believe it does, the objective standard removes the feared bias from the decisionmaking process. For those who believe sexism does not exist in the legal process, it at least establishes a standard of notice so high that none but the most doggedly unenlightened could ignore it.

84. I admit a bit of queasiness at this latter proposition. It is not clear to me that the criminal law should play a substantial, if any, role in such social engineering. Those who experience similar unease are directed to the fact that circumventing sexism stands alone as a sufficient reason for an objective standard of consent. Therefore, validating sexual autonomy may be viewed, by some, as a by-product.

85. Objective tests are used in virtually all other violent crimes. *See, e.g.*, MODEL PENAL CODE, art. 210, 211, 212 (Proposed Official Draft 1962) (defining crimes of criminal homicide, assault, and kidnapping).

86. *See* U.S. CONST. amend. V ("No person . . . shall be compelled in a criminal case to be a witness against himself . . ."); Dana Berliner, *Rethinking the Reasonable Defense Belief to Rape*, 100 YALE L.J. 2687, 2694 (1991) (explaining practical difficulties with subjective standard).

87. *See* Berliner, *supra* note 86, at 2694-95.

If the courts do not enforce the subjective element, the defense becomes more available and more subject to manipulation; a defendant who did not honestly believe the victim consented may nonetheless successfully employ the defense if "hypothetically" someone else might have reasonably believed consent was given.<sup>88</sup>

In such a case, the defendant need not have honestly believed in the woman's consent; he need not even reasonably have believed in it, so long as someone reasonably could have.

*Regina v. Morgan*<sup>89</sup> is the most famous example of a subjective test gone awry. Morgan, a Royal Air Force officer, convinced three enlisted men to go to his home and have sex with his wife. The three later testified that Morgan had told them not to worry if she screamed or resisted; she was "kinky," said Morgan, and needed the violence to become excited. (Morgan denied this part of the story). The four men took turns holding Morgan's wife down and having sex with her, while she screamed, cried, and tried in vain to fight them off. She reported the incident immediately afterward.

Morgan and his three co-defendants were convicted at trial. Upon review, the House of Lords found that a reasonable belief in the prosecuting witness's consent constituted a complete defense. Although the convictions were upheld, the dangers of the subjective test are manifest. *Morgan* was a 3-2 decision. At the trial level, the jury had been instructed that the defendants must have had a reasonable belief in the prosecuting witness's consent to be acquitted. This was held harmless error by the House of Lords, who ruled that no reasonable jury could have believed that the defendants made an honest mistake. The House of Lords' ruling notwithstanding, it is impossible to know how the jury would have come out had they been instructed on the subjective test.

It is important not to attribute the denial of an "honest mistake" defense to a concern about a defendant who might lie regarding what he believed to be true. That would be equivalent to the previous supposition that the prosecuting witness is lying, thus mixing elemental and evidentiary requirements. What is really at stake are two central theories. First, at some point, a reasonable man must be put on notice that his actions have become coercive. Criminal law expects people to act reasonably, and may rightly punish them when they do not. Second, as we have said, there are some acts of aggression and coercion so beyond the pale of reasonableness that no "good faith" on the part of the actor will acquit him.<sup>90</sup>

Some commentators have argued that, even if an objective test is to be used,

---

88. *Id.* at 2695.

89. 2 All E.R. 347 (1975).

90. See, e.g., *supra* note 80.

the "reasonable woman" inquiry is the correct standard.<sup>91</sup> Leaving the *mens rea* difficulty of that position aside, for this has already been discussed, the "reasonable woman" standard would not solve the problem of sexist jurists and juries. If anything, it would exacerbate it, especially when the "reasonable woman" is defined by male jurists.<sup>92</sup>

While a reasonable man standard is also vulnerable to sexist judgments, recall that this element is reached only when the verbal manifestation of consent is ambiguous. The first element disposes of the easy cases; the second element addresses the hard ones. Creating a "reasonable man" standard, while not a perfect solution, substitutes societal norms for individual anomalies. Although it remains subject to societal and institutional sexism, no standard (other than strict liability) could ever eliminate those dangers completely.

Eliminating the defense of "honest mistake" sets the standard for mental state at negligence *de facto*. Setting the bar as high as recklessness would mean that the defendant would have to have been aware of the prosecuting witness's unwillingness, and "consciously disregard[ed]" it.<sup>93</sup> This requirement of conscious disregard would imply the existence of an unreasonable "honest mistake" defense. Therefore, the defendant need only act negligently with respect to the prosecuting victim's willingness to be guilty of rape.

At this stage, a devil's choice becomes apparent. By focusing on the prosecuting witness's actions, rape law brings her past into the courtroom. Yet by focusing on the defendant's *mens rea*, and demanding reasonableness of him, the defendant must be allowed to introduce evidence that would tend to show he acted reasonably. This inevitably will bring the focus upon the prosecuting witness's conduct, and such evidence will now be required for him to form a defense. It must be agreed, from this choice between evils, that some such focus upon the witness's conduct is inevitable. The use of a negligence standard mitigates this somewhat, as those of her acts without reasonable implications about her willingness will not exculpate the defendant. The negligence standard may even keep such evidence out completely as irrelevant or inflammatory.<sup>94</sup> Lastly, negligence is the best we can do. It cannot be disputed that a woman's acts are relevant concerning the reasonableness of the defendant's beliefs.<sup>95</sup> We have argued thus far that the defendant must consider those actions which

---

91. See, e.g., Mary Ruffolo Rauch, *Rape—From a Woman's Perspective*, 82 ILL. B.J. 614, 618 (1994) ("By defining force through a man's perception, legal doctrine omits much of what women perceive as coercion.").

92. See, e.g., *People v. Collins*, 186 N.E. 2d 30, 33 (Ill. 1962) ("The underlying thought here is that it is more probable that an unchaste woman would assent . . . than a virtuous woman . . ."); *People v. Bales*, 169 P.2d 262 (Cal. 1946) (overturning rape conviction because lack of resistance could reasonably be interpreted as consent).

93. MODEL PENAL CODE § 2.02(c) (Proposed Official Draft 1962).

94. See FED. R. EVID. 403 (excluding evidence for which unfair prejudice substantially outweighs probative value).

95. The Federal Rules of Evidence define relevance broadly, such that relevant evidence is that which "[has] any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." FED. R. EVID. 401.

manifest her refusal; it is the logical converse to allow him to consider those actions which manifest her assent. In so doing, he may be constitutionally entitled to introduce them as evidence in his defense.<sup>96</sup> By placing the standard at one of objective reasonableness, however, the defendant's use of the prosecuting witness's conduct is limited to what would have led him reasonably to conclude that the woman had agreed to intercourse. All other conduct, such as her sexual history, is irrelevant.<sup>97</sup>

It may be a curiosity of the law that "no harm, no foul" cases may still be prosecuted. Consider the woman who truly desires sex, but remains silent, or assents to intercourse. If the man truly believes he has coerced her into sex, he could theoretically be convicted. In reality, it is not clear who would bring the charges. This is at best a trivial case, and will be rarely encountered as a practical matter. More worrisome is what Estrich refers to as the "male rape fantasy,"<sup>98</sup> the origin of much of the current state of rape law. This may occur only rarely; yet, as Estrich herself points out, "even if only one of a hundred men, or one of a thousand, is falsely accused, the question is still how we can protect that man's right to disprove his guilt."<sup>99</sup> Ultimately, reliance must fall on the court system and the reasonable doubt requirement to save the defendant from the truly vindictive former lover. If any given rape trial becomes a contest of credibility, it is no worse than trials in other criminal contexts. That rape is often a difficult crime to prove does not mean that we need to change the crime's elements.<sup>100</sup> We do not change the definition of robbery when some cases boil down to the defendant's word against the complainant's. It is no answer that such credibility contests may occur more frequently in rape, where there are usually no witnesses and evidence is often consistent with consensual sex.<sup>101</sup> The infrequency of a given set of circumstances does not mean we should ignore the principles behind them, and if we satisfy ourselves that a defendant may properly defend himself

---

96. See Clifford S. Fishman, *Consent, Credibility, and the Constitution: Evidence Relating to a Sex Offense Complainant's Past Sexual Behavior*, 44 CATH. U. L. REV. 709, 730 (1995) (arguing that a defendant has due process, equal protection, and confrontation rights to present evidence of prosecuting witness's relevant conduct).

97. Dripps points out that this reasonableness standard places rape shield laws on doctrinally strong ground. Although Dripps uses a different approach, evidence of past sexual conduct is inadmissible under a reasonableness standard because it is completely irrelevant. "[L]iability would hinge exclusively on the defendant's conduct and mental state. . . . [This shift in focus] makes the victim's psychology irrelevant." Dripps, *supra* note 37, at 1797-98. Thus, the definition has the distinct advantage of answering the many constitutional challenges to rape shield laws. See also *id.* at 1798 n.58 (explaining that not all previous conduct by the prosecuting witness would be irrelevant, but that rape shield laws would be substantially more consistent with the Constitution).

98. ESTRICH, *supra* note 52, at 5-6. Estrich defines the "male rape fantasy" as:

The male rape fantasy is a nightmare of being caught in the classic, simple rape. A man engages in sex. Perhaps he's a bit aggressive about it. The woman says no but doesn't fight very much. Finally, she gives in. It's happened like this before, with other women, if not with her. But this time is different: she charges rape. There are no witnesses. It's a contest of credibility, and he is the accused "rapist."

*Id.* Estrich thus falls into the sexist rhetoric of which she accuses the judiciary.

99. Susan Estrich, *Teaching Rape Law*, 102 YALE L.J. 509, 518 (1992).

100. See ESTRICH, *supra* note 52, at 21.

101. See *id.*

from false accusations of robbery, we must be equally satisfied that he can do so when falsely accused of rape.

In summary, then, the second element of rape is defined as *acting negligently against the will of the prosecuting witness*. Negligence is measured against the standard of a reasonable person's actions. This element is reached only if the strict liability element of nonconsent is not fulfilled.

#### V. USE OF FORCE

It is clear, now, why force is not an element of this crime. As a strict liability element, nonconsent requires nothing more than the victim's refusal and the defendant's continuing with the act to constitute culpability. Force is unnecessary, and would indeed eviscerate the concept of giving effect to the woman's words. Similarly, the second element, examining the defendant's reasonableness toward the woman's willingness, has no need of a force requirement. Although in reality a nonconsensual or unwilling rape act cannot be completed without some form of coercion or force, these are often difficult or impossible to prove.<sup>102</sup> The introduction of those elements also carries attendant difficulties; some courts used to require proof of injury to the woman in order to fulfill the force element.<sup>103</sup> In any event, force or coercion are tangential to the inquiry of the defendant's culpability, so the requirement of their proof is an inequity in law.

In addition, there are so many ways in which sex can be involuntarily coerced that to include "force" as part of the definition of rape is underinclusive. Some courts have attempted to rectify the situation by expanding the definition of "force," going so far as to include the act of penetration as sufficient to satisfy the element.<sup>104</sup> Although this occurs most often in cases where the victim is drugged or otherwise unconscious,<sup>105</sup> it demonstrates that defining rape in terms of force is highly problematic.

This is not to say that force and coercion are wholly irrelevant to the inquiry. They may still fulfill an evidentiary purpose. The connections between force, unwillingness, and *mens rea* are not to be denied; they are simply to be categorized as evidence and elements, respectively. Furthermore, different levels

---

102. See *id.* ("Unless the victim actively resists, her clothes may be untorn and her body unmarked.").

103. See Martha Chamallas, *Consent, Equality, and the Legal Control of Sexual Conduct*, 61 S. CAL. L. REV. 777, 799 (1988) ("Many forcefully argued that the resistance requirement was especially harsh on victims because it prescribed a course of action that significantly increased their chances of suffering additional physical injury."); Beth C. Miller, *A Comparison of American and Jewish Legal Views on Rape*, 5 COLUM. J. GENDER & LAW 182, 198 n.100 (1996) (citing cases in which defendant was acquitted on the grounds that complainant showed no visible injury); see also QUEEN'S BENCH FOUNDATION, RAPE PREVENTION AND RESISTANCE 85 (1976) (finding that more than half of sexual assault offenders became more violent when they encountered resistance).

104. See Renee Madeleine Hom, *State v. Moorman: Can Sex with a Sleeping Woman Constitute Forcible Rape?*, 65 N.C. L. REV. 1246, 1252-53 (1987) ("Courts have accepted with unanimity the view that an act of sexual intercourse constitutes sufficient force to support a charge of rape when the victim is asleep.").

105. See *id.* at 1250-53 (citing cases).

of force may be assigned different levels of punishment.<sup>106</sup> States should be free to gradate their rape-like crimes based on the use of force, or non-violent coercive means.<sup>107</sup> Yet there are those who believe that rape is rape, and its perpetrators are equally culpable, regardless of whether force was used or physical harm was caused.<sup>108</sup> Those who hold this belief need not dissent from this Article's more general principles. Even if one views all rapists as having the same level of culpability, and refuse to gradate based on use of force, one can still consistently adhere to the rules of *mens rea*, consent, and willingness.

In summary, force need not and cannot be an element of rape. As an indicator of willingness or consent, force is unnecessary if other signs are available, and so need not be a requirement. Furthermore, it is an evidentiary, rather than an elemental, issue of the crime; the various ways in which sex can be involuntarily coerced mandate that force not be part of rape's definition.

## VI. APPLYING THE DEFINITION

Having established the doctrinal background, the definition of rape can now be expressed concisely:

Rape is (1) sexual intercourse<sup>109</sup> (2) with negligence toward the prosecuting witness's will. Negligence is to be viewed under a reasonable man standard. If the prosecuting witness refuses sexual intercourse, the defendant has acted negligently *per se*.

To demonstrate how this proposed definition would be used, three cases shall be examined: *State v. Rusk*,<sup>110</sup> *State v. Alston*,<sup>111</sup> and *People v. Barnes*.<sup>112</sup> *Rusk* and *Alston* have been called the "[h]ard cases."<sup>113</sup> *Barnes* is frequently included in casebooks,<sup>114</sup> and presents a strong test for the second element of the crime. Because the analysis of rape cases is fact-intensive, the facts of each case will be reviewed in some detail.

106. For an interesting suggestion about including a standard of "dangerousness" in criminal analyses, see Arnold H. Loewy, *Culpability, Dangerousness, and Harm: Balancing the Factors on Which our Criminal Law is Predicated*, 66 N.C. L. REV. 283 (1987).

107. Many states already follow this policy. See *supra* note 21.

108. The theory that harm done should play no role in determining culpability has powerful advocates beyond the realm of rape law. See, e.g., H.L.A. HART, PUNISHMENT AND RESPONSIBILITY: ESSAYS IN THE PHILOSOPHY OF LAW 131 (1968) ("Why should an accidental fact that an intended harmful outcome has not occurred be a ground for punishing less a criminal who may be equally dangerous and equally wicked?").

109. The definition of sexual intercourse itself differs among states. The definition of this element is beyond the scope of this Article.

110. *Rusk*, *supra* note 33.

111. *Alston*, *supra* note 33.

112. *Barnes*, *supra* note 15.

113. See Estrich, *supra* note 99, at 513.

114. See, e.g., JOHN KAPLAN ET AL., CRIMINAL LAW: CASES AND MATERIALS 1100-12 (3rd ed. 1996).



A. *State v. Rusk*

Pat went out for the night to go barhopping with her girlfriend Terry. At the third bar, she met the defendant, Edward Rusk. Rusk knew Terry, and, after they had said hello, he began talking with Pat. In the course of conversation, they each mentioned having a child, and being separated from their respective spouses.

Pat eventually told Rusk that she had to go home, and Rusk asked for a ride back to his own place. Pat agreed, but told him, "I'm just giving a ride home, you know, as a friend, not anything to be, you know, thought of other than a ride." Rusk said, "Oh, okay." They left the bar together around midnight.

Pat parked near Rusk's apartment, in an area with which Pat was completely unfamiliar. She left the engine of her car running, and at least twice declined Rusk's invitation to go with him to his apartment. Rusk then leaned into her car and removed the car keys. He then walked to her side of the car, opened the door, and asked, "Now will you come up?"

Pat testified that she followed Rusk to his apartment out of fear. Without her keys, in an unknown neighborhood, she testified that she was afraid at that point that Rusk would rape her. Once inside the apartment, Rusk told Pat to sit down.

Pat sat in a chair beside the bed, while Rusk sat on the bed. When Rusk left the room for a few minutes, Pat made no effort to leave, but remained seated. When he returned, Pat asked for her keys back so she could leave. Rusk told her that he wanted her to stay, and asked Pat to get on the bed with him. He pulled her by the arms to the bed, and began undressing her. She took off her own slacks, the rest of her clothes, and Rusk's pants after he told her to do so. The next part of her testimony is critical:

I was still begging him to please let, you know, let me leave. I said, "you can get a lot of girls down there, for what you want," and he just kept saying, "no"; and then I was really scared, because I can't describe, you know, what was said, at that point—I didn't know what to say; and I said, "If I do what you want, will you let me go without killing me?" Because I didn't know, at that point, what he was going to do; and I started to cry; and when I did he put his hands on my throat, and started lightly to choke me; and I said, "If I do what you want, will you let me go?" And he said, yes, and at that time, I proceeded to do what he wanted me to.

Rusk and Pat had oral sex and vaginal intercourse. Rusk was convicted at trial of second degree rape, and the conviction was upheld on appeal.

It is tempting to dispose of this case on the basis of nonconsent. That temptation must be resisted, however; it will be recalled that Pat never actually told Rusk that she did not want to have sex. She in fact said, "If I do what you

want, will you let me go without killing me?" The difference is semantic, but then again, so is the definition. It is a dangerous expansion of the definition of nonconsent to include statements that do not *explicitly* and *unequivocally* refuse sex. If a strict liability element is created, which by itself can convict, that element must be construed exceedingly narrowly. The same analysis applies to Pat's initial statement that she was only offering Rusk a ride home.

Pat's statements, however, work against Rusk in the third element. It is by no means reasonable to believe that a woman who asks whether sex will save her life is in fact willing to have sex. Furthermore, when Rusk took Pat's car keys, his actions could not reasonably be deemed as directed toward Pat's willingness. What about having one's car keys taken is meant to arouse sexual passion?

For his part, Rusk would have to argue his reasonable belief in Pat's willingness. He could suggest as evidence that she did not leave the apartment when he left her alone, and she made no effort to contact anyone. Furthermore, Pat helped undress herself and Rusk prior to asking him whether he would let her go without killing her. At trial, Rusk testified that the "light choking" was in fact a caress.

In this case, the evidence seems to point to Rusk having directed his actions toward overcoming Pat's will. Without her car keys, Pat's failure to escape gave Rusk no reasonable indication that she wanted sex. Furthermore, asking him whether he would let her go without killing her, despite having taken his pants off, would clearly place any reasonable man on sufficient notice. Rusk would most likely be found guilty of rape.

In upholding Rusk's conviction, the Maryland Court of Appeals made much of Pat's state of mind, and the fear she felt. With this Article's law of rape, such an analysis is unnecessary. The focus, as shown, would have been on Rusk's state of mind, as evidenced by his actions and what he intended to accomplish by them.

#### B. State v. Alston

Cottie Brown and defendant Alston had been in a sexual relationship for six months. They lived together, fought often, and he sometimes struck her. She would occasionally leave him after being struck, and she did so on May 15. One month later, Alston found her in front of the technical school where she was enrolled, and began talking with her. He blocked her exit from the school, grabbed her by the arm, and insisted on walking with her. As the two walked, he demanded to know where she was now living, and threatened to "fix her face" if she did not tell him. Brown testified that she told Alston that the relationship was over. He demanded the right to have sex with her. They walked together to a friend's house, where they had gone on previous occasions to have sex. Although they encountered several people during this time, Brown testified that she said nothing to any of them because she believed they would not help her.

When they entered the friend's home, Alston and the friend left together for a moment. Brown did not leave or make any effort to contact anyone. When Alston returned alone, he proposed that he and Brown have sex. Brown refused, and the court found, as a matter of fact, that she had said "no, that I wasn't going to bed with him." Alston began fondling her. Brown undressed herself when he told her to, and the two engaged in sex.

Two days later, Alston came to her apartment, and the two had sex again. Brown testified that she did not fight Alston off, because she enjoyed this encounter with him.

Alston was convicted of second degree rape at trial, and the conviction was upheld on appeal. The North Carolina Supreme Court overturned Alston's conviction, on the grounds that the threats made in public were too far removed in time and meaning to have induced the later sex act.

Unlike *Rusk*, the *Alston* case is a candidate for guilt by nonconsent. When the court found, as a matter of fact, that Brown had said "no" to sex, that was sufficient to convict Alston.

The advantage of this Article's definition becomes clear with *Alston*. The North Carolina Supreme Court struggled with whether Alston's threats of force induced Brown to have sex with him. Under this new definition of rape, what caused Brown to assent is irrelevant; only the defendant's *mens rea* is at issue. Thus, if nonconsent were not to be found, the issue would be whether Alston could reasonably believe that his actions affected Brown's willingness. Particularly relevant would be his forceful grabbing of Brown's arm, and making a threat. These seem to indicate his awareness that she did not accompany him willingly. Had Brown not explicitly refused sex, this case would be much less clear-cut, and would turn very heavily on the facts in evidence.

### C. *People v. Barnes*

Marsha had known defendant Barnes for about four years. She had occasionally bought marijuana from him. On May 27, 1982, Barnes called her on the telephone to invite her to his house. She told him she was unsure, but that he could call back later. When he called twice in two hours, she agreed to come over.

Marsha arrived at Barnes' front gate an hour later, where he met her, and invited her in to smoke marijuana. She refused at first, but ultimately agreed. After smoking, Barnes began hugging her. She pushed him away, testifying that she took his actions to be just good-natured playfulness. When he continued, she said she just wanted to buy marijuana and leave. She said goodbye, and walked out of the room.

At this point, as Marsha approached the front gate, she testified that Barnes' demeanor changed. He became angry, saying, "No, you don't go leaving. You don't just jump up and leave my goddamn house." He yelled at her and argued

with her, saying she was acting like he was "a rapist or something."

Marsha asked Barnes to open the front gate for her, at which point he "reared back," which Marsha believed meant he was going to hit her. Barnes then said he had to get his shoes in order to let her out, and he went back to the house. Marsha followed him.

After putting on his shoes, Barnes stood up and began to "lecture" Marsha, threatening her, "telling her he was a man and displaying the muscles in his arms." At one point, he grabbed her by the collar of her sweater, saying he could throw her out with one hand.

Marsha testified that she suggested they go to her house in an effort to get out of his home. Barnes began hugging her, apologizing for "fussing" at her, and acting affectionately. Soon, he told Marsha to remove her clothes. Marsha refused, and Barnes told her she was making him upset. Barnes again made a gesture that Marsha believed meant he was going to hit her. Marsha undressed, and the two had intercourse for about an hour. Marsha testified that she acted as though she were a willing participant in an attempt to extricate herself from Barnes's home. Afterward, Barnes and Marsha fell asleep for an hour or two. When Marsha awoke, she went home and reported the incident to the hospital. She reported it to the police the following day.

It is unclear from the record what Marsha said to refuse intercourse. Assuming that nonconsent is not proven, this case also becomes very difficult.

California law makes the feelings of the prosecuting witness of primary importance in the analysis.<sup>115</sup> This explains the California Supreme Court's odd discussion of what Marsha felt the defendant "looked like," and how she felt threatened when he "displayed the muscles in his arms."

Again, Marsha's feelings are irrelevant under this Article's analysis. What matters is what the defendant knew or reasonably should have known of her willingness. Having grabbed her by the sweater collar, it could be inferred that he was threatening her, an act that no reasonable man would believe could lead to a willing sex partner. However, Marsha "pretended to be a willing partner." Although she claimed her motivation was escape, a jury would have to find whether Barnes could reasonably have been aware of her unwillingness. Her actions during sex will necessarily cut against Barnes' conviction.

Also important are the motions Barnes made which led Marsha to believe he would hit her. If the jury found that he meant to threaten her, that could help convict Barnes.

## VII. CONCLUSION

The above three examples show the power of this definition of rape. A defendant ignores a woman's "no" at his own peril. If he passes this threshold point, he must still be found to have given reasonable consideration to her

---

115. See CAL. PENAL CODE, *supra* note 12.

willingness to have sex. Although the complainant's conduct may still be brought into issue, it will be only to the extent it could reasonably have influenced the defendant's perceptions. Finally, such inquiry into the complainant's actions will be limited by the absence of a force requirement. What matters is what the defendant thought he was doing, not what the prosecuting witness perceived.

The law has spent a great deal of time and energy attempting to discern rape victims' states of mind. The time has come to spend our time in a more fruitful and relevant endeavor: deciding whether defendants are culpable. Regardless of the origins of current rape law, it is clearly out of step with other areas of the criminal law. By establishing that "no means no," and requiring that people at least act reasonably when dealing with one another, rape law can achieve some consistency, and, perhaps, some justice.

