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Rape*

Susan Estrich†

I. INTRODUCTION

Eleven years ago, a man held an ice pick to my throat and said: “Push over, shut up, or I’ll kill you.” I did what he said, but I couldn’t stop crying. A hundred years later, I jumped out of my car as he drove away. I ended up in the back seat of a police car. I told the two officers I had been raped by a man who came up to the car door as I was getting out in my own parking lot (and trying to balance two bags of groceries and kick the car door open). He took the car, too.

They asked me if he was a crow. That was their first question. A crow, I learned that day, meant to them someone who is black.

They asked me if I knew him. That was their second question. They believed me when I said I didn’t. Because, as one of them put it, how would a nice (white) girl like me know a crow?

Now they were on my side. They asked me if he took any money. He

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did; but while I remember virtually every detail of that day and night, I can’t remember how much. But I remember their answer. He did take money; that made it an armed robbery. Much better than a rape. They got right on the radio with that.

We went to the police station first, not the hospital, so I could repeat my story (and then what did he do?) to four more policemen. When we got there, I borrowed a dime to call my father. They all liked that.

By the time we went to the hospital, they were really on my team. I could’ve been one of their kids. Now there was something they’d better tell me. Did I realize what prosecuting a rape complaint was all about? They tried to tell me that “the law” was against me. But they didn’t explain exactly how. And I didn’t understand why. I believed in “the law,” not knowing what it was.

Late that night, I sat in the Police Headquarters looking at mug shots. I was the one who insisted on going back that night. My memory was fresh. I was ready. They had four or five to “really show” me; being “really shown” a mug shot means exactly what defense attorneys are afraid it means. But it wasn’t any one of them. After that, they couldn’t help me very much. One shot looked close until my father realized that the man had been the right age ten years before. It was late. I didn’t have a great description of identifying marks, or the like: No one had ever told me that if you’re raped, you should not shut your eyes and cry for fear that this really is happening. You should keep your eyes open focusing on this man who is raping you so you can identify him when you survive. After an hour of looking, I left the police station. They told me they’d be back in touch. They weren’t.

A clerk called me one day to tell me that my car had been found minus tires and I should come sign a release and have it towed—no small matter if you don’t have a car to get there and are slightly afraid of your shadow. The women from the rape crisis center called me every day, then every other day, then every week. The police detectives never called at all.

I learned, much later, that I had “really” been raped. Unlike, say, the woman who claimed she’d been raped by a man she actually knew, and was with voluntarily. Unlike, say, women who are “asking for it,” and get what they deserve. I would listen as seemingly intelligent people explained these distinctions to me, and marvel; later I read about them in books, court opinions, and empirical studies. It is bad enough to be a “real” rape victim. How terrible to be—what to call it—a “not real” rape victim.

Even the real rape victim must bear the heavy weight of the silence that surrounds this crime. At first, it is something you simply don’t talk about. Then it occurs to you that people whose houses are broken into or who
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are mugged in Central Park talk about it all the time. Rape is a much more serious crime. If it isn’t my fault, why am I supposed to be ashamed? If I shouldn’t be ashamed, if it wasn’t “personal,” why look askance when I mention it?

As this introduction makes clear, I talk about it. I do so very consciously. Sometimes, I have been harassed as a result. More often, it leads women I know to tell me that they too are victims, and I try to help them. I cannot imagine anyone writing an article on prosecutorial discretion without disclosing that he or she had been a prosecutor. I cannot imagine myself writing on rape without disclosing how I learned my first lessons or why I care so much.

The rapes that I examine in this Article are, like my own, the rapes of adult, competent women by men. I have simply excluded from my consideration the additional problems presented when young girls or unconscious women are raped; it is enough for me to try to understand the application of the law to women who are not special or different in these ways. I have put almost as far to one side the issue of race as a dominant theme. The history of rape, as the law has been enforced in this country, is a history of both racism and sexism. One could write an article of this length dealing only with the racism. I address it in places—for its influence is pervasive—but I cannot do justice to both. My focus is sexism.

1. By adult, I mean above the age defining statutory rape. While my focus is the rape of women, I do not mean to suggest that men are not raped. The apparent invisibility of the problem of male rape, at least outside the prison context, may well reflect the intensity of the stigma attached to the crime and the homophobic reactions against its gay victims. In some respects, the situation facing male rape victims today is not so different from that which faced female victims, say, two centuries ago.

2. The death penalty for rape in this country, now unconstitutional under Coker v. Georgia, 433 U.S. 584 (1977), was traditionally reserved for black men who raped white women. Between 1930 and 1967, 89% of the men executed for rape in this country were black. That figure includes 36% of the black men who were convicted of raping a white woman; only 2% of the defendants convicted of rape involving any other racial combination were executed. Professor Wolfgang, after a systematic analysis of 1,238 rape convictions between 1945 and 1965, concluded that race was the only factor that accounted for the disparities in the imposition of the death penalty. See Wolfgang, Racial Discrimination in the Death Sentence for Rape, in Executions in America 110-20 (W. Bowers ed. 1974); see also M. Meltsner, Cruel and Unusual 73-105 (1973); Mann & Seva, The Sexualization of Racism: The Black as Rapist and White Justice, 3 J. Black Studies 168 (1979); Wolfgang & Reidel, Race, Judicial Discretion, and the Death Penalty, 407 Annals 120 (1973). Although the death penalty for rape is now prohibited, at least one study has found that black men convicted of raping white women continue to receive the harshest penalties. See LaFree, The Effect of Sexual Stratification by Race on Official Reactions to Rape, 45 Am. Soc. Rev. 842, 852 (1980). See generally Wriggins, Rape, Racism, and the Law, 6 Harv. Women’s L.J. 103 (1983).

3. I am certain that some will say that I have not devoted enough attention to class either. I do not doubt that upper-class women fare better in the system when they are raped by lower-class men. I would suspect that class differences between victim and defendant may be more important than class itself in predicting disposition, although I have not seen any study of rape itself which confirms this. Beyond that, it seems to me that sex and sexism, not class, is far more useful as a focus in understanding the law of rape, certainly in theory but also in practice. Or, as some of my (upper-class male) friends put it to those who occasionally forget: “You may think you have it made, but you’re still a woman.”
In recent years, rape has emerged as a topic of increasing research and attention among feminists, in both popular and scholarly journals. But much of the feminist writing is not focused on an analysis of the law of rape, and some that is so focused is not very firmly grounded in the criminal law. At the same time, much of the writing about rape in the more traditional criminal law literature, with the exception of some recent articles (primarily student notes), does little more than mirror the condescension and misunderstanding, if not outright hostility to women, that have made rape a central part of the feminist agenda.

This Article examines rape within the criminal law tradition in order to expose and understand that tradition's attitude toward women. It is, first and foremost, a study of rape law as an illustration of sexism in the criminal law. A second purpose is to examine the connections between the law as written by legislators, as understood by courts, as acted upon by victims, and as enforced by prosecutors. Finally, this Article is an argument for an expanded understanding of rape in the law.

To examine rape within the criminal law tradition is to expose fully the sexism of the law. Much that is striking about the crime of rape—and revealing of the sexism of the system—emerges only when rape is examined relative to other crimes, which the feminist literature by and large does not do. For example, rape is most assuredly not the only crime in which consent is a defense; but it is the only crime that has required the victim to resist physically in order to establish nonconsent. Nor is rape the


6. For instance, "major" articles in the late nineteenth and early twentieth century discussed the problems of consent in the law of rape. But these articles are not concerned with the consent of adult, competent women: Rather, what fascinated Professors Beale and Puttkammer, the leading authors, was whether there is "consent" when a snake oil salesman convinces a woman that he is really her husband and that sex is really a physical examination of her wooden leg. I am kidding, but just a very little. See Beale, Consent in the Criminal Law, 8 HARV. L. REV. 317 (1895); Puttkammer, Consent in Rape, 19 ILL. L. REV. 410 (1925). Freud has exercised a major influence as well; although he did not invent the fear of lying women complainants, he gave the fear a solid foundation and an aura of reasoned elaboration that is evidenced in the law review writings of the 1950's and 1960's. See, e.g., Note, Corroborating Charges of Rape, 67 COLUM. L. REV. 1137 (1967) [hereinafter cited as Note, Corroborating Charges]; Note, The Resistance Standard in Rape Legislation, 18 STAN. L. REV. 680 (1966) [hereinafter cited as Note, Resistance Standard]; Note, Forcible and Statutory Rape: An Exploration of the Operation and Objectives of the Consent Standard, 62 YALE L.J. 55 (1952) [hereinafter cited as Note, Forcible and Statutory Rape].
only crime where prior relationship is taken into account by prosecutors in screening cases; yet we have not asked whether considering prior relationship in rape cases is different, and less justifiable, than considering it in cases of assault.

Sexism in the law of rape is no matter of mere historical interest; it endures, even where some of the most blatant testaments to that sexism have disappeared. Corroboration requirements unique to rape may have been repealed, but they continue to be enforced as a matter of practice in many jurisdictions. The victim of rape may not be required to resist to the utmost as a matter of statutory law in any jurisdiction, but the definitions accorded to force and consent may render "reasonable" resistance both a practical and a legal necessity. In the law of rape, supposedly dead horses continue to run.

The study of rape as an illustration of sexism in the criminal law also raises broader questions about the way conceptions of gender and the different backgrounds and perspectives of men and women should be encompassed within the criminal law. In one of his most celebrated essays, Oliver Wendell Holmes explained that the law does not exist to tell the good man what to do, but to tell the bad man what not to do. Holmes was interested in the distinction between the good and bad man; I cannot help noticing that both are men. Most of the time, a criminal law that reflects male views and male standards imposes its judgment on men who have injured other men. It is "boys' rules" applied to a boys' fight. In rape, the male standard defines a crime committed against women, and male standards are used not only to judge men, but also to judge the conduct of women victims. Moreover, because the crime involves sex itself, the law of rape inevitably treads on the explosive ground of sex roles, of male aggression and female passivity, of our understandings of sexuality—areas where differences between a male and a female perspective may be most pronounced.

The criminal law defines rape in at least three places. The way most of us teach "law" is by focusing on the common law tradition: cases from

7. Similar questions may be raised, for example, when a woman is prosecuted for killing the husband who battered her, see, e.g., Ibn-Tamas v. United States, 407 A.2d 626 (D.C. 1979), or a man suspected of sexually molesting her children, see, e.g., State v. Wanrow, 88 Wash. 2d 221, 559 P.2d 548 (1977). The law must define the standard of "reasonableness" against which the woman's conduct must be judged for purposes of self-defense or provocation. Is the question what a "reasonable person" would have done in such a situation, or what a "reasonable woman" would have done? Is there such a thing, in life or in law, as reasonable people, or only men and women, with all their differences?


9. In referring to "male" standards and "boys' rules," I do not mean to suggest that every man adheres to them. A "male view" is nonetheless distinct from a "female view" not only by the gender of most of those who adhere to it, but also by the character of the life experiences and socialization which tend to produce it.
appellate courts and leading commentary. That is what I do in Part II of this Article. In Part III, I look at the law of statutes by examining two very different and very influential statutory schemes which were intended, and which have served, as models of "reform." Finally, in Part IV of this Article, my focus is on how the criminal justice system defines and understands rape.

In considering each area, my questions are essentially the same: How have the limits on the crime of rape been formulated? What do those limits signify? What makes it rape, as opposed to sex? In what ways is rape defined differently from other crimes? What do those differences tell us about the law's attitudes towards women, men, sex, and sexuality?

The answers I have found are strikingly consistent in each area of the "law." At one end of the spectrum is the "real" rape, what I will call the traditional rape: A stranger puts a gun to the head of his victim, threatens to kill her or beats her, and then engages in intercourse. In that case, the law—judges, statutes, prosecutors and all—generally acknowledge that a serious crime has been committed. But most cases deviate in one or many respects from this clear picture, making interpretation far more complex. Where less force is used or no other physical injury is inflicted, where threats are inarticulate, where the two know each other, where the setting is not an alley but a bedroom, where the initial contact was not a kidnapping but a date, where the woman says no but does not fight, the understanding is different. In such cases, the law, as reflected in the opinions of the courts, the interpretation, if not the words, of the statutes, and the decisions of those within the criminal justice system, often tell us that no crime has taken place and that fault, if any is to be recognized, belongs with the woman. In concluding that such acts—what I call, for lack of a better title, "non-traditional" rapes—are not criminal, and worse, that the woman must bear any guilt, the law has reflected, legitimized, and enforced a view of sex and women which celebrates male aggressiveness and punishes female passivity. And that vision, while under attack in recent years, continues to be a dominant force in our society and in the law of rape.

10. The cases I have chosen to examine date primarily from the last decade; they state rules which continue to have force. While I am far more interested in slaying real dragons than straw men, these cases are admittedly unrepresentative in the same way that all appellate cases are unrepresentative of the criminal justice system. The overwhelming majority of all rape cases—and certainly most of the closest and most difficult among them—never reach the appellate courts or result in written opinions. They are dismissed or plea bargained. In looking for cases to discuss in this Article, as in looking for cases to teach my students, I have avoided three-paragraph affirmances on sufficiency of the evidence. Instead, I have looked for cases where there are majorities and dissents, for cases where there are opinions in both the intermediate and the highest courts of appeal, in short, for cases where the courts are struggling with what they see as difficult questions. Those are the questions I want to struggle with too.
Finally, this Article is an argument that the law can make a difference—and that it should. But the answer is not to write the perfect statute. While some statutes invite a more restrictive application than others, there is no “model statute” solution to rape law, because the problem has never been the words of the statutes as much as our interpretation of them. A typical statute of the 1890’s—punishing a man who engages in sexual intercourse “by force” and “against the will and without the consent” of the woman—may not be all that different from the “model” statute we will enforce in the 1990’s. The difference must come in our understanding of “consent” and “will” and “force.”

Some of those who have written about rape from a feminist perspective intimate that nothing short of political revolution can redress the failings of the traditional approach to rape, that most of what passes for “sex” in our capitalist society is coerced, and that no lines can or should be drawn between rape and what happens in tens of millions of bedrooms across America.

So understood, this particular feminist vision of rape shares one thing with the most traditional sexist vision: the view that non-traditional rape is not fundamentally different from what happens in tens of millions of bedrooms across America. According to the radical feminist, all of it is rape; according to the traditionalist, it is all permissible sex and seduction. In policy terms, neither is willing to draw lines between rape and permissible sex. As a result, the two visions, contradictory in every other respect, point to the same practical policy implications.

My own view is different from both of these. I recognize that both men and women in our society have long accepted norms of male aggressiveness and female passivity which lead to a restricted understanding of rape. And I do not propose, nor do I think it feasible, to punish all of the acts of sexual intercourse that could be termed coerced. But lines can be drawn between these two alternatives. The law should be understood to prohibit claims and threats to secure sex that would be prohibited by extortion law and fraud or false pretenses law as a means to secure money. The law should evaluate the conduct of “reasonable” men, not according to a Playboy-macho philosophy that says “no means yes,” but by according respect to a woman’s words. If in 1986 silence does not negate consent, at least crying and saying “no” should.

Traditionally, the law has done more than reflect the restrictive and sexist views of our society; it has legitimized and contributed to them. In

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11. The statutes of the 1990's will no doubt include degrees of rape based on weapons, injuries, or intent, but unless there are dramatic changes in the next ten years, they will continue to rely on some combination of “force” and “consent” in defining the offense. See infra Part V.
12. See, e.g., MacKinnon, supra note 4, at 635; see also D. Russell, supra note 4, at 276.
the same way, a law that rejected those views and respected female autonomy might do more than reflect the changes in our society; it might even push them forward a bit.

II. THE DEFINITION OF RAPE: THE COMMON LAW TRADITION

The traditional way of defining a crime is by describing the prohibited act (actus reus) committed by the defendant and the prohibited mental state (mens rea) with which he must have done it. We ask: What did the defendant do? What did he know or intend when he did it?

The definition of rape stands in striking contrast to this tradition, because courts, in defining the crime, have focused almost incidentally on the defendant—and almost entirely on the victim. It has often been noted that, traditionally at least, the rules associated with the proof of a rape charge—the corroboration requirement, the requirement of cautionary instructions, and the fresh complaint rule—as well as the evidentiary rules relating to prior sexual conduct by the victim, placed the victim as much on trial as the defendant. Such a reversal also occurs in the course of defining the elements of the crime. Mens rea, where it might matter, is all but eliminated; prohibited force tends to be defined according to the response of the victim; and nonconsent—the sine qua non of the offense—turns entirely on the victim’s response.

But while the focus is on the female victim, the judgment of her actions is entirely male. If the issue were what the defendant knew, thought, or intended as to key elements of the offense, this perspective might be understandable; yet the issue has instead been the appropriateness of the woman’s behavior, according to male standards of appropriate female behavior.

To some extent, this evaluation is but a modern response to the long-standing suspicion of rape victims. As Matthew Hale put it three centuries ago: “Rape is . . . an accusation easily to be made and hard to be
proven, and harder to be defended by the party accused, tho never so innocent.’

But the problem is more fundamental than that. Apart from the woman’s conduct, the law provides no clear, working definition of rape. This rather conspicuous gap in the law of rape presents substantial questions of fair warning for men, which the law not so handily resolves by imposing the burden of warning them on women.

At its simplest, the dilemma lies in this: If nonconsent is essential to rape (and no amount of force or physical struggle is inherently inconsistent with lawful sex), and if no sometimes means yes, and if men are supposed to be aggressive in any event, how is a man to know when he has crossed the line? And how are we to avoid unjust convictions?

This dilemma is hardly inevitable. Partly, it is a product of the way society (or at least a powerful part of it) views sex. Partly, it is a product of the lengths to which the law has gone to enforce and legitimize those views. We could prohibit the use of force and threats and coercion in sex, regardless of “consent.” We could define consent in a way that respected the autonomy of women. Having chosen neither course, however, we have created a problem of fair warning, and force and consent have been defined in an effort to resolve this problem.

Usually, any discussion of rape begins (and ends) with consent. I begin instead with *mens rea*, because if unjust punishment of the blameless man is our fear (as it was Hale’s), then *mens rea* would seem an appropriate place to start addressing it. At least a requirement of *mens rea* would avoid unjust convictions without adjudicating the “guilt” of the victim. It could also be the first step in expanding liability beyond the most traditional rape.

Without *mens rea*, the fair warning problem turns solely on the understanding of force and consent. To the extent that force is defined apart from a woman’s reaction, it has been defined narrowly, in the most schoolboyish terms. But most of the time, force has been defined according to the woman’s will to resist, judged as if she could and should fight like a man. Thus defined, force serves to limit our understanding of rape even in cases where a court might be willing to say that this woman did not consent.

Rape is not a unique crime in requiring nonconsent. But it is unique in the definition given to nonconsent. As it has been understood, the consent standard denies female autonomy; indeed, it even denies that women are capable of making decisions about sex, let alone articulating them. Yet

15. 1 M. HALE, THE HISTORY OF THE PLEAS OF THE CROWN 635 (1778). This statement is the usual basis for the “cautionary” instructions traditionally given in rape cases.
consent, properly understood, has the potential to give women greater power in sexual relations and to expand our understanding of the crime of rape. That is, perhaps, why so many efforts have been made to cabin the concept.

A. Mens Rea

It is difficult to imagine any man engaging in intercourse accidentally or mistakenly. It is just as difficult to imagine an accidental or mistaken use of force, at least as force is conventionally defined. But it is not at all difficult to imagine cases in which a man might claim that he did not realize that the woman was not consenting to sex. He may have been mistaken in assuming that no meant yes. He may not have bothered to inquire. He may have ignored signs that would have told him that the woman did not welcome his forceful penetration.

In doctrinal terms, such a man could argue that his mistake of fact should exculpate him because he lacked the requisite intent or mens rea as to the woman’s required nonconsent.\(^6\) American courts have altogether eschewed the mens rea or mistake inquiry as to consent, opting instead for a definition of the crime of rape that is so limited that it leaves little room for men to be mistaken, reasonably or unreasonably, as to consent. The House of Lords, by contrast, has confronted the question explicitly and, in its leading case, has formally restricted the crime of rape to men who act recklessly, a state of mind defined to allow even the unreasonably mistaken man to avoid conviction.

This Section argues that the American courts’ refusal to confront the mens rea problem works to the detriment of the victim. In order to protect men from unfair convictions, American courts end up defining rape with

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6. Mistakes of fact which are unrelated to elements of the offense are irrelevant to guilt or innocence; those which exculpate do so precisely because they negate the required mens rea as to an element of the offense. Thus, it matters not at all if the defendant believed—reasonably or unreasonably—that his victim was a professional model (the example is suggested by one case in which the defendant’s stated intent was to have intercourse with a model; the victim was a clerical employee of a modeling agency); it should matter if he believes she is consenting, however, because nonconsent is an element of the crime. In order for the prohibited act to be criminal, it should not be significant, for these purposes, whether nonconsent is considered to be part of the definition of the actus reus prohibited by rape law, or a required “circumstance.” In either case, the prosecution should be held to prove that the defendant in fact had the requisite mental state, whether it is, in Model Penal Code terms, purpose, knowledge, recklessness or even negligence, as to nonconsent. See G. Williams, Criminal Law 137 (1953) (“It is impossible to assert that a crime requiring intention or recklessness can be committed although the accused labored under a mistake that negatived the requisite intention or recklessness. Such an assertion carries its own refutation.”) The Model Penal Code has a separate provision as to mistakes of fact, but one which seeks to make clear that mistakes exculpate because, and only because, they negative the required mental state as to one or more elements of the offense. Section 2.04(1)(a) provides a mistake of fact defense if “the ignorance or mistake negatives the purpose, knowledge, belief, recklessness or negligence required to establish a material element of the offense.” Model Penal Code § 2.04(1)(a) (1985).
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undue restrictiveness. The English approach, while doctrinally clearer, also tends toward an unduly restricted definition of the crime of rape.

While the defendant's attitude toward consent may be considered either an issue of *mens rea* or a mistake of fact, the key question remains the same. In *mens rea* terms, the question is whether negligence suffices, that is, whether the defendant should be convicted who claims that he thought the woman was consenting, or didn't think about it, in situations where a "reasonable man" would have known that there was not consent. In mistake of fact terms, the question is whether a mistake as to consent must be reasonable in order to exculpate the defendant.  

In defining the crime of rape, most American courts have omitted *mens rea* altogether. In Maine, for example, the Supreme Judicial Court has held that there is no *mens rea* requirement at all for rape. In Pennsylvania, the Superior Court held in 1982 that even a reasonable belief as to the victim's consent would not exculpate a defendant charged with rape. In 1982 the Supreme Judicial Court of Massachusetts left open the question whether it would recognize a defense of reasonable mistake of fact as to consent, but it rejected the defendant's suggestion that any mistake, reasonable or unreasonable, would be sufficient to negate the required intent to rape; such a claim was treated by the court as bordering on the ridiculous. The following year the court went on to hold that a specific intent that intercourse be without consent was not an element of the crime of

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17. Arguably, viewing such situations as cases of a mistake "defense" rather than as cases where the required *mens rea* cannot be established invites a court or legislature to impose the burden of coming forward and of proving the defense on the defendant. But as long as nonconsent is spelled out as an affirmative element of the crime, such a shift at least in the burden of persuasion would raise serious constitutional questions. See Patterson v. New York, 432 U.S. 197 (1977) (New York law requiring defendant to prove affirmative defense not violative of due process clause because defense bears no direct relationship to elements of crime). Still, some states have managed to destroy the symmetry: Pennsylvania, for example, follows the Model Penal Code approach to the point of providing a mistake of fact defense when it negates the "intent, knowledge, belief, recklessness, or negligence required," but only if the mistake is one "for which there is a reasonable explanation or excuse." 18 PA. CONS. STAT. ANN. tit. 18, § 304 (Purdon 1983). In other words, for some crimes requiring at least recklessness, negligence as to some elements (those conceived of in mistake terms) is sufficient to convict.

18. "The legislature, by carefully defining the sex offenses in the criminal code, and by making no reference to a culpable state of mind for rape, clearly indicated that rape compelled by force or threat requires no culpable state of mind." State v. Reed, 479 A.2d 1291, 1296 (Me. 1984).

19. [D]efendant contends that the court should have instructed the jury that if the defendant reasonably believed that the prosecutrix had consented to his sexual advances that this would constitute a defense to the rape and involuntary deviate sexual intercourse charge. . . . The charge requested by the defendant is not now and has never been the law of Pennsylvania. . . . If the element of the defendant's belief as to the victim's state of mind is to be established as a defense to the crime of rape then it should be done by our legislature which has the power to define crimes and offenses. We refuse to create such a defense.


rape,\textsuperscript{21} that decision has since been construed to mean that there is no intent requirement at all as to consent in rape cases.\textsuperscript{22}

To treat what the defendant intended or knew or even should have known about the victim’s consent as irrelevant to his liability sounds like a result favorable to both prosecution and women as victims. But experience makes all too clear that it is not. To refuse to inquire into \textit{mens rea} leaves two possibilities: turning rape into a strict liability offense where, in the absence of consent, the man is guilty of rape regardless of whether he (or anyone) would have recognized nonconsent in the circumstances; or defining the crime of rape in a fashion that is so limited that it would be virtually impossible for any man to be convicted where he was truly unaware or mistaken as to nonconsent. In fact, it is the latter approach which has characterized all of the older, and many of the newer, American cases. In practice, abandoning \textit{mens rea} produces the worst of all possible worlds: The trial emerges not as an inquiry into the guilt of the defendant (is he a rapist?) but of the victim (was she really raped? did she consent?). The perspective that governs is therefore not that of the woman, nor even of the particular man, but of a judicial system intent upon protecting against unjust conviction, regardless of the dangers of injustice to the woman in the particular case.

The requirement that sexual intercourse be accompanied by force or

\begin{itemize}
\item \textsuperscript{22} In Commonwealth v. Lefkowitz, 20 Mass. App. Ct. 513, 481 N.E.2d 227, 230, \textit{review denied}, 396 Mass. 1103, 485 N.E.2d 224 (1985), the Massachusetts Appeals Court termed an argument that some intent requirement ought to apply to every element of the offense, including consent, a request for an instruction on specific intent and rejected it out of hand. The trial judge in that case thought the defendants’ attitudes toward consent to be irrelevant: In rejecting their proffered instruction, he explained that the jury should “not look at [the case] from the point of view of the defendant’s perceptions . . . I don’t think that’s the law.” \textit{Id.} at 518-19, 481 N.E.2d at 230. His decision was upheld by the Appeals Court on the ground that “specific intent”—a term they never defined—was not required. It seems quite clear that, as used by the Massachusetts court, “specific intent” does not mean a \textit{mens rea} of “purpose” as it has been traditionally understood; rather, it means any \textit{mens rea} at all. \textit{Cf. Model Penal Code} \textsection 2.02(1) (1985) (\textit{mens rea} required as to each element of offense); S. Kadish, S. Schulhofer & M. Paulsen, \textit{Criminal Law} 277 (1983) (“The term \textit{specific intent} has been productive of untold confusion, partly because courts have not been consistent in their use of it and partly for the more fundamental reason that it is often quite difficult to determine whether a statute should be interpreted to require specific intent—that is, the [Model Penal] Code concept of a true ‘purpose.’”) (emphasis in original).
\item \textsuperscript{23} And in South Dakota, the state supreme court has held that “evidence of other alleged rapes cannot be deemed to be admissible because it shows intent for the reason that intent is simply not one of the elements of the crime charged.” State v. Houghton, 272 N.W.2d 788, 791 (S.D. 1978). \textit{See also} State v. Cantrell, 234 Kan. 426, 434, 673 P.2d 1147, 1153–54 (1983), \textit{cert. denied}, 105 S. Ct. 84 (1984); People v. Hammack, 63 Mich. App. 87, 91, 234 N.W.2d 415, 417 (1975); Brown v. State, 59 Wis. 2d 200, 213–14, 207 N.W.2d 602, 609 (1973). Two notable exceptions to this pattern among American courts are Alaska and California. \textit{See Reynolds} v. State, 664 P.2d 621 (Alaska Ct. App. 1983); People v. Mayberry, 15 Cal. 3d 143, 152 P.2d 1337, 125 Cal. Rptr. 745 (1975). In \textit{Mayberry}, the California court held that the state must prove that a defendant intentionally engaged in intercourse and was at least negligent regarding consent. In \textit{Reynolds}, the Alaska court held that the state must prove that the defendant knowingly engaged in sexual intercourse and recklessly disregarded his victim’s lack of consent.
\end{itemize}
threat of force to constitute rape provides a man with some protection against mistakes as to consent. A man who uses a gun or knife against his victim is not likely to be in serious doubt as to her lack of consent, and the more narrowly force is defined, the more implausible the claim that he was unaware of nonconsent.

But the law’s protection of men is not limited to a requirement of force. Rather than inquire whether the man believed (reasonably or unreasonably) that his victim was consenting, the courts have demanded that the victim demonstrate her nonconsent by engaging in resistance that will leave no doubt as to nonconsent. The definition of nonconsent as resistance—in the older cases, as utmost resistance,\(^2\) while in some more recent ones, as “reasonable” physical resistance\(^2\)\(^4\)—functions as a substitute for mens rea to ensure that the man has notice of the woman's nonconsent.

The choice between focusing on the man’s intent or focusing on the woman’s is not simply a doctrinal flip of the coin.

First, the 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 (even though utterly unknown to the man).\(^2\)\(^5\) Considering consent from his perspective,
by contrast, substantially undermines the relevance of the woman's sexual history where it was unknown to the man.  

Second, the issue for determination shifts from whether the man is a rapist to whether the woman was raped. A verdict of acquittal thus does more than signal that the prosecution has failed to prove the defendant guilty beyond a reasonable doubt; it signals that the prosecution has failed to prove the woman's sexual violation—her innocence—beyond a reasonable doubt. Thus, as one dissenter put it in disagreeing with the affirmance of a conviction of rape: "The majority today . . . declares the innocence of an at best distraught young woman." Presumably, the dissenter thought the young woman guilty.

Third, the resistance requirement is not only ill-conceived as a definition of nonconsent, but is an overbroad substitute for mens rea in any event. Both the resistance requirement and the mens rea requirement can be used to enforce a male perspective on the crime, but while mens rea might be justified as protecting the individual defendant who has not made a blameworthy choice, the resistance standard requires women to risk injury to themselves in cases where there may be no doubt as to the man's intent or blameworthiness. The application of the resistance requirement has not been limited to cases in which there was uncertainty as to what the man thought, knew or intended; it has been fully applied in cases where there can be no question that the man knew that intercourse was without consent. Indeed, most of the cases that have dismissed claims that mens rea ought to be required have been cases where both force and resistance were present, and where there was no danger of any unfairness.

Finally, by ignoring mens rea, American courts and legislators have imposed limits on the fair expansion of our understanding of rape. As

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26. A defendant enjoys no constitutional right to present irrelevant evidence; to the extent that the legal issue is framed in terms of his intent, rather than hers, facts about her reputation and history which were unknown to him are far less probative and far more prejudicial, especially in view of the strong public policy grounds favoring exclusion of such evidence. Cf. Berger, supra note 5 (model statute includes distinction based on defendant's knowledge).

Explicitly recognizing the mens rea issue would, of course, allow defendants in states with shield laws to argue that their inability to present evidence of sexual history which they claim was known to them denied them their constitutional right to present exculpatory evidence. Certainly it would be reasonable to require such defendants to present persuasive evidence of the fact of their knowledge in the hearing provided for by most shield statutes. It is not clear why framing the issue in terms of the fact of consent—rather than the defendant's knowledge or intent with respect to consent—could constitutionally provide a woman victim with any more protection of her sexual history; to the extent that the key issue is her intent, a defendant would have an equally strong Sixth Amendment claim as to his right to present all evidence (whether known to him or not) that might be relevant to the fact of consent.


28. See infra text accompanying notes 100-33.

ne mirected enforcement of the law so that mens rea is not required, and that no instructions on intent need be given, pressure will exist to retain some form of resistance requirement and to insist on force as conventionally defined in order to protect men against conviction for "sex." Using resistance as a substitute for mens rea unnecessarily and unfairly immunizes those men whose victims are afraid enough, or intimidated enough, or, frankly, smart enough, not to take the risk of resisting physically. In doing so, the resistance test may declare the blameworthy man innocent and the raped woman guilty.

While American courts have unwisely ignored the entire issue of mens rea or mistake of fact, the British courts may have gone too far in the other direction. To their credit, they have squarely confronted the issue, but their resolution suggests a highly restrictive understanding of criminal intent in cases of sexual assault. The focal point of the debate in Great Britain and the Commonwealth countries was the House of Lords' decision in Director of Public Prosecutions v. Morgan, in which the certified question was: "Whether in rape the defendant can properly be convicted, notwithstanding that he in fact believed that the woman consented, if such belief was not based on reasonable grounds." The majority of the House of Lords answered the question in the negative.

The Heilbron Committee was created to review the controversial Morgan decision. The Committee's recommendation, ultimately enacted in 1976, retained the Morgan approach in requiring that at the time of in-

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31. Id. at 205, [1975] 2 All E.R. at 354.
32. Mr. Morgan and his three co-defendants had been convicted of the rape of Mr. Morgan's wife. The four men had been drinking together and when they failed in their efforts to "find some women," Mr. Morgan invited the three home to have intercourse with his wife. According to the three co-defendants, Morgan told them not to be surprised if his wife struggled, since she was "kinky" and this was the only way she could be "turned on." All four were convicted, Mr. Morgan for aiding and abetting, and their convictions had been affirmed by the Court of Appeals. Id. at 182, 206, [1975] 2 All E.R. at 347, 355. According to Lord Hailsham:

Once one has accepted, what seems to me abundantly clear, that the prohibited act in rape is non-consensual sexual intercourse, and that the guilty state of mind is an intention to commit it, it seems to me to follow as a matter of inexorable logic that there is no room either for a "defence" of honest belief or mistake, or of a defence of honest and reasonable belief and mistake. Either the prosecution proves that the accused had the requisite intent, or it does not. In the former case it succeeds, and in the latter it fails. Since honest belief clearly negatives intent, the reasonableness or otherwise of that belief can only be evidence for or against the view that the belief and therefore the intent was actually held.

Id. at 214, [1975] 2 All E.R. at 361.
33. The Times of London attacked Morgan as "unduly legalistic" and not in accord with "common sense." The Times (London), May 5, 1975, at 15, col. 1, while the academic community sprang to the defense of the House of Lords decision as, in Professor J.C. Smith's view, "a victory for common sense so far as intention in the criminal law is concerned." The Times (London), May 7, 1975, at 17, col. 4; see also The Times (London), May 8, 1975, at 15, col. 6 (letter of Professor Glanville Williams). But see The Times (London) May 12, 1975, at 15, col. 5 (letter of Jack Ashley, M.P.).
tercourse the man knew or at least was aware of the risk of nonconsent, but provided that the reasonableness of the man’s belief could be considered by the jury in determining what he in fact knew. In situations where a "reasonable man" would have known that the woman was not consenting, most defendants will face great difficulty in arguing that they were honestly mistaken or inadvertent as to consent. Thus, in Morgan itself, the House of Lords, although holding that negligence was not sufficient to establish liability for rape, upheld the convictions on the ground that no properly instructed jury, in the circumstances of that case, could have concluded that the defendants honestly believed that their victim was consenting. Still, in an English case decided shortly after Morgan, on facts substantially similar (a husband procuring a buddy to engage in sex with his crying wife), an English jury concluded that the defendant had been negligent in believing, honestly but unreasonably, in the wife’s consent. On the authority of Morgan, the court held that the defendant therefore deserved acquittal.

My view is that such a “negligent rapist” should be punished, albeit—as in murder—less severely than the man who acts with purpose or knowledge, or even knowledge of the risk. First, he is sufficiently blame-

34. The Sexual Offences (Amendment) Act, § 1(1976). See generally Smith, The Heilbron Report, 1976 Crim. L. Rev. 97, 98–105. But if the question appeared settled in 1976, the House of Lords decision in Regina v. Caldwell, 1982 A.C. 341, [1981] 1 All E.R. 961, [1981] 2 W.L.R. 509 (H.L.) once again opened doubts. In that case, which did not involve a sexual offense, Lord Diplock seemed to redefine recklessness to allow conviction where the accused unreasonably and foolishly was not aware of the risks created by his conduct. According to Lord Diplock, a person is reckless if “(1) he does an act which in fact creates an obvious risk that property will be destroyed or damaged and (2) when he does the act he either has not given any thought to the possibility of there being any such risk or has recognized that there was some risk involved and has nonetheless gone on to do it.” Id. at 354, [1981] 1 All E.R. at 967. In dissenting from Lord Diplock’s approach in Caldwell, Lord Edmund-Davies expressed his concern that the new formulation would now be applied to all crimes requiring at least recklessness as mens rea. Id. at 359, [1981] 1 All E.R. at 970. And, indeed, in the 1983 Court of Appeal decision in Regina v. Pigg, [1982] 2 All E.R. 591, [1982] 1 W.L.R. 762 (C.A.), that was the apparent result for the crime of rape. In that case, the court invoked Caldwell in holding that recklessness as to consent might be established by proving either that the accused was aware that the woman might not be consenting and nonetheless proceeded (the Morgan approach) or that he was indifferent and gave no thought to the possibility that the woman might not be consenting (the Caldwell approach). Pigg, 2 All E.R. at 596–98 [1982] 1 W.L.R. at 769–71; cf. Regina v. Lawrence, 1982 A.C. 510, 526–27, [1981] 1 All E.R. 974, 982, [1981] 2 W.L.R. 524 (H.L.) (applying similar approach to “reckless” driving).

35. The most striking difference between that case, Regina v. Cogan, 2 All E.R. 1059, [1975] 3 W.L.R. 316 (C.A.), and Morgan is the number of “buddies” involved. In the law of rape, numbers often assume major significance in a court’s approach to the facts. See infra note 84.

36. I use the terms here in the sense they are used by the Model Penal Code, which distinguishes between recklessness and negligence not on the basis of the substantiality of the risk involved, but on the defendant’s awareness of it. The notions of “advertence” and “foresight,” which are the basis of the Code distinction, however, may not be wholly accurate as descriptions of the way people really act. See Hughes, Criminal Responsibility, 16 Stan. L. Rev. 470, 472–73 (1964). Thus, Lord Diplock has warned “against adopting the simplistic approach of treating all problems of criminal liability as soluble by classifying the test of liability as either ‘subjective’ or ‘objective.’” Regina v. Lawrence, 1982 A.C. 510, 526, [1981] 1 All E.R. 974, 982 (H.L.) (citing Regina v. Caldwell, [1982] A.C. 341, [1981] 1 All E.R. 961, [1981] 2 W.L.R. 509 (H.L.)). That distinction, however, remains
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worthwhile for it to be just to punish him. Second, the injury he inflicts is sufficiently grave to deserve the law's prohibition. 37

The traditional argument against negligence liability is that punishment should be limited to cases of choice, because to punish a man for his stupidity is unjust and, in deterrence terms, ineffective. Under this view, a man should only be held responsible for what he does knowingly or purposely, or at least while aware of the risks involved. As one of Morgan's most respected defenders put it:

To convict the stupid man would be to convict him for what lawyers call inadvertent negligence—honest conduct which may be the best that this man can do but that does not come up to the standard of the so-called reasonable man. People ought not to be punished for negligence except in some minor offences established by statute. Rape carries a possible sentence of imprisonment for life, and it would be wrong to have a law of negligent rape. 38

If inaccuracy or indifference to consent is "the best that this man can do" because he lacks the capacity to act reasonably, then it might well be unjust and ineffective to punish him for it. 39 But such men will be rare, and there was no evidence that the men in Morgan were among them, at least as long as voluntary drunkenness is not equated with inherent lack of capacity. More common is the case of the man who could have done better but didn't; could have paid attention, but didn't; heard her say no, or saw her tears, but decided to ignore them. Neither justice nor deterrence argues against punishing this man.

Certainly, if the "reasonable" attitude to which a male defendant is held is defined according to a "no means yes" philosophy that celebrates
critical as a threshold for liability in those jurisdictions which, following the Code approach, provide that unless stated specifically (as in the case of murder), recklessness (defined as conscious disregard of risk) as to each material element of the offense is required to establish culpability: "This accepts as the basic norm what usually is regarded as the common law position." Model Penal Code § 2.02(3) comment at 127 (Tent. Draft 1956).

37. Professor Fletcher argues that negligent rape should be punished by framing the inquiry in mistake-of-fact terms, concluding that an unreasonable mistake of fact as to consent should not exculpate. Under his analysis, negligent rapes would not be distinguished, on mens rea grounds at least, from those committed purposely, knowingly or recklessly. See G. Fletcher, Rethinking Criminal Law 698–707 (1978); see also Pickard, Culpable Mistakes and Rape: Relating Mens Rea to the Crime, 30 U. Toronto L.J. 75 (1980) (another approach to same conclusion, focusing primarily on Canadian cases).

38. Professor Glanville Williams in a letter to The Times (London), May 8, 1975, at 15, col. 6. See also G. Williams, supra note 16, at 120–25.

39. See H.L.A. Hart, Punishment and Responsibility 152–54 (1968). Professor Hart argues that what is critical to just punishment is not the defendant's awareness of the risks of his conduct, but "that those whom we punish should have had, when they acted, the normal capacities, physical and mental, for doing what the law requires and abstaining from what it forbids, and a fair opportunity to exercise these capacities." Id. at 152.
male aggressiveness and female passivity, there is little potential for un-
fairness in holding men who fall below that standard criminally liable.
Under such a low standard of reasonableness, only a very drunk man
could honestly be mistaken as to a woman's consent, and a man who vol-
untarily sheds his capacity to act and perceive reasonably should not be
heard to complain here—any more than with respect to other
cries—that he is being punished in the absence of choice.40

But even if reasonableness is defined—as I argue it should
be—according to a rule that "no means no," it is not unfair to hold those
men who violate the rule criminally responsible, provided that there is fair
warning of the rule. I understand that some men in our society have hon-
estly believed in a different reality of sexual relations, and that many may
honestly view such situations differently than women. But, it is precisely
because men and women may perceive these situations differently, and
because the injury to women stemming from the different male perception
may be grave, that it is necessary and appropriate for the law to impose a
duty upon men to act with reason, and to punish them when they violate
that duty.41

In holding a man to such a standard of reasonableness, the law signifies
that it considers a woman's consent to sex to be significant enough to
merit a man's reasoned attention. In effect, the law imposes a duty on
men to open their eyes and use their heads before engaging in sex—not to
read a woman's mind, but to give her credit for knowing her own mind
when she speaks it. The man who has the inherent capacity to act reason-
able, but fails to do so, has made the blameworthy choice to violate this
duty. While the injury caused by purposeful conduct may be greater than

40. Unreasonable aggressiveness in sexual relations is not such an unusual and unforeseen conse-
quence of male inebriation as to be beyond the limits of just punishment and deterrence. Moreover,
the Model Penal Code approach, for example, does not even require that the subsequent risk be a
foreseeable result of drinking; it is enough that inability to perceive and gauge risks is itself a well-
known risk of excessive drinking. The Code provides that:

When recklessness establishes an element of the offense, if the actor, due to self-induced intoxi-
cation, is unaware of a risk of which he would have been aware had he been sober, such
unawareness is immaterial.

MODEL PENAL CODE § 2.08(2) (1980). Thus, while the Code sides with the House of Lords' ap-
proach in Morgan in requiring at least recklessness as to consent, the practical impact of that rule is
somewhat limited by denying its benefits to those men whose unawareness of the risk of nonconsent
was due to their voluntary inebriation (as, apparently, was the case in Morgan itself).

41. Whether this duty is imposed in the name of "simple negligence" liability or "gross negli-
gence" liability does not matter as long as the duty is made clear. In some jurisdictions, negligence
liability for killings includes what is termed "simple negligence," see, e.g., State v. Williams, 4 Wash.
App. 908, 484 P.2d 1167 (1971), while in others "gross deviation," see, e.g., MODEL PENAL CODE §
2.02(2)(d) (1980), or even "wanton and wilful negligence," see, e.g., Commonwealth v. Welansky,
316 Mass. 383, 55 N.E.2d 902 (1944), is required. However one describes it, the fact remains that
"reasonable men," "unreasonable men" and even "grossly unreasonable men" are legal constructs and
that the law (and the jury) have at least some flexibility in creating them.
that caused by negligent acts,\textsuperscript{42} being negligently sexually penetrated without one's consent remains a grave harm, and being treated like an object whose words or actions are not even worthy of consideration adds insult to injury. This dehumanization exacerbates the denial of dignity and autonomy which is so much a part of the injury of rape, and it is equally present in both the purposeful and negligent rape.

By holding out the prospect of punishment for negligence, the law provides an additional motive for men to "take care before acting, to use their faculties and draw on their experience in gauging the potentialities of contemplated conduct."\textsuperscript{43} We may not yet have reached the point where men are required to ask verbally. But if silence does not negate consent, at least the word "no" should, and those who ignore such an explicit sign of non-consent should be subject to criminal liability.

Securing the protection of the criminal law is not, however, simply a matter of forcing courts or legislatures to focus on \textit{mens rea} or mistake. First, it would require acknowledging an understanding of consent quite at odds with the "no means yes" philosophy which has characterized the common law tradition. Such a shift would require an awareness of the extent to which distrust of women has pervaded rape law. Second, criminal prohibition would require a move away from the traditionally narrow understanding of the force required, in addition to non-consent, to define intercourse as rape. Those are the subjects of the next two subsections.

\subsection*{B. Force and Threats}

This Section examines two views of force in human relations. The first understands force as most schoolboys do on the playground: Force is when he hits me; resistance is when I hit back. That is the definition of force traditionally enforced in rape cases. A second understanding of force, not acknowledged in the law of rape, recognizes that bodily integrity means more than freedom from the force of fists, that power can be exercised without violence, and that coercion is not limited to what boys do in schoolyards.

Virtually every jurisdiction has traditionally made "force" or "threat of force" an element of the crime of rape.\textsuperscript{44} Where a defendant threatens his

\textsuperscript{42} See H.L.A. Hart, \textit{supra} note 39.

\textsuperscript{43} \textit{MODEL PENAL CODE} § 2.02 comment at 126–27 (Tent. Draft No. 4, 1955). The Model Penal Code commentators thus recognized the deterrence rationale of negligence liability in justifying its inclusion as a potential basis for criminal liability (albeit for a limited number of crimes, not including rape).

\textsuperscript{44} Traditional rape statutes typically required both that the intercourse be accomplished "by force" and that it be "against her will." In Wisconsin, for example, the carnal knowledge statute enacted in 1895 and applicable until 1955 provided:

\begin{quote}
Any person who shall ravish and carnally know any female of the age of fourteen years or
victim with a deadly weapon, beats her, or threatens to hurt her, and then proceeds immediately to have sex, few courts have difficulty finding that force is present. These facts fit the schoolboy definition of force. But when some time elapses between the force and intercourse, when the force is more of the variety considered "incidental" to sex, or when the situation is threatening but no explicit threat of harm is communicated, "force" as defined and required by the criminal law may not be present at all. In such cases, the law fails to recognize, let alone protect, a woman's interest in bodily integrity.

In *Mills v. United States*, in 1897, the defendant seized his victim at gunpoint, told her he was a notorious train robber named "Henry Starr," threatened to kill her, and proceeded to have intercourse with her twice. The trial court instructed the jury:

> The fact is that all the force that need be exercised, if there is no consent, is the force incident to the commission of the act. If there is non-consent of the woman, the force, I say, incident to the commission of the crime is all the force that is required to make out this element of the crime.

The jury convicted, and the defendant appealed on the ground that this instruction was in error as to the amount of force necessary to constitute rape. The Supreme Court agreed, and reversed the conviction:

> In this charge we think the court did not explain fully enough so as to be understood by the jury what constitutes in law non-consent on the part of the woman, and what is the force, necessary in all cases of non-consent, to constitute the crime. . . . But the charge in question . . . covered the case where no threats were made; where no active resistance was overcome; where the woman was not unconscious, but where there was simply non-consent on her part and no real resistance whatever. . . . More force is necessary when that is the character of non-consent than was stated by the court to be necessary to make out that element of the crime. That kind of non-

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45. 164 U.S. 644 (1897).
46. Id. at 647.
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...consent is not enough, nor is the force spoken of then sufficient, which is only incidental to the act itself.47

The requirement of force is not unique to the law of rape. But rape is different in two critical respects. First, unlike theft, if “force” is not inherent in noncriminal sex, at least physical contact is. Certainly, if a person stripped his victim, flattened that victim on the floor, lay down on top, and took the other person’s wallet or jewelry, few would pause before the conclusion of a forcible robbery. Second, rape does not involve “one person” and “another person.” It involves, in practice if not everywhere by definition, a male person using “force” against a female person. The question of whose definition of “force” should apply, whose understanding should govern, is therefore critical.

The distinction between the “force” incidental to the act of intercourse and the “force” required to convict a man of rape is one commonly drawn by courts.48 Once drawn, however, the distinction would seem to require the courts to define what additional acts are needed to constitute prohibited rather than incidental force. This is where the problems arise. For many courts and jurisdictions, “force” triggers an inquiry identical to that which informs the understanding of consent. Both serve as substitutes for a mens rea requirement. Force is required to constitute rape, but force—even force that goes far beyond the physical contact necessary to accomplish penetration—is not itself prohibited. Rather, what is required, and prohibited, is force used to overcome female nonconsent. The prohibition is defined in terms of a woman’s resistance. Thus, “forcible compulsion” becomes the force necessary to overcome reasonable resistance.49

47. Id. at 647-48. The reader may be puzzled as to why I am devoting any attention to a decision, even a decision of the United States Supreme Court, which dates from the 1890’s. Were Mills simply a historical curiosity, the reader would surely be right to question my priorities; it is far too easy to attack 100-year-old cases. But when cases from the 1890’s reflect an understanding of force which survives into cases from the 1980’s—and Mills does—it is no longer a matter of slaying straw men. Mills is a living dragon.

48. See R. Perkis & R. Boyce, supra note 44.

49. Kentucky, for example, requires “forcible compulsion” as an element of the rape of a competent, adult woman. “Forcible compulsion” means:

physical force that overcomes earnest resistance or a threat, express or implied, that overcomes earnest resistance by placing a person in fear of immediate death or physical injury to himself or another person or in fear that he or another person will be immediately kidnapped.

KY. REV. STAT. § 510.010(2) (1985). As stated, forcible compulsion is defined to require earnest resistance; the prohibition may be formally applicable to the defendant, but the focus and judgment is on the victim. Washington and Hawaii have modified this definition to the extent of not requiring that the resistance be “earnest.” WASH. REV. CODE § 9.79.140(5) (1977); HAWAII REV. STAT. § 707-700(11) (Supp. 1980). In Utah, sexual intercourse is prohibited where “the actor compels the victim to submit or participate by force that overcomes such earnest resistance as might reasonably be expected under the circumstances.” UTAH CODE ANN. § 76-5-406(1) (1985). In other states, where “force” is included in the statute but not specifically defined, courts have relied on the “judicially determined meaning” of those elements of the common law crime of rape to the same effect. See, e.g., Goldberg v. State, 41 Md. App. 58, 395 A.2d 1213 (1979) (relying on Hazel v. State, 221 Md. 464,
When the woman does not physically resist, the question becomes then whether the force was sufficient to overcome a reasonable woman’s will to resist. Prohibited force turns on the judge’s evaluation of a reasonable woman’s response.

In *State v. Alston*, Mr. Alston and the victim had been involved in a “consensual” relationship for six months. That relationship admittedly involved “some violence” by the defendant and some passivity by the victim. The defendant would strike the victim when she refused to give him money or refused to do what he wanted. As for sex, the court noted that “she often had sex with the defendant just to accommodate him. On those occasions, she would stand still and remain entirely passive while the defendant undressed her and had intercourse with her.”

This was their “consensual” relationship. It ended when, after being struck by the defendant, the victim left him and moved in with her mother.

A month later, the defendant came to the school which the victim attended, blocked her path, demanded to know where she was living and, when she refused to tell him, grabbed her arm and stated that she was coming with him. The victim told the defendant she would walk with him if he released her arm. They then walked around the school and talked about their relationship. At one point, the defendant told the victim he was going to “fix” her face; when told that their relationship was over, the defendant stated that he had a “right” to have sex with her again. The two went to the house of a friend. The defendant asked her if she was “ready,” and the victim told him she did not want to have sexual relations. The defendant pulled her up from the chair, undressed her, pushed her legs apart, and penetrated her. She cried.

The defendant was convicted of rape, and his conviction was affirmed by the intermediate court of appeals. On appeal, the North Carolina Supreme Court agreed that the victim was not required to resist physically to establish nonconsent: The victim’s testimony that she did not consent was “unequivocal” and her testimony provided substantial evidence that the act of sexual intercourse was against her will.

But the North Carolina Supreme Court nonetheless reversed on the ground that, even viewing the evidence in the light most favorable to the

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157 A.2d 922 (1960); *see also* ILL. REV. STAT. ch. 38, § 11.1 (1982) (requiring “force” and, in comments, stating that definition should be taken from certain common law cases); *Note, Recent Statutory Developments, supra* note 5, at 1512–14.

51.  *Id.* at 401, 312 S.E.2d at 471.
52.  *Id.* at 401–03, 312 S.E.2d at 471–73.
54.  310 N.C. at 408, 312 S.E. 2d at 475.
state, the element of force had not been established by substantial evidence. The victim did not "resist"—physically, at least. And her failure to resist, in the court's evaluation, was not a result of what the defendant did before penetration. Therefore, there was no "force." 55

The force used outside the school, and the threats made on the walk, "although they may have induced fear," were considered to be "unrelated to the act of sexual intercourse." 56 Indeed, the court emphasized that the victim testified that it was not what the defendant said that day, but her experience with him in the past, that made her afraid. Such past experience was deemed irrelevant.

Although [the victim's] general fear of the defendant may have been justified by his conduct on prior occasions, absent evidence that the defendant used force or threats to overcome the will of the victim to resist the sexual intercourse alleged to have been rape, such general fear was not sufficient to show that the defendant used the force required to support a conviction of rape. 57

The undressing and the pushing of her legs apart—presumably the "incidental" force—were not even mentioned as factors to be considered.

*State v. Alston* is not a unique case, but it is an unusual one. Rape cases between individuals who have had what passes in the law for a "consensual" sexual relationship are rare in the system. In some sense, the supreme court here simply did what is usually done by the women (who don't press charges), by the police (who unfound them), or by the prosecutors (who dismiss them). But it did so to greater legal effect.

Later in 1984, the North Carolina Court of Appeals applied *Alston* to another case where the defendant and the victim knew each other and had had previous sexual relations. In this case, however, the parties were not "boyfriend" and "girlfriend." They were a father and his 15-year-old daughter.

The defendant in *State v. Lester* 58 was the father of three daughters and a son. Prior to the parents' divorce, the defendant frequently beat the children's mother in their presence. He also beat his girlfriend and his son. He had a gun and on one occasion pointed it at his children. He engaged in sexual activity with all three of his daughters. He first had sexual relations with the daughter whose rape was at issue when she was 11 years old. Her mother found out and confronted the defendant. He

55. *Id.* at 408, 312 S.E.2d at 476.
56. *Id.*
57. *Id.* at 409, 312 S.E.2d at 476 (emphasis omitted).
swore never to touch her again, and then threatened to kill both mother and daughter if they told anyone of his actions. On both of the occasions in question, the victim initially refused her father's demand to take her clothes off and "do it." In both cases, she complied when the demand was repeated and she sensed that her father was becoming angry. The court held that the defendant could be convicted of incest, but not of rape:

In the instant case there is evidence that the acts of sexual intercourse between defendant and his fifteen-year-old daughter . . . were against her will. There is no evidence, however, that defendant used either actual or constructive force to accomplish the acts with which he is charged. As Alston makes clear, the victim's fear of defendant, however justified by his previous conduct, is insufficient to show that defendant forcibly raped his daughter on 25 November and 18 December.\(^{59}\)

A digression is in order. Some people have suggested that I make these cases up. I don't. Others suggest that they must be rare. Such abuse of teenagers is not rare.\(^{60}\) Some suggest that even if these cases are not rare, decisions such as Lester must be, or must only happen in North Carolina, or must in some other easy and convenient way be sufficiently distinguishable as to be an unsuitable basis for either analysis or anxiety. I don't think so. Just a year before Lester, the Pennsylvania appellate court was confronted with a father who used a different approach to the same end with his 17-year-old daughter. Over a one year period, the defendant had sex with her on several occasions. She "did so because her father told her that the Bible said that 'if the mother could no longer provide as a mother, it was up to the oldest daughter, and if she could no longer do it, it would go right down to the last daughter in the family.'"\(^{61}\) The defendant also told his daughter that if she reported these incidents to anyone, he would show people pictures he had taken of her in the nude. His conviction for rape, like Mr. Lester's, was reversed:

The record clearly shows that defendant never used or threatened to use force in inducing his daughter to participate in sexual intercourse. Rather, he asserted a biblical basis for the intercourse and assured his daughter's silence by threats, not of force, but of humiliation. Although this conduct is reprehensible, it is not the conduct

\(^{59}\) Id. at 761, 321 S.E.2d at 168 (emphasis in original).

\(^{60}\) In part due to the efforts of feminists reformers, many states have amended their statutory rape laws to lower the "age of consent," see Bienen, supra note 25, and thus render men like these immune from prosecution for statutory rape, and subject to the category of "adult" rape addressed in this Article.

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proscribed by section 3121 of the Crimes Code, which forbids intercourse by threat of forcible compulsion.62

Decisions such as Lester and Alston are vulnerable to attack on traditional doctrinal grounds. The courts' unwillingness to credit the victim's past experience of violence at the hands of the defendant stands in sharp contrast to the black letter law that a defendant's knowledge of his attacker's reputation for violence or ownership of a gun is relevant to the reasonableness of his use of deadly force in self-defense.63

That these decisions depart so straightforwardly from established criminal law doctrine is noteworthy but not unusual in the law of rape. More interesting is the apparent paradox that they create. In each case, the court says—and this is explicit, not implicit—that sex was without the woman's consent. It also says that there was no force. In other words, the woman was not forced to engage in sex, but the sex she engaged in was against her will.

Such a paradox is almost inevitable if one adopts, and then enforces, the most traditional male notion of a fight as the working definition of "force." In a fight, you hit your assailant with your fists or your elbows or your knees. In a fight, the one attacked fights back. In these terms, there was no fight in Alston. Therefore, there was no force.

I am not at all sure how the judges who decided Alston would explain the victim's simultaneous refusal to consent and failure to resist. For myself, it is not at all difficult to understand that a woman who had been repeatedly beaten, who had been a passive victim of both violence and sex during the "consensual" relationship, who had sought to escape from the man, who is confronted and threatened by him, who summons the courage to tell him their relationship is over only to be answered by his assertion of a "right" to sex—a woman in such a position would not fight. She wouldn't fight; she might cry. Hers is the reaction of "sissies" in playground fights. Hers is the reaction of people who have already been beaten, or who never had the power to fight in the first instance. Hers is, from my reading, the most common reaction of women to rape.64 It certainly was mine.

62. Id. at 268, 467 A.2d at 32 (emphasis in original).
63. Lester and Alston are classic examples of the manipulation of the "time frame" for criminal liability. See generally Kelman, Interpretive Construction in the Substantive Criminal Law, 33 STAN. L. REV. 591, 600-16 (1981). With respect to women victims, it is also a classic one-way ratchet; one would be hard pressed to find any case anywhere holding that a victim's past sexual experience with this defendant is not relevant to the issue of her consent. Indeed, while forty-one states have passed some form of rape evidence statute, even the most protective of these statutes allows evidence of prior sexual conduct between victim and accused to be admitted on the issue of consent. See Bienen, supra note 25, at 197-206.
64. Cf. R. PerKINS & R. Boyce, supra note 44 (arguing that resistance is fact of "human na-
To say that there is no “force” in such a situation is to create a gulf between power and force, and to define the latter solely in schoolboy terms. Mr. Alston did not beat his victim—at least not with his fists. He didn’t have to. She had been beaten—physically and emotionally—long before. But that beating was one that the court was willing to go to great lengths to avoid recognizing.

That the law prohibiting forced sex understands force in such narrow terms is frustrating enough for its women victims. Worse, however, is the fact that the conclusion that no force is present may emerge as a judgment not that the man did not act unreasonably, but as a judgment that the woman victim did.

Pat met Rusk at a bar. They talked briefly. She announced she was leaving, and he asked for a ride. She drove him home. He invited her up. She declined. He asked again. She declined again. He reached over and took the car keys. She followed him to his room. He went to the bathroom. She didn’t move. He told her to remove her slacks and his clothing. She did. After they undressed:

I said, ‘you can get a lot of other 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. It was more the look in his eyes; and I 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.\(^5\)

After sex, the defendant walked her to her car, and asked if he could see her again.

How does a court respond to facts like this? Is “force” established by the “look in his eyes,” by light choking (her description)/heavy caresses (his description),\(^6\) or by taking the car keys of an adult woman? Is the latter force, or motor vehicle larceny? If we accept Pat’s testimony, as the jury did, then it is established that she was overcome. Is that enough?

Rusk’s case was heard *en banc* by both the Maryland Court of Special...
Appeals and the Maryland Court of Appeals. The Court of Special Appeals reversed the conviction, 8–5. The Maryland Court of Appeals reinstated it, 4–3. All told, twenty-one judges, including the trial judge, considered the sufficiency of the evidence. Ten concluded that Rusk was a rapist. Eleven concluded that he was not.

Those who considered the evidence insufficient focused nearly all their attention not on what Mr. Rusk did or did not do, but on how the woman victim should have responded. Prohibited force was defined according to a hypothetical victim’s resistance: The defendant’s words or actions must create in the mind of a victim a reasonable fear that if she resisted, he would have harmed her, or that faced with such resistance, he would have used force to overcome her. The intermediate court majority found unpersuasive the argument that an honest fear was sufficient where there is nothing whatsoever to indicate that the victim was “anything but a normal, intelligent, twenty-one year old, vigorous female.” Of course, the question remains as to what is “reasonably” expected of such a female faced with a man who frightens her, in an unfamiliar neighborhood, without her car keys. To the Maryland Court of Appeals dissenters, the answer was clear:

While courts no longer require a female to resist to the utmost or to resist where resistance would be foolhardy, they do require her acquiescence in the act of intercourse to stem from fear generated by something of substance. She may not simply say, “I was really scared,” and thereby transform consent or mere unwillingness into submission by force. These words do not transform a seducer into a rapist. She must follow the natural instinct of every proud female to resist, by more than mere words, the violation of her person by a stranger or an unwelcomed friend. She must make it plain that she regards such sexual acts as abhorrent and repugnant to her natural sense of pride. She must resist unless the defendant has objectively manifested his intent to use physical force to accomplish his purpose.

In the dissenters’ view, Pat was not a “reasonable” victim, or even a

69. Rusk had been convicted of second degree rape in violation of MD. CODE ANN. art. 27, § 463(a)(1) (1982), which provides in part: “A person is guilty of rape in the second degree if the person engages in vaginal intercourse with another person . . . by force or threat of force against the will and without the consent of the other person.” Of the 21 judges who reviewed Rusk’s conviction, one was a woman. She voted to convict. See 289 Md. at V, 230, 424 A.2d at VII, 720.
70. 43 Md. App. at 482, 406 A.2d at 627.
71. 289 Md. at 255, 424 A.2d at 733 (Cole, J., dissenting).
victim at all. Instead of fighting, she cried. Instead of protecting her virtue, she acquiesced. Far from having any claim that her bodily integrity had been violated, she was adjudged complicit in the intercourse of which she complained. She was “in effect, an adulteress.”

In a very real sense, the “reasonable” woman under the view of the eleven judges who would reverse Mr. Rusk’s conviction is not a woman at all. Their version of a reasonable person is one who does not scare easily, one who does not feel vulnerability, one who is not passive, one who fights back, not cries. The reasonable woman, it seems, is not a schoolboy “sissy.” She is a real man.

The court of appeals majority ultimately affirmed the conviction on the narrowest possible ground. The court stated that “generally,. . . the correct standard” is that the victim’s fear must “be reasonably grounded in order to obviate the need for either proof of actual force on the part of the assailant or physical resistance on the part of the victim.” Was this victim’s fear reasonable? The court strove to avoid the question. The fundamental error of the intermediate court was its violation of the principle of appellate restraint; the question of reasonableness was a question of fact to be left to the jury. Still, the court of appeals could not avoid entirely the obligation to review the sufficiency of the evidence. Thus, “[c]onsidering all of the evidence in the case, with particular focus upon the actual force applied by Rusk to Pat’s neck, we conclude that the jury could rationally find that the essential elements of second degree rape had been established.”

72. This is exactly how Judge Wilner, the dissenting judge in the Court of Special Appeals, characterizes the majority’s decision to reverse Rusk’s conviction. 43 Md. App. at 498, 406 A.2d at 636. The Court of Appeals dissenters, for their part, attacked that majority for declaring her to be innocent:

The law regards rape as a crime of violence. The majority today attenuates this proposition. It declares the innocence of an at best distraught young woman. It does not demonstrate the defendant’s guilt of the crime of rape.

289 Md. at 255-56, 424 A.2d at 733. The debate, quite clearly, is focused not on whether Rusk is a rapist but on whether Pat is a real victim.

73. 289 Md. at 244, 424 A.2d at 727 (footnote omitted).

74. Id. at 246-47, 424 A.2d at 728 (emphasis added). On facts substantially similar to those in Rusk, the Wyoming Supreme Court in 1973 reversed a conviction entered by a trial judge sitting without a jury on the ground that the judge had failed to consider the reasonableness of the victim’s fear. In Gonzales v. State, 516 P.2d 592 (Wyo. 1973), as in Rusk, the victim and the defendant met in a bar, and he requested a ride home. The victim refused, but the defendant got into the car anyway. After unsuccessfully refusing him again, she started driving; he asked her to turn down a road and, according to the supreme court:

He asked her to stop “to go to the bathroom” and took the keys out of the ignition, telling her she would not drive off and leave him. She stayed in the car when he “went to the bathroom” and made no attempt to leave. When he returned he told her he was going to rape her and she kept trying to talk him out of it. He told her he was getting mad at her and then put his fist against her face and said, “I’m going to do it. You can have it one way or the other.”

Id. at 593. The trial judge, in finding Mr. Gonzales guilty of rape, reasoned that a victim “does not have to subject herself to a beating, knifing, or anything of that nature. As long as she is convinced
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The emphasis on the light choking/heavy caresses is, perhaps, understandable: It is the only "objective" (as the supreme court dissent put it) force in the victim's testimony; it is certainly the only "force" that a schoolboy might recognize. As it happens, however, that force was not applied until the two were already undressed and in bed. Whatever it was—choking or caressing—was a response to the woman's crying as the moment of intercourse approached. It was not, it seems fairly clear, the only force that produced that moment.

Unable to understand force as the power one need not use (at least physically), courts are left either to emphasize the "light choking" or to look for threats of force. Technically, these threats of force may be implicit as well as explicit. But implicit to whom? That a woman feels genuinely afraid, that a man has created the situation that she finds frightening, even that he has done it intentionally in order to secure sexual satisfaction, may not be enough to constitute the necessary force or even implicit threat of force which earns bodily integrity any protection under the law of rape.

In Goldberg v. State, a high-school senior working as a sales clerk was "sold a story" by the defendant that he was a free-lance agent and thought she was an excellent prospect to become a successful model. She accompanied him to his "temporary studio" where she testified that she engaged in intercourse because she was afraid. Her reasons for being afraid, according to the appellate court which reversed the conviction, were: "1) she was alone with the appellant in a house with no buildings

something of a more serious nature will happen, she is then given by law the right to submit." Id. at 594 (quoting unreported trial court opinion). Not, however, according to the Wyoming Supreme Court, which found the trial judge's standard to be in error "because it would place the determination solely in the judgment of the prosecutrix and omit the necessary element of a reasonable apprehension and reasonable ground for such fear; and the reasonableness must rest with the fact finder." Id.

What is stunning about Gonzales is not so much the Wyoming court's statement of the proper standard—it very much resembles that of the other courts noted here—as the fact that the court thought application of that standard to these facts could conceivably lead to a different verdict. The error, in the court's view, was far from harmless: "[T]he evidence of the nature and sufficiency of the threat to justify nonresistance is far from overwhelming in this case." Id. The reasonable woman in Wyoming, apparently, is not simply a man, but Superman.

75. See, e.g., People v. Flores, 62 Cal. App. 2d 700, 703, 145 P.2d 318, 320 (Dist. Ct. App. 1944) ("A threat may be expressed by acts and conduct as well as by words."); Hazel v. State, 221 Md. 464, 469, 157 A.2d 922, 925 (1960) ("acts and threats may create in victim's mind real apprehension of imminent bodily harm"); State v. Lewis, 96 Idaho 743, 760, 536 P.2d 738, 745 (1975) ("Threats or force can come in forms other than verbalized threats or displays of weaponry.")).

76. Cases recognizing threats short of force as sufficient for rape convictions are virtually nonexistent. The closest, perhaps, is the oft-cited People v. Cassandras, 83 Cal. App. 2d 272, 188 P.2d 546 (Dist. Ct. App. 1948), where the defendant used an elaborate ploy to lure the complainant into a hotel, and then threatened to have the hotel clerk report her to the police as a prostitute and to have her children taken away from her. The court, in affirming the defendant's conviction, found that there was sufficient evidence of threats of physical harm, but also implied that mental coercion might be enough to overcome the woman's will.

close by and no one to help her if she resisted, and 2) the appellant was much larger than she was."

According to the appellate court, "[i]n the complete absence of any threatening words or actions by the appellant, these two factors, as a matter of law, are simply not enough to have created a reasonable fear of harm so as to preclude resistance and be 'the equivalent of force.'"

The New York Supreme Court, sitting as the trier of fact in a rape case, reached a similar conclusion with respect to the threatening situation facing an "incredibly gullible, trusting, and naive" college sophomore. In People v. Evans,\footnote{80} the defendant posed as a psychologist conducting a sociological experiment, took the woman to a dating bar to "observe" her, and then induced her to come to an apartment he used as an "office." When she rejected his advances, he said to her: "'Look where you are. You are in the apartment of a strange man. How do you know that I am really who I say I am? How do you know that I am really a psychologist?. . . I could kill you. I could rape you. I could hurt you physically.'"\footnote{81} The trial court found his conduct "reprehensible," describing it as "conquest by con job." But it was not criminal; the words were ambiguous, capable of communicating either a threat to use ultimate force or the chiding of a "foolish girl."\footnote{82} While acknowledging that the victim might be terrified, the court was not persuaded beyond a reasonable doubt that the guilt of the defendant had been established.\footnote{83}

In both Goldberg and Evans, a woman finds herself alone and potentially stranded in a strange place with a man who is bigger than she. One

\footnote{78} Id. at 69, 395 A.2d at 1219.  
\footnote{79} Id. (citation omitted).  
\footnote{81} 85 Misc. 2d at 1093, 379 N.Y.S.2d at 917.  
\footnote{82} Id. at 1095, 379 N.Y.S.2d at 920.  
\footnote{83} Id. at 1096, 379 N.Y.S.2d at 921. Since the Evans decision, New York has amended its statute. Historically, New York had strictly enforced a standard of utmost resistance, which required a victim to resist "until exhausted or overpowered." People v. Dohring, 59 N.Y. 374, 386 (1874). By the time of Evans, the words of the law had changed to require earnest resistance; following Evans, the New York legislature amended the statute to make clear that the earnest resistance standard was not to be equated with the utmost resistance requirement. 1977 N.Y. LAWS ch. 692. The 1977 version, however, still required "reasonable" earnest resistance. Id. § 2.

In 1982, the New York legislature again amended the law. 1982 N.Y. LAWS ch. 560. The new law prohibits the use of actual physical force or "a threat, express or implied, which places a person in fear of immediate death or physical injury to himself, herself or another person, or in fear that he, she or another person will immediately be kidnapped." N.Y. PENAL LAW § 130.00(8) (Consol. 1984). See generally Note, Elimination of the Resistance Requirement and Other Rape Law Reforms: The New York Experience, 47 ALBANY L. REV. 871, 872-74 (1983). New York law also includes a misdemeanor provision entitled "sexual misconduct," which occurs when a male "engages in sexual intercourse with a female without her consent." N.Y. PENAL LAW § 130.20(1) (Consol. 1984).

Many states continue to follow New York's earlier definition of "forcible compulsion," see supra note 49, and the requirement of "actual physical force" or a threat which the court understands to place the victim in fear may continue to protect con-men like Mr. Evans, although it need not.
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need not be "incredibly gullible" to find oneself in this situation; one need only, as did the woman in Rusk, agree to give an average man (who is bigger than an average woman) a ride home.84 There are at least four possible doctrinal approaches to these threatening situations, even accepting the courts' understanding that "force" can only be understood in relation to a woman's resistance.85 It is noteworthy that all the decisions discussed above adopt the approach that not only makes conviction most difficult, but also operates to place guilt most squarely on the victim.

The simplest approach would be to ask whether this woman's will to resist was in fact overcome by this defendant's actions. Is she lying, or did she submit because she was truly frightened? If she is not lying—and none of the courts suggested that any of the women in these cases were actually lying—then affirm the conviction. But what about the poor man who didn't realize that the woman was overcome by fear of him, rather than desire for him? Properly regarded, such a man lacks mens rea as to force or consent.86

A second approach resolves that problem without relying explicitly on mens rea. It asks instead: Were the defendant's acts and behavior intended to overcome this woman's will to resist? Under such a standard, at least Mr. Lester, Mr. Alston, Mr. Goldberg, and Mr. Evans—if not Mr. Rusk as well—will have a hard time claiming that they didn't mean to

84. Had there been two or more men involved, rather than one, it seems likely that the defendants in Goldberg and Evans would have fared far less well in the courts. It is in such cases—and almost only in such cases—that courts consider the situations sufficiently threatening to not require that threats be verbally explicit. In California, four men have long been presumed dangerous: "If one were met in a lonely place by four big men and told to hold up his hands or to do anything else, he would be doing the reasonable thing if he obeyed, even if they did not say what they would do to him if he refused. . . . We think similar considerations are applicable here [in a rape case]." People v. Flores, 62 Cal. App. 2d 700, 703, 145 P.2d 318, 320 (Cal. Dist. Ct. App. 1944). However two may be enough:

The victim was in the company of two men whom she had met for the first time that evening. On a winter night, she was driven to a remote area, tried to escape, was caught and was thrust back to the car. . . .

[S]he submitted in the back seat to the act of intercourse with the defendant while his companion was nearby in the front seat, obviously ready to help defendant restrain and do bodily harm to the victim if she resisted. . . .

Jones v. Commonwealth, 219 Va. 982, 986–87, 252 S.E.2d 370, 372 (1979). See also State v. Lewis, 96 Idaho 743, 750, 536 P.2d 738, 745 (1975) (fearing for her life, woman engaged in intercourse with three men). But where only one man is involved, even if he intentionally created the situation which the woman finds threatening, it is rather difficult to find appellate cases; most such complaints are not prosecuted in the first instance. See infra Section IV(B). Where they are, however, courts intent on protecting an individual man's right to "seduce" often reverse rape convictions.

85. To abandon that understanding would suggest either that force itself is unlawful, regardless of whether it is used to coerce submission, or that consent is inconsistent with force. It would, in short, call into question the almost universal common law understanding that regardless of what the man does ("force"), consent remains a defense. See infra Section C.

86. In Model Penal Code terms, if the man recognized but disregarded a substantial risk of non-consent, he would be reckless; even if he did not recognize the risk, he would be guilty of negligent rape if a reasonable man would have recognized this risk.
succeed, and that success was not defined as creating a situation that would frighten the woman into submission.\footnote{This is precisely the standard applied to men who engage in theft by false pretenses; gullibility is no defense if the defendant's acts were intended to prey on that gullibility. See W. LaFave & A. Scott, CRIMINAL LAW 669 (1972); Clarke v. People, 64 Colo. 164, 171 P. 69 (1918); State v. Foot, 100 Mont. 33, 48 P.2d 1113 (1935).}

A third approach probes whether the defendant's acts and statements were calculated to overcome the will of a reasonable woman. This standard, very close to the "reasonable calculation" standard actually used in earlier decisions in Maryland and elsewhere,\footnote{See Hazel v. State, 221 Md. 464, 469, 157 A.2d 922, 925 (1960) (citing State v. Thompson, 227 N.C. 19, 40 S.E.2d 620 (1946); State v. Dill, 42 Del. 533, 40 A.2d 443 (1944)): [F]orce may exist without violence. If the acts and threats of the defendant were reasonably calculated to create in the mind of the victim . . . a real apprehension, due to fear, of imminent bodily harm, serious enough to impair or overcome her will to resist, then such acts and threats are the equivalent of force.} obviously allows men greater freedom than the second approach. It tolerates their exploitation of naive and gullible women by claiming that, in their "reasonableness calculation," the tactics should not have been threatening enough. Even at its best, the "reasonably calculated" standard creates something of a paradox: If most women have a different understanding of force than most men, then the reasonable calculation standard is one that asks how a reasonable man understands the mind of a reasonable woman. But at least it focuses primarily on the defendant's actions and thoughts and makes his guilt or innocence the center of the trial.

The final approach doesn't even do that. It judges the woman, not the man. It asks—as did the court in each of these cases—whether the will of the reasonable woman would have been overcome given the circumstances. The focus is on women generally, and on the victim as she compares (poorly) to the court's assessment of the reasonable woman. The court then proceeds to conclude that a reasonable woman's will would not have been overcome in those circumstances, because there is no "force" as men understand it.

Such an approach accomplishes two things. First, it ensures broad male freedom to "seduce" women who feel powerless, vulnerable, and afraid; the force standard guarantees men freedom to intimidate women and exploit their weaknesses, as long as they don't "fight" with them. Second, it makes clear that the responsibility and blame for such seductions belong with the woman. Because the will of a reasonable woman by definition would not have been overcome, a particular woman's submission can only mean that she is sub-par as women go or that she was complicitous in the intercourse.

It is one thing to argue that none of the men in these cases should be considered in the same category (in terms of their blameworthiness, their
dangerousness, or the harm caused by their actions), as the man who puts a gun to his victim's head and threatens to kill her if she refuses to have sex. It is quite another to argue that these men have committed no crime.

Most striking about these cases is the fact that had these men been seeking money instead of sex, their actions would plainly violate traditional state criminal prohibitions. Had Mr. Goldberg used his modeling agent story to secure money rather than sex, his would be a case of theft by deception or false pretenses. As for Mr. Evans, had he sought money rather than sex as part of his "sociological test," he too could have been found guilty of theft. Neither Goldberg nor Evans could have escaped liability on the ground that a "reasonable person" would not have been deceived, any more than a victim's leaving his front door unlocked or his keys in the automobile ignition serves as a defense to burglary or larceny. Had Mr. Rusk simply taken the woman's car keys, he would have been guilty of larceny or theft. And had Mr. Lester threatened to expose

89. State v. Witherspoon, 648 S.W.2d 279 (Tenn. Crim. App. 1983), is a worthy comparison in this regard. In Witherspoon, the defendant, who had been convicted of robbery, claimed on appeal that the government failed to establish the causal connection between his conduct and the victim's fear (required to make his taking of money robbery). According to the victim, the defendant came over to her car door so that she was unable to close it; he stood there for a few minutes; then, as he was asking for directions, he grabbed the money bag. The victim testified that she was afraid—not of robbery, but of rape: "Well, at that point I forgot I had the money and the only thing that I could think that he wanted was rape." Id. at 280. The court upheld the robbery conviction, reasoning that "the standard for determining whether the victim was put 'in fear' is largely subjective;" that the victim's testimony was credible and not apparently unreasonable; and concluding that "the record tends to indicate not only that the defendant's intention was to 'intimidate and frighten the victim into docile nonresistance and meek compliance,' . . . but also that he succeeded in his purpose, whether or not the victim realized it and whether or not she was able to articulate it at trial." Id. at 280, 281. The difference between this standard and its application and the approaches in Goldberg and Evans could not be greater, particularly since the defendants in the latter two cases pursued far more elaborate schemes to frighten their victims. Notably, all three women feared rape; that fear was enough to sustain a conviction of robbery, but not of the crime feared.

Moreover, even courts adopting a narrow definition of "physical force" for purposes of robbery statutes have recognized that where defendants manage to avoid physical force or its threatened use through a ruse—i.e., by portraying a police officer—the felonies of larceny by trick or by false pretenses plainly could be charged, in addition to petit larceny. The absence of "physical force" as conventionally defined did not render the taking of money a lawful gift. See People v. Flynn, 123 Misc. 2d 1021, 475 N.Y.S.2d 334 (Sup. Ct. 1984).

90. While defined slightly differently in different jurisdictions, conviction for false pretenses generally requires a false representation of a material fact which causes the victim to pass title or property to the defendant, who knows his representation to be false and intends to use such representation to defraud the victim. See W. LaFave & A. Scott, supra note 87, at 655; Model Penal Code § 223.3 comment at 180-81 (1980).

91. In false pretenses statutes, "the almost universal modern rule" is that gullibility or carelessness is no defense, because "the criminal law aims to protect those who cannot protect themselves." W. LaFave & A. Scott, supra note 87, at 669. See, e.g., State v. Nash, 110 Kan. 550, 204 P. 736 (1922); Clarke v. People, 64 Colo. 164, 171 P. 69 (1918); Lefler v. State, 153 Ind. 82, 54 N.E. 439 (1899); State v. Foot, 100 Mont. 33, 48 P.2d 1113 (1935).

92. See, e.g., Model Penal Code § 223.2 (1980) ("A person is guilty of theft if he unlawfully takes, or exercises unlawful control over, movable property of another with purpose to deprive him thereof."). Under the Model Penal Code, theft of an automobile is a third degree felony. Id. at § 223.1(2)(a).
the nude pictures were he not paid, he might well have been guilty of state law extortion.93

Lying to secure money is unlawful theft by deception or false pretenses, a lesser crime than robbery, but a crime nonetheless. Yet lying to secure sex is old-fashioned seduction—not first-degree rape, not even third-degree rape. A threat to expose sexual information has long been considered a classic case of extortion, if not robbery itself.94 But securing sex itself by means of a threat short of force has, in many jurisdictions, been considered no crime at all.

To the argument that it is either impossible or unwise for the law to regulate sexual "bargains" short of physical force, the law of extortion stands as a sharp rebuke: It has long listed prohibited threats in fairly inclusive terms.95 While extortion may be a lesser offense than robbery, it is nonetheless prohibited.

It is almost certainly impossible to expect that the law could address all of the techniques of power and coercion which men use against women in sexual relations. I am not suggesting that we try.96 Rather, I am suggesting that we do something that is actually quite easy—prohibit fraud to secure sex to the same extent we prohibit fraud to secure money, and prohibit extortion to secure sex to the same extent we prohibit extortion to secure money. Many states already have criminal coercion or fraud provisions that are worded with sufficient breadth (e.g., "engage in conduct")97 to be applied to prohibit such coerced sex. But cases enforcing such prohibitions are relatively rare,98 and the results have been divided.99 The

94. W. LAFAVE & A. SCOTT, supra note 87, at 705 (threat to accuse victim of sodomy constitutes robbery).
95. Traditionally, robbery has been limited to threats of immediate bodily harms, threats to destroy the victim's home, or threats to accuse him of sodomy. Securing property through the use of other threats—threats to accuse an individual of a crime, to impair his credit or business repute, to take or withhold action as an official or cause an official to take or withhold action, to expose any secret tending to subject the person to contempt or ridicule—have been prohibited as the lesser offense of extortion or blackmail. Notably, extortion encompasses threats to do what is legal and even desirable—to report a crime, for instance. It also encompasses threats to make public information which is true and accurate. Nonetheless, when those threats are used to secure money, in the absence of an honest claim of restitution or indemnification, they are prohibited as criminal. See generally W. LAFAVE & A. SCOTT, supra note 87, at 704-07; Model Penal Code § 223.4 comments at 201-03 (1980); Lindgren, Unraveling the Paradox of Blackmail, 84 Colum. L. Rev. 670 (1984).
96. Nor am I arguing that these cases must of necessity be considered in the same category as first degree, armed and brutal rape. I am more than willing to treat them as a lesser degree of "rape" and to impose lighter punishment in the same way that the unarmed robber, or the blackmailer, is treated as a less serious offender than the one who uses a deadly weapon in a robbery.
98. See United States v. Condolon, 600 F.2d 7 (4th Cir. 1979); Robertson, 293 Or. 402, 649 P.2d
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broad reach of such statutes not only invites overbreadth challenges and
claims of lack of warning, but fails to make clear that loss of bodily integ-
rity is a different and greater injury than loss of money and thus merits
greater punishment. Criminal coercion statutes are, at best, poor substi-
tutes for an expanded understanding of the “force” that makes sex rape.

C. Consent

This Section will examine what has long been viewed as the most im-
portant concept in rape law—the notion of female consent. Nonconsent
has traditionally been a required element in the definition of a number of
crimes, including theft, assault and battery.100 Thus rape may be the most
serious crime to encompass a consent defense,101 but it is certainly not the
only one.102

569; State v. Felton, 339 So. 2d 797, 800 (La. 1976).
99. Compare State v. Robertson (overturning Oregon criminal coercion statute as overbroad in
case of sexual coercion) with State v. Felton (upholding Louisiana extortion statute applied in case of
sexual coercion).
100. See Hughes, Consent in Sexual Offenses, 25 MOD. L. REV. 672, 673-76 (1962); Williams,
Consent and Public Policy, 9 CRIM. L. REV. 74, 154 (1962) (pts. 1 & 2); Puttkammer, supra note 6.

By contrast, sexual offenses are a classic and deservedly criticized example of a “morals” offense for
which consent is no defense. See Kadish, The Crisis of Overcriminalization, 374 ANNALS 157, 159-60
(1967) (criticizing use of criminal law to enforce moral code prohibiting extramarital and abnormal
sexual intercourse). “Deviant” sex punishable by law has included homosexual sex, sex with children,
oral sex, sex for money, sex outside of marriage, and adultery. But in the long list of prohibited sexual
relations, the absence of a separate category of “consensual,” violent heterosexual sex is noteworthy; to
the extent that such sex has traditionally been prohibited, it is because it has also been fornication or
adultery, not because it is violent; in such cases, both man and woman are considered equally guilty.

101. Technically, nonconsent is an element of the offense or a required attendant circumstance.
The difference between a defense and the absence of a required element or circumstance is not en-
tirely technical, although it probably should be; the United States Supreme Court, in determining the
constitutionality of requiring defendants to bear the burden of proof of “defenses,” has drawn just
such a line. Compare Patterson v. New York, 432 U.S. 197 (1977) (state may require defendant to
prove defense of extreme emotional disturbance) with Mullaney v. Wilbur, 421 U.S. 684 (1975)
(state’s requirement that defendant prove actions occurred in “heat of passion” to reduce crime from
homicide to manslaughter violates due process clause because requisite level of intent must be estab-

102. Virtually the only exception to the rule requiring nonconsent in cases of rape or sexual
assault is one oft-cited (and criticized) English case. In The King v. Donovan, [1934] 2 K.B. 498
(G.A.), the accused was charged with caning a girl of seventeen “in circumstances of indecency” for
purposes of sexual gratification. His defense was consent, and he appealed his conviction on the
ground that the trial judge had failed to instruct the jury that the burden was on the prosecution to
establish lack of consent as an element of the offense of indecent assault. The court quashed his
conviction on the ground of misdirection of the jury, but in doing so held that where the blows were
likely or intended to do bodily harm, consent was no defense. It treated as an exception those cases of
“cudgels, fists, or wrestling” which are “manly diversions, they intend to give strength, skill and
activity, and may fit people for defence,” as well as cases of “rough and undisciplined sport or play,
where there is no anger and no intention to cause bodily harm.” Id. at 508 (quoting M. Foster,
CROWN LAW 259 (1756)). According to the court, “[n]othing could be more absurd or more repellent
to the ordinary intelligence than to regard his conduct as comparable with that of a participant in one
of those ‘manly diversions’. . . . Nor is his act to be compared with the rough but innocent horse-
play.” Id. at 509. For criticism of Donovan’s “breadth,” see, e.g., G. WILLIAMS, supra note 16, at
155.
Rape is unique, however, in the definition which has been accorded to consent. That definition makes all too plain that the purpose of the consent rule is not to protect female autonomy and freedom of choice, but to assure men the broadest sexual access to women. In matters of sex, the common law tradition views women ambivalently at best: Even when not intentionally dishonest, they simply cannot be trusted to know what they want or to mean what they say. While the cases that engendered this tradition date from the 1870’s and 1880’s, the law reviews of the 1950’s and 1960’s, and the appellate cases of the 1970’s and 1980’s, have perpetuated it.

The justification for the central role of consent in the law of rape is that it protects women’s choice and women’s autonomy in sexual relations. Or, as one leading commentator put it: “In all cases the law of rape protects the woman’s discretion by proscribing coitus contrary to her wishes.”

Not exactly. As discussed in the preceding Section, the law does not protect the woman from “coitus contrary to her wishes” when there is no “force.” Secondly, the definition of nonconsent requires victims of rape, unlike victims of any other crime, to demonstrate their “wishes” through physical resistance.

A 1906 Wisconsin case, Brown v. State, provides an example of the classic definition of nonconsent in rape as it was applied for most of this century. In a modified form, it continues to apply in some courts and jurisdictions. The victim in Brown, a sixteen-year-old (and a virgin), was a neighbor of the accused. She testified at trial that on a walk across the fields to her grandmother’s home, she greeted the accused. He at once seized her, tripped her to the ground, and forced himself upon her. “I tried as hard as I could to get away. I was trying all the time to get away just as hard as I could. I was trying to get up; I pulled at the grass; I screamed as hard as I could, and he told me to shut up, and I didn’t, and then he held his hand on my mouth until I was almost strangled.” Whenever he removed his hand from her mouth she repeated her screams. The jury found the defendant guilty of rape.

103. Note, Forcible and Statutory Rape, supra note 6, at 71; see also Model Penal Code § 213.1 comment 4, at 301 (1980) (“The law of rape protects the female’s freedom of choice and punishes unwanted and coerced intimacy.”).
104. 127 Wis. 193, 106 N.W. 536 (1906).
105. See also King v. State, 210 Tenn. 150, 158, 357 S.W. 2d 42, 45 (1962) (“in every way possible and continued such resistance until she was overcome by force, was insensible through fright, or ceased resistance from exhaustion, fear of death, or great bodily harm”); Moss v. State, 208 Miss. 531, 536, 45 So. 2d 125, 126 (1950) (“resistance must be unto the uttermost”); Reynolds v. State, 27 Neb. 90, 91–92, 42 N.W. 903, 903–04 (1889); People v. Dohring, 59 N.Y. 374, 386 (1874) (“until exhausted or overpowered”). In effect, the “utmost resistance” rule required both that the woman resist to the “utmost” of her capacity and that such resistance must not have abated during the struggle. See Note, Recent Statutory Developments supra note 5, at 1506.
106. 127 Wis. at 196, 106 N.W. at 537.
On appeal, the Supreme Court of Wisconsin did not reverse Brown's conviction on the ground that the force used was insufficient to constitute rape. Nor did the court conclude that the defendant lacked the necessary mens rea for rape. Rather, the court reversed the conviction on the ground that the victim had not adequately demonstrated her nonconsent:

Not only must there be entire absence of mental consent or assent, but there must be the most vehement exercise of every physical means or faculty within the woman's power to resist the penetration of her person, and this must be shown to persist until the offense is consummated.107

Here, the victim failed to meet that standard: She only once said "let me go;" her screams were considered "inarticulate;" and her failure to actually "resist," to use her "hands and limbs and pelvic muscles"—obstacles which the court noted that "medical writers insist . . . are practically insuperable"—justified reversal of the conviction.108 Indeed, the court noted that "when one pauses to reflect upon the terrific resistance which the determined woman should make," the victim's absence of bruises and torn clothing was "well-nigh incredible."109

Brown is almost eighty years old. But the problem it illustrates is not merely of historical interest. Virtually every jurisdiction has eliminated the requirement of "utmost resistance" to establish nonconsent.110 But by statute and in practice,111 many courts continue to inquire into the vic-

107. Id. at 199, 106 N.W. at 538.
108. Id. at 199–200, 106 N.W. at 538. According to the court, a woman is equipped to interpose most effective obstacles by means of hands and limbs and pelvic muscles. Indeed, medical writers insist that these obstacles are practically insuperable in absence of more than the usual relative disproportion of age and strength between man and woman, though no such impossibility is recognized as a rule of law.
109. Id. The latter qualification is, by the court's own opinion and holding, open to question. The view that an unwilling woman physically could not be raped was not limited to Wisconsin or to the nineteenth century. It provided support for insisting that the least women should do was resist to the utmost. See East, Sexual Offenders—A British View, 55 YALE L.J. 527, 543 (1946).
111. A number of states include "resistance" or "earnest resistance" in their definitions of "forcible compulsion." See, e.g., HAWAII REV. STAT. § 707-700(11) (Supp. 1980); KY. REV. STAT. § 510.010(2) (1985); OR. REV. STAT. § 163.305(2) (1985); UTAH CODE ANN. 76-5-406(1) (Supp. 1985); WASH. REV. CODE ANN. § 9A.44.010(5) (Supp. 1986). See generally Note, Recent Statutory Developments, supra note 5, at 1512–14. Some states that do not require resistance as a statutory element of the offense nonetheless provide in the statute that its absence is relevant to consent. In Virginia, for example, the law until 1981 required reasonable resistance as an element of the offense. The reform statute eliminated that requirement, but made clear that resistance was relevant to
tim's "earnest resistance" to establish that she did not consent to intercourse.

The 1981 case of *State v. Lima* is, like the *Rusk* case discussed in the preceding Section, an example of the sort of rape case that is causing concern and division in the appeals courts today. As in *Rusk*, the intermediate and highest appeals courts took different views of what was acknowledged to be a difficult case.

*Lima*, like *Brown*, involved an alleged rape in an open field involving no weapons and two individuals who knew each other. In *Lima*, the defendant had agreed to give his wife's 14-year-old cousin a ride home, and stopped at a park on the way. Once there, he pinned her shoulder to the ground with his left hand and moved his right hand inside of her blouse to her breast. When she told him to remove his hand, he told her to "shut up" and began to unbutton her shorts. She protested, "Willy, why are you doing this to me, you're my cousin," and began to cry.

Both the court of appeals and the supreme court viewed the key issue in *Lima* as whether, on these facts, the prosecution had established the "earnest resistance" of the victim required by Hawaii law. The court of appeals answered the question in the negative, because the "only resistance shown by the record are the victim's pleas to appellant to stop and an attempt to push appellant off of her." In reversing, the Supreme Court

whether sex was "against the will" of the complainant:

The Commonwealth need not demonstrate that the complaining witness cried out or physically resisted the accused in order to convict the accused of an offense under this article, but the absence of such resistance may be considered when relevant to show that the act alleged was not against the will of the complaining witness.

1981 VA. ACts 397, codified at VA. CODE § 18.2-67.6 (1982). See Kneedler, *Sexual Assault Law Reform in Virginia—A Legislative History*, 68 VA. L. REV. 459, 484-85 (1982); see also MODEL PENAL CODE § 213.1 comment 4 at 306-07 (1980) (in describing Model Penal Code as fresh approach, "[i]t is not to say that consent by the victim is irrelevant or that inquiry into the level of resistance by the victim cannot or should not be made. Compulsion plainly implies non-consent, just as resistance is evidence of non-consent.") (footnote omitted).


113. 2 Hawaii App. at 22, 624 P.2d at 1377. The court's analysis of the facts is strikingly similar to that of the *Brown* court:

114. Id., 624 P.2d at 1377 (citing State v. Jones, 62 Hawaii 572, 574 617 P.2d 1214, 1217 (1980)). Nor could Mr. Lima be convicted of any lesser included offense, in the view of the appellate court. Sexual abuse in the first degree, like rape in the first degree, requires "forcible compulsion"—"the very element which the prosecution failed to prove on the rape charge." Assault in the third degree requires proof that the defendant intentionally caused "bodily injury," defined as "physical pain, illness or any impairment of physical condition. Again, the prosecution failed to adduce any evidence to support a finding of bodily injury." Id. at 22-23, 624 P.2d at 1377. 

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of Hawaii made much of this "push" in its interpretation of nonconsent, much as the Maryland court in *Rusk* emphasized the light choking/heavy caresses in its interpretation of force. The court affirmed the conviction on the ground that the victim "did not simply lie supine and unresisting while the respondent had his way with her." Thus, it could not be said, as a matter of law, that "the complainant here did not exhibit a 'genuine physical effort' to resist." 14

Presumably, in Hawaii, to say no, cry, and then "simply lie supine and unresisting while [a man] ha[s] his way" is to consent to sex.

Hawaii is not unique in holding that a victim must do more than say no, at least in the absence of deadly force. In *Goldberg v. State*, 15 where the defendant brought a would-be modeling prospect to his fictitious and deserted "temporary studio," his conviction of rape was reversed both on the ground that the force used was insufficient and on the ground that the victim had failed to offer "real resistance." On the latter point, the court drew a bright line between verbal and physical resistance: "It is true that she told the appellant she 'didn't want to do that [stuff].' But the resistance that must be shown involves not merely verbal but physical resistance 'to the extent of her ability at the time.'" 16

No similar effort is required of victims of other crimes for which consent is a defense. In trespass, for example, the posting of a sign or the offering of verbal warnings generally suffices to meet the victim’s burden of nonconsent; indeed, under the Model Penal Code, the offense of trespass is aggravated where a defendant is verbally warned to desist and fails to do so. 17 A defendant’s claim that the signs and the warnings were not meant to exclude him normally goes to his *mens rea* in committing the act, not to the existence of consent. 18

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114. 643 P.2d at 541. *See also State v. Jones:* "Earnest resistance" . . . is a relative term and whether or not the statutory requirement was satisfied must be measured by the circumstances surrounding the alleged assault. Among the factors to be considered are the relative strength of the parties, the age of the female, her physical and mental condition, and the nature and degree of the force used by the assailant. Resistance may appear to be useless, and may eventually prove to be unavailing, but there *must have been a genuine physical effort on the part of the complainant to discourage and to prevent her assailant from accomplishing his intended purpose.


115. 41 Md. App. 58, 395 A.2d 1212 (1979); see supra text accompanying notes 77–79.

116. 41 Md. App. at 68, 395 A.2d at 1219 (citation omitted). *See also Hazel v. State, 221 Md. 464, 469–70, 157 A.2d 922, 925 (1960):*

The authorities are by no means in accord as to what degree of resistance is necessary to establish the absence of consent. However, the generally accepted doctrine seems to be that a female—who was conscious and possessed of her natural, mental and physical powers when the attack took place—must have resisted to the extent of her ability at the time, unless it appears that she was overcome by numbers or was so terrified by threats as to overpower her will to resist.


118. The Model Penal Code requires that the person enter the place "knowing that he is not
In robbery, claims that the victim cooperated with the taking of the money or eased the way, and thus consented, have generally been unsuccessful. Only where the owner of the property actively participates in planning and committing the theft will consent be found. Mere "passive submission" or "passive assent" does not amount to consent—except in the law of rape.

That the law puts a special burden on the rape victim to prove through her actions her nonconsent (or at least to account for why her actions did not demonstrate "nonconsent"), while imposing no similar burden on the victim of trespass, battery, or robbery, cannot be explained by the oft-observed fact that consensual sex is part of everyday life. Visiting (trespass with consent) is equally everyday, as is philanthropy (robbery with consent), and surgery (battery with consent). Instinctively, we may think it is easier in those cases to tell the difference between consent and nonconsent. But if so, it is only because we are willing to presume that men are entitled to access to women's bodies (as opposed to their houses or their wallets), at least if they know them, and to accept male force in potentially "consensual" sexual relations.
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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. Viewing women as autonomous human beings would mean treating them as persons who know what they want and mean what they say. A woman who wanted sex would say yes; a woman who did not would say no, and those verbal signals would be respected.

From a woman's point of view, the danger in this position is that many women who say "yes" are not in fact choosing freely, but are submitting because they feel a lack of power to say "no." From some men's point of view, the problem is that some women who say "no" would be willing to say "yes," or at least to "go along," if properly pressured. The "no means yes" philosophy, from this perspective, affords sexual enjoyment to those women who desire it but will not say so—at the cost of violating the integrity of all those women who say "no" and mean it.

A system of law that has traditionally celebrated female chastity and frowned upon sex outside of marriage might be expected to err on the side of less sex and to presume nonconsent in the absence of evidence to the contrary. But if ours has now become a society in which women have been "liberated" to say yes, that provides all the more reason—if more were needed—to respect a no. If the stigma attached to saying yes has been eliminated, then so have the grounds for claiming that no means yes. That we treat women in sexual encounters more like spectators at sporting events (where consent is presumed)\(^\text{124}\) than like owners of property (who are merely required to post a sign or verbally communicate nonassent) is only partly explained by the fact that rape is a more serious offense than trespass. It also reflects a view of women as lacking in autonomy, if not integrity, and secures the priority of men's sexual satisfaction.

In the 1950's and 1960's, the leading law journals in this country provided detailed explanations of why women could not be relied upon to know what they wanted or mean what they said; how it was that many women enjoyed physical struggle as a sexual stimulant; and how unfair it would be to punish men who realized that "no" means "yes," only to have

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\(^\text{124}\) Participants and spectators in a sporting event are presumed to consent to injuries that might result in the usual course of play. See W. LAFAVE & A. SCOTT, supra note 87, at 608 (1972); Williams, supra note 100, at 80-81; Comment, Towards a Consent Standard, supra note 5, at 636. But even here presumed consent is limited; where physical aggression exceeds the usual course of the sport, consent becomes inoperative and assault may be charged. See Comment, Violence in Professional Sports, 1975 Wis. L. Rev. 771 (discussing indictment of professional hockey player on aggravated assault charges for intentionally striking another player with stick); People v. Lentl, 44 Misc. 2d 118, 123-24, 253 N.Y.S. 2d 9, 15-16 (1964) (prosecutions of fraternity members for beatings given during hazing).
their ambivalent partners lie after the fact.\footnote{125} According to a student author published in the \textit{Stanford Law Review}: 

Although a woman may desire sexual intercourse, it is customary for her to say, “no, no, no” (although meaning “yes, yes, yes”) and to expect the male to be the aggressor. . . . It is always difficult in rape cases to determine whether the female really meant “no”. . . . The problem of determining what the female “really meant” is compounded when, in fact, the female had no clearly determined attitude—that is, her attitude was one of ambivalence. Slovenko explains that often a woman faces a “trilemma”; she is faced with a choice among being a prude, a tease, or an “easy lay.” Furthermore, a woman may note a man’s brutal nature and be attracted to him rather than repulsed.\footnote{126}

In order to remedy these problems, the author concluded that the resistance standard must be “high enough to assure that the resistance is unfeigned and to indicate with some degree of certainty that the woman’s attitude was not one of ambivalence or unconscious compliance and that her complaints do not result from moralistic afterthoughts,” but must be “low enough to make death or serious bodily injury an \textit{unlikely outcome} of the event.”\footnote{127} That death or serious bodily injury remains a possible result of ignoring a woman’s words is apparently not too great a cost to pay.

Perhaps the most influential of all such commentary was the often and still-cited \textit{Yale Law Journal} Note on what women want.\footnote{128} Relying on Freud, the author pointed out that it is not simply that women lie, al-
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though there is an “unusual inducement to malicious or psychopathic accusation inherent in the sexual nature of the crime.” Even the “normal girl” is a confused and ambivalent character when it comes to sex. Her behavior is not always an accurate guide to her true desires; it may suggest resistance when in fact the woman is enjoying the physical struggle:

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. Many women, for example, require as part of preliminary “love play” aggressive overtures by the man. Often their erotic pleasure may be enhanced by, or even depend upon, an accompanying physical struggle. The “love bite” is a common, if mild, sign of the aggressive component in the sex act. And the tangible signs of struggle may survive to support a subsequent accusation by the woman.\textsuperscript{129}

And if women are ambivalent toward sex, it follows that it would be unfair to punish the man who was not acting entirely against her wishes:

\[\text{A}\] woman’s need for sexual satisfaction may lead to the unconscious desire for forceful penetration, the coercion serving neatly to avoid the guilt feelings which might arise after willing participation. . . .

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. To illustrate . . . [T]he anxiety resulting from this conflict of needs may cause her to flee from the situation of discomfort, either physically by running away, or symbolically by retreating to such infantile behavior as crying. The scratches, flight, and crying constitute admissible and compelling evidence of non-consent. But the conclusion of rape in this situation may be inconsistent with the meaning of the consent standard and unjust to the man . . . . [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.\textsuperscript{130}

In short, the problem is not only that some women lie, but that many women do not in fact know what they want, or mean what they say—at least when they say no. And the presence of force does not even prove rape, because many women enjoy and depend on force. According to this view, insisting that women do more than simply say no to sex is an essential means of protecting the man who exercises his judgment to ignore a woman’s words of protestation.

\textsuperscript{129} Note, Forcible and Statutory Rape, supra note 6, at 66 (footnotes omitted).

\textsuperscript{130} Id. at 67–68 (footnotes omitted).
Nonconsent, defined as physical resistance, serves this notice function in two ways. First, resistance defines the limits of force. The law avoids the task of inquiring into how much force in sex is too much by defining proscribed force according to victim resistance. Second, physical resistance means that this woman in fact means what she says; men are free to ignore words, but resistance signifies that no, in this case, means no. Resistance thus serves to give notice that sex is indeed unwelcome, that force is just that, and that the man has crossed the line.

Under this view, the "utmost resistance" standard could be understood by judges to reflect their view that a truly unwilling woman would fight nearly to the death to protect her virtue. If the judges believed this, then certainly a male defendant did not deserve the serious punishment of a rape conviction for acting on the same belief. Unless the woman offered utmost resistance, or had good reason (fear of death, unconsciousness, incompetence) for not doing so, the man presumably could not be held to be on notice that his advances were truly unwelcome.

In practice, the nonconsent standard has served a second important function as well. It has provided a convenient means for distinguishing between those victims deserving of the law's protection, characteristically the chaste, white victim, and those who were not. Thus the Court of Appeals of Virginia reasoned, in reversing the conviction of a black man for attempted rape of a black woman (who, the court thought it important to note, had never been married and had two children, and attended a performance with the prisoner paying all the expenses):

The evidence indicates that he had wooed her pretty roughly in a way that would have been horrible and a shocking outrage toward a woman of virtuous sensibilities, and should have subjected him to the severest punishment which the law would warrant. But how far it affected the sensibilities of the prosecutrix does not appear. It by no

131. See, e.g., Government of Virgin Islands v. John, 447 F.2d 69, 73 (3d Cir. 1971) (finding prejudicial error in trial court's failure to instruct jury of "substantial probative value," with respect to issue of consent); Packineau v. United States, 202 F.2d 681, 685-87 (8th Cir. 1953) (holding that evidence of "her concupiscence—of her having sexual lust and unlawfully indulging it" must be admitted to balance jury's view of her as "very refined" and unsophisticated; but error to allow defendant to be questioned about illegitimate children and arrests because "acts of misconduct, not resulting in conviction of a crime, are not the proper subjects of cross-examination to impeach a witness"); see also Wynne v. Commonwealth, 216 Va. 355, 356, 218 S.E.2d 445, 446 (1975); People v. Collins, 25 Ill. 2d 605, 611, 186 N.E.2d 30, 33 (1962); Lee v. State, 132 Tenn. 655, 658, 179 S.W. 145, 146 (1915) ("no impartial mind can resist the conclusion that a female who had been in the recent habit of illicit intercourse with others will not be so likely to resist as one who is spotless and pure"); Bailey v. Commonwealth, 82 Va. 107, 110-11 (1886) (upholding rape conviction of man who had sex with fourteen-year-old chaste stepdaughter, notwithstanding absence of active resistance, though insisting that physical resistance generally required); People v. Abbot, 19 Wend. 192, 195 (N.Y. Sup. Ct. 1838) ("Will you not more readily infer assent in the practised Messalina, in loose attire, than in the reserved and virtuous Lucretia?").
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means appears, from the facts certified, that it was an attempt to ravish her, against her will, or that it was not only an attempt to work upon her passions, and overcome her virtue, which had yielded to others before—how often it does not appear. . . . Without any interference, or any outcry on her part, together with his after conduct, shows, we think, that his conduct, though extremely reprehensible, and deserving of punishment, does not involve him in the crime which this statute was designed to punish.132

Eventually, the “utmost resistance” standard came to be replaced by a “reasonable resistance” standard: Chastity may be valuable, but judges came to realize that it may not be more valuable than life itself. The reasonable resistance standard spares the woman the choice of risking her life or serious injury to prevent unwanted sex, instead asking whether she had offered “reasonable” resistance. But for many courts, saying “no”—passive resistance—does not count as resistance. In those courts, the understanding of the law review authors of the 1950’s and 1960’s, that “no means yes,” continues to have the force of law.

The consent standard, like the force standard, thus emerges as another means to protect men against unfair convictions by giving them full and fair warning that their (forceful) advances constitute an unwelcome rape rather than a welcome, or at least accepted, seduction. An alternative approach to this fair warning problem would be to spell out the crime or crimes of “rape” in detail, without regard to the response of the woman. In fact, most courts recognize the use of deadly weapons or a threat of imminent death as criminal without the need for too much reliance on the woman’s response, at least most of the time. But to go further and prohibit all forms of physical force would inject the criminal law into what many conceive as private and appropriate choices: It is one thing to ban guns and deadly weapons, or even fraud and extortion, but quite another to say that “love bites” or vigorous thrashing or pushing is criminal regardless of consent.

Our inability or unwillingness to detail the sexual practices that we as

132. Christian v. Commonwealth, 64 Va. (23 Gratt.) 954, 955, 959 (1873). The Virginia Court subsequently upheld the death penalty for the attempted rape of a white “simple, good, unsophisticated country girl” by a black man. Hart v. Commonwealth, 131 Va. 726, 729, 109 S.E. 582 (1921). But even virginity could have its costs, at least in cases involving simple white country boys as defendants; the story of Brown v. State, 127 Wis. 193, 106 N.W. 536 (1906), discussed earlier, is, after all, the story of Little Red Riding Hood on her way to her grandmother’s house when attacked in the fields by the accused. In her case, it appears, virginity was seen not as a factor earning her the court’s protection but one which would motivate her to lie about her sexual indiscretion. According to the court, when she found that she was bleeding, she realized that she would have to lie: “[The] prosecutor turned from her way to friends and succor to arrange her underclothing and there discovered a condition making silence impossible. . . . She could not conceal from her family what had taken place.” Id. at 201, 106 N.W. at 539.

133. Note, Forcible and Statutory Rape, supra note 6, at 66.
a society will not tolerate, regardless of consent, creates the law’s heavy reliance on the behavior of the woman. Because the law has provided that if the woman “consents”—regardless of the amount of force used—intercourse is not rape, men have a right to fair warning as to consent. But the consent standard does not necessarily lead to the denial of autonomy to women, or to the “no means yes” philosophy. Quite the contrary, the consent standard could be viewed as a means to afford women their deserved freedom to engage in sex however they choose—whether that is sex with women or sex with forcible penetration. 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 of 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. It could also expand liability for criminal sex to any man who refuses to respect those limits.

Many feminists would argue that as long as women are powerless relative to men, viewing a “yes” as a sign of true consent is misguided. Yet if a “yes” might really mean “no,” we might at least agree to respect the courage of a woman who dared to say “no.” The insistence that men are entitled not only to presume consent from silence but actually to ignore a woman’s explicit words makes all too clear the law’s absolute determination not to empower women at all. The fear that women, acting from shame or spite or vengeance, will abuse any power they are afforded in sexual relations at the expense of “innocent” men is the most pervasive theme in the legal commentary on rape. A consent standard that further empowered women and potentially eased the burden of proving rape—limited sexual access—has been plainly unacceptable.

The refusal of the law (and the society it reflects) either to limit the scope of seduction regardless of consent or to empower women through the consent standard creates the fair warning problem that demands a resistance standard as its answer. We could seek to prohibit certain forms of seduction. We could seek to empower women, at least when they say no. Both alternatives would mean less freedom for men to coerce submission and secure sexual access. Both would eliminate the need for women to resist physically. Having chosen neither, we have created a fair warning problem whose only solution, at least to many courts and commentators, is to interpret force and consent in ways that punish women for “complicity” in sex, making their conduct the determinant of liability and the subject of our verdicts. There is nothing inevitable about either the problem or the solution.
As of 1980, every state had considered and most had passed some form of rape "reform" legislation. The scope of legislative change varies enormously among the states. In many cases, the reform effort centered not on the definition of the crime itself, but on the means of disproving it. Rape shield laws were enacted to limit the admissibility of the victim's prior sexual conduct. In other cases, the reform effort consisted of the adoption of the Model Penal Code standards for rape and other crimes; in still others, the impetus for legislation was opposition to certain of the Code's provisions on rape (such as corroboration and fresh complaint).

My purpose here is not to summarize all of the changes that have been made on a state-by-state basis; others have done that. Rather, I want to focus on the two statutory schemes which have been the most important models of reform—the Model Penal Code and the Michigan criminal sexual conduct statute. Both models claim to be "reforms" in that they seek to make changes in the common law tradition. The Model Penal Code, its commentators claimed in 1980, is the "balanced" approach. The Michigan statute has been widely described as a model "feminist" approach.

Theoretically, a reform statute might move beyond the most traditional understanding of rape either by focusing on the victim and giving meaning to the consent standard and respect to a woman's words of refusal, or by focusing on the man and expanding our understanding of the force and coercion that makes intercourse rape. The Model Penal Code focuses on the woman, but it does not empower her. The Michigan statute focuses on the man; but it does not expand our understanding of force and coercion. As "reforms," both are far more limited than either their proponents or opponents would acknowledge. According to the empirical studies, neither

134. Bienen, supra note 25, at 171.
135. See id.; see, e.g., H. Feild & L. Bienen, Jurors and Rape 207-458 (1980) (state-by-state listing of rape provisions); Note, Recent Statutory Developments, supra note 5, at 1500.
136. See, e.g., MODEL PENAL CODE § 213.1 comment at 286 (1980).
Of those states which have departed from the traditional common-law approach to the definition of rape, the vast majority have followed the Model Penal Code, the New York statute, the Michigan statute, or some combination of the three. Both the New York and Michigan statutes have been influenced by the Model Code, although the departures in the Michigan statute are more dramatic.
The then existing New York statute departed from the Code most significantly in its requirement of "earnest resistance," a requirement still followed by a number of other states, but since eliminated in New York, See supra note 111; see also Bienen, supra note 25, at 172 (Michigan statute "continues to be the most important model for reform"); Note, Recent Statutory Developments, supra note 5, at 1502.
137. See MODEL PENAL CODE § 213.1 comment at 303 (1980).
of these reforms, or any of the statutes modeled on them, have had a significant, measurable impact on the actual processing of rape complaints.

A. The Model Penal Code

The Model Penal Code provisions on rape were first presented to the American Law Institute in 1955 and were ultimately adopted in 1962. Since that time, they have been enormously influential: Many states today enforce rape laws based on, or at least significantly influenced by, the Code. In 1980, the final Commentaries were completed and published. Those Commentaries not only justify, but applaud the 1962 Code. With the exception of the gender-specificity of the Code, which the commentators now consider a close question, the provisions of the Code are praised as a “fresh,” “balanced,” and “enlightened” resolution of the issues involved in providing statutory definitions for the elements of rape.

The Code creates three categories of prohibited sexual intercourse with adult, competent women. Rape is a felony of the second degree where a male has sexual intercourse with a female not his wife if “he compels her to submit by force or by threat of imminent death, serious bodily injury, extreme pain or kidnapping, to be inflicted on anyone.” Rape becomes a first degree felony where these requirements are met and serious bodily

141. Model Penal Code and comments, Part II (Definition of Specific Crimes) (1980), published in three volumes. The provisions on sexual offenses are included in volume 1. The revised Commentaries relating to the general provisions of the Code—Part I—were published in three volumes in 1985.
142. See Model Penal Code § 213.1 comment at 335-37 (1980):
The Model Penal Code was drafted at a time when the social climate was such that the limitation of rape to male aggression was hardly questioned. This is not to say that the possibility of male attacks upon males or female attacks upon males or females was ignored. Rather, the significance of the difference between these cases on the one hand and the case of a male attack upon a female on the other was largely perceived as one of grading.
If the Model Code were being redrafted today, it might well be that preserving these differences would not be thought to outweigh the advantages of describing the entire offense of rape in gender-neutral terms.

The passage is significant because it is the only point in these Commentaries where the authors suggest that a different result might or should obtain were the Code redrafted today. Compare, e.g., id. at 344-46 (defending marital exemption) with Model Penal Code § 213.6 comment at 428-29 (1980) (defending corroboration requirement at time when virtually every jurisdiction had abandoned it as formal rule). But even with respect to gender neutrality, the Code writers continue to defend the view—reflected in the current Code—that there are significant differences between heterosexual and homosexual rape. The current Code enforces those perceived differences by classifying the crime of “deviate sexual intercourse” (a striking title in itself given the Code’s abandonment of criminal penalties for sodomy) as under no circumstances more serious than a felony in the second degree, while rape (of a woman, by a man not her husband) in certain circumstances is punished as a first degree felony.
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injury is inflicted or "the victim was not a voluntary social companion of the actor upon the occasion of the crime and had not previously permitted him sexual liberties." Sexual intercourse constitutes the third degree felony of "gross sexual imposition" where a man compels a female not his wife to submit "by any threat that would prevent resistance by a woman of ordinary resolution."143

The Code further provides that a complaint to the police within three months is required for all of these offenses; that the victim's testimony must be corroborated by other evidence; and that the jury must be given a cautionary instruction to evaluate the victim's testimony with special care.144

Surprisingly, given their long history and influence, the Code provisions have not been the subject of searching scrutiny or criticism in the literature. On occasion summarily praised,145 on occasion summarily condemned,146 the innovations of the Code have rarely been examined at any length except by their own approving commentators. These innovations fall into two categories. Both focus on the victim, but in significantly different ways. The first innovation involves the Code's efforts to enforce a set of "objective" rules which "avoid making the imposition-consent in-

143. Model Penal Code § 213.1(1) & (2) (1980) provides in pertinent part:
(1) Rape. A male who has sexual intercourse with a female not his wife is guilty of rape if
. . . . he compels her to submit by force or by threat of imminent death, serious bodily injury, extreme pain or kidnapping, to be inflicted on anyone;
. . . . Rape is a felony of the second degree unless (i) in the course thereof the actor inflicts serious bodily injury upon anyone, or (ii) the victim was not a voluntary social companion of the actor upon the occasion of the crime and had not previously permitted him sexual liberties, in which cases the offense is a felony of the first degree.

(2) Gross Sexual Imposition. A male who has sexual intercourse with a female not his wife commits a felony of the third degree if . . . . he compels her to submit by any threat that would prevent resistance by a woman of ordinary resolution.

144. Model Penal Code § 213.6(2), (4) & (5) (1980) provides in pertinent part:
(2) Spouse Relationships. Whenever in this Article the definition of an offense excludes conduct with a spouse, the exclusion shall be deemed to extend to persons living as man and wife, regardless of the legal status of their relationship. The exclusion shall be inoperative as respects spouses living apart under a decree of judicial separation.

. . . .

(4) Prompt Complaint. No prosecution may be instituted or maintained under this Article unless the alleged offense was brought to the notice of public authority within [3] months of its occurrence or, where the alleged victim was less than [16] years old or otherwise incompetent to make complaint, within [3] months after a parent, guardian or other competent person specially interested in the victim learns of the offense.

(5) Testimony of Complainants. No person shall be convicted of any felony under this Article upon the uncorroborated testimony of the alleged victim. Corroboration may be circumstantial. In any prosecution before a jury for an offense under this Article, the jury shall be instructed to evaluate the testimony of a victim or complaining witness with special care in view of the emotional involvement of the witness and the difficulty of determining the truth with respect to alleged sexual activities carried out in private.

145. See, e.g., Note, Recent Statutory Developments, supra note 5.
146. See, e.g., Bienen, supra note 25, at 176.
quiry entirely on a subjective basis" by imposing obstacles both on the circumstances in which and the extent to which the woman's "subjective" view is credited. The second innovation involves the Code's definition of a lesser offense of gross sexual imposition which depends on the will to resist of the woman of "ordinary resolution," a new construct in the law.

1. The "Objective" Rules

The Code begins with the premise that the nonconsent of the woman is critical to make male conduct, no matter how aggressive, rape: "If the law regards the female as competent to consent and if she does so, intercourse is not rape." Moreover, "the possibility of consent by the victim, even in the face of conduct that may give some evidence of overreaching, cannot be ignored." But at the same time, echoing the Freudian approach of student commentaries of the 1950's and 1960's, the Code argues that a consent standard that allowed women, simply in saying no to a man and repeating it to a jury, to establish a charge of rape would afford them unjustified power:

"Often the woman's attitude may be deeply ambivalent. She may not want intercourse, may fear it, or may desire it but feel compelled to say 'no.' Her confusion at the time of the act may later resolve into non-consent ... The deceptively simple notion of consent may obscure a tangled mesh of psychological complexity, ambiguous communication, and unconscious restructuring of the event by the participants."

This is, of course, precisely the dilemma that traditionally led common law courts and commentators to insist on resistance by the woman—even utmost resistance—as a matter of law. The Code is "balanced" in its attack on both sides of the resistance debate, criticizing both those who "place[] disproportionate emphasis upon objective manifestations of non-consent by the woman" (the resistance school) and those who go "too far in the opposite direction" (Michigan) by statutorily eliminating the resistance requirement.

The Code's answer to the immediate resistance conflict is to recognize the evidentiary relevance, if not legal necessity, of female resistance. As

148. Id. at 301. Notably, the converse is most assuredly not true: If the law regards the female as competent to consent and she does not do so, intercourse may also not be rape.
149. Id. at 303.
150. Id. at 302-03. The commentators, it should be noted, feel no need to cite any authority whatsoever in support of their understanding of how women behave and think in sexual encounters.
151. Id. at 303.
152. The harder question is not whether the presence of physical resistance ought be considered
for the larger dilemma, the Code eschews any effort to provide objectivity by actually defining force and consent: The Code requires force (or threats of serious bodily injury)\(^{153}\) by the man and nonconsent by the woman,\(^{154}\) but defines neither, thus leaving courts and juries free to focus their attention and judgment on the woman victim in the most traditional, restrictive way. Instead the Code seeks “objectivity” through a series of rules that call into question female reliability and honesty (“subjectivity”), even as the focus of inquiry remains almost exclusively on the woman.

The first such rule is the requirement of corroboration of the victim’s testimony, a rule which did not exist at common law\(^{166}\) and which is imposed by the Code only in cases of rape and sexual assault.\(^{166}\) The usual justification for corroboration requirements is that women intentionally lie about sex.\(^{157}\) The Code commentators tread carefully on the paradigm of the vengeful and lying female, and the one who fantasizes rape. “[N]o

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probative of nonconsent, but whether its absence ought be considered probative of consent. In my judgment, the assumption that women who do not consent resist physically—and that therefore the absence of physical resistance is at least suspect and must be explained—reflects a view of reality that bears little relation to the experience of rape victims.

153. The qualifying threats under the Code—imminent death, serious bodily injury, or extreme pain or kidnapping—are broader than some common law statutes, which even further restricted the threats that would excuse “utmost resistance.” The Code includes threats made against persons other than the victim, and includes neither the “reasonable person” nor the “apparent power of execution” restrictions of some common law statutes. See Model Penal Code § 213.1 comment at 309–12 (1980).

154. While pointing with pride to the fact that consent is not included as an element of the offense of rape defined in the article on sexual offenses, the Commentators recognize in a footnote that the Code’s general consent defense is fully applicable to rape. Id. at 306 & n.93.

155. At one time, the rule was enforced by a significant minority of American jurisdictions, but by the time of the Commentaries in 1980, it had been abandoned by most of them. The commentators were able to cite only one revised Code—Georgia’s—which included a corroboration requirement for all rape cases. Model Penal Code § 213.6 comment at 428 n.37 (1980). They also cited two jurisdictions which had accomplished the result judicially—the U.S. Court of Appeals for the District of Columbia Circuit, in Washington v. United States, 419 F.2d 636 (D.C. Cir. 1969), and Nebraska, in State v. Garza, 187 Neb. 407, 191 N.W.2d 454 (1971). See Model Penal Code § 213.6 comment at 428 n.38 (1980). The U.S. Court of Appeals for the D.C. Circuit abandoned its corroboration requirement in 1977. See United States v. Sheppard, 569 F.2d 114 (D.C. Cir. 1977). Nebraska may now be the only state that requires corroboration in all rape cases, as the Code does, though some others continue to require it in more limited categories of cases. See S. Kadish, S. Schulhofer, & M. Paulsen, supra note 22, at 394–95. See generally State v. Byers, 102 Idaho 159, 627 P.2d 788 (1981) (reviewing recent authorities); Note, Rape Corroboration, supra note 5; Clarke, Corroboration in Sexual Cases, 1980 Crim. L. Rev. 362.

156. While this means that the requirement technically applies in cases where men may be victims (e.g., deviate sexual intercourse), the commentators acknowledge that in practice those whose testimony would require corroboration under the Code will generally be female. Model Penal Code § 213.6 comment at 422 (1980).

157. See, e.g., Note, Corroborating Charges, supra note 6, at 1137–38 (citations omitted): Because of the inordinate danger that innocent men will be convicted of rape, some states have adopted the rule that the unsupported testimony of the complaining witness is not sufficient evidence to support a rape conviction . . . .

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 . . . . Since stories of rape are frequently lies or fantasies, it is reasonable to provide that such a story, in itself, should not be enough evidence to convict a man of a crime.

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doubt such cases exist," but the whole area is a "murky ground." Nor do the commentaries seek to justify the corroboration rule on the ground that judges and juries will too quickly rush to express their outrage about rape through conviction. Their concern echoes Lord Hale's insistence on the difficulty of defending against a false accusation of a sexual offense. The commentary argues:

The difference between criminal and non-criminal conduct depends ultimately on a question of attitude. Proof of this elusive issue often boils down to a confrontation of conflicting accounts. The corroboration requirement is an attempt to skew resolution of such disputes in favor of the defendant. It does not, or at least need not, rest on the assertion that one person's testimony is inherently more deserving of credence than another's. It is, rather, a determination to favor justice to the defendant, even at some cost to societal interest in effective law enforcement and to the personal demand of the victim for redress. In short, the corroboration requirement should not be understood as an effort to discount female testimony or as an unsympathetic understanding of the female experience with sexual aggression. It is, rather, only a particular implementation of the general policy that uncertainty should be resolved in favor of the accused.

The problem with this explanation is that the policy of resolving uncertainty in favor of the defendant is one which is already addressed in every criminal trial by the requirement of proof beyond a reasonable doubt. Why is that constitutional mandate sufficient to protect the rights of all criminal defendants except those accused of rape? The answer—if it is not that rape victims are disproportionately liars or that rape juries are disproportionately conviction-prone (and the Commentary rejects both of these answers)—is that the crime of rape, because it turns on a woman's nonconsent to sex, is different from other offenses.

The reference to consent as an "elusive issue" involving "a question of attitude" is revealing. What makes the "attitude" component so troubling is, of course, the ambivalence ("subjectivity") problem—the danger either that the woman did not know what she wanted or mean what she said, or at least that the man did not hear it or see it that way. The corroboration

158. MODEL PENAL CODE § 213.6 comment at 427 (1980).
159. Id. at 427-28. While recognizing the paradigm of this argument in the trial of a black defendant accused of raping a white woman, the Comments "expect that enforced non-discriminatory juror selection might provide a partial answer."
160. 1 M. HALE, supra note 15, at 635 (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."). Lord Hale's "insight" is also incorporated in the separate requirement of a cautionary instruction in rape cases. MODEL PENAL CODE § 213.6(5) (1980).
161. MODEL PENAL CODE § 213.6 comment at 428 (1980).
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requirement, as offered by the Code, addresses that problem by requiring other proof, beyond the woman's word then or now, that she did not consent. In effect, it requires violence (as schoolboys know it) and resistance: Because there are rarely witnesses to a rape, that proof almost inevitably must consist of the bruises and torn clothing which such force and resistance produce.\textsuperscript{162}

The additional requirement that a complaint must be filed within three months—the "fresh complaint" rule—was a true "innovation" of the Model Penal Code. At common law, absence of a fresh complaint created a strong but not conclusive presumption against a woman\textsuperscript{163} and at the time the Code was drafted, no jurisdiction barred prosecution in the absence of a fresh complaint.\textsuperscript{164} The rule is unique to rape, and its justification is unique to women victims of sexual assault: "The requirement of prompt complaint springs in part from a fear that unwanted pregnancy or bitterness at a relationship gone sour might convert a willing participant in sexual relations into a vindictive complainant."\textsuperscript{165} "Perhaps more importantly," the commentary continues, "the provision limits the opportunity for blackmailing another by threatening to bring a criminal charge for sexual aggression," an objective which "is especially critical for those

\textsuperscript{162} There may, to be sure, be individual rape cases where juries should not convict based on uncorroborated testimony, and where judges should not allow their convictions to stand if they do. Where the case is indeed a contest of credibility between two parties—particularly where one of the two may have a complaint growing out of a long-term relationship (as business partners might)—the prosecution may well have a difficult time meeting its constitutional mandate, let alone convincing a jury to vote for conviction. But this recognition does not support the blanket corroboration rule for rape cases. There is absolutely no evidence that juries need such a rule in order to protect defendants; quite the contrary, the empirical evidence points both to the rarity of cases which are in fact contests of credibility, see Note, Rape Corroboration, supra note 5, and to the suspicion with which juries consider the testimony of rape complainants, particularly in the absence of aggravating circumstances, see, e.g., H. Kalven \& H. Zeisel, The American Jury 142 (1966). Moreover, the Code's corroboration rule is not limited to cases where there is concern about a motive to lie or about affording an unfair advantage to one of two parties in a long-standing relationship. Indeed, the Code requires corroboration even in cases where consent is not at issue. Where, for instance, the defense is misidentification—which is common in traditional, stranger cases—the Code's position that "the court should require some supporting evidence for whatever aspect of the case is most in issue," Model Penal Code § 213.6 comment at 430 (1980), would require corroboration of the victim's identification—a position whose justification cannot be the problems of consent, but must be the problems of rape victims being particularly untrustworthy witnesses.

\textsuperscript{163} See 4 W. Blackstone, Commentaries\textsuperscript{*} 211; 1 W. Hawkins, History of the Pleas of the Crown 22 (8th ed. 1824); Model Penal Code § 213.6(5) (1980).


\textsuperscript{165} Model Penal Code § 213.6 comment at 421 (1980).
offenses involving consensual relations” with underage girls, although the rule is not so limited.166 The Code commentary on the fresh complaint rule is startlingly attentive to the problem of the vindictive, spurned woman, but silent about the woman who legitimately worries about the receptiveness of police, prosecutors, juries and even friends or employers to a report that she was raped. If the statistics are credited at all, rape’s uniqueness comes not in the disproportionate numbers of false complaints, but in the disproportionate numbers of cases that are never reported at all.167 That rape, particularly among acquaintances, is a strikingly underreported offense; that the adverse consequences of pursuing a rape complaint may be substantial; in short, that there may be legitimate reasons for delay, is not even acknowledged by the Code. Instead, in order to protect men from an unsubstantiated risk of lies or blackmail, the Code imposes an initial statute of limitations of unique and unheard-of brevity in the criminal law, regardless of the circumstances or justifications for delay in the particular case.

Even where there is both a fresh complaint and corroboration, the Code is still unwilling to allow a jury simply to evaluate a woman’s testimony about a rape. Beyond the instruction that the jury must be persuaded beyond a reasonable doubt, the Code further requires that the jury also be specifically warned “to evaluate the testimony of a victim or complaining witness with special care in view of the emotional involvement of the witness and the difficulty of determining the truth with respect to alleged sexual activities carried out in private.”168 This “cautionary instruction” very clearly says that all women who are forced to have sex have an “emotional involvement” in the event and are therefore not to be totally trusted in their recounting of it. The force of this instruction is, not unintentionally I would think, likely to be greatest in those cases where there is some prior “involvement,” if not emotion, between the man and the woman. But no woman is entirely above suspicion: “Objectivity” demands that the jury be reminded to view the testimony of every victim or complaining witness with the “special care” uniquely required in rape cases.

Men have written for decades, if not centuries, about women’s rape fantasies. But perhaps the better explanation for the law, as reflected in the Code and commentaries, lies in the fantasies of men. The male rape fantasy is not a pleasant dream. It is a nightmare of being caught in the classic, non-traditional rape. A man engages in sex. Perhaps he’s a bit aggressive about it. The woman says no but doesn’t fight very much. Fi-

166. Id.
167. See Note, Rape Corroboration, supra 5, at 1374–75; see also infra Part IV.
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nally, 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 were no witnesses. It’s his word against hers. At best, it’s a contest of credibility, and the jury is on her side: After all, he’s an accused “rapist.”

It is important to note that this is not simply a nightmare about women; it is also, the Code’s comments to the contrary notwithstanding, a nightmare about juries, and about the unwillingness or inability of prosecutors to exercise screening discretion and judges to exercise meaningful review.\(^{169}\) Rape has long been viewed not only as a crime against women, but also as a crime against the man who is entitled to exclusive possession of that woman.\(^{170}\) The male nightmare is thus not simply the lying, confused or ambivalent woman, but the men on the jury whose passions are

\(^{169}\) As noted earlier, in discussing the corroboration requirement, the Code comments eschew the justification that juries will be prejudiced against a defendant because of the hostility generated by a charge of rape, and recognize that juries are in fact reluctant to return rape convictions in the absence of aggravating circumstances. MODEL PENAL CODE \(\S\) 213.6 comment at 427–28 (1980) (citing H. KALVEN & H. ZEISEL, supra note 162, at 29, 142). Yet if juries were not distrusted, then they could be expected to recognize the “ambivalent” woman without the corroboration requirement, to take into account the absence of a fresh complaint as one factor to be considered in judging her credibility, and certainly to resolve the issues presented without the necessity of a cautionary instruction. While the Code does not rest explicitly on jury distrust—perhaps because the weight of empirical evidence flows so greatly the other way—its ultimate positions seem to incorporate it. In fact, it offers no alternative justification for some rules, i.e., the fresh complaint rule. Virtually every court and author who has ever agreed with these Code positions has done so explicitly on the ground of distrust of both juries and women. See, e.g., Note, Corroborating Charges, supra note 6, at 1139 (“[i]t is important that the conflict be resolved automatically because a jury—or even a judge—cannot always be trusted to resolve it fairly.”); 3A J. WIGMORE, EVIDENCE \(\S\) 924(a), at 736–37 (Chadbourn ed. 1970); 1 M. HALE, supra note 15, at 636; Roberts v. State, 106 Neb. 362, 366–67, 183 N.W. 555, 557 (1921); State v. Connelly, 57 Minn. 482, 486, 59 N.W. 479, 481 (1894); see also, Note, Rape Corroboration, supra note 5, at 1378–82.

\(^{170}\) Deuteronomy punished the rape of an unbetrothed virgin by requiring the man to marry the woman and pay fifty shekels to her father. Deuteronomy 22:28–29. See generally Gold & Wyatt, The Rape System: Old Roles and New Times, 27 Cath. U. L. REV. 695, 696–700 (1978). Freud viewed the “exclusive right of possession of a woman” as the “essence of monogamy,” and the “demand that the girl shall bring with her into marriage with one man no memory of sexual relations with another” as a “logical consequence” of that right. 4 S. FREUD, COLLECTED PAPERS 217 (Riviere's trans. 1925). An author in the Yale Law Journal, putting Freud’s views in the legal context, asserted:

The consent standard in our society does more than protect a significant item of social currency for women; it fosters, and is in turn bolstered by, a masculine pride in the exclusive possession of a sexual object. The consent of a woman to sexual intercourse awards the man a privilege of bodily access, a personal “prize” whose value is enhanced by sole ownership. . . . Words like “ravaged” and “despoiled” used to describe the rape victim reflect the notion of a stain attaching to the body of the girl. The man responds to this undercutting of his status as “possessor” of the girl with hostility toward the rapist; no other restitution device is available. The law of rape provides an orderly outlet for his vengeance.

Note, Forceful and Statutory Rape, supra note 6, at 72–73 (footnotes omitted).

Notably, in this account of the crime, the woman victim is nearly invisible. Cf. S. BROWNMILLER, supra note 4, at 15 (rape is “nothing more or less than a conscious process of intimidation by which all men keep all women in a state of fear”). Instead, rape emerges as a conflict between and among men, with one man’s woman used wrongly by another. Cf. E. CLEAVER, SOUL ON ICE 14 (1968):

Rape was an insurrectionary act. It delighted me that I was defying and trampling upon the white man’s law, upon his system of values, and that I was defiling his women—and this point, I believe, was the most satisfying to me because I was very resentful over the historical fact of how the white man had used the black woman.

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inflamed by the violation of rape. It is "because the crime of rape arouses emotions as do few others,"171 because of "the respect and sympathy naturally felt by any tribunal for a wronged female,"172 because "[p]ublic sentiment seems preinclined to believe a man guilty of any illicit sexual offense he may be charged with,"173 that juries cannot be trusted.

Actual occurrence of the male fantasy has never been substantiated by an empirical study. According to what we do know, the nightmare case is highly unlikely even to be reported to the police, let alone prosecuted; cases that are simply credibility contests are virtually non-existent; and juries tend to be highly suspicious of rape complainants, particularly in the non-traditional, non-stranger rape.174 The fantasy, in short, appears to be just that. Yet it lives on in the "objective rules" of the Model Penal Code, which impose obstacles in not only the non-traditional cases, which would appear to be their raison d'etre, but in all rapes.

The final objective rule of the Code explicitly downgrades the seriousness of the non-traditional rape in which there was a prior relationship of intimacy. Forcible rapes are graded by the Code according to two factors. If serious bodily injury is inflicted, forcible rape is a first degree felony. If there is no serious bodily injury, then the grading of rape depends entirely on the relationship between victim and defendant and the circumstances of their encounter: It is a first degree felony if "the victim was not a voluntary social companion of the actor upon the occasion of the crime and had not previously permitted him sexual liberties."175 If the two are married, or even living as husband and wife, it is no crime at all.176

171. Note, Corroborating Charges, supra note 6, at 1139.
172. 3 J. WIGMORE, EVIDENCE § 924a, at 459 (Chadbourn ed. 1970).
174. See Note, Rape Corroboration, supra note 5, at 1382-85; H. Kalven & H. Zeisel, supra note 162, at 141-42, 249-54. Nor do the Code commentators claim otherwise; to the extent that they respond to the empirical evidence, it is by claiming: "[t]hat the existence of a rule of corroboration may not make much difference lends as much support to retention as it does to repeal." MODEL PENAL CODE § 213.6 comment at 429 (1980). But that rationale ignores not only the individual case where corroboration will exclude a meritorious charge (even a traditional stranger rape may be uncorroborated), but also ignores the symbolic importance of "encas[ing] . . . in a rule of law" (the commentators' own phrase for a rule that they do not like, see id. at 305-06) a requirement which inevitably communicates the message that rape is different than all other crimes because its victims (women) are not to be trusted.
175. MODEL PENAL CODE § 213.1(1) (1980). In other words, armed rape which does not result in serious bodily injury is a first degree felony unless there is a prior relationship of "sexual liberties."
176. MODEL PENAL CODE § 213.6(2) (1980). Under the Code's provision, a legal marriage is not required to get you inside the marital exemption from the rape law, but a legal separation is required to get you out. While the marital exemption is not a focus of this piece, the Code's justification of it is too striking to ignore. The commentators recognize that the historical basis of this exception "probably lies" in the conception of the "wife as chattel." MODEL PENAL CODE § 213.1 comment at 343 (1980). But its retention, they argue, is necessary to avoid the "unwarranted intrusion of the penal law into the life of the family." To punish a man for forcibly raping his wife "would thrust the prospect of criminal sanctions into the ongoing process of adjustment in the marital relationship." Id. at 345. The
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Prior relationship is regularly considered by police and prosecutors in exercising their discretion and screening complaints. But I know of no other instance, either in the Model Penal Code or, for that matter, in any other Code, where the prior relationship between the victim and the offender determines liability in the actual provision of the substantive criminal law.

The commentators provide two reasons for the inclusion of a provision downgrading prior relationship cases. First, the authors are of the view that when a prior relationship existed, "the gravity of the wrong is arguably less severe." Contrary to the commentators' view, however, many women report that they feel greater injury and betrayal when raped by someone they know than by someone they do not.

While degree of injury may be a debatable matter, the commentators' second justification for reliance on prior relationship is not. According to the Code, the absence of a prior sexual relationship is "strong objective corroboration of the fact that the sexual act was accomplished by imposition," while "[i]t's presence reduces confidence in the conclusion of aggression and nonconsent."

The practical reality has long been that rapes by intimates, in order to result in convictions, must have caused more physical harm than rapes by strangers, precisely because the problems of proof are greater in such cases. The presence of a prior sexual relationship is always considered relevant evidence of consent, even where a rape shield law otherwise limits the admissibility of the victim's prior sexual conduct or reputation.

Police, prosecutors and juries tend to be particularly skeptical of such complaints, and relatively few cases result in convictions. The fact that there was a prior relationship and voluntary social companionship, and that a prosecutor is nonetheless willing to prosecute and a jury willing to convict (or a defendant to plead), ought signal us that we are dealing with a particularly clearcut and brutal case of rape or a particularly dangerous explanation should be familiar to anyone who has heard the argument that domestic beatings should not be considered crimes either. Marital rape would, in practice, be the most difficult to prove, precisely because of assumptions of consent. The law must be clear and provide fair warning, but where the woman is willing to prosecute, and a jury is willing to convict, forcible rape should not be considered a part of the "life of the family" whose sanctity we need worry about preserving.

177. See infra text accompanying notes 289-97.
178. MODEL PENAL CODE § 213.1 comment at 307 (1980). They do not say how or why they think that this is so.
179. See D. Russell, supra note 4, at 71. In contrast, robberies and assaults are graded not by whether you know your assailant but by whether he is armed. An ex-boyfriend who places a loaded pistol against your temple may be every bit as frightening—and as dangerous—as a stranger who does.
181. Id. at 280.
182. See Bienen, supra note 25, at 197; Berger, supra note 5, at 58-59.
183. See infra text accompanying notes 278-305.
felon. Yet it is in precisely these cases that the Code’s gradation rule limits the prosecutor’s hand in charging and plea bargaining, and protects the rapist from the most serious penalties.

2. **Gross Sexual Imposition**

The Model Penal Code provides third degree felony liability when a man “compels” a woman (not his wife) to submit to intercourse “by any threat that would prevent resistance by a woman of ordinary resolution.” The offense of gross sexual imposition, like the offense of forcible rape, is limited by the corroboration, fresh complaint, and cautionary instruction rules. But it suggests an understanding of coercion potentially far more expansive than that usually found in statutes or opinions.

Just how all-encompassing this new crime could be is a source of some concern in the Commentaries. Gross sexual imposition is, to be sure, a lesser offense than rape. But it is also an offense that is defined according to a supposedly “objective” male understanding of the female will to resist, and limited by an uncertain line between coercion and bargain in male-female relations.

The requirement that the threat be such as would prevent resistance “by a woman of ordinary resolution” is intended to provide an “objective requirement of minimal gravity.” While the “woman of ordinary resolution,” unlike the reasonable man, is hardly “a staple of the law,” it was “thought to be sufficiently meaningful in context to achieve the essential purpose of eliminating cases of intimidation by threat of remote or trivial harm.” The standard of the “woman of ordinary resolution” was adopted as preferable to a formulation requiring a threat “reasonably calculated to prevent resistance.” The reason for the choice given was that:

> The alternative would have raised problems of the actor’s anticipation of the peculiar effect of a given threat on the individual in question. The present version achieves a more manageable inquiry into the gravity of the threat. Moreover, it focuses clearly on the coercive conduct and state of mind of the actor.

Both approaches, it bears emphasizing, phrase the inquiry in terms of resistance: A prohibited threat is one that would prevent resistance. Thus, neither resolves the problem that resistance defined in male

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186. Id.
187. *Id.* The Model Penal Code’s reliance on resistance as definitive is particularly striking in view of the comments’ criticism of the statutory use of “earnest resistance” in New York’s definition of prohibited force. See *Model Penal Code* § 213.1 comment at 278 (1980).
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terms—fighting back, as opposed to saying no and please don’t and crying—may not be the usual response of most women to threats of either physical or economic force.

Still, the rejected approach at least judges the man’s intention with respect to this woman. The approach adopted by the Code, by contrast, judges the woman; and it does so by comparing her submission to an external standard of when other women (as viewed by men) would resist.

The rejected approach asks if the actor, in making the threat to this particular woman, did so with the knowledge (or at least knowledge of the risk) that it would lead her to submit. It matters not at all if she is “incredibly gullible, trusting and naive,” as the victim in Evans 188 was, as long as he knows it, which he certainly did. Or, to take the example of the Lester case, 189 a threat to expose nude pictures might, for aspiring Playboy centerfolds, be no threat at all; for a young and modest woman it would be a serious threat indeed. The question for the man is not how other women, let alone the mythical “woman of ordinary resolution,” would react, but how this woman would; and it is he, not the woman, who is judged.

In contrast, the approach of the Code and Commentaries shows great concern for protecting the man who makes a “trivial” threat which has an unusual effect on this particular woman. In such cases, “the male may make the plausible assumption that the woman’s acquiescence has as much to do with his own attractiveness as with the prospect of threatened harm.” 190 But gross sexual imposition is not a strict liability offense; as long as the reasonable calculation must be made by the man (and that is how the rejected standard reads), and as long as a mens rea of at least recklessness is required (and it is), there is no danger that a man will be found guilty on the basis of a threat which he reasonably assumed would be considered trivial and which the woman for some reason unknown to him considered substantial. The difference between the rejected and adopted standards is that the first punishes a man when he knowingly preys on a vulnerable or naive woman, while the other not only protects a man’s right to do so, but accomplishes this result by judging her to be sub-par—not up to the standard of the woman of “ordinary resolution.”

How great a difference there will be in practice depends on what attributes we attach to the “woman of ordinary resolution.” That is a complicated task. The goal of much of liberal feminism, and of much Title VII litigation, has been to attack stereotypes of women as weak, passive,

and deserving of special protection from the state—as different from men. To argue for a characterization of "the woman of ordinary resolution" that includes all of those stereotyped characteristics seems uncomfortably inconsistent with the goal of eliminating them. Not to do so, however, is to blink at the reality of women's vulnerability, and is therefore to leave them vulnerable.\footnote{191}

The efforts to define the well-known "reasonable man" provide little guidance in the task.\footnote{192} While the reasonable man is itself far from an "objective" and "manageable" standard, at least it tends to be a standard applied by men to other men. The definition of the "woman of ordinary resolution" is in the hands of men. The jury that applies the standard may be composed of both men and women, but it is not their interpretation of the woman's resolution, but their understanding of the defendant's understanding, which is controlling. Because gross sexual imposition requires a \textit{mens rea} of at least \textit{recklessness}, it is not enough to find that the woman of ordinary resolution would have succumbed to the threat that was made. \textit{Mens rea} also requires that the jury must find that the man, in making the threat, knew, or at least was aware of the risk, that the woman would succumb. Thus, liability turns on the jury's judgment both of the woman's response and of the man's assessment (through the \textit{mens rea} requirement) of the woman's response.

A further constraint on the offense of gross sexual imposition is, according to the Commentators, implicit in the requirement that the threat "compel" the woman to submit:

The threat must be such that submission by the female results from coercion rather than bargain. This inquiry into the essential character of the threat is distinct from, though complementary to, the re-


192. The Model Penal Code, in defining negligence, refers to the care that would be exercised by a reasonable person in the actor's situation. The comment explains the compromise inherent in "situation":

There is an inevitable ambiguity in "situation." If the actor were blind or if he had just suffered a blow or experienced a heart attack, these would certainly be facts to be considered in a judgment involving criminal liability, as they would be under traditional law. But the heredity, intelligence or temperament of the actor would not be held material in judging negligence, and could not be without depriving the criterion of all its objectivity. The Code is not intended to displace discriminations of this kind, but rather to leave the issue to the courts. \textit{Model Penal Code} § 2.02(2)(c) comment at 242 (1980). \textit{See also} Bedder v. Director of Pub. Prosecutions, [1954] All E.R. 801 (discussing reasonable man standard in manslaughter context); Director of Pub. Prosecutions v. Camplin, [1978] All E.R. 168 (same); Williams, \textit{Provocation and the Reasonable Man}, 1 CRIM. L. REV. 740 (1954); Cal. Senate Bill No. 54 (1981) (overruling diminished capacity defense in California).}
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requirement that it achieve a gravity sufficient to “prevent resistance by a woman of ordinary resolution.” Thus, if a wealthy man were to threaten to withdraw financial support from his unemployed girlfriend, it is at least arguable under the circumstances that he is making a threat “that would prevent resistance by a woman of ordinary resolution.” The reason why this case is excluded from liability . . . is not the gravity of the harm threatened—it may be quite substantial—but its essential character as part of a process of bargain. He is not guilty of compulsion overwhelming the will of his victim but only of offering her an unattractive choice to avoid some unwanted alternative.193

As the Code commentators recognize, extortion law also requires the drawing of lines between coercion and bargain. Interestingly enough, the Code section on extortion is not limited to threats that a reasonable man or person would find irresistible. Objectivity in extortion law is served not by focusing on the victim, but by defining a rather long list of threats that are prohibited as a means of securing money. Included in the list are threats to commit any criminal offense, to accuse anyone of a criminal offense, to expose any secret tending to subject any person to contempt or ridicule, to take or withhold action as an official, to bring about or continue a strike, to testify or withhold testimony, or, in the catch-all provision, to inflict any other harm that would not benefit the actor.194

The Code recognizes that coercion—for sex as for money—is not limited to threats of bodily injury. But equivalent prohibitions are not provided: The protection afforded to women’s bodily integrity depends on how men conceive and judge the fortitude of the woman of ordinary resolution and on where the line is drawn between coercion and bargain.

B. The Michigan Statute

The Michigan reform statute was largely the work of the Michigan Women’s Task Force on Rape. As one study put it: “Forming coalitions with ‘law and order’ legislators concerned with the increasing frequency of the crime and mobilizing statewide support through a newsletter, the media, and intense lobbying efforts, the Michigan Task Force on Rape passed a bill in 1975 that remains the most comprehensive and innovative statute of its kind.”195 The statute has also been a lightning rod, praised

194. MODEL PENAL CODE § 223.4 comment at 201 (1980); see also W. LAFAVE & A. SCOTT, supra note 87, at 704.
195. J. MARSH, A. GEIST & N. CAPLAN, supra note 138, at 23. The coalition with law-and-order groups is a typical characteristic of feminist efforts to reform rape laws. According to one author:

If feminists had not allied themselves with law-and-order groups, the recent backlash against
by some writers as model legislation and roundly denounced by others as "plainly unacceptable" and a good example of an "overreaction" to political pressures by the commentators of the Model Penal Code.

The Michigan model is, in many respects, the counterpoint to the Model Penal Code. The Model Penal Code punishes rape by men against women; Michigan's crime of criminal sexual conduct can be committed by any person. Felony liability under the Model Penal Code is limited to sexual intercourse; in Michigan, sexual conduct is broadly defined to include not only penetration with objects, but offensive sexual contact. In the Model Penal Code, the focus remains on the victim; in Michigan, it is almost exclusively on the actor. The key to the Michigan statute is "force or coercion" by the actor. But in its definition of "force or coercion," Michigan ultimately does not move very far beyond the Model Penal Code and its traditional understanding of rape.

The expansion of the crime to include male victims and female offenders is a common element of reform statutes. Similarly, the change in labels—from rape to criminal sexual conduct or assault—is not unique to Michigan. By renaming "rape," reformers have sought to rid the crime of its common law baggage of unique rules (in Model Penal Code terms, "objective" rules) of resistance and proof.

However well-intentioned, these changes risk obscuring the unique meaning and understanding of the indignity and harm of "rape." Rape is a different and more serious affront than assault. Women who have been raped are very clear that they have not only been beaten or assaulted. As one woman testified in opposition to changing the name of the crime in Washington:

the women's movement might have blocked the enactments of reform legislation in many states.

Bienen, supra note 25, at 171 n.1. Yet, notwithstanding the alliances with law-and-order, women have—in Michigan and elsewhere—played the leading role. J. MARSH, A. GEIST & N. CAPLAN, supra note 138, at 18–19; Bienen, supra note 25, at 171 n.3 ("men are rarely committed to the enormous political effort required to enact rape reform legislation").

196. See Bienen, supra note 25, at 172 (the Michigan statute "continues to be the most important model for reform"); Note, Recent Statutory Developments, supra note 5, at 1502 (Michigan statute "is already being presented as a model in numerous jurisdictions").


The Michigan statute also has the advantage of being one of the few that has been subject to any serious empirical study as to its impact on the processing of cases in the criminal justice system, see J. MARSH, A. GEIST & N. CAPLAN, supra note 138.


199. See Bienen, supra note 25, at 174–75; H. FEILD & L. BIENEN, supra note 135, at 153; Note, Recent Statutory Developments, supra note 5, at 1513–14; MODEL PENAL CODE § 213.1 comment at 335 n.169 (1980).
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I think rape is a particular crime. I think that it's different than assault. People who commit rape commit it for different reasons than people who commit assaults. Changing the name of the crime isn't going to do any good. It's going to be throwing the issue under the rug, so to speak. I think this would be very detrimental to our work with rape victims, because rape is not simply a form of assault.\footnote{200}{See Loh, *The Impact of Common Law and Reform Rape Statutes on Prosecution: An Empirical Study*, 55 WASH. L. REV. 543, 553 n.51 (1980).}

Moreover, rape (at least as defined in traditional gender terms) does raise unique and important issues of male and female power. It invokes the differences in male and female ways of understanding force and consent, and each other. Defining the crime in terms of "actors" and "victims" neither resolves those conflicts nor changes the empirical realities of male abuse of women. But it may sweep them under the rug, thus raising questions from a feminist standpoint about the decision in Michigan, and the near-unanimity in the law reform community, that rape, or better yet "assault" or "criminal sexual conduct," should be defined in gender-neutral terms.\footnote{201}{See, e.g., Note, *Rape and Rape Laws: Sexism in Society and the Law*, 61 CALIF. L. REV. 919, 941 (1973): Men who are sexually assaulted should have the same protection as female victims, and women who sexually assault men or other women should be as liable for conviction as conventional rapists. Considering rape as a sexual assault rather than as a special crime against women might do much to place rape law in a healthier perspective and to reduce the mythical elements that have tended to make rape laws a means of reinforcing the status of women as sexual possessions. See also Bienen, *supra* note 25, at 174–75; Note, *Recent Statutory Developments, supra* note 5, at 1513–14 (gender neutrality set forth as way "to eliminate the traditional attitude that the victim is expected to resist earnestly to protect her virginity, her female 'virtue,' or her marital fidelity"). As of 1980, well over half of all American jurisdictions had adopted or at least considered a gender-neutral definition of both victim and offender. See MODEL PENAL CODE § 213.1 comment at 335 n.169 (1980).}

The Model Penal Code approach casts some light on the concerns underlying the Michigan statute. The Code provides separate and less serious penalties for "deviate sexual intercourse by force or imposition," which is defined in gender-neutral terms.\footnote{202}{MODEL PENAL CODE § 213.2 (1980).} Deviate sexual intercourse is at most a second degree felony, whereas (male on female) rape in identical circumstances may be a first degree felony. Moreover, certain cases of forced, non-consensual sex are not prohibited at all when men are the victims. Because only "deviate sexual intercourse," defined to mean "intercourse per os or per anum between human beings who are not husband and wife," is covered by section 213.2, conventional vaginal intercourse between a man and woman who uses force, threats of force, or other threats that "would prevent resistance by a person of ordinary resolution" are not prohibited at all. The Code comments respond to these differences
by suggesting that they may be justified, or at least that it is a close question:

On the one hand, the male who is forced to engage in intercourse is denied freedom of choice in much the same way as the female victim of rape. On the other hand, the potential consequences of coercive intimacy do not seem so grave. For one thing there is no prospect of unwanted pregnancy. And however devalued virginity has become for the modern woman, it is difficult to believe that its loss constitutes a comparable injury to the male.203

The Code comments make the approach of the feminist law reformers in seeking gender neutrality understandable, if not ideal.

The name chosen in Michigan to replace "rape" is significant as well. To relabel rape "criminal sexual conduct" is, perhaps only accidentally, to assume a position in a debate of some vigor as to whether rape should be thought about as sex or as violence. The "rape as sex" position has been articulated by individuals ranging from feminist theoreticians who argue for a more expansive understanding of coerced sex204 to the judge in a well-publicized South Carolina case who thought that convicted rapists should have a choice between castration and imprisonment.205 The "rape as violence" position, said to be the response of "liberal" (as opposed to radical) feminists,206 seems to me the better approach both theoretically and strategically: Focusing on the violent aspects of rape makes clear that you are not trying to prohibit all sex and that violent men (such as the rapists in that South Carolina case) must not only be treated as sexually aberrant, but also be incapacitated as dangerous to the community.207 Moreover, to see rape as violence is, one hopes, to recognize that sex should be inconsistent with violence, a message which is needed precisely because violence in sex has been accepted by so many as normal. The problem is that a man can also force a nonconsenting woman to engage in sex without resort to actual "violence." Power will do. The "rape as violence" approach may strengthen the case for punishing violently coerced sex, but it may do so at the cost of obscuring the case for punishing forced sex in the absence of physical violence. On this point, Michigan is curi-

204. See MacKinnon, supra note 4, at 646; see generally D. Russell, supra note 4; A. Medea & K. Thompson, supra note 4; L. Clark & D. Lewis, Rape: The Price of Coercive Sexuality (1977).
206. See MacKinnon, supra note 4, at 646.
207. See S. Brownmiller, supra note 4 (describing rape in riots, wars, pogrom).
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ously ambivalent. While the statute writers relabel rape as a crime of “sexual conduct,” the force and coercion that are required to make sexual conduct criminal largely limits the statute’s application to cases of conventional violence.

Michigan’s definition of “sexual conduct” itself stands in sharp contrast to the traditional intercourse requirement that has been criticized as a male understanding of what constitutes sex and sexual violation. First, Michigan’s definition of sexual penetration goes beyond even most reform laws in including not only oral and anal intercourse, but also “any other intrusion, however slight, of any part of a person’s body or of any object into the genital or anal openings of another person’s body.” The problem here, as in many places in this statute, is that while it is easy to think of cases (rape with a Coke bottle) where penetration by an object is as serious, and potentially more dangerous, as the traditional form, it is also easy to think of cases (an “unacceptabl[y]” performed medical examination, which is included in the definition of force) where penetration is not as serious and should plainly not be included. The Michigan statute fails to draw such distinctions.

Second, the Michigan statute moves beyond any requirement of penetration by its inclusion of “sexual contact” as a felony punishable by a prison sentence of up to 15 years where aggravating factors are present. Sexual contact is defined to include any intentional touching of intimate parts of either the victim or the actor, or the clothing covering them, if that intentional touching can “reasonably be construed” as being for the purpose of sexual arousal or gratification. The Model Penal Code commentaries see the quoted Michigan standard as totally unacceptable:

Permitting conviction against such a standard is unduly harsh, even draconian, given the petty nature of many forms of “sexual contact” as defined and the unlikelihood in many situations that the “victim” will be seriously offended. There are also substantial fair warning arguments that could be made against a standard so vaguely worded.

It is not the notion of sexual arousal or gratification per se that troubles

208. See MacKinnon, supra note 4, at 647.
210. Id. at § 750.520b(f)(iv) (defining force or coercion to include circumstances “[w]hen the actor engages in the medical treatment or examination of the victim in a manner or for purposes which are medically recognized as unethical or unacceptable”).
211. Id. at § 750.520c(2). In the absence of aggravating factors, criminal sexual contact is a misdemeanor punishable by imprisonment for not more than 2 years, by a fine of not more than $500.00, or both. Id. at § 750.520e.
212. MODEL PENAL CODE § 213.1 comment at 298 (1980).
the commentators, but the notion of what "can reasonably be construed" by a jury. The suggestion that it is somehow impossible for a jury to determine according to a standard of reasonableness the purpose of a defendant's actions would, if accepted elsewhere, be a wholesale indictment of the Code's definitions of mens rea, which require precisely such determinations.213 Apparently, it is only when it comes to sexual contact that an emphasis on a defendant's purpose and reasonableness becomes somehow too indeterminate and too vaguely worded to afford fair warning.

More straightforward is the Code commentators' characterization of the harm—of a "petty nature"—and of their view of "the unlikelihood in many situations that the 'victim' will be seriously offended."214 The quotation marks suggest that she is not to be considered a victim at all.

Attitudes such as those of the Code commentators explain the Michigan statute. To be out jogging and have one's breast grabbed by a man who jumps from behind a tree, to take a common example, is not a "petty" indignity; the woman is a victim, and she is likely to be seriously offended. In some respects, the Michigan statute may be an overreaction to these attitudes, although there is surely a great deal to overreact to. To impose the maximum authorized sentence of fifteen years for aggravated sexual contact (where bodily injury results) might well be unduly harsh, not because the standard of sexual contact is too amorphous and not because the offense is victimless but because, particularly in view of the statute's broad definition of bodily injury, the sentence might be disproportionate both to the harm and to sentences for other crimes of assault and battery. But to say that forcibly fondling a woman's body, or forcing her to fondle and stimulate a man's, is—as the Model Code provision would have it—the criminal equivalent of surreptitiously grabbing her wallet from her pocketbook215 is to denigrate the personal integrity of men and women.

213. Nor does it appear to be especially difficult here where the purpose must be sexual: The intent of the drafters is, quite clearly, to distinguish the man who pushes or shoves a woman out of his way, and may touch her breast in the process, from the man who intentionally reaches for the breast to fondle it. There is no reason to think juries incapable of drawing and applying such a distinction, and the Code offers no parade of horrible hypotheticals which might confuse them.

The problem remains (in theory, if not likely in practice) of what to do in cases where a jury concludes that a defendant's intentional actions were, according to an external standard of reasonableness, for the purpose of sexual gratification, but the defendant himself lacked that purpose or, perhaps, did not even realize the risk. Such cases would, of course, be rare: It would be very difficult to convince a jury that the purpose as it appeared externally was not in fact the defendant's purpose. Cf. notes 30-39 and accompanying text. Whether such cases would be covered by the statute depends on whether the required "purpose of sexual gratification" is that of the defendant (at least recklessness) or that of a reasonable man (negligence). A felony term for the latter seems particularly harsh, not because of the problems of vagueness stressed in the Model Penal Code, but because of the lack of (or at least reduced) criminal intent.


215. The Code punishes as a misdemeanor sexual assault, defined in the case of competent adults to include:

A person who has sexual contact with another not his spouse, or causes such other to have

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The breadth of Michigan's understanding of "sexual conduct" is not well-matched by its definition of what makes that conduct criminal. There are four degrees of criminal sexual conduct under the Michigan approach. Unlawful "sexual penetration" is punished as either criminal sexual conduct in the first degree (CSC1), with a penalty of imprisonment for life or any term of years, or criminal sexual conduct in the third degree (CSC3), punishable by imprisonment for not more than 15 years, depending on the circumstances. The remaining two categories of criminal sexual conduct—the second and fourth degrees—are reserved for unlawful "sexual contact." With respect to normal adults, sexual penetration constitutes CSC1, and sexual contact CSC2, if:

(c) Sexual penetration occurs under circumstances involving the commission of any other felony.
(d) The actor is aided or abetted by 1 or more other persons and . . . the actor uses force or coercion to accomplish the sexual penetration. . . .
(e) The actor is armed with a weapon or any other article used or fashioned in a manner to lead the victim to reasonably believe it to be a weapon.
(f) The actor causes personal injury to the victim and force or coercion is used to accomplish sexual penetration. Force or coercion includes but is not limited to any of the following circumstances:
   (i) When the actor overcomes the victim through the actual application of physical force or physical violence.
   (ii) When the actor coerces the victim to submit by threatening to use force or violence on the victim, and the victim believes that the actor has the present ability to execute these threats.
   (iii) When the actor coerces the victim to submit by threatening to retaliate in the future against the victim, or any other person, and the victim believes that the actor has the ability to execute this threat. As used in this subdivision, "to retaliate" includes threats of physical punishment, kidnapping, or extortion.
   (iv) When the actor engages in the medical treatment or examination of the victim in a manner or for purposes which are medically recognized as unethical or unacceptable.
Where the victim is a competent adult, the lesser offenses—CSC3 and CSC4—depend solely on the presence of "force or coercion" as defined above.\(^{218}\) For all of these offenses, the statute provides that the testimony of a victim need not be corroborated and that a victim "need not resist the actor."\(^{219}\)

"Force or coercion" are thus the key to the Michigan approach. Where they are present, sex is a crime; if personal injury was inflicted or the actor was aided by one or more individuals, it is an aggravated offense. The word "nonconsent" never appears as a required circumstance of the offense.

The Michigan statute's emphasis on force or coercion attempts to shift the focus of rape prosecutions from what the victim does or does not do (consent or resist) to the actions of the defendant. Moreover, because nonconsent is not an element of the crime, the message of the law may be that violence is inconsistent with sex and that violent sex is prohibited regardless of any claimed consent. Yet if that is the point, it is one that is poorly executed, to say the least.

First are problems of poor draftsmanship.\(^{220}\) For example, the definition of either actual or threatened infliction of injury, is limited solely to the victim; a threat to kill the victim's escort or child, or the actual infliction of injury on another, does not come within the stated definition of force or coercion.\(^{221}\) Inexplicably, in the succeeding section, threats to retaliate in the future against the victim "or any other person" are included.\(^{222}\)

The problems go beyond poor draftsmanship, however. The inclusion of medical treatment conducted in a medically unacceptable manner, while novel,\(^{223}\) seems highly objectionable; why feminists would want to allow

\(^{218}\) Id. §§ 750.520d(1)(b); 750.520e(1)(a).

\(^{219}\) Id. §§ 750.520h-.520i.

\(^{220}\) The only instances in which sex (penetration or contact) is penalized in the absence of force or coercion is where the act takes place "under circumstances involving the commission of any other felony" or the actor is armed with a weapon. The former provision technically prohibits consensual, nonviolent sex among kidnappers themselves; the latter includes by its terms any circumstances in which the actor is armed with a weapon, even a lawfully registered weapon, regardless of whether he ever brandishes it. Thus, consensual sex with a woman with a handgun in her pocketbook or with a police officer is technically a first degree offense.

\(^{221}\) Id. § 750.520b(1)(f)(ii).

\(^{222}\) Compare id. § 750.520b(1)(f)(i) ("on the victim") with id. § 750.520b(1)(f)(iii) ("against the victim, or any other person"). Of course, a court could read the language defining force or coercion as non-exclusive and include threats to others within its scope. But that is hardly an ideal response in a criminal statute, one of whose purposes was to provide needed definitions for these terms. Clarity is not simply desirable in criminal statutes; it is constitutionally required. Even if fair warning is not a problem, the courts surely have been, from a feminist perspective. To leave it to the courts to define force or coercion is to invite duplication of the pre-reform standards.

\(^{223}\) Id. § 750.520b(1)(f)(iv) ("When the actor engages in the medical treatment or examination of the victim in a manner or for purposes which are medically recognized as unethical or unacceptable.").
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the male-dominated medical profession to define as a crime punishable by life imprisonment the failure to follow their standards for proper examinations, childbirth or abortion, is frankly beyond me.

And yet in its other definitions, Michigan is painfully conventional. The first and most basic definition of force or coercion—"when the actor overcomes the victim through the actual application of physical force or physical violence"—invites application not only of the traditional, schoolboy-fight definition of force, but also of the traditional requirements of nonconsent; if "overcome" does not require nonconsent, it is hard to see what it means. Moreover, the subsequent definitions of force wholly ignore the reality illustrated by the cases—that coercion of a woman need not involve either actual violence or threats of future physical injury. Threats of retaliation, other than physical injury, kidnapping or extortion, are not included; thus, if a man coerces a woman to engage in sex by threatening to fire her from her job or destroy her property or reputation, he has not used force or coercion within the definition of the statute. In this sense, the Michigan statute actually appears to be narrower than the Model Penal Code, which might at least prohibit such conduct as the lesser offense of gross sexual imposition. The statute adds nothing to the resolution of these cases, except, perversely, to make clear that the woman's lack of consent is irrelevant to the determination of criminal liability.

The elimination of consent as a defense where traditional violence and threats are involved can be justified on either of two grounds: that lawful sex ought to be inconsistent with violence (on grounds of either dangerousness or immorality); or that consent in such circumstances is meaning-

224. Id. § 750.520b(1)(f)(i).

225. In the provisions of the statute relating to sexual conduct with those between the ages of 13 and 16, one of the aggravating circumstances is that "the actor is in a position of authority over the victim and used this authority to coerce the victim to submit." Id. § 750.520b(1)(b)(iii). No similar provision exists in the detailed definitions of force and coercion of adult women, and although these definitions are said to be non-exclusive, the omission of a category specifically stated in another section seems a most curious way of inviting courts to include it. The more logical explanation is that this form of coercion is only punished when used against young women; older women are thus assumed to be in a better position to "resist" coercion by teachers or bosses. As a "feminist" law reform approach, such a strong focus on age seems curious, for one would think that a prime aim of feminist law reform would be to make clear that it is power and powerlessness, not simply age, which leads to coercion and submission. At best, the Michigan approach is unclear; at worst, it seems traditional in the most oppressive form.

226. Under the terms of the Michigan statute, a threat to commit extortion "in the future" counts as force. If the purpose of this provision was to expand liability for coercion to all those threats that might qualify under the extortion statutes, it is one which is not accomplished by the words of the statute, which speak of a threat to commit the actual crime of extortion in the future, not of inducing submission to sex in the present through any threat which would be included within the scope of an extortion statute. Moreover, the statute indiscriminately groups together those who threaten to commit a first degree felony (murder) and those who threaten to commit what may be only a misdemeanor (extortion), a result plainly inconsistent with any effort to expand liability by careful grading.
less. But in reality, it is a very limited reform, particularly since the most oppressive aspects of the consent standard are addressed by the existence of an evidentiary shield law[^227] and the provision that resistance is not required[^228]. What the Michigan statute does not address is the myriad of situations in which a woman engages in sex without her consent though traditional force is not applied.

Feminist reformers seeking to protect women from such threatening situations have only two choices: to focus on the man and seek to redefine what is meant by force in broader terms; or to focus on the woman and rely on her word as to nonconsent, properly defined (not saying yes, or at least saying no). The Michigan statute, the supposed model of reform, does neither. It neither empowers women to say no, harnessing the power of criminal sanctions behind them, nor redefines the conditions of force and coercion.

Finally, beyond differentiating between penetration and contact, the Michigan statute fails meaningfully to staircase criminal sexual conduct. To be sure, there are two degrees of criminal sexual penetration, CSC1 and CSC3. But force or coercion, defined in exactly the same terms, is the common denominator of both. The infliction of "personal injury" determines whether a forcible rape by a single individual is CSC1 or CSC3. "'Personal injury' means bodily injury, disfigurement, mental anguish, chronic pain, pregnancy, disease, or loss or impairment of a sexual or reproductive organ."[^229]

There is nothing unusual in the criminal law about tailoring liability to the injury inflicted, even if that injury was at least partly fortuitous. Impregnating a woman is just as much a foreseeable risk of rape, for which the rapist can be held responsible, as hitting a pedestrian is a risk of driving recklessly. The Model Penal Code commentators see pregnancy as insignificant; it "hardly seems to justify" a substantial difference in the ranges of punishment[^230]. But a man who forces a woman to choose between abortion and carrying and bearing a child fathered by her rapist has inflicted a terrible injury, at least from a woman's perspective.

The Michigan injury provision, which functions as the key grading provision of this statute, encompasses all "mental anguish." It is hard to

[^227]: Under the statute, evidence of prior sexual conduct by the victim is inadmissible unless the judge finds that it is material to a fact in issue and that its inflammatory or prejudicial nature does not outweigh its probative value. *Id.* § 750.520j.

[^228]: *Id.* § 750.520l. Moreover, while the statute's silence as to consent would seem to reflect an intention to "preclude a consent defense" in these circumstances, see Binan, *supra* note 25, at 181, the Michigan courts have nonetheless construed the statute as implicitly preserving a consent defense, see People v. Thompson, 117 Mich. App. 522, 324 N.W.2d 22 (1982); People v. Jansson, 116 Mich. App. 674, 323 N.W.2d 508 (1982); People v. Hearn, 100 Mich. App. 749, 300 N.W.2d 396 (1980).

[^229]: *Id.* § 750.520a(j).

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imagine any forcible rape that would not result in "mental anguish" for
the victim, however; indeed, this is what makes rape a more serious of-
ference than other forms of assault. But if we are serious about staircasing,
then it will not do merely to say that all rapes are bad. The question
remains which rapists deserve greater punishment. The Michigan statute
succeeds in creating grades of the offense for the ad hoc use of prosecutors
in plea bargaining and of juries in reducing charges. But it does not suc-
ceed in meaningfully defining, from a feminist perspective or any other,
how liability should be graded.

While the Michigan statute expands what we think of as sex in its
definitions of penetration and contact, it does not really expand what we
think of as offensive sex. Beyond the problems of poor draftsman-
ship, the Michigan statute does not meaningfully expand our notions of force or
threat. It does not recognize a woman’s interest in saying no and in having
her word respected in situations where force or threats in traditional terms
are not present. To do so would, I believe, require a meaningful grading
system, which Michigan has failed to provide.

C. Epilogue: The Limits of Law Reform

Many of the goals of rape law reform cannot easily be tested by statisti-
cal studies. The decision whether to focus on the actor or the victim may
or may not have an impact on quantifiable events such as the reporting of
rapes and conviction rates, but it almost certainly will have an impact on
the experience of an individual victim as she proceeds through the system.
Similarly, eliminating legal rules that are premised on a stereotype of
women as vengeful liars or fantasizing cheats may or may not result in
more convictions, but it is critical in any conception of the law as a force
which seeks to reflect and even educate public sentiment. The rape reform
effort has been both an occasion for women to exercise power in the legis-
lative process and a part of a larger effort to change the way the law and
our society think about women, sex and sexuality.

The fact remains that both those who have favored and those who have
opposed different models of reform have done so on the assumption that
legislative changes would have some impact on the actual processing of
cases. The conflicting models of reform discussed in this Section are
clearly worthy of scrutiny as a theoretical matter. Whether and how much
difference these provisions and others influenced by them have made on
the system’s operations is far from clear.

The record is scanty, but the results that have surfaced must be a disap-
pointment to the “reformers,” however defined. The few “before and af-
fter” studies within particular jurisdictions suggest limited, if any, changes
in the processing of rape cases in the aftermath of major law reform enactments.

Professor Kenneth Polk examined arrest, conviction, and disposition data from California for the years 1975–1982. He found no significant increases in either the percentage of rape complaints that resulted in arrest or the percentage of felony complaints that resulted in convictions. The only dramatic trend occurred at sentencing, where the probability that a convicted rapist would receive an institutional sentence increased substantially. But that was equally true for homicide and burglary, and seemed to reflect the move to determinate sentencing for all felonies in California, not the efforts of rape reformers. Indeed, increasing the severity of sentences for individual rapists has not even been one of the stated goals of feminist law reform.

Of course, focusing solely on clearance and conviction rates, as Professor Polk and some feminist commentators do, may mask changes, or even work against them. The danger of such a focus is that it may encourage precisely the sort of screening that strictly limits the definition of rape to the most traditional model (violence among strangers) where convictions are most certain, and eliminates from criminal penalties precisely those cases at the margin (less violence, non-strangers) which should be subject to criminal penalties, albeit reduced ones. Thus, while increasing conviction rates was a stated purpose of law reform, to the extent that those efforts were also intended to expand the scope of the crime of rape, their success might well be evidenced by broader standards for prosecution which would not necessarily result in higher rates of convictions. As it

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232. As for convictions, no trend can be observed as to when felony convictions are considered as a percentage of felony complaints filed; rape, with conviction rates in the high-50% to mid-60% range, is significantly lower than murder, somewhat lower than robbery, similar to burglary and higher than assault. A slight upward trend appears when the calculation is made in terms of all those arrested for the offense, as opposed to felony complaints filed; the author explains this increase as reflecting the slight increase in the probability that rape cases will be filed as felonies. Polk, supra note 231, at 197–99.

233. Id. at 199. Upwards trends, though not as strong, were found for robbery and assault. Determinate sentencing took effect in California in 1976, and the sentence ranges were increased in 1978.

234. Quite the contrary, the severe punishments for a single crime of rape have been viewed as a significant deterrent to convictions, and it was hoped by some that grading systems providing for lesser offenses and lesser punishments would increase conviction rates. See Bienen, supra note 25. Thus, it was thought that juries were reluctant to convict given the severity of the offense, and might be more willing to convict were lesser punishments available. The reality, of course, is that the overwhelming majority of cases are resolved not by jury trials but by plea bargaining. Id. at 177. Moreover, the Washington study, Loh, supra note 200, at 591–98, discussed below, suggests that within the old structure, lesser penalties were available through charges and convictions of assault. The grading schemes may improve labeling in these cases (by calling it rape 3 instead of assault), without having any necessary impact on conviction rates.
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happens, Professor Wallace Loh, in his study of the Washington reform statute, went beyond the disposition statistics in search of just such changes—and found none.

Professor Loh examined the charging and disposition of 445 rape complaints filed by the police with the Kings County (Seattle) Prosecuting Attorney between 1972 and 1977, before and after the Washington rape reform law took effect on July 1, 1975.235 He found that the reform law had no impact on the proportion of cases charged.236 Prior to reform, of those cases presented by police for prosecution, 51% were filed as rape, 16% as carnal knowledge (statutory rape), 13% as another offense (other), and 20% were declined for prosecution. Under the new law, 51% were filed as (first, second, or third degree) rape, 19% as statutory rape, 10% as other, and 19% declined. Moreover, “[t]here are practically no noteworthy distinctions in the setting, circumstances, and evidentiary background, or in the personal characteristics of victims and suspects, between the cases presented for prosecution before and after the law reform.”237

As for the decisionmaking process in charging, the impact of the reform statute has been “negligible.”238 The five most important factors in deciding whether or not to charge, under both the old and the new statutes, were, in descending order of importance, the amount of physical force, the social interaction between suspect and victim prior to the alleged rape, corroborative evidence, victim credibility and race.239

The most significant change Loh found as a result of reform was the more accurate labeling of convicted offenders. Under the old statute, 37% of those charged with rape were convicted of rape, and 35% were convicted of another crime; the total conviction rate was thus 72%. Under the new law, 56% of those charged with rape are convicted of rape, and 15% are convicted of another crime; the total conviction rate is 71%. The overall conviction rate thus remains unchanged, but more accurate labels are now placed on convicted offenders (that is, they are convicted of “rape” rather than “assault”).240

235. Loh, supra note 200, at 585.
236. Id. at 601.
237. Id. at 603 (footnotes omitted).
238. Id. at 613.
239. Id. at 605. The only surprising application of any of these factors was race: It was not minority victim/minority suspect cases that were most likely to be declined, as had been found in other studies and as was true under the old statute, but those involving black suspects and white victims. The author found “no adequate explanation” for the increase in the failure to file charges in these cases.
240. Id. at 591–93; see also Loh, Q: What Has Reform of Rape Legislation Wrought? A: Truth in Criminal Labelling, 37 J. SOC. ISSUES 28 (1981); K. Williams, THE PROSECUTION OF SEXUAL ASSAULTS 43 (Promis Research Project No. 7, Institute for Law and Social Research, 1978) (finding no increase in conviction rates in District of Columbia in immediate aftermath of repeal of its corroboration requirement); Chappell, The Impact of Rape Legislation Reform: Some Comparative Trends,
The only major study to find any significant change in disposition as a result of law reform was conducted in Michigan by Professors Jeanne Marsh, Alison Geist, and Nathan Caplan. While they found some statistical improvement in conviction rates, the dimensions of improvement are not clear. Their overall conclusion, based both on interviews and statistics, was that "the law has very little impact on the system's approach to sexual assault cases, despite statistical improvements in conviction rates." The major change discerned from interviews with prosecutors, defense attorneys and judges was the decline in the importance attached to the victim's prior sexual history. But even as to this issue, the defense attorneys responded that they continued to investigate the victim's sexual history as a matter of course, and to seek ways to use such information to discredit the victim.

At one level, the results are not all that surprising: The criticisms of the Model Penal Code commentators and others notwithstanding, if Michigan is considered one of the more "radical" reform efforts, then it is quite clear that law reform has been neither as radical as some have feared, nor as effective as some might hope. Indeed, the interrelationship between force, consent, and mens rea as understood by courts means that simply moving these pieces around in a statute is unlikely to affect the legal system's working definition of the crime, although it may alter the message communicated to the public by the law.

Moreover, standard, short-term "before and after" studies may not be

7 INT'L J. WOMEN'S STUDIES 70-80 (1983) (suggesting that impact of 1983 rape law reform, as measured by criminal justice statistics, is likely to be slight, although long-term symbolic impact may be great).
242. Id. at 29-37. They base this conclusion of improvement on two calculations. The first is the increase in the monthly number of convictions, an increase which may reflect—in some unstated part—an increase in the number of reports and arrests; it does not necessarily mean an improvement in the success rate of prosecutions. As for conviction rates, the authors examine convictions as a percentage of reports rather than of cases presented for prosecution. This combines in a somewhat unclear way police and prosecutorial effectiveness. The two do not go hand in hand; the types of cases in which arrests are most easily made—cases where the victim and offender have a prior relationship, and thus the alleged offender is easily identifiable—are precisely those which prosecutors claim are the most difficult to convict. From their numbers, my own rough calculations of convictions (either as charged or of a lesser offense) as a percentage of arrests suggest a somewhat uneven pattern, but somewhat greater improvement (from 12.8% in 1972 to 17.5% in 1974, 17.6% in 1976, 27.1% in 1977, 19.5% in 1978), but these numbers not only seem quite low, but are so inconsistent with conviction rates presented for Detroit for the post-reform period (upwards of 70% of all arrests, which seems quite high) as to lead one to wonder which figures can fairly be relied upon. And as for the Detroit figures, while they make clear that CSC1 charges and convictions overwhelmingly predominate, there is no comparison data for the pre-1975 period to suggest what impact law reform may have had.
243. Id. at 65.
244. Id. at 52.
245. Id. at 55.
246. Similarly, changes in the rules of proof may be more important symbolically than practically, at least in the short run; eliminating corroboration as a legal requirement has not, for example, eliminated its practical necessity in many jurisdictions, see infra Part IV.
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the best measure of the impact of law reform. On the one hand, the changes in social attitudes necessary to enact reform statutes may have already been reflected, to some extent, in the operation of the criminal justice system before the new statutes were enacted. Alternatively, it may be that at least some changes take longer than the few years measured in the before and after studies. Anecdotal evidence suggests that the pressures on prosecutors to prosecute rape complaints have mounted substantially in the last decade; for example, it is difficult to believe that some of the cases discussed in Part II of this Article would have been reported or tried, let alone resulted in convictions, prior to the changes in attitudes if not also in statutes of the late 1970's. Some have suggested that the problem is not that prosecutors are using their discretion to screen out too many rape complaints, but that the politicization of the crime is leading prosecutors not to screen out enough complaints. Such concerns have yet to emerge from the data, but they suggest the importance of continued study. In the meantime, the record on the impact of law reform remains uncertain, at best.

IV. THE CRIMINAL JUSTICE SYSTEM'S UNDERSTANDING OF RAPE

Statutes and appellate court opinions provide a background for the way rape is defined in practice within the criminal justice system. But on a day-to-day basis, the critical decisions are made not by the legislators or the appellate judges, but by the actors within the system: by the victims themselves, in reporting a crime; by police, in investigating it and making arrests; by prosecutors, in charging, dismissing, and plea bargaining; and by juries and judges, at trial and in sentencing. This Part will examine the practical definition of the crime of rape which is produced by these decisions, focusing on the way in which both victims and officials distinguish between the traditional and the non-traditional rape—in effect, defining at least two crimes.

Whether “rape” is the most underreported crime in America—a frequent claim of some critics of the system247—depends on how one defines “rape,” and to what extent one treats the non-traditional rape as a crime. The available data suggest that while violent, stranger rape may be among the most frequently reported crimes in this country, the non-traditional rape—the case involving non-strangers, less force, no beatings, no weapons—may be among the least frequently reported, even when its victims perceive it to be “rape.” In many if not most of these cases, forced sex is tolerated by its victims as unavoidable, if not “normal.”

Along with victim underreporting, the criminal justice system provides a second screen on the understanding of rape. Prosecution and conviction rates are highest when force and resistance are greatest, when the rape is corroborated, when no prior relationship exists between victim and defendant, and when the initial contact between the two is involuntary. Indeed, when such factors are present, prosecution and conviction rates are quite high; when they are not, the case is far more likely to be dismissed or at least pleaded out as a minor offense, or if taken to trial, most likely to result in an acquittal.

The downgrading of cases involving prior relationships, less force, no injuries, and no corroboration is characteristic of the criminal justice system's treatment of both violent and property crimes, and the overall statistics on rape (at least among reported cases) are not substantially different or worse than other serious crimes. To the extent that the feminist critique of the system depends on rape being treated uniquely—and that has been the predominant claim—the studies fail to prove the case, and the system's defenders would seem to carry the day.

My own critique depends on no such proof of uniqueness. I am willing to assume, along with the system's defenders, that in certain basic respects the criminal justice system operates no differently with respect to rape complaints than with respect to other crimes. In my view, it is precisely by treating rape the same as other crimes that the criminal justice system manages to duplicate in every-day practice the most oppressive aspects of the common law tradition. The system's emphasis on force, resistance, and corroboration, the familiar factors of the appellate court opinions, tends to minimize the perceived severity of many rapes. Moreover, the reliance placed on prior relationship between victim and defendant and the circumstances of their initial contact, which may be the most important factors in determining disposition, tends to legitimize the very notions of male entitlement and female contributory fault which are at the core of the common law tradition that I have criticized.

A. Screening by the Victims: The Reporting of Rapes

The underreporting of rapes has been a subject of substantial controversy. It is often cited as one of the primary effects of the unfair rules of law and the hostile attitudes that penalize and denigrate rape victims. Victims do not report rapes, it is said, because the traumas associated with pursuing a complaint and the difficulties of securing a conviction are daunting.248

248. Id. at 141. “[A]mong crimes of violence, rape may be the one least often reported to authorities. . . . ‘Police brutalization of the victim is responsible for the failure of women to report the
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[T]he number of women with legitimate cases who refuse to prosecute in dread of what the system does to them is so high that it is difficult to imagine a woman deliberately putting herself through it, particularly when a shadowy corner of our consciousness says only bad girls get raped.

The final report of the Battelle Memorial Institute of its multi-year project on forcible rape, published in 1978, sounded a similar theme, at least with respect to the statistics. That report concluded that "victimization studies have shown that rape is probably the most underreported of all major crimes. If victimization estimates are accurate, the actual number of rapes in the United States is approximately four times the reported number."

In contrast, using data from the National Crime Surveys for the years 1973–82, the Bureau of Justice Statistics (BJS) calculated that 52% of all rapes (attempted and completed) were reported to police, while 47% were not. The data for completed rapes was higher still: 58% were reported, while 40% were not. In an earlier study of rape victimization in 26 American cities, reporting rates were even higher: 68% of those who stated that they had been the victims of a completed rape by a stranger told interviewers that they had reported the crime to the police.

Jim Galvin and Kenneth Polk point to the crime survey data as proof that rape underreporting is not unique among serious crimes, and that the feminist hypotheses are therefore wrong. According to the BJS reports, for the years 1976–1980 national rape reporting ranged from a high of 58% in 1977 to a low of 42% in 1980. Among the four crimes considered—rape, robbery, assault, and burglary—rape was, on average, second only to robbery in terms of the percentage of victims reporting.


250. National Institute of Law Enforcement and Criminal Justice, Law Enforcement Assistance Admin., U.S. Dep’t. of Justice, Forcible Rape 15 (1978) (emphasis added) [hereinafter cited as Forcible Rape]. The most recent study cited for this proposition, however, was one done in 1965 by the National Opinion Research Center, id. at 22 n.1, which included only 15 rapes as its basis for prediction. See Hindelang & Davis, *Forcible Rape in the United States: A Statistical Profile*, in Forcible Rape: The Crime, The Victim and The Offender 87 (D. ChapPELL, R. Geis & G. Geis eds. 1977).


252. Id. The BJS itself noted that their statistics were almost certainly skewed by the fact that: "Just as some women are reluctant to report rape to the police, others are reluctant to report the event to a survey interviewer." Id. at 2.


254. Galvin & Polk, supra note 231, at 126.

255. Reporting rates are not necessarily a measure of how seriously a crime is viewed by its victims. Insurance requirements may increase reporting rates for property crimes such as burglary;
Galvin and Polk’s argument disposes of the issue as long as one accepts the victimization surveys as authoritative—or at least as no less authoritative with respect to rape than they are with respect to the other crimes compared. But the authority of the victimization surveys’ finding of a 58% completed rape reporting rate does not simply depend, as it does with other crimes, on people accurately recalling whether the victimization was within the last twelve months (the issue that is usually scrutinized) or even whether they called the police. It also depends on two additional factors: first, whether women correctly perceive when forced sex is a crime and thus whether they think of themselves as rape victims; and second, whether women who do perceive of themselves as being rape victims are willing to tell surveyors about it. Both of these predicates are highly dubious when applied to the victim of the non-traditional rape, far more dubious than when applied to the victims of robbery, assault and burglary.

There is little question that the victims of traditional rapes are more likely to report than are the victims of non-traditional rapes. Thus, one should expect that the high reporting rate found in the surveys includes relatively more of the violent rapes by strangers and fewer of the less violent rapes by non-strangers; indeed, the victimization surveys themselves acknowledge this. But it appears that not only police reporting, but “rape” itself as understood in the victimization survey, is disproportionately of the “traditional” variety. This is not necessarily because the traditional rape reflects the social reality, but because those reporting are the victims who both perceive themselves as having been raped and who are willing to disclose the crime against them to the surveyors. Reporting rates are high because “rape” is so narrowly defined by its victims.

In the sociological studies, almost no one has any difficulty recognizing the classic, traditional rape—the stranger with a gun to the throat of his victim forcing intercourse on pain of death—as just that. But when the man in the hypothetical (even a stranger) “warns her to do as he said”
and "tells her to lie down" rather than "slashing her with a knife," those who are certain that a "rape" has taken place decreases significantly in every category except "pro-feminist" women. In situations where a woman is presented as being forced to engage in sex after a "date with a respected bachelor" or with a man she met in a bar who takes her to a deserted road (instead of home) or with her boss after working late, less than half of the female respondents in another survey were certain that a "rape" had occurred. Notably, where the two were strangers and the circumstances of the initial contact were involuntary—accosted in parking lots, house break-ins—nearly everyone was certain that a rape had occurred. Adolescents in one survey were least likely to label clearly forced sex as "rape" when the couple was presented as dating. According to that study, "teenagers of both genders are quite accepting of forced sex between acquaintances and often don't view it as rape."

The distinctions are not limited to hypothetical responses. It is clear that women act on them as well. The most striking findings of this sort are based on Diana Russell's survey of 930 adult women (by other trained women) in the San Francisco area in 1978. Some 22% of those surveyed responded that they had been the victims of "a rape or completed rape" at some time in their lives, a figure substantially higher than the annual percentages produced by the victimization surveys. Even so, when the questions were rephrased inquiring as to forced intercourse or intercourse obtained by threat (rather than the word "rape"), the number climbed to 56% (24% completed, 31% attempted). Eighty-two percent of Russell's total rapes involved non-strangers—and under 10% of that group were reported to the police. Russell's findings as to the prevalence of forced sex among dates, acquaintances and friends are not unique. In a 1977 study, over half of the female college students interviewed reported experiencing offensive male sexual aggression during the previous year. A 1983 nationwide study of

262. Id. at 61. See also L'Armand & Pepitone, supra note 25.
264. D. RUSSELL, supra note 4, at 34-37.
265. Id. at 101. Russell found the stranger rapes most likely to be reported (30%), compared to reporting rates of 7% or less for friends or dates. The difference in absolute numbers would seem to follow from a broader understanding of "rape" in her survey.
266. Malamuth, Rape Proclivity Among Males, J. SOCIAL ISSUES 138, 152 (Fall 1981).
adolescents conservatively estimated that from 5 to 16% of adolescent males “sexually assault” each year, and that most of these assaults are “spontaneous events that occur in the context of a date.” Yet only 5% of the female victims of these sexual assaults report them to the police as rape. In three separate studies of college students released this year, one in five women in each study reported being “physically forced” to have sexual intercourse by their dates. Yet the majority of these women did not think they had been raped; as one newspaper headline put it: “Rape not rape to some victims.”

The reasons given in these studies for the failure to perceive forced sex as rape and report it betray a view of rape that approaches the definition of the “traditional” rape. Some women do not report attacks because they were “successful” in resisting the actual penetration, suggesting a belief that sexual aggression is only a crime when it ends in unwanted intercourse. Other women do not report because they ended up “giving in” to the sexual pressure without a “fight,” suggesting the traditional equation of nonconsent with utmost or at least reasonable physical resistance. And many young women believe that sexual pressure, including physical pressure, is simply not aberrant or illegal behavior in a dating situation. Thus, one study concluded that most adolescent victims do not perceive their experiences of victimization “as legitimate,” meaning that “they do not involve strangers or substantial violence. . . . Contemporary teenagers expect and receive a fair amount of pressure for sex in dating situations. This expectation may lead them to accept as normative sexually

267. S. Ageton, Sexual Assault Among Adolescents 134–35 (1983). Sexual assault was defined to include “all forced sexual behavior involving contact with the sexual parts of the body;” the force used could be “as mild as verbal pressure or as severe as a physical beating or injury from a weapon.” Id. at 8.

Interestingly, reports on the amount of force used in these adolescent encounters varied greatly depending upon whether the subject questioned was a male aggressor or a female victim. While the overwhelming number of young men reported using verbal persuasion (68% in 1978; 83% in 1979; 71% in 1980), only 7 to 12% reported using “pushing, slapping, mild roughness,” and only 4 to 12% reported using their size or strength to accomplish their goals during the period between 1978–1980. Id. at 96. On the other hand, 27 to 40% of the female victims reported “pushing, slapping, mild roughness,” and 39 to 66% reported size and strength of the offender as a factor in the assault. Id. at 41.

268. Id. at 130.

269. The surveys were conducted at the University of South Dakota (20.6% of the women were “physically forced by a dating partner to have sexual intercourse”). At Cornell, 19% reported they had “intercourse against their will . . . through rough coercion, threats, force or violence”; but only 2% said they had been “raped”; and at a small college near Ithaca, 18% said they had engaged in intercourse against their will through force and 9% said they had been “raped.” See Boston Herald, Sept. 22, 1985, at 6; Parade Magazine, Sept. 22, 1985, at 10.


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aggressive, assaultive behavior unless it occurs outside a dating situation or becomes especially violent.”

When we walk out of our houses and do not see our car, we know (unless we’ve parked illegally in Cambridge) that we are the victims of a car theft. The same is not true of women who say no, but are forced to have sex. We know that we have been abused. But most of us do not think that we have been raped—unless we happen to be women who are more “pro-feminist” than most. Rape is not, at least in the words of most statutes or even appellate opinions, strictly limited to sex that begins as a kidnapping or a breaking and entering. But in practice, when the victimization surveys find that reporting rates for rape are higher than for other crimes, the rapes they are examining are disproportionately cases of greater force, involuntary encounters, and strangers attacking strangers.

The high reporting rate found in the victimization surveys is also skewed by the willingness or unwillingness of women who do perceive themselves as rape victims to disclose this to the victimization surveyors. One would think that the women most likely to be forthcoming to the victimization surveyors would be those who had already reported to the police; after all, they were certain enough that they had been victimized to report it to the police, and the questions asked by a victimization surveyor are far less intrusive and probing than those asked by the police. How-

273. S. Ageton, supra note 267, at 48.
274. See, e.g., Krulewitz & Payne, supra note 259; L'Armand & Pepitone, supra note 25. Indeed, at Washington State University, a survey reported that 5% of the women and 19% of the male students do not even believe that forcible rape on dates is definitely criminal rape or that the male’s behavior is definitely unacceptable. See Professor Gloria Fisher, quoted in the Boston Herald, supra note 270.
275. The victimization surveys find the reporting rate for attempted and completed rapes by strangers (56%) to be significantly higher than that by non-strangers (45%), see THE CRIME OF RAPE, supra note 251, at table 7, at 3. What is striking is that these results are based on the finding that rapes committed by non-strangers are rare events (at least relative to those committed by strangers) and in some surveys almost nonexistent. The 10-year victimization study found that 68% of all the rapes it learned about were committed by strangers. Id. at table 5, at 3. And the 26-city survey could not even find enough instances of non-stranger rape to form a statistically significant sample for inclusion in the main body of its report.

The definitional problems of rape as studied in victimization surveys may also explain other seemingly inexplicable distinctions found in them. The most striking is based on race: The 13-city crime survey found that the reporting rate for white victims of completed rapes was 65%; for black/other victims, the rate was 84%. See Hindelang & Davis, supra note 250, at 98. That finding is striking because others have found minority women less likely than white women to report the same hypothetical rape. Feldman-Summers & Ashworth, Factors Related to Intentions to Report a Rape, J. Soc. Issues 53, 65–66 (Fall 1981). What I suspect is lurking in the distinction between white and black reporting rates is a difference in understanding as to the scope of “rape.” If black women have a narrower understanding of rape—and socioeconomic status and feminist views have been found to correlate with the breadth of one’s understanding—then more of the events that black women characterize as rape are likely to be of the traditional sort reported most often by all women. While the 13-city study does not include such data, in the 1982 national victimization survey, 84.2% of the rapes reported to survey interviewers by blacks involved strangers, compared to 62.7% reported by whites. U.S. DEPARTMENT OF JUSTICE, BUREAU OF JUSTICE STATISTICS, CRIMINAL VICTIMIZATION IN THE UNITED STATES 1982, table 37 (1982).
ever, research suggests that even among those women who have reported their rapes to the police, women victimized by non-strangers are substantially less likely to describe themselves as having been raped to surveyors.

In 1971, the Bureau of the Census, in an effort to examine the accuracy of its criminal victimization surveys, conducted what is known as a reverse record check, interviewing 620 persons who were known from police records to have reported that they were victims of specific crimes during 1970.276 In this report, entitled The San Jose Methods Test of Known Crime Victims, the authors found that 84.2% of those raped by a stranger reported the victimization to the interviewer, while only 54.2% of those raped by someone they knew reported the victimization.277 Every one of the victims in both groups, it bears emphasizing, had already reported the victimization to the police.

The San Jose report found that rapes were both more and less likely to be reported than other crimes—depending entirely on the circumstances. Rape committed by a stranger was the crime most likely to be reported to survey interviewers. Second to aggravated assault, rape committed by a non-stranger was the crime least likely to be reported to the interviewers.

Why would women who had reported a rape to the police fail to disclose it to a survey interviewer? One possibility is that these women were, quite simply, tired of talking about it, or considered it too private or too painful to raise with a stranger who wanted the information for a survey. But that possibility would seem to apply equally to all self-perceived rape victims; it does not explain the striking difference between the very high reporting rates of the victims of stranger rapes and the significantly lower reporting rates of the victims of non-stranger rape. That distinction may be explained both by the interviewee’s concerns about the surveyor’s response and, even more troubling, by the fact that she may have received just such a skeptical response from the police and the criminal justice system. The latter would surely be enough to convince any woman that while she herself felt victimized, this was not a “rape” as defined by the criminal justice system.

A very small minority of the victims of non-stranger, less violent rapes perceive themselves to be rape victims, notwithstanding that they all felt forced to have sex against their will through force or threat of force. Among the minority who do perceive themselves as rape victims, only a minority of that group contact the police. But even among the minority of the minority who are not only convinced that they were raped, but sufficiently certain of its “legitimacy” and sufficiently free of self-doubt as to

277. Id. at table I, at 9.
be willing to report to the police, barely half were later willing to tell victimization surveyors that they were “raped.”

The answer to the reporting controversy thus seems largely definitional: The more narrowly rape is defined, the higher the rates of reporting. Rape as a crime committed by strangers using substantial force is, by all indicators, readily perceived as such and reported with greater frequency than virtually any other crime. Forced sex among non-strangers, particularly in social situations, is rarely perceived as a crime, and by all indicators, rarely reported as such; the victimization studies themselves acknowledge that nearly half of the non-stranger victims who do report to the police are later silent when surveyed about their victimizations.

B. Screening Within the System: Arrest, Prosecution and Disposition

The future of a rape complaint, if it is reported, is determined in part by luck (as in finding the perpetrator) and in part by discretion (of police, prosecutors, judges, and juries). As with reporting, the debate over the handling of rape cases has raged with intensity at the rhetorical level. The institutional sexism of the criminal justice system has been pointed to by some commentators as the prime cause of what are characterized as appallingly low rates of arrest, prosecution, and conviction. For example:

Forcible rape is unique among crimes in the manner in which its victims are dealt with by the criminal justice system. Raped women are subjected to an institutionalized sexism that begins with their treatment by the police, continues through a male-dominated criminal justice system influenced by pseudo-scientific notions of victim precipitation, and ends with the systematic acquittal of many de facto guilty rapists.278

Or consider:

Although rapes tend to be both violent and planned, very few apprehended rapists are ever charged with and convicted of rape; fewer yet are committed to institutions. . . . The reasons for this failure to charge and convict are clear: legal and social attitudes about rape have produced a network of formal and informal restraints on the actions of police, prosecutors, judges, and juries that hinder prosecutions for forcible rape.279

And finally:

278. Robin, supra note 247, at 136.
279. Note, Rape and Rape Laws, supra note 201, at 927-28.
Although more and more rapes are reported to the police, very few cases actually go to trial and even fewer result in convictions. . . . The reasons for this tremendous lack of convictions are complex, but it is clear that a major factor is related to the judgmental policies of the police, the prosecuting attorneys, and the juries. 280

Yet to the extent that the feminist critique depends on rapes being treated uniquely, it rests on uncertain grounds. Although there are variations among studies, the statistics on arrests and prosecutions are not substantially worse nor are the factors that appear to guide discretion substantially different than for other crimes. The question that interests me, however, is not so much whether rape is treated differently, but whether treating it the same as other crimes masks significant differences and conveys inappropriate judgements. My view is that it does.

The studies of individual jurisdictions have found that 20% (Washington, D.C.) 281 or 25% (New York City) 282 or 34% (California) 283 or 32% (Indiana) 284 of felony arrests for rape result in convictions. While those figures may appear shocking to some, substantial felony attrition, as it is called, is characteristic of the criminal justice system: Whether one looks at New York City in 1973 or 1926, at California, Portland, Oregon, Washington, D.C., New Orleans, or even Germany and Austria, from 40-60% of all felony arrests result in dismissal or acquittal. 285 Moreover, studies of individual jurisdictions have found rape rather typical in the level of felony attrition as compared to other crimes of violence. 286 For example, Galvin and Polk found that in California between 1975 and 1980/81, rape ranked third (behind homicide and assault) in the average percentage of offenses cleared by arrest, third (behind homicide and robbery) in the percentage of all arrests resulting in the filing of a felony complaint, second (behind homicide) in the percentage of felony filings of all complaints, third (behind homicide and robbery) in the percentage of felony convictions of all felony complaints filed, and third (again behind homicide and robbery) in the percentage of felony arrests resulting in in-

281. K. Williams, supra note 240, at 25–27, 43.
283. Galvin & Polk, supra note 231.
284. LaFree, The Effect of Sexual Stratification by Race on Official Reactions to Rape, 45 AMER. SOC. REV. 842 (1980); see also Galvin & Polk, supra note 231, at 129.
286. Of course, to the extent that “rapes” are screened more strictly by their victims than other crimes in the reporting decision itself, an equivalent statistical record by the criminal justice system may be proof of its diminished efficacy in rape cases. The studies have not focused on this problem.
Rapestitutional sentences. Galvin and Polk also point to the available national data to further buttress the proof from California that attrition in rape case processing is not unique.

Even if the conviction rates for rape are not unique, the question remains whether the factors relied upon to produce them are. Studies of individual jurisdictions, along with surveys of prosecutors, point to three sets of crime-related factors which determine whether a rape arrest will lead to prosecution and conviction: the relationship of victim and offender; the amount of force and resistance; and the existence of corroborating evidence.

The relationship of victim and offender and the circumstances of their initial encounter appear key in virtually every study. In New York, ChapPELL and Singer found that 24% of the rape complaints in non-stranger cases were judged by the police to be without merit, compared with less than 5% in the stranger cases. A student review of the case files of the Sex Crime Unit in the New York County (Manhattan) District Attorney’s Office found that in cases involving strangers, 33% were indicted, 33% were dismissed, and 16% were reduced. As for non-strangers, 7% of the cases were indicted, 49% were dismissed, and 18% were reduced. In effect, the numbers point toward a policy to reduce or dismiss cases involving non-strangers, a policy that has been confirmed and defended (for all crimes) in newspaper accounts.

New York is not unique in this regard. A national survey of prosecu-

288. An earlier study of processing in the District of Columbia yielded results which provide somewhat greater support for those who argue that rape is treated uniquely. Researchers in 1973 found that one out of five arrests for forcible rape resulted in conviction, placing rape fifth among the five serious crimes examined (murder, aggravated assault, robbery, burglary and rape). Rape ranked last as well in the percentage of arrests accepted for prosecution, first in dismissals by judge or prosecutor, and last in the number of guilty pleas, although some of these rankings were based on relatively small actual differences in percentages. The District of Columbia study is more than ten years old, but it is not easily dismissed as dated; recognizing that their data was gathered before the District of Columbia eliminated its corroboration rule in May, 1976, the authors went back and examined the comparability of the data after that time. They found “not only that the number of reported rapes was much lower than in previous years, but also that there was no increase in the conviction rate for the last six months of 1976. In fact, the rate was somewhat lower than in 1973 and 1974. Conviction rates and reporting behavior may change in the future but as yet we see no move in that direction.” K. Williams, supra note 240, at 25-27, 43 (emphasis in original).
289. As noted at the outset, I recognize the serious problems involved in my reliance, of necessity, on the studies of others as they have chosen to present them. But the factors listed here are ones noted with such regularity in the studies that, even if they are not as important as some of their authors believe, it is likely that they remain significant; this is confirmed as well by my own conversations with prosecutors.
tors conducted by the Battelle Institute found the relationship between the victim and the suspect and the circumstances of their initial contact to be among the ten factors considered most important in screening rape cases and obtaining convictions.\(^\text{293}\) In Washington, Professor Loh found the social interaction of the victim and the defendant to be the second most important factor, behind the amount of force used, in predicting disposition.\(^\text{294}\) In the District of Columbia, researchers found that the relationship between the victim and the accused was substantially more important than seriousness of the incident; while the latter did not predict convictions, the former did, and the closer the relationship, the lower the conviction rate.\(^\text{295}\) In Travis County, Texas (Austin), Professor Weninger found that 58% of all stranger cases resulted in indictments, compared with 29% of the cases among acquaintances and 47% among friends. Even more important, when the initial encounter between the victim and the defendant was voluntary, only one-third of the cases resulted in indictment; when it was involuntary, the indictment rate was 62%.\(^\text{296}\) And at Harvard's Center for Criminal Justice, proposed sentencing guidelines drafted last year distinguish in each category of sexual assault between the stranger and non-stranger, providing for lower sentencing recommendations when an otherwise similar rape is committed by a non-stranger.\(^\text{297}\)

The second set of factors critical to disposition relates to the amount of force used by the defendant and the level of resistance offered by the victim. In the Battelle survey, use of physical force was rated by prosecutors as the single most important factor in screening and securing conviction; also included in the ten key factors were injury to the victim, use of a weapon, and resistance by the victim.\(^\text{298}\) In Washington, Professor Loh found that force was the most important factor.\(^\text{299}\) Similarly, in Texas, both a high degree of force and substantial resistance were among the five significant predictors of indictments. The existence of resistance was particularly critical in cases where the initial encounter was voluntary. In voluntary encounter cases, the probability of indictment was only 13% when little victim resistance was used, but jumped to 53% when resistance was substantial. When the initial encounter was involuntary, the differential based on resistance was only 10% (from 57% to 67%).\(^\text{300}\)

\(^{293}\) FORCIBLE RAPE, supra note 250, table 30, at 19.
\(^{294}\) Loh, supra note 200, at 604.
\(^{295}\) K. WILLIAMS, supra note 240, at 32.
\(^{296}\) See Weninger, Factors Affecting the Prosecution of Rape: A Case Study of Travis County, Texas, 64 VA. L. REV. 357, 379–82 (1978).
\(^{298}\) FORCIBLE RAPE, supra note 250, table 30, at 19.
\(^{299}\) Loh, supra note 200, at 604.
\(^{300}\) Weninger, supra note 296, at 386.
The final set of factors relates not to the quality of the evidence as judged by the prosecutor's own evaluation of the victim's credibility, but to the existence of corroboration of her account. In Texas, Professor Weninger found that where there was no medical corroboration (at least of penetration) only 12% of the arrests resulted in indictment. Proof of penetration, extent of victim identification, and the availability of witnesses were cited as among the ten most important factors in the Battelle study, and corroborative evidence was the third most important factor in Professor Loh's study of the state of Washington. In Indiana, Professors Myers and LaFree found that corroboration remained an informal requirement despite the change in the law formally eliminating its necessity, a conclusion also reached by those interviewed by Marsh and her colleagues in Michigan.

The factors emphasized by prosecutors are also considered significant by juries in the minority of cases which go to trial. In their landmark study of juries, Professors Kalven and Zeisel found not only that the jury tends to be biased against the prosecution in a rape case, but that it will go to great lengths to be lenient with the defendant when there are any suggestions of "contributory behavior" on the part of the woman. "Contributory behavior" justifying leniency includes hitchhiking, dating, and talking to men at parties. To demonstrate their point, Kalven and Zeisel divided the rape cases in their study into two categories, aggravated and simple, and emphasized the dimensions of disagreement between judge and jury in the two categories. "Aggravated" rape, according to Kalven and Zeisel, included cases with extrinsic violence, multiple assailants, or no prior relationship between victim and offender—what I have termed the "traditional" rape. "Simple" rape included cases in which none of the "aggravating circumstances" were present. Not only were jury conviction rates nearly four times as high in the aggravated cases, but the

301. See Loh, supra note 200, at 605; K. WILLIAMS, supra note 240, at 27; Caringella-MacDonald, The Comparability in Sexual and Nonsexual Assault Case Treatment: Did Statute Change Meet the Objective? 31 CRIME & DELINQUENCY 206 (1985). While prosecutors understandably do not admit to considering race and class, to the extent that such considerations enter into their decisionmaking, it may well be related to their assessments of "credibility." Professor Loh found black men arrested for the rapes of white women less likely to be charged and convicted, see Loh, supra note 200, at 604, while Professor LaFree found that black men who assaulted white women were no more likely than other suspects to be arrested or found guilty, but they were more likely to have their cases filed as felonies, to receive longer sentences, and to be incarcerated in the state penitentiary, LaFree, supra note 284, at 842–54. See also Note, Police Discretion and the Judgment That a Crime Has Been Committed—Rape in Philadelphia, 117 U. PA. L. REV. 277 (1968).
302. Weninger, supra note 296, at 386, 389 n.115.
303. FORCIBLE RAPE, supra note 250, at 19; Loh, supra note 200, at 605.
percentage of jury disagreement with the judge jumped from 12 per cent in the aggravated cases to 60 per cent in the simple cases,\textsuperscript{307} with the bulk of the disagreement explained by the jury's absolute determination not to convict for rape when there was any sign of contributory fault by the woman.\textsuperscript{308}

The factors that determine the disposition of rape arrests are, in short, those that have been emphasized throughout this paper in distinguishing the "traditional" from the "non-traditional" rape. Reliance on these factors, however, is not limited to rape arrests. Although one study found some variations in the application of prosecutorial discretion to rape cases,\textsuperscript{309} others reached conflicting results.\textsuperscript{310} The importance attached to prior relationship, force, and corroboration—like the statistics on attrition of rape arrests—appears rather typical of the way in which the criminal justice system processes cases generally.

But treating rape the same is only appropriate if it is the same. In my view, rape is different in ways which demand that it be treated differently from assault, robbery or burglary by the criminal justice system. Given the nature of the crime, rapes are less likely to be supported by corroboration. Given the sex and socialization of the victims, rapes may require less force and generate less resistance. Moreover, to take account of prior relationship in the same way and for the same reasons in rape as the system does for other crimes communicates the common law tradition's most oppressive judgments of women victims—precisely the sort of judgments that would lead women who had reported non-stranger rapes to the police to later remain silent with the victimization surveyers.

Consider corroboration. There is surely reason to suspect that many rape victims initially confront substantial skepticism from police and prosecutors, if not as a result of the sexism of the individual officials, then as a result of the officials' perceptions of the reactions of juries. Corroboration of these victims' accounts is therefore that much more important to begin

\begin{itemize}
  \item \textsuperscript{307} Id. at 253. The focus on judge-jury disagreement suggests that judges can be relied upon to disregard contributory fault and thus serve as a sort of control on the jury's consideration. Perhaps that is so of Kalven and Zeisel's judges; if not, the results are even more striking. But whether it is true of judges in general is far from clear given the tenor of the appellate opinions and the factors found to be important in the studies above, which included relatively few jury trials.
  \item \textsuperscript{308} Id. at 254. In some such cases, juries were willing to convict of a lesser offense where instructed that they could do so—a result which understandably led many feminist reformers to hope that grading of rapes would increase conviction rates. More recent studies of potential jurors—samples of the general population and of students asked to evaluate case descriptions as if they were jurors—provide further support for Kalven and Zeisel's conclusions and for the emphasis on prior relationship and the circumstances of the initial contact (contributory fault/assumption of risk) in evaluating rape cases. See, e.g., H. Feld & L. Biener, supra note 135, at 125-41; Klemmack & Klemmack, supra note 260, at 135-46; L'Armand & Pepitone, supra note 25, at 134-39; Krulewitz & Payne, supra note 259, at 291-305.
  \item \textsuperscript{309} K. Williams, supra note 240, at 26-27.
  \item \textsuperscript{310} See, e.g., Myers & LaFree, supra note 304, at 1282.
\end{itemize}
with. But corroborative evidence may be far more difficult to secure for rape cases than for many other crimes. In a street theft, the requirement of corroboration may be easily met: The defendant is arrested with the stolen goods in his possession. In corruption, it is routine to secure needed corroboration by sending in an informant with a tape recorder (if not the video cameras of Abscam) or by wiretapping telephone lines. In drug cases, there is both physical evidence and (often) tape recordings.

In a rape, corroboration may be impossible to find. In most cases, there are no witnesses. The event cannot be repeated for the tape recorder—as bribes or drug sales are. There is no contraband—no drugs, no marked money, no stolen goods. Unless the victim actively resists, her clothes may be untorn and her body unmarked. Medical corroboration may establish the fact of penetration, but that only proves that the victim engaged in intercourse—not that it was nonconsensual or that this defendant was the man involved. Moreover, the availability of medical corroboration turns not only on prompt and appropriate treatment by police and medical personnel but, in the first instance, on the victim not doing what interviews find to be the most immediate response of many rape victims: bathing, douching, brushing her teeth, gargling. On the surface, at least, rape appears to be a crime for which corroboration may be uniquely absent.

The second set of factors relates to force. In most crimes of violence, the demographics of victim and offender tend to be nearly identical: young, male, center city residents. Rape is different; its victims, even in jurisdictions with gender-neutral laws, are overwhelmingly female. The reality of our existence, and our size, is that less force is required to overcome most women than most men.

The importance accorded to the victim's resistance is troubling for the same reason. To expect women to resist an attacker who is likely to be both larger and stronger is to expect them to do what many or most women have been brought up and conditioned (and, if they read some manuals, instructed) not to do.

In short, corroboration, force and resistance are not necessarily “neutral” factors equally likely to be found in rape and assault cases and therefore entitled to equal weight in both. For example, Professor Susan

311. See Caringella-MacDonald, supra note 301, at 206.
312. In one study where respondents were asked to impose hypothetical penalties for several different rapes, the male subjects imposed significantly more lenient sentences where there was low resistance, but the female subjects imposed significantly harsher ones. Seeking to explain this “startling finding,” the author found that most of the female subjects “identified with the victim... That the rapist in the no resistance case so terrified his victim she dared not resist apparently aroused more sympathy for her plight among female subjects. Perhaps they could more readily imagine themselves acting in a similar fashion.” Scroggs, Penalties for Rape as a Function of Victim Provocativeness, Damage, and Resistance, 6 J. APPLIED SOC. PSYCHOLOGY 360, 367 (1976).
Caringella-MacDonald, in a study of the treatment of sexual (CSC) and non-sexual assault cases (including robbery) in Kalamazoo County, Michigan between 1981–1983,\textsuperscript{313} found that the mean number of witnesses was more than twice as high in the non-sexual cases, and victim credibility problems, including implausible account, inconsistent statements, and suspected ulterior motives, were noted by prosecutors in over a third of the CSC cases and only 15% of the non-sexual assault cases. She also found that the CSC victims, who were overwhelmingly female, offered less resistance and sustained fewer injuries (other than the sexual attack) than the non-sexual assault victims, who were predominantly male. The overall conviction probability as rated by prosecutors was, not surprisingly, statistically higher for the nonsexual than the CSC cases.\textsuperscript{314}

The third set of factors relates to the prior relationship of the victim and the accused and the circumstances of their initial contact. The more broadly we define the crime of rape, the more prior relationship cases we will see. Redefining force or consent in statutes or appellate opinions will not make much practical difference if the system automatically downgrades or dismisses the newly-included cases on the grounds that they involve a “prior relationship.”

Prior relationship cases often result in dismissal because the victim withdraws her complaint.\textsuperscript{315} The reasons victims withdraw range from intimidation by the defendant to the private resolution of their dispute to the inadequacy of either imprisonment or probation (which is all the criminal justice system can offer) as a remedy for an individual who is dependent on her attacker (e.g., the battered wife). To the extent that vulnerability and dependence are factors that lead to withdrawal, women may disproportionately withdraw not because they choose to but because they lack any other choice.\textsuperscript{316}

But lack of victim cooperation is not the only reason—or perhaps even the most important one—that prior relationship cases are dismissed or downgraded. Outside of murder, prior relationship cases tend to be viewed

\textsuperscript{313} Caringella-MacDonald, supra note 301, at 206.
\textsuperscript{314} Id. at 212.
\textsuperscript{315} See generally President's Commission on Law Enforcement and Administration of Justice, Report on a Pilot Study in the District of Columbia on Victimization and Attitudes Toward Law Enforcement (1967); R. Davis, V. Russell, & F. Kunreuther, The Role of the Complaining Witness in an Urban Criminal Court (Vera Institute of Justice 1980).
\textsuperscript{316} Of course, victim withdrawal in prior relationship cases may also be something of a self-fulfilling prophecy, particularly in rape cases. If the prosecutor’s attitude is that the victim will withdraw—or that this is not a very serious case in any event—that message may readily be conveyed to the victim. Pursuing a rape complaint under the best of circumstances has costs unique to that crime; pursuing it where the prosecutorial response is that the crime is not serious or will not result in serious punishment or does not deserve the prosecutor’s attention is likely to be more than most women are willing to endure.
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as simply less serious and less deserving of the attention of the system and the resources of punishment. At least four sets of reasons are generally offered to explain this systemic bias. What is troubling is that each, when applied to rape, incorporates the very notions of male power and entitlement and female contributory fault that make the appellate courts' definition of the crime of rape so damning for women victims.

First, prior relationship cases are sometimes described as truly "private" disputes which are not the business of the public prosecution system. I have no particular problems with such an explanation when applied to two friends of relatively equal size and strength fighting over a bet or a baseball game. Leaving those two to their own devices is leaving them in a situation of rough equality. But if that is the case, it is unlikely that either will be pressing charges in any event. It is quite a different matter when—and this is when one more often hears the explanation—the two are estranged husband and wife, or ex-boyfriend and girlfriend. To treat this relationship as private is to maintain the privilege of the more powerful (man) to rape or batter the less powerful (woman). The law claims to be respecting the privacy of a relationship by denying the request of one of the parties (the complaining witness) to not treat the relationship as private and to intervene to save her. Privacy in this context means respecting not voluntary relationships, but the abuse of greater power.

Second, prior relationship cases are said to be less serious (and the defendants less blameworthy), because they often involve a claim of right while attacks by strangers do not. The paradigm of the non-stranger theft, for example, is a case in which underlying the taking of fifty dollars is a claim of right; the defendant asserts that he is legitimately owed the money and—when the victim refuses to pay—simply takes it. If prosecutors want to view this case as less serious than a stranger theft or robbery, fine. But the same reasoning applied to rape cases is wholly unacceptable. The claim of right argument in that context means that once a woman consents to sex, or even agrees to a date or a drink, the man has a right to full and continuing sexual satisfaction; that her body might be his just entitlement in the same way fifty dollars might.

Third, prior relationship cases often involve contributory fault by the so-called victim, where offenses by strangers do not. The paradigm of the non-stranger assault, for example, is the barroom fight. Both parties claim the other started it; both may even file complaints; and both will be dismissed. The same inquiry in the rape context conveys a very different message. When there we ask, "who started it," we imply that if the wo-

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man agrees to a ride or a date, she is responsible for her subsequent rape and should not be heard to complain. Indeed, Menachem Amir, a sociologist who studied Philadelphia rape cases in 1958 and 1960, adapted the concept of the "victim-precipitated" rape to describe, and implicitly ascribe blame for, just such cases.8

Finally, it is said that an attack by a non-stranger—whether it is a rape or assault—is a less terrifying incident, and therefore deserving of lesser (or no) punishment. As often as I have seen and heard this explanation, it continues to confound me. People are more afraid of stranger crime because they assume, often wrongly, that no one they know would victimize them. But once it happens, betrayal may be every bit as terrifying, or more so, than random violence. That you know your attacker is hardly a guarantee of better treatment: For robbery and assault (no equivalent figures are presented for rape), the most recent victimization survey finds a greater likelihood of physical injury from attacks by non-strangers than by strangers.3

That is not to say that some prior relationship cases may not, on other variables, prove less serious, although few studies have tested such correlations and few commentators have asserted them as a basis for downgrading. It may be, as one study found, that strangers tend to use greater force against their victims, but this should not excuse the non-stranger who uses equivalent force. It may be, taking Amir's argument in the least insulting light, that prior relationship cases will more often involve the lesser mens rea category of negligence than is true of stranger cases, although this should not excuse the non-stranger who acts purposefully or knowingly. The problem with focusing on prior relationship per se as a critical factor is not only that it is overinclusive, although this is surely a problem. The problem is also that it legitimates notions of male entitlement and female contributory fault which have no place in the law of rape, either as construed in the appellate courts or as enforced within the criminal justice system.

318. M. AMIR, supra note 257, at 259-76. The concept was adapted from Professor Wolfgang’s work on homicide, M. WOLFGANG, PATRONS IN CRIMINAL HOMICIDE (1958). Amir included within this category cases where the victim acts in a way that “is interpreted by the offender either as a direct invitation to sexual relations or as a sign that she will be available for sexual contact if he will persist in demanding it”—that is, she agreed to drinks, rides or dates, or failed to react strongly enough to sexual suggestions and overtures. Excluded from this category, according to Amir, are cases where there was no interaction between offender and victim, when what was involved was a sudden attack. M. AMIR, supra note 257, at 260-61. Amir, a sociologist, says that the law does not recognize precipitation, provocation, and seduction. Id. at 265-66. In this, he is clearly wrong. Most statutes may not recognize such elements, but see MODEL PENAL CODE § 213.1(1) (1980); but in the definition of force and consent, the courts do, and the system does in its emphasis on prior relationship and the nature of the initial contact.

319. U.S. DEPARTMENT OF JUSTICE, supra note 255; see also FELONY ARRESTS, supra note 282, at xii-xiii.
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V. TOWARD A BROADER UNDERSTANDING

The conduct that one might think of as “rape” ranges from the armed stranger who breaks into a woman’s home to the date she invites in who takes silence for assent. In between are literally hundreds of variations: the man may be a stranger, but he may not be armed; he may be armed, but he may not be a stranger; he may be an almost, rather than a perfect, stranger—a man who gave her a ride or introduced himself through a ruse; she may say yes, but only because he threatens to expose her to the police or the welfare authorities; she may say no, but he may ignore her words.

In 1985, the woman raped at gunpoint by the intruding stranger should find most of the legal obstacles to her complaint removed. That was not always so: As recently as ten years ago, she might well have faced a corroboration requirement, a cautionary instruction, a fresh complaint rule, and a searing cross-examination about her sexual past to determine whether she had nonetheless consented to sex. In practice, she may still encounter some of these obstacles; but to the extent that the law communicates any clear message, it is likely to be that she was raped.

But most rapes do not as purely fit the traditional model, and most victims do not fare as well. Cases involving men met in bars (Rusk)\textsuperscript{320} or at work (Goldberg)\textsuperscript{321} or at airports (Evans),\textsuperscript{322} let alone cases involving ex-boyfriends (Alston),\textsuperscript{323} still lead some appellate courts to enforce the most traditional views of women in the context of the less traditional rape. And in the system, considerations of prior relationship and the circumstances of the initial encounter, as well as force and resistance and corroboration, seem to reflect a similarly grounded if not so clearly stated view of the limits of rape law.

In thinking about rape, it is not as difficult to decide which rapes are more serious or which rapists deserving of more punishment: Weapons, injury, and intent—the traditional grading criteria of the criminal law—are all justifiable answers to these questions. Most jurisdictions that have reformed their rape laws in the last ten years have focused on creating degrees of rape—aggravated and unaggravated—based on some combination of the presence of weapons and injury.\textsuperscript{324} While mens rea or mistake needs to be addressed more clearly in some rape laws, and bodily

\textsuperscript{323} State v. Alston, 312 S.E.2d 470 (N.C. 1984).
\textsuperscript{324} See H. Field & L. Bienen, supra note 135, at 207–458 (state by state listing of rape provisions); Bienen, supra note 25, at 170.
injury more carefully defined in others, these are essentially problems of
draftsmanship which are hardly insurmountable.

The more difficult problem comes in understanding and defining the
threshold for liability—where we draw the line between criminal sex and
seduction. Every statute still uses some combination of “force,” “threats”
and “consent” to define the crime. But in giving meaning to those terms at
the threshold of liability, the law of rape must confront the powerful
norms of male aggressiveness and female passivity which continue to be
adhered to by many men and women in our society.

The law did not invent the “no means yes” philosophy. Women as well
as men have viewed male aggressiveness as desirable and forced sex as an
expression of love, women as well as men have been taught and have
come to believe that when a woman “encourages” a man, he is entitled to
sexual satisfaction. From the sociological surveys to prime time televi-
sion, one can find ample support in society and culture for even the most
oppressive views of women, and the most expansive notions of seduction
enforced by the most traditional judges.

But the evidence is not entirely one-sided. For every prime time series
celebrating forced sex, there seems to be another true confession story in a
popular magazine detailing the facts of a date rape and calling it
“rape.” College men and women may think that the typical male is
forward and primarily interested in sex, but they no longer conclude that
he is the desirable man. The old sex manuals may have lauded male

325. See Ruble, Sex Stereotypes: Issues of Change in the 1970’s, 9 Sex Roles 397, 400 (1983);
Kelley, Miller, Byrne & Bell, Facilitating Sexual Arousal via Anger, Aggression, or Dominance, 7
Motivation & Emotion 191, 200 (1983); see also E. Shapiro, Dynasty: The Authorized
Biography of the Carringtons 47 (1984) (explaining rape of one character by another as man’s
attempt to persuade woman to marry him through “a combination of love, warmth, and violent
threats”).

326. See Burt, Cultural Myths and Supports for Rape, 38 J. Personality & Soc. Psychol-
ogy 217, 229 (1980); Malamuth, supra note 266, at 143-44. Or as Ann Landers put it, “the woman
who ‘repairs to some private place for a few drinks and a little shared affection’ has, by her accept-
ance of such a cozy invitation, given the man reason to believe she is a candidate for whatever he
might have in mind.” Boston Globe, July 29, 1985, at 9, col. 4.

327. See supra notes 325-26; see also Malamuth, Haver & Feshbach, Testing Hypotheses Re-
garding Rape: Exposure to Sexual Violence, Sex Differences, and the “Normality” of Rapists, 14 J.
Research in Personality 121, 134 (1980); Eisenberg, Enter Arab Princes, Seductions and Water
Buffalos, T.V. Guide, May 4-10, 1985, at 16, 20:

Boy, trying to find people around here to even consider Abdullah a villain for raping Judy is
hard. Even on the shooting schedule it says, “Abdullah seduces Judy.” The other day I said to
Deborah, “Do you realize you get raped four times in this thing?” She asked what the fourth
one was and I said, “When you’re in the jungle.” And she said, “No, that’s seduction.” And I
said, “You’re being held at gunpoint and they’re trying to extort a million dollars. You call
that a seduction?”

328. See, e.g., Kaye, Was I Raped? GLAMOUR, Aug. 1985, at 258; McBain, I Was Raped: A

329. See Ruble, supra note 325, at 400.
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sexual responses as automatic and uncontrollable, but some of the newer ones no longer see men as machines and even advocate sensitivity as seductive.

We live, in short, in a time of changing sexual mores—and we are likely to for some time to come. In such times, the law can cling to the past or help move us into the future. We can continue to enforce the most traditional views of male aggressiveness and female passivity, continue to adhere to the “no means yes” philosophy and to the broadest understanding of seduction, until and unless change overwhelms us. That is not a neutral course, however; in taking it, the law (judges, legislators, or prosecutors) not only reflects (a part of) society, but legitimates and reenforces those views.

Or we can use the law to move forward. It may be impossible—and even unwise—to try to use the criminal law to change the way people think, to push progress to the ideal. But recognition of the limits of the criminal sanction need not be taken as a justification for the status quo. Faced with a choice between reenforcing the old and fueling the new in a world of changing norms, it is not necessarily more legitimate or neutral to choose the old. There are lines to be drawn short of the ideal: The challenge we face in thinking about rape is to use the power and legitimacy of law to reenforce what is best, not what is worst, in our changing sexual mores.

In the late eighteenth and early nineteenth centuries, the judges of England waged a successful campaign against duelling. While “the attitude of the law” was clear that killing in a duel was murder, the problem was that for some, accepting a challenge remained a matter of “honour,” and juries would therefore not convict. “Some change in the public attitude toward duelling, coupled with the energy of judges in directing juries in strong terms, eventually brought about convictions, and it was not necessary to hang many gentlemen of quality before the understanding became general that duelling was not required by the code of honour.”

There has been “some change in the public attitude” about the demands of manhood in heterosexual relations, as in duelling. If the “attitude of the law” is made clearer—and that is, in essence, what this Article is about—then it may not be necessary to prosecute too many “gentlemen

331. See Radlove, Sexual Responses and Gender Roles, in Changing Boundaries, supra note 261, at 87, 102; see also M. Morgenstern, How to Make Love to a Woman (1982).
332. The constitutional mandate of fair warning in the criminal law requires that people be told—or be capable of ascertaining—their obligations. It does not mean that new obligations cannot be imposed to prevent newly-understood injuries.
333. Williams, supra note 100, at 77.
of quality" before the understanding becomes general that manly honor need not be inconsistent with female autonomy.

In a better world, I believe that men and women would not presume either consent or nonconsent. They would ask, and be certain. There is nothing unromantic about showing the kind of respect for another person that demands that you know for sure before engaging in intimate contact. In a better world, women who said yes would be saying so from a position of equality, or at least sufficient power to say no. In a better world, fewer women would bargain with sex because they had nothing else to bargain with; they would be in at least as good a position to reject demands for sexual access as men are to reject demands for money.

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. I am quite certain that many women who say yes—whether on dates or on the job—would say no if they could; I have no doubt that women’s silence is sometimes the product not of passion and desire but of pressure and pain. But at the very least the criminal law ought to say clearly that women who actually say no must be respected as meaning it; that nonconsent means saying no; that men who proceed nonetheless, claiming that they thought no meant yes, have acted unreasonably and unlawfully.

So, too, for threats of harm short of physical injury, and for deception and false pretenses as methods of seduction. The powerlessness of women and the value of bodily integrity are great enough to argue that women deserve more comprehensive protection for their bodies than the laws of extortion or fraud provide for money. But if going so far seems too complicated and fraught with difficulty, as it does to many, then we need not. For the present, it would be a significant improvement if the law of rape in any state prohibited exactly the same threats as that state’s law of extortion and exactly the same deceptions as that state’s law of false pretenses or fraud.334

In short, I am arguing that “consent” should be defined so that “no means no.” And the “force” or “coercion” that negates consent ought be defined to include extortionate threats and deceptions of material fact. As for mens rea, unreasonableness as to consent, understood to mean ignor-

334. To the difficult hypothetical, there is thus an easy answer: resolve it as if money were involved, and I will gladly apply that resolution in the context of rape. Drawing lines between bargains and threats is not always easy. Deciding which misstatements are material is not always automatic. But I have never heard either problem offered as a reason for the repeal of the laws against blackmail, extortion, deception or false pretenses. And in practice, there are likely to be more than enough easy cases for victims, prosecutors and judges who are so inclined.
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ing a woman’s words, should be sufficient for liability: Reasonable men should be held to know that no means no, and unreasonable mistakes, no matter how honestly claimed, should not exculpate. Thus, the threshold of liability—whether phrased in terms of “consent,” “force” or “coercion,” or some combination of the three, should be understood to include at least those non-traditional rapes where the woman says no or submits only in response to lies or threats which would be prohibited were money sought instead. 335 The crime I have described would be a lesser offense than the aggravated rape in which life is threatened or bodily injury inflicted, but it is, in my judgment, “rape.” One could, I suppose, claim that as we move from such violent rapes to “just” coerced or nonconsensual sex, we are moving away from a crime of violence toward something else. But what makes the violent rape different—and more serious—than an aggravated assault is the injury to personal integrity involved in forced sex. That same injury is the reason that forced sex should be a crime even when there is no weapon or no beating. In a very real sense, what does make rape different from other crimes, at every level of the offense, is that rape is about sex and sexual violation. Were the essence of the crime the use of the gun or the knife or the threat, we wouldn’t need—and wouldn’t have—a separate crime.

Conduct is labeled as criminal “to announce to society that these actions are not to be done and to secure that fewer of them are done.” 336 As a matter of principle, we should be ready to announce to society our condemnation of coerced and nonconsensual sex and to secure that we have less of it. The message of the substantive law to men, and to women, should be made clear.

That does not mean that this crime will, or should, be easy to prove. The constitutional requirement of proof beyond a reasonable doubt may

335. That the problem is more one of understanding than of draftsman ship is amply demonstrated by the statute in the state of Washington. In Washington, rape in the third degree, a felony punishable by up to five years imprisonment, occurs where a person engages in sexual intercourse: (a) Where the victim did not consent . . . to sexual intercourse with the perpetrator and such lack of consent was clearly expressed by the victim’s words or conduct; or (b) Where there is a threat of substantial unlawful harm to property rights of the victim.

WASH. REV. CODE ANN. § 9A.44.060 (West. Supp. 1986). The provision as to threats, limited as it is to unlawful action and to property rights, is potentially narrower than the Model Penal Code’s crime of gross sexual imposition, and certainly narrower than traditional prohibitions of extortion. The provision as to consent, on the other hand, is potentially quite broad; it could be read to criminalize all those cases where force is difficult to prove in traditional terms but the woman said no. That is how I would read it. Others read it differently. Professor Loh of the University of Washington, perhaps the key commentator on the Washington rape statute, and certainly the expert on its practical impact, see supra Section III(C), reads this provision as adding absolutely nothing to a statute which, in the first two degrees of the offense, explicitly requires force and does not mention consent: “The definitions of the first two degrees preempt the content of rape 3 and render its prosecution difficult.” Loh, supra note 200, at 552.


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well be difficult to meet in cases where guilt turns on whose account is credited as to what was said. If the jury is in doubt, it should acquit. If the judge is uncertain, he should dismiss.

The message of the substantive law must be distinguished from the constitutional standards of proof. In this as in every criminal case, a jury must be told to acquit if it is in doubt. The requirement of proof beyond a reasonable doubt rests on the premise that it is better that ten guilty should go free than that one innocent man should be punished. But if we should acquit ten, let us be clear that the we are acquitting them not because they have an entitlement to ignore a woman’s words, not because what they allegedly did was right or macho or manly, but because we live in a system that errs on the side of freeing the guilty.