1991

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Recommended Citation
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Rethinking the Reasonable Belief Defense to Rape

Dana Berliner

Most rape victims know their attackers. Yet convicting rapists of such nonstranger rapes is particularly difficult. When a woman is raped by a stranger who jumps out of the proverbial dark alley, courts and jurors tend to assume lack of consent. In acquaintance rapes, however, lack of consent is difficult to prove. Empirical studies indicate that when the victim and defendant are not strangers, prosecutors are less likely to prosecute and juries less likely to convict than in stranger rapes. As the relationship between defendant and victim becomes closer, there is a greater tendency to presume consent.

Given that juries and courts are likely to believe that a victim consented in cases where the victim and defendant knew each other previously or were “voluntary social companions” at the time of the rape, it is not surprising that

2. When most people think of rape, they think of a “traditional” rape, one in which the rapist is a stranger to the victim, assaults her with a weapon, and may also steal her money after the rape. However, women are more likely to be raped by nonstrangers. See supra note 1 and accompanying text. In a “nontraditional” rape, the defendant and victim have known each other before the rape, and the defendant uses less (or less obvious) force. After analyzing a number of studies, Susan Estrich concludes that traditional stranger rape is probably one of the most reported crimes and has high conviction rates. Estrich, Rape, 95 YALE L.J. 1087, 1161 (1986).
3. Because most rapes are committed by men against women, this Note will use pronouns accordingly. Most of the Note’s discussion is applicable to any sexual assault involving adults.
4. As used in this Note, the word “victim” designates the complaining witness in the case. It does not represent a conclusion about the accuracy of the rape accusations.
5. See H. KALVEN & H. ZEISEL, THE AMERICAN JURY 249-54 (1966) (juries look at voluntary association of victim with defendant as “assumption of risk”); Laffree, Variables Affecting Guilty Pleas and Convictions in Rape Cases: Toward a Social Theory of Rape Processing, 58 SOC. FORCES 833, 848 (1980) (guilty pleas and convictions less likely when victim and defendant acquaintances); Laffree, Reskin & Visher, Jurors’ Responses to Victims’ Behavior and Legal Issues in Sexual Assault Trials, 32 SOC. PROBLEMS 392, 400 (1985) (juries less likely to convict when victim and defendant acquaintances). For reviews of empirical research, see L. BOURQUE, DEFINING RAPE 199-200 (1989) and Estrich, supra note 2, at 1171-78.
6. Catharine MacKinnon argues that intimacy with the defendant and presumption of consent are inversely related. Thus, there is often a presumption of nonconsent in stranger rapes, but in marital rapes there seems to be an irrebuttable presumption of consent. MacKinnon, Feminism, Marxism, Method, and the State: Toward Feminist Jurisprudence, 8 SIGNS 635, 648-49 (1983).
7. A number of states recognize a voluntary social companion exception, which reduces the degree of felony of the rape. See, e.g., DEL. CODE ANN. tit. 11, §§ 773 to 775 (1987); ME. REV. STAT. ANN. tit. 17-A, §§ 252 to 253 (1983); see also MODEL PENAL CODE § 213.1 (1985).
defendants in these cases often raise the defense that they truly and reasonably
believed that the victim consented to sexual activity. This defense is called
“reasonable belief of consent” or “reasonable mistake of fact as to consent”.

On its face, the reasonable mistake defense seems eminently “reasonable,”
in the common meaning of the term. If a man could not have reasonably known
that a woman did not consent to sexual activity, he should not be held liable
for rape. In practice, however, the reasonable mistake defense is misunderstood
and misused. This Note will argue that if our judicial system rethinks the
policies underlying the defense, and accordingly adjusts its application, the
defense could become a valuable tool in determining culpability for rape.

Part I of this Note describes the basic legal elements of rape. Part II de-
scribes the defense of reasonable belief as to victim consent. It then explains
how courts have misapplied the defense of reasonable belief of consent by (1)
effectively failing to examine whether the defendant genuinely believed his
victim consented and (2) creating a standard of reasonableness which makes
a belief of consent reasonable only if the victim failed to physically resist. After
comparing the standard of reasonableness used in rape cases with that used in
cases of self-defense killings, Part II concludes that the reasonableness standard
applied to rape defendants is much less “reasonable” than the standard applied
to homicide defendants. Part III suggests that courts and prosecutors look at
the reasonable belief of consent defense with a more critical eye. Jury instruc-
tions and prosecutors should focus the jury’s attention on deciding whether the
defendant actually believed the victim was consenting. Part III also proposes
a rebuttable presumption of nonconsent in cases where the victim shows
nonconsent by arguing with the defendant, physically struggling, or crying.

I. A RAPE LAW PRIMER: THE LEGAL CONTEXT OF REASONABLE MISTAKE

This part presents an overview of basic legal doctrines of rape, including
the elements of the crime and possible defenses to the charge. To facilitate an
understanding of rape law as it currently exists, this part also presents the
history of the legal treatment of victim physical resistance.

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8. The issue of mistake of fact of consent arises in nearly every presenting case in which the defendant
and victim knew each other. Telephone interview with Penny Schneider, Los Angeles County Deputy
District Attorney (Sept. 12, 1989); Telephone interview with Darcy McGraw, former Manhattan Assistant

9. Reasonable belief and reasonable mistake of consent are slightly different defenses. A defendant’s
reasonable belief of consent may be consistent with actual consent, while a reasonable mistake implies that
the victim did not consent. Since the distinction is not important to this Note, the terms will be used
interchangeably.
A. The Elements of Rape

To obtain a rape conviction, the prosecution must prove beyond a reasonable doubt certain elements of the crime. Specifically, it must prove to the jury that there was sexual activity, that the victim did not consent to this activity, that the defendant used force or threat of force as a means to the sexual activity, and that the defendant intended to rape the victim.

1. Lack of Consent

Lack of consent is often believed to be the essential element of rape, because sexual activity with the consent of a woman is never rape. In most states, the prosecution must prove that the defendant had sexual intercourse without the consent or against the will of the victim. Few states statutorily define consent, but those that do describe it as words or actions indicating a "freely given agreement," a definition similar to the popular understanding of consent. But in rape law, courts have not interpreted "without consent" to mean the absence of what is popularly understood to be "consent;" the prosecution must do more than prove that the victim did affirmatively consent. To establish "without consent," it must prove actual refusal; mere absence of consent or silence will usually be insufficient for conviction.

2. Force

In a rape case, the prosecution must prove that the defendant used force or threat of force against the victim. Like "lack of consent" and "consent,"


11. In contrast, sexual activity without the consent of a woman may not be considered rape if the defendant did not exercise force. See infra note 17 and accompanying text.

12. See, e.g., ALA. CODE §§ 13A-6-60 to -61 (1982); CAL. PENAL CODE §§ 261(2), (6) to (7) (West 1988); MASS. GEN. LAWS ANN. ch. 265, § 22(b) (West 1990); N.Y. PENAL LAW § 130.05 (Consol. 1984). In some states, nonconsent is not an element of the crime, but consent is available as a defense. See infra note 43.


14. WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 482 (1986) defines consent as "capable, deliberate, and voluntary agreement to or concurrence in some action . . . ." However, the popular understanding of consent to sex may more closely resemble the legal standard or absence of resistance. See L. BOURQUE, supra note 5, at 265-67 (1989).


16. See Estrich, supra note 2, at 1126, 1132.


Other states use the concept of "forcible compulsion," instead of force. See, e.g., ALA. CODE § 13A-6-61 (1982); KY. REV. STAT. ANN. § 510.040(1)(a) (Michie/Bobbs-Merrill 1990); WASH. REV. CODE ANN.
courts and legislatures have rarely, if ever, defined the terms "force" or "threat of force" within the context of rape law. Statutes do not establish an amount of physical coercion sufficient to demonstrate that sexual activity was accomplished "by force." Furthermore, because courts and the general public seem to believe that a certain amount of force is normal in sexual activity, it becomes difficult to determine what behavior constitutes force.

The legal meaning of threat of force is similarly amorphous. While courts have consistently held threat of force to include threats with a weapon, less obvious threats may not be held to meet the statutory requirement. Courts have found intimidating behavior by the defendant to constitute an implicit threat of force when the victim and defendant are strangers, but not when the victim voluntarily associated with the defendant.

3. Intent

In general, a defendant cannot be convicted for a crime, including rape, if he did not have the requisite intent or mens rea to do the forbidden act. Criminal intent can be described in terms of one of four levels of mental

§ 9A.44.040 (West 1988). Forcible compulsion is sometimes defined as force overcoming resistance. See infra note 36. Also, a number of states create a lesser penalty for nonconsensual sexual activity where the defendant does not use force. For a review of these states, see Seerles & Berger, The Current Status of Rape Reform Legislation: An Examination of State Statutes, 10 WOMEN'S RTS. L. REP. 25, 32 (1987) (Table 3). See, e.g., NEV. REV. STAT. ANN. § 200.366 (Michie 1986).

18. Use of a forcible compulsion standard obviates the need for a definition of force; force is whatever is necessary to overcome resistance. The definition problem thus shifts to defining sufficient resistance. See Estrich, supra note 2, at 1105-06.

19. Obvious examples of physical violence like beating the victim will often, but by no means always, be thought by juries to constitute "force." See Estrich, supra note 2, at 1105-06, 1131-32.


21. While people generally understand the act of rape to entail some use of force, there can be substantial force before people are willing to identify an act as "rape." See L. BOURQUE, supra note 5, at 135-41, 265-74.


23. See, e.g., People v. La Salle, 103 Cal. App. 3d 139, 142, 162 Cal. Rptr. 816, 821 (1980) (implicit threat found where defendant induced victim into car by refusing to return her two-and-one-half year old child); People v. Dorsey, 104 Misc. 2d 963, 970, 429 N.Y.S.2d 828, 832 (Sup. Ct. 1980) (large young defendant trapping small older woman in an elevator between floors constituted implicit threat).


25. Crime is a union of a voluntary act and a particular state of mental culpability. W. LAFAVE & A. SCOTT, CRIMINAL LAW § 3.1 (2d ed. 1986). See, e.g., CAL. PENAL CODE § 20 (West 1988); N.Y. PENAL LAWS § 15.10 (Consol. 1984); see also MODEL PENAL CODE § 2.01 to .02 (1985).
culpability: intention, knowledge, recklessness, or negligence. The theoretical importance of the mens rea doctrine, however, has little impact on a rape case because the defendant's intent is rarely the primary focus of rape trials. Only a few jurisdictions indicate which level of intent suffices for a rape conviction. Most states simply fail to discuss levels of intent in rape cases. As the next section demonstrates, the defendant's intent and actions are not used to assess his culpability. Instead, the law looks to the victim's actions and asks whether she properly demonstrated nonconsent.

B. Victim Resistance—The Ghost Element of Rape

Historically, victim physical resistance was an element which had to be proven to convict a defendant of rape. Rape law has thus traditionally emphasized the victim's actions—namely her physical resistance or lack there-of—by using her actions as evidence of her lack of consent, the defendant's use of force, and his intent. If the victim vigorously resisted, this meant

26. A person acts intentionally . . . when his conscious objective is to cause such result or to engage in such conduct . . . .
   A person acts knowingly . . . when he is aware that his conduct is of such nature or that such circumstance exists . . . .
   A person acts recklessly . . . when he is aware of and consciously disregards a substantial and unjustifiable risk . . . . The risk must be of such nature and degree that disregard thereof constitutes a gross deviation from the standard of conduct that a reasonable person would observe in the situation . . . .
   A person acts with criminal negligence . . . when he fails to perceive a substantial and unjustifiable risk . . . . The risk must be of such nature and degree that the failure to perceive it constitutes a gross deviation from the standard of care that a reasonable person would observe in the situation . . . .


The primary difference between recklessness and negligence is that a reckless person has consciously considered a risk and disregarded it, while a negligent person has not consciously realized a risk although a reasonable person would have. See MODEL PENAL CODE § 2.02 comment 4 (1985).


29. See, e.g., ME. REV. STAT. ANN. tit. 17-A, §§ 34, 252 (statutes require intent as an element of sexual assault); MD. CRIM. LAW CODE ANN. §§ 462, 463 (intent not mentioned for first or second degree rape); N.Y. PENAL LAW §§ 15.15(2), 130.35 (Consol. 1984).

30. See Estrich, supra note 2, at 1098-1100; Comment, supra note 10, at 1535-36.


32. See R. PERKINS & R. BOYCE, supra note 31, at 211 (resistance used to establish both nonconsent and force); Bienen, supra note 15, at 182 (same); Estrich, supra note 2, at 1129-30 (same).

33. See Estrich, supra note 2, at 1099 (defendant continuing in face of physical resistance shows intent to rape).
that she did not consent, that the defendant needed to use force to overcome her resistance, and that her resistance informed him of her lack of consent so that when he forced her, he must have intended to rape her. On the other hand, courts have interpreted submission or lack of resistance to mean that the victim consented and that the defendant did not force her.  

Elimination of the physical resistance requirement has been one of the most important goals of rape law reform, and, at least in terms of statutory reform, this goal has largely been achieved. The majority of states have repealed the statutory requirement of physical resistance, realizing that victims are often too frightened to resist and that victims who resist are often more seriously injured than those who submit. Most have eliminated the requirement simply by omitting any reference to resistance in their definition of force, while a few states have enacted explicit provisions stating that physical resistance is not a required element of rape.

In practice, statutory revision has not had the intended effect of eliminating the need for victim physical resistance. Although no longer explicitly required, it nevertheless remains an unacknowledged yardstick for courts when evaluating evidence of force and consent. Moreover, a victim’s lack of resistance is still evaluated and often considered to be a crucial factor in a rape case where the defendant asserts the defense of reasonable belief of consent.

34. See, e.g., People v. Perez, 194 Cal. App. 3d 525, 529, 530, 239 Cal. Rptr. 569, 571, 572 (1987) (consent may be manifested by acquiescence or even some resistance if this is a relationship pattern).


36. The requirements that the victim resist to the “utmost” and “continuously” until penetration have now been universally repealed. See Estrich, supra note 2, at 1123-24; Note, Recent Statutory Developments in the Definition of Forcible Rape, 61 Va. L. Rev. 1500, 1506 (1975). Most states have also eliminated all requirements of victim physical resistance. See infra notes 40 & 83.


37. See, e.g., R. Warshaw, I NEVER CALLED IT RAPE 54-56, 60-62 (1988); Estrich, supra note 2, at 1111.

38. See People v. Barnes, 42 Cal. 3d 284, 299-302, 721 P.2d 110, 118-21, 228 Cal. Rptr. 228, 237-39 (1986) (reviewing research data); M. Amir, Patterns in Forcible Rape 169-71 (1971) (correlation between victim resistance and degree of force used by attacker); cf. L. Bourque, supra note 5, at 53-54 (critically reviewing research on prevalence and effects of resistance).

39. See, e.g., statutes cited infra note 83.


II. THE DEFENSE OF REASONABLE BELIEF OF VICTIM CONSENT

The two most common defenses to rape charges in acquaintance rape cases are consent and reasonable belief of consent.\textsuperscript{42} A consent defense\textsuperscript{43} often entails the claim that the victim’s behavior, as she herself described it, constituted consent.\textsuperscript{44} This type of consent defense is thus similar to, and sometimes indistinguishable from, the reasonable belief of consent defense, which asserts that the victim’s behavior would have looked like consent to the reasonable man.

The reasonable belief of consent defense contains two elements, one subjective and the other objective. First, at the time of the sexual conduct, the defendant must have honestly believed the victim consented. Second, the defendant’s belief must have been reasonable.\textsuperscript{45}

\textsuperscript{42} Defendants may also assert other defenses that are beyond the scope of this Note. Examples include alibi, lack of sexual activity, lack of force, or mistaken identification of the defendant.

\textsuperscript{43} Where lack of consent is a statutory element of the crime of rape, a defendant will be acquitted if the prosecution does not carry its burden of proving nonconsent beyond a reasonable doubt.

\textsuperscript{44} Some states have eliminated lack of consent as an element of the crime but provide that victim consent is a defense. See, e.g., ILL. ANN. STAT. ch. 38, para. 22-15 (1975); N.J. STAT. ANN. § 2C:2-10 (West Supp. 1988). However, in most of these states, the prosecution must prove lack of consent beyond a reasonable doubt once the defendant has raised the issue of consent. See, e.g., People v. Haywood, 118 Ill. 2d 263, 274, 515 N.E.2d 45, 50 (1987); People v. Thompson, 117 Mich. App. 522, 528-529, 324 N.W.2d 22, 24-25 (1982); see also Comment, supra note 10, at 1548, 1554 (advocating shifting from lack of consent as element of crime to consent as defense to crime).

Washington is the only state that shifts the burden of proof of a consent defense to the defendant. See State v. Camara, 113 Wash. 2d 631, 639-40, 781 P.2d 483, 487 (1989); see also Note, Focusing on the Offender’s Forceful Conduct: A Proposal for the Redefinition of Rape Laws, 56 GEO. WASH. L. REV. 399, 414 (1988) (advocating burden shift to defendant). However, since the prosecution must still prove forcible compulsion, this change has had little effect in Washington. Telephone interview with Michael Hogan, King County Senior Deputy Prosecuting Attorney (March 21, 1991).

\textsuperscript{45} Defendants argue and judges often agree that lack of resistance means the victim consented.

There are two other possible claims which may be involved in a consent defense. The defendant may claim that the victim actually consented to the sexual activity and subsequently lied about the events in question. See, e.g., People v. Romero, 171 Cal. App. 3d 1144, 1144-45, 222 Cal. Rptr. 630, 638-39 (1986) (consent defense may involve assertion that victim’s observable behavior indicated consent).


Alaska also permits a defense of honest but reckless mistakes of fact. Reynolds v. State, 664 P.2d 621, 627-28 (Alaska Ct. App. 1983). For an evaluation of this defense, see Comment, Culpable Mistakes in Rape:
A. Flawed Application of Honest Belief

Generally, mistake is a defense to a crime when the factual mistake makes the requisite criminal intent impossible.\(^6\) To satisfy the first doctrinal element of the reasonable belief defense, then, a defendant must claim that he did not have the requisite *mens rea* for the crime of rape because he genuinely and honestly believed the victim was consenting. If he believed, even mistakenly, that the victim was consenting, then he merely intended to have consensual sexual intercourse and had no criminal intent at all.\(^4\)

In practice, this “subjective” aspect of the defense (i.e., did the defendant honestly believe the victim consented) is virtually ignored. Because defendants are entitled to raise the reasonable belief defense without testifying, juries evaluate the defendant’s reasonable belief defense without hearing him testify that he in fact believed the victim consented.\(^7\) Moreover, when the defendant does not testify, a jury may be instructed on the reasonable belief defense if the victim’s testimony about *her own* behavior suggests the possibility of reasonable mistake.\(^8\) Thus, the courts focus on the victim’s behavior, not the defendant’s subjective belief that the victim consented.

The subjective prong of the defense is further discounted because, in practice, the courts have improperly collapsed the two elements. That is, instead of determining whether a particular defendant honestly believed his victim consented\(^5\) and then whether that belief was reasonable, courts ask whether any defendant could have reasonably believed the victim consented.\(^9\) Under this approach, the court no longer conducts a particularized inquiry into the beliefs and behavior of the defendant but instead hypothesizes that his belief

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\(^{46}\) For example, if a person believes the wallet she picks up is hers, she does not have the requisite criminal intent for this act to constitute theft.


\(^{47}\) See People v. Mayberry, 15 Cal. 3d 143, 155, 542 P.2d 1337, 1345, 125 Cal. Rptr. 745, 753 (1975).


\(^{50}\) Estrich, *supra* note 2, at 1117-18, advocates such a particularized inquiry.

was honest if it could have been reasonable. Once a court or jury finds that belief of consent was reasonable (the second prong), it then automatically has found that a defendant could have reasonably and honestly held such a belief—implying that he did, in fact, hold such a belief. Hence the first prong becomes superfluous.

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

B. Flawed Application of Reasonable Mistake

Due to the flawed inquiry into the honesty of the defendant's belief, the inquiry into the reasonableness of the defendant's belief of consent becomes the central issue in a reasonable mistake defense. The next problem is that courts and juries believe that a defendant's belief of consent is reasonable when the victim does not resist.

1. Reasonable Belief as a Proxy for the Resistance Requirement

The elimination of the physical resistance requirement has intensified fears that innocent men will be convicted of rape. These fears are embodied in two separate but related beliefs: (1) that men will be convicted solely on the basis of a woman's subjective feelings of violation, even if she behaved as if she were consenting, and (2) that a reasonable man will assume consent in the absence of physical resistance. In theory, the reasonable belief defense was created to guard against feared miscarriages of justice that could result from miscommunication. In practice, the defense has become a proxy for the physical resistance requirement, with its attendant drawbacks.

The first belief focuses upon a problem that has always been evident in rape law: the divergence between female and male subjective understandings of sexual encounters. Some behavior by women (e.g., dress and friendliness) may

52. See Estrich, supra note 2, at 1098 ("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 . . .").

53. Cf. id. at 1099-1100 (discussing consequences of failure to focus on defendant's intent).

54. Resistance has consistently been represented as a device to prevent unjust convictions. See id. at 1099-99; Note, supra note 36, at 1503-1504; Note, supra note 44, at 68.

55. For an extensive discussion on the fear of this type of unjust conviction, see Taylor, Rape and Women's Credibility: Problems of Recantations and False Accusations Echoed in the Case of Cathleen Crowell Webb and Gary Dotson, 10 HARV. WOMEN'S L.J. 59 (1987).

be interpreted by men as indicating sexual availability when it is not so intended.57 Some of women's intended indications of lack of consent are even interpreted by men as indicating consent.58 Conversely, women may interpret men's behavior as threatening when it is not so intended.59 These problems of subjectivity and miscommunication call for the application of some sort of objective test.

The popularity of the physical resistance requirement was, in part, due to its ability to serve as an objective measure of whether a rape took place, one so stark that it was not open to misinterpretation by defendants or juries. Thus it was seen as helping to close the gap between female and male subjective understandings of sexual encounters.60

In the absence of a resistance requirement, courts have looked to objective manifestations of subjective states or applied a reasonable person standard to subjective feelings. Both of these approaches evaluate a reasonable belief defense using an objective standard.61

For example, in a recent ruling, the Supreme Court of Connecticut argued that courts evaluate lack of consent by reference to objectively measurable

57. See L. BOURQUE, supra note 5, at 134, 140 (reporting results of empirical studies showing that males infer sexual meaning in dress or behavior of females when it is not so intended).
58. See R. WARSHAW, supra note 37, at 39, 42 (men may ignore clear expressions of nonconsent); Note, Rape: Reasonableness & Ti., 1 OXFORD J. LEG. STUD. 452, 441 (1981) (men may misinterpret revocation of consent for sexual interest).
59. Note, supra note 56, at 147-49 & 150. For this reason, the courts often focus on whether the victim's fear was "reasonable" when determining whether a rape occurred. See, e.g., People v. Hill, 558 N.Y.S.2d 380, 381 (N.Y. App. 1990) ("proper focus is on the state of mind produced in the victim by the defendant's conduct"); see also Commonwealth v. Sherry, 386 Mass. 682, 696, 437 N.E.2d 224, 232-33 (1982) (where victim's fear explains lack of resistance, such fear must be reasonable).
60. See Note, supra note 56, at 150-51.

Reasonable Belief of Consent

The court specifically held that consent does not refer to the victim's subjective state but rather to objective manifestations of this state. The court then concluded that a finding of reasonable belief in consent should not differ from a finding of consent. A person would have a reasonable belief of consent if there were objective manifestations of consent. But the court still proceeded to create a separate defense of reasonable belief of consent, reasoning that the defense was necessary because the defendant might be "concerned about the possibility" that the jury would look exclusively at the victim's subjective state.

Thus, while both lack of consent and intent have been labeled "subjective," representing the victim's and defendant's perspectives respectively, in practice courts do not treat consent or intent as subjective elements. Courts do not ask victims and defendants about their subjective beliefs and feelings when evaluating consent and intent. As in other legal areas, they rely on objective manifestations of subjective states when evaluating a rape allegation.

The problem with this approach is not that courts rely on an objective standard, but that courts apply the standard by looking exclusively to the victim's behavior, particularly her physical resistance or lack thereof. Courts should evaluate consent by looking to whether the victim behaved as if she consented and should evaluate intent by looking to whether the defendant behaved as if he intended to commit a rape. Instead, courts interpret and evaluate the defendant's behavior in light of the victim's actions. If the victim indicated lack of consent, then the defendant must have had an intent to rape if he proceeded in the face of her objections. If the victim did not indicate lack of consent, then he could not have intended to rape her. Thus, the "objective" evaluation of both lack of consent and intent tends to become an inquiry into the victim's physical resistance.

Courts have not explicitly recognized the second concern regarding the conviction of innocent men—that the reasonable man will assume consent in the absence of physical resistance. Nevertheless, courts tend to accept the

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63. Id. at 140, 554 A.2d at 717 ("Whether a complainant has consented to intercourse depends upon her manifestations of such consent . . . .").
64. Id. at 141, 554 A.2d at 717. The court then engaged in some appellate factfinding to hold that, given the jury's finding that the victim did not consent, it also implicitly found that the defendant could not have reasonably believed there was consent. Id.
65. Courts seem to believe that "consent" and "lack of consent" refer to the interior emotional state of the woman before and during sexual activity. Id. at 140, 554 A.2d at 717. See, e.g., People v. Bruce, 208 Cal. App. 3d 1099, 1104, 256 Cal. Rptr. 647, 649 (1989); see also MODEL PENAL CODE § 213.6 comment at 428 (1980).
66. A defendant's intent is subjective almost by definition, since "intent" refers to the defendant's state of mind. See W. LAFAVE & A. SCOTT, supra note 25, § 3.1.
68. Estrich argues that courts should, but fail to, evaluate defendant's actions as indicating his intent. See Estrich, supra note 2, at 1117-18.
69. See supra notes 30-34 and accompanying text.
reasonable belief of consent defense in cases where the victim did not resist or submitted after initial resistance. Courts’ treatment of cases involving “equivocal conduct”—conduct which was ambiguous as to consent—also illustrates their continued adherence to the resistance standard. The concept of equivocal conduct becomes relevant to a reasonable belief defense when the victim appears ambivalent or submits out of fear, and from this conduct the defendant claims that he reasonably believed she consented even if the law would not recognize such submissive behavior as consent.

The concept of equivocal conduct was first discussed in People v. Mayberry, the first major case addressing reasonable belief. In Mayberry, the court identified the complainant’s equivocal conduct as “her ‘act’ [of having conversation while delaying and looking for an opportunity to escape] and admitted failure to physically resist him after the initial encounter [digging her nails into his wrist and stating that she did not want to accompany him] or to attempt to escape or obtain help . . . .” This type of conduct, the court held, “might have misled him as to whether she was consenting.” Other examples of equivocal conduct include willingly accompanying a man to his apartment and not attempting to escape from a car at a stop light. These cases imply that equivocal conduct includes both ordinary behavior and the conduct of a woman who feels herself to be helpless. The defendant may be entitled to jury instructions on reasonable belief sua sponte if the complainant’s testimony in-

70. Most California cases in which the court allowed a reasonable belief defense involved insufficient or ambiguous victim resistance. See infra notes 71-78 and accompanying text; see also infra notes 80-82 and accompanying text (discussing People v. Crispo, No. 3105-85 (N.Y. Sup. Ct. Oct. 16, 1988)). In at least one case, the court, after proclaiming the demise of the resistance requirement, stated in a footnote that lack of resistance is still relevant to reasonable belief. People v. Barnes, 42 Cal. 3d 284, 303 n.19, 721 P.2d 110, 121 n.19, 228 Cal. Rptr. 228, 240 n.19 (1986) (“Absence of resistance may also continue to be probative of whether the accused honestly and reasonably believed he was engaging in consensual sex.”).

Conversely, some other courts have refused to entertain a reasonable belief defense in cases where the defendant used such a high degree of force that resistance could not have been expected. See infra notes 84-86 and accompanying text.

71. See People v. Mayberry, 15 Cal. 3d 143, 156, 542 P.2d 1337, 1346, 125 Cal. Rptr. 745, 754 (1975). There has been considerable debate in California appellate courts about whether a judge must instruct on reasonable belief of consent if she instructs on consent. People v. Hampton, 118 Cal. App. 3d 324, 329-30, 173 Cal. Rptr. 268, 271-72 (1981) (judge must instruct jury on reasonable belief of consent whenever consent is defense); cf. People v. Bruce, 208 Cal. App. 3d 1099, 1104, 256 Cal. Rptr. 647, 650 (1989) (“One relying on the Mayberry defense must produce some evidence of the victim’s equivocal conduct that led the accused to reasonably believe that there was consent.”); People v. Burnham, 176 Cal. App. 3d 1134, 1146-47, 222 Cal. Rptr. 630, 640 (1986) (defendant must produce either evidence of equivocal conduct or evidence of unequivocal consent).

73. Id. at 156, 542 P.2d at 1346, 125 Cal. Rptr. at 754. The defendant testified and denied all aspects of violence in the complainant’s narrative. The court did not conclude that there was reasonable belief, but only that it was an issue for the jury. Id.
74. Id.
76. People v. Anderson, 144 Cal. App. 3d 55, 62, 192 Cal. Rptr. 409, 413 (1983) (victims were 14 and 15 years old).
cludes a description of equivocal conduct. This understanding of equivocal conduct implies that if a man may reasonably interpret equivocal, partially resisting conduct as consent, then a reasonable man can assume consent in the absence of resistance. "Equivocal conduct" then replaces submission or lack of resistance in rape law. Victims remain in the same double bind as they were when the resistance requirement was in effect. If they do not resist, they risk disbelief by the legal system; if they do, they risk being subjected to greater violence.

In one of the few New York cases on this issue, the defense successfully argued that since sadomasochists customarily evidence some resistance as part of their sexual activity, the defendant was justified in believing the victim's resistance was a mere sham. The defendant was acquitted specifically because the jury could not decide beyond a reasonable doubt that the defendant did not reasonably believe that the victim consented. Although the defense limited its argument to sadomasochism between gay men, there have been similar theories about women's resistance.

The courts' effective reinstatement of the resistance requirement via the defense of reasonable mistake of fact is not problematic in violent cases because most jurisdictions which permit a reasonable mistake of fact defense will not instruct on it when there is uncontroverted evidence of the application of significant force or threats with a weapon or when the defendant admits force. In acquaintance and other nontraditional cases, however, reinstatement

78. Even the Mayberry court recognized that resistance was at issue in reasonable belief, but it concluded that it was a consideration that should be addressed by the legislature. People v. Mayberry, 15 Cal. 3d 143, 156, 542 P.2d 1337, 1346, 125 Cal. Rptr. 745, 754 (1975).
79. See supra note 38 and accompanying text.
81. Jury members told Justice Atlas that they acquitted on the issue of reasonable mistake. Justice Atlas volunteered that he believed that the reasonable mistake defense was mandated by New York law, but that it effectively reinstated the resistance requirement. Id. Unfortunately, it is impossible to obtain systematic data revealing the number of times juries acquit on the issue of reasonable mistake. This information can only be found in scattered newspaper interviews or in juror conversations with lawyers and judges.
82. See, e.g., S. FREUD, Femininity, in NEW INTRODUCTORY LECTURES ON PSYCHO-ANALYSIS 139, 142-44 (J. Strachey ed. 1989) ("masochism . . . is truly feminine"); Note, supra note 44, at 66-68 (resistance may be inconclusive as to consent because many women require or desire male sexual aggression).
83. None of the jurisdictions which allow a reasonable belief defense have retained a statutory requirement of resistance or resistance overcome. See CAL. PENAL CODE § 261 (West 1990); MASS. GEN. LAWS ANN. ch. 265, § 22 (West 1988); MO. ANN. STAT. § 566.030 (Vernon Supp. 1991); NEV. REV. STAT. ANN. § 200.366 (1986); N.Y. PENAL LAW § 130.00 (Consol. 1984); OKLA. STAT. ANN. tit. 21, § 1111 (West Supp. 1991). Although the legislatures chose to remove this requirement, the courts have unfortunately chosen to reinstate it through judicial construction of the reasonable belief defense.
86. See, e.g., State v. Faehnrich, 359 N.W.2d 895, 899-901 (S.D. 1984) (defendant admitting holding his hand over victim's mouth to stifle screams).
of the resistance standard is more problematic. First, reasonable mistake seems most plausible when the defendant does not use obvious physical force, since the victim will not have corroborating evidence of injury. Second, juries are already disposed toward finding consent simply because the parties know each other. If juries feel some reluctance to completely reject the victim’s interpretation, they may be particularly tempted to acquit by the “compromise” of characterizing the rape as a misunderstanding in which the woman did not consent, but the defendant reasonably believed that she did.

2. Comparing the Degree of Reasonableness in Mistakes of Rape and Self-Defense

This Note has argued that courts have incorrectly construed what constitutes a reasonable belief of consent. Comparing the interpretations of reasonableness in rape law and in self-defense killings reveals that courts have construed reasonable mistakes of consent more broadly than reasonable mistakes of life threatening danger. That is, what is considered a “reasonable” mistake in rape may be relatively unreasonable when compared to what constitutes a “reasonable” mistake in killing. The underlying purposes for the creation of both defenses suggest that defendants in rape cases should be held to as high a standard of reasonableness as those in self-defense cases.

Reasonable mistake of fact is permitted as a defense to murder charges. A defendant’s reasonable and honest belief that he was in danger of great bodily harm or death constitutes the defense of self-defense against a charge of murder, even if this belief later turns out to be mistaken. For a defendant’s belief to be reasonable, it must be neither reckless nor criminally negligent.


87. See Berger, Man’s Trial, Woman’s Tribulation: Rape Cases in the Courtroom, 77 COLUM. L. REV 1, 61-63 (1977) (approving use of reasonable belief defense in such cases); see also People v. Evans, 85 Misc. 2d 1088, 1097-98, 379 N.Y.S.2d 912, 920-21 (N.Y. Sup. Ct. 1975), aff’d, 55 A.D.2d 858, 390 N.Y.S.2d 768 (1976) (defendant made ambiguous statement which victim interpreted as threat, but court held that defendant’s meaning controlled).

88. See supra note 5 and accompanying text.

89. People v. Bruce, 208 Cal. App. 3d 1099, 1104, 256 Cal. Rptr. 647, 649 (1989) (characterizing successful reasonable belief defense as jury conclusion that both parties told truth).

90. The defendant’s apprehension of imminent danger and belief in the necessity of deadly force must be reasonable. See W. LAFAVE & A. SCOTT, supra note 25, § 5.7(a)-(c); see, e.g., CAL. PENAL CODE §§ 197(3), 198 (West 1988); CONN. GEN. STAT. ANN. § 53a-19 (West 1985); ILL. ANN. STAT. ch. 38, para. 7-1 (Smith-Hurd 1989); N.Y. PENAL LAW § 35.15 Form 2, para. 2 at 112 (Consol. 1984) (Instruction to Jury as to Self-Defense).

91. See supra note 26 and accompanying text.
The defendant must present some evidence that led him to believe he was in danger. Honest beliefs which are reckless or negligent constitute imperfect self-defense and justify conviction on the lesser offense of manslaughter.92

The existence of a reasonable mistake defense in the context of self-defense killings can be justified for two related reasons: (1) the consequences of failing to act may include death, and (2) the defendant has only a very short time to decide how to react. Indeed, nearly every court discussion of self-defense emphasizes that using deadly force was necessary.93

Both the risk of death and the time pressure contribute to the necessity of killing in self-defense.94 Analogous justifications for the existence of a reasonable mistake defense in the context of rape are not immediately apparent. The failure to act in a self-defense situation carries an astronomically greater risk than the risk of failing to act in a sexual situation. Mistakenly acting in a self-defense situation, i.e., killing, is also somewhat more costly than mistakenly acting in a sexual situation, i.e., raping.

Killing based on mistake is partially justified by the exigency of the situation. The time which could be spent attempting to ascertain whether he is truly in a life-threatening situation might be a defendant's only opportunity for self-defense. He must act and must act quickly. In sexual situations, there are usually no stringent time constraints on his decision and thus no need to make split-second decisions.95 Moreover, ascertaining the truth about consent involves no risk to the defendant. He could refrain, wait, or ask;96 there is no need for action. Therefore, the burden on the defendant to reasonably ensure he is not mistaken about consent in a sexual encounter should be at least the same as the burden on a defendant to reasonably ensure he is not mistaken that his life is in danger. Instead, courts have adopted a standard where a man need not present affirmative evidence of consent, but may reasonably believe that consent has been given unless there is overwhelming evidence to the contrary.

92. See W. LAFAVE & A. SCOTT, supra note 25, § 5.7(i); see, e.g., ILL. STAT. ANN. ch. 38, § 9-2(2) (Smith-Hurd Supp. 1991); 18 PA. CONS. STAT. ANN. § 2503(b) (Purdon 1983). A few states have held that an unreasonable belief in the necessity of killing does not mitigate the degree of homicide. See, e.g., State v. Bowens, 108 N.J. 622, 630-31, 532 A.2d 215, 219 (1987). The MODEL PENAL CODE § 3.04 (1985) provides that an unreasonable but genuine belief in the imminence of danger constitutes complete self-defense, but no states appear to have followed this example.


95. Of course, the moment before penetration is a limited period of time. If the woman has consented up to this point, penetration may be a split-second decision. However, the decision can be delayed in order to ascertain if the woman is consenting, whereas delay in the decision to exercise deadly force might result in the person's death.

i.e., unless the victim physically resisted. Such a standard effectively condones reckless and negligent, as well as reasonable, mistakes. In theory, reckless or negligent mistakes are not bases for acquittal from a charge of rape, and they should not be allowed to become so through manipulation of the standard of reasonableness.

III. RETHINKING THE DEFENSE OF REASONABLE MISTAKE

The doctrine of reasonable mistake of fact as to victim consent has some major drawbacks. First, courts consistently apply it incorrectly by conflating the honest belief prong with the reasonable belief prong. Second, by treating a mistake of consent as reasonable unless there is overwhelming evidence to the contrary, courts use the reasonable belief defense to effectively reinstate the resistance requirement. Additionally, the courts’ conception of “reasonable” which informs inquiries into reasonable mistake is not really reasonable when compared to other areas of criminal law.

One response to these problems would be to simply abolish the defense. Statutes could define rape as sexual activity in the absence of the victim’s affirmative consent, rather than as sexual activity where the victim expresses refusal. The law could require, in effect, that a man take steps to ensure consent when faced with any ambiguous signals. In fact, some commentators argue that the seriousness and overwhelming consequences of rape justify requiring men to ensure consent.

Abolition of the defense in its entirety, however, might generate unwanted consequences. If one assumes that sincere and reasonable mistakes of consent are possible, then abolition of the defense might lead to convictions in such cases. Also, persons must have notice that behavior is criminal in order to distinguish between criminal and innocent conduct. In some circumstances, a man might not be able to distinguish his honest and truly reasonable belief from actual consent. Finally, courts may respond to the enhanced fear of convicting a blameless defendant by simply changing the construction of the elements of lack of consent and force so both depend on the existence of

97. See supra note 70 and accompanying text.
98. It has been suggested that a reckless or negligent rape should give rise to a lesser sentence. See Estrich, supra note 2, at 1102-03.
99. One case in Wisconsin adopted this approach. See State v. Lederer, 99 Wis. 2d 430, 436, 299 N.W.2d 457, 460 (1980). However, this decision seems to have had no impact on the prosecution of rapes in Wisconsin. Telephone interview with Donald S. Jackson, Milwaukee County Assistant District Attorney and Co-Director, Sensitive Crimes Unit (March 12, 1991).
100. See supra Note, supra note 56, at 158-60; note 96 and accompanying text.
101. See Connally v. General Constr. Co., 269 U.S. 385, 393 (1926) (criminal statute must not be so vague that ordinary persons cannot distinguish between criminal and innocent conduct).
Reasonable Belief of Consent

physical resistance. These negative consequences suggest that the defense of reasonable belief of consent should be retained.

There is also a positive reason for favoring retention of the defense. If reformulated, it can become an accurate means of assessing criminal liability without unfairness to either victim or defendant. In order to accomplish this goal, jury instructions should be expanded to explain the concepts of “reasonable” and “honest” belief. The explanation of honest mistake should focus the jury’s attention on the defendant’s actions and intent rather than the victim’s, and the explanation of reasonable mistake should reflect an appropriate standard of reasonableness. Additionally, there should be a rebuttable presumption that a belief of consent was not reasonable if the jury finds that the victim offered verbal resistance, any physical resistance, or cried.

A. Honest Mistake

If a defense of reasonable belief is retained, it becomes important to define and distinguish what constitutes an “honest” and “reasonable” mistake. The law and the prosecution can and should focus discussion to ask whether the defendant behaved like a person who believed he was engaged in consensual sexual activity. A man who believed that a woman desired to engage in sexual activity with him would not use force, intimidation, or threats of force; they would not be necessary. Deceptive or threatening behavior is not consistent with a good faith belief in consent. Admittedly, some proportion of the population considers such behavior to be part of normal seduction. However, such behavior reveals an intention to coerce the victim into sexual activity, and law can and should play a normative role in condemning this behavior.

Because the question of a defendant’s genuine belief of consent tends to be brushed over, the court should instruct (and the prosecutor should urge) the jury to consider whether the defendant behaved as if he believed the victim consented. Courts and juries should not treat the honest belief inquiry as a hypothetical question of whether the defendant might have believed there was

102. See Estrich, supra note 2, at 1098 (courts may respond by “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”).

103. The current California jury instruction reads, “a reasonable and good faith belief that there was voluntary consent is a defense . . . ,” but no detailed explanation of honesty or reasonableness is included. CALJIC, supra note 45, No. 10.65.

104. For example, a defendant might admit that he had been physically aggressive and that his victim had begun to cry but had not fought him. The defendant might then state that he honestly believed that crying and submission represented consent. A court might address the defendant’s belief as an unreasonable mistake or as so unreasonable as to be dishonest. In Director of Pub. Prosecutions v. Morgan, 1976 App. Cas. 182, 214 (H.L. 1975), the court decided that the defendants’ asserted belief of consent was so unreasonable that they could not have honestly believed it. American courts would probably have treated this as an unreasonable mistake; English courts have shown a greater interest in the honesty inquiry, but analysis of honest belief has been mostly obscured by the debate over whether reasonableness or unreasonableness is the appropriate standard. See Temkin, supra note 96, for a survey of this debate.
Even without the defendant's testimony, the jury can refer to the victim's testimony about the defendant's behavior to evaluate if there were signs of good faith. The court should instruct the jury that such factors as whether the defendant intentionally used deception, ignored the victim's protests, attempted to frighten or intimidate the victim, or otherwise attempted to procure submission by threats argue against a claim of honest belief.

B. Reasonable Mistake

The doctrine of reasonable mistake also calls for an investigation of whether the defendant could have "reasonably" believed the victim consented. The current standard where a man may "reasonably" assume consent in the absence of resistance\textsuperscript{106} is wholly inadequate.\textsuperscript{107} Instead, a reasonable mistake should be defined as one in which (1) the defendant did not use force and (2) the mistake was not negligent. Furthermore, there should be a rebuttable presumption that a mistake is not reasonable if the victim cried or offered verbal resistance during the encounter.

Any belief of consent by a defendant who has exercised or threatened force should be deemed categorically unreasonable. Free and voluntary choice is impossible where coercion is present. When the defendant exercises physical violence against the victim or threatens her with a weapon, the impossibility of consent is clear.

Even if one concedes that some women actually do desire forceful or forced sex,\textsuperscript{108} it is impossible in the presence of force to distinguish such women from those who feign consent out of fear. It is improper to err on the side of legal support for forceful sex at the expense of those who do not desire it. If state legislatures want to preserve the legality of sadomasochism, an exception could be created without altering the force of the law. The defendant could be required to establish by a preponderance of the evidence that (1) he had obtained explicit consent to forceful sexual activity and (2) he and the victim had established a procedure for revocation of consent.\textsuperscript{109} Consequently, courts should instruct juries to first evaluate whether the defendant used force. If they find that he did use physical force, then they may not consider reasonable belief of consent as a defense. If, and only if, they do

\textsuperscript{105}See supra Section II.A (describing how honest mistake has been converted to a hypothetical inquiry).

\textsuperscript{106}See supra Section II.B.1.

\textsuperscript{107}Id. The current standard is less reasonable than the standard of reasonable criminal mistake used in self-defense killing. See supra Section II.B.2.

\textsuperscript{108}See supra note 82 and accompanying text.

\textsuperscript{109}Interestingly, consent is not a defense to sadomasochistic assault in California, People v. Samuels, 250 Cal. App. 2d 501, 513, 58 Cal. Rptr. 439, 447 (1967), although reasonable belief of consent can be a defense to a sexual encounter where the victim is injured. See, e.g., People v. Mayberry, 15 Cal. 3d 143, 542 P.2d 1337, 125 Cal. Rptr. 745, (1975).
not find that he used physical force, they may go on to examine whether his mistake was reasonable or negligent.

A reasonable mistake should be described as one which is not negligent, where the fact that this woman might not be consenting would not have occurred to a reasonable man. The current standard of reasonable mistake, although it uses the word "reasonable," effectively condones even reckless mistakes by holding that a mistake is reasonable as long as the victim does not physically resist. Yet, there are many circumstances short of physical resistance which would lead a reasonable man to wonder about consent. A resistance standard of mistake presumes that the man cannot hear or speak and can only observe the woman's large-scale physical gestures. In fact, the man is an active participant, capable of both comprehending and altering the communication. Failing to consider the possibility that a woman did not consent when a reasonable man would have done so should constitute a negligent mistake. Juries should be specifically instructed that physical resistance is not required of the victim and that submission or lack of resistance does not constitute sufficient basis for belief of consent.

Women often respond to unwanted sexual aggression by trying to reason with their attackers, turning cold, physically struggling, and/or crying. Courts often hold that such behavior does not meet the statutory requirement of nonconsent. However, this type of victim behavior should have implications for the reasonable belief defense. Crying or verbal resistance should alert a reasonable man to the possibility that the woman does not consent. If this does not alert the defendant, his belief of consent would be negligent. If it does alert him but he ignores the possibility, his belief of consent would be reckless. Therefore, there should be a presumption, preferably statutory, that belief of consent is unreasonable in the face of victim crying, verbal resistance, or any physical resistance. This presumption should be included in the jury instructions.

110. Some courts have expressed discomfort with the concept of convicting someone of rape who was merely negligent. See, e.g., Commonwealth v. Cordeiro, 401 Mass. 843, 850, 519 N.E.2d 1328, 1333 (1988) (court implies that it would not permit reduction of rape to crime of negligence); Telling, Rape—Consent and Belief, 47 J. CRM L. 129, 136 (1983) (conviction improper when defendant held negligent belief of consent). However, if the law convicts the reckless rapist but not the negligent one, this creates an incentive for men to discount even the possibility that the woman is not consenting, because once they consider the possibility, their intent rises to the level of recklessness. See supra note 26 for explanation of difference between recklessness and negligence.

111. See Koss, Dinero, Seibel & Cox, Stranger and Acquaintance Rape: Are There Differences in the Victim's Experience?, 21 PSYCHOLOGY WOMEN Q. 1, 12 (1988) (Table 2). Although most women engage in some physical struggling, it is likely to be fairly mild and short-lived. See R. WARSHAW, supra note 37, at 60-62.

112. See Estrich, supra note 2, at 1114.

113. Unfortunately, this standard also looks to victim behavior. However, it at least has the benefit of offering a clear standard. Furthermore, in a case where the defendant does not testify, a victim's testimony that she engaged in one of these behaviors would create a presumption that the defendant's belief could not have been reasonable.
CONCLUSION

Fueled by fears of unjust convictions, the defense in rape of reasonable mistake as to victim consent has developed into a common law loophole to the statutory abolition of the resistance requirement. Instead of becoming an inquiry into a defendant’s intent, reasonable belief has become an inquiry into the victim’s resistance. The mistake defense works most powerfully against victims of acquaintance and date rape, and it contributes to the tremendous difficulty in obtaining convictions for such rapes.

In order to make the reasonable mistake defense a useful tool for determining culpability, the honest belief element of reasonable mistake needs to be revitalized. As a particularized inquiry into whether this defendant could have believed in good faith that his victim was consenting, the reasonable mistake doctrine could diminish the necessity of proving outright physical force as an element of rape.\footnote{114. Estrich, supra note 2, at 1096-1101.}

I do not wish to be unreasonably optimistic. Changes in statutory law seem to have little effect on outcomes in rape cases.\footnote{115. See L. BOURQUE, supra note 5, at 117-30 for a review of empirical research.} Cultural norms regarding sexual situations are so fraught with confusion that it is often difficult to meet the “beyond a reasonable doubt” standard when the victim knows the defendant. This Note recommends the presentation of different behavioral norms to juries in the context of the reasonable belief of consent defense.\footnote{116. Many commentators suggest more far-reaching changes in rape law. Some advocate a pure consent standard (liability where victim fails to consent) or a nonconsent standard (liability where victim objects) with force acting as an aggravating factor. See Estrich, supra note 2, at 1120 & n.96; Ireland, Reform Rape Legislation: A New Standard of Sexual Responsibility, 49 U. COLO. L. REV. 185, 196-97 (1978); Comment, Toward a Consent Standard in the Law of Rape, 43 U. CHI. L. REV. 613, 620 (1976); Note, supra note 56, at 158-60. For a review of state statutes which prohibit nonconsensual, nonforceful sexual behavior, see Searles & Berger, supra note 17, at 32 (Table 3).}

Other writers suggest that force and threat of force should establish rape regardless of consent. See, e.g., S. BROWNMILLER, AGAINST OUR WILL: MEN, WOMEN AND RAPE 384-85 (1975); Berger, supra note 87, at 8 n.50; Estrich, supra note 2, at 1095; Searles & Berger, supra note 17, at 28; Comment, supra note 10, at 1528-29. Estrich suggests a modification of our current system which would include an improved understanding of both force and nonconsent, as well as an inquiry into mens rea. Estrich, supra note 2, at 1105, 1119-20.