Rethinking the Reasonable Belief Defense to Rape

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Most rape victims know their attackers.¹ Yet convicting rapists of such nonstranger rapes is particularly difficult.² When a woman³ 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 victim⁴ and defendant are not strangers, prosecutors are less likely to prosecute and juries less likely to convict than in stranger rapes.⁵ As the relationship between defendant and victim becomes closer, there is a greater tendency to presume consent.⁶

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"⁷ at the time of the rape, it is not surprising that

1. Loh, *The Impact of Common Law and Reform Rape Statutes on Prosecution: An Empirical Study*, 55 WASH. L. REV. 543, 588-89 (1980) (68 percent); Sorenson, Stein, Siegel, Golding & Burnam, *The Prevalence of Adult Sexual Assault: The Los Angeles Epidemiologic Catchment Area Project*, 126 AM. J. EPIDEMIOLOGY 1154, 1160 (1987) (81 percent); cf. BUREAU OF JUSTICE STATISTICS, U.S. DEPARTMENT OF JUSTICE, CRIMINAL VICTIMIZATION IN THE UNITED STATES, 1987, at 44-45 (1989) (46 percent).

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. In contrast, nonstranger rapes are one of the least reported crimes, with high attrition rates at all stages of reporting and prosecution. 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"); Lafree, *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); Lafree, Reskin & Visher, *Jurors' Responses to Victims' Behavior and Legal Issues in Sexual Assault Trials*, 32 SOC. PROBLEMS 392, 400 (1985) (jurors 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.⁸ This defense is called "reasonable belief of consent" or "reasonable mistake of fact as to consent".⁹

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 describes 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 instructions 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.

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 District Attorney (Oct. 19, 1989).

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,¹⁰ because sexual activity with the consent of a woman is never rape.¹¹ In most states, the prosecution must prove that the defendant had sexual intercourse without the consent or against the will of the victim.¹² Few states statutorily define consent, but those that do describe it as words or actions indicating a "freely given agreement,"¹³ a definition similar to the popular understanding of consent.¹⁴ But in rape law, courts have not interpreted "without consent" to mean the absence of what is popularly understood to be "consent;"¹⁵ 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.¹⁶

2. *Force*

In a rape case, the prosecution must prove that the defendant used force or threat of force against the victim.¹⁷ Like "lack of consent" and "consent,"

10. See, e.g., *Williams v. United States*, 327 U.S. 711, 715 (1946); *Director of Pub. Prosecutions v. Morgan*, 1976 App. Cas. 182, 214 (H.L. 1975); *Estrich*, *supra* note 2, at 1121; Comment, *Rape Reform and a Statutory Consent Defense*, 74 J. CRIM. L. & CRIMINOLOGY 1518, 1519 (1983).

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.

13. See, e.g., ILL. ANN. STAT. ch. 38, para. 12-17 (Smith-Hurd Supp. 1990); NEV. REV. STAT. ANN. § 200.366(1) (Michie 1986); WASH. REV. CODE ANN. § 9A.44.010 (1988); WIS. STAT. ANN. § 940.225(4) (West 1982).

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).

15. See Bienen, *Rape III—National Developments in Rape Reform Legislation*, 6 WOMEN'S RTS. L. REP. 170, 181, 183-84 (1980) (discussing entrenchment of common law consent doctrine).

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

17. See, e.g., CAL. PENAL CODE § 261 (West 1988); CONN. GEN. STAT. ANN. § 53a-70 (West 1985); S.D. CODIFIED LAWS ANN. § 22-22-1 (Supp. 1990); VA. CODE ANN. § 18.2-67.3(2) (1988).

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.¹⁸ Statutes do not establish an amount of physical coercion sufficient to demonstrate that sexual activity was accomplished "by force."¹⁹ Furthermore, because courts²⁰ and the general public²¹ 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,²² 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,²³ but not when the victim voluntarily associated with the defendant.²⁴

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.²⁵ 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 Searles & 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.

20. Courts have held that force does not include the physical contact necessary to accomplish a sexual act upon a passive victim. See, e.g., State v. Alston, 310 N.C. 399, 403, 312 S.E.2d 470, 473 (1984) (undressing and forcing legs apart); Johnson v. Commonwealth, 5 Va. App. 529, 534-35, 365 S.E.2d 237, 240 (1988) (fondling of fourteen year old feigning sleep). Estrich describes this as the force "incidental" to a sexual act. See Estrich, *supra* note 2, at 1107-09 (discussing case law).

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.

22. See, e.g., State v. Longabardi, 5 Conn. App. 424, 426, 499 A.2d 79, 80 (1985) (defendant threatened victim with gun); Shelby v. State, 541 So. 2d 1219, 1220 (Fla. Dist. Ct. App. 1989) (same).

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).

24. See Estrich, *supra* note 2, at 1115-16 & nn.75-76. See, e.g., State v. Lester, 70 N.C. App. 757, 761, 321 S.E.2d 166, 168 (1984), *aff'd*, 313 N.C. 595, 330 S.E.2d 205 (1985) (per curiam) (father of victim frequently beat her mother and became angry at victim's refusal); People v. Evans, 85 Misc. 2d 1088, 1096, 379 N.Y.S.2d 912, 918-19 (Sup. Ct. 1975), *aff'd*, 55 A.D.2d 858, 390 N.Y.S.2d 768 (1976) (defendant suggested, hypothetically, that he might hurt or kill victim).

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 LAW § 15.10 (Consol. 1984); see also MODEL PENAL CODE § 2.01 to .02 (1985).

culpability: intention, knowledge, recklessness, or negligence.²⁶ 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.²⁷ Only a few jurisdictions indicate which level of intent suffices for a rape conviction.²⁸ Most states simply fail to discuss levels of intent in rape cases.²⁹ 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.³⁰

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.³¹ Rape law has thus traditionally emphasized the victim's actions—namely her physical resistance or lack thereof—by using her actions as evidence of her lack of consent, the defendant's use of force,³² and his intent.³³ 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

N.Y. PENAL LAW §15.05 (Consol. 1984). Every state uses nearly identical language. *See, e.g.*, COLO. REV. STAT. § 18-1-501 (1990); WASH. REV. CODE ANN. § 9A.08.010 (1988); *see also* MODEL PENAL CODE § 2.02 (1985).

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).

27. *See* Estrich, *supra* note 2, at 1096-99. *See, e.g.*, State v. Smith, 210 Conn. 132, 136-38, 554 A.2d 713, 715-16 (1989) (rejecting intent as "touchstone" of rape); State v. Reed, 479 A.2d 1291, 1295-96 (Me. 1984) (intent not an issue in rape trial).

28. *See, e.g.*, COLO. REV. STAT. § 18-3-402 (1986) (knowingly); OR. REV. STAT. §§ 161.115(2), 163.375 (1989) (negligently); TEX. PENAL CODE ANN. § 22.011 (Vernon 1989) (knowingly). Judicial decision has established the standard in Missouri to be recklessness. State v. Koonce, 731 S.W.2d 431, 437 n.2 (Mo. Ct. App. 1987).

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.

31. *See* R. PERKINS & R. BOYCE, CRIMINAL LAW 211 (3d ed. 1982) (role of resistance in establishing rape); Estrich, *supra* note 2, at 1122-23 (describing history of resistance requirement).

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.³⁴

Elimination of the physical resistance requirement has been one of the most important goals of rape law reform,³⁵ 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,³⁶ realizing that victims are often too frightened to resist³⁷ and that victims who resist are often more seriously injured than those who submit.³⁸ Most have eliminated the requirement simply by omitting any reference to resistance in their definition of force,³⁹ while a few states have enacted explicit provisions stating that physical resistance is not a required element of rape.⁴⁰

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.⁴¹ 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).

35. Chamallas, *Consent, Equality, and the Legal Control of Sexual Conduct*, 61 S. CAL. L. REV. 777, 799 (1988).

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.

However, those states which use "forcible compulsion" as an element of rape usually define it in terms of force or threats that overcome resistance. See, e.g., ALA. CODE § 13A-6-60(8) (1982); 18 PA. CONS. STAT. ANN. § 3121 (Purdon Supp. 1990); WASH. REV. CODE ANN. § 9A.44.010(5) (1988).

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.

40. See, e.g., ILL. ANN. STAT. ch. 38, para. 12-17 (Smith-Hurd Supp. 1990); MICH. COMP. LAWS ANN. § 750.520i (West Supp. 1990).

41. For extensive discussion of the continuing role of resistance, see Estrich, *supra* note 2, at 1095-1134 and Comment, *supra* note 10, at 1531-46. See, e.g., *State v. Alston*, 310 N.C. 399, 409, 312 S.E.2d 470, 476 (1984) (conviction reversed because victim's lack of resistance was insufficient to establish force or threat of force); see also *State v. Rusk*, 289 Md. 230, 247-59, 424 A.2d 720, 728-35 (1981) (Cole, J., dissenting) (dissenting judge enraged by conviction when victim failed to resist).

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.⁴² A consent defense⁴³ often entails the claim that the victim's behavior, as she herself described it, constituted consent.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.⁴⁵

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.

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.

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. 12-17 (Smith-Hurd Supp. 1990); N.J. STAT. ANN. § 2C:2-10 (West 1982). 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, 528-29, 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, 638-40, 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).

44. Defendants argue and judges often agree that lack of resistance means the victim consented. *See, e.g.*, *State v. Rusk*, 289 Md. 230, 255, 424 A.2d 720, 733 (1981) (Cole, J., dissenting) ("She may not simply say, 'I was really scared,' and thereby transform consent or mere unwillingness into submission by force."). Judge Cole implies that the victim's lack of resistance constituted consent. *See also* *People v. Burnham*, 176 Cal. App. 3d 1134, 1144-45, 222 Cal. Rptr. 630, 638-39 (1986) (consent defense may involve assertion that victim's observable behavior indicated consent).

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 1149, 1156, 215 Cal. Rptr. 634, 638 (1985) ("The defense of consent . . . might only involve the contention that the complaining witness lied about the events that took place . . ."); *see also* *People v. Burnham*, 176 Cal. App. 3d 1134, 1141, 222 Cal. Rptr. 630, 638 (1986) (defendant raising consent defense often refers to out-of-court victim statements indicating consent). A second related claim is that the woman actually desired the forceful activity even if she offered some resistance or gave signs of nonconsent. *See* MODEL PENAL CODE § 213.1 comment at 302-03 (1980); Note, *Forcible and Statutory Rape: An Exploration of the Operation and Objectives of the Consent Standard*, 62 YALE L.J. 55, 67-68 (1952).

45. In California and Missouri, the elements of the defense were established by judicial interpretation of a general statutory mistake defense. *See* *People v. Mayberry*, 15 Cal. 3d 143, 155, 542 P.2d 1337, 1345, 125 Cal. Rptr. 745, 753 (1975); SUPERIOR COURT OF LOS ANGELES COUNTY, CALIFORNIA JURY INSTRUCTIONS CRIMINAL, No. 10.65 (1988) [hereinafter CALJIC]; *State v. Williams*, 696 S.W.2d 809, 811-13 (Mo. Ct. App. 1985). Courts have created the defense in other states. *See, e.g.*, *State v. Smith*, 210 Conn. 132, 141-42, 554 A.2d 713, 717 (1989); *People v. Crispo*, No. 3105-85 (N.Y. Sup. Ct. Oct. 16, 1988).

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.⁴⁶ 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.⁴⁷

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.⁴⁸ 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.⁴⁹ 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 consented⁵⁰ and then whether that belief was reasonable, courts ask whether *any* defendant *could have* reasonably believed the victim consented.⁵¹ 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

Eliminating the Defense of Unreasonable Mistake of Fact as to Victim Consent, 89 DICK. L. REV. 473 (1985).

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.

The criminal code of nearly every state contains a similar section regarding mistake of fact: "A person shall not be relieved of criminal liability for conduct . . . unless: (1) such factual mistake negates the mental state required for the commission of an offense . . ." CONN. GEN. STAT. ANN. § 53a-6(a)(1) (West 1985); see also ILL. ANN. STAT. ch. 38, para. 4-8(a) (Smith-Hurd 1989); MO. ANN. STAT. § 562.031(1) (Vernon 1979); N.J. STAT. ANN. § 2C:2-4(a)(1) (West 1982); MODEL PENAL CODE § 2.04(1)(a) (1985).

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

48. See, e.g., *People v. Anderson*, 144 Cal. App. 3d 55, 62, 192 Cal. Rptr. 409, 413 (1983) (reversible error in not giving reasonable belief instruction although defendant did not testify). A defendant may not be compelled to testify in order to raise a defense. *But see* Bienen, *Mistakes*, 7 PHIL. & PUB. AFF. 224, 238-240 (1978) (honest belief should not be evaluated without defendant testimony).

49. See, e.g., *People v. Castillo*, 193 Cal. App. 3d 119, 126, 238 Cal. Rptr. 207, 211 (1987) (victim's testimony alone demonstrated equivocal conduct).

50. Estrich, *supra* note 2, at 1117-18, advocates such a particularized inquiry.

51. See, e.g., *People v. May*, 213 Cal. App. 3d 118, 126, 261 Cal. Rptr. 502, 506 (1989) (victim's self-described behavior "could reasonably have been misinterpreted"); *People v. Romero*, 171 Cal. App. 3d 1149, 1156, 215 Cal. Rptr. 634, 638 (1985) (jury must ask whether victim's actions "reasonably could be misunderstood by defendant"); *State v. Smith*, 210 Conn. 132, 141, 554 A.2d 713, 717 (1989) (asks if victim's conduct "should reasonably be viewed as indicating consent").

was honest if it could have been reasonable.⁵² 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.⁵³ 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.⁵⁴ 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,⁵⁵ 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.⁵⁶ 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 1098-99; 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).

56. See Note, *Shifting the Communication Burden: A Meaningful Consent Standard in Rape*, 6 HARV. WOMEN’S L.J. 143, 147 (1983); see also Estrich, *supra* note 2, at 1112-15 & n. 66 (discussing differing interpretations of force in *Rusk v. State*, 43 Md. App. 476, 406 A.2d 624 (1979), *rev’d*, 289 Md. 230, 424 A.2d 720 (1981)); MacKinnon, *supra* note 6, at 654 (“a woman is raped but not by a rapist”).

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 & Title*, 1 OXFORD J. LEG. STUD. 432, 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.

61. See *People v. Burnham*, 176 Cal. App. 3d 1141, 1143, 222 Cal. Rptr. 630, 637 (1986) (reasonableness judged by objective standard); *Commonwealth v. Cordeiro*, 401 Mass. 843, 850, 519 N.E.2d 1328, 1332 (1988) (jury instructed to follow "objective, 'reasonable man'" standard).

The reasonable belief defense has become popular over the last fifteen years, coincident with the decline of the physical resistance requirement, but it has been used at least as far back as 1888. See, e.g., *McQuirk v. State*, 84 Ala. 435, 437, 4 So. 775, 776 (1888). The last case following *McQuirk* was *Gordon v. State*, 32 Ala. App. 398, 400, 26 So. 2d 419, 420-21 (Ala. App. 1946). The reasonable mistake defense was adopted by the military courts in 1954. *United States v. Short*, 4 C.M.A. 437, 445, 16 C.M.R. 11, 19 (1954). For a review of military law on reasonable mistake, see Wilkins, *Mistake of Fact: A Defense to Rape*, 14 ARMY LAW., Dec. 1987, at 24. In 1975, the California Supreme Court held that reasonable mistake of fact constituted a defense to rape, *People v. Mayberry*, 15 Cal. 3d 143, 153-58, 542 P.2d 1337, 1344-47, 125 Cal. Rptr. 745, 752-55 (1975), and the English House of Lords ruled that an honest mistake of fact (even if unreasonable) would constitute a defense, *Director of Pub. Prosecutions v. Morgan*, 1976 App. Cas. 182, 214 (H.L. 1975) (husband told drunken soldiers that his wife's resistance would be insincere). Since then, a number of states have followed suit. Some do so explicitly. See *State v. Smith*, 210 Conn. 132, 141, 554 A.2d 713, 717 (1989); *State v. Beishir*, 646 S.W.2d 74, 79 (Mo. 1983); *People v. Crispo*, No. 3105-85 (N.Y. Sup. Ct. Oct. 16, 1988); *State v. Faehrich*, 359 N.W.2d 895, 899-900 n.1 (S.D. 1984). Others do so implicitly by failing to exclude reasonable mistake of consent as a possible defense in future cases. See, e.g., *Green v. State*, 611 P.2d 262, 265-66 & n.2 (Okla. Crim. App. 1980). One state court, however, has ruled that reasonable belief of consent is not a defense to rape. See *People v. Hale*, 142 Mich. App. 451, 453-54, 370 N.W.2d 382, 383 (1985). Two have reserved the issue. *Commonwealth v. Sherry*, 386 Mass. 682, 697, 437 N.E.2d 224, 233 (1982); *Owens v. State*, 96 Nev. 880, 884 n.4, 620 P.2d 1236, 1239 n.4 (1980).

behavior.⁶² The court specifically held that consent does not refer to the victim's subjective state but rather to objective manifestations of this state.⁶³ 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.⁶⁴

Thus, while both lack of consent and intent have been labeled "subjective," representing the victim's⁶⁵ and defendant's⁶⁶ 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 consented⁶⁷ 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.⁶⁸ 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.⁶⁹ 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

62. *State v. Smith*, 210 Conn. 132, 554 A.2d 713 (1989).

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. LAFAYE & A. SCOTT, *supra* note 25, § 3.1.

67. *See, e.g.*, *Johnston v. State*, 673 P.2d 844, 847 (Okla. Crim. App. 1983), *cert. denied*, 467 U.S. 1229 (1984); *State v. Ciskie*, 110 Wash. 2d 263, 282, 751 P.2d 1165, 1175 (1988).

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.⁷⁰ 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.⁷¹

The concept of equivocal conduct was first discussed in *People v. Mayberry*,⁷² 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"⁷³ This type of conduct, the court held, "might have misled him as to whether she was consenting."⁷⁴ Other examples of equivocal conduct include willingly accompanying a man to his apartment⁷⁵ and not attempting to escape from a car at a stop light.⁷⁶ 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).

72. *People v. Mayberry*, 15 Cal. 3d 143, 542 P.2d 1337, 125 Cal. Rptr. 745. (1975).

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.*

75. *People v. May*, 213 Cal. App. 3d 118, 125-26, 261 Cal. Rptr. 502, 506 (1989) (victim also failed to escape when presented with opportunity).

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.⁷⁷ 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.⁷⁸ 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.⁷⁹

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.⁸⁰ 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.⁸¹ Although the defense limited its argument to sadomasochism between gay men, there have been similar theories about women's resistance.⁸²

The courts' effective reinstatement of the resistance requirement via the defense of reasonable mistake of fact⁸³ 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 force⁸⁴ or threats with a weapon⁸⁵ or when the defendant admits force.⁸⁶ In acquaintance and other nontraditional cases, however, reinstatement

77. *People v. Burnham*, 176 Cal. App. 3d 1134, 1145, 222 Cal. Rptr. 630, 639 (1986).

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.

80. Telephone interview with Jeffrey Atlas, New York Supreme Court Justice (Nov. 2, 1989) (discussing *People v. Crispo*, No. 3105-85 (N.Y. Sup. Ct. Oct. 16, 1988)).

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.

84. See, e.g., *State v. Williams*, 235 Kan. 485, 493-94, 681 P.2d 660, 667 (1984) (defendant struck victim several times; tape recording corroborated victim's testimony).

85. See, e.g., *People v. Romero*, 171 Cal. App. 3d 1149, 1153-56, 215 Cal. Rptr. 634, 635-38 (1985) (threats with sharp object); *State v. Lint*, 657 S.W.2d 722, 724-27 (Mo. Ct. App. 1983) (threats to use and actual beating with rifle).

86. See, e.g., *State v. Faehrich*, 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,⁸⁷ 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.⁸⁸ 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.⁸⁹

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.⁹⁰ For a defendant's belief to be reasonable, it must be neither reckless nor criminally negligent.⁹¹

Some jurisdictions have adopted this policy with the defense of consent. *See, e.g.*, *State v. Smith*, 638 P.2d 1, 4 & n.3 (Colo. 1981) (consent not available as defense to rape by force or threat of force because "statute prohibits conduct which by its very nature negates the existence of the victim's consent"); *State v. Lint*, 657 S.W.2d 722, 724 (Mo. Ct. App. 1983) (defendant threatened victim with deadly weapon); *Green v. State*, 611 P.2d 262, 265-66 (Okla. Crim. App. 1980) (uncontroverted evidence of bruises and torn clothing); *Faehrich*, 359 N.W.2d at 900 (evidence of consent must "utterly negate any element of force, coercion or threat"). *But cf.* *People v. Thompson*, 117 Mich. App. 522, 526, 324 N.W.2d 22, 23 (1982) (consensual intercourse not necessarily impossible in course of kidnapping).

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.

93. See, e.g., *Fersner v. United States*, 482 A.2d 387, 393 (D.C. App. 1984); *Terry v. State*, 467 So. 2d 761, 764 (Fla. Dist. Ct. App. 1985).

94. See, e.g., *People v. Aris*, 215 Cal. App. 3d 1178, 1186-89, 264 Cal. Rptr. 167, 172-74 (1989) (imminence of danger is crucial element of self-defense); *People v. White*, 87 Ill. App. 3d 321, 323, 409 N.E. 2d 73, 75 (1980) (decision must be made in seconds).

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.

96. See Balos & Fellows, *Guilty of the Crime of Trust: Nonstranger Rape*, 75 MINN. L. REV. 599, 607 (1991) (advocating heightened obligation to ensure consent in nonstranger rape); Pickard, *Culpable Mistakes and Rape: Relating Mens Rea to the Crime*, 30 U. TORONTO L.J. 75, 81 (1983) (verbal inquiry is proper means to avoid mistake); Temkin, *The Limits of Reckless Rape*, 30 CRIM. L. REV. 5, 15-16 (1983) (same).

i.e., unless the victim physically resisted.⁹⁷ 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.⁹⁸

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,⁹⁹ 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.¹⁰⁰

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.¹⁰¹ 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).

physical resistance.¹⁰² 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.¹⁰³ 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.¹⁰⁴ 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.

consent.¹⁰⁵ 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 resistance¹⁰⁶ is wholly inadequate.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,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.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

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

106. See *supra* Section II.B.1.

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.

108. See *supra* note 82 and accompanying text.

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.¹¹⁰ 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.¹¹¹ Courts often hold that such behavior does not meet the statutory requirement of nonconsent.¹¹² 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.¹¹³ 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. CRIM 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.¹¹⁴

I do not wish to be unreasonably optimistic. Changes in statutory law seem to have little effect on outcomes in rape cases.¹¹⁵ 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.¹¹⁶ They may succeed in some cases and fail in others. By giving substance to the concepts of "honest" and "reasonable," the law can point out that a belief in consent should not be a mere assumption. It should have an honest and reasonable basis.

114. Estrich, *supra* note 2, at 1096-1101.

115. See L. BOURQUE, *supra* note 5, at 117-30 for a review of empirical research.

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. BROWN MILLER, *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.