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## Where We Have Been, and Where We Might Be Going: Some Cautionary Reflections on Rape Law Reform, The Sixty-Eighth Cleveland-Marshall Fund Lecture

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THE SIXTY-EIGHTH CLEVELAND-MARSHALL FUND LECTURE

WHERE WE HAVE BEEN, AND WHERE WE MIGHT BE GOING:  
SOME CAUTIONARY REFLECTIONS ON RAPE LAW REFORM

JOSHUA DRESSLER<sup>1</sup>

I. ON YINS AND YANGS IN RAPE REFORM.....	410
II. INITIAL PREMISES: A PERSONAL DISCLAIMER.....	413
III. PRE-REFORM LAW: THE “BAD OLD DAYS”.....	415
IV. FORCIBLE RAPE: THE CHANGES (SOME GOOD, SOME NOT) .....	418
A. <i>Actus Reus</i> .....	418
B. <i>Mens Rea</i> .....	430
V. RAPE BY FRAUD .....	439
VI. CONCLUSION.....	442

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I thank George Thomas (Rutgers Newark) for commenting on a draft of this article. Special thanks is owed to Kate Bloch (U.C. Hastings), who somehow found the time and capacity to provide me with extremely helpful remarks regarding—and diplomatic criticisms of—an earlier draft, all of which she provided immediately before and after giving birth to her daughter, Julia. I very much appreciate Kate’s willingness to give me her time at such an important moment in her life. Also, I express my appreciation to Dean Gerald Caplan and everyone at McGeorge School of Law, who have consistently provided me with the time and support needed to further my scholarly pursuits.

One final comment: In 1980, just a few years after I joined the academy, I read a then-newly published article by criminal law giant Sanford Kadish, entitled *Why Substantive Criminal Law—A Dialogue*, in 29 CLEV. ST. L. REV. 1 (1980). In the article, Professor Kadish set out a fictional dialogue between a professor of substantive criminal law and a disgruntled student, composed of students’ common criticisms of the criminal law course and subject matter (e.g., “impractical” and “a waste of time,” *id.* at 2), and Kadish’s “apologia” for (actually, powerful defense of) what he had been doing in the classroom for several decades. As a relatively new professor and scholar of substantive criminal law, Kadish’s message resonated powerfully with me. I made a copy of the article, put it away in my files, have often looked at it over the years, and have directed a number of my students to read it when they have expressed many of the same concerns in *my* classroom. As it turns out, the Kadish article was the 1980 address he delivered as the eighteenth Cleveland-Marshall Fund Visiting Scholar. Even at that early time in my career, I appreciated the honor and significance of giving the Cleveland-Marshall Visiting Scholar Lecture. I could not have imagined in my fondest fantasies at that time that, two decades later, I would be invited by the faculty of Cleveland-Marshall College of Law to give the sixty-eighth Cleveland-Marshall Fund Visting Scholar Lecture, which I did on March 25, 1999. (This article, however, is not the subject of that address.) I thank everyone, most especially Professor David Goshien, for their kindness before and during my campus visit in that regard.

## I. ON YINS AND YANGS IN RAPE REFORM

Until not very long ago, American rape<sup>2</sup> law unmitigatedly and universally represented what Susan Estrich aptly described as "boys' rules."<sup>3</sup> Indeed, rape law has been male-oriented at least since Biblical times.<sup>4</sup> One does not have to accept the view that rape law was devised for the misogynistic purpose of "embodying and ensuring male control over women's sexuality,"<sup>5</sup> to agree with the assertion that the common law approach to the offense—a crime which by definition deals with male conduct in relation to females<sup>6</sup>—was male-centered. After all, the law of rape developed during a time when women played no role in legal affairs, even as to offenses that affected them intimately.

Boys' rules have certainly not been eradicated everywhere and in every case, but feminists can take legitimate pride in the fact that rape law has undergone significant reform in just the past decade or two, largely as a result of their efforts.<sup>7</sup> The thesis

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<sup>2</sup>Some states now characterize the crime of rape as "sexual assault," e.g., N.J. STAT. ANN. § 2C:14-2c(1) (1995), or "criminal sexual conduct," e.g., MICH. COMP. LAWS ANN. § 750.520b (West 1991). The reasons for the change in nomenclature is that:

*[s]exual assault* puts the concept of violence into the word *rape*. It reflects a historically recent clinical, political, and social analysis of the phenomenon of rape that attempts to drain off the toxins of blame-the-victim, and to shift the criterion of rape from the behavior of the victim to that of the criminal. It is an attempt to take any ambiguity out of the word *rape*.

NANCY VENABLE RAINE, *AFTER SILENCE: RAPE AND MY JOURNEY BACK* 208 (1998).

<sup>3</sup>SUSAN ESTRICH, *REAL RAPE* 60 (1987).

<sup>4</sup>According to Deuteronomy, if a man "takes hold" of "a virgin maiden" and "lies with her and is discovered," the wrongdoer must pay fifty shekels of silver to the father, marry the maiden, and never divorce. *Deuteronomy* 22:28-29.

<sup>5</sup>Catherine A. MacKinnon, *Feminism, Marxism, Method, and the State: Toward Feminist Jurisprudence*, 8 *SIGNS* 635, 644 (1983).

<sup>6</sup>The common law definition of the crime was gender-specific: nonconsensual sexual intercourse by a male with a female not his wife. Some states now define the offense in gender-neutral terms. See e.g., MICH. COMP. LAWS ANN. § 750.250b (West 1991) ("A person is guilty . . . if he or she engages in sexual penetration with another person . . ."). For purposes of clarity, however, and in order to deal with the statistically most common scenario, I intend to focus here on heterosexual rape, and to assume that the aggressor is a male, and the victim is a female.

<sup>7</sup>I do not want to overstate the case of reform. Rape law (which itself has not advanced uniformly among the states) has progressed further than public attitudes about the offense, particularly in the acquaintance rape area. One need only read newspaper stories, listen to "talk radio," or converse with police officers, jurors, and others to come to the unhappy view that cultural attitudes regarding sexual relations change very slowly. See David P. Bryden & Sonja Lengnick, *Rape in the Criminal Justice System*, 87 *J. CRIM. L. & CRIMINOLOGY* 1194, 1379 (1997) ("There is a great deal of anecdotal and social-scientific evidence of public (and jury) bias against norm-violating victims of acquaintance rape."). However, bias against female victims of acquaintance rape has declined in recent years, resulting in juries "at least somewhat more sympathetic to the prosecution" in such cases. *Id.* at 1379-80.

Justice Harlan wisely wrote that "it is the task of the law to form and project, as well as mirror and reflect." *United States v. White*, 401 U.S. 745, 786 (1971) (Harlan, J., dissenting). It is necessary and appropriate, therefore, for legislatures and courts to seek to change public

of my comments here is that although additional legal reform is in order,<sup>8</sup> the time may also be right for us to concern ourselves at least a little with the possibility that rape reform *could* go (or perhaps *is* going) down some other paths that fair-minded persons will later regret. Just a few decades ago, rape law was so irrational and insensitive to the legitimate interests of women that there was really no need to strike a balance: virtually any reform effort was likely to result in improvement. But, we are past that extreme stage. It is worthwhile now, I think, to pause for a moment, take stock of the reforms that have been implemented and the ones that remain to be realized, and make sure that our efforts to provide justice to rape victims do not result in unfairness to those who might be accused of this heinous offense.<sup>9</sup>

Is there really a risk that rape law reform will go too far? At first blush, my concern seems silly. After all, men still retain disproportionate lawmaking power, and whatever the law may compel, juries can ignore reforms, as they do on occasion. In my view, however, there is not an insignificant risk of expanding rape law too far in certain regards.

Let me explain. Consider for a moment a political lesson from the Oklahoma City bombing case. After that horrendous incident, President Bill Clinton moved quickly to demand legislation expanding the Government's authority to monitor and infiltrate organizations it suspects of terrorism.<sup>10</sup> The President took the position normally reserved for political conservatives who made similar (I believe unwise) calls for expanded police powers during the McCarthy, civil rights, and Vietnam War eras. But, as Clinton sought to diminish citizens' civil liberties, lo and behold, opposition to the anti-terrorist measure came from not only an expected (but ordinarily politically weak) source, the American Civil Liberties Union, but also from an *unexpected* one—from conservative Republicans who warned about expanded federal police power.<sup>11</sup> Although Senator Orrin Hatch suggested that this turn-around had long-term implications,<sup>12</sup> these Republicans did not suddenly get "A.C.L.U. religion." Instead, conservatives opposed Clinton's proposed legislation because they feared that if the Government were given a free rein to conduct surveillance of militia groups, they might also infiltrate the National Rifle Association and other political enemies of the left and friends of the right. So, in the Oklahoma City situation, although the political left and right traded sides, the

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attitudes through the law. Of course, if the law gets *too* far ahead of public attitudes, the risk of jury nullification increases, a matter of particular concern in the rape context.

<sup>8</sup>See *infra* text accompanying notes 105-06, 154-65.

<sup>9</sup>See *Roundtree v. United States*, 581 A.2d 315, 336 (D.C. 1990) (Schwelb, J., concurring in part and dissenting in part) ("[T]he end does not justify the means. Our commitment to eradicating past and present wrongs [in the law of rape] may not be permitted to dilute our determination that all defendants, including those charged with sexual offenses, receive the fair trial which is their constitutional due.").

<sup>10</sup>John F. Harris, *Clinton Lashes Out At Terrorists, Seeks Expanded Powers*, WASH. POST, Apr. 24, 1995, at A1.

<sup>11</sup>Christopher Hanson, *Terrorist Bill Vote Shows New Lineup on Law and Order*, SEATTLE POST-INTELLIGENCER, Apr. 19, 1996, at A1.

<sup>12</sup>"The world is turning around. When I got here . . . the conservatives wanted to increase wiretaps and the liberals didn't." *Id.*

political system had its usual “yin and yang,”<sup>13</sup> the usual competing, tugging forces. The adversarial system was at work in Congress.

One would naturally expect the same yin and yang to work in rape law reform. After all, we still have Democrats and Republicans, liberals and conservatives, advocates of civil liberties and proponents of unfettered law enforcement, and men and women, all with potentially competing interests at stake.<sup>14</sup> But, the rape reform movement has not followed the expected course. Many of the usual supporters of civil liberties and the rights of criminal suspects have been in the political bed with their usual enemies. Many feminists—who typically favor the interests of underdogs, which include, of course, people accused of crime—have allied themselves with political conservatives. Feminists seek to abolish “boys’ rules” to sexual relations; political conservatives seek to strengthen the powers of police and prosecutors and to increase the punishment of wrongdoers.<sup>15</sup> Strange bedfellows like this can produce unwanted offspring. And, when we add a third, very powerful political force, the “victims’ rights movement,” there is a more-than-ordinary risk that, unless we are cautious, rape law may take some wrong paths, for who will be there to resist the wrong turns that are taken?

Therefore, I urge a thoughtful and reasoned look at where we have been in rape law and where we may be going. The goal should ultimately be to strike a sensible

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<sup>13</sup>According to one Chinese school of thought, there are:  
two cosmic forces, one yin. . . which is negative, passive, weak, and disintegrative,  
and the other yang. . . , which is positive, active, strong, and integrative. All things are  
produced through the interaction of the two. . . . Wherever harmony is sought or  
change takes place, the forces of yin and yang are at work . . . .

Wing-Tsit Chan, *Chinese Philosophy* in 2 THE ENCYCLOPEDIA OF PHILOSOPHY 87, 89 (Paul Edwards, ed., 1967).

<sup>14</sup>I find it disquieting to realize that many persons assume that men and women, solely because of their gender, inevitably are on opposite sides of the rape reform movement. Presumably, the basis for such a view is that women constitute the potential victims of rape, and men are the potential predators. Even if one accepts this cynical view of the world, the more accurate way to characterize the “battle lines” is between those who fear sexual violation of themselves or those close to them and those who do not. This description would put virtually all females and some males together in battle against males predators and those who simply “don’t get it.”

On the “they don’t get it” subject, it is certainly true that, although humans have the capacity to feel empathy, no one can *completely* understand what one has *not* experienced. In my case, thankfully, neither I nor any loved one of mine has been raped. Therefore, I come to this subject as an “outsider” who sought through reading and conversation to understand the effects of the crime on its victims. In this regard I am persuaded by those who argue that it is not enough to say, simply, that rape is a grievous crime. Just as a person can rationally believe that *physical* pain from disease is so severe, and the resulting loss of dignity so great, that death is preferable to life, I accept the proposition of some persons that it is not irrational to believe that, in some cases, rape can result in *psychological* death—a form of “spiritual murder,” Robin L. West, *Legitimizing the Illegitimate: A Comment on Beyond Rape*, 93 COLUM. L. REV. 1442, 1448 (1993), or “soul-murder,” Lynne Henderson, *Rape and Responsibility*, 11 LAW & PHILOSOPHY 127, 164 (1992).

<sup>15</sup>Others have noted the intriguing alliance between political conservatives and feminists. See e.g., Michelle Oberman, *Turning Girls Into Women: Re-Evaluating Modern Statutory Rape Law*, 85 J. CRIM. L. & CRIMINOLOGY 15, 31 (1994).

balance. We should not give up the gains in rape reform and, indeed, should go further in some regards, but we should move with considerable caution.

## II. INITIAL PREMISES: A PERSONAL DISCLAIMER

Rape is an especially sensitive subject. It presents unique problems to teach,<sup>16</sup> and it is a difficult topic about which to write without trepidation, particularly if the author intends to question any present-day conventional wisdom on the subject. Therefore, so fair-minded readers will not misconstrue my views, let me set out the premises supporting my analysis.<sup>17</sup>

First, I believe that rape can cause such devastating psychological harm that it is not irrational for a legislature (death penalty issues aside) to treat rape and murder as offenses of essentially equivalent gravity.<sup>18</sup> Second, I accept wholeheartedly the view that for centuries rape law, including the way rape victims were treated in the criminal justice system, was profoundly unwise and unjust.

But, third, I also endorse the view that, although crime control concerns sometimes make the Constitution “and the values it represents . . . appear unrealistic or ‘extravagant’ to some,”<sup>19</sup> constitutional rights—including, but not limited to, the “bedrock . . . principle”<sup>20</sup> of presumption of innocence and, if you will, basic fairness—must not be impaired as a result of efforts to “fight crime” generally or “stop rape” specifically. Constitutional rights are not absolute, of course. But, in balancing law enforcement needs against constitutional rights, in the close cases I will come down on the side of the Constitution and on the side of protecting the accused, even at the risk of releasing some guilty persons.<sup>21</sup>

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<sup>16</sup>For excellent discussion of the teaching problems and potential solutions, see Kate E. Bloch, *A Rape Law Pedagogy*, 7 *YALE J.L. & FEMINISM* 307 (1995); Susan Estrich, *Teaching Rape Law*, 102 *YALE L.J.* 481 (1992); James J. Tomkovicz, *On Teaching Rape: Reasons, Risks, and Rewards*, 102 *YALE L.J.* 481 (1992).

<sup>17</sup>I am conflicted by my decision to set out the premises. Professor Stephen Carter has written about intellectuals that it is:

the responsibility of the intellectual . . . to try not to worry about whether one’s views are, in someone else’s judgment, the proper ones . . . . What makes one an intellectual is the drive to learn, to question, to understand, to criticize, not as a means to an end but as an end in itself.

STEPHEN L. CARTER, *REFLECTIONS OF AN AFFIRMATIVE ACTION BABY* 6 (1991).

Those of us in academia have the luxury and responsibility to reflect on the law and to search for “truths.” It may later prove to be the case that, in my search for the “truth” of rape reform, I have taken an incorrect path. If so, it won’t be the first time. But, we do not satisfy our responsibilities if we simply accept conventional wisdom *in any regard*. We must always be skeptics.

<sup>18</sup>See *supra* note 14.

<sup>19</sup>*Coolidge v. New Hampshire*, 403 U.S. 443, 455 (1971) (Stewart, J., plurality opinion).

<sup>20</sup>*In re Winship*, 397 U.S. 358, 363 (1970).

<sup>21</sup>See also *id.* at 372 (Harlan, J., concurring) (“In a criminal case, . . . we do not view the social disutility of convicting an innocent man as equivalent to the disutility of acquitting someone who is guilty . . . . [T]he requirement of proof beyond a reasonable doubt in a criminal case [is] bottomed on a fundamental value determination of our society that it is far worse to convict an innocent man than to let a guilty man go free.”).

Fourth, constitutional principles aside, men and women both have responsibilities in preventing rape. Traditional rape law put the onus on women to prevent their own rape,<sup>22</sup> reformers have rightly sought to put an increasing burden on men. But, the law should avoid inadvertently treating women as passive parties in sexual encounters. They have as much responsibility to express their feelings about intimacy as the male has the duty to make reasonable efforts to learn a female's wishes.

Fifth, in a liberal society that values individual freedom, we should not use the sledge hammer of the criminal law to punish *every* form of wrongdoing that exists in society. I deplore the tendency of legislators and the public to respond reflexively to perceived wrongdoing by criminalizing conduct without first determining whether the problem justifies such a result. Lying may be morally wrong, but not all lying is or should be criminal. It may be wrong to stand by and allow harm to come to others when we could easily prevent it, but generally it is no crime to do so.<sup>23</sup> And, it should follow that there is nothing inconsistent with the assertion that some forms of sexual misconduct do not justify the criminal sanction and are more properly handled through tort law,<sup>24</sup> mediation,<sup>25</sup> or other non-criminal approaches.

I am a traditionalist in the belief that “[w]hat distinguishes a criminal from a civil sanction and all that distinguishes it, . . . is the judgment of community condemnation which accompanies and justifies its imposition.”<sup>26</sup> For present purposes this means that felony liability is unjust in the absence of *very serious* wrongdoing and moral culpability in committing the wrongdoing. A criminal conviction is inappropriate if the community, ordinarily represented by the jury,<sup>27</sup>

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<sup>22</sup>See *infra* text accompanying notes 40-49.

<sup>23</sup>JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW § 9.06 (2d ed. 1995).

<sup>24</sup>See e.g., Nora West, Note, *Rape in the Criminal Law and the Victim's Tort Alternative: A Feminist Analysis*, 50 U. TORONTO FAC. L. REV. 96 (1992).

<sup>25</sup>E.g., Deborah Gartzke Goolsby, Note, *Using Mediation in Cases of Simple Rape*, 47 WASH. & LEE L. REV. 1183 (1990).

<sup>26</sup>Henry M. Hart, Jr., *The Aims of the Criminal Law*, 23 LAW & CONTEMP. PROBS. 401, 404 (1958).

<sup>27</sup>Professor Kate Bloch, who read an earlier draft of this article, wrote me that “one underlying premise of [your] article is an enormous faith in the ability of juries to render fair verdicts, despite some still prevalent rape myths.” Letter from Kate Bloch to Author, dated (Jan. 14, 1999) (in author's possession). As indicated earlier, see *supra* note 7, I am aware that the law is presently more progressive than public attitudes about rape, and this means that juries sometimes fail to convict in circumstances in which I and others can only shake our heads in disbelief and shock.

Juries fail to convict, even when others believe proof of guilt is great, for many reasons, including poor lawyering, juror prejudice or ignorance, or reasonable doubt about guilt. An acquittal may also represent the jurors' moral sense that the law is out of touch with community values. Sometimes, “[t]he pages of history shine on instances of the jury's exercise of its prerogative to disregard uncontradicted evidence and instructions of the judge,” but other times jury nullification does not seem so benevolent. *United States v. Dougherty*, 473 F.2d 1113, 1130 (D.C. Cir. 1972).

*So, do I trust juries? Yes, I do trust in juries, for a simple reason. Since I believe that a criminal conviction does and should express the community's condemnation of the actor, it follows that a jury, if fairly selected, is better equipped than a judge to determine whether the*

does not believe that the misconduct justifies “a formal and solemn pronouncement of the moral condemnation of the community.”<sup>28</sup>

Finally, and probably least controversially, when the criminal law is properly invoked, offenses should be graded sensibly. We should save the most severe penalties for the most serious forms of wrongdoing. Even if the constitutional doctrine of proportional punishment is now largely lifeless outside the death penalty context,<sup>29</sup> the basic principle that punishment should be roughly proportioned to the offense committed deserves our continued respect. This means that an act that causes less harm or involves less personal moral turpitude than another should be punished less severely. Not all forms of sexual misconduct—even those that justify the criminal sanction—deserve the label “rape” and the severe sanctions that should follow from a conviction for that offense.

### III. PRE-REFORM RAPE LAW: THE “BAD OLD DAYS”

To appreciate how far we have come, and in order to determine where we should go from here, it is essential to understand pre-reform rape law and what may truly be called “the bad old days” of rape law.

Until recent years, state laws, by statute and judicial interpretation, often stacked the law against women who asserted that they had been raped.<sup>30</sup> On the procedural

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accused’s conduct (if proven) justifies the community’s approbation. *See* *Duncan v. Louisiana*, 391 U.S. 145, 156 (1968) (“If the defendant preferred the common-sense judgment of a jury to the more tutored but perhaps less sympathetic reaction of the single judge, he was to have it.”). Since punishment is imposed in the community’s—our—name, I prefer to have ordinary persons, and not the elite, speak for me, for better *or for worse*. And, sometimes it will be for the worse in an individual case. But, there are also many examples in history of bizarre or incomprehensible judicial verdicts, rulings and comments from the bench.

My trust is not blind. Few would argue with the proposition that current jury selection procedures are flawed, although the suggested remedies vary. The institutional remedy for these flaws is not to reduce the influence of juries, but rather is to improve jury selection procedures (and, specifically in the rape context, to educate the community—the future jurors—regarding rape myths). In some circumstances, judges should also be prepared to tailor special jury instructions to mitigate the risk of juror prejudice. *Cf.*, Joshua Dressler, *When “Heterosexual” Men Kill “Homosexual” Men: Reflections on Provocation Law, Sexual Advances, and the “Reasonable Man” Standard*, 85 J. CRIM. L. & CRIMINOLOGY 726, 760-61 (1995) (proposing jury instructions intended to reduce the risk of homophobic jury verdicts in criminal homicide cases in which the victim was gay). Ultimately, however, juries fail us for the same reason that *all* institutions disappoint us on occasion (or more often than that): because human beings are fallible.

So, again, do I trust juries? I trust *in* juries. If we don’t trust in them, then I do not know where else we can turn.

<sup>28</sup>Hart, *supra* note 26, at 405.

<sup>29</sup>*See* *Harmelin v. Michigan*, 501 U.S. 957 (1991) (two Justices stating that there is no constitutional proportionality requirement in non-capital offenses; three Justices stating that any term of imprisonment is permissible for a serious offense).

<sup>30</sup>Some of the greatest injustices to rape victims occur *prior* to trial. Police officers and prosecutors have frequently treated rape victims with scorn, questioned their allegations, and even suggested that they were responsible for their fate. *E.g.*, VERNON R. WIEHE & ANN L. RICHARDS, *INTIMATE BETRAYAL: UNDERSTANDING AND RESPONDING TO THE TRAUMA OF ACQUAINTANCE RAPE* 32 (1995) (reporting that one officer told a rape victim that “[u]sually if women are out at this time of night, it was their fault”). Of course, these official attitudes



side, various rules reduced the likelihood of prosecutorial success in rape trials. First, some states, following the lead of the Model Penal Code, barred rape prosecutions if the female did not notify public authorities within a brief period of time after her assault.<sup>31</sup>

Second, in rape prosecutions in which consent was an issue, judges sometimes warned jurors that a rape charge “is easily made and once made, difficult to defend against even if the person accused is innocent.”<sup>32</sup> Juries were admonished “to examine the testimony” of the complainant “with caution”<sup>33</sup> and to evaluate the complainant's testimony with special care, “in view of the emotional involvement of the witness and the difficulty of determining the truth with respect to alleged sexual activities carried out in private.”<sup>34</sup> Third, some states required corroboration of the complainant's accusation,<sup>35</sup> although such a rule was not required for other offenses.<sup>36</sup>

Fourth, defense lawyers cross-examined rape complainants, and often introduced third-party testimony relating to the complainant's consensual sexual activities with other persons. The purposes of such questioning and testimony were to humiliate and degrade the complainant, to prove her unchastity as a means of casting doubt on her truthfulness regarding her complaint, and to allow jurors *sub rosa* to characterize the female as a sexually promiscuous person undeserving of the law's protection. Perhaps this aspect of rape trials, more than anything else, deterred women from making truthful accusations of rape.

The substance of rape law—the focus of this article—was also weighted against women. Although it is often said that common law rape consisted of “unlawful sexual intercourse with a female person without her consent,”<sup>37</sup> Blackstone described the crime as “carnal knowledge of a woman *forcibly* and against her will.”<sup>38</sup> That is,

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typically mirror community beliefs. See RAINE, *supra* note 2, at 224-25 (reporting a 1988 Rhode Island Crisis Center survey of 1,700 sixth- to ninth-grade students of both sexes, in which about half of the respondents said that a woman who walks alone at night in “seductive” clothing is “asking to be raped”). These abuses fall outside the scope of this article, which focuses on substantive rape law and not on pre-trial and trial procedures.

<sup>31</sup>See, e.g., MODEL PENAL CODE § 213.6(4) (1985) (requiring notice to authorities by a rape victim within three months of the offense; with females under the age of 16, requiring notice within three months after a parent or guardian learned of the offense); 2 American Law Institute, MODEL PENAL CODE AND COMMENTARIES, Comment to § 213.6 at 421 (1980) (citing eight jurisdictions with notice requirements).

<sup>32</sup>See, e.g., *State v. Bashaw*, 672 P.2d 48 (Or. 1983).

<sup>33</sup>*Id.* (disapproving of the jury instruction).

<sup>34</sup>E.g., MODEL PENAL CODE § 213.6 (5) (1985).

<sup>35</sup>*Id.*

<sup>36</sup>Although the corroboration requirement did not exist at common law, “its history in American jurisdictions is long and varied.” 2 American Law Institute, MODEL PENAL CODE AND COMMENTARIES, Comment to § 213.6 at 422 (1980).

<sup>37</sup>ROLLIN M. PERKINS & RONALD N. BOYCE, CRIMINAL LAW 197 (3d ed. 1982).

<sup>38</sup>4 SIR WILLIAM BLACKSTONE, COMMENTARIES ON THE LAW OF ENGLAND 210 (1778) (emphasis added).

it was not enough that the woman did not consent to the intercourse; the intercourse had to be forcible.<sup>39</sup>

The force requirement led to an odd and dangerous principle, the resistance requirement. A woman had to physically resist her attacker, often “to the utmost.”<sup>40</sup> If she did not resist sufficiently, a rape conviction would not stand. The only time resistance was not required was when the aggressor used or threatened deadly force. In other words, if the male used moderate force to attempt intercourse, the victim was expected to resist him and, thus, demonstrate to the man (and the jury?) that the intercourse was against her will.<sup>41</sup> The effect of this rule, of course, was to enhance the possibility that the male would escalate his violence to overcome her resistance and, in the process, aggravate the physical injuries to the woman.<sup>42</sup> It is this rule, most of all, that inspired Professor Estrich’s observation that rape law played by “boys’ rules”: “The reasonable woman, it seems, is not a school boy ‘sissy.’ She is a real man.”<sup>43</sup>

A classic example of pre-reform rape law is *State v. Alston*.<sup>44</sup> The complainant, Cottie Brown, lived with Alston in what the court oddly characterized as a relationship in which “consensual sexual relations [at times] involved some violence.”<sup>45</sup> As a result of Alston’s physical abuse of Brown, she occasionally left Alston, only to return. During this period, Brown frequently acceded to Alston’s demands for sexual intercourse, even when she did not want relations. She testified that she would undress without complaint, and lie passively while he had intercourse.

At the time of the alleged rape, Brown was living with her mother. Alston called her to demand that she return to him. Later the next day, he accosted her on a street, put his hand on her, and warned her that he would “fix” her face “so that her mother could see he was not ‘playing’.”<sup>46</sup> He escorted her to a friend’s house, where they had frequently had sex together before, and where she again passively allowed him to have intercourse.

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<sup>39</sup>*State v. Alston*, 312 S.E.2d 470, 475 (N.C. 1984).

<sup>40</sup>*Starr v. State*, 237 N.W. 96, 97 (Wis. 1931).

<sup>41</sup>The resistance requirement also demonstrated that the victim “merited” the law’s protection. See *State v. Rusk*, 424 A.2d 720, 733 (Md. 1981) (Cole, J., dissenting) (requiring the woman to “follow the natural instinct of every proud female to resist, by more than mere words, the violation of her person by a stranger or an unwelcome friend. She must make it plain that she regards such sexual acts as abhorrent and repugnant to her natural sense of pride.”).

<sup>42</sup>See CAROLINE W. HARLOW, U.S. DEP’T OF JUSTICE, FEMALE VICTIMS OF VIOLENT CRIME 11 (1991) (reporting that women who resisted were less likely to be victims of completed rape, but more likely to be injured, than those who took no self-protective measures); but see Michelle J. Anderson, *Reviving Resistance in Rape Law*, 1998 U. ILL. L. REV. 953, 981 (citing various studies, concluding that “[d]espite popular mythology, a woman’s physical resistance to a sexual aggressor decreases her chance of being raped and does not increase her risk for serious bodily injury or death”).

<sup>43</sup>Susan Estrich, *Rape*, 95 YALE L.J. 1087, 1114 (1986).

<sup>44</sup>312 S.E.2d 470 (N.C. 1984).

<sup>45</sup>*Id.* at 471.

<sup>46</sup>*Id.* at 472.

The jury convicted Alston of forcible rape, but the North Carolina Supreme Court reversed his conviction. It held that although Brown did not consent to the intercourse, there was no evidence that Alston used physical force—that is, force likely to cause death or serious bodily injury—to secure intercourse with her, nor did he threaten her with such force.

What about the fact that Alston had abused Brown in the past and threatened that day to “fix” her face? Remarkably, the court discounted all of this. In a wholly unrealistic example of narrow time-framing and psychological naivete, the court stated that Alston’s prior use of force and his “fix your face” threat were “unrelated” to the act of sexual intercourse on that day. To the *Alston* court, it seems, prior acts of force and current threats not directly linked to a demand for sexual intercourse are causally irrelevant; it is as if they do not act upon the psyche of a victim. In the absence of legally recognized force, therefore, Brown had to physically resist Alston, which she did not. In effect, because Brown did not make clear that Alston’s acts were “abhorrent and repugnant to her natural sense of pride,”<sup>47</sup> he was set free.

*Alston* says it all. Under the “old view” of rape, a few exceptions aside,<sup>48</sup> “mere” nonconsensual intercourse did not constitute a crime.<sup>49</sup> The prosecution had to prove either that the male used or threatened to use serious physical force, on the present occasion, for the purpose of securing intercourse, or that the female resisted him to the utmost. Thus, the traditional version of the crime was exceedingly narrow, and the resistance rule arguably enhanced the risk of additional serious harm to the victim. When we include the procedural barriers to conviction, it is evident that rape law needed serious reform.

#### IV. FORCIBLE RAPE: THE CHANGES (SOME GOOD, SOME NOT)

##### A. *Actus Reus*

Substantive rape law *has* changed, much of it for the good, but some of it troubling.<sup>50</sup> The primary change in the law of forcible rape pertains to the concept of

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<sup>47</sup>See *supra* note 41.

<sup>48</sup>I am putting aside so-called statutory rape (sexual intercourse with an underage female). On rare occasion, rape could also be proved on the basis of fraud. See *infra* Part V.

<sup>49</sup>Fornication was a misdemeanor offense in a very few jurisdictions. PERKINS & BOYCE, *supra* note 37, at 455.

<sup>50</sup>On the procedural side, the single most significant change has been the passage in nearly all states of so-called “rape shield” laws. These laws restrict, in varying degrees, the right of defense attorneys to cross-examine complainants and to call witnesses to testify regarding the complainant’s prior sexual behavior and reputation. See Harriett R. Galvin, *Shielding Rape Victims in the State and Federal Courts: A Proposal for the Second Decade*, 70 MINN. L. REV. 763, 905 (1985) (summarizing various models of rape-shield statutes). The proportion of rape victims who report the crime has seemingly increased since the enactment of rape-shield laws and other procedural reforms. Some scholars have hypothesized that this rise in crime reporting is more associated with changes in public attitudes about the crime, inspired by the women’s movement, than is associated with the legal reforms themselves. Bryden & Lengnick, *supra* note 7, at 1378. Other researchers believe that the reforms themselves have prompted the increased willingness of women to report their victimization, at least in acquaintance rapes cases. Cassia C. Spohn & Julie Horney, *The Impact of Rape Reform Law*

force. First, the good news. Some states have abolished the resistance requirement outright.<sup>51</sup> Other states no longer require the woman to resist “to the utmost,” and only demand that her resistance be reasonable under the circumstances.<sup>52</sup> And, even here, the resistance requirement may be less real than it seems. Remember that a woman is not required to resist if the male uses or threatens to use serious force. And, in perhaps the most significant change in judicial attitudes, courts are becoming more realistic in their conception of force.

Consider here *State v. Rusk*.<sup>53</sup> The victim agreed to drive Rusk, whom she had met that evening in a bar, to his rooming house. When they arrived, at night, he tried to convince her to come up to his place. When she refused, he took the keys out of the ignition, and asked “Now will you come up?”<sup>54</sup> She acceded because, as she testified, she was scared being in an unfamiliar area. When they entered his room, he went to the bathroom for a few minutes, but she did not leave or seek help. When he returned, he sat down on the bed, while she sat in a chair. He turned off the lights and began to remove her blouse. She took off her slacks because “her [sic] asked me to do it.”<sup>55</sup> She begged him to let her leave, and she testified that she was scared because of a “look in his eyes.” At one point, she apparently asked him, “If I do what you want, will you let me go without killing me?”<sup>56</sup> He said yes. She also testified that at one point “he put his hands on my throat and started lightly to choke me.”<sup>57</sup> She did not physically resist Rusk.

Now, how do these facts compare to *Alston*?<sup>58</sup> Which presents a stronger case of forcible rape? One substantial fact supports the argument that *Rusk* is the more compelling case of rape. In *Rusk*, we have the light choking, whereas no actual force was used during the commission of the sexual act in *Alston*.<sup>59</sup>

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*on the Processing of Simple and Aggravated Rape Cases*, 86 J. CRIM. L. & CRIMINOLOGY 861, 882 (1996).

<sup>51</sup>*E.g.*, 720 ILL. COMP. STAT. ANN. 5/12-17 (West 1993); MICH. COMP. LAWS. Ann § 750.520i (West 1991); MINN. STAT. ANN. § 609.347(2) (West 1987); PA. STAT. ANN. tit. 18 § 3107 (West 1983); *People v. Barnes*, 721 P.2d 110, 120, (Cal. 1986) (interpreting statutory amendments to California’s rape law to mean that “[f]or the first time, the Legislature has assigned the decision as to whether a sexual assault should be resisted to the realm of personal choice”).

<sup>52</sup>Anderson, *supra* note 42, at 964-66; Aya Gruber, *Pink Elephants in the Rape Trial: The Problem of Tort-Type Defenses in the Criminal Law of Rape*, 4 WM. & MARY J. WOMEN & LAW 203, 217 (1997); Mustafa K. Kasubhai, *Destabilizing Power in Rape: Why Consent Theory in Rape Law is Turned On Its Head*, 11 WIS. WOMEN’S L.J. 37, 57-58 n.101 (1996).

<sup>53</sup>406 A.2d 624 (Md. 1979), *rev’d*, 424 A.2d 720 (1981).

<sup>54</sup>406 A.2d at 625.

<sup>55</sup>*Id.* at 626.

<sup>56</sup>*Id.* However, at another point she testified that she asked him only “If I do what you want, will you let me go?” *Id.*

<sup>57</sup>*Id.*

<sup>58</sup>*State v. Alston*, 312 S.E.2d 470 (N.C. 1984); *see also* notes 44-47.

<sup>59</sup>Does the existence of the prior sexual relationship in *Alston*, not present in *Rusk*, make the latter case a stronger one for conviction? It does in one regard. In view of Cottie Brown’s

Virtually everything else strikes me as supporting the claim that *Alston* is the better case for conviction. First, in *Rusk*, the Court of Special Appeals inferentially disparaged the victim when it noted the irrelevant fact that she was “a twenty-one year old mother of a two-year-old son . . . separated from her husband but not yet divorced” who had left her son with her mother to go “bar hopping.”<sup>60</sup> The implicit message is that the victim was “asking for trouble,” a precursor to an unfriendly judicial outcome.<sup>61</sup> Second, there is the history of physical abuse in *Alston*, absent in *Rusk*, that should have counted in measuring the victim’s reasonable fear of Alston.

Third, the physical force in *Rusk* (the “light choke”) could easily have been characterized by an unfriendly court or jury as ambiguous evidence: one person’s light choke is another person’s inartful caress. Fourth, *Rusk*’s victim had the opportunity to leave the apartment; Alston’s victim could not get away.<sup>62</sup> Fifth, in *Alston*, there was an explicit threat of physical harm (“fixing” the victim’s face), whereas *Rusk* involved only an implicit threat (his yes to her question whether he would let her go and not kill her if she acceded). Even this “threat” was ambiguous. It is unclear that his “yes” was intended as a response to a plea not to be killed; it may have been that he was affirming that he would let her go after the sex.<sup>63</sup>

It is hard for me to imagine that the *Alston* court would have upheld a forcible rape conviction in *Rusk*. But, the Court of Appeals in Maryland affirmed the rape conviction. It agreed with the dissent below that a jury could reasonably have found that *Rusk*’s conduct was calculated to create in the victim’s mind “a real apprehension, due to fear, of imminent bodily harm, serious enough to overcome her will to resist.”<sup>64</sup> Thus, the resistance requirement was mooted because the court applied a less strict—a far more realistic—understanding of physical force.

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prior sexual relationship with Alston, the court demanded heightened proof that she did not consent to the alleged rape.

Where as here the victim has engaged in a prior continuing consensual sexual relationship with the defendant . . . the State ordinarily will be able to show the victim’s lack of consent . . . only by evidence of statements or actions by the victim which were clearly communicated to the defendant and which expressly and unequivocally indicated the victim’s withdrawal of any prior consent and lack of consent to the particular act of intercourse.

*Id.* at 475. The court ruled, however, that there *was* sufficient evidence of non-consent. Her case failed for lack of proof of force or resistance.

<sup>60</sup>406 A.2d at 625; *see also id.* at 633 (Wilner, J., dissenting) (criticizing this characterization for its lack of significance).

<sup>61</sup>And, indeed, the Court of Special Appeals overturned *Rusk*’s conviction, despite the sharp criticism of the dissent. The Court of Appeals of Maryland, however, reversed this judgment and affirmed the conviction, “for the fundamental reason so well expressed in the dissenting opinion” below. *State v. Rusk*, 424 A.2d 720, 727 (1981).

<sup>62</sup>The point here is not that this opportunity—the ability to leave the apartment, at night, in an unknown area, and seek help by foot—was a meaningful one, for it was not. The point is that, given the unsympathetic treatment rape complainants have come to expect from juries and courts, the woman’s slight window of opportunity could have been used against her.

<sup>63</sup>The victim provided two different accounts of the question she asked *Rusk*, to which he answered yes. *See supra* note 56.

<sup>64</sup>406 A.2d at 627 (Wilner, J., dissenting).

The *Alston/Rusk* dichotomy cannot be explained on the basis of a trend in rape law. We are dealing here with two different state courts, and the *Rusk* decision actually preceded *Alston* by three years. But, what we see, I think, is emblematic of something like the start of a trend in *Rusk*, and the beginning of the end of the “bad old days” in *Alston*. Indeed, the North Carolina Supreme Court has virtually repudiated its decision in *Alston*.<sup>65</sup> It has since characterized the facts in *Alston* as “unique,”<sup>66</sup> “peculiar,” and perhaps “*sui generis*,”<sup>67</sup> and it has since affirmed forcible rape convictions in more ambiguous circumstances.<sup>68</sup>

A realistic treatment of force, of course, is as it should be. But, a few states are taking rape reform to another, I believe more questionable, level. Consider the *M.T.S.* case.<sup>69</sup> A 17-year-old boy, M.T.S., lived in the same house as C.G., a fifteen-year-old girl, and her parents. On the critical night, the two participated in consensual “kissing and heavy petting.”<sup>70</sup> Ultimately, intercourse occurred in the girl’s bedroom. C.G. testified that M.T.S. had intercourse with her while she was asleep. He claimed an entirely consensual enterprise. The court, as trier of fact, “did not find that C.G. had been sleeping at the time of penetration, but nevertheless found that she had not consented to the actual sexual act.”<sup>71</sup> There was no evidence that M.T.S. threatened C.G. in any manner, nor did she physically resist his actions. Nonetheless, the defendant was convicted of forcible rape, according to a statute that, by its terms, required evidence that the sexual penetration occurred as the result of “physical force or coercion.”

Now, what is wrong with convicting M.T.S.? There is *nothing* wrong with convicting M.T.S. of a crime. If C.G. truly did not consent to the intercourse, as the judge found,<sup>72</sup> she *was* wronged. Her right of sexual autonomy *was* violated. But, let’s put the case in perspective. At an earlier time, in many jurisdictions, if the teenagers’ sexual activities had been brought to the attention of prosecutors, the

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<sup>65</sup>In *State v. Brown*, 420 S.E.2d 147 (N.C. 1992), the state supreme court signaled its wish to bury the decision entirely by citing and quoting from Susan Estrich, *supra* note 43, characterizing it as a “thoughtful article” “which makes strong arguments that the law should treat such conduct [as occurred in *Alston*] as ‘force’ . . . or should abandon the element of force.” *Id.* at 152.

<sup>66</sup>*Id.* at 151.

<sup>67</sup>*Id.* at 150.

<sup>68</sup>In *Brown*, the defendant entered a hospital room in which the victim was sleeping, pulled down her bed clothing, felt her abdomen, touched her genital region, and then inserted his finger in her vagina, and left. The victim awoke when he was feeling her abdomen. Believing that the defendant was a nurse assessing her condition, the patient did not resist. Confronted with a rape statute that did not easily encompass this situation, the court found the requisite force “in pulling back the bedclothing, pulling up the victim’s gown, and pulling her panties aside.” *Id.* at 152.

<sup>69</sup>*New Jersey in re M.T.S.*, 609 A.2d 1266 (N.J. 1992).

<sup>70</sup>*Id.* at 1267.

<sup>71</sup>*Id.* at 1269.

<sup>72</sup>Every year, I poll students on the case. The vast majority of my students, male and female—at Wayne State University, McGeorge, and U.C. Berkeley—believe the boy’s story.

matter would have been handled as a case of statutory rape, and probably treated leniently given the boy's age and lack of criminal record.<sup>73</sup> But, here the prosecutor sought to prove *forcible* rape. This means that C.G.'s behavior—and not her underage status—was critical. What might have been handled through pre-trial bargaining (after all, both sides agreed that intercourse with an underage female occurred, the only viable issue in statutory rape cases), instead resulted in a trial that put C.G. and her family through embarrassing testimony about “heavy petting” and must have made C.G.'s experience with the legal system far more harrowing than it had to be.

But, that is not the worst of it. I return to the statute. It prohibited sexual intercourse brought about by “physical force or coercion.” No coercion was alleged. Instead, the prosecutor argued, and the New Jersey Supreme Court *unanimously* agreed—there was no yang response to the yin—that M.T.S. used physical force to secure the intercourse. But, wait. What *was* the physical force? It was, quite simply, the physical contact inherent in the sexual act itself. In short, *every* act of sexual intercourse in New Jersey—inside and outside of marriage—satisfies the force requirement of forcible rape.<sup>74</sup> What distinguishes a Class A felony, punishable by a term of imprisonment of from 10 to 20 years, from lawful intercourse is the female's consent or lack thereof. The offense is proven, the court said, unless the victim gives “affirmative and freely-given permission . . . to the specific act of penetration.”<sup>75</sup>

Now, what is wrong with this picture?<sup>76</sup> What is wrong, first of all, is that the court effectively redrafted the statute. The New Jersey statute expressly prohibited “physical force” and was silent regarding the element of “non-consent.” After *M.T.S.*, the statute is interpreted as requiring just the act of intercourse itself, in the

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<sup>73</sup>But, maybe not. In *State v. Yanez*, 716 A.2d 759 (R.I. 1998), an 18-year-old male engaged in consensual intercourse with a 13-year-old female whom he had been “dating.” The defendant was not permitted to introduce evidence that he reasonably believed she was 16 years old (the age of consent). He was sentenced to the statutory minimum sentence of 20 years imprisonment, with 18 years suspended and probation. The court also ordered Yanez not to have contact with the female for 20 years, and, as required by law, to register as a convicted sex offender. The state supreme court upheld the conviction over the strong dissent of one Justice, who described the punishment as “uncommonly brutal, harsh, and undeserved . . . that is so out of whack with reality that it is virtually without parallel in any jurisdiction of the United States.” *Id.* at 771-72.

<sup>74</sup>The New Jersey sexual assault statute applies to married couples as well. N.J. STAT. ANN. § 2C:14-2c (West 1995) (“An actor is guilty of sexual assault if he commits an act of sexual penetration *with another person . . .*”) (emphasis added).

<sup>75</sup>*M.T.S.*, 609 A.2d at 1277.

<sup>76</sup>Susan Estrich has written that “if a thief stripped his victim, flattened that victim on the floor, lay down on top, and took the victim's wallet or jewelry, few would pause before concluding forcible robbery.” ESTRICH, *supra* note 3, at 59. In other words, what M.T.S. did to C.G., in fact, *did* constitute “force.” There is a difference, however between Estrich's example and the ordinary act of sexual intercourse. The “thief” wants money and can obtain the money without the use of force. That is why “flattening” the victim converts a thief into a robber: he has done something that is not an inherent feature of the act of unlawfully taking property. But, there is no way to have sexual intercourse without the physical contact that qualifies as force under *M.T.S.*

absence of freely-given permission. Even if this is a good result, it certainly is not what the statute provided. If the New Jersey legislature had intended to punish simple nonconsensual intercourse, it could (and should) have drafted its statute accordingly.<sup>77</sup>

Not only has the court acted as a super-legislature, but by treating sexual intercourse as “force” it invites disproportional punishment. Can there be any doubt that forcible nonconsensual sexual intercourse is a worse harm than *non*forcible, nonconsensual intercourse and, therefore, should be punished more severely? Yet, as interpreted, the New Jersey rape statute treats alike the rapist who jumps out from the bushes with a knife or gun and threatens the victim, the rapist who uses mild physical force to secure intercourse with an unwilling partner, and the teenage boy who has ordinary intercourse after consensual petting, without obtaining permission for the act.<sup>78</sup> We can readily agree—I certainly do—that nonconsensual sexual intercourse is wrong. But, to treat these widely disparate wrongful acts *similarly* is unjust to defendants like M.T.S., invites jury nullification,<sup>79</sup> and trivializes the concept of forcible rape<sup>80</sup> and the harm experienced by victims of the most violent rapes.<sup>81</sup>

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<sup>77</sup>Although it is necessarily a matter of speculation, such legislation might have passed. The New Jersey rape law was the product of reform efforts spurred by “a coalition of feminist groups assisted by the National Organization of Women (NOW) National Task Force on Rape.” *M.T.S.*, 609 A.2d at 1274. The legislature was in a rape reform mood. If my yin-yang analysis is correct, it is unlikely there would have been a strong lobbying force to defend the principle that the criminal law should tolerate nonconsensual sexual intercourse. Of course, if I am wrong, and if there would have been significant public opposition to such a position, this only buttresses the argument in the text that the state supreme court went beyond the scope of the statute and legislative intent.

<sup>78</sup>Compare this to WISC. STAT. ANN. § 940.225 (West 1996), which thoughtfully distinguishes between various types of sexual assault. First degree sexual assault prohibits and punishes aggravated forms of sexual misconduct “with another person without consent of that person by use or threat of use of a dangerous weapon.” § 940.225(1)(b). Second degree sexual assault also encompasses forcible rape, but here the sexual contact or intercourse is obtained nonconsensually and forcibly, but without the use of a dangerous weapon. § 940.225(2)(a). Third degree sexual assault is limited to nonconsensual, nonforcible sexual intercourse. § 940.225(3)(m). Fourth degree sexual assault, a misdemeanor, is reserved for nonconsensual sexual contact short of intercourse. § 940.225(4).

<sup>79</sup>Stephen J. Schulhofer, *Taking Sexual Autonomy Seriously: Rape Law and Beyond*, 11 LAW & PHIL. 35, 58 (1992).

<sup>80</sup>Lynne Henderson has pointed out that “[r]ape denies that you are a *person*, that you *exist*. In contrast, lovemaking affirms your existence, and *undesired* sex, at least does not completely *deny* your personhood.” She warns that “[t]o lose the distinction, however tenuous and unamenable to bright line distinctions it may be, is to trivialize what rape *is* and what it *does* to a woman.” Lynne N. Henderson, *What Makes Rape a Crime?*, 3 BERK. WOM. L.J. 193, 226 (1988).

<sup>81</sup>New Jersey’s sexual assault statute does not include a martial immunity provision. N.J. STAT. ANN. § 2C:14-2c (West 1995). Therefore, from the perspective of the *actus reus* of the offense, the post-*M.T.S.* law now treats the husband who turns over in bed, asks his drowsy wife for intercourse, fails to obtain “affirmative and freely-given permission,” but proceeds anyway, the same as it does the out-of-the-bushes knife-wielding rapist. The husband should not have intercourse in such circumstances, of course, but his actions are not in the same



There is more to be said about *M.T.S.*, as it relates to the meaning of “consent.” There are two ways one might understand this concept. First, “consent” functions to exculpate an actor because, “if the victim concurs in mind and spirit [with the act], [her] interests are not violated by the accused’s” acts.<sup>82</sup> In essence, she is not a victim at all. Alternatively, consent is a defense “if the actor knows of the consent,” because in these circumstances “his conduct is inspired by good motives and his action is not culpable.”<sup>83</sup> I submit that in the context of rape, the first meaning of “consent” applies. After all, “lack of consent” is an *element* of the *actus reus*—indeed, the essence—of the crime of rape.<sup>84</sup> If a female “concurr[s] in mind and spirit” with the act of intercourse, her interest in autonomy has not been violated.<sup>85</sup> The attendant social harm of rape is absent.

Why does this distinction matter? Consider a female who desperately wants to have intercourse with a particular male, but because of a sexually conservative upbringing cannot admit this to him. She allows the male to be intimate with her. She concurs in mind and spirit in the act. Her (indeed, their) pleasure in the sexual act is doubtlessly reduced because she feels too embarrassed to express her true feelings, but she *has* “consented” to the intercourse. Seemingly, no rape has occurred.

But, this same event *could* constitute sexual assault in New Jersey, for *M.T.S.* provides that every act of sexual intercourse is forcible rape in the absence of “affirmative and freely-given *permission*.” The permission does not need to be a

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league with the knife-wielder. The point here is not that I believe that there is a genuine risk of prosecution of husbands who have intercourse in the manner described in the text, for I do not believe this. But, it is no answer to a silly rule that it is so extreme that we can trust prosecutors to use common sense.

<sup>82</sup>George P. Fletcher, *The Right Deed for the Wrong Reason: A Reply to Mr. Robinson*, 23 UCLA L. REV. 293, 300 (1975) (discussing the meaning of “consent” generally).

<sup>83</sup>*Id.*

<sup>84</sup>See RAINE, *supra* note 2, at 202 (“the difference between being a ‘sexual partner’ and a ‘victim of rape’ may be as simple as a three-letter word—*fun*”; even sadomasochistic sex is not rape because “unlike rape it is consensual”); see also *id.* at 210 (“The difference between sex and rape is consent.”).

<sup>85</sup>In *id.* at 163, Nancy Venable Raine, the victim of a three-hour forcible rape by an intruder into her home, eloquently and powerfully described her loss of autonomy this way:

The rapist had violated my most basic human need—my bodyright. By destroying my ability to control my own body, he had made my body an object. I lost a sense of it as the boundary of self, the fundamental and most sacred of all borders. A self without boundaries is like a weak country that has been overrun by a stronger one. Once the borders are violated and the invader is entrenched, inhabitants can do little more than go into hiding and hope for outside aid. [Only] [t]ouch that respects bodyright is healing; it restores the autonomy and authenticity of the self.

Ms. Raine further described the harm of her rape, *id.* at 206-07:

The most personal part of being raped had less to do with what happened to my body for three hours . . . , than with what happened to my spirit. The loss of faith that there is order and continuity in life—that life is meaningful—is the most personal of all losses. . . . To lose faith in life was, for me, the loss of connection with the intangible world—with soul, spirit, anima, essence, vital force, or whatever one chooses to call it. . . .

verbal “yes”—permission may be “inferred either from [physical] acts or statements”<sup>86</sup> at the time of the act—but an omission to object, that is, her *failure* to indicate *disapproval* by resisting in some manner or simply by saying no, is not enough to save the defendant from prosecution. And, the freely-given permission must be “to the specific act of penetration.” Thus, in *M.T.S.*, the teenagers participated in consensual (and, we might assume for current purposes, permitted) heavy petting. But, *M.T.S.* was guilty because he failed to obtain her permission—or, at least lacked a reasonable belief that she granted him permission<sup>87</sup>—to move to a higher degree of sexual intimacy. Thus, under *M.T.S.* and in a few other states,<sup>88</sup> we have gone beyond the no-means-rape proposition to absence-of-yes means forcible rape.<sup>89</sup>

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<sup>86</sup>New Jersey *in re M.T.S.*, 609 A.2d 1266, 1277 (N.J. 1992).

<sup>87</sup>If *M.T.S.* had reasonably, although incorrectly, believed that C.G. had given him permission to have intercourse with her, he would not have been guilty of the offense. *Id.* at 1278 (“The role of the factfinder is to decide . . . whether the defendant’s belief that the alleged victim had freely given affirmative permission was reasonable.”). This is not because the *actus reus* of the rape had not occurred, but rather because he lacked the *mens rea* required for the offense of rape. The current focus of my textual observations, however, relate exclusively to the *actus reus* component of rape—to the critical question of what conduct by a defendant ought to be condemned as social harmful and morally wrongful. The actor’s culpability for that harmful conduct is a separate question considered *infra* in Part IV.B.

<sup>88</sup>See also VT. STAT. ANN. tit. 13, § 3252(a)(1) (1997) (prohibiting nonconsensual intercourse), and § 3251(3) (1998) (defining “consent” as “words or actions by a person indicating a voluntary agreement to engage in the sexual act”); WISC. STAT. ANN. § 940.225(4) (West, 1996) (defining consent as “words or overt actions by a person who is competent to give informed consent indicating a freely given agreement to have sexual intercourse or sexual contact”).

These laws are reminiscent of the 1993 version of the Sexual Offense Policy of Antioch College relating to student behavior, which provided that “[i]f the level of sexual intimacy increases during an interaction (i.e. if two people move from kissing while fully clothed—which is one level—to undressing for direct physical contact, which is another level), the people involved need to express their clear verbal consent before moving to that new level.” David Archard, “*A Nod’s As Good As a Wink*”: *Consent, Convention, and Reasonable Belief*, 3 LEGAL THEORY 273, 288 n.23 (1997) (quoting the policy). The Antioch rules, however, required that permission be verbal, whereas the rape laws here allow for implied permission.

<sup>89</sup>Of course, if the female silently wanted intercourse (but failed to give permission in some form), she is not likely to bring the matter to the attention of authorities. But, there are some cases in which “consensual” but “unpermitted” sexual intimacy might be brought to a prosecutor’s attention. The *M.T.S.* case could be just such an example, in which angry parents may have brought the matter to the attention of the police or prosecutor. Second, if the female does not give permission for intercourse because sexual intimacy is embarrassing to her or because such conduct violates the values of her upbringing (as was hypothesized in the text), the female might later feel guilty about her activities and, post hoc, object to the intimacy. Third, a female might feel, after the fact, that the male took advantage of her in some way, and bring charges.

The risk of prosecution in most of these cases admittedly is small. As noted in the text *supra* following note 73, *M.T.S.* will invite embarrassing testimony likely to deter females from reporting the offense; and such a case is ripe for jury nullification if stiff penalties are attached. However, this only demonstrates the lack of wisdom of the rule as it relates to a charge *forcible* rape, and does not strike me as a reason to retain it.

Let's look at this more carefully. We need to pause to see where we are going, because it is here that I believe matters become murky. Let's start with the proposition that "no means no." This has become a mantra of the rape reform movement, and it is an excellent one. It is a clear and proper message.<sup>90</sup> Any person who has sexual contact with a person who does not want it has violated the latter's sexual autonomy and, therefore, had wronged that individual. But, that only begins, it does not end, the analysis.

The first issue is whether intercourse following a "no" should constitute a crime. Not all wrongs are sufficiently egregious to justify the criminal (as distinguished from a civil) sanction. There is no *a priori* method for drawing the line between civil and criminal wrongdoing, and my purpose here is simply to suggest that we should *always* be asking this question—should we criminalize?—regarding *all* forms of wrongdoing, and not simply *assuming* that the criminal law is the only, first, or best forum for condemning wrongful conduct. For me, however, I have no difficulty saying—it isn't a close issue—that a person who has nonforcible intercourse following a "no"—*however that "no" is expressed, whether in words or conduct*—has wronged that individual in a serious manner and (*mens rea* issues aside for now) deserves to be treated as a criminal.<sup>91</sup> But, that being said, his conduct should constitute a lesser degree of rape than forcible intercourse, or even be considered a lesser sexual offense than rape, in a thoughtful reformed system.<sup>92</sup>

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<sup>90</sup>Women, as well as men, need to learn this message. According to some studies, a significant number of females sometimes say "no" when, in fact, they do *not* want the male to desist from his efforts to obtain intercourse. *E.g.*, Charlene L. Muehlenhard & Lisa C. Hollabaugh, *Do Women Sometimes Say No When They Mean Yes? The Prevalence and Correlates of Token Resistance To Sex*, 54 J. PERSON & SOC. PSYCHOL. 872, 874 (1988) (39% of female undergraduates at Texas A&M University reported saying no to intercourse although they "had every intention to and were willing to engage in sexual intercourse."). Any mixed message arising in such circumstances can lend credence to a male's claim of reasonable belief, which can trigger a *mens rea* claim on his part. *See infra* part IV.B.

<sup>91</sup>Even here, however, bright lines do not work as well in determining guilt as they do in setting cultural expectations. Schulhofer, *supra* note 79, at 42. After all, what does "no" mean in romantic or sexual circumstances? The answer is fact-dependent. A "no" expressed by a female to a male whom she barely knows is likely to have a different meaning than a "no" from a female already in a loving and intimate relationship with the male. One "no" may mean, "cut it out and leave me alone *permanently*, you jerk" whereas another one might mean, "maybe let's have intercourse, but not now, let's slow down." It would be better if the female were to explain her "no," but it is unrealistic to expect such precision in such circumstances.

Another issue not resolved by the no-means-no principle is what the male is supposed to do after the "no" (other than not to proceed immediately to intercourse). May the male continue his sexual overtures, albeit more slowly, in order to convince the female to change her mind, or does there have to be some cooling-off period? *Id.* at 42-44 (discussing the difficulties of resolving this issue).

<sup>92</sup>Professor Stephen Schulhofer has urged that the law of sexual abuse . . . be organized around two separate offenses, or more precisely two distinct groups of offenses, with one or two degrees of each. "Rape" should reach intercourse by force, in the sense of actual or threatened physical violence. A new offense, "sexual abuse" or "sexual misconduct," would reach nonviolent interference with freedom of choice.

*Id.* at 67.

But, *M.T.S.* does not say, simply, “no means no.” It says that the *actus reus* of forcible rape occurs in the absence of a “yes” in words or action. This distinction will not matter, of course, in the great majority of circumstances. Nearly always, it may be assumed, an unwilling female will make her wishes known by resisting verbally or physically, and a willing one will demonstrate by words and actions that she encourages the intimacy. But, the Supreme Court of New Jersey meant to take the law beyond the no-means-rape position, or else it would simply have held that nonconsensual intercourse constitutes rape; it felt it constituted good public policy to require the male to obtain affirmative permission to proceed, at the threat of a forcible rape conviction if he does not. So, I want to consider this proposition.

It is certainly *wiser* for a male to obtain permission rather than to rely on a female’s lack of objection as grounds for proceeding. We would be better off if the culture taught boys that permission is required before having sexual contact with a female, *and* if girls were taught to make their wishes known—yes or no—plainly and truthfully to males.<sup>93</sup> But, should we go so far as to treat the act of sexual intercourse, performed *nonforcibly* with an adult female in full control of her faculties,<sup>94</sup> as rape for want of a “yes,” when the female could as easily have said “no”? Again, the issue is not whether it would be *better* for the male to wait for a yes—of course, it would be—but the issue is whether we should *automatically criminalize* “no affirmative permission” conduct and, if we should, whether we should treat it as a major felony.

There are practical reasons for us to rethink the leap from no-means-no to absence-of-yes-means-no rape. First, as *M.T.S.* itself demonstrates, this rule hardly makes life easier for the complainant at the criminal trial. In the absence of a straightforward “yes” or “no,” the parties will have to explicitly describe the sexual events of the evening, right down to every minute and embarrassing detail. The issue will not be whether the male threatened to hurt the female, punched her, or threw her down on the ground, nor will the evidence focus on her screams, cries for help, or her efforts to push him off of her, all of which demonstrate lack of consent. Such testimony is traumatic to a crime victim—it is traumatic for *any* victim of *any* crime to be required to replay the events in the non-therapeutic atmosphere of a criminal trial—but testimony by the woman about how she resisted the male is far less embarrassing than the type of testimony we can expect to see in the new *M.T.S.* world, where the male will testify to every nuance in the female’s behavior, all for the purpose of showing that the complainant gave permission, if not in words then in action. In a world in which no-means-no, the affirmative rejection by the female ends the analysis, at least in so far as proof of the *actus reus* is concerned.<sup>95</sup> Therefore, I am not sure *M.T.S.* is a step forward for female witnesses in rape law.

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The Model Penal Code, as well, has reorganized the sex offenses by including a lesser crime than rape, which it terms “gross sexual imposition.” MODEL PENAL CODE § 213.1(2) (1985).

<sup>93</sup>This does not always occur. See *supra* note 90.

<sup>94</sup>Thus, of course, I am putting aside here the rape of an adult female who is asleep or otherwise unconscious, mentally disordered, or severely intoxicated.

<sup>95</sup>See RAINE, *supra* note 2, at 214 (defining “forced sexual contact” as “a woman saying no and a man not taking her at her word”).

But, there is more. When a female says “no,” she is an active and equal participant in the story. She has made her wishes known. If the male proceeds against her expressed wishes, his actions justify condemnation. But, in the case of a female who says nothing—perhaps, as in *M.T.S.*, the parties are involved in heavy petting or some romantic interlude and the male nonforcibly, but unilaterally, proceeds to a greater degree of sexual intimacy—is not the female also responsible for what occurs? This is not to hearken back to a physical resistance requirement; this is simply to say that verbal resistance is resistance.<sup>96</sup> As Vivian Berger has written “overprotection risks enfeebling instead of empowering women.”<sup>97</sup> Men should be taught in our culture to seek permission; but women should also be taught in our culture to express their wishes, whether it is to invite or reject sexual contact.

Reformers sometimes suggest that a woman should not be required to say “no” in order for the sexual act to constitute a crime, just as a theft victim is not required by the law to resist or otherwise object to the taking of her property in order for the latter to constitute a crime. Many feminists reason that to require a “no” in the rape context, but not in the theft case, is to place property rights on a higher plane than sexual autonomy.<sup>98</sup>

This is a fair observation, but we should not oversimplify the problem. Consider the case of a person who leaves his car unlocked and keys in the ignition in a high-crime area where, inevitably and foreseeably, it is stolen. It is theft, of course, even without a “no” from the owner. Consider now a member of a college fraternity who has sexual relations with a co-ed who is asleep or, perhaps, too intoxicated to know what is going on. The law, quite properly, treats the male’s actions as rape, in the absence of a “no” and very likely even if there is a heavily intoxicated “yes.”<sup>99</sup> The male is properly punished for taking advantage of the female’s vulnerability—her lack of opportunity to meaningfully object—even if the victim was responsible for her own vulnerability in the intoxication scenario.

But, what if a car owner stands by as another person walks up to the car, looks at the owner, smiles, and slowly gets into the unlocked car and turns the key sitting in the ignition, and drives away. Theft? Yes, if the car owner did not want the vehicle taken. The absence of a “no” does not, in itself, constitute consent. But, if the person who takes the vehicle is a close friend or relative of the owner, a jury *might* (although, it need not) infer from the owner’s absence of resistance or verbal objection that the taking was *not* against her will, although the taker cannot point to any affirmative act that demonstrates permission.<sup>100</sup> Under such circumstances, the taking should *not* constitute theft.

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<sup>96</sup>Rusk v. State, 406 A.2d 624, 634 (1979) (Wilner, J., dissenting).

<sup>97</sup>Vivian Berger, *Not So Simple Rape*, 7 CRIM. JUST. ETHICS (Winter/Spring 1988), at 69, 76.

<sup>98</sup>Not all feminists agree with the rape-theft analogy. Some say that it “wildly misdescribes the experience of rape,” which is more analogous to murder than to a property crime. West, *supra* note 14, at 1448.

<sup>99</sup>*E.g.*, CAL. PEN. CODE § 261(a)(3)-(4) (West Supp. 1999).

<sup>100</sup>Alternatively, the taker might reasonably believe he has consent in such circumstances, which would raise a *mens rea* claim.

Shift now to a “sexual taking.” There are two important differences between a property taking and sexual one. First, sexual autonomy is a more valuable and important right than the right to retain one’s automobile. This suggests two conflicting points: a culpable violation of another’s sexual autonomy deserves far greater punishment than a property taking; but, society may have a right to expect people to take greater care to protect what is more valuable, namely, their autonomy. Therefore, it does not seem unfair as a matter of social policy to expect a simple “no” in words or conduct, when another person, in unthreatening circumstances, indicates a desire to be sexually intimate.

The second difference is that, unlike a car taking or, say, a bone breaking, which mentally healthy people rarely want to occur, sexual contact ordinarily is a pleasurable event that humans generally seek rather than avoid. Therefore, it is not grossly unreasonable to expect the parties to make their wishes evident in sexual affairs. When the woman, in nonforcible nonthreatening circumstances—as in *M.T.S.* where the parties were already participating in mutually desired heavy petting—does not object *in any manner* to the other person’s overtures for intercourse, it strikes me that we should be hesitant to treat the male’s actions as a major felony.

Again, let me emphasize what I am saying, and what I am not saying, because the lines are very thin here. With forcible rape, the law *should* focus on the male’s conduct—on the force or threats of physical harm. As long as the concept of force is a realistic one, nothing more should be necessary to prove the *actus reus* of the offense. Physical resistance should not be required.

When we shift to nonforcible cases (that is, to cases in which the only force is the inherent touching that sexual intercourse itself involves), the issue, quite simply, should be whether the intercourse was consensual or nonconsensual. Nonconsensual intercourse *should* be an offense, although a lesser one than intercourse obtained forcibly. In determining whether the female consented to the sexual intimacy, the bright-line rule that “no (in words or actions) means no” is a good one.<sup>101</sup> The more difficult question is how to deal with the situation in which a mentally alert adult female fails to object in any manner, when she has the opportunity to do so. The bottom line ultimately is the same: did the female want the intimacy to occur at this time or not? The law should be prepared to answer this question in the negative, *even in the absence of a “no,”* if the objective circumstances suggest beyond a reasonable doubt that she did not desire sexual intimacy, notwithstanding her silence. For example, there may be evidence that the woman froze up in fright, although the man did not threaten her in any manner. But, proof of affirmative permission should not be required in order for the male to avoid conviction. The burden should be on the Government to prove her lack of consent despite her silence, rather than to require the defendant, as a practical matter, to prove that she gave permission. The message, “no means no” is an excellent reform measure; “absence of no means no” is not.

This leaves us with one other issue that I only wish to note briefly here. If we are going to punish nonconsensual sexual contact, even when there is no physical force or threatened force intimated, then we must look with more care than in the past at what constitutes “voluntary” consent or, in *M.T.S.*, “freely given” permission. It is

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<sup>101</sup>But see *supra* note 91.

easy to determine that permission or consent is coerced if the man has a knife, uses his fists, or threatens physical injury, but what now? We necessarily return to the question of the female's role in the situation.

The hypotheticals are endless. If an employer offers a job to an applicant in exchange for sex, is this "lack of freely given permission"? Does it matter whether the applicant could easily have found another job of equal value? Or, suppose that a female with few employment skills and a couple of children from a previous marriage lives with a male in his home. Suppose that after some months, he threatens to end the relationship—effectively kick her and the children out on the street—unless she has sexual relations more often than in the past, or unless she agrees to specific forms of sexual contact that she finds distasteful. If she consents rather than being evicted, is this coerced or freely-given?<sup>102</sup>

These are no easy answers to what constitutes duress. Although courts sometimes suggest otherwise,<sup>103</sup> the law does not *really* treat coercion as an empirical matter: we do not *really* seek to determine what is undeterminable, namely, whether a particular person's "free will" (whatever that is) was overborne. The real issue is normative: What degree of fortitude do we have a right to expect from ordinary human beings when they are confronted—as we all are in our daily lives—by hard decisions, by great temptations, and by lawful and unlawful pressures?<sup>104</sup>

The best approach, I submit here, is to apply the Model Penal Code concept of "gross sexual imposition," that is, a person is guilty of an offense if the other party submits to the sexual act by "any threat that would prevent resistance by a woman of ordinary resolution."<sup>105</sup> Only threats, and not temptations, should constitute a potential criminal offense. But, this offense (a lesser crime than rape) encompasses—as it should—non-physical threats, such as threats of economic harm. If such a non-physical threat is made, the woman is—and should be—required to resist the male (although the "resistance" should only require a simple "no") unless the threat is one that would cause a woman of ordinary fortitude to accede without resistance.<sup>106</sup> Ultimately, the matter should be left to the good sense of a jury.

#### B. *Mens Rea*

It is a fundamental principle of the criminal law—"no provincial or transient notion"<sup>107</sup>—that we do not send people to prison and stigmatize them as serious wrongdoers in the absence of culpability for their actions. No matter how serious the harm caused, the general rule is that a person is not guilty of a criminal offense in the

<sup>102</sup>This hypothetical is inspired by Schulhofer, *supra* note 79, at 84-88.

<sup>103</sup>*E.g.*, *Spano v. New York*, 360 U.S. 315, 323 (1959) (in police interrogation context, concluding that "petitioner's will was overborne" by the police tactics).

<sup>104</sup>Joshua Dressler, *Exegesis of the Law of Duress: Justifying the Excuse and Searching For Its Proper Limits*, 62 S. CAL. L. REV. 1331, 1365-66 (1989).

<sup>105</sup>MODEL PENAL CODE § 213.1(2)(a) (1985).

<sup>106</sup>Approximately 20 jurisdictions now prohibit non-physical forms of coercion used to secure sexual relations. Patricia J. Falk, *Rape By Fraud and Rape by Coercion*, 64 BROOK. L. REV. 1, 119 (1998).

<sup>107</sup>*Morissette v. United States*, 342 U.S. 246, 250 (1952).

absence of *mens rea*.<sup>108</sup> Imagine for a moment that you are driving safely on the highway, under an overpass, when a piece of the bridge crumbles, strikes your windshield, and causes you to lose control of your car. As a consequence, your car strikes and kills another. You are likely to feel awful about what happened, and in criminal law terms, you have committed the *actus reus* of criminal homicide. That is, you have caused precisely the type of harm that the criminal law wishes to prevent, the death of another human being. But, of course, you are guilty of no crime. You did not kill the pedestrian intentionally, or even recklessly or negligently.

Increasingly, we are forgetting—or, at least, at risk of forgetting—this basic culpability principle in the context of rape. In one sense, this is understandable. The female who is the victim of undesired sexual contact is initially apt to feel just as violated, whether the male knew he was acting against her will or, at the other extreme, was understandably clueless.<sup>109</sup> The harm to her, after all, is the same.<sup>110</sup> But, of course, the harm to the dead person on the highway in the imagined overpass accident is the same whether you killed *him* purposely or innocently—nonetheless, the law will exculpate you for the death assuming non-culpability in causing the harm. Unfortunately, as obvious as this seems, some people find the notion of a *mens rea* requirement in the rape context silly. The principle that a male should not be convicted of rape if he reasonably (but incorrectly) believed that the female consented has been trivialized (or distorted) to mean that “a woman [was] raped but not by a rapist”?<sup>111</sup>

Before rape law reform, the issue of *mens rea* rarely arose in rape trials. As a practical matter, the *actus reus* proved the *mens rea*. If a male used or threatened force to obtain intercourse, then it was evident that he purposely or knowingly had

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<sup>108</sup>See DRESSLER, *supra* note 23, at § 10.01.

<sup>109</sup>I have added the word “initially.” According to Holmes, “[e]ven a dog distinguishes between being stumbled over and being kicked.” OLIVER W. HOLMES, *THE COMMON LAW* 3 (1881). One may question the accuracy of Holmes’s observation of dogs. With humans, however, it is a fairly common experience that we *do* draw a distinction between being *harmed* and being *wronged*, by which I mean here that if I am harmed in some way, I am likely to feel more victimized if I learn that the party causing the harm wanted me to be hurt—he chose to violate my rights—than if the injury occurred unintentionally. And, I will not feel *wronged* (only *harmed*) if the injury occurred in an entirely nonculpable manner.

Nonetheless, the initial reaction of most humans to a human-caused injury is anger—to assume that the harmdoer acted intentionally. Our feelings are only assuaged when we learn that the victimizer acted innocently. In this sense, Holmes’s canine observation may be accurate. A dog, too, may snarl at the moment of the stumble/kick, but, at least my dog instantly “forgives” me if the “kick” is followed by a demonstration on my part of my warm feelings and love for him. This is the dog equivalent, perhaps, to the defendant’s statement, “I didn’t mean to do it.”

<sup>110</sup>But not the wrongdoing. *See id.*

<sup>111</sup>MacKinnon, *supra* note 5, at 654. This is like saying that the victim in the highway accident “was murdered, but not by a murderer.” Of course, this is wrong from the law’s perspective. The word “murder” is a legal conclusion. The correct statement is that the person “was killed [or was the victim of a homicide] but not by a murderer.” Similarly, the woman in the rape case is the victim of unwanted intercourse, but not necessarily by a rapist. She is a victim of harm, but the harmdoer is not necessarily a criminal.



nonconsensual sexual relations. If his conduct was not forcible, the female had to resist, and this gave the male reasonable warning of her lack of consent: if he proceeded against her resistance, a jury could reasonably assume that he knew she did not want sexual relations. At a minimum, the resistance meant that the male acted recklessly or negligently in regard to her wishes. Thus, there was always some form of culpability proven.

With the abandonment or softening of the resistance requirement and the increased willingness of lawmakers to permit prosecutions for nonforcible forms of nonconsensual intercourse—an appropriate change, as I have suggested—the risk of conviction in the absence of *mens rea* is enhanced. A person who sincerely believes that his partner has consented to sexual intimacy should not be convicted of rape if his belief was one that a reasonable person in the same circumstances might hold. And, indeed, this has been the traditional rule for “general intent” offenses, such as rape.<sup>112</sup>

It is too early to know where rape law is going in regard to *mens rea*, but there are some distressing signs. One concern I have is that courts may abandon altogether the requirement of *mens rea* in the rape context. Recently, the Supreme Judicial Council of Massachusetts, an historically liberal court, and thus one that might be expected to honor the requirement of culpability, held that even a reasonable (but incorrect) belief as to a female's consent, is not a defense in a rape prosecution.<sup>113</sup> Thus, even if a reasonable person in the actor's situation would have believed that the female was consenting, the male is guilty of rape, although the victim did not physically or verbally resist his overtures, and although he did not use or threaten to use any force. It would be as if you were convicted as a murderer for killing accidentally when the bridgework crumbled.

An appellate court in Massachusetts explained that the no-defense rule was “in harmony with the analogous rule that a defendant in a statutory rape case is not entitled to an instruction that a reasonable mistake as to the victim's age is a defense.”<sup>114</sup> But, it is only in harmony if one ignores the basic point that statutory rape is *a grave exception to the general rule that mens rea matters*. Wisely or not, most (although not all<sup>115</sup>) jurisdictions treat statutory rape as an exceptional strict liability offense, in order to protect young females from the effects of their own decisions. Ordinary rape, however, has not been viewed as strict liability in character.<sup>116</sup> There is simply no more principled basis for dispensing with the *mens rea* requirement in rape cases than there is in regard to any other serious crime.

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<sup>112</sup>DRESSLER, *supra* note 23, at 138.

<sup>113</sup>Commonwealth v. Ascolillo, 541 N.E.2d 570, 575 (Mass. 1989).

<sup>114</sup>Commonwealth v. Simcock, 575 N.E.2d 1137, 1142 (Mass. 1991).

<sup>115</sup>*E.g.*, State v. Guest, 583 P.2d 836 (Alaska 1978) (a reasonable mistake of fact as to the female's age is a defense to statutory rape); People v. Hernandez, 393 P.2d 673 (Cal. 1964) (same); MODEL PENAL CODE § 213.6 (1) (1985) (permitting a defense of mistake of age, except where the child is under 10 years of age).

<sup>116</sup>Indeed, a few courts, *e.g.*, Director of Public Prosecutions v. Morgan, [1976] App.Cas. 182, and the Model Penal Code treat rape as if it were what the common law characterizes as a “specific intent crime.” Thus, under Code § 213.1(1), a person is not guilty of rape unless he purposely, knowingly, or recklessly compelled the female to have intercourse. And, under § 2.04(1), a person is not guilty of an offense if his mistake of fact (here, the female's lack of

Massachusetts, of course, is just one state. I do not mean to cry wolf here, but certain other judicial decisions suggest that courts might be prepared to erode, if not abolish, the *mens rea* requirement. Even if a person is entitled to be acquitted on the ground of a reasonable mistake of fact, courts might impose special rules regarding mistake claims in rape prosecutions that would effectively strip the defendant of the claim. For example, consider Justice Frederick Brown's remarks in *Commonwealth v. Lefkowitz*:<sup>117</sup>

The essence of the offense of rape is lack of consent on the part of the victim. I am prepared to say that when a woman says "no" to someone any implication other than a manifestation of non-consent that might arise in that person's psyche is legally irrelevant, and thus no defense. Any further action is unwarranted and the person proceeds at his peril. In effect, he assumes the risk. In 1985, I find no social utility in establishing a rule defining non-consensual intercourse on the basis of the subjective (and quite likely wishful) view of the more aggressive player in the sexual encounter.<sup>118</sup>

In short, if a female says no (I assume he means in words or actions) to intercourse, not only does this prove the *actus reus* of the offense, but it automatically proves the *mens rea*. If the defendant asserts a mistake claim, Justice Brown would consider the mistake unreasonable *as a matter of law*. Thus, the issue would not go to the jury.

"No means no" is an excellent rule to teach men (and women) in our culture. And, it is an excellent starting point—initial premise—in rape trials. But, bright-line rules such as this can only result, at best, in the correct outcome *most* of the time. Such rules do not assure justice to the individual whose case might not fit the bright-line assumptions. As troubling as it is to acknowledge, no does *not* always—in one hundred percent of the cases—mean no in sexual relations, even today.<sup>119</sup> If no does not always mean no, there can surely be cases in which a reasonable person could *believe* that no does not mean no in the specific incident, *even when it does*. Such cases will be relatively few in number, but it is improper to convict a person on the basis of the law of averages. It is wrong to use the bludgeon of the criminal law to impose rules intended to change cultural attitudes when this means punishing an individual for rape who made a mistake that the community, represented by the jurors, would characterize as reasonable. If the mistake was, indeed,

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consent) negatives the element of purpose, knowledge, or recklessness. Thus, under some circumstances, even an *unreasonable* mistake of fact is a defense in a Code jurisdiction, since such a mistake might only prove that the male was negligent, and not reckless, in his belief. The Code, however, was adopted in 1962, well before commencement of the trends I am discussing here.

<sup>117</sup>481 N.E.2d 227, 232 (Mass. 1985) (Brown, J., concurring).

<sup>118</sup>In *R v. Esau*, 148 D.L.R.4th 662 (1997), one Justice on the Supreme Court of Canada took an even more hardened position by stating that "[a]n accused who infers consent from passivity without more makes a dishonest, irresponsible inference." *Id.* at 686 (McLachlin, J., dissenting).

<sup>119</sup>*See supra* note 90.

unreasonable<sup>120</sup>—or if the jurors don't believe the defendant's claim that he was mistaken—they can convict on the facts. The jury should not be deprived of the issue of *mens rea* through bright-line rules. Each case should be considered on its own merits.

The last sentence brings us to another way courts may improperly take the *mens rea* issue away from the jury. Various courts, led by the California Supreme Court, now provide that a “reasonable belief as to consent” jury instruction should not be given unless there is “substantial evidence of equivocal conduct” on the part of the female “that would have led a defendant to reasonably and in good faith believe consent existed where it did not.”<sup>121</sup> On its face, this rule makes sense; on closer inspection, the equivocality rule is illogical and potentially unfair.<sup>122</sup>

Let us start with *People v. Mayberry*,<sup>123</sup> the case in which the California Supreme Court first held that a defendant's reasonable belief regarding consent was a “defense”<sup>124</sup> in rape prosecutions. In order to see how far rape law has changed—how the California Supreme Court has virtually shut the door on mistake claims in forcible rape prosecutions<sup>125</sup>—it is necessary to look at the facts of that case with some specificity.

In *Mayberry*, the complainant testified that the defendant, a stranger, grabbed her by the arm on the street. According to her, she dug her fingernails into him, after which he angrily kicked her, struck her with a bottle, and yelled obscenities at her. She went into a nearby store but the defendant followed her in. She found nobody to help her. Out of fear and confusion, she accompanied the defendant outside the store, where they remained for about 20 minutes. She testified that he threateningly demanded sex, struck her with his fist when she refused to go with him, and warned her he would “knock every tooth out of [her] mouth,” if she did not cooperate.<sup>126</sup> In order “to buy time” she asked permission to go to another store and buy cigarettes;

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<sup>120</sup>For example, in *Commonwealth v. Berkowitz*, 609 A.2d 1338, (Pa. 1992), *aff'd*, 641 A.2d 1161 (Pa. 1994), the complainant testified that she said “no” in a scolding manner when the defendant made sexual advances, whereas the defendant claimed that her “no's” were “moaned passionately.” *Id.* at 1341. It is possible, of course, that the defendant knew full well that she was not consenting. It is also possible that the defendant heard what he wanted to hear. The jury should make that determination.

<sup>121</sup>*People v. Williams*, 841 P.2d 961 (Cal. 1992); *see also* *Regina v. Park*, [1995] 2 S.C.R. 836, 838 (a jury instruction on mistake will not be given unless the claim of mistake has an “air of reality”).

<sup>122</sup>By far the most thorough critique of the equivocality doctrine is found in Rosanna Cavallaro, *A Big Mistake: Eroding the Defense of Mistake of Fact About Consent in Rape*, 86 J. CRIM. L. & CRIMINOLOGY 815 (1996).

<sup>123</sup>542 P.2d 1337 (Cal. 1975).

<sup>124</sup>The word “defense” is in quotations, because the ultimate issue really is whether the defendant possessed the requisite *mens rea* to be convicted of rape. *See infra* the text accompanying notes 148-53.

<sup>125</sup>*Williams*, 841 P.2d at 973 (Kennard, J., concurring) (stating that under the new rule announced in the instant case, it will “indeed [be] a rare case” in which the evidence would support a jury finding of “reasonable mistake” in a rape prosecution).

<sup>126</sup>542 P.2d at 1340.

he agreed, but when she entered with him she felt “completely beaten” and did not seek help from the clerk. Outside she said she “put on an act” and tried “to fool” the defendant by engaging in conversation while sitting on a curb.<sup>127</sup> But he seized her elbow, took her to his apartment, barricaded the door, and after 15 minutes of conversation, engaged in intercourse with her, at times striking her. In stark contrast to this testimony, Mayberry testified that he and complainant met and engaged in conversation, that he went with her to purchase cigarettes, and then the two went without protest or force to his apartment where nonviolent intercourse occurred.<sup>128</sup>

Thus, there was an “evidentiary chasm”<sup>129</sup>: her description of the facts suggested forcible, nonconsensual rape; the defendant claimed “mutuality and consent.”<sup>130</sup> Based on the conflicting testimony, the *Mayberry* court held that the defendant was entitled to an instruction on reasonable mistake-of-fact. That is, the jury could believe his story of consent, and acquit on that ground. *But it could also believe her claims of force and, thus, lack of consent*, and yet the defendant was still entitled to an instruction that he should be acquitted if the jury believed that he genuinely thought that she consented and that this belief was reasonable.

Now, of course, based on the appellate court’s summary of the facts, it is hard to believe that a jury would buy the defendant’s claim of reasonable mistake. It is indeed unlikely that it would find that the defendant even *subjectively* believed she consented. But, that is a matter ordinarily left to the jury to decide. The issue here is much narrower: Is the defendant entitled to an *instruction* that will *permit* the jury to *consider* his lack-of-*mens rea* claim. He was entitled, according to *Mayberry*.<sup>131</sup>

But, seventeen years later, the California Supreme Court reversed directions in *People v. Williams*.<sup>132</sup> As in *Mayberry*, *Williams* involved sharply conflicting testimony. The complainant lived in a homeless shelter. The defendant, a volunteer and resident of the shelter, befriended the complainant and, after spending the morning walking with her and engaging in conversation, offered to take her elsewhere to watch television. She agreed, because she “thought they were going to ‘his friends or something.’”<sup>133</sup> She went with him to a building where he rang a buzzer and was admitted. Inside, she observed the defendant rent a room and ask a clerk for a sheet. At this point, according to the complainant’s testimony, she realized they were in a hotel. They went into the room he rented. She observed no television. He sat on the bed and asked her to join him. She refused and suggested that he get his money back and leave. She went to the door to let herself out, but he stopped her. He hollered at her that he “didn’t spend \$20.00 for nothing.”<sup>134</sup> She testified that he then punched her in the left eye, ordered her onto the bed, and when she refused, pushed her down on it, got on top of her, and engaged in intercourse.

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<sup>127</sup>*Id.* at 1341.

<sup>128</sup>*Id.*

<sup>129</sup>Cavallaro, *supra* note 122, at 824.

<sup>130</sup>*Id.*

<sup>131</sup>542 P.2d at 1346.

<sup>132</sup>841 P.2d 961 (1992).

<sup>133</sup>*Id.* at 963.

<sup>134</sup>*Id.*

The defendant's testimony was similar up to the point they entered the hotel room. He said that he did not want or expect to have sex with her, but that inside the room she kissed and hugged him and removed her clothing. He testified that he suffered from diabetes and, as a result, was nearly impotent. Therefore, he testified, she rubbed his penis for 15 minutes and then assisted him in inserting his penis inside her. After the intercourse, he said, she demanded money, and when he refused, she threatened to "fix" him.<sup>135</sup>

The prosecutor and defense both requested a *Mayberry* reasonable belief instruction, but the trial judge refused. The California Supreme Court agreed with the trial court. It held that a *Mayberry* defense has two components, the first of which is the defendant's subjective but mistaken belief that the victim consented. The court stated that the defendant's burden in this regard could only be satisfied by evidence "of the victim's equivocal conduct on the basis of which [the defendant] erroneously believed there was consent."<sup>136</sup> Second,

the defendant must satisfy the objective component, which asks whether the defendant's mistake regarding consent was reasonable under the circumstances. Thus, regardless of how strongly a defendant may subjectively believe a person has consented to sexual intercourse, that belief must be formed under circumstances society will tolerate as reasonable in order . . . [to] give rise to a *Mayberry* instruction.<sup>137</sup>

The California Supreme Court stated that the evidence here involved "wholly divergent accounts" of what occurred—a fully consensual act versus one of force—and there was "no middle ground from which Williams could argue he reasonably misinterpreted" the complainant's conduct.<sup>138</sup>

If there was no equivocal conduct in *Williams*, where was it in *Mayberry*? One can read *Mayberry* for the proposition that no equivocal conduct is necessary to raise a *mens rea* claim. That is, a jury is not required to accept in whole either the defendant's or the complainant's testimony; it may choose to patch together aspects of both versions of the events in a way that makes it possible for it to find that the defendant *believed*, although incorrectly, that the victim consented. And, it is for the jury to decide whether this belief was reasonable.

But, there is language in *Mayberry* that might explain and distinguish *Williams*. In *Mayberry*, after the court ruled that a jury instruction was necessary in the case, it stated that "[i]n addition, part of [the complainant's] testimony furnishes support for the requested instructions. It appears from her testimony that her behavior was equivocal."<sup>139</sup> The equivocal conduct, according to the court, was her conversation on the curb when she put "on her act," and her "admitted failure physically to resist him" at various stages in the process. Such behavior, the court suggested, "might have misled [the defendant] as to whether she was consenting."<sup>140</sup>

<sup>135</sup>*Id.* at 964.

<sup>136</sup>*Id.* at 965.

<sup>137</sup>*Williams*, 841 P.2d at 965.

<sup>138</sup>*Id.* at 966.

<sup>139</sup>*People v. Mayberry*, 542 P.2d 1337, 1346 (1975).

<sup>140</sup>*Id.*

But, surely, this is not equivocal conduct. Some of the asserted “conduct” consists of omissions—failure to resist. And, more importantly, how could a defendant interpret the victim’s conversation with him as implying her consent, in light of the force he used before and after? If this *does* represent equivocal conduct, then surely it existed in *Williams*, given the victim’s conceded willingness to go with him to the hotel room. *Williams*’s jury perhaps would have agreed with Ann Landers’s comment that “the woman who ‘repairs to some private place for a few drinks and a little shared affection’ has, by her acceptance of such a cozy invitation, given the man reason to believe she is a candidate for whatever he might have in mind?”<sup>141</sup> The fact that I and many others consider this an outrageous comment is largely beside the point: the issue is not what outcome a reasonable jury *should* reach on the facts, but what outcome it *could* reach. If the *Mayberry* jury was entitled to an instruction, surely so was the jury in *Williams*.<sup>142</sup>

In this regard, consider also the events leading up to boxer Michael Tyson’s rape conviction.<sup>143</sup> The complainant admitted that she went willingly with him to his hotel room. From there the facts diverge. She said she went to the bathroom and when she came out he was in his underwear and that he forcibly had intercourse with her. He testified that they kissed and touched in the limousine on the way to the hotel, and that upstairs they had entirely consensual intercourse. As in *Williams*, the appellate court justified the trial judge’s refusal to give a “mistake” instruction because there was no middle ground in this testimony.<sup>144</sup> The court did not permit the defendant to argue to the jury that it might choose to believe the complainant’s testimony that she did not consent to intercourse (the *actus reus* of the offense was committed), but that Tyson could have believed Ann Landers’s spin on such conduct.

Of course, the answer to all of this may be that cases such as *Mayberry*, on the one hand, and *Tyson* and *Williams*, on the other hand, are indistinguishable, and that the latter decisions are rightly decided. This is a plausible response, and even one to which I am sympathetic. But, let me suggest some reasons why we should not be overly quick to accept *Williams*. First, *Williams* puts the defendant in the strange position that the stronger the case of consent, the less likely the defendant is entitled to a *Mayberry* instruction. According to Justice Mosk, who concurred in *Williams*, the rule of that case

lead[s] to untenable results. It would effectively prohibit the defendant to attempt to raise a reasonable doubt about the intent element of rape unless he concedes the no-consent element. In other words, to offer the defense he would have to take the position that he was *mistaken* about the

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<sup>141</sup>Ann Landers, *BOSTON GLOBE*, July 29, 1985, at 9 (*quoted in* SUSAN ESTRICH, *REAL RAPE* 100 (1987)).

<sup>142</sup>Even the prosecutor in *Williams* requested a jury instruction on mistake, which is some indication that the State believed that *Mayberry* applied.

<sup>143</sup>*Tyson v. State*, 619 N.E.2d 276 (Ind. Ct. App. 1993), *aff’d in part, rev’d in part*, 626 N.E.2d 482 (Ind. Ct. App. 1993), *habeas corpus denied*, *Tyson v. Trigg*, 883 F.Supp. 1213 (S.D. Ind. 1994), *aff’d*, 50 F.3d 436 (7th Cir. 1995).

<sup>144</sup>*Tyson v. Trigg*, 50 F.3d at 448; *see also* *Tyson v. State*, 619 N.E.2d at 295.

complainant's consent—and thereby admit, at least by implication, that the complainant did not in fact consent. That is illogical. . . .

But, . . . “consent” and “mistaken belief in consent” are simply not at issue. “Consent” and “reasonable and honest belief in consent” *are*. And they are compatible.<sup>145</sup>

Mosk's point is that what we commonly call a “mistake” instruction is really a “reasonable belief” instruction. That is, if the defendant reasonably believes the female consented, he is not guilty of the offense, *whether or not that belief is accurate*. The *Williams* rule, “virtually bar[s] the jury from entertaining a reasonable doubt about the intent element until it resolves the no-consent element in the People's favor.”<sup>146</sup> There is no reason why a jury should not be permitted to rule for the defendant on the basis of lack-of-*mens rea*, without first deciding whether the *actus reus* was committed. Yet, *Williams* precludes this, by characterizing the *mens rea* issue as a “mistake about consent” claim, rather than a “belief about consent” claim.

*Williams* is also wrong in treating the “substantial equivocal conduct” requirement as determinative of the subjective prong of the “reasonable belief” requirement. There is no reason why a judge (in determining whether a *Mayberry* instruction to the jury should be given) should look exclusively at the *female's* conduct to determine if it is sufficiently equivocal to justify a defendant's assertion that *he believed* that she consented. The male's belief that the female has consented to intercourse may be a *correct* belief (in which case the *actus reus* of the offense, as well, did not occur) or an *incorrect* one (the *actus reus* did occur). An incorrect belief may be reasonable—one that an ordinary and reasonable person might possess—or the belief may be irrational, unreasonable, stupid, or down right bizarre. But, a belief is a belief. If the defendant claims that he believed that the woman consented, it is up to the jury to decide whether, in fact, the defendant possessed that belief or instead is committing perjury.

The real issue should be whether the defendant's belief is *reasonable*. That is, if *Williams* is rightly decided, it is because we believe that there is *no* way a reasonable jury could find that *Williams's* subjective belief was *objectively* reasonable. But, this point needs to be placed in perspective. A defendant has a constitutional right to trial by *jury*; when a *judge* decides that there is no way that a jury could find a particular fact to exist based on the evidence introduced and, therefore, refuses to instruct the jury on that issue, the judge substitutes herself for the jury as factfinder. In order to avoid a constitutional violation, courts have set a very low evidentiary standard in regard to criminal law defenses. For example, when a self-defense theory is raised, even minimally, by the evidence, a defendant is entitled to have the jury instructed on that theory “regardless of whether such evidence is strong or weak, unimpeached or contradicted.”<sup>147</sup> *Williams* seems in conflict with this principle.

But, the problem with *Williams* is more serious than the prior example suggests. Self-defense—my example above—is an affirmative defense. That is, a defendant

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<sup>145</sup>People v. Williams, 841 P.2d 961, 970-71 (Cal. 1992).

<sup>146</sup>*Id.* at 970.

<sup>147</sup>*See* Hayes v. State, 728 S.W.2d 804, 807 (Tex. Crim. App. 1987).

who seeks to prove self-defense does not, by making such a claim, deny the fact that he possessed the *mens rea* of the offense, e.g., the intent to kill or cause bodily injury. He seeks to justify that intent on self-protection grounds. In contrast, a rape defendant who claims that he believed that the victim consented to intercourse is arguing that *he lacks the mens rea of the offense*. That is, a mistake-of-fact claim in a rape prosecution constitutes a failure-of-proof claim<sup>148</sup>—a claim that the prosecution has not, in fact, proven beyond a reasonable doubt *one of the essential elements of the offense, the defendant's culpability*.

Why should this distinction matter? The reason is that the Constitution requires the prosecutor to prove every element of an offense beyond a reasonable doubt,<sup>149</sup> but the Constitution does not compel the State to carry the burden of persuasion regarding defenses to crimes.<sup>150</sup> As a result of this distinction, a trial judge does not need to instruct the jury *on a defense* unless the defendant produces "more than a scintilla" of evidence, "slight evidence," "some credible evidence" or "evidence sufficient to raise a reasonable doubt" in regard to the defense.<sup>151</sup>

But, no matter how compelling and even uncontradicted the prosecutor's case is in regard to the elements of the crime, a trial judge may *not* direct a verdict for conviction,<sup>152</sup> but *must* let the jury determine for itself whether the prosecution has satisfied its constitutional burden of proof. I would argue from this that, as a matter of fair play, although apparently not constitutional edict,<sup>153</sup> courts should hesitate long and hard before they ease the Government's constitutional burden of proof regarding the element of *mens rea* by refusing to instruct the jury in regard to a defendant's "reasonable belief" claim. Let juries convict men who claim mistake in implausible cases; but be very, very slow to deny defendants the *opportunity* to have their theory of the case heard by juries. And, surely, the standard for determining when a "reasonable belief" (or "mistake") instruction is required should be no harsher in rape cases than in other criminal prosecutions.

#### V. RAPE BY FRAUD

I have stated that intercourse obtained by nonphysical threat should be an offense, although a lesser one than the forcible variety.<sup>154</sup> But, how should the law deal with consent obtained by fraud? The traditional rule is that consent obtained by fraud-in-the-factum—when the defrauded party does not know that she has consented to intercourse—is a nullity, whereas fraud-in-the-inducement—when the defrauded party knows that she has consented to intercourse, but was induced to do

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<sup>148</sup>1 PAUL H. ROBINSON, CRIMINAL LAW DEFENSES § 22 (1984).

<sup>149</sup>*In re Winship*, 397 U.S. 358, 364 (1970).

<sup>150</sup>*Patterson v. New York*, 432 U.S. 197, 207-08 (1977).

<sup>151</sup>ROBINSON, *supra* note 148, at 35-36. Put differently, the defendant has the burden of *production* in regard to defenses; unless the defendant satisfies that burden (by meeting one of the standards set out in the text), the defense is not properly before the jury.

<sup>152</sup>*Sullivan v. Louisiana*, 508 U.S. 275 (1993).

<sup>153</sup>See *Montana v. Egelhoff*, 518 U.S. 37, 54 (1996) (upholding as constitutional "a burden-reducing, rather than burden-shifting" statute).

<sup>154</sup>See *supra* text accompanying notes 105-06.



so by deceit—does not vitiate the consent.<sup>155</sup> Thus, a female who agrees to insertion of a surgical instrument in her vagina by her male doctor, is the victim of rape if the doctor has intercourse with her instead,<sup>156</sup> but a female who agrees to intercourse on the fraudulently induced belief that it will cure her of a disease has not been raped.<sup>157</sup>

I have purposely juxtaposed the medical examples to show how odd the traditional rule seems to be. Why should one form of fraud negate consent, but not the other? The rule seems even more objectionable when one realizes that in the case of common law larceny, *either* form of fraud used to obtain possession of another's property ordinarily constitutes a "trespassory taking;"<sup>158</sup> whether the offense is characterized as larceny or larceny by trick, the fraud is criminal. So why not with rape?<sup>159</sup>

Generally speaking, but *only* generally speaking, the law of rape should not differ from larceny law in regard to fraud. A person's right to sexual autonomy is surely violated when consent is granted as the result of material misrepresentations, and the harm in such cases may even smack of misappropriation, as in theft.<sup>160</sup> But, we should not move too quickly to the rule that *all* forms of fraud are equal, because they are not.

Securing sexual relations by fraud in the factum is a serious wrong. The victim's body is used by the perpetrator for sexual gratification without giving the victim the opportunity to consent to intercourse. There is no qualitative difference between this and sexual intercourse with an unconscious female, which is often prohibited by statute.<sup>161</sup> And, the defendant's culpability is great, since he purposely manipulated the victim. He can make no serious claim of reasonable, or even unreasonable, mistake of fact.

In contrast, the woman who is fraudulently *induced* to have intercourse has not been wronged as seriously as the fraud-in-the-factum victim, because she has made a choice, albeit a misinformed one. A male who fraudulently induces a female to have intercourse has committed a moral wrong. But, as always, the question that must be asked is: Is his conduct serious enough to justify the criminal sanction? And, if it is, does it justify the level of punishment accorded to forcible rape or, for that matter, fraud-in-the-factum rape?

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<sup>155</sup>DRESSLER, *supra* note 23, at § 33.04[C].

<sup>156</sup>PERKINS & BOYCE, *supra* note 37, at 215 (and cases cited therein).

<sup>157</sup>*Boro v. Superior Court*, 210 Cal.Rptr. 122 (1985); *Moran v. People*, 25 Mich. 356 (1872).

<sup>158</sup>*See Pear's Case*, 2 East P.C. 685 (1779).

<sup>159</sup>Rape is not the only offense in which the inducement/factum distinction is drawn. It is drawn with non-sexual offenses in which "without consent" is an express element of the crime. For example, if A fraudulently induces B to loan her his car, she is *not* guilty of the offense of "operating a motor vehicle without the consent of the owner." *People v. Cook*, 39 Cal.Rptr. 802, 806 (Cal. Dist. Ct. App. 1964).

<sup>160</sup>*See* Donald A. Dripps, *Beyond Rape: An Essay on the Difference Between the Presence of Force and the Absence of Consent*, 92 COLUM. L. REV. 1780, 1799-1805 (1992). Some feminists understandably object to the misappropriation characterization. *See supra* note 98.

<sup>161</sup>*E.g.*, CAL. PEN. CODE § 261(4) (West Supp. 1998).

Although there is no self-evident answer, I would assert that a male who exploits a female's naivete in order to secure sexual relations is acting in a manner wrongful enough to justify the community's sanction.<sup>162</sup> But, once one agrees that fraud-in-the-inducement vitiates consent in rape cases, we are left with a line-drawing issue. If all cases of such fraud vitiate consent, then rape occurs in such disparate cases as the doctor who falsely convinces his patient that she has a disease that is best treated by intercourse with him,<sup>163</sup> to the male who falsely claims to be a Hollywood producer and promises to get Actress an audition for a major role in a movie if she sleeps with him, to the male who falsely claims to be Greedy Monica, the object of his sexual desires, that he is a millionaire, and thereby induces her to believe that her sexual compliance will result in marriage and a wealthy future.

In each of these examples, the male has acted wrongly. He has exploited the victim for his own sexual purposes. But, the wrongdoing here is not as serious as forcible rape, in which bodily integrity is also at stake, or of fraud-in-the-factum rape, in which the victim has made no decision to have intercourse. Indeed, we would be guilty of seriously trivializing the harm suffered in those other rape cases if we were to characterize Actress and Greedy Monica as "rape" victims.

Depending on the facts, Actress and Greedy Monica may justly be held partially responsible for their own plight. They evinced false interest in the men in order to further their own interests. Each party was manipulating the other. What do we do, for example, if Actress, through no fault of the male, believed the man was a producer, feigned sexual interest in him, only after which the man took the opportunity to play Producer to the hilt? The cases of Actress and Greedy Monica strike me as petty criminal conduct, *at most*. They do not deserve to be equated to forcible intercourse, intercourse coerced by serious economic threats, fraud-in-the-factum rape, or intercourse induced by a promise to cure a serious disease. In short, not only does fraud-in-the-inducement justify less punishment than the other forms of sexual misconduct, but fraudulently induced intercourse varies in seriousness on a case-by-case basis.

I am tentatively persuaded that the fraud-in-the-inducement cases ought to constitute a crime. If a person is guilty of a theft crime when he "purposely obtain[s] property of another by deception,"<sup>164</sup> I am persuaded that sex by deception justifies

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<sup>162</sup>Some judges have treated the plight of female victims of fraud with derision. *E.g.*, *People v. Evans*, 379 N.Y.S.2d 912, 915, 922 (N.Y. Sup. Ct. 1975) (in which a "glib" New York City "predatory" male took advantage of a "twenty-year-old petite, attractive" and "unworldly" college student in order to secure intercourse by fraud; noting that seduction was not an offense, and while condemning the defendant's conduct, the judge went on to write:

So bachelors, and other men on the make, fear not. It is still not illegal to feed a girl a line, to continue the attempt, not to take no for a final answer, at least not the first time. But there comes a point at which one must desist. It is not criminal conduct for a male . . . to assure any trusting female that, as in the ancient fairy tale, the ugly frog is really the handsome prince. Every man is free, under the law, to be a gentleman or a cad. . . .)

<sup>163</sup>*Boro*, 210 Cal.Rptr. at 122. *Boro* has overtones of wrongdoing independent of the fraud. The doctor has violated the special trust that inheres in the doctor-patient relationship. Also, the victim presumably has experienced unnecessary fear that she will suffer pain or death if she does not undergo the prescribed treatment.

<sup>164</sup>MODEL PENAL CODE § 223.3 (1985).

the criminal sanction, although lawmakers should treat it as a *significantly* less serious offense than other forms of sexual misconduct.<sup>165</sup> And, truth be told, I would hope that prosecutors would use their substantial discretion to pick and choose only the worst cases of deception for prosecution. If prosecutors become too aggressive in this arena, they are more likely to inspire jury nullification than to deter predatory conduct by males.

## VI. CONCLUSION

California Supreme Court Chief Justice Roger Traynor once observed that “[t]he law will never be built in a day, and with luck it will never be finished.”<sup>166</sup> His words are an excellent reminder to us all. We should never treat any legal reform effort as complete. We should always be looking to see where we are, how we got there, and where we appear to be going. My purpose in this article has been to ask those questions in the context of rape law.

In evaluating rape reform, I have tried to be fair-minded and balanced in my observations. I have suggested areas in which the law should go further to protect against sexual misconduct, but I have also expressed my belief that rape law reform threatens to move in undesirable directions. In particular, I have argued that there is a risk that courts will follow the lead of a few jurisdictions and unrealistically expand the concept of “force” in rape cases, that we should not take the “absence-of-yes-means-no” path in criminal law enforcement, and that we should be careful not to eviscerate the *mens rea* requirement in rape prosecutions.

Since I believe that rape reform has not gone far enough in certain regards, why have I chosen to emphasize the areas where I fear we might go *too* far? The answer, I guess, has something to do with my tendency to want to intellectually swim upstream. I have few doubts that advocates for broad expansion of rape law will continue to be heard in the academy and most legal circles. I fear, however, that our righteous condemnation of rape might chill constructive debate regarding the proper direction of future rape law reform. This article is my scholarly effort, I guess, to call for a little more yin and yang in rape law reform.

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<sup>165</sup>I was unwilling to fully accept the rape/theft equation earlier, *see supra* text accompanying notes 99-101, because intercourse is not itself a social harm; in the absence of force or other misconduct by the male, I believe that the female has as much responsibility to let her wishes be known as the male has a responsibility to learn what her wishes are. In the case of fraud, however, the requisite misconduct is present.

<sup>166</sup>Roger Traynor, *La Rude Vita, La Dolce Giustizia; or Hard Cases Can Make Good Law*, 29 U. CHI. L. REV. 223, 236 (1962).