New York State of Mind: Rape and Mens Rea

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INTRODUCTION

At 8:30 p.m. on November 22, 1996, Oliver Jovanovic, a Columbia University graduate student and a Barnard undergraduate student ("Jane") finally met face-to-face after a few months of conversing on-line and through e-mails. Their conversations were quite personal and graphic, delving into the world of sadomasochism ("S/M") and snuff films. Oliver called Jane at 3 a.m. on November 22nd, and they spoke for approximately four hours. After Oliver invited Jane to see a movie with him that night, Jane gave Oliver the address of her J.D. Candidate, June 2003, St. John's University School of Law; M.S., Aug. 2000, Dowling College; B.A., Jan. 1997, Binghamton University.

2 Id. at 160. Snuff films are films in which a person is killed. Id. Their first encounter began when Jane received an "instant message" from Oliver. From the start their conversations became intimate as the two realized their common interests. Id. at 159–60. They both had an interest in the grotesque, the bizarre, and in snuff films, and Jane expressed an interest in making such a film herself. Id. Jane graphically described how her love interest, Luke, was raped when he was a young boy: "[S]o young man took young boy (like) [sic] to empty hotel room, tied him to bed, straddled his ass, knife to throat, no protection, come in all the way and make it good... made it good." Id. at 163–64. Jane explained that this made her perk up because she was thinking about a plot for a snuff film. Id. at 164. Jane went on to explain that Luke was a sadomasochist and she was his slave: "[I]ts [sic] painful, but the fun of telling my friends 'hey I'm a sadomasochist' more than outweighs the torment." Id. at 164. When Oliver expressed an interest in the world of S/M, Jane added: "I'm what those happy pain fiends at the Vault call a 'pushy bottom.'" Id. The court explained that a "pushy bottom" is a submissive partner who pushes the dominant partner to inflict greater pain." Id. at n.4.

3 Id. at 161.
dormitory. On the evening of the 22nd, they met for dinner and then went to Oliver's apartment to watch a movie. At his apartment, Oliver gave Jane some tea, which she found to have a chemical taste, then they looked at a book of photographs depicting corpses placed in grotesque poses, and watched a sexually violent video. After talking about various topics, Oliver and Jane engaged in S/M activities, which included Oliver tying Jane to a futon frame, pouring hot wax on her, and sodomizing her.

Jane left Oliver's apartment on the evening of November 23rd and returned to her dormitory where she fell asleep, showered, and then went to Luke's apartment. She told Luke that she had been tied up, sodomized, and burned by Oliver. On Sunday, November 24th, Jane received an e-mail sent by Oliver informing her that she had left her gold chain at his apartment. The next day Jane responded that she was "'purged by emotions, and pain,' and that she was 'quite bruised mentally and physically, but never been so happy to be alive.'" They continued communicating over the Internet later that day. Oliver claimed that the encounter was consensual; Jane insisted she was an unwilling participant.
On August 15, 1973, three members of the Royal Air Force of England accompanied William Anthony Morgan, a superior officer, back to his house to have sex with his wife. On the ride to Morgan's house, Morgan provided the men with contraceptives and told them that while his wife was "kinky" and needed to resist and struggle during intercourse to get "turned on," she would welcome sexual intercourse with them. When the four men arrived at the Morgan home, Mrs. Morgan was sleeping in a room with her eleven-year-old son. Mrs. Morgan was awoken, dragged into another room, and while the men took turns holding her limbs, they had sexual intercourse with her. From the moment Mrs. Morgan was forced out of bed, she screamed for her sons to call the police. She only stopped when the defendants covered her face, pinched her nose, and she could no longer breathe. Mrs. Morgan went directly to a hospital and told the staff she was raped. After the defendants were arrested, they gave statements to the police, corroborating Mrs. Morgan's story. At trial, however, the defendants claimed that although there was some degree of force at the beginning of the encounter, Mrs. Morgan became an active participant when they took her to the second room.
One of the purposes underlying the laws surrounding sexual offenses is the fact that people treasure their sexual autonomy. This includes the right to engage in any type of sexual relationship, as well as the right to refrain from sexual contact. While the crime of rape touches upon one of the most precious rights known to a human, the law surrounding the offense is unsettled. Each state's statutory definition of rape varies considerably, but typically it is a crime to forcibly compel, either by threat or physical force, an unwilling participant to have sexual intercourse. The law not only differs significantly from state to state, but it is quite unsettled within the states, resulting in decisions that do not clearly delineate the parameters of the offense.

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New York separates its sex offenses into degrees.\textsuperscript{21} Rape in the first degree is governed by New York Penal Law section 130.35.\textsuperscript{22} It is apparent from reading the New York statute that the actus reus\textsuperscript{23} element is forcible compulsion, however, no mens rea\textsuperscript{24} element appears in the statute. While there is much written about the forcible compulsion component of the statute,\textsuperscript{25} 

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Barnes, 721 P.2d 110, 123–24 (Cal. 1986). The court did not examine the defendant's beliefs but focused exclusively on the fact that the victim felt threatened by the defendant's statements and actions, including his “displaying the muscles in his arms,” “lecturing her,” and “look[ing] at her ‘funny.’” \textit{Id.} at 112. These opposing approaches to rape law send mixed messages both to potential victims and to potential defendants.

Two decisions, \textit{People v. Benard}, 360 N.W.2d 204 (Mich. Ct. App. 1984), and \textit{People v. Jansson}, 323 N.W.2d 508 (Mich. Ct. App. 1982), both handed down by the Michigan Court of Appeals only two years apart, demonstrate the confusion that exists concerning rape law even within a single jurisdiction. In \textit{Jansson}, the victim accompanied the defendant, whom she was just introduced to by a mutual friend, to his office so that she could apply for a job. \textit{Jansson}, 323 N.W.2d at 511. Once at his office, the defendant stated that he wanted to have intercourse with her. \textit{Id.} The victim refused, but when the defendant grabbed her, pulled her to the floor, and undressed her, she reluctantly submitted to sexual intercourse because she did not know what else to do. \textit{Id.} The court, interpreting the statute very broadly, upheld a conviction of third-degree criminal sexual conduct based on a showing of force or coercion sufficient to overcome the victim. \textit{Id.} at 513.

In \textit{Benard}, another case of criminal sexual conduct, the Michigan Court of Appeals interpreted the same statute very narrowly. The victim in \textit{Benard} was raped at gunpoint, but the rape was committed by the defendant while his accomplice held the gun. \textit{Benard}, 360 N.W.2d at 205. The court held that the weapon must actually be in the hands of the person committing the sexual act to constitute first-degree criminal sexual conduct. \textit{Id.} The court found itself interpreting different provisions of the same statute contrarily. See SUSAN ESTRICH, REAL RAPE 90 (1987) (noting that the Michigan cases prove that interpretation is the key to rape law).

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\textsuperscript{22} \textit{Id.} § 130.35 (McKinney Supp. 2002). The statute provides: “A person is guilty of rape in the first degree when he or she engages in sexual intercourse with another person: 1. By forcible compulsion . . . .” \textit{Id.}
\textsuperscript{23} See DRESSLER, supra note 19, § 9.01, at 81 (defining actus reus as “a voluntary act . . . that causes . . . social harm”).
\textsuperscript{24} See id. § 10.02[C], at 117 (“[T]he particular mental state provided for in the definition of an offense.”).
\textsuperscript{25} See generally Kit Kinports, \textit{Rape and Force: The Forgotten Mens Rea}, 4 BUFF. CRIM. L. REV. 755, 760 (2001) (expressing surprise that so little attention has been given to the mens rea element since it is generally assumed in criminal law that the mens rea term attaches to every material element of the crime). This neglect of mens rea in rape is not surprising considering that most modern statutes are a codification of the common law offense, which focused on the force requirement and not the defendant’s state of mind. See generally SCHULHOFER, supra note 16, at 18 (commenting that most American rape statutes are a codification of Blackstone’s definition).
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the issue of mens rea is relatively unexplored and hence, quite unsettled. In 1993, in *People v. Williams*, the New York Court of Appeals stated that although the statute is silent on the issue, "intent is implicitly an element" of the crime. Expounding upon this, the court held that the intent requirement is the "intent to forcibly compel another to engage in intercourse or sodomy." The *Williams* court, however, did not explain its reasoning when it declared that the mens rea for rape is intent, nor has any other court of appeals decision offered any guidance on the issue.

This Note proposes that while a mens rea element written into the statute defining the offense of rape is necessary, there should also be a reasonable mistake of fact defense. The statute should expressly allow the defendant to raise the defense of a reasonable mistake as to the victim's willingness, thereby negating the mens rea. New York courts need to focus their attention on the culpable mental state of the defendant and not on the victim. While it is important to reduce sexual assaults, there are countervailing interests. The rape statute in New York should be designed to produce successful convictions when the defendant had the requisite state of mind to commit the crime, not just when there was force used. In addition, a clear distinction needs to be drawn between the actus reus element, forcible compulsion, and the mens rea element. This Note concludes that the New York statute for rape should be revised to explicitly include a mens rea element of negligence, with an explanation that a reasonable mistake of fact is a defense to the crime.

Part I of this Note traces the evolution of the law of rape from the common law to present day, detailing both statutes and courts' interpretations of such statutes. Part I also provides a detailed look at the history of rape law reform and the application of rape statutes in various jurisdictions. Part II of this note focuses on rape law in New York State. In discussing a

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27 Id. at 736.
28 Id.
29 *See id.* (stating, without elaborating, that "intent is implicitly an element of [rape]").
30 *Dressler, supra* note 19, § 12.01, at 151 (defining a mistake of fact as being "either unaware of, or mistaken about, a fact pertaining to an element of [an] offense"); *see also id.* § 12.02, at 152.
number of important New York cases, Part II explains the current rape statute and how it is applied by courts and explores the problems with the current interpretation of the offense of rape. Part III proposes a revised statute for rape in the first degree, including both mens rea and actus reus elements. Finally, it applies the statute to the factual scenarios set forth at the beginning of this Note and examines the effects of focusing on the defendant's state of mind rather than on the victim's conduct.

I. EVOLUTION OF THE LAW OF RAPE

A. Common Law Definition

At common law, rape was a general intent crime. Criminal responsibility was based on the actus reus performed with a culpable state of mind; no specific mens rea element needed to be shown. Blackstone defined rape as "carnal knowledge of a woman forcibly and against her will." Additional

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31 DRESSLER, supra note 19, § 33.01, at 569. At common law, the distinction between specific intent and general intent carried more meaning than it does today. Id. § 10.06, at 136. Historically, it was common for a statute not to contain a mens rea term. Id. Therefore, "general intent" referred to any offense for which only a blameworthy state of mind was required and "specific intent" was reserved for offenses that expressly required proof of a particular mental state. Id. Today, however, most criminal statutes expressly include a mens rea term rendering the distinction more difficult to express and understand. Id.

Although the distinction between general and specific intent crimes can take on several different meanings depending on the jurisdiction, for the Model Penal Code (MPC) and states that structured their statutes similarly to the MPC, the distinction no longer exists. See id. § 10.07[A], at 137–38. New York follows the MPC's "elemental" approach to mens rea. Thus, a person may not be convicted solely because he acted with a general moral blameworthiness; he must have acted either intentionally, knowingly, recklessly, or with criminal negligence. See N.Y. PENAL LAW § 15.15(1) (McKinney 1998); see also DRESSLER, supra note 19, § 10.07[A], at 138 (noting that the MPC uses the mens rea terms purposely, knowingly, recklessly or negligently). The departure from the common law scheme has rendered the distinction between specific intent and general intent irrelevant. See id. at 136–38.

32 DRESSLER, supra note 19, § 10.06, at 136.

33 4 WILLIAM BLACKSTONE, COMMENTARIES *210. This definition was interpreted to mean that only a woman could be a victim of rape, with the exception that a married woman could not be raped by her husband. SCHULHOFER, supra note 16, at 18. This aspect of the law of rape was based on a seventeenth century notion of consent expressed by British Chief Justice Lord Hale: "by their mutual matrimonial consent and contract the wife hath given up herself in this kind unto her husband, which she cannot retract." 1 SIR MATTHEW HALE, THE HISTORY OF
requirements, that the victim report the incident promptly, corroboration of the victim’s story, and utmost resistance, heightened the proof necessary for a conviction.\textsuperscript{34} Generally, a conviction rested on the last of these requirements: how well the woman conveyed her unwillingness to engage in intercourse.\textsuperscript{35} As a result, force and consent were defined in relation to the resistance offered by the woman, and sufficiency of such resistance was determined by a male judge.\textsuperscript{36} Underlying the

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\textbf{THE PLEAS OF THE CROWN} 629 (P. R. Glazebrooke ed., London Professional Books Ltd. 1971) (1736). Another rationale was found in notions of property. A woman was considered the property of her father and, when she married, the husband took over for the father, thereby inheriting the ownership rights over his wife. See DRESSLER, supra note 19, § 33.03[A] [1], at 573 (noting that based upon the property rationale a husband possessed unlimited rights over his wife, including sexual access). New York was one of the first states to abolish the marital exception. See People v. Liberta, 474 N.E.2d 567, 573 (N.Y. 1984). Further, the current New York statute has also abolished the gender distinction; the victim can be male or female. N.Y. PENAL LAW § 130.35 (McKinney Supp. 2002).

\textsuperscript{34} See SCHULHOFER, supra note 16, at 18–19 (explaining that these strict rules were to guard against false accusations); David P. Bryden, Redefining Rape, 3 BUFF. CRIM. L. REV. 317, 318–19 (2000) (noting that the corroboration requirement and other evidentiary rules reflected male judges’ skepticism towards accusations of rape); see also RICHARD A. POSNER & KATHARINE B. SILBAUGH, A GUIDE TO AMERICA’S SEX LAWS 5–6 (1996) (listing the marital exception, the corroboration requirement, and the utmost resistance requirement as the most criticized aspects of rape law).

\textsuperscript{35} See DRESSLER, supra note 19, § 33.04[C], at 580–82.

\textsuperscript{36} See ESTRICH, supra note 20, at 31–32, 82 (discussing the history of the definition of rape as it was developed in a male dominated field with the “imposition of male standards of conduct”); see also SCHULHOFER, supra note 16, at 19 (noting that the requirement of utmost resistance intensified during the 20th century).

There are a number of cases throughout history that illustrate the distrust embedded in the law surrounding rape, requiring women to resist until the offense is consummated or be thought of as voluntarily consenting. In 1889, the Supreme Court of Nebraska reversed a rape conviction, holding that “[i]f the carnal knowledge was with the voluntary consent of the woman, no matter how tardily given, or how much force had theretofore been employed, it is not rape.” Reynolds v. State, 42 N.W. 903, 903 (Neb. 1889). Over half a century later, Nebraska courts continued to quote the same language and uphold the same principles. See, e.g., Cascio v. State, 25 N.W.2d 897, 900 (Neb. 1947) (reversing a conviction because submission constituted consent “no matter how reluctantly yielded”).

Some of the clearest examples of the traditional male judge viewpoint on this issue come from the state of Wisconsin. In 1880, the judges on the Supreme Court of Wisconsin did not believe that use of a gun was a sufficient threat of personal violence. Whittaker v. State, 7 N.W. 431, 431 (Wis. 1880). Being held down at the hands and feet, the victim screamed for help numerous times. \textit{Id.} The defendant then threatened to use his revolver if she cried for help again, but the woman still tried once more. \textit{Id.} Finally, physically exhausted, she was no longer able to fight and reluctantly gave up. \textit{Id.} While this was more than enough evidence to convince a jury to convict, the Supreme Court of Wisconsin felt differently. \textit{Id.} at 433.
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requirements to prove rape was the general distrust of such accusations.\textsuperscript{37}

B. History of Rape Law Reform

Common law requirements and interpretations had a direct impact on the codification of rape law, thereby continuing the difficulty in obtaining rape convictions.\textsuperscript{38} In the 1950s, however, the American Law Institute (ALI) recognized the low rate of conviction in rape cases and proposed the Model Penal Code (MPC) to deal with the problems associated with rape law.\textsuperscript{39} The ALI identified three major defects\textsuperscript{40} and made the following proposals to rectify each problem: eliminate the resistance requirement; abolish any mention of victim consent; and divide rape into two separate offenses—stranger rape and acquaintance

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\textsuperscript{37} See supra note 20; see also 3A John Henry Wigmore, Evidence in Trials at Common Law § 924(a), at 737 (Chadbourn rev. 1970) (proposing that “no judge should ever let a sex offense charge go to the jury unless the female complainant’s social history and mental makeup have been examined and testified to by a qualified physician”). Wigmore’s distrust of rape complainants stemmed from the view that they suffered from a mental defect and that the real victim was the man. \textit{Id.} at 736.

\textsuperscript{38} See Byrnes, \textit{supra} note 20, at 278 (commenting that the impact of the common law offence of rape on current statutes has exacerbated the problems surrounding modern rape law); see also Commonwealth v. Burke, 105 Mass. 376, 379–80 (1870) (noting that the first rape statute codified in Massachusetts in 1642 retained the description of the common law offense).

\textsuperscript{39} See Schulhofer, \textit{supra} note 16, at 20; see also Christina E. Wells & Erin Elliott Motley, Reinforcing the Myth of the Crazed Rapist: A Feminist Critique of Recent Rape Legislation, 81 B.U. L. Rev. 127, 146 n.80 (2001) (discussing two 1973 studies finding that men had between a two and thirteen percent chance of being convicted of rape).

\textsuperscript{40} The ALI attributed the problems in the law to the resistance requirement, the focus on victim consent, and the inclusion of a number of diverse kinds of misconduct carrying with them severe punishments. See Schulhofer, \textit{supra} note 16, at 20.
rape—with distinct penalty levels. The theory behind the proposals was that if consent was removed as an issue, juries would focus on the actions of the defendant and not the victim. In an attempt to facilitate this, the MPC departed from the common law by eliminating the resistance requirement and making forcible compulsion the main component of the offense.

The MPC provided a framework from which many states structured their statutes, especially adhering to the forcible compulsion component. Thus, despite widespread rape law reforms, the fixation on the actus reus—specifically physical force—continued. Following the lead of the ALI, some states used the forcible compulsion element to minimize the need to show resistance. A majority of states, however, ignored the ALI's proposal to completely eliminate the resistance

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41 See id. at 20–21 (pointing out that the reformers did not diverge from traditional assumptions in that they preserved the prompt complaint and corroboration requirements, but did attempt to make rape prosecutions more effective).

42 Id. at 22.

43 MODEL PENAL CODE § 213.1 (Proposed Official Draft 1962); see SCHULHOFER, supra note 16, at 23 (noting that the MPC implemented the stringent requirement of forcible compulsion but failed to define the term).

44 See SCHULHOFER, supra note 16, at 23 (describing the ALI's influence on rape law reform throughout the country); POSNER & SILBAUGH, supra note 34, at 6 (noting that most states followed the lead of the Michigan statute, the New York statute, or the MPC in reforming their rape statutes).

45 See SCHULHOFER, supra note 16, at 24 (criticizing the ALI's reinforcement of the physical violence requirement to successfully prove rape); POSNER & SILBAUGH, supra note 34, at 6 (concluding that the MPC's emphasis on outward manifestations of nonconsent resembles the common law utmost resistance requirement).

46 See ALA. CODE § 13A-6-61 (2001); ARK. CODE ANN. § 5-14-103 (Michie Supp. 2001); KY. REV. STAT. ANN. § 510.040 (Michie 1999); N.Y. PENAL LAW § 130.35 (McKinney Supp. 2002); OR. REV. STAT. § 163.375 (2001); WASH. REV. CODE ANN. § 9A.44.040 (West 2000). These states defined "forcible compulsion" to be either physical force upon the victim or an express or implied threat of physical force upon the victim, and in some states, upon others. See ALA. CODE § 13A-6-60 (1994); ARK. CODE ANN. § 5-14-101 (Michie Supp. 2001); KY. REV. STAT. ANN. § 510.010 (Michie Supp. 2001); N.Y. PENAL LAW § 130.00 (McKinney Supp. 2002); OR. REV. STAT. § 163.305 (2001); WASH. REV. CODE ANN. § 9A.44.010 (West 2000). Due to the dual meaning of "forcible compulsion," courts did not require victim resistance, especially when it was futile or the victim feared physical injury. See Ayers v. State, 594 So. 2d 719, 720 (Ala. Crim. App. 1991) (holding that the second definition of forcible compulsion—a threat of serious physical injury—did not require the victim to continue resisting); State v. Spencer, 50 S.W.3d 869, 874 (Mo. Ct. App. 2001) (stating, "the law does not require or expect the utmost resistance to sexual assault when it appears that such resistance would be futile or would provoke more serious injury"); State v. Koonce, 731 S.W.2d 431, 439 (Mo. Ct. App. 1987) ("Resistance never comes into play where a threat (constructive force) is employed.").
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requirement and heightened the corroboration and prompt reporting requirements, making it more difficult to obtain rape convictions. In reality, the change was mostly semantic in that judges continued to use resistance to gauge the existence and extent of force. As a result, physical force remained intertwined with the victim's resistance, with a slight shift in case law and statutes in defining sufficient resistance.

48 See id. at 26–27 (noting that the corroboration requirement became so restrictive that in a typical year in the early 1970s in New York, thousands of rape complaints were filed resulting in only eighteen convictions).

Many courts went so far as to require some type of medical corroboration before they would convict. See id. In the 1973 case United States v. Wiley, 492 F.2d 547 (D.C. Cir. 1973), a twelve-year old girl testified that while visiting a friend two men grabbed her by the legs, dragged her into a bedroom, closed the door, put a dresser in front of it, pulled her clothes off, and raped her. As soon as she was freed, she ran out of the apartment, without her coat, and called the police. Id. at 548. Police testified that they observed that the victim was crying, her clothing was disheveled, and she was not wearing a coat on a cold day. Id. at 549. Wiley was convicted of rape and appealed. Id. at 550. Although the court admitted that the police officers' testimony and the prompt report of the incident corroborated the victim's claims, it reversed the conviction because the doctor who examined the victim was not subpoenaed to corroborate the sexual intercourse (the doctor had been subpoenaed on three prior dates set for trial but was on vacation on the fourth date). Id. at 551; see also SCHULHOFER, supra note 16, at 26. This case was decided in what was considered "one of the nation's most progressive courts" at the time. Id.

49 See Bryden, supra note 34, at 358 ("Since the Code's definition of rape clearly requires that the compulsion be by force or a threat of force . . . [and] an acquaintance rapist usually does not employ force unless his victim resists . . . the MPC did not abolish the resistance requirement.").

A typical example of this resistance rationale is found in a 1973 New York case, People v. Hughes, 343 N.Y.S.2d 240 (3d Dep't 1973). The victim testified that she submitted without resisting or crying out because the defendant threatened her with a box cutter. Id. at 241. Subsequently, the victim got the weapon away from the defendant and threw it out the window, but submitted to intercourse again because he pulled her hair, choked her, and told her that he could kill her. Id. Based upon this testimony, the jury convicted the defendant of rape, yet the appellate division reversed. Id. at 242–43. The court focused on the sufficiency of the victim's resistance to satisfy the forcible compulsion requirement, thereby concluding that rape "is not committed unless the woman opposes the man to the utmost limit of her power. The resistance must be genuine and active." Id. at 242.

50 In 1965, New York enacted a rape statute requiring "earnest resistance." SCHULHOFER, supra note 16, at 24. "Forcible compulsion"—the requisite actus reus of first degree rape—was defined as "physical force that overcomes earnest resistance" or threat of "immediate death or serious physical injury." N.Y. PENAL LAW § 130.00(8) (McKinney 1965). To alleviate concerns about the stringent statutory requirement New York revised the statute in a 1977 amendment, defining "earnest resistance" as: "resistance of a type reasonably expected from a person who genuinely refuses to participate in sexual intercourse, deviate sexual intercourse or sexual contact, under all the attendant circumstances. Earnest resistance does not
C. Resistance Remains Rooted in Rape Law

It was apparent that the rape reform spurred by the ALI had not increased rape convictions. In response, a new generation of reformers directed their efforts towards eliminating the restrictive rules of evidence and the resistance requirement.\textsuperscript{51} Scholars, and even some courts, began to recognize that women respond to sexual assault differently—some with "active resistance" and others with a "numbing fear" causing them to "freeze."\textsuperscript{52} Legislators responded by decreasing the utmost resistance requirement to reasonable resistance\textsuperscript{53} or mean utmost resistance." SANFORD H. KADISH & STEPHEN J. SCHULHOFER, CRIMINAL LAW AND ITS PROCESSES 340 (6th ed. 1994).

\textsuperscript{51} See SCHULHOFER, supra note 16, at 25–29 (discussing the work of various scholars whose work throughout the 1970s sought to enlighten society about the plight that faced a victim of rape); Dana Berliner, Note, Rethinking the Reasonable Belief Defense to Rape, 100 YALE L.J. 2687, 2692 (1991) ("Elimination of the physical resistance requirement has been one of the most important goals of rape law reform . . . ").

\textsuperscript{52} People v. Barnes, 721 P.2d 110, 118–19 (Cal. 1986); see DRESSLER, supra note 19, § 33.04[2], at 580–81; Berliner, supra note 51, at 2692. The Barnes court cited a number of studies conducted in the 1970s, indicating that while resistance may be probative in establishing force, its absence is not dispositive of consent. Barnes, 721 P.2d at 118–19. In addition, the court recognized that resistance to sexual assault places the victim at a greater risk of injury. Id. at 119; see also DRESSLER, supra note 19, §33.04[2], at 581 ("S)ubstantial resistance increases the risk of aggravated injury to the female confronting a determined rapist."); cf LINDA BROOKOVER BOURQUE, DEFINING RAPE 53–54 (1989) (reviewing research on prevalence and effects of resistance). But see Michelle J. Anderson, Reviving Resistance in Rape Law, 1998 U. ILL. L. REV. 953, 981 (1999) (rejecting the myth that women who physically resist their attackers are at a greater risk of being raped and seriously injured, because more than four out of five women who protected themselves in a rape attack prevented the rape from being completed); Bryden, supra note 34, at 365–66 (pointing out that the studies concluding that resistance is dangerous are not convincing because stranger rapes are over-represented in such studies).

\textsuperscript{53} See SCHULHOFER, supra note 16, at 30 (noting that the great majority of states softened their resistance requirements considerably); Bryden, supra note 34, at 358–59 (concluding that although most rape statutes do not mention resistance, courts still require more force than is necessary to have intercourse, and therefore, the standard is reasonable resistance). Some examples of such statutes are: DEL. CODE ANN. tit. 11, § 761(h)(1) (2001), which requires reasonable resistance under the circumstances to communicate nonconsent; IDAHO CODE § 18-6101(3) (Michie Supp. 2002), which states, “Where she resists but her resistance is overcome by force or violence . . . ”; LA. REV. STAT. ANN. §§ 14:42, 14:42.1 (West Supp. 2002), which provides that aggravated rape requires utmost resistance but forcible rape requires only force or threats of physical violence that make resistance useless; and WASH. REV. CODE ANN. § 9A.44.010 (West Supp. 2002), which explains that forcible compulsion requires physical force that overcomes resistance.
eliminating it altogether.\(^{54}\) In addition, rape shield laws were enacted, which protected a rape victim by limiting the scope of admissible evidence regarding a victim's past sexual history.\(^{55}\) Despite these accomplishments, judges continued to use resistance as a yardstick in evaluating force,\(^{56}\) preventing many
rapes from meeting the threshold requirements necessary to sustain a conviction.\textsuperscript{57} While the legislatures changed the wording of the statutes, they could not change societal attitudes concerning rape.

Two cases decided in the 1980s, \textit{State v. Alston}\textsuperscript{58} and \textit{State v. Rusk},\textsuperscript{59} illustrate the prevalence of the traditional resistance rationale despite statutory reforms. In \textit{Rusk}, the victim, Pat, was at a Baltimore bar with a friend, Terry, when she met the defendant. Rusk asked Pat for a ride to his apartment as she was getting ready to leave. Thinking that Terry knew Rusk, Pat agreed but cautioned Rusk that this was just a ride home, "as a friend" and not to be thought of as anything more.\textsuperscript{60} When they arrived, Pat declined Rusk's invitation to come inside twice. He then reached over, turned off the ignition, and took her car keys.\textsuperscript{61} Completely unfamiliar with the area, Pat testified that she followed Rusk up to his apartment out of fear.

Once inside the apartment, Rusk told Pat to sit down, which she did. After some conversation,\textsuperscript{62} Rusk pulled Pat by the arms to the bed and began to undress her. At Rusk's request, Pat

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  \item \textsuperscript{57} SCHULHOFER, \textit{supra} note 16, at 32–33.
  \item \textsuperscript{58} 312 S.E.2d 470 (N.C. 1984).
  \item \textsuperscript{59} 424 A.2d 720 (Md. 1981).
  \item \textsuperscript{60} Id. at 721.
  \item \textsuperscript{61} Id. Rusk then walked to Pat's side of the car, opened the door and said, "Now, will you come up?" \textit{Id}.
  \item \textsuperscript{62} Id. at 722. After Rusk talked for a few minutes, he left the room for one to five minutes. \textit{Id}. Pat sat there without making a noise and made no attempt to leave. \textit{Id}. When he returned, Pat asked if she could leave, but Rusk, still holding her car keys, told her that he wanted her to stay. \textit{Id}.
\end{itemize}
finished undressing herself and Rusk. Pat begged Rusk to let her leave, but he continued to refuse. Pat testified that she was scared and asked: "If I do what you want, will you let me go without killing me?" 63 At that point she started to cry and he put his hands on her throat and lightly choked her. Again she asked, "If I do what you want, will you let me go?" 64 Rusk replied that he would. Rusk and Pat had oral sex and vaginal intercourse. Afterwards Rusk allowed Pat to leave. 65

Although the Maryland Court of Appeals reinstated a conviction of second degree rape, 66 it was a four-to-three decision, which rested on the actual force used by Rusk when he lightly choked Pat. 67 A strongly worded dissenting opinion, however, clearly illustrates that attitudes did not change as much as reformers would have liked: "She must follow the natural instinct of every proud female to resist, by more than mere words, the violation of her person by a stranger or an unwelcome friend." 68

In Alston, the North Carolina Supreme Court set aside a rape conviction, reasoning that while there was "unequivocal" evidence of non-consent, the victim did not resist physically, and the defendant did not specifically threaten her at the moment of intercourse. 69 Alston and the victim, Cottie, had been involved in a consensual sexual, yet abusive, relationship for six months. About a month after Cottie left Alston, 70 he went to Cottie's school to speak with her. 71 After blocking Cottie's path, Alston asked her where she was living, but she refused to tell him. He then grabbed her arm and they walked towards the parking lot. Cottie told Alston that if he would let her go she would walk with

63 Id.
64 Id.
65 Id.
66 A jury had found Rusk guilty of second degree rape, but the court of special appeals, sitting en banc, reversed. Id. at 720–21.
67 Id. at 728.
68 Id. at 733 (Cole, J., dissenting). But see Bryden, supra note 34, at 361 (questioning the merit of discussing Rusk since in the end the conviction was reinstated). Between the trial court, court of special appeals, and the Maryland Court of Appeals, twenty-one judges considered this case. See Estrich, supra note 54, at 1112–13. Of the twenty-one judges, ten voted to convict Rusk and eleven to acquit. Id. at 1113.
70 Cottie eventually left Alston after he hit her for refusing to give him money. Id. at 471.
71 Id. at 471–72.
him, which he did. Cottie testified that she did not run because she was afraid of him. As they walked, Alston threatened to “fix” Cottie’s face and told her that she was going to miss class that day. They walked to the house of Alston’s friend. Once they were inside, Alston asked if she was ready to have sex. Cottie refused. 72 Alston then started undressing Cottie but she pulled her pants back up. Again, Alston took her pants and blouse off and they had sexual intercourse, while Cottie remained passive and cried. A few days later, Cottie and Alston had sex again at which time she did not fight him off. 73

The court concluded that the threats Alston made while he and Cottie were walking were unrelated to the actual intercourse. While Cottie may have had a justifiable “general fear” of Alston, it was not sufficient to meet the standard of force required to convict for rape. 74 Once again, the court decided that the victim did not use sufficient resistance based on the degree of force employed by the defendant.

Throughout the battle to improve rape laws, the main focus remained on the defendant’s actions, the actus reus, with little mention of the defendant’s state of mind, the mens rea. 75 Even the most progressive rape statutes made no reference to a mens rea element. 76 As a result, the focus remained on the victim, as evidenced by Rusk and Alston. 77 Instead of contemplating the

72 Id. at 472. On prior occasions, Cottie and Alston had gone to the house to have sex. Id.
73 Id. at 472–73. Cottie testified that during this last encounter Alston had threatened to kick her door down unless she let him inside. Id. After Cottie let Alston in, he began kissing her and performing sexual acts on her but she did not fight him off because she was enjoying it. Id.
74 Id. at 476.
75 See SCHULHOFER, supra note 16, at 39 (noting that reformers remained focused on the physical violence aspect of rape).
76 The Michigan statute led the way to gender-neutral language and the removal of the resistance inquiry, instead focusing on the conduct of the defendant. POSNER & SILBAUGH, supra note 34, at 6; see also ESTRICH, supra note 20, at 81 (referring to the Michigan statute as the “model feminist reform statute” because it was addressed to “actors” and “victims” instead of “men” and “women”). In order to remain focused on the defendant’s conduct alone, lack of consent is not a part of the definition of rape in Michigan. POSNER & SILBAUGH, supra note 34, at 6–7; see SCHULHOFER, supra note 16, at 31–32 (describing the Michigan statute as the “most ambitious and detailed” of the reform efforts, though it remains focused on the force concept).
77 See George E. Dix, Date Rape: Defining When ‘No’ Means ‘No,’ CONN. L. TRIB., Apr. 12, 1993, at 22 (explaining that the major criticism of the emphasis on force is that it “encourages prosecutions to focus upon the behavior of the victim
sufficiency of the resistance offered by the victim, judges focused their attention on whether a reasonable woman would have felt threatened by the defendant. 78 Both resistance and threat of force were poor substitutes for examining the defendant’s state of mind. 79 Criminal laws are based on the premise that the defendant has a culpable state of mind, yet that requirement is not addressed in one of the most serious offenses. 80 The approach that states have taken when prosecuting rape has been detrimental to both victims and defendants. 81

II. RAPE LAW IN NEW YORK

A. People v. Evans: A First Glimpse into Mens Rea

While force is an essential ingredient to rape, mens rea is equally important. New York seemed to recognize this fact, at least in dicta, as far back as 1975. 82 In People v. Evans, 83 the court emphasized that in rape prosecutions it is the defendant’s state of mind that is controlling and must be proven beyond a reasonable doubt. 84 In that case, Evans approached the victim rather than on that of the accused”).

78 See State v. Rusk, 424 A.2d 720, 726–27 (Md. 1981); Commonwealth v. Sherry, 437 N.E.2d 224, 232–33 (Mass. 1982). The force must be sufficient to overcome the victim’s resistance or the threat of force must be sufficient to prevent the victim from resisting. Additionally, the victim’s fear must be reasonable in order to justify the lack of resistance. Id.

79 See generally Estrich, supra note 54, at 1098–99 (opining that the requirements of force and resistance function as a substitute for mens rea).

80 See Dix, supra note 77 (criticizing the lack of inquiry into a defendant’s state of mind when being prosecuted for a serious crime, such as rape).

81 By focusing on the force requirement, courts have essentially retained the resistance requirement notwithstanding the express language in rape statutes. See supra text accompanying note 49. Using the force-resistance rationale, while ignoring the issue of mens rea, has immunized those defendants whose victims are too afraid to resist and leaves unprotected those defendants who did not possess a culpable state of mind. See Estrich, supra note 54, at 1101, 1117 (declaring that the resistance test may result in a finding that the blameworthy man is innocent and the man who did not realize that the woman was overcome by fear is guilty).

82 See generally Kinports, supra note 25, at 784–87 (observing that People v. Evans was one of the most well known decisions to recognize the importance of a mens rea element in a rape prosecution). But see ESTRICH, supra note 20, at 68–69 (criticizing the decision in People v. Evans for dismissing the threat posed by the defendant even in the absence of threatening words or actions).

83 379 N.Y.S.2d 912 (N.Y. Sup. Ct. 1975), aff’d, 390 N.Y.S. 2d 768 (1st Dep’t 1976). People v. Evans was a bench decision as the defendant waived his right to a jury trial. Id. at 914.

84 Id. at 921.
under the pretense that he was a psychologist conducting a sociological experiment and convinced her to go with him.\textsuperscript{85} He lured her up to an apartment, claiming it was his office, wherein he pulled the victim onto an open sofa bed and attempted to undress her.\textsuperscript{86} When the victim resisted his attempts, Evans explained that it was all part of the experiment. Evans then made several statements causing the victim to become frightened: “Look where you are. You are in the apartment of a strange man . . . . I could kill you. I could rape you. I could hurt you physically.”\textsuperscript{87} Subsequently, several acts of sexual intercourse took place.\textsuperscript{88} Ultimately, the court found the defendant innocent of rape, but stressed the importance of inquiring into the defendant’s state of mind:\textsuperscript{89} “It is [the defendant’s] intent when he acts, his intent when he speaks, which must . . . be controlling.”\textsuperscript{90} The court never expressly stated the actus reus to which the intent should attach, but

\textsuperscript{85} Id. at 915–16. The victim, a 20-year-old girl from North Carolina, accepted a ride with the defendant to Manhattan. Id. at 915. On the way to Grand Central Station, Evans persuaded the victim to go to the West Side to pick up his car. Id. at 915–16. Instead of picking up his automobile, Evans convinced the victim to accompany him to an apartment, which he explained was one of his offices. Id. at 916. In reality, the apartment belonged to an individual who was out of the country at the time. Id.

\textsuperscript{86} Id. As the defendant disrobed the victim, she would pull her clothes back on until she was completely dressed again. Id.

\textsuperscript{87} Id. at 917. The court noted that the defendant did not hit the victim or display any weapons. Id. Evans did yell and scream in order to intimidate the victim. Id. He then played on her sympathy by telling her a story of his lost love who committed suicide. Id. The victim, obviously touched by the story, reached out for the defendant. Id. Evans then grabbed the victim and said: “You’re mine, you are mine.” Id.

\textsuperscript{88} Id. The court pointed out that victim offered little resistance during the actual intercourse and did not have any cuts, bruises, or torn clothing. Id. While the court did find the victim’s testimony credible, it concluded that what she described constituted seduction, not rape. Id. at 918–19.

\textsuperscript{89} Id. at 920–21. The court struggled with determining how much of a threat is required to constitute force. Id. at 920. The real issue, the court stated, was whether the threats made by the defendant rendered resistance useless under the circumstances—a question, the court held, for the trier of fact. Id. Furthermore, it is the defendant’s state of mind that controls, not the victim’s perception. Id. at 920–21.

\textsuperscript{90} Id. at 921. Although the court acknowledged that the victim could have reasonably interpreted Evan’s words as threats, the victim’s perception was not dispositive. Id. at 920–21. It was the defendant’s intent that was controlling, and since his words were “ambiguous,” the court could not find, beyond a reasonable doubt, that the defendant intended to use threat of force to overcome the victim’s will. Id. at 921.
implicit in its reasoning was that the requisite intent applied to the use of force or threat of force to overcome the victim's will.\textsuperscript{91} Unfortunately, the court combined this progressive concept with a convoluted interpretation of the defendant's threats.\textsuperscript{92} The mens rea requirement espoused in \textit{Evans} did little to change the law in New York.\textsuperscript{93} Both the statute and subsequent decisions remained focused on forcible compulsion.\textsuperscript{94}

\section*{B. The Current Statute in Practice}

New York Penal Law section 130.35 defines rape in the first degree as "sexual intercourse . . . [b]y forcible compulsion."\textsuperscript{95} "Forcible compulsion" is defined in a previous provision as either the "(a) use of physical force; or (b) a threat, express or implied, which places a person in fear of immediate death or physical injury to himself, herself or another person" as a means to compel.\textsuperscript{96} A separate section of the statute adds lack of consent as an element: "Whether or not specifically stated, it is an element of every offense defined in this article . . . that the sexual act was committed without consent of the victim."\textsuperscript{97} Furthermore, the statute explains that lack of consent is proven when "forcible compulsion" is shown.\textsuperscript{98} In the final analysis, New York is left

\textsuperscript{91} Id.

\textsuperscript{92} At the time \textit{Evans} was decided, New York's rape statute still included the requirement of "earnest resistance." In addition, the defining amendment, which sought to soften the stringent requirements, did not come until 1977, two years after \textit{Evans}. See supra text accompanying note 50. Despite the actual holding, the \textit{Evans} decision was quite revolutionary in that it looked beyond the victim's resistance to the defendant's state of mind. \textit{Evans}, 379 N.Y.S.2d at 920–21. This is not to suggest agreement with the decision or the court's interpretation of the defendant's words. Nonetheless, considering the 1975 version of the rape statute and the precedent surrounding the issue, the court's diversion into a mens rea discussion represents a glimmer of hope that judges may some day be able to focus their attention on the defendant's state of mind rather than on the victim's actions.

\textsuperscript{93} See \textit{Kinports}, supra note 25, at 787 (indicating that \textit{Evans} was a "short-lived exception to the courts' general tendency to completely ignore the question of mens rea").

\textsuperscript{94} While some cases made mention of a mens rea element, they did not engage in an analysis of the defendant's state of mind. See, e.g., \textit{People v. Fenton}, 563 N.Y.S.2d 522, 523 (3d Dep't 1990) (explaining, without citing \textit{Evans}, that "[w]hile intent is clearly an element of rape in the first degree, we find that the element of intent is implicit in the element of forcible compulsion").

\textsuperscript{95} N.Y. PENAL LAW § 130.35 (McKinney Supp. 2002).

\textsuperscript{96} Id. § 130.00(8).

\textsuperscript{97} Id. § 130.05(1).

\textsuperscript{98} Id. § 130.05(2)(a).
with a confusing statute that essentially requires sexual intercourse, forcible compulsion, and lack of consent, with lack of consent being presumed once forcible compulsion is proven.

Clearly, there is no mens rea element in the text of New York's rape statute. That does not mean, however, that rape is a strict liability crime. When there is no express mens rea element in a statute, the New York Penal Law explains that "a culpable mental state may nevertheless be required . . . if the proscribed conduct necessarily involves such culpable mental state." In 1993, the New York Court of Appeals spoke to this issue for the first and only time in a rape prosecution. In People v. Williams, the court explained that although the statute is silent as to a mens rea element, "intent is implicitly an element" of the crime. Expounding upon this, the court stated that the intent applies to the actus reus, that is, "the intent to forcibly compel another to engage in intercourse or sodomy." A few sentences later, the court cancelled out the mens rea it had previously implied by concluding that if forcible compulsion is used, the defendant must have known that the victim was an unwilling participant. Thus, the prosecution need only prove

99 There is a strong presumption against strict liability when a statute is silent, especially when the offense is serious and carries a severe penalty. See People v. Hager, 476 N.Y.S.2d 442, 446 (Sup. Ct. Nassau County 1984) ("What is certain is that the principle of statutory construction is one that requires, emphasizes and insists that intent be engrafted upon every element of the offense unless the intent to limit is patently clear."); see also DRESSLER, supra note 19, § 11.01[B], at 144 (noting the presumption against strict liability and setting forth factors that may overcome the presumption). In addition, the statute explains that unless there is a clear "legislative intent to impose strict liability," the offense "should be construed as defining a crime of mental culpability." N.Y. PENAL LAW § 15.15(2) (McKinney 1998). As the crime of rape is a codification of the common law offense, which was a general intent crime not a strict liability offense, there is no such clear legislative intent. See generally supra text accompanying note 27 (discussing the holding in People v. Williams, 614 N.E.2d 730, 736 (N.Y. 1993), that intent to perform the prohibited act is the mens rea of New York's rape statute).

100 N.Y. PENAL LAW § 15.15(2).

101 See Williams, 614 N.E.2d at 736.

102 Id.

103 Id.

104 Id. at 736–37. The court was evaluating whether the jury charge adequately conveyed that the defendants acted with the necessary mens rea. Id. at 736. The jury charge did not mention a mens rea term, nor did it mention that the defendants' state of mind was a consideration. Id. The court found that the trial court did not commit reversible error in declining to instruct as to the mens rea. Id. at 737. The court explained, "[T]he jury, by finding that defendants used forcible compulsion to coerce the victim to engage in sodomy and intercourse, necessarily
the actus reus element and it will have necessarily proven the mens rea of intent as well because "[m]anifestly, it is unnecessary to forcibly compel another to engage in sexual acts unless that person is an unwilling participant."\textsuperscript{105}

The dissent points out the illogical conclusions reached by the majority.\textsuperscript{106} One such conclusion resulted by "blending and blurring" the concepts of actus reus and mens rea.\textsuperscript{107} The majority allowed the mens rea of intent to be subsumed and proven by the actus reus of forcible compulsion.\textsuperscript{108} Another problem with the court's conclusions was its finding that the trial court did not commit reversible error when it declined to instruct the jury on the mens rea component of the crime.\textsuperscript{109} If, as the court stated, intent is an element of the crime, the jury should have been instructed as to this element.\textsuperscript{110} It seems as though the Williams court could not have reasonably expected intent to be an element of this crime given that it allowed the newly introduced requirement to be subsumed in its definition of actus reus. In addition, the court disregarded the trial court's substantial omission in not instructing the jury on the mens rea element, which clearly eliminated any consideration of the defendant's state of mind from the jury's deliberations.

C. The Implications of People v. Williams

There are two possible interpretations of the decision rendered in Williams. One would allow for an unreasonable found that defendants believed the victim did not consent to the sexual activity." \textit{Id.} at 736–37.

\textsuperscript{105} \textit{Id.} at 736.

\textsuperscript{106} \textit{Id.} at 737–38 (Bellacosa, J., dissenting). Judge Bellacosa initially, in an unhelpful diversion, discussed the general intent/specific intent dichotomy. \textit{Id.} at 737. He then pointed out the flaws with the decision of the court. \textit{Id.} at 737–39.

\textsuperscript{107} \textit{Id.} at 738 (pointing out that forcible compulsion is part of the actus reus of an offense and intent is a mens rea term).

\textsuperscript{108} See \textit{id.} (noting that the majority did not engage in sound legal analysis).

\textsuperscript{109} Judge Bellacosa expressed concern about the jury's understanding of such concepts even with an instruction, not to mention no instruction at all. \textit{Id.} A culpable state of mind is an essential element of an offense and yet the majority allowed the jury to render a verdict without mentioning the concept. See \textit{id.}

\textsuperscript{110} It is essential that jury instructions include every element of a crime. See \textit{id.} at 737 (Bellacosa, J., dissenting) (noting that every element of an offense must be included to provide guidance in jury deliberations). If the court expected the jury to follow the instructions it gave regarding the other elements of the crime, then it must have realized that the defendants' state of mind was not considered in the jury's deliberations.
mistake of fact defense and the other, as alluded to above, would essentially abolish the mens rea requirement. Under the first interpretation, and as suggested by the court in Williams, a mens rea of intent to forcibly compel would be implied. Since a mens rea term usually applies to each essential element of the crime, in New York, intent would seem to modify both the force and lack of consent components of the statute. In applying these principles, a problem arises when a mistake of fact defense is raised. In New York, a mistake of fact must negate the requisite mens rea to constitute a valid defense. Therefore, to establish a valid defense, a defendant would have to show a mistake as to the force used and as to his understanding of the victim’s consent, sufficient to negate the intent. As a result, a mistake of fact defense in New York can be reasonable or unreasonable as long as it negates the mens rea.

Implying a mens rea of intent into the rape statute would allow for an unacceptable result in situations where the defendant claims mistake of fact. The facts, as set forth above, surrounding Director of Public Prosecutions v. Morgan support this conclusion. Although the House of Lords found Morgan

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111 See id. at 736.
112 See N.Y. PENAL LAW § 15.15(1) (McKinney 1998) (providing that the mens rea is “presumed to apply to every element of the offense unless an intent to limit its application clearly appears”); see also DRESSLER, supra note 19, § 10.05, at 135 (explaining that the grammatical structure of the statute often dictates which elements the mens rea modifies).
113 See supra notes 95–98 and accompanying text.
114 See Bryden, supra note 34, at 325 (observing that the mens rea issue usually arises when the defendant claims a mistake of fact).
115 A person is relieved of criminal liability when he engages in conduct under a mistaken belief of fact if “[s]uch factual mistake negatives the culpable mental state required for the commission of an offense.” N.Y. PENAL LAW § 15.20(1)(a) (McKinney 1998).
116 At common law, mistake of fact as to a specific intent offense was a defense if it negated the mens rea. See DRESSLER, supra note 19, § 12.03[A], at 153. Therefore, the mistake could be reasonable or unreasonable as long as it was an honest mistake. See id. § 12.03[C], at 155. If it was a general intent offense, the mistake of fact had to be reasonable in order to constitute a valid defense. See id. § 12.03[D][1]. As a practical matter, this permits punishment on the basis of negligence since a reasonable person would not have made the same mistake. See id. at 156. Since modern statutes no longer follow the general intent/specific intent dichotomy, the result is the same as it was at common law with a specific intent offense—mistake of facts need only be honestly believed. See id. § 12.03[A], at 153 (noting that modern codes typically include a mens rea element).
and his codefendants guilty of rape, it ruled that an honest mistake pertaining to the victim's consent could act to negate the mens rea, regardless of whether that belief was reasonable or unreasonable. The court reasoned, however, that it would have been impossible for a jury to find that the defendants honestly believed that Mrs. Morgan was consenting to sexual intercourse and, therefore, upheld the conviction. While the court's final holding is not especially controversial, its rationale caused quite a stir and illustrates why a mens rea of intent, allowing both an unreasonable and reasonable mistake of fact, is improper.

The other possible interpretation of mens rea in New York, as suggested by the Williams majority, is that it is unnecessary to instruct on the issue of mens rea because it is impossible for a person to forcibly compel a willing participant to engage in sexual acts. Essentially, the court eliminated the mens rea requirement by allowing it to be proven through the actus reus. This application of Williams treats consent as a strict liability element and allows courts to deal with rape as they always have, by focusing on the forcible compulsion component. The court's error in concluding that it is impossible to forcibly compel a willing participant to engage in sexual intercourse becomes more evident when considering People v. Jovanovic. The Williams court implied that a situation could never arise where a person forcibly compels a willing participant into sex.

118 Morgan, 2 All E.R. at 347.
119 Id. at 353–62; see supra note 15.
120 See Alexander, supra note 15, at 227 (noting that the Morgan decision created severe negative reactions both inside and outside of England).
121 See supra text accompanying notes 101–05.
122 See the discussion of Judge Bellacosa's dissent supra text accompanying notes 107–108.
123 When an element of a crime is deemed to be strict liability, neither a reasonable nor an unreasonable mistake of fact is a defense. See DRESSLER, supra note 19, § 12.03[B], at 154 ("Under no circumstances does a person's mistake of fact negate his criminal responsibility for violating a strict-liability offense."). Several jurisdictions treat consent as a strict liability element of rape, thereby refusing to instruct on the defense of mistake. See Commonwealth v. Ascolillo, 541 N.E.2d 570, 575 (Mass. 1989) (holding that defendant was not entitled to a mistake of fact charge); Commonwealth v. Williams, 439 A.2d 765, 769 (Pa. Super. Ct. 1982) (same); Brown v. State, 207 N.W.2d 602, 609 (Wis. 1973) (finding that it was not error to refuse to instruct on the mens rea of rape since intent to have intercourse by force and against the victim's will is not an element of the crime).
124 700 N.Y.S.2d 156 (1st Dep't 1999).
however, as the situation between Oliver and Jane illustrates, such a situation is possible. The situation in Morgan, although more difficult to believe, is another example where a defendant intentionally used forcible compulsion to have intercourse with what the defendant thought was a willing participant. Thus, both Jovanovic and Morgan are clear examples of the flawed reasoning in Williams, and demonstrate the need for this issue to be revisited, either by case law or statute.

III. PROPOSAL FOR RAPE IN THE FIRST DEGREE

It is unlikely that New York's rape law will be reformed through case law, as Williams has been the only court of appeals case reviewing the issue of mens rea. It is necessary, therefore, to revise the statute. This Note proposes that rape in the first degree build off the newly added offense to rape in the third degree. In February 2001, section 130.05(2)(d) became effective and created a new crime under the existing offense of rape in the third degree. The new offense provides that lack of consent results when, at the time of the act, "the victim clearly expressed that he or she did not consent to engage in such act, and a reasonable person in the actor's situation would have understood such person's words and acts as an expression of lack of consent to such act under all the circumstances." A combination of this provision and the current first-degree rape offense would create a statute that contains both a mens rea and an actus reus element. Although this proposal allows for a reasonable mistake of fact defense, which is beneficial for defendants, it also concentrates on the defendant's state of mind, which decreases the focus placed on the victims.

126 See supra text accompanying notes 1–10.
127 See supra text accompanying notes 11–15.
128 See N.Y. PENAL LAW § 130.05(2)(d) (McKinney 2002).
129 Id. (emphasis added). This added section covers the situation in which the defendant did not use any physical force and there is no overt sign of threat, but where the victim clearly and unequivocally said or intimated "no," thereby making it clear to any reasonable person in the defendant's situation. Under this provision, the defendant in Commonwealth v. Berkowitz would have most likely been found guilty of rape in the third degree. See Commonwealth v. Berkowitz, 641 A.2d 1161, 1164 (Pa. 1994) (concluding that while the fact that the victim said "no throughout the encounter" is "relevant to the issue of consent, it is not relevant to the issue of force").
The following represents a proposal for the crime of rape in the first degree:

A person is guilty of rape in the first degree when he or she engages in sexual intercourse with another person while intentionally using physical force or threat, express or implied, which places a person in fear of immediate death or physical injury to himself, herself, or another person, or in fear that he, she or another person will immediately be kidnapped and is negligent as to the victim's lack of consent, such that a reasonable person in the actor's situation would have understood the victim's words and acts as an expression of lack of consent to sexual intercourse.\(^{130}\) It is a defense to such offense that the actor made a reasonable mistake of fact as to the victim's lack of consent.

While this proposal requires proof of intentional use of force, typically, this will not be difficult to show.\(^{131}\) Essentially, the only difference between the proposed rape in the first degree and section 130.03(2)(d) is the element of force. Thus, if a defendant intentionally uses force while engaging in sexual intercourse and disregards the victim's words or actions—actions which would lead a reasonable person in the defendant's situation to believe

\(^{130}\) Although there is a hesitancy to use a mens rea of negligence in the statutory definition of a serious offense, the thought behind the proposed statute is that if a defendant is intentionally using force while engaging in sexual intercourse the actor is involved in a high risk activity. See generally DRESSLER, supra note 19, § 10.04[2][1][a], at 128–29 (noting that negligence is a controversial mens rea standard because the defendant is punished for lacking the state of mind of a reasonable person). Therefore, the actor is on notice that the participant may be unwilling and if the actor is unreasonable in his or her understanding of the victim's words or actions, the actor will be held accountable.

The reasonable person standard proposed is similar to the existing standard in New York associated with the justification of self-defense. The defense of justification is set forth in New York Penal Law section 35.15 and uses the language “reasonably believes.” N.Y. PENAL LAW § 35.15(1) (McKinney 1998). Unlike the proposed statute, the self-defense provision does not explain how the standard should be applied. In 1986, however, the court of appeals traced the legislative history of the statute and set forth the standards to be considered. See People v. Goetz, 497 N.E.2d 41, 48–52 (N.Y. 1986). The court rejected a wholly subjective interpretation of the term “reasonably” as defying the ordinary meaning of the term and retained an objective element. Id. Basically, the court set forth a standard that rested on a determination of what a reasonable objective man would do in light of the circumstances facing a defendant in his subjective situation. Id. at 52. This Note proposes the same standard in relation to whether the defendant was reasonable in understanding the victim's words and actions.

\(^{131}\) See generally Estrich, supra note 54, at 1096 (asserting that it is “difficult to imagine an accidental or mistaken use of force”).
that the victim was an unwilling participant—the defendant would be guilty of rape in the first degree.

The proposed statute differs from most rape statutes in its use of negligence and its allowance of a reasonable mistake of fact defense. Acquittal based on a reasonable mistake, even though the victim may not have actually consented, is supported by the fact that the defendant did not have the requisite culpable state of mind. In essence, by finding the mistake to be reasonable, the jury is stating that any ordinary person in the defendant's situation could have made the same mistake and society does not want to punish such a mistake. But why punish a person who has made an honest yet unreasonable mistake—a person who has acted negligently? When a person deviates from the standard of care that a reasonable person would have exercised, and at the same time is involved in a high-risk activity where the potential harm is so great, he must be held accountable. In a first-degree rape situation, the defendant will have intentionally used physical force or threat of force,

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132 See DRESSLER, supra note 19, § 12.03[D][1], at 156 (explaining that if the defendant's mistake regarding the victim's consent is reasonable, then he is not guilty of the offense because his "state of mind . . . was nonculpable").

133 Dressler points out that punishing a defendant for an unreasonable, yet honestly believed mistake, is unfair because it treats the defendant in the same manner as an "intentional wrongdoer." Id. "For example, a male who genuinely, but unreasonably, believes that a female is consenting to intercourse will be convicted of the same degree of offense . . . as one who has full knowledge that he is acting against the will of the victim." Id.

The proposed statute first requires an intentional use of force, therefore, there is some sense of awareness on the part of the defendant that the activity he is participating in is risky. As such, the arguments that might hold true in a rape situation that does not involve force, beyond that which is necessary for sexual intercourse, do not apply. In addition, a defendant who did not use forcible compulsion, but is convicted because he unreasonably believed the victim consented, is guilty of third-degree rape which carries a sentence as little as probation and up to four years. Conversely, first-degree rape carries with it a sentence of five to twenty-five years, a significantly harsher penalty. See N.Y. PENAL LAW § 70.00(2), (3) (McKinney & Supp. 2002).

134 See DRESSLER, supra note 19, § 10.04[2][a], at 128–29 (noting that when a person "deviate[s] from a standard of care that a reasonable person would have observed" he has acted negligently and is punished for failing to act as a reasonable person would have acted). Dressler lists three factors helpful in determining whether a person has acted reasonably: "(1) the gravity of harm that foreseeably [sic] would result from the defendant's conduct; (2) the probability of such harm occurring; and (3) the burden to the defendant of desisting from the risky conduct . . . ." Id at 129; see also Byrnes, supra note 20, at 295 (opining that in a society that insists on reasonable behavior, honest yet unreasonable mistakes are intolerable).
thereby placing him in a high-risk activity. Once in that situation, the defendant is on notice that he may be held accountable for acting unreasonably.\textsuperscript{135} The harm that could result if the defendant proceeds while the victim is an unwilling participant is tremendous and, therefore, punishment is justified.

A defendant would not be able to raise the mistake of fact defense simply based on a he said/she said scenario. There needs to be evidence that creates a middle ground from which the defendant can argue that he reasonably misinterpreted the victim’s conduct. For instance, if the defendant claims that the victim actually initiated sexual contact and was an active participant, while the victim alleges the defendant hit her, tore her clothes off, and threatened to hurt her if she did not comply, there is no “equivocal conduct.”\textsuperscript{136} Each scenario, if believed, would not leave any room for misinterpretation; thus, a mistake of fact defense would not be appropriate here.

If it is determined that a mistake of fact defense is appropriate, the question of whether the defendant reasonably interpreted the victim’s words or conduct is a question of fact, in most cases, for the jury. As seen with \textit{People v. Goetz},\textsuperscript{137} there are dangers associated with leaving that final decision to a jury, but it is hoped that a majority of the time the jury will reach the proper decision. Ultimately, the jury acquitted Goetz of attempted murder;\textsuperscript{138} however, the New York Court of Appeals set forth factors a jury should consider when determining whether a defendant acted reasonably.\textsuperscript{139} While reasonableness is determined using an objective standard, relevant background information need not be ignored. This allows consideration of any relevant knowledge the defendant had about the victim, prior experiences the defendant had which could provide a reasonable basis of belief, and physical attributes of the

\textsuperscript{135} See supra note 130.
\textsuperscript{136} See \textit{People v. Williams}, 841 P.2d 961, 966 (Cal. 1992). California has adopted a reasonable mistake of fact defense similar to the one proposed in this note. See \textit{id.} at 967.
\textsuperscript{137} \textit{497 N.E.2d} 41 (N.Y. 1986).
\textsuperscript{138} See JOSHUA DRESSLER, CRIMINAL LAW 471 (2d ed. 1999) (noting that a jury comprised of eight men and four women, ten of whom were white and two of whom were African-American, acquitted Goetz of all charges except possession of a concealed weapon, for which he served eight months).
\textsuperscript{139} \textit{Goetz}, \textit{497 N.E.2d} at 52.
parties. The jury would combine the subjective attributes with an objective standard to determine whether the defendant acted reasonably.

To demonstrate how this proposed statute would work, consider the factual scenarios posed by Jovanovic and Morgan. In Jovanovic, the defendant admitted to intentionally using physical force while engaging in sexual intercourse, satisfying the first part of the definition. The real analysis will take place with the defendant's state of mind in relation to the victim's consent. Oliver had received a number of e-mails and on-line instant messages from the victim describing her interest in S/M and more importantly her interest in exploring such activities with him. This case presents evidence of equivocal conduct that Oliver could reasonably have misinterpreted; therefore, the defense would be appropriate. When presented with all of the correspondence between Oliver and Jane, the trier of fact would have to determine whether a reasonable person in the defendant's situation would have understood Jane's words and conduct, at the time of intercourse, as conveying a lack of consent to such acts. While this is ultimately up to the trier of fact, it seems probable that given all the defendant knew of the victim and all that she told the defendant she wanted to do with him, a reasonable person would have understood Jane's words and actions to mean that she was a willing participant. Regardless of the outcome, the proposed statute would allow Oliver to present the defense to the jury, an opportunity that is not likely under the current statute.

Similarly, in Morgan, the defendants admittedly used forcible compulsion to drag Mrs Morgan out of bed and to take turns having sexual intercourse with her. Therefore, the first

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140 Id. at 52–53. While Goetz involved self-defense for attempted murder, these factors are helpful in a reasonable mistake of fact defense for rape. Id.
141 People v. Jovanovic, 700 N.Y.S.2d 156, 162 (1st Dep't 1999) (describing how the defendant tied the victim's arms and legs to the frame of the futon).
142 See id. at 163–64.
143 See supra text accompanying notes 1–10.
144 Jovanovic would arguably still be guilty of "Forcible touching" a class A misdemeanor pursuant to section 130.52 of the penal law. N.Y. Penal Law § 130.52(2) (McKinney 2002). Section 130.52 provides: "A person is guilty of forcible touching when such person intentionally, and for no legitimate purpose, forcibly touches the sexual or other intimate parts of another person . . . for the purpose of gratifying the actor's sexual desire." Id.
145 See supra text accompanying note 13.
prong of the proposed statute, intentional use of force, is satisfied. As for the defendants’ state of mind, the three defendants claimed that they believed the victim was a willing participant because Mr. Morgan advised them that Mrs. Morgan would resist in order to get “turned on,”\textsuperscript{146} making a mistake of fact defense appropriate for the trier of fact to consider. Once again, the trier of fact would have to determine whether a reasonable person in the defendants’ situations would have understood Mrs. Morgan’s words and conduct, at the time of intercourse,\textsuperscript{147} to convey a lack of consent to such acts. The question to be answered by the trier of fact is whether it is reasonable for men, who have been told by a woman’s husband that she is kinky and will resist but actually enjoys it, to understand the victim’s pleas of help to her young children to call the police as an indication that she was not willing to participate in the sexual acts. It is probable that the trier of fact would find that, even considering what Mr. Morgan told the three defendants, it was unreasonable for them to think that Mrs. Morgan was consenting. Therefore, the defendants would be guilty of rape in the first degree. Jovanovic and Morgan are extreme and rare cases, but cases nonetheless. It seems that even with the difficult cases, the proposed statute would allow juries and judges to reach the “right” decision.

CONCLUSION

While the law surrounding the crime of rape has evolved significantly since the common law, it is still in need of reform. Specifically, the offense of rape needs to comport with other serious crimes by providing for both a mens rea and an actus reus element. In Williams, the New York Court of Appeals seemed to create such a mens rea requirement, only to abandon it later in the decision by defining the mens rea within the actus reus of forcible compulsion. Williams left New York essentially where it was, focused on forcible compulsion and thus on the victim. By revising the rape statute to include a mens rea element the focus will shift from the victim’s actions to the defendant’s state of mind. As previous reforms in legislation have indicated, revising a statute will not miraculously change

\textsuperscript{146} See supra text accompanying note 12.
\textsuperscript{147} See supra text accompanying note 14.
societal attitudes towards rape; however, this proposed revision expressly allows, for the first time, the trier of fact to concentrate on the defendant's state of mind in a rape prosecution. Hopefully, such a change in the rape statute will bring about more successful prosecutions when the defendant is blameworthy and allow for an appropriate defense when the defendant made a reasonable mistake of fact.