Addressing Acquaintance Rape: The New Direction of the Rape Law Reform Movement

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INTRODUCTION

As the status of women has elevated throughout history, laws criminalizing unwanted sexual conduct have mirrored this change. At one time, rape was viewed as an offense against a victim's household rather than as a crime against a victim. A woman's consent to sexual acts was considered so insignificant that, in some instances, a man who married a woman without her family's consent committed the same offense as a 

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2 Though rape is generally recognized as a crime that can be committed by or against a male or female, the term "rape" is used in this Note in its most prevalent sense—the rape of women by men.

3 See James A. Brundage, Law, Sex, and Christian Society in Medieval Europe 48, 249 (1987); Susan Brownmiller, Against Our Will 17 (1975). Under the earliest forms of social order, the union of men and women occurred by a violent custom known as "bride capture" whereby a man forcibly seized a woman, took title to her person, and "staked a claim to her body." Id. at 16-17; see 4 William Blackstone, Commentaries on the Laws of England 951 (George Chase ed., 3d ed. 1910) (prohibiting offenses of forcible abduction and marriage of women against their will). In exchange for earning a man's protection against other male attackers, a woman was treated as a chattel and a crime against her body was considered a crime against a man's estate. Brownmiller, supra, at 17. Thus, rape law developed through "the back door" as a property crime committed by one man against another. Id. at 18. Some later societies considered it more "civilized" to obtain a bride by a monetary payment to the bride's father rather than through forcible capture; however, bride capture remained an acceptable spoil of warfare. Id. (referring to ancient Babylonian and Mosaic law). In these societies, the rape of an unmarried woman was a crime against her father or his household because it decreased a woman's value on the marriage market. Id.; see Brundage, supra, at 48, 55, 249 (discussing similar treatment under ancient Roman, canon, and Jewish law). In some instances, the father could seek either criminal charges or civil damages. Id. at 48. The rape of a married woman, however, was labeled "adultery" in many societies, and, if her husband permitted, the woman would be punished along with the man. Brownmiller, supra, at 19 (noting that such women were "bound and thrown into the river" as per Code of Hammurabi, or "stoned to death at the gates of the city" prior to codification of Mosaic law).
rapist.\(^4\)

In recent history, the victim’s consent to sexual conduct has become the paramount issue in defining rape.\(^5\) At common law, rape was defined as carnal knowledge of a woman, other than one’s wife, by force or the threat of force, and against her will.\(^6\) Therefore, courts required actual physical resistance by the victim and substantial force by the assailant as proof that the sexual intercourse was nonconsensual.\(^7\)

Traditionally, criminal justice systems treated alleged rapes with great caution and suspicion.\(^8\) Under the pretense that the intimate nature of the crime made it difficult to prove the defendant’s innocence, evidentiary rules developed that required corroboration of the victim’s testimony, penalized victims who did not complain promptly, and tolerated the admission of evidence regarding the victim’s sexual history.\(^9\) In fact, it was often

\(^4\) See Brundage, supra note 3, at 48. Under ancient Roman law, for example, acts of rape and elopement were treated as a single offense called raptus. Id. At most, the woman’s consent mitigated the penalty imposed upon the man. Id.; see Brownmiller, supra note 3, at 18 (noting that women’s consent to sexual intercourse was essentially irrelevant in early forms of rape law).


\(^6\) See Blackstone, supra note 3, at 951; Estrich, supra note 5, at 8; Spohn & Horney, supra note 5, at 21.

\(^7\) See Estrich, supra note 5, at 5. Most serious crimes require a mens rea of actual knowledge, recklessness, or at least negligence to establish that the defendant possessed a criminal state of mind. Wayne R. LaFave & Austin W. Scott, Jr., Criminal Law 212-13 (2d ed. 1986); Catherine Trevison, Note, Changing Sexual Assault Law and the Hmong, 27 Ind. L. Rev. 393, 408 (1993). The rationale for this principle is expressed by the maxim “actus non facit reum nisi mens sit rea (an act does not make one guilty unless his mind is guilty).” LaFave & Scott, supra, at 212. Most jurisdictions, however, dispensed with an express mens rea requirement for rape because the act of sexual intercourse accomplished by force and against the resistance of the woman was thought to evince sufficient criminal intent. See Estrich, supra note 5, at 94-95 (discussing that culpable mental state was not required for rape conviction in numerous jurisdictions); Trevison, supra, at 408 (noting that force and resistance elements were considered “functional equivalent” of criminal intent to commit rape).

\(^8\) Spohn & Horney, supra note 5, at 24; Estrich, supra note 5, at 5. “Traditional wisdom, reflected in common law, held that rape should be treated differently from other crimes because of the danger of false charges by vindictive or mentally disturbed women.” Spohn & Horney, supra note 5, at 24. Indeed, centuries ago, the English Lord Chief Justice Matthew Hale cautioned that rape “is an accusation easily to be made and hard to be proved, and harder to be defended by the party accused, tho never so innocent.” 1 Matthew Hale, The History of the Pleas of the Crown 635 (P.R. Glazebrook ed. 1971).

\(^9\) Estrich, supra note 5, at 5; see Ronet Bachman & Raymond Paternoster, A Contemporary Look at the Effects of Rape Law Reform: How Far Have We Really Come?, 84 J. Crim. L. & Criminology 554, 558 (1993) (noting that concern with protecting men accused of rape created “serious” evidentiary and procedural “impediments”). Attempts to make rape cases difficult to prosecute may have their roots in early forms of rape law. At one time, canon law only recognized the rape of “an ‘honest’ . . . [women of] . . . good legal standing.” James A.
assumed that women falsely accused men of rape, and that women had a duty to prevent rape from occurring. In effect, "[t]he usual procedural guarantees and the constitutional mandate that the government prove the man's guilt beyond a reasonable doubt [were] not considered enough to protect the man accused of rape."  

In response, during the 1970s, feminists and criminal justice advocates lobbied for changes in state rape laws through a movement for rape law reform (the "Rape Law Reform Movement"). The Rape Law Reform Movement was founded on both pragmatic and ideological bases. Both feminists and criminal justice advocates were largely concerned with rape laws and evidentiary rules that permitted officials to use "legally irrelevant assessments of the victim's character, behavior, and relationship with the defendant," which resulted in low reporting and conviction rates.

BRUNDAGE, Rape and Marriage in the Medieval Canon Law, in SEX, LAW AND MARRIAGE IN THE MIDDLE AGES pt. VIII, at 71 (1993). In effect, subsequent rape laws also offered protection only to such "honest" women by allowing courts to hear evidence which cast victims in an unfavorable light. Indeed, in response to defendants' claims that the victims "'precipitated'" attacks by their provocative dress, questionable behavior, or reputations, victims were left to "prove that they [were] worthy of protection under the law." SPOHN & Horney, supra note 5, at 20.

See SPOHN & Horney, supra note 5, at 24 (noting that common law reflected falsehoods traditionally associated with rape); George E. Dix, 'Date Rape' Cases Call for New Definition of Consent, N.J. L.J., Apr. 19, 1993, at 17 (noting criticism that pre-reform rape statutes' excessive focus on victims allowed defendants to invoke perception that women lie about rape out of embarrassment or revenge); John D. Ingram, Date Rape: It's Time for "No" to Really Mean "No," 21 AM. J. CRIM. L. 3, 7 (1993) (discussing legal system's ability to perpetuate notion that alleged rape victims seek notoriety, marriage, money, or revenge). As English Lord Chief Justice Matthew Hale warned:

[If she be of evil fame, and stand unsupported by others; if she concealed the injury for any considerable time after she had opportunity to complain; if the place, where the fact was alleged to be committed, was where it was possible she might have been heard, and she made no outcry; these and the like circumstances carry a strong but not conclusive presumption that her testimony is false or feigned.

BLACKSTONE, supra note 3, at 953 (discussing English Lord Chief Justice Hale's comments). In reality, recent studies indicate that only 2% of reported rapes are false allegations. See JULIE A. ALLISON & LAWRENCE S. WRIGHTSMAN, RAPE: THE MISUNDERSTOOD CRIME 11 (1993) (noting 2% false report rate is same for other major crimes).

See ALLISON & WRIGHTSMAN, supra note 10, at 98-99 (examining myth that women are responsible for being raped because "[a]ny healthy woman can resist a rapist if she really wants to"); Ingram, supra note 10, at 7 (noting view that women are responsible for extent to which sexual activity progresses).

See SPOHN & Horney, supra note 5, at 5.

See SPOHN & Horney, supra note 5, at 20; Bachman & Paternoster, supra note 9, at 554-55.

See MARSH ET AL., supra note 1, at 4; Bachman & Paternoster, supra note 9, at 554-55; ALLISON & WRIGHTSMAN, supra note 10, at 209-11.

SPOHN & Horney, supra note 5, at 18.
Additionally, feminists sought symbolic reformation that would highlight the violent nature of the crime and eliminate the stigma and myths connected with rape victims.\(^1\) Criminal justice systems were criticized for maintaining procedures "mired in assumptions inconsistent with the realities of the crime and the activities of women in [contemporary] society."\(^2\)

Generally, the Rape Law Reform Movement focused on amending rape laws in four critical areas:\(^3\) (1) the scope of rape law;\(^4\) (2) the standard for proving nonconsent;\(^5\) (3) the requirement that the victim's testimony be corroborated;\(^6\) and (4) the admissibility of evidence

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16 See id.; Bachman & Paternoster, supra note 9, at 555.
17 See Bachman & Paternoster, supra note 9, at 555; Allison & Wrightsman, supra note 10, at 210. See generally Lynn Hecht Schafran, Writing and Reading About Rape: A Primer, 66 St. John's L. Rev. 979 (1993) (dispelling myths commonly connected with incidents of rape).
18 Marsh et al., supra note 1, at 1.
19 Spohn & Horney, supra note 5, at 21-29.
20 Rape traditionally was defined as a specified crime which did not include a number of questionable sexual acts such as "attacks on male victims, acts other than sexual intercourse, sexual assaults with an object, or sexual assaults by a spouse." Spohn & Horney, supra note 5, at 22; see Allison & Wrightsman, supra note 10, at 211-12 (discussing narrow definition of rape).


In addition to clarifying and expanding criminally punishable conduct, these changes sought to increase the number of sexual crimes that were prosecuted and convicted; it was believed that lesser included offenses allowed prosecutors to plea bargain and offer juries an alternative to acquittal where reluctant to convict of forcible rape. Spohn & Horney, supra note 5, at 22. In some instances, states even replaced the word "rape" with terms such as "sexual assault" or "criminal sexual conduct" to emphasize the violent nature of the crime, Allison & Wrightsman, supra note 10, at 212, and to avoid historic misconceptions connected with the term "rape." Ingram, supra note 10, at 16.

21 See infra part II.B (discussing nonconsent standard).
22 Corroboration has been described as "that doctrine of the [criminal] law which requires that certain suspect evidence be supplemented by a minimum of independent inculpatory fact or circumstance, as a matter of law, before a jury may consider whether its weight or sufficiency warrants a conviction." Irving Fendel, Note, Corroboration in the New York Criminal Law, 24 Brook. L. Rev. 324, 324 (1958). Due to the suspicion with which rape charges were handled, see supra notes 8-12 and accompanying text, courts often would not permit rape convictions
regarding the victim's prior sexual conduct. Studies analyzing the effects of reform efforts have had "equivocal" results. It is generally agreed, however, that rape law reform has been particularly ineffective with respect to a certain class of rape cases—acquaintance rape.

Based on the uncorroborated testimony of the victim. See SPOHN & HORNEY, supra note 5, at 24. Furthermore, judges were often required to read a cautionary instruction to the jury warning them of the highly suspicious nature of rape charges. Id.; see also Ingram, supra note 10, at 14 (stating that jury instructions on credibility were "specially drafted for rape trials"). Courts required evidence to support the victim's testimony on some or all of the elements of the case—the woman's word was not enough. SPOHN & HORNEY, supra note 5, at 24; ALLISON & WRIGHTSMAN, supra note 10, at 204; see SUE BESSMER, THE LAWS OF RAPE 105 (1984) (noting that some jurisdictions required corroboration as matter of law, while others allowed uncorroborated testimony of victim only if testimony was clear and convincing and underlying circumstances pointed to probable guilt of accused).

After complaints that these requirements were sexually discriminatory and unnecessarily stringent, most states removed the corroboration requirement. SPOHN & HORNEY, supra note 5, at 24-25; see, e.g., MICH. COMP. LAWS ANN. § 750.520h (West 1991) (providing "testimony of a victim need not be corroborated in prosecutions of [criminal sexual conduct]"). Though these changes sought to increase the number of rape prosecutions and convictions, SPOHN & HORNEY, supra note 5, at 25, they are equally important for allowing the fact-finder to determine the victim's credibility, rather than presuming that the woman's word could never stand alone.

Evidence regarding the victim's sexual history was considered relevant to her consent and credibility. MARSH ET AL., supra note 1, at 22; SPOHN & HORNEY, supra note 5, at 25. This practice was justified under the antiquated notions that unchaste women are more likely to consent to intercourse and to lie about it than are chaste women. MARSH ET AL., supra note 1, at 22; SPOHN & HORNEY, supra note 5, at 25; Ingram, supra note 10, at 17. The admissibility of this evidence was criticized for being discriminatory and outdated in light of conventional notions of sexual relations. SPOHN & HORNEY, supra note 5, at 26; Ingram, supra note 10, at 17. In response, many states enacted "rape shield laws" to limit the admissibility of evidence of a victim's sexual history. MARSH ET AL., supra note 1, at 22-23; SPOHN & HORNEY, supra note 5, at 26; see, e.g., MICH. COMP. LAWS ANN. § 750.520j (West 1991) (limiting evidence of victim's sexual conduct to past sexual conduct with accused and "instances of sexual activity showing the source or origin of semen, pregnancy, or disease"); see also United States v. Saunders, 736 F. Supp. 698 (E.D. Va. 1990), aff'd, 943 F.2d 388 (4th Cir. 1991), cert. denied, 502 U.S. 1105 (1992) ("[W]hether a woman has consented once or myriad times, and whether she has done so for love or money, she is, in any event, entitled by law to be free from nonconsensual sexual contact. A woman's past behavior, however unchaste, confers on no one a license to commit rape.").

Bachman & Paternoster, supra note 9, at 556. One study in the jurisdiction of Michigan concluded that statutory reform efforts can have a "profound influence" on the successful prosecution of rape cases, MARSH ET AL., supra note 1, at 25, but little impact on factors that are beyond the reach of the criminal justice system, such as victims' reporting of rape. Id. at 27; see Bachman & Paternoster, supra note 9, at 556 n.9 (discussing Marsh's Michigan study). But see SPOHN & HORNEY, supra note 5, at 173 (stating comprehensive study of rape law reform in Michigan, Illinois, Pennsylvania, Texas, Georgia, and Washington, D.C. found that, "[i]n most jurisdictions . . . studied, the reforms had no impact").

See, e.g., SPOHN & HORNEY, supra note 5, at 162-64 (discussing elimination of resistance and corroboration requirements had little influence in acquaintance rape cases since such factors are still vital in decisions of prosecutors to prosecute and juries to convict); MARSH ET AL., supra note 1, at 95-102 (evaluating negative responses of criminal justice officials in
In recent years, there has been a growing recognition that most rapes do not occur under “traditional” circumstances where an armed stranger jumps out of the bushes. Rather, acquaintance rapes are those committed by friends, relatives, boyfriends, colleagues, and other acquaintances of the victim. Given that approximately eighty-five percent of all victims are raped by someone they know, it is especially troubling that the Rape Law Reform Movement has not adequately addressed the prosecution of acquaintance rape cases. Moreover, studies unfortunately reveal that statutory reform has limited impact due to the degree of discretion afforded individuals in the criminal justice system. Further statutory reform is nevertheless necessary to ensure that convictions are possible for those acquaintance rapes that succeed in overcoming individuals’ prejudicial attitudes.

Part I of this Note illustrates that many post-reform statutes define rape in terms that fail to encompass certain instances of acquaintance rape—a problem long recognized by rape law reformers and recently embraced by state legislators. Part II discusses proposals for further reform to correct this shortcoming and focuses on problems encountered by legislators regarding the structure of rape statutes and definition of “nonconsent.” Part III analyzes these proposals and suggests which situations involving acquaintance rape); Bachman & Paternoster, supra note 9, at 574 (conceding that “there continues to be a large ‘acquaintance discount’” in treatment of rape cases).

26 ESTRICH, supra note 5, at 29; see SPOHN & HORNBY, supra note 5, at 19-20; ALLISON & WRIGHTSMAN, supra note 10, at 60-61; Ingram, supra note 10, at 5-6.

27 ESTRICH, supra note 5, at 29; ALLISON & WRIGHTSMAN, supra note 10, at 64.

28 ALLISON & WRIGHTSMAN, supra note 10, at 5, 63; see Margaret D. Bonilla, What Feminists Are Doing to Rape Ought To Be a Crime, POL'Y REV., Fall 1993, at 22 (reporting that 70% to 80% of women know their attackers). It is difficult to accurately determine the frequency of rape. According to the Federal Bureau of Investigation (“FBI”), in 1990, 102,555 rapes were reported to the police nationwide. Alice Vachss, Rape and Denial: A Federal Nonsolution, NEW REPUBLIC, Nov. 22, 1993, at 14 (citing FBI’s Uniform Crime Reports). Because rape is the single most underreported crime, however, official reports inaccurately reflect the frequency of its occurrence. ESTRICH, supra note 5, at 10; Bonilla, supra, at 22. Many women, especially victims of acquaintance rape, blame themselves and do not realize that they have been raped. ALLISON & WRIGHTSMAN, supra note 10, at 61, 63. Others recognize the crime, but choose not to report it. Id. at 172; see ESTRICH, supra note 5, at 12-13.

Thus, while the United States Department of Justice concedes that only 53% of all rapes or attempted rapes are reported to the police, ALLISON & WRIGHTSMAN, supra note 10, at 7, studies indicate that only approximately 5% to 9.5% of all rapes are reported. Id. at 6-7. The frequency of rape, therefore, is thought to be more accurately reflected in studies that include unreported rapes. For example, in a recent national survey, 15% of the women surveyed reported that they were “raped as adults at least one time in their life” and, of these women, 85% were acquainted with the rapist. Id. at 63.

29 See SPOHN & HORNBY, supra note 5, at 160, 163; MARSH ET AL., supra note 1, at 118-19; supra note 25 (discussing effects of discretion).
scheme defines rape in a manner that adequately protects acquaintance rape victims, and properly defines criminally punishable sexual conduct. Finally, Part IV briefly examines prosecuting techniques that address the limitations placed on statutory reform by individuals who exercise discretion in the criminal justice system.

I. LIMITATIONS OF THE REFORMED DEFINITION OF RAPE

Although the Rape Law Reform Movement opened the door to the litigation of rape cases previously considered "unprosecutable," many post-reform statutes define rape in terms that do not include certain types of acquaintance rapes. This Part demonstrates how the reform goal of eliminating resistance and nonconsent requirements in rape statutes is appropriate in stranger rape cases, but prevents the successful prosecution of many acquaintance rapes.

A. Elimination of Resistance and Nonconsent Requirements

Prior to the Rape Law Reform Movement, rape law was unique in that it required a victim to physically resist her assailant to demonstrate nonconsent. As part of the historic distrust of women claiming they were raped, courts required objective proof that nonconsensual intercourse, in fact, occurred. As demonstrated by one court, the law demanded fierce resistance to prove nonconsent:

[V]oluntary submission by the woman, while she has power to resist, no matter how reluctantly yielded, removes from the act an essential element of the crime of rape. . . . [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 no rape.

The resistance requirement was satisfied only if there was evidence that the woman displayed "the most vehement exercise of every physical means or

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30 See Linda A. Fairstein, Sexual Violence 134 (1993) (acknowledging that past reform efforts made it possible to litigate acquaintance rape cases which were previously unprosecutable).
31 See Estrich, supra note 5, at 29; Marsh et al., supra note 1, at 21; Spohn & Horney, supra note 5, at 23. For example, when a victim complains of robbery, the prosecutor is not required to prove that the victim struggled with the defendant and involuntarily gave up his or her wallet. See Ingram, supra note 10, at 7-8 (hypothesizing situation where defense attorney cross-examines robbery victim as he or she would rape victim).
32 See Ingram, supra note 10, at 12; see also Estrich, supra note 5, at 40 (recognizing that resistance requirement purportedly served as notice that sexual intercourse was not welcomed); Dana Berliner, Comment, Rethinking the Reasonable Belief Defense to Rape, 100 Yale L.J. 2687, 2696 (1991) (noting resistance requirement's popularity for ability to serve as measure "so stark . . . it was not open to misinterpretation by defendants or juries").
33 Reynolds v. State, 42 N.W. 903, 904 (Neb. 1889).
faculties within the woman's power to resist the penetration of her per-
son. This standard was most strictly applied in acquaintance rape cases.

The physical resistance requirement was alarming to both feminists
and criminal justice advocates because it subjected a woman to a higher
degree of violence by prompting her attacker to use force in response to
her resistance. Moreover, it was criticized for focusing on the victim's
behavior and requiring that all women react to rape in a uniform and
patriarchal manner. In response, most states removed their resistance
requirements.

34 Brown v. State, 106 N.W. 536, 538 (Wis. 1906). The Supreme Court of Wisconsin's
decision in Brown is often cited to exemplify the degree to which women were required to resist. See, e.g., ESTRICH, supra note 5, at 29-30; SPOHN & HORNEY, supra note 5, at 23. In Brown, the victim was a sixteen-year-old girl who alleged that she was raped by her neighbor. Brown, 106 N.W. at 537. The girl claimed that her neighbor seized her in a field, tripped her to the ground, and forced himself upon her. Id. She further testified:

I tried as hard as I could to get away. I was trying all the time to get away just as hard as I could. I was trying to get up; I pulled at the grass; I screamed as hard as I could, and he told me to shut up, and I didn't, and then he held his hand on my mouth until I was almost strangled.

Id. (internal quotations omitted). The jury convicted but the Supreme Court of Wisconsin ultimately reversed because the victim did not sufficiently demonstrate her resistance: "[W]hen one pauses to reflect upon the terrific resistance which the determined woman should make, [her absence of bruises and torn clothing] is well-nigh incredible." Id. at 539.

35 See ESTRICH, supra note 5, at 32 (concluding that resistance standard was used in
discriminatory manner where "utmost resistance" was required in acquaintance rape cases but not where accused was stranger or minority); see also ALLISON & WRIGHTSMAN, supra note 10, at 202 (noting selective application of resistance standard).

36 SPOHN & HORNEY, supra note 5, at 23; see Ingram, supra note 10, at 14 (citing report of
New York legislature that "the likelihood of receiving serious injury during a rape attack
increases significantly when the victim resists her attacker." (quoting N.Y. PENAL LAW § 130.00
note (Consol. 1984)); Berliner, supra note 32, at 2692 (discussing realization that victims who
resist rape are injured more than victims who submit to rape).

37 Dix, supra note 10, at 17 (noting criticism that pre-reform rape statutes focused too much
on victim's behavior and, in effect, put victim on trial).

38 See ESTRICH, supra note 5, at 64-66. Judges who do not recognize tears or fear as
reasonable responses to rape indicate that "[t]heir version of a reasonable person is one who does
not scare easily, one who does not feel vulnerable, one who is not passive, one who fights back,
not cries. The reasonable woman, it seems, is not a schoolboy 'sissy'; she is a real man." Id. at
65; see ALLISON & WRIGHTSMAN, supra note 10, at 202 (noting that "legal system defined
resistance in male terms").

39 See, e.g., IOWA CODE. ANN. § 709.5 (West 1993) ("[I]t shall not be necessary to establish
physical resistance by a participant in order to establish that an act of sexual abuse was committed
by force or against the will of the participant."); MICH. COMP. LAWS ANN. § 750.520i (West
1991) (stating that "victim need not resist the actor in prosecution for criminal sexual conduct"). However, in states where nonconsent remains an element of rape, removal of the resistance
requirement appears to have been a futile effort; defendants still emphasize the victim's failure
to resist and "encourage[] judges and juries to regard a victim's protestations as mere observance
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proven by the prosecution, yet permitted consent as a defense.40 Although these reforms successfully shifted the focus away from the victim and eliminated the much-criticized resistance element, they also emphasized the requirement that the defendant use force—a factor not always sufficiently present in acquaintance rapes. This approach of emphasizing force and de-emphasizing victims' nonconsent has eased the prosecution of traditional, stranger rape cases, but has frustrated the prosecution of nonaggravated acquaintance rapes.42 Essentially, where a victim expresses verbal nonconsent, but does not physically resist, and the assailant does not use force beyond that necessary to accomplish penetration, a rape incident may not fit within the reformed definition of rape.43 The problem that this situation poses recently arose in a case decided by the Supreme Court of Pennsylvania.44

B. Commonwealth v. Berkowitz

In Commonwealth v. Berkowitz,45 the complainant ("Complainant") and the defendant, Berkowitz ("Berkowitz"), were both college students at...
The incident arose when Complainant went to her dormitory room, drank a martini, and thereafter went to a campus lounge to meet her boyfriend. Her boyfriend did not show up, and Complainant proceeded to a friend's dormitory. After knocking on her friend's door and receiving no answer, she opened the door and discovered her friend's roommate, Berkowitz, sleeping on the bed. Complainant accepted Berkowitz's offer to stay in the room, but declined his invitation to sit on his bed, opting to sit on the floor instead. She also refused his request for a back-rub. Berkowitz then attempted a series of failed sexual advances which culminated in his pushing Complainant onto the bed, removing her undergarments, and penetrating her.

Complainant's testimony revealed that: Berkowitz's hands did not restrain her at the time of penetration; Berkowitz's only use of force was the weight of his body on top of her; Complainant sought to leave the room but never attempted to unlock the door; and Complainant said "no" throughout the incident.

Berkowitz was charged with rape and indecent assault. Despite a jury conviction on both charges, in a unanimous decision, the Supreme Court of Pennsylvania vacated the rape conviction.

The court emphasized that Pennsylvania's rape statute specifically

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47 Berkowitz, 641 A.2d at 1163.
48 Id.
49 Id.
50 Id.
51 Id.
52 Berkowitz, 641 A.2d at 1163. As the court stated:
[Berkowitz] moved to the floor beside her, lifted up her shirt and bra and massaged her breasts. He then unfastened his pants and unsuccessfully attempted to put his penis in her mouth. They both stood up, and he locked the door. He returned to push her onto the bed, and removed her undergarments from one leg. He then penetrated her vagina with his penis. After withdrawing and ejaculating on her stomach, he stated, "Wow, I guess we just got carried away," to which she responded, "No, we didn't get carried away, you get carried away."

Id.
53 Id. at 1164.
55 Id.
56 Berkowitz, 641 A.2d at 1163.
required a showing of forcible compulsion,\textsuperscript{57} while the indecent assault provision specified that the act be committed "without the consent of the other person."\textsuperscript{58} Finding the lack-of-consent provision "conspicuously absent" from the rape statute,\textsuperscript{59} the court insisted that the forcible compulsion element "be interpreted as something more than a lack of consent."\textsuperscript{60} While conceding Complainant's testimony claiming she said "no" throughout the incident was relevant to the issue of nonconsent, the court held that "where there is a lack of consent, but no showing of either physical force, a threat of physical force, or psychological coercion, the 'forcible compulsion' requirement under [the Pennsylvania rape statute] is not met."\textsuperscript{61}

C. Issues Presented by Berkowitz

Berkowitz has been regarded as "a huge backward step for women's rights."\textsuperscript{62} Essentially, the case has been interpreted to mean that saying "no" is insufficient proof of rape.\textsuperscript{63} By requiring more than verbal

\textsuperscript{57} Id. at 1164; see 18 PA. CONS. STAT. ANN. § 3121 (Supp. 1994), amended by 1995 Pa. Laws 10. Pennsylvania's rape statute provided, in part:
A person commits a felony of the first degree when he engages in sexual intercourse with another person not his spouse:
(1) by forcible compulsion;
(2) by threat of forcible compulsion that would prevent resistance by a person of reasonable resolution;
(3) who is unconscious; or
(4) who is so mentally deranged or deficient that such person is incapable of consent.

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\textsuperscript{58} 18 PA. CONS. STAT. ANN. § 3126 (Supp. 1994), amended by 1995 Pa. Laws 10. Pennsylvania's indecent assault statute provided, in part, that "[a] person who has indecent contact with another not his spouse, or causes such other to have indecent contact with him, is guilty of indecent assault if . . . he does so without the consent of the other person." \textit{Id.}

\textsuperscript{59} Berkowitz, 641 A.2d at 1164.

\textsuperscript{60} \textit{Id.} at 1165.

\textsuperscript{61} \textit{Id.} at 1164.


\textsuperscript{63} See Dale Russakoff, Where Women Just Can't Say 'No': Pennsylvania Supreme Court Rules Force Is Needed to Prove Rape, \textit{Wash. Post}, June 3, 1994, at A1 (commenting that Berkowitz is referred to as "No Is Not Enough" case); see also \textit{All Things Considered} (National Public Radio broadcast, July 27, 1994), available in LEXIS, News Library, CURNWS File [hereinafter All Things Considered]. Shortly after the Berkowitz decision, a prosecutor in another Pennsylvania rape case reportedly "dropped the charges, saying it was invalid because the woman protested only with words and did not fight back." \textit{Id.} One Philadelphia prosecutor commented, "I think the Berkowitz decision was incorrect, but I'm bound by it . . . ." \textit{Id.}

Berkowitz's attorney stated, however, that he felt that the decision was based on unusual
nonconsent, the court, in effect, read the physical resistance requirement back into the rape statute in situations where the assailant does not use force beyond that necessary for penetration.

Although the court did not expressly hold that it required physical resistance, it stated that sufficient force was not present. The level of force required in rape cases, however, is generally that force necessary to overcome female nonconsent. Where, as in Berkowitz, the victim's nonconsent is expressed through words, rather than conduct, the force applied by the assailant to overcome nonconsent is perceived as normal sexual activity. Thus, in cases that lack excessive force and appear before courts that do not honor verbal nonconsent, the force employed becomes criminal only at the point that it is used to overcome the victim's physical resistance. In such situations, rapists will be convicted only if the victim physically resisted—a fact that directly contradicts an important goal of rape law reform and conflicts with rape counselling that teaches women not to physically resist their assailants.

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64 See Dix, supra note 10, at 17 (concluding that Berkowitz functionally reinstated resistance requirement); James P. Gregor, Saying 'No' Should Be Enough, CHI. TRIB., July 3, 1994, at 9 (suggesting that lack of resistance by victim was basis for Berkowitz decision).


66 Berkowitz, 641 A.2d at 1165.

67 ESTRICH, supra note 5, at 60.

68 For example, normal activity such as pressing your weight against someone and removing their clothing is not considered forceful and, therefore, is normal behavior in consensual situations. Such activity in the face of verbal nonconsent is considered forceful; however, according to Berkowitz, it is insufficient force for a rape conviction. See Berkowitz, 609 A.2d at 1347 (noting that acts such as leaning or placing bodyweight on top of another individual are not "themselves inconsistent with consensual relations" and "cannot be bootstrapped into sexual intercourse by forcible compulsion").

69 See supra note 36 and accompanying text (discussing danger of resisting attacker).

70 In light of the fact that victims' resistance against their attackers often leads to greater violence against the victim, rape counselors teach women that they should not physically resist their assailant. See supra note 36 and accompanying text; Gregor, supra note 64, at 9 (discussing effects of Berkowitz decision); Women's Groups Say No, supra note 62, at 1A (quoting Kathryn Geller Myers, spokeswoman for Pennsylvania Coalition Against Rape). The attorney who prosecuted Berkowitz commented that "[i]n the face of the decision, instructors [are] faced with
Furthermore, the outcome in Berkowitz is counterintuitive. When a court finds that a rape did not occur, it should conclude that the intercourse was consensual. In Berkowitz, however, the court's finding that the defendant committed indecent assault indicates the court's recognition that the encounter was not consensual. In effect, Berkowitz's actions prior to penetration—removing Complainant's clothing and touching her body—were illegal, yet the act of penetration was legal because of the lack of excessive force. Clearly, this case sends the disturbing message that proceeding with sexual intercourse despite verbal nonconsent is not criminally punishable conduct.

A Berkowitz-type ruling also has a chilling effect on an already grossly underreported crime: it will cause victims and prosecutors to be very reluctant to pursue acquaintance rape cases where force is difficult to prove. As rapists are notorious repeat offenders, any impediment to prosecuting incidents of acquaintance rape may have devastating effects.

It has long been argued that force requirements should be removed from rape statutes—Berkowitz is merely a recent reminder of this dilemma: Do we continue to teach victims to show no resistance and lose the case in court, or to fight back and risk injury or even death?” Gregor, supra note 64, at 9.

71 See Berkowitz, 641 A.2d at 1166.

72 Cf. States Struggle to Define Rape; Is Force Needed? Is 'No' Enough? Rulings Vary, STAR TRIB., June 3, 1994, at 1A [hereinafter States Struggle]. Stephen Schulhofer, a criminal law professor at the University of Chicago Law School, asserts that states such as Pennsylvania “trivialized” alleged acquaintance rape attacks “when they classified them as indecent assault.” Id.

73 Women’s Groups Say No, supra note 62, at 1A. As Gregor commented, acquaintance rape cases “are already underreported” and “many victims will be unwilling to come forward, knowing their own behavior will be scrutinized. “There will be a lot more emphasis on whether she cried out or tried to unlock the door’ to get away.” Id.; Court Limits Rape Law, supra note 63, at A1.

74 See ALICE VACHSS, SEX CRIMES 91 (1993) (suggesting that “[r]apists progress—often they start with people they know before moving on to strangers”); Peg Tyre & Michele Parente, Rape: Still a Secret Crime; Crime Figures Show Rise, but How Many Unreported?, N.Y. NEWSDAY, Apr. 19, 1994, at A5 (“‘Rape has a very high rate of recidivism. When a person is arrested for rape, [it is] usually . . . not the first one he has committed.’” (quoting New York Police Department Special Victims Liaison)).

In April 1994, for example, a thirty-five-year-old Wall Street accountant was shot and killed by an “obscene ex-boyfriend.” Id. Several months earlier, her ex-boyfriend had raped her at knifepoint. Id. Although in this case the victim terminated the prosecution by withdrawing the charges, this incident is illustrative of the consequences which any impediment to prosecuting acquaintance rapes can have. See Cindi Leive, The Final Rape Injustice, GLAMOUR, Nov. 1994, at 198, 210 (discussing California acquaintance rape incident where prosecutors declined to file rape charges and accused individual raped and murdered another woman shortly thereafter).

75 See, e.g., ESTRICH, supra note 5, at 58-71 (arguing that force standard continues to be “obstacle” in convicting acquaintance rapists); Robin D. Wiener, Comment, Shifting the Communication Burden: A Meaningful Consent Standard in Rape, 6 HARV. WOMEN’S L. J. 143,
contention. In states where no such statutory reform exists, courts have attempted to provide judicial remedies to acquaintance rape victims. Generally, courts have tried to eliminate force requirements by minimizing the amount of force necessary for a conviction. Clearly, courts should not have to write around the law. Rape statutes should be amended to remove the force element and reflect that the term “forcible rape” is redundant since the act of penetration in the face of verbal nonconsent is force in itself.

II. PROPOSALS FOR STATUTORY REFORM

As demonstrated in Part I of this Note, in certain circumstances, acquaintance rape cannot be recognized as a serious crime until the force requirement is removed from rape statutes. In recognition of this principle, there has been a growing trend for states to criminalize nonconsensual intercourse, with no additional force requirement. The manner in which

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76 See States Struggle, supra note 72, at 1A (“Courts are continuing to struggle with how to address this abusive conduct, which is neither fish nor fowl... These are cases where there has been some overreaching, disrespect and abuse, but not the overwhelming life-threatening violence we think of traditionally in rape cases.”) (quoting Professor Schulhofer)).

77 See, e.g., State ex rel. M.T.S., 609 A.2d 1266 (N.J. 1992). In M.T.S., the Supreme Court of New Jersey interpreted the state’s second-degree sexual assault statute, which is defined, in part, as sexual penetration by physical force or coercion. Id. at 1269 (referring to N.J. Stat. Ann. § 2C:14-2c(1) (West 1982)). The court specifically addressed the issue of “whether the element of ‘physical force’ [was] met simply by an act of non-consensual penetration involving no more force than necessary to accomplish that result.” Id. at 1267. Noting the absence of reference to the victim’s will or resistance in the criminal statute, the court excluded consideration of the victim’s subjective state of mind and responsive behavior in determining the role of force in sexual penetration. Id. at 1277. The court concluded that any act of sexual penetration without the affirmative and voluntary consent of the victim constituted sexual assault. Id. Consequently, the court found that “physical force in excess of that inherent in the act of sexual penetration [was] not required for such penetration to be unlawful.” M.T.S., 609 A.2d at 1277; see also People v. Iniguez, 872 P.2d 1183 (Cal. 1994). In Iniguez, the California Supreme Court held that the statutory requirement dictating that rape is accomplished through force, violence, or fear of immediate harm is satisfied when the perpetrator creates circumstances that paralyze the victim with fear and, thereby, cause submission. Id. at 1187.


Other states similarly criminalize nonconsensual intercourse, but classify the offense as a misdemeanor called sexual misconduct, which is distinguished from rape. See, e.g., Ala. Code §§ 13A-6-61, -65 (1994) (defining rape in first degree as act of forcible compulsion and sexual misconduct as nonconsensual act); N.Y. Penal Law §§ 130.35, .20 (Consol. 1984) (providing
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these statutes should be drafted, however, raises other issues. First, should
nonconsensual intercourse without the presence of aggravating factors such
as force or violence be classified as a lesser offense than nonconsensual
intercourse with the presence of such factors? Second, how should
nonconsent be defined?

A. Structure of Statutes

Perhaps the most favorable observation of the Pennsylvania Supreme
Court justices and their decision in Berkowitz was that they were merely
interpreting "'antiquated laws.'" The Pennsylvania Legislature appar-
ently agreed: at the time the case was decided, bills were pending in both
the Pennsylvania House and Senate with proposed amendments to the
state's rape law. Both of these bills proposed amendments that provide
for rape convictions in the absence of force. The controversy over their
distinctions, however, illustrates the issue of whether nonconsensual
intercourse should be classified as a lesser offense than aggravated
nonconsensual intercourse.

The Pennsylvania Senate bill ("Senate Bill") removed the requirement
that rape be accomplished by forcible compulsion or by the threat of
forcible compulsion, requiring instead that the prosecution prove only that

for rape in first degree if actor used force and sexual misconduct if act was nonconsensual). However, these states define "lack of consent" as resulting from forcible compulsion or incapacity to consent; thus, in effect, they do not remove the force element. See N.Y. PENAL LAW § 130.05 (Consol. 1984) (defining lack of consent, in part, as resulting from forcible compulsion); Martin v. State, 504 So. 2d 335, 339 (Ala. Crim. App. 1986) (holding lack of consent for sexual misconduct conviction results from forcible compulsion).


80 Nancy E. Roman, Scales of Justice Weigh Tiers of Sexual Assault; State May Reform Rape Law, WASH. TIMES, June 16, 1994, at A8 (discussing controversy over amendments to Pennsylvania's rape statute proposed in wake of Berkowitz); Brad Bumsted, Bill to Change Law Has Languished for Three Years, GANNET NEWS SERVICE, June 10, 1994 (reporting Pennsylvania legislature's "mad rush" to correct ruling in Berkowitz); see infra notes 81-84 (reviewing bills pending in Pennsylvania's legislature at time of Berkowitz decision).

In March 1995, Pennsylvania's governor, Tom Ridge, signed into law a bill that revised Pennsylvania's criminal code on sexual offenses. See 1995 Pa. Laws 10 (amending PA. CONS. STAT. ANN. tits. 18, 23 & 42 (Supp. 1994)). The amended statute retains the first-degree felony of "rape," which is defined, in part, in terms of forcible compulsion, and adds the second-degree felony of "sexual assault," which is defined as nonconsensual sexual intercourse. Id. §§ 3121, 3124.1; see Mario F. Cattabiani, Ridge Signs Bill Rewriting Rape Laws, MORNING CALL (Allentown, Pa.), April 1, 1995, at A3 (discussing enactment of reformed rape statute).
the intercourse was nonconsensual. The bill introduced to the Pennsylvania House ("House Bill"), however, proposed a different approach. The House Bill sought to abolish the current rape statute and replace it with a graded-offense "sexual assault" statute. Under this proposal, there would be two grades of sexual assault: (1) sexual assault, a second-degree felony requiring only proof of nonconsent; and (2) aggravated sexual assault, a first-degree felony requiring, in part, proof of forcible compulsion or the threat of forcible compulsion. Similar graded-offense rape statutes are currently in force in several states. Thus, the House Bill

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(A) Offense Defined.—A person commits a felony of the first degree when he engages in sexual intercourse with another person not his spouse:

(1) without consent of the other person;
(2) who is unconscious;
(3) who is so mentally deranged or deficient that such person is incapable of consent; or
(4) who is a child ten years of age or younger, if the person engaging in sexual intercourse with the child is 16 years of age or older.

(B) Spousal Sexual Assault.—Whenever the term "rape" is used in this title or any other title, it is deemed to include spousal sexual assault as further defined in section 3128 (relating to spousal sexual assault).

(C) Consent.—For the purposes of this section, "consent" shall mean words or overt actions by a person who is competent to give informed consent indicating freely given agreement to have sexual intercourse.

Id.; see also Roman, supra note 80, at A8 (discussing Senate Bill).


83 See id. Section four of the House Bill provided, in part:

Section 3122. Sexual Assault.

A defendant commits a felony of the second degree when the defendant engages in sexual intercourse with a complainant without the complainant's consent.

Id.

84 Id. Section four of the House Bill provided, in part:

Section 3121. Aggravated Sexual Assault.

A defendant commits a felony of the first degree when the defendant engages in sexual intercourse with a complainant if:

(1) the defendant does so by forcible compulsion;
(2) the defendant does so by threat of forcible compulsion that would prevent resistance by a person of reasonable resolution;
(3) the complainant is unconscious or the defendant knows that the complainant is unaware that the sexual intercourse is occurring . . . .

Id.

85 See, e.g., VT. STAT. ANN. tit. 13, §§ 3252-53 (Supp. 1994) (defining sexual assault, and in part, as nonconsensual sex act and aggravated sexual assault, in part, as sexual assault either causing serious bodily injury, involving deadly weapon, involving threat to cause serious bodily injury, applying deadly force, or involving repeated nonconsensual sexual acts); WIS. STAT. ANN.
treated nonaggravated, nonconsensual intercourse as a second-degree felony, while the Senate Bill classified it as a first-degree felony.

Pennsylvania House Representative Karen Ritter, who introduced the House Bill, intended that the aggravated sexual assault charge be used to prosecute stranger rapes, while acquaintance rape cases would be prosecuted under the sexual assault statute. Representative Ritter supported the bill on several grounds. First, she believed that, since other crimes have similar graded offenses, it is appropriate to have two degrees of sexual assault. Supporters of the House Bill similarly believed that a rapist who, for example, beats a woman violently should not be charged with the same crime as a rapist who does not use force beyond penetration. Second, it would ensure a greater likelihood of convictions by juries that are hesitant to impose the same penalty on aggravated and nonaggravated rapes. Supporters who initially rejected the graded-offense

§ 940.225(1)-(3) (West 1982 & Supp. 1994) (defining first-degree sexual assault, Class B felony, as nonconsensual intercourse causing pregnancy or “great bodily harm,” second-degree sexual assault, Class C felony, as nonconsensual intercourse causing injury or illness, and third-degree sexual assault, Class D felony, as nonconsensual sexual intercourse).

Graded-offense rape statutes are also used by some states that continue to require force as an element of the crime. See, e.g., ILL. ANN. STAT. ch. 720, paras. 5/12-13, -14 (Smith-Hurd 1993) (providing for criminal sexual assault, class 1 felony, and aggravated criminal sexual assault, class X felony); IOWA CODE ANN. §§ 709.1-.4 (West 1993 & Supp. 1995) (defining sexual abuse in first, second, and third degrees as class A, B, and C felonies, respectively); N.J. STAT. ANN. § 2C:14-2(a), (c) (West 1995) (defining aggravated sexual assault as first-degree crime and sexual assault as second-degree crime); WASH. REV. CODE ANN. §§ 9A.44.040-.060 (West 1988 & Supp. 1995) (defining rape in first, second, and third degrees as class A, B, and C felonies, respectively).

65 See Bill Pushed, supra note 79, at B4 (discussing application of penalties proposed under House Bill); Frank Reeves, Bill Recognizes Additional Kinds of ‘Force’ in Rape, PITTSBURGH POST-GAZETTE, June 3, 1994, at A4 (describing graded structure of proposed sexual assault legislation).

86 Roman, supra note 80, at A8.

65 See id. Ken Pangborn, the head of Men International, a group that counsels and defends men claiming to be falsely accused of rape and other sexual crimes, expressed support for the House Bill. Id. While he agrees with the view that “no” should be sufficient, Pangborn supports changes that reflect the distinction between rapes which involve force and those that involve only nonconsent. Id. “Rape is a crime like murder; one size does not fit all.” Id. (quoting Ken Pangborn). Similarly, one Pennsylvania district attorney urged the Pennsylvania House to reject the Senate Bill. House Urged, supra note 46, at B9. “A two-tiered approach is a recognition of the way things are in life. There really is a difference between a vicious aggravated sexual assault and the Berkowitz case. Judges and juries recognize the difference.” Id. (quoting William Ryan, head of Pennsylvania District Attorneys Association).

87 See Roman, supra note 80, at A8. “Juries are reluctant to convict someone of a first-degree felony if they are not convinced . . . a sufficient amount of force is present.” Id. (quoting Pennsylvania Representative Ritter); Bill Pushed, supra note 79, at B4 (restating argument of Pennsylvania Representative Ritter).
statute later endorsed the House Bill as a “first step” and practical approach to prevent acquittals in acquaintance rape cases.\footnote{Roman, supra note 80, at A8 (quoting Kathryn Kolbert, Vice President of Center of Reproductive Law and Strategy). Kolbert maintains that “rape is rape” and cautions that acquaintance rape may cause victims worse psychological damage because they are harmed by persons they trust. Id. (quoting Kathryn Kolbert). However, she favored the House Bill as a practical alternative to allowing rape to go unpunished. Id. “[A]s a practical reality, I would rather see some punishment than none at all. If as a first step we have to get a reduced crime, that might be the way to go.” Id. (quoting Kathryn Kolbert). Additionally, a researcher for the Pennsylvania Coalition Against Rape admits that, despite previous rape law reform efforts that decreased criminal penalties for rape in hopes of more convictions, “juries remain reluctant to convict college students of a first-degree felony, and many cases go unprosecuted.” Id. (quoting Gail Rawlings, researcher for Pennsylvania Coalition Against Rape). Linda Fairstein, Bureau Chief of the Sex Crimes Unit for the New York County District Attorney’s Office, indicates that 90% of jurors draw a distinction between stranger rape and acquaintance rape and, thus, graded-offense statutes make it “much easier to get convictions” in the absence of aggravating factors. Telephone Interview with Linda A. Fairstein, Bureau Chief, Sex Crimes Unit, District Attorney’s Office for the County of New York (Jan. 25, 1995) [hereinafter Fairstein Interview].}

Graded-offense statutes have been opposed, however, for their failure to reflect that the offense of rape should criminalize nonconsensual intercourse regardless of whether aggravating factors are present.\footnote{See, e.g., Bill Pushed, supra note 79, at B4. “We will waste no time in making a forceful legislative statement that ‘no’ means ‘no’; that a victim who does not give consent to sexual intercourse has indeed been violated; and that perpetrators will face the full penalty for rape when they refuse to take no for an answer.” Id. (quoting Senator Stewart J. Greenleaf, sponsor of bill).} In particular, graded-offense statutes have been criticized for treating acquaintance rape as “‘quasi rape’” and signalling that it is less grave than stranger rape.\footnote{Roman, supra note 80, at A8 (quoting attorney Lynn Hecht Schafran, sponsor of bill).} In fact, the scheme offered by the House Bill has been discouraged by reformers who note that acquaintance rape may cause more psychological trauma than stranger rape.\footnote{See ESTRICH, supra note 5, at 25; Roman, supra note 80, at A8.}

A third approach, however, was enacted by the state of Utah.\footnote{See generally UTAH CODE ANN. §§ 76-5-402, -405, -406 (1995). Section 76-5-405 has been amended by provisions to take effect April 29, 1996, see UTAH CODE ANN. § 76-5-405 (Supp. 1995), but such amendment does not substantively effect this Note.} Utah’s statute defines rape as “sexual intercourse with another person without the victim’s consent,” a first-degree felony.\footnote{UTAH CODE ANN. § 76-5-402(1) (1995).} In contrast to Pennsylvania’s Senate Bill, Utah’s statute also provides for a separate offense of “aggravated sexual assault,” defined, in part, as a rape or other sexual offense that involves aggravating factors such as bodily injury or the use or threat of use of a dangerous weapon.\footnote{UTAH CODE ANN. § 76-5-405(1)(a),(b) (1995).} Aggravated sexual assault
is also a first-degree felony,97 but is clearly distinguished from the crime of rape.98

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97 UTAH CODE ANN. § 76-5-405(2) (1995). Utah's aggravated sexual assault offense imposes minimum mandatory sentencing for convicted defendants. Id. (stating that aggravated sexual assault is "punishable by imprisonment in the state prison for a term which is a minimum mandatory term of 5, 10, or 15 years and which may be for life"). The court is mandated to impose the term of middle severity, to wit, 10 years, unless there are aggravating or mitigating circumstances. Id. § 76-3-201(6)(a). See generally Jeffery J. DeVayshayee, Recent Developments, 1989 UTAH L. REV. 216 (discussing constitutionality of Utah's aggravated sexual assault statute's mandatory sentencing provision). Section 76-5-405(2) of the Utah Code has since been amended and effective April 29, 1996, the punishment for aggravated assault will be "imprisonment . . . for an indeterminate term at not less than 5 years to life." See UTAH CODE ANN. § 76-5-405(2) (Supp. 1995).

Utah Assistant Deputy District Attorney James Cope indicates that the aggravated sexual assault statute is an extremely useful prosecution tool. Telephone Interview with James Cope, Assistant Deputy District Attorney, Special Victims Unit, Salt Lake County District Attorney’s Office (Jan. 27, 1995) [hereinafter Cope Interview]. The statute gives the prosecution the option of charging a defendant with aggravated sexual assault in order to distinguish violent and aggravated rapes, and encourages defendants to plead guilty to rape in order to avoid the minimum mandatory sentencing provision of the aggravated sexual assault offense. Id.


Nevada takes another interesting approach. Nevada's single sexual assault provision has one definition for sexual assault. Nev. Rev. Stat. Ann § 200.366(1) (Michie 1992). Section 200.366(1) provides, in part, that "[a] person who subjects another person to sexual penetration . . . against the victim's will . . . is guilty of sexual assault." Id. Sentencing is based on the presence or absence of aggravating factors, such as force or violence. Id. § 200.366(2). For example, the sentence imposed on the defendant can depend on whether "substantial bodily harm" to the victim results from the sexual assault. Id. Section 200.366(2) provides, in part:

2. Any person who commits a sexual assault shall be punished:
   (a) If substantial bodily harm to the victim results from the actions of the defendant committed in connection with or as a part of the sexual assault:
      (1) By imprisonment in the state prison for life, without possibility of parole;
      or
      (2) By imprisonment in the state prison for life with possibility of parole, eligibility for which begins when a minimum of 10 years has been served.
   (b) If no substantial bodily harm to the victim results:
      (1) By imprisonment in the state prison for life, with possibility of parole, beginning when a minimum of 5 years has been served; or
      (2) By imprisonment in the state prison for any definite term of 5 years or more, with eligibility for parole beginning when a minimum of 5 years has been served.

Id.

This approach is similar to Utah's present statutory scheme. It is susceptible, however, to some of the same criticism as the graded-offense rape statute where juries are reluctant to convict an aggravated and nonaggravated rapist with the same crime. See Fairstein Interview, supra note 90 (suggesting same). Since the prosecutor cannot discuss sentencing with the jury, jurors will not know that a violent rapist will be sentenced under harsher penalties than a nonviolent rapist. Id. Therefore, jurors who feel the need to distinguish between aggravated and nonaggravated rapes may hesitate to convict because of the mistaken belief that both crimes will be penalized
B. Standard of Nonconsent

However structured, statutes defining rape in terms of nonconsent must clarify how nonconsent will be determined. In some states, nonconsent is defined as the absence of freely given words or overt actions demonstrating a woman's consent ("Affirmative Consent Standard"). In effect, the Affirmative Consent Standard establishes a presumption of nonconsent and creates an affirmative duty for the initiator to obtain consent from the other party in each sexual encounter. Other states, however, require that nonconsent be proven by the victim's words or conduct or by other circumstances indicating nonconsent ("Affirmative Nonconsent Standard"). Thus, in these states, evidence that the victim uttered "no" even once is sufficient to prove nonconsent. While the satisfaction of nonconsent elements typically does not present significant obstacles in the prosecution of rape cases, the manner in which nonconsent is determined has important implications regarding how

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99 See, e.g., WASH. REV. CODE ANN. § 9a.44.010(7) (West Supp. 1995) (describing consent as "actual words or conduct indicating freely given agreement to have sexual intercourse"); WIS. STAT. ANN. § 940.225(4) (West 1982 & Supp. 1994) (specifying 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"); see also Lani A. Remick, Comment, Read Her Lips: An Argument for a Verbal Consent Standard in Rape, 141 U. Pa. L. Rev. 1103 (1993) (proposing verbal affirmative consent standard); Wiener, supra note 75, at 159 (suggesting consent standard based on victim's affirmative words or acts); Ingram, supra note 10, at 28-30 (noting increasing requirement that consent means freely given words or overt actions).

Some states define consent in a similar manner, even though their rape statutes still define rape in terms of force. See, e.g., CAL. PENAL CODE § 261.6 (Deering 1995) ("’[C]onsent’ shall be defined to mean positive cooperation in act or attitude pursuant to an exercise of free will. The person must act freely and voluntarily and have knowledge of the nature of the act or transaction involved."); ILL. ANN. STAT. ch. 720, para. 5/12-17(a) (Smith-Hurd 1993) (defining defense of consent as "a freely given agreement to the act of sexual penetration" and noting that "[l]ack of verbal or physical resistance or submission . . . resulting from the use of force or threat of force . . . shall not constitute consent").

100 Remick, supra note 99, at 1114.

101 See, e.g., UTAH CODE ANN. § 76-5-406(1) (1995). In Utah, "[a] person commits rape when the actor has sexual intercourse with another person without the victim's consent." UTAH CODE ANN. § 76-5-402 (1995). "Without consent" is further defined, in part, as occurring if "the actor expresses lack of consent through words or conduct" or if "the actor is able to overcome the victim through concealment or by the element of surprise." Id. § 76-5-406(1), (3); see also WASH. REV. CODE ANN. § 9A.44.010(7), .060(1)(a) (West 1988 & Supp. 1995) (defining consent as actual words or conduct indicating consent, but requiring "lack of consent . . . clearly expressed by the victim's words or conduct" for third-degree rape conviction).

102 Cope Interview, supra note 97 (indicating that manner in which nonconsent is defined is not significant prosecuting impediment); Fairstein Interview, supra note 90 (same).
criminal sexual conduct is defined. The Affirmative Consent Standard is based on the premise that rape law will not adequately protect a woman's right to absolute sexual autonomy unless it creates a presumption of female nonconsent and requires a man to obtain a woman's freely given affirmative consent prior to each sexual encounter. While nonconsent could be proven by a rape victim's expression of verbal or physical nonconsent, absent affirmative nonconsent, the defendant carries the burden of proving that the woman consented.

The Affirmative Consent Standard rejects the notion that an Affirmative Nonconsent Standard comports with "modern principles of personal autonomy." Proponents of the Affirmative Consent Standard reason that it is inherently unfair to require the prosecution to prove affirmative nonconsent in rape cases while no comparable requirement exists for other crimes that contain nonconsent as an element and consent as a defense. Therefore, it has been suggested that the Affirmative Nonconsent Standard creates a presumption of consent, demonstrating that

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103 Chamallas, supra note 5, at 777 ("The law of sex . . . can operate as a value generating force when those who create or are governed by it perceive in the law an underlying vision of appropriate sexual conduct."). As one commentator framed the issue:

Men and women today grapple with the politics of yes. What does a solid yes look like? Who gets to say it under what conditions, and how does it differ from no? After centuries of being denied the ability to say no or to have consent respected as a concept, women have been able to make the point that any no should be an unambiguous stop. However, there has been less success at defining yes . . . Pepper Schwartz, The Politics of Desire: A New Take on the Changing Rules of Sex; Part One, PLAYBOY, June 1994, at 53.

104 See Remick, supra note 99, at 1104-05 (arguing that, to bring nontraditional rape within "boundaries of criminal law," redefinition of consent standard is necessary).

105 See Ingram, supra note 10, at 29 (noting that under "no means no" standard, defendant would not be able to defend on basis of being uncertain about woman's consent); Remick, supra note 99, at 1105 (proposing Affirmative Consent Standard, but noting "no' would mean 'no"); Wiener, supra note 75, at 156 (discussing Affirmative Consent Standard, yet noting situations where verbal protests are sufficient resistance); see also Estrich, supra note 5, at 84 (discussing feminist goal of having courts rely on female's "word as to nonconsent (not saying yes, or at least saying no")).

106 Remick, supra note 99, at 1114; Wiener, supra note 75, at 155 (praising Wisconsin statute for shifting consent burden to defendant (citing Wis. STAT. ANN § 940.225(3) (West 1982)); see Ingram, supra note 10, at 28-29.

107 See Remick, supra note 99, at 1115 (quoting State ex rel. M.T.S., 609 A.2d 1266, 1277 (N.J. 1992)).

108 See Remick, supra note 99, at 1111, 1113. For example, in auto theft, a crime containing nonconsent as an element and consent as a defense, "[a] mere showing that the owner never gave the defendant permission to take the car is enough to defeat [a consent] defense; no showing that the owner actually told the defendant not to take the car is necessary." Id. at 1111 (emphasis in original).
the law reflects that "society accepts a certain amount of coercion, aggression or violence against women as a normal, even desirable, part of sexual encounters." Accordingly, "placing the burden on the defendant comports with the distribution of responsibility characteristic of other laws for which nonconsent is an element or consent is a defense: it suggests that a man has a duty to ascertain his partner's consent before proceeding with sexual activity" and establishes that a woman should not be burdened with the duty to convey nonconsent when she wishes to retain the right to deny sexual access to her body.

Despite the appeal of an Affirmative Consent Standard, there remains a dispute, even among women and feminists, over the degree of protection women truly need or desire. These issues have recently become the

109 Remick, supra note 99, at 1104; see Wiener, supra note 75, at 147 ("Because both men and women are socialized to accept coercive sexuality as the norm in sexual behavior, men often see extreme forms of this aggressive behavior as seduction, rather than rape.").

110 Remick, supra note 99, at 1130.

111 Remick, supra note 99, at 1111-12.

112 See Claudia Fitzherbert, Notebook: Victims? Chaps Lead the Way. DAILY TELEGRAPH, Jan. 21, 1994, at 19. Indeed, as one woman remarked, "[i]t has become fashionable among my more moderate sisters in the women's movement to pour scorn on the current emphasis on women as victims." Id. The views of women such as Camille Paglia and Katie Roiphe are representative of feminists who denounce recent reform efforts. See Stephanie Gutmann, The Morning After: Sex, Fear, and Feminism on Campus, NAT'L REV., Oct. 18, 1993, at 66 (hereinafter Book Review) (reviewing KATIE ROIPHE, THE MORNING AFTER: SEX, FEAR, AND FEMINISM ON CAMPUS (1993)); Suzanne Moore, Date Rape Is One Word Too Many. THE GUARDIAN, Jan. 15, 1993, at 9 (commenting on CAMILLE PAGLIA, SEX, ART AND AMERICAN CULTURE (1992)); Molly O'Neill, Decades as Icon; Now Freedom, N.Y. TIMES, Feb. 9, 1995, at C1, C10 (noting dissention within feminist ranks by women such as Katie Roiphe who "have railed against the notion of woman-as-victim"); see also Bonilla, supra note 28, at 22 (denouncing expanded definition of date rape and feminist focus on rape as "victimization of all women by all men"); Stephanie Gutmann, Are All Men Rapists? Problems with the Violence Against Women Act of 1993, NAT'L REV., Aug. 23, 1993, at 44 (hereinafter VAWA) (disparaging views that depict rape as systematic discrimination against women).

Some women praise the view of Roiphe and Paglia for revealing the "date-rape crisis" as a "dishonest, public re-evaluation of sexual norms" where "one huge sector of people (students, professors, members of the 'helping professions') decides to start identifying ordinary male sexual initiative as rape, and other huge sectors (college administrators, journalists, politicians) accept this vision of the world." Book Review, supra, at 67. Others label such views as "loony feminist nonsense with an appeal to 'common sense'" which concededly "identify[] the confusion surrounding the date rape debate," yet are largely ignorant of the facts." Moore, supra, at 9.

Nevertheless, even Professor Susan Estrich, a leading scholar in the field of acquaintance rape, has suggested that "those 'who claim that a woman or man doesn't even need to say no,' constitute 'the greatest threat' to 'real' date-rape victims." California Sex-Consent Law Model for Others, USA TODAY, May 31, 1994, at 14A (hereinafter California Sex-Consent Law); cf. ESTRICH, supra note 5, at 103 (proposing that "threshold of liability" for rape should "include at least those nontraditional rapes where the woman says no or submits only in response to
subject of heavy debate on college campuses throughout the country. An often-cited study conducted in the mid-eighties reported that one in four college women have been or will be victims of rape or attempted rape, and that eighty-four percent of these women will know their assailants. To address this threat, one Ohio college implemented a student-drafted sexual offense policy that requires affirmative consent at each new level of sexual interaction between students ("Antioch Policy"). Both women and men, however, object to such policies and declare that distortions to the definition of rape have exaggerated its occurrence.

Although the Antioch Policy is well regarded by some for clearly defining sexual boundaries between students, others criticize it for implying that women are "so weak and gullible and innocent and naive that [they] really need[] this kind of protection in a kind of everyday sexual encounter." Indeed, critics of current reform efforts also object to

[ certain] lies or threats") (emphasis in original). Similarly, Pennsylvania state Representative Karen Ritter, sponsor of the House Bill discussed in part II.A, supra, rejects the notion that a woman must say "yes" at each level of sexual activity and "agrees strongly that saying 'no' should be enough to convict someone of . . . a serious felony." Bumsted, supra note 80.

See Book Review, supra note 112, at 66; Debate Rages over Definition of Rape and Date Rape (National Public Radio broadcast, Sept. 1, 1993) [hereinafter Debate Rages].

See Debate Rages, supra note 113 (discussing results of study conducted by Professor Mary Koss of University of Arizona for Ms. magazine (the "Koss Study").

See Sonya Live (CNN television broadcast, Oct. 14, 1993) (interviewing Katie Roiphe and Antioch College students regarding sexual offense policy implemented at Antioch College) [hereinafter Cable News Network]. The Antioch Policy mandates affirmative consent and encourages affirmative nonconsent when reasonably possible. Id. Alleged violators of the policy must appear before the Dean of Students and a hearing board who determine the punishment imposed on the violator. Id. Pomona College in California has a similar student conduct code, which requires "a clear and explicit agreement to engage in a specific activity." California Sex-Consent Law, supra note 112, at 14A.

See, e.g., Cable News Network, supra note 115 (discussing criticism of Antioch Policy); Schwartz, supra note 103, at 53 (noting widespread criticism of Antioch Policy's "assault on personal freedom" and "legislation of sexual style by committee").

The Koss Study, which reported that one in four college women have been or will be raped, see supra note 114, has been the subject of much criticism. It is contended that the definition of rape used in the Koss Study was so loosely worded that an affirmative response to questions such as "[d]id you have sex with someone when you didn't want to because a man gave you drugs or alcohol?" would indicate that a rape had occurred. Cable News Network, supra note 115 (interviewing Katie Roiphe). Essentially, the Koss Study has been labeled as "pure hype," Debate Rages, supra note 113, that expands the scope of rape to include everything from regretted sexual intercourse, VAWA, supra note 112, at 44, and "verbal coercion or manipulation" to "sex with someone who [is] intoxicated." Cable News Network, supra note 115.

Cable News Network, supra note 115 (interviewing Antioch College student).

Id. (interviewing Katie Roiphe). Critics of the Antioch Policy argue that it is "very condescending to have a policy saying, '[y]ou need special protection. You're not capable of articulating your feelings, so we're going to create a safe space for you in order to do that.'" Id. (interviewing Antioch College student). Debate over the Antioch Policy e
rape education that tends to depict all men as potential rapists and teaches teenagers and college students that behind each date "lurk[s] sexual peril." Essentially, critics of current rape law reform efforts contend that "the pendulum has swung too far" and people should focus on exactly what is being said about men and women.

Those who oppose Affirmative Consent Standards are especially troubled by the light these rules cast upon women: they object to Affirmative Consent Standards for treating women as infants, implying that women cannot assert themselves when sexually pressured, and insinuating that women are not responsible for their own actions. Because these critics fear the "passive" view of women in the sexual arena will pervade notions of women in other areas, they object to programs that would cause Affirmative Consent Standards to become a part of college policies and legislation.

III. ANALYSIS AND SUGGESTIONS

A. Structure of Statutes

While a graded-offense rape statute is structured to meet the goal of higher conviction rates, a single-offense rape statute conforms with the goal of treating all rapes as equally serious offenses regardless of whether...
aggravating circumstances are present.\(^{127}\) Apparently, the disparity between these two well-intentioned approaches can be traced to the sometimes conflicting ideological and pragmatic goals of the Rape Law Reform Movement. It is submitted that Utah's rape statute provides the most effective means of achieving both these goals, while resolving the concerns of those who oppose either the graded-offense or single-offense rape statutes.

A graded-offense rape statute has several flaws and limitations. Supporters of the graded-offense statute point out that a rapist who uses additional violence or creates other aggravating circumstances should be subjected to a higher penalty than a rapist who does not.\(^{128}\) This goal, however, is accomplished at the expense of undermining the very principles rape law aims to protect. Specifically, a graded-offense rape statute continues to define rape in terms of force and, thus, fails to reflect that the interests protected in modern rape law are women's rights to sexual autonomy\(^{129}\) and bodily integrity.\(^{130}\)

Some reluctantly support graded-offense rape statutes in order to obtain more convictions by judges and juries who are hesitant to convict acquaintance and stranger rapists of the same crime.\(^{131}\) Graded-offense statutes, however, arguably have been no more effective in that respect than single-offense statutes. One study revealed that a higher-degree statute that explicitly defines rape in forcible terms effectively "'preempt[s]'" the content of the lesser, nonaggravated rape offense, "'render[ing] its"

\(^{127}\) See supra notes 91-92 and accompanying text.

\(^{128}\) See supra notes 87-88 and accompanying text.

\(^{129}\) 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, 1782-83 (1992) (describing historical change in rape laws); Remick, supra note 99, at 1104. Thus, "[w]hat is meant by sexual autonomy [in this context] is the freedom to refuse to have sex with any one for any reason." Dripps, supra, at 1785.

\(^{130}\) See Dix, supra note 10, at 17 (noting that rape law protects "privacy and integrity" of victim's bodies); see also Cal. Penal Code § 263 (Deering 1995). Interestingly, California's rape statute specifies that "[t]he essential guilt of rape consists in the outrage to the person and feelings of the victim of the rape. Any sexual penetration, however slight, is sufficient to complete the crime." Id.

\(^{131}\) See supra note 89 and accompanying text. Ironically, a version of the graded-offense statute was enacted in Pennsylvania in response to a case where the jury convicted under a single-offense rape statute, but the verdict was subsequently reversed due to the statute's force element. See supra notes 56-57 and accompanying text. Though Berkowitz's jury verdict would seem to indicate the willingness of juries to convict nonaggravated rapes under a single rape statute, it has been suggested that most juries would not have convicted under similar facts. Fairstein Interview, supra note 90 (suggesting Berkowitz was atypical because it resulted in prosecution and conviction).
Also, it has been suggested that the classification of rape as a graded offense masks the problem that low conviction rates are often related to the fact that prosecutors, judges, and juries are reluctant to prosecute or convict, as the case may be, where additional elements of force and physical resistance are absent.\footnote{132}{ESTRICH, supra note 5, at 89 (quoting results of study conducted by Professor Wallace Loh of University of Washington on effectiveness of Washington's graded-offense rape statute in Wallace Loh, The Impact of Common Law and Reform Rape Statutes on Prosecution: An Empirical Study, 55 WASH. L. REV. 543, 552 (1980)).}

The Utah statute presents a hybrid of the graded-offense and single-offense rape statutes. As noted in Part II.A of this Note, in Utah, there is a single rape offense.\footnote{133}{Id.; see BESSMER, supra note 22, at 110, 123 (noting that police and prosecutors are reluctant to act where rape accusations stand on uncorroborated testimony of victim because juries are less likely to convict).} There is also, however, a separate crime called "aggravated sexual assault," which includes rape and other sexual offenses committed under aggravating circumstances.\footnote{134}{UTAH CODE ANN. § 76-5-402(1) (1995). Section 76-5-402(1) provides that "[a] person commits rape when the actor has sexual intercourse with another person without the victim's consent." Id.} Significantly, both rape and aggravated sexual assault are first-degree felonies,\footnote{135}{UTAH CODE ANN. § 76-5-405(1) (1995). Section 76-5-405(1) provides:

    (1) A person commits aggravated sexual assault if in the course of a rape or attempted rape, object rape or attempted object rape, forcible sodomy or attempted forcible sodomy, or forcible sexual abuse or attempted forcible sexual abuse the actor:

(a) causes bodily injury to the victim;
(b) uses or threatens the victim by use of a dangerous weapon as defined in Section 76-1-601;
(c) compels, or attempts to compel, the victim to submit to rape, object rape, forcible sodomy, or forcible sexual abuse, by threat of kidnapping, death, or serious bodily injury to be inflicted imminently on any person; or
(d) is aided or abetted by one or more persons.

Id.} and the definition of rape—nonconsensual sexual intercourse—does not incorporate aggravating factors.

It is submitted that a statute modeled after Utah's rape statute would meet the symbolic and pragmatic goals of rape law reform. Such a statute would treat both stranger and acquaintance rape equally as one crime, reflecting the view that the state should punish violations of a person's right to sexual autonomy and bodily integrity regardless of whether additional injury results. The statute also, however, offers the alternative aggravated offense which helps prosecutors, judges, and juries distinguish between rape and aggravated rape and, if necessary, pursue stricter sentencing to

\footnote{See UTAH CODE ANN. §§ 76-5-402(3), -405(2) (1995 & Supp. 1995); see also supra note 97 (discussing sentencing under aggravated sexual assault statute).}
account for aggravating circumstances.

B. Standard for Nonconsent

For rape law to comport with societal norms, it must reflect the concept that victims of acquaintance rape need protection, yet recognize that it regulates the most intimate aspect of people's lives. Of course, the United States Supreme Court has acknowledged that a line does not have to be drawn around intimate behavior. Nevertheless, due to the nature of the conduct being regulated, a consent standard should be drafted to reflect that which people desire.

A nonconsent standard that requires affirmative words or overt actions of consent is troublesome for several reasons. First, it arguably includes within its definition noncriminal sexual behavior. Second, in an effort to secure absolute sexual autonomy for women, it places too much responsibility on men and commands individuals to conduct sexual relations in a manner which does not necessarily reflect society's needs or desires. Conversely, an Affirmative Nonconsent Standard is preferable because it provides protection for all acquaintance rape victims in a manner that does not incorporate noncriminal behavior. Furthermore, it promotes equal responsibility by men and women in all sexual encounters.

The reasoning of women who vehemently oppose current rape reform efforts is flawed in many respects: these women do not include certain incidents of nonconsensual intercourse in their definition of rape; they


138 See Cable News Network, supra note 115 (interviewing Katie Roiphe); Bonilla, supra note 28, at 22 (criticizing Koss Study and noting that “[o]nly three of the five questions in the survey mentioned threat or use of physical force as a basis for discerning whether or not a rape had occurred”). When asked to define rape, Roiphe stated:

[The use of physical force, the serious threat of physical force, or sex with someone who’s incapacitated, namely, someone who [i] passed out drunk. . . . I think all of those things are rape. What I don’t think is rape is . . . when you were drunk and something happened that[] you . . . wished hadn’t happened the next morning. And that’s what I think is a gray area here.

Cable News Network, supra note 115 (interview with Katie Roiphe). Clearly, her definition of a “gray area” in sexual relations is overbroad. The dispute over the validity of the Koss Study, see supra note 114, apparently centers around a disagreement over exactly what acts constitute rape. Those who question the results of the Koss Study apparently feel that rape should be defined in terms of force.

Labelling all allegations of nonaggravated rape as lies constructed by women who have “morning after regrets,” however, seriously undermines legitimate rape reform efforts. Extremist attempts to prevent the definition of rape from including acts which very few would consider rape gloss over the real “gray area” that falls between a forceful rape and “morning after regrets”—such as incidents where the woman simply says “no” but does not physically resist.
misplace the source of feminist views on rape; and they fail to recognize that all women do not have the same strengths. Extremist views such as these have caused people to focus on exactly what is being said about men and women and have demonstrated that not all women agree that an Affirmative Consent Standard is a desirable way to regulate sexual behavior.

Clearly, "ordinary male sexual initiative" exists. While this behavior is not necessarily desirable to all women, the law must reflect that only some of it is criminal. Unfortunately, some women submit to sexual intercourse for reasons that are less than admirable. If a woman unwillingly yet silently submits to intercourse, her lack of verbal or overt consent should not deem the resulting sexual intercourse criminal. While it is highly desirable that no woman should ever submit to any unwanted sexual act, teaching men and women how to behave sexually in situations where there is no criminal intent should not be accomplished through the penal code. An Affirmative Nonconsent Standard reflects this distinction,

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139 Roiphe points to anger as the source of feminist views, urging that women should keep their "fear and rage in perspective." Roiphe, supra note 120, at 56. While conceding that "[t]here is nothing wrong with anger in feminism," id., she believes that women's views on sexual harassment and date rape are tainted by their personal experiences: "The truth is we bring so much that is personal into our conversations about men and women: the time our fathers embarrassed us at our 6th birthday party, the boyfriends who left us, the boyfriends we left, the husbands who have sordid affairs with our best friends." Id. Clearly, it is demeaning and untenable to claim that all women's views on the categorization of nonconsensual sexual activity as date rape derive from such thoughts.

140 The failure to recognize nonforceful rape as rape indicates that Roiphe, and those who agree with her, assume all women are equally aggressive. See Cable News Network, supra note 115 (noting comment that "Ms. Roiphe, obviously, has benefitted greatly from having a . . . strong sense of self"). As mentioned in part II.A, supra, all women do not react to rape in a uniform manner, especially in acquaintance rape situations where acquaintances rely on "shock and embarrassment" to overcome their victims. Tyre & Parente, supra note 74, at A5 (quoting detective in New York City Police Department).

One woman revealed that a guest at her college roommate's party let himself into her room while she slept, "gripped" her arms over her head, and raped her. Stan, supra note 119, at A39. She verbally protested, but "was afraid to do so too loudly, for just outside the door lurked the beer-soaked players of an entire hockey team." Id. Recalling both "boasts from athletes about girls who had . . . serviced 10 or 15 members in a single night," and advice from police experts on violent crime who discourage violent resistance, she opted for self-preservation and "resigned [herself] to her fate." Id. Her story illustrates that calculated efforts at self-preservation are all too easily classified as passive responses not worthy of protection by rape laws.

141 Book Review, supra note 112, at 66.

142 Ingram, supra note 10, at 25 (citing some reasons as "[s]he doesn't want to seem a prude; . . . she likes him and wants to keep seeing him; [and] she may think that she did sort of lead him on").
while an Affirmative Consent Standard, though well-intentioned, does not.  

A nonconsent standard must be drafted to strike a balance between the interests of both men and women. Of course, responsibility in sexual relations should not lie solely with women. There is concern, however, that serious criminal liability will be assessed against men where no criminal intent is proven. An Affirmative Nonconsent Standard balances these concerns more effectively than does an Affirmative Consent Standard.

In the past, many states dispensed with a mens rea requirement for rape because it was clear that intercourse compelled by force and against the resistance of the woman demonstrated a criminal state of mind. Where, however, rape is defined in terms of nonconsent, and nonconsent is defined by an Affirmative Consent Standard, the elements that historically replaced the mens rea are removed from the statute. Perhaps for these reasons, some commentators object to an Affirmative Consent Standard for assessing criminal liability where the defendant lacks subjective intent or actual knowledge. While this notion has sometimes been rejected, those not persuaded by such denials may be less troubled by an Affirmative

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143 The focus of this section is not whether the Affirmative Consent Standard is unconstitutionally overbroad. Courts have upheld legislatures’ ability to create such standards, rejecting defendants’ claims that they impermissibly define criminal behavior in a vague manner where no knowledge or intent is required. See, e.g., State v. Lederer, 299 N.W.2d 457, 460-61 (Wis. Ct. App. 1980); infra note 147 and accompanying text. Rather, the focus of this subpart is whether, given the choice, legislatures should use an Affirmative Consent Standard above an Affirmative Nonconsent Standard.

144 Contra Ingram, supra note 10, at 25 n.157 (noting that some men take view that “once aroused, [men] cannot control their sexual desires, placing responsibility for any ensuing intercourse on women” (citing Morrison Torrey, When Will We Be Believed? Rape Myths and the Idea of a Fair Trial in Rape Prosecutions, 24 U.C. DAVIS L. REV. 1013, 1048 (1991))).

145 See Dix, supra note 10, at 17; see also infra note 149 and accompanying text. Professor George E. Dix, A.W. Walker Centennial Chair in Law at the University of Texas at Austin, suggests that the severity of rape punishment mandates an inquiry into the defendant’s awareness of the complainant’s nonconsent.

146 See supra note 7 (discussing mens rea in rape offenses).

147 See Wiener, supra note 75, at 158 (noting that “[c]riminalizing failure to ensure consent might be questioned” by some for lack of mens rea); Dix, supra note 10, at 17 (cautioning that “a person should not be found guilty of a serious crime in the absence of proof that the person was aware of the major facts and circumstances that justify making the conduct criminal”).

148 Wiener, supra note 75, at 158 & n.97 (discussing that modern criminal law may aim to induce conformity to objective standard, rather than punishing for morally culpable behavior); cf. Roberson v. State, 501 So. 2d 398, 401 (Miss. 1987) (holding that absence of explicit mens rea language in crime of sexual battery—nonconsensual sexual penetration—does not render statute unconstitutionally vague since “[l]egislature may define a crime which depends on no mental element and consists only of forbidden acts or omissions”) (citation omitted).
Nonconsent Standard. An Affirmative Nonconsent Standard comports with the historic rationale for dispensing with the \textit{mens rea} requirement because intercourse accompanied by expressed nonconsent demonstrates criminal intent.

Furthermore, some commentators contend that rape statutes should include an express \textit{mens rea} requirement.\textsuperscript{49} While some have proposed a \textit{mens rea} of recklessness, which demonstrates awareness or knowledge,\textsuperscript{50} several have suggested that a negligence standard is more appropriate.\textsuperscript{51} Thus, a \textit{mens rea} of negligence under an Affirmative Consent Standard asserts that a defendant’s reliance on nonverbal or nonovert consent is per se unreasonable, placing on all men the affirmative duty of inquiry.\textsuperscript{52}

In comparison, a \textit{mens rea} of negligence under an Affirmative Nonconsent Standard is a more equitable way of assessing liability by declaring that a defendant’s sexual acts, despite words, conduct, or circumstances indicating nonconsent, are per se unreasonable.\textsuperscript{53} This places a duty on both the woman to communicate her nonconsent and on the man to be receptive to the woman’s communication.

\textsuperscript{49} See, e.g., \textsc{Estrich}, \textit{supra} note 5, at 96-98 (proposing that rape law should include \textit{mens rea} element so that focus is on defendant’s state of mind rather than victim’s); Dix, \textit{supra} note 10, at 17 (contending that “failure to require awareness of the complainant’s non-consent is likely to violate the due-process requirement that criminal liability not be outrageously disproportionate to the blameworthiness of the offender’s conduct”); Mary I. Coombs, \textit{Telling the Victim’s Story}, 2 \textsc{Tex. J. Women & L.} \textbf{277}, 287-88 (1993) (concluding that serious crimes such as rape require \textit{mens rea} and conceding that plausible reform effort cannot make accused’s perspective “wholly irrelevant”).

\textsuperscript{50} Dix, \textit{supra} note 10, at 17. Professor Dix contends that a \textit{mens rea} of recklessness should be applied, “requiring proof beyond a reasonable doubt that the accused was actually aware of a significant risk that the complainant was not consenting.” Id.

\textsuperscript{51} See, e.g., \textsc{Estrich}, \textit{supra} note 5, at 97-98; Remick, \textit{supra} note 99, at 1131.

\textsuperscript{52} Remick, \textit{supra} note 99, at 1132.

\textsuperscript{53} See \textsc{Estrich}, \textit{supra} note 5, at 103 (“Reasonable men should be held to know that no means no . . . .”). The aggressor is held to know that a verbal protest or like action means nonconsent, whether or not emphatically stated. See id. In one case, a defendant conceded that the victim said “no” “in a very quiet, soft voice,” but maintained that “[h]e thought by saying ‘no’ she meant ‘[s]lower down. You’re going too fast. Take your time.’” State v. Bowen, 609 N.E.2d 346, 353 (Ill. App. Ct. 1993) (quoting defendant’s testimony). Apparently, some men interpret the word “no” depending on “context and nonverbal signals” so that “no” can mean “‘maybe,’ ‘convince me,’ ‘back off for awhile,’ or ‘get lost.’” John Leo, \textit{Don’t Oversimplify Date Rape}, \textsc{U.S. News and World Rep.}, Feb. 11, 1991, at 17; see Remick, \textit{supra} note 99, at 1146 n. 159 (citing Leo’s interpretation of “no”). Clearly, a strictly enforced Affirmative Nonconsent Standard would leave no room for such interpretations and, thus, proceeding despite a victim’s statement of “no” would be criminal conduct.

As Professor Estrich suggests, “unreasonableness as to consent, understood to mean ignoring a woman’s words, should be sufficient for liability.” \textsc{Estrich}, \textit{supra} note 5, at 103.
Proponents of the Affirmative Consent Standard note that, in many instances, the victim’s verbal nonconsent is not sufficient evidence to sustain a rape conviction. This occurs, however, in jurisdictions where statutes define rape in terms of force. Where the force element is removed and nonconsent is defined in terms of the victim’s words or conduct, the victim’s verbal protests or actions are sufficient.

The Affirmative Consent Standard has been proposed as superior because it eliminates evaluations of individuals’ reasonable responses. Noting the difficulty in assessing reasonable behavior due to inherent miscommunication between men and women, one commentator questioned whether a court could “easily conclude that the victim’s behavior does not reasonably convey to the defendant her lack of consent.” If, however, an Affirmative Consent Standard requires courts to consider overt actions evincing consent, it also suffers from the problems encountered when interpreting whether a woman’s actions

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154 See Wiener, supra note 75, at 157 & n.90 (concluding that verbal resistance is unpredictable standard for lack of consent); Remick, supra note 99, at 1113 (noting that verbal resistance is insufficient evidence of nonconsent in many states).

155 See Wiener, supra note 75, at 151-52 (discussing California’s and Massachusetts’ rape statutes).

156 See State v. Lederer, 299 N.W.2d 457, 461 (Wis. Ct. App. 1980) (“‘No’ means no, and precludes any finding that the prosecutrix consented to any of the sexual acts performed during the night.”). In another case, State ex. rel. J.F.S., the Court of Appeals of Utah for the first time interpreted a consent standard that provides that lack of consent can be expressed through the victim’s words or conduct. 803 P.2d 1254, 1257-60 (Utah Ct. App. 1990) (citing UTAH CODE ANN. § 76-5-406 (1990)), cert. denied, 815 P.2d 241 (Utah 1991). The court applied the clear meaning of the statutory provision and found that the victims’ verbal protests evidenced nonconsent through words, and the victims’ attempts to get out from under the defendant and hitting him evidenced conduct indicating lack of consent. Id. at 1260-61. While the victims did more than just say “no,” the statute defined lack of consent as expressions of words or conduct; thus, seemingly, verbal expressions of nonconsent alone would suffice as nonconsent under the plain meaning of the statute.

See also Remick, supra note 99, at 1116 (commenting that “[i]n order to effectuate a ‘no means no’ standard in the law of rape, . . . the force requirement must be eliminated”).

157 Wiener, supra note 75, at 147-49. For example, if, in an initially consensual sexual encounter, a woman believes that she is conveying nonconsent, and other women agree, that woman’s behavior would be considered reasonable. Id. at 148. But, if the man does not think that she is conveying lack of consent and proceeds, the woman may read his persistence as an indication that he plans to have intercourse with her despite her nonconsent, and may submit out of fear. Id. at 148-49. If other men would agree that the woman did not indicate nonconsent, the man’s conduct could be considered reasonable. Id. at 148. The issue, therefore, is to determine whether reasonable behavior is to be judged from the man’s or the woman’s perspective. Id. at 149.

158 Wiener, supra note 75, at 157.
indicated nonconsent. Determining whether a woman's actions indicated consent will be an equally difficult task, especially where the sexual encounter in question was initially consensual.

A nonconsent standard requiring affirmative nonconsent has also been challenged for excluding protection in cases where the victim is paralyzed with fear, surprise, or shock, or the victim offers no resistance because of fear of retaliation by the actor. Clearly, such behavior by the victim should not be construed as consent. Accordingly, many jurisdictions set forth circumstances that indicate lack of consent, even where force is still an element of the crime of rape. As one court noted:

Merely because a victim does not cry out for help or try to escape at the slightest opportunity is not determinative on the issues of whether she was being forced to have sexual intercourse, or whether she consented to having sexual intercourse, especially if she was threatened or in fear of being harmed, overcome by the superior strength of the assailant, or paralyzed by fear. Accordingly, statutes drafted pursuant to an Affirmative Nonconsent Standard must delineate circumstances which would be treated as indicating lack of consent to ensure protection for those victims who are unable to express nonconsent through words or conduct.

Articulating an adequate standard of nonconsent is more than a matter of semantics. If the law of sexual conduct truly "operate[s] as a value generating force when those who create or are governed by it perceive in the law an underlying vision of appropriate sexual conduct," the way

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160 Id. (conceding same).
161 See Remick, supra note 99, at 1112 (declaring rape laws that require affirmative demonstration of nonconsent "'regard[] mere submission as consent [and] fail[] to offer persons vulnerable to those assaults adequate protection'" (quoting Lois Pineau, Date Rape: A Feminist Analysis, 8 LAW & PHIL. 217, 221 (1989))).
162 See, e.g., People v. Iniguez, 872 P.2d 1183, 1187 (Cal. 1994) (allowing subjective standard of fear due to "'studies [that] have demonstrated that while some women respond to sexual assault with active resistance, others 'freeze,' and become helpless from panic and numbing fear.'" (quoting People v. Barnes, 721 P.2d 110, 118 (Cal. 1986))); People v. Bowen, 609 N.E.2d 346, 356 (Ill. App. Ct.) (noting that consent is not present where victim fails to cry out or escape because "paralyzed by fear"), appeal denied, 616 N.E.2d 339 (Ill.), cert. denied., 114 S.Ct. 387 (1993).
163 Bowen, 609 N.E.2d at 356.
164 See, e.g., UTAH CODE ANN. § 76-5-406(3) (1995) ("the actor is able to overcome the victim through concealment or by the element of surprise"); VT. STAT. ANN. tit. 13, § 3252 (Supp. 1994) ("[the actor has impaired] substantially the ability of the other person to appraise or control conduct by administering or employing drugs or intoxicants without the knowledge or against the will of the other person").
165 Chamallas, supra note 5, at 777.
in which a nonconsent standard is framed can largely affect the intimate behavior of all who are subjected to it. Thus, an Affirmative Consent Standard is objectionable—not because it is "unduly 'unromantic,'" but because it falsely assumes that affirmative consent is desirable and necessary and, thus, regulates intimacy in a manner that does not necessarily represent the views of most men and women.

Further, by allowing nonconsent to be proven by the surrounding circumstances of the rape, an Affirmative Nonconsent Standard provides protection to victims of acquaintance rape who have expressed nonconsent but are unable to prove affirmative nonconsent. It also encourages the highly desirable goal of equal responsibility in sexual relations. As part of that shared responsibility, women should be encouraged to express nonconsent and men should be taught to ensure that their partners are consenting when affirmative nonconsent is not given.

Many sexual encounters are fraught with poor communication. In such situations, a "no" can act as a preventative measure to stop those men who had no intention of proceeding despite nonconsent. It can also serve as proof of nonconsent to convict the rapist who does proceed.

IV. ADDITIONAL REFORM EFFORTS

Due to the ease with which statutory reform may be "'thwarted'" by individuals who exercise discretion in the criminal justice system, it is important to briefly mention additional steps that can be taken to increase prosecution and conviction rates in acquaintance rape cases.

166 Ingram, supra note 10, at 34. Ingram conceded that many find express consent standards "unduly 'unromantic.'" Id. Similarly, one advocate for an Affirmative Consent Standard reasons that some object to such a standard because "seeking and acquiring verbal consent would 'ruin the moment.'" Remick, supra note 99, at 1148. In view of the gravity of the threat of rape, such objections alone would certainly be unwarranted.

167 For instance, one advocate of the Affirmative Consent Standard proposed: "[I]n reality, informed, consensual, pleasurable sexual encounters are the result of communication, not silence; and since verbal messages are the clearest, most unequivocal variety of sexual communication, they are also most likely to lead to desirable sexual encounters." Remick, supra note 99, at 1148. Also, one commentator conceded that "it can well be argued that being sure of your partner's consent and desire is the ultimate demonstration of respect and the best possible way to earn the trust and confidence that 'romantic' overtures are supposedly designed to accomplish." Ingram, supra note 10, at 34. These justifications are troubling—not because it is undesirable to demonstrate respect, earn trust and confidence, or be aware of a partner's consent or nonconsent, but because it is improper to tell people to achieve these goals through verbal consent when other methods of protecting women exist.

168 See supra notes 112, 116-17 (discussing opposition to Affirmative Consent Standards and current reform efforts addressing acquaintance rape).

169 SpoHN & HORNEY, supra note 5, at 160.
Clearly, jurors’ increased understanding of the reality of acquaintance rape will help to win convictions. A larger problem exists, however, in that many difficult acquaintance rape cases are never prosecuted because of the prejudices and inexperience of prosecuting attorneys. Moreover, in many jurisdictions, prosecutors do not have the resources to try acquaintance rape cases.

Investigative techniques employed by district attorneys’ offices with specialized sex-crimes units can help win cases that are otherwise too easily dismissed by many prosecutors. For example, because there is usually an existing relationship between the victim and the assailant, willing victims have participated with investigators to confront rapists and obtain audiotaped admissions of the crimes. Also, where a victim shows no

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170 Two elements that are often present in acquaintance rape cases are areas of particular juror bias: (1) victims have behavior traits such as drug and alcohol use and frequenting bars late at night and (2) acquaintance rapists are often attractive, well-regarded members of the community with no other criminal record and, thus, do not appear to be the “criminal type.” FAIRSTEIN, supra note 30, at 134-35; see VACHSS, supra note 74, at 66 (stating juries may not be as likely to convict where they do not like victim). However, rapists “have things in common that are not cultural or economic.” Id. at 126.

One study revealed that, though jurors were aware that they were not supposed to be judgmental about acquaintance rape victims, they admitted that they often were. FAIRSTEIN, supra note 30, at 134 (citing results of study conducted by National Center for Prevention and Control of Rape on jurors’ attitudes in sex offense cases).

It has been suggested that rapists rely on obvious prejudices to “look for whatever vulnerability might insulate them from capture and punishment.” VACHSS, supra note 74, at 91. Unfortunately, jurors affected by such stereotypes perpetuate the myth that rape is act of sexual desire, rather than an act of power and violence. See FAIRSTEIN, supra note 30, at 135-36; VACHSS, supra note 74, at 125.

171 See VACHSS, supra note 74, at 90-91 (describing trait some assistant district attorneys would attribute to “Good Victim”); Leive, supra note 74, at 198-201 (reporting unwarranted instances where prosecutors decline pursuit of difficult acquaintance rape charges); Fairstein Interview, supra note 90 (suggesting it is “battle” to get prosecutors to try many acquaintance rape cases).

172 See FAIRSTEIN, supra note 30, at 138. Experienced attorneys in specialized units are better equipped to prepare for and prosecute acquaintance rape cases. Id.; see also VACHSS, supra note 74, at 141 (suggesting assistant district attorneys decline prosecution of certain cases to preserve high conviction rates).

173 FAIRSTEIN, supra note 30, at 152. However, larger offices, such as Manhattan’s district attorney’s office, are able to “set an outstanding example by providing [sex crimes] unit[s] with the resources to take to trial every case in which a credible victim is willing to participate.” Id.

174 See FAIRSTEIN, supra note 30, at 159-60. For example, in New York, courts permit audiotaping conversations where one party to the conversation (here, the victim) consents. Id. at 169.

[M]ost street criminals are far too savvy to succumb to this ploy, but the colossal arrogance of the better-educated offenders—the professional men, especially—frequently lets them play right into our hands. They always seem to be so certain that they can explain their conduct satisfactorily or assuage the aggrieved
external injuries, a prompt medical examination can provide prosecutors with evidence of internal damage often caused by forced intercourse.\textsuperscript{175} Other effective techniques include videotaping repeat offenders,\textsuperscript{176} “shrewd” jury selection, extensive preparation of victim testimony, and the use of expert witnesses.\textsuperscript{177} By mandating the use of such techniques, district attorneys’ offices can minimize the amount of discretion prosecutors may exercise before dismissing complaints. Essentially, dedication is the key element to successfully prosecuting difficult acquaintance rape cases.\textsuperscript{178}

CONCLUSION

The current debate over the degree of protection women need and desire reminds us that perhaps the only thing more complex than sexual conduct itself is the law that must regulate such conduct. Certainly, the goals of rape law reformers sometimes conflict. Nonetheless, by carefully drafting rape statutes and employing special techniques to facilitate the prosecution of acquaintance rape cases, the pragmatic goal of increased convictions can be met without abandoning the important symbolic goals of the Rape Law Reform Movement.

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\textsuperscript{175} FAIRSTEIN, supra note 30, at 153.

\textsuperscript{176} See id. at 155-66 (recounting successful implementation of videotaping technique on New York dentist); Leive, supra note 74, at 253 (discussing use and relatively low cost of technique).

\textsuperscript{177} See Leive, supra note 74, at 253 (discussing various prosecution techniques).

\textsuperscript{178} See id. ("The kiss of death in a courtroom is a prosecutor who appears apathetic or, worse, unconvincing. ‘Jurors can smell it when a prosecutor is just going through the motions’ . . . ." (quoting Paul Anderson, District Attorney of Stillwater, Oklahoma)).
§ X. RAPE
(a) A person commits rape when he or she has sexual intercourse with another person without the consent of such person.
(b) Consent. An act of sexual intercourse is without the consent of a person under any of the following circumstances:
   (1) that person expresses lack of consent through words or conduct;
   (2) the actor is able to overcome that person by an element of fear, surprise, or shock; or
   (3) [OTHER USUAL CIRCUMSTANCES (e.g., age, incapacity)].
(c) Rape is a first degree felony.

§ XX. AGGRAVATED SEXUAL ASSAULT
(a) A person commits aggravated sexual assault if, in the course of a rape or attempted rape [or other sexual offense], the actor:
   (1) causes bodily injury to the victim;
   (2) uses or threatens the victim by use of a dangerous weapon;
   (3) compels, or attempts to compel, the victim to submit to rape [or other sexual offenses] by threat of kidnapping, death, or serious bodily injury to be inflicted imminently on any person; or
   (4) is aided or abetted by one or more persons.
(b) Aggravated sexual assault is a first degree felony.