
SEX CRIMES AND SEXUAL MISCUES: THE NEED FOR A
CLEARER LINE BETWEEN FORCIBLE RAPE AND
NONCONSENSUAL SEX

*Meredith J. Duncan**

Modern changes to forcible rape statutes have resulted in broad statutes that criminalize widely varying sexual misconduct. Under these statutes, a forcible rapist can range anywhere from a stranger who violently secured sexual intercourse to a person who engaged in what was initially consensual sex, but whose partner withdrew that consent postcoitus. More precise stratification of sex crime statutes is necessary in order to identify clearly the line between rape and nonconsensual sex. As careful consideration of criminal law theory establishes a significant difference between forcible rape and nonconsensual sex, statutes that criminalize these acts should fashion distinct punishments and remedies appropriate to each offense. This Article considers modern rape law reforms and suggests additional modifications to sex crime statutes to provide the necessary distinction in the identification and punishment of forcible rapists and nonconsensual sex offenders.

I. INTRODUCTION

Rape is a heinous crime. Physical and psychological damages are widely known. But is all rape equal? Consider the following scenario: Walter and Amber are adult friends who occasionally choose to be sexually intimate with each other. They have both been willing participants in this friendly sexual relationship for many years, until one evening in the middle of agreed-upon sex, Amber decides that she does not want to continue. She asks Walter to stop. At first, because he is consumed in the sexual moment and does not appreciate Amber's request as a serious request to stop the sex that he thought

* George Butler Research Professor of Law, University of Houston Law Center; Straus Distinguished Visiting Professor of Law, Pepperdine University School of Law; J.D., University of Houston Law Center; B.A., Northwestern University. Thanks to all who read various drafts of this Article and provided me with invaluable suggestions. I am particularly grateful for the comments of my colleagues David R. Dow, Ronald Turner, Sandra Guerra Thompson, Gerry Moohr, Nancy Rapoport, and Marcilynn Burke. Special thanks to Dorothy Brown, Michele Goodwin, Song Richardson, Njeri Mathis-Rutledge, and all other participants of the 2007 Mid-Atlantic People of Color Conference, at which I presented this Article as a work-in-progress. Thanks also to Curtis Duncan, Stacey Bond, and Katherine Cabaniss for their invaluable support. Finally, a special thank you for the fine research assistance and support of Beth Lloyd, Brian Ensigmann, Jeanice Dawes, Christopher Dykes, and the University of Houston Law Foundation.

they both were enjoying, he does not stop. However, when Amber makes the same request again, he stops. That she wanted to stop in the middle of sex did strike Walter as unusual, but it was not until several days later when he was contacted by the local authorities that he realized what happened that evening could be rape.

Although the story of Walter and Amber is pure fiction, similar factual situations leading to prosecution and conviction for rape are a reality.¹ Modern rape law reforms may have resulted in statutes that are too broad because they criminalize widely varying sexual misconduct as forcible rape.² In considering whether modern rape law reforms have exceeded their initial design, I have two primary concerns: (1) that modern revisions have resulted in statutes that cast too broad a net, thereby unjustly identifying some people as rapists, and (2) that these statutes may result in conviction for a particularly serious crime (rape) that does not adequately reflect the offense committed (nonconsensual sex).³ The focus of this Article is not the question of whether a woman has a right to say “no.” Without question, a woman has an absolute right to say “no” at any time during a sexual encounter, and her sexual partner should respect her “no.” Rather, the focus of this Article is the dividing line between forcible rape and nonconsensual sex. For example, in the postpenetration context, the questions may be whether a person who does not respect “no” (or does not respect that “no” fast enough) is properly identified as a forcible rapist or some other type of sexual offender and how the criminal law should treat that person. To be certain, I am very much in favor of prosecuting rapists. This Article does not argue for the decriminalization of rape. Rather, it urges for the adoption of more definitively stratified categories of sexual crimes so that

1. See Jeninne Lee-St. John, *A Time Limit on Rape: When a Woman Says Yes and Then Changes Her Mind, How Fast Must a Man Stop Before It's a Crime?*, TIME, Feb. 12, 2007, at 59 (discussing recent postpenetration or withdrawn consent rape cases and sexual assault issues that arise in such contexts). Compare *People v. John Z.*, 60 P.3d 183 (Cal. 2003) (affirming the defendant's conviction for first-degree forcible rape when the victim initially consented to sexual intercourse and subsequently withdrew consent postpenetration), with *Baby v. State*, 916 A.2d 410 (Md. Ct. Spec. App. 2007) (concluding that withdrawal of consent after penetration cannot constitute rape).

2. Throughout this Article, I use the terms “forcible rape” and “sexual assault” interchangeably. The term “nonconsensual sex” is not interchangeable with these terms. See *infra* notes 107–30 and accompanying text (detailing the distinction between rape and nonconsensual sex). Rape is historically characterized as carnal knowledge of a woman not one's wife, forcibly, without her consent, and against her will. See 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAW OF ENGLAND *210 (Univ. Chi. Press 1979) (1769). Statutes that have codified common law rape have done so to varying degrees and have often changed the name of the crime from “rape” to “sexual assault” or the like. See, e.g., FLA. STAT. ANN. § 794.011(h) (West 2007) (defining sexual battery as causing penetration or union with another's sex organ by force); N.C. GEN. STAT. § 14-27-2(a)(2)(b) (2005) (defining first degree rape as engaging in vaginal intercourse “[w]ith another person by force and against the will of the other person, and . . . [i]nfl[ic]t[ing] serious personal injury upon the victim or another person”).

3. See Andrew E. Taslitz, *Willfully Blinded: On Date Rape and Self-Deception*, 28 HARV. J.L. & GENDER 381 (2005) (discussing date or acquaintance rape conviction of perpetrators who may genuinely but incorrectly believe their victim has consented, a state of mind Professor Taslitz describes as “self-deception”).

the crime of conviction and its punishment reflect the offense perpetrated.

Just as there exist well-defined lines in the homicide context between, for instance, negligent homicide and murder,⁴ there is a need for clearer lines delineating the boundaries between and punishments available for forcible rape and nonconsensual sex.⁵ With a focus exclusively on the date rape or acquaintance rape context,⁶ this Article will first examine the crime of forcible rape.⁷ It will begin by discussing rape in both its traditional and current forms.⁸ In the next Part, I explain how some of the modern reformations may have gone too far and, in so doing, removed the distinction between forcible rapists and other types of sex offenders.⁹ This Article concludes by arguing for the reformation of rape laws, encouraging legislators to demarcate clearly the line between forcible rape and the lesser offense of nonconsensual sex. Such line drawing should: (1) clearly identify the distinction between forcible rape and nonconsensual sex;¹⁰ (2) ensure that the mens rea for forcible rape not fall below recklessness;¹¹ (3) require verbal or physical victim resistance to sustain a charge of forcible rape;¹² (4) require nonconsensual sex offenders to satisfy less stringent sex registration requirements;¹³ (5) recognize an additional remedy for nonconsensual sex as an independent, well-defined civil offense;¹⁴ and (6) allow for victims of nonconsensual sex to be entitled to criminal court-

4. The line drawing between differing types of homicide is at times imperfect, but at least there is a recognition of the need to differentiate between the most egregious and other types of killings. *See, e.g.*, MODEL PENAL CODE § 210.1-4 (1980) (distinguishing between murder, manslaughter, and negligent homicide).

5. *See generally* Kathleen Parker, *Date Rape Shouldn't Be Punished Like Child Sex Assault*, HOUSTON CHRON., May 14, 2006, at E4 (discussing the unfortunately not so uncommon situation of college-aged men who have been convicted of and are serving prison time for rape because "their dates decided that what he understood as consensual, she understood as rape"). Most jurisdictions do not recognize the crime of nonconsensual sex. *But see, e.g.*, MONT. CODE ANN. § 45-5-503 (2005) (criminalizing sexual intercourse without consent).

6. *See* ACQUAINTANCE RAPE: THE HIDDEN CRIME 1 (Andrea Parrot & Laurie Bechhofer eds., 1991) (explaining that acquaintance rapes—those committed by dates, husbands, ex-husbands, lovers, friends, and authority figures—are the most prevalent types of rape).

7. Throughout this Article, for simplicity's sake, I will refer to a person accused, charged, or convicted of rape in the male gender and refer to the victim as a female. Of course, either males or females may be victims of rape and either males or females may be perpetrators of rape. The reality, however, is that most rapists are male and most victims of rape are female. *See, e.g.*, *Doe v. Bd. of Comm'rs*, [1998] 126 C.C.C.3d 12 (Can.) (explaining that perpetrators of sexual assaults are overwhelmingly male and rape victims are overwhelmingly female); *Osolin v. The Queen*, [1993] R.C.S. 595, 669 (Can.) (explaining that ninety-nine percent of rape offenders are male and ninety percent of rape victims are female).

8. *See infra* Parts II.A–II.B.

9. *See infra* notes Part III.

10. *See infra* notes Part III.D.1.a.

11. *See infra* notes Part III.D.1.b.

12. *See infra* notes Part III.D.1.c.

13. *See infra* notes Part III.D.2.a.

14. *See infra* notes Part III.D.2.b.

sanctioned mediation.¹⁵

II. FORCIBLE RAPE

The 1960s marked the beginning of the much needed reformation of rape law provisions nationwide.¹⁶ Prior to that time, much of American rape law was based on the common law, which was antiquated in terms of acknowledging female autonomy and sexual violence. For example, rape law dictated that the crime could only be committed by a male against a female.¹⁷ Rape law also protected only women who were victimized outside of marriage.¹⁸ Moreover, rape law provisions did not provide enough protection to victims seeking to report rape and effectively discouraged the reporting of rape.¹⁹ Simply put, rape statutes did not recognize rape as the violent crime against women that it was and unfortunately still is.²⁰ Thankfully, many jurisdictions have enacted modern reforms recognizing rape as a crime that may be committed by either sex against either sex.²¹ Many jurisdictions have abolished the marital immunity doctrine,²² have enacted rape shield provisions,²³ and have generally raised societal awareness of rape as a crime of sexual, physical, and psychological violence.²⁴

15. See *infra* Part III.D.2.c.

16. See generally J. Shoshanna Ehrlich, *From Age of Consent Laws to the "Silver Ring Thing": The Regulation of Adolescent Female Sexuality*, 16 HEALTH MATRIX 151, 161–80 (2006) (discussing the sexual law moral reform campaigns); see also Joshua Dressler, *Where We Have Been, and Where We Might Be Going: Some Cautionary Reflections on Rape Law Reform*, 46 CLEV. ST. L. REV. 409, 418–39 (1998) (discussing recent reformations of rape law).

17. See, e.g., BLACKSTONE, *supra* note 2, at *210 (defining rape as “carnal knowledge of a woman forcibly and against her will”); see also Susan Estrich, *Rape*, 95 YALE L.J. 1087, 1094–96 (1986) (discussing the common law traditional definition of rape).

18. See Jill Elaine Hasday, *Contest and Consent: A Legal History of Marital Rape*, 88 CAL. L. REV. 1373, 1392–406 (2000) (discussing the marital rape immunity doctrine); see also *infra* note 28 (discussing the marital rape immunity doctrine).

19. See James B. Johnston, *How the Confrontation Clause Defeated the Rape Shield Statute: Acquaintance Rape, the Consent Defense and the New Jersey Supreme Court's Ruling in State v. Garron*, 14 S. CAL. REV. L. & WOMEN'S STUD. 197, 200–06 (2005) (noting that victims were effectively on trial under common law).

20. See generally *id.* (recognizing the seriousness of the crime and previous lack of protection).

21. See, e.g., 720 ILL. COMP. STAT. ANN. 5/12–13 (West 2002) (providing that a person commits “criminal sexual assault if he or she commits an act of sexual penetration by the use of force or threat of force”).

22. See, e.g., *People v. Liberta*, 485 N.Y.S.2d 207, 213 (1984) (abolishing marital rape exemption as violating equal protection).

23. Johnston, *supra* note 19, at 200–06 (discussing rape shield laws).

24. For the most part, society recognizes rape as a crime of violence. See, e.g., Christina Hoff Sommers, *The Incidence of Acquaintance Rape Is Inflated*, in VIOLENCE AGAINST WOMEN 65, 72 (James D. Torr et al. eds., 1999) (explaining that rape is a crime of violence which is caused, at least in part, by “whatever it is that makes our society among the most violent of the so-called advanced nations”); cf. Samuel H. Pillsbury, *Crimes Against the Heart: Recognizing the Wrongs of Forced Sex*, 35 LOY. L.A. L. REV. 845, 851, 907–08 (2002) (arguing that acquaintance rape, characterized by Pillsbury as “forced sex,”

As deeply appreciative of these much needed reforms as I am, I am now concerned that some of these reforms have resulted in unintended or unanticipated consequences.²⁵ My concern is twofold: (1) that too many modern statutes cast such a broad net that they unjustly brand some individuals as rapists; and (2) that these statutes result in conviction for a particularly serious crime (rape) that does not always adequately reflect the offense committed (nonconsensual sex). To understand the basis of my concern, it is important to understand the common law history of rape law as well as rape law as it exists today.

A. *Rape at Common Law*

The common law criminalized forcible rape.²⁶ An old crime dating back to biblical times,²⁷ common law rape required proof of vaginal intercourse with a woman, not one's wife, by force or threat of force, against her will and without her consent.²⁸ Like most other crimes, rape requires proof of an actus reus and mens rea—that the accused committed a criminal act while possessing a criminal mind.²⁹ It is important to emphasize that rape, like all crimes that

is a crime against the heart or soul of the victim rather than a crime of violence, and discussing the need to recognize forced sex as motivated by sexual desire rather than by violence). One author critical of the impact that "second wave feminists" have had on the rape law movement considers whether recent public alarm concerning the prevalence of rape is justified, claiming that "[g]ender feminist ideologues bemuse and alarm the public with inflated [rape] statistics." CHRISTINA HOFF SOMMERS, WHO STOLE FEMINISM?: HOW WOMEN HAVE BETRAYED WOMEN 225–26 (1994).

25. See Dressler, *supra* note 16, at 410–11 (expressing concern that modern rape law reform may take or has already taken a regretful path).

26. See BLACKSTONE, *supra* note 2, at *210 (defining rape as "carnal knowledge of a woman forcibly and against her will").

27. See, e.g., *Genesis* 34:2 (recounting the rape of Dinah).

28. Although today rape is commonly regarded as a crime of sexual violence primarily victimizing women, originally rape was a crime that protected from violation a male's right to his property, his property being his wife or daughters. See SUSAN BROWNMILLER, AGAINST OUR WILL: MEN, WOMEN AND RAPE 16–17 (1975) (explaining that rape originated in protection of a man's property and that a "crime committed against her body became a crime against the male estate"); *Deuteronomy* 22:28–29 (setting the penalty for rape as payment of fifty shekels of silver to the father of the raped female); Dressler, *supra* note 16, at 410 (describing rape as historically being "male-centered"). Thus, the rape victim was not the woman, but rather the woman's father or husband. See Brief Amici Curiae of the American Civil Liberties Union et al. at 6, *Coker v. Georgia*, 433 U.S. 584 (No. 75-5444) (1975) (explaining the "long standing view of rape as a crime of property where the aggrieved was not the woman but her husband or father"). As an extension of this principle, at common law it was impossible for a husband to rape his wife. As Lord Hale explained, "the husband cannot be guilty of a rape committed by himself upon his lawful wife, for by their mutual matrimonial consent and contract the wife hath given up herself in this kind unto her husband, which she cannot retract." 1 HALE, HISTORY OF THE PLEAS OF THE CROWN 628 (Rider 1800); see also Hasday, *supra* note 18, at 1392–406 (discussing the marital rape immunity doctrine); Jane E. Larson, "Women Understand So Little, They Call My Good Nature 'Deceit'": A Feminist Rethinking of Seduction, 93 COLUM. L. REV. 374, 382–87 (1993) (explaining the civil action of seduction as belonging to the victim's father); M.B.W. Sinclair, *Seduction and The Myth of the Ideal Woman*, 5 LAW. & INEQ. 33, 33 (1987) (same).

29. See *Staples v. United States*, 511 U.S. 600, 605 (1994) (explaining that at common

are not strict liability in nature, requires the concurrence of the required mens rea and the actus reus.³⁰ The criminal act must occur while the defendant possessed a criminal mind. In other words, causing the social harm without the requisite criminal mind does not constitute the crime.

1. The Actus Reus of Common Law Rape

Proving the actus reus of rape at common law required proof that the accused engaged in (1) vaginal intercourse with the victim (2) without her consent (3) by force or threat of force.³¹ Common law also required proof of vaginal intercourse.³² Sexual acts other than vaginal intercourse were traditionally not protected by rape law.³³ Accordingly, only a female could be the victim of a rape and only a male could be the perpetrator.

At common law, the vaginal intercourse had to occur without the female's consent.³⁴ This element of nonconsent was proven by the female demonstrating that the perpetrator violated an interest that she sought to protect.³⁵ As such, this lack of consent emanated from the victim. She was required to demonstrate that at the time of the attack she was unwilling.³⁶ Thus, the "against her will" requirement was one which mandated that she resist her attacker with the utmost of resistance.³⁷ Demonstrating her lack of consent required proof that she physically resisted her attacker.³⁸

The common law criminalized forcible rape, and a critical component of establishing that crime was proof that the defendant used force or threatened

law most crimes required a showing of mens rea).

30. See, e.g., *State v. Brown*, 602 S.E.2d 392, 396 (S.C. 2004) (explaining that to secure conviction for criminal sexual conduct in South Carolina, "[t]he evidence must show the actual use of aggravated force occurred near in time and place to the assault, such that the effect of the aggravated force caused the victim to submit to the assault").

31. See JOSHUA DRESSLER, *UNDERSTANDING CRIMINAL LAW* § 33.01[A], at 617 (4th ed. 2006).

32. See *id.* at 617 n.2.

33. See *id.*

34. See P.K. Menon, *The Law of Rape and Criminal Law Administration with Special Reference to the Commonwealth Caribbean*, 32 INT'L & COMP. L.Q. 832, 834 (1983). This lack of consent requirement was said to require proof that the intercourse took place "against her will and without her consent." As the law developed, it became clear that proof of "against her will" and "without her consent" required proof of the victim's nonconsent to the sexual intercourse. The redundancy of the stated requirement was simply a common law embellishment. See DRESSLER, *supra* note 31, § 33.01[B], at 618 (noting that all of these terms could be found in the statute, but did not always mean the same thing).

35. See, e.g., *State v. Alston*, 310 N.C. 399, 407-08, 312 S.E.2d 470, 475 (1984) (defining lack of consent as emanating from the victim, proven by "statements or actions by the victim which were clearly communicated to the defendant and which expressly and unequivocally indicated the victim's withdrawal of any prior consent and lack of consent to the particular act of intercourse").

36. See *Pollard v. State*, 580 S.E.2d 337, 340 (Ga. Ct. App. 2003) ("The term 'against her will' means without consent . . .").

37. See Estrich, *supra* note 17, at 1123 (describing resistance as requiring "the most vehement exercise of every physical means or faculty within the woman's power to resist the penetration of her person" (citations omitted)).

38. See *id.*

force.³⁹ The defendant was required to use enough force to overcome her resistance to sexual intercourse.⁴⁰ Unlike lack of consent, the existence of force emanated from the defendant, not the victim.⁴¹ The defendant was required to employ actual physical force or threaten use of physical force designed to cause the victim to submit to unwanted sexual intercourse.⁴² It was the forcible nature of the nonconsensual sex that made the defendant's conduct the crime of rape. Nonconsensual sex was not the crime; forcible nonconsensual sex was.

2. *The Mens Rea of Common Law Rape*

At common law, rape was among the many crimes that required proof of mens rea.⁴³ Rape was a general intent crime, meaning that at common law, there was not a specifically identified state of mind with which the defendant must have acted, but rather that the perpetrator must have committed the actus reus with a morally blameworthy state of mind.⁴⁴ No specific mens rea was required.⁴⁵

As was the case with all general intent crimes, a defendant's reasonable mistake of fact operated as a defense to the crime. In the rape context, that meant that a defendant's reasonable mistake regarding the victim's lack of consent—for example, he reasonably, but mistakenly, believed that she consented to sex—would shield him from criminal responsibility. On the other hand, if the defendant was unreasonable regarding the victim's lack of consent, his unreasonable mistake would not be a defense to the rape charge.⁴⁶

39. DRESSLER, *supra* note 31, § 33.04[B][1], at 625.

40. Estrich, *supra* note 17, at 1107.

41. *See* State v. Alston, 310 N.C. 399, 408, 312 S.E.2d 470, 476 (1984) (describing sufficient force for a rape charge as proof of actual physical force, constructive force, or “[t]hreats of serious bodily harm which reasonably induce fear”). “It is enough if the totality of the circumstances gives rise to a reasonable inference that the unspoken purpose of the threat was to force the victim to submit to unwanted sexual intercourse.” *Id.* at 409, 312 S.E.2d at 476. Some jurisdictions use the term “menace” to describe constructive force. *See, e.g.*, State v. Lima, 643 P.2d 536, 540 n.5 (Haw. 1982) (“[T]he crime of rape [has] been historically defined as being comprised of two competing actions, *i.e.*, force, whether physical or by menace, on the part of the assailant, and non-consent, as evidenced by the amount of resistance exhibited, by the victim.”).

42. *See* Alston, 310 N.C. at 408, 312 S.E.2d at 476.

43. Very few common law crimes were strict liability offenses, or offenses that required no showing of mens rea. *See* Staples v. United States, 511 U.S. 600, 605 (1994) (noting that under common law, the “requirement of some *mens rea* for a crime is firmly embedded”).

44. *See* DRESSLER, *supra* note 31 § 33.05, at 637–38.

45. At common law, establishing that the defendant committed the actus reus with a morally culpable state of mind was facilitated by proof of the actus reus itself because having sexual intercourse with someone who was not one's wife was, at the time, considered immoral. The act itself helped to establish that the defendant's mind was culpable or morally blameworthy, thereby satisfying the mens rea component. John W. Poulos, *The Judicial Process and Substantive Criminal Law: The Legacy of Roger Traynor*, 29 LOY. L.A. L. REV. 429, 502–03 (1996).

46. *See* Taslitz, *supra* note 3, at 387 n.33 (citing JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW 155–56 (3d ed. 2001)).

Often in a prosecution for rape at common law, evidence useful in establishing one element of the offense was useful in establishing others. For instance, proof of the victim's lack of consent was proven in part by evidence that she resisted her attacker.⁴⁷ Proof that she resisted her attacker and that he had to overcome that resistance helped to establish that he used or threatened the requisite amount of force. Proof of her resistance also helped to establish the necessary mens rea, that he acted with a morally blameworthy or immoral state of mind in securing the sexual intercourse. Proof that she resisted also helped to prove that *he* knew that she did not consent to sexual intercourse with him at that time.

B. *Modern Rape Law*

An outgrowth of the common law, modern rape law statutes reflect the following recent reforms.

1. *The Actus Reus of Modern Rape*

Most jurisdictions today have expanded their rape provisions to encompass more conduct than the common law's forcible, nonconsensual vaginal intercourse.⁴⁸ One of the most critical changes to rape law is that in many jurisdictions, the vaginal intercourse requirement of the common law has been expanded to criminalize a wider variety of sexual contact in addition to vaginal intercourse.⁴⁹ Thus, an essential component of the actus reus of rape is sexual contact. But, of course, proof of sexual contact alone is insufficient to support rape charges. In most jurisdictions, other critical components from the common law remain necessary—primarily, proof of the nonconsent of the victim as well as the perpetrator's use of force.⁵⁰

2. *The Mens Rea of Modern Rape*

At common law, rape was a general intent crime which required a

47. See *infra* Part II.B.3.b (discussing the resistance requirement).

48. See, e.g., *Ex Parte Cordar*, 538 So. 2d 1246, 1247–49 (Ala. 1988) (explaining that nonconsensual sex without forcible compulsion does not constitute rape, but is instead sexual misconduct); *Sanders v. State*, 586 So. 2d 792, 796 (Miss. 1991) (explaining that Mississippi's sexual battery provision does not require force or reasonable apprehension of force as necessary elements); *Dinkens v. State*, 546 P.2d 228, 230 (Nev. 1976) (explaining that in Nevada, "[p]hysical force is not a necessary ingredient in the commission of the crime of rape"). But see MONT. CODE ANN. §§ 45-5-501, -503 (2005) (defining the crime of "sexual intercourse without consent" as knowingly engaging in forcible sex without consent); see also *supra* notes 26–47 and accompanying text (explaining requirements of common law rape).

49. See, e.g., S.C. CODE ANN. § 16-3-651 (2003) (defining sexual battery as "sexual intercourse, cunnilingus, fellatio, anal intercourse, or any intrusion, however slight, of any part of a person's body or of any object into the genital or anal openings of another person's body"); WASH. REV. CODE ANN. § 9A.44.010 (West 2000) (defining sexual intercourse as vaginal or anal penetration, however slight, by one person against another, whether such persons are same or different sex).

50. See *infra* notes 74–94 and accompanying text (discussing the force and nonconsent requirements of rape).

showing that the accused engaged in the actus reus in a morally blameworthy manner.⁵¹ That moral blameworthiness was the mental state required to perpetrate forcible rape at common law is understandable considering societal attitudes at common law. Much more so than today, society condemned adultery or sex outside marriage. Such behavior was widely considered morally reprehensible, and society considered a perpetrator's state of mind to engage in such morally unacceptable conduct (i.e., nonconsensual sexual intercourse with someone not his wife) as malevolence sufficient and worthy of the condemnation of the criminal law.⁵²

Since common law times, the mens rea component of rape law has changed. Rape, like most every other crime, has been codified in most jurisdictions.⁵³ In enacting penal statutes, particularly after the introduction of the Model Penal Code,⁵⁴ legislators have adopted an elemental or specific intent approach to mens rea.⁵⁵ In prosecuting a defendant for a crime, prosecutors today are most often required to prove that the accused acted with a specifically defined mental state regarding each material element of the charged offense. Thus, in virtually every jurisdiction, rape now requires more than just proof that the defendant acted in a morally blameworthy fashion.⁵⁶ Rather, most jurisdictions require proof that the perpetrator committed the actus reus of rape with a specifically defined mental state.⁵⁷ This requirement

51. Forcible rape is a crime distinct from statutory rape, which generally criminalizes adults having sex with children, regardless of the adult defendant's belief or state of mind regarding the child's age or apparent consent. *See, e.g.*, MODEL PENAL CODE § 213.1(1)(d) (1985) (defining statutory rape as a strict liability offense committed by a male against a female less than ten years old). Statutory rape is usually a strict liability offense. As such, there are several interesting issues concerning statutory rape and mens rea. *See, e.g.*, Daryl J. Olszewski, Comment, *Statutory Rape in Wisconsin: History, Rationale, and the Need for Reform*, 89 MARQ. L. REV. 693, 694 (2006) (discussing the need for reformation of statutory rape law in Wisconsin). However, statutory rape is not the focus of this Article. Rather, this Article focuses on forcible rape committed by adults against adults. I hope to explore the issue of statutory rape and mens rea in future pieces.

52. *See supra* note 45 and accompanying text.

53. *See, e.g.*, ALA. CODE § 13A-6-61 (LexisNexis 2005) (codifying a prohibition of first-degree rape); ARK. CODE ANN. § 5-14-103 (2006) (codifying a prohibition of rape); DEL. CODE ANN. tit. 11, § 773 (2001) (codifying a prohibition of first-degree rape); GA. CODE ANN. § 16-6-1 (2007) (codifying a prohibition of rape); KY. REV. STAT. ANN. § 510.040 (LexisNexis 1999) (codifying a prohibition of first-degree rape).

54. The Model Penal Code was drafted in 1962. *See generally* MODEL PENAL CODE (Proposed Official Draft 1962).

55. MODEL PENAL CODE § 2.02 cmt. (1985) (explaining mens rea within the Model Penal Code).

56. *But see* State v. Smith, 554 A.2d 713, 715 (Conn. 1989) (explaining that rape requires only a showing of general intent, not specific intent); Winnerford Frank H. v. State, 915 P.2d 291, 294 (Nev. 1996) (explaining that sexual assault is a general intent crime).

57. *See, e.g.*, ARIZ. REV. STAT. ANN. § 13-1406 (2001) (defining mens rea for sexual assault in Arizona as "intentionally" or "knowingly"); COLO. REV. STAT. § 18-3-402 (2006) (defining mens rea for sexual assault in Colorado as "knowingly"); DEL. CODE ANN. tit. 11, § 773 (2001) (defining mens rea for rape in Delaware as "intentionally"); HAW. REV. STAT. § 707-730 (1993) (defining the crime of sexual assault in Hawaii as requiring proof that the defendant acted knowingly); IND. CODE § 35-42-4-1 (LexisNexis 2004) (requiring mens rea

means that the prosecution is required to prove that the defendant used force and engaged in nonconsensual sexual intercourse with the victim while acting with the specifically defined mental state. Most jurisdictions permit a mens rea of negligence to support a rape prosecution.⁵⁸

Reference to the perpetrator's mens rea to commit rape does not so much refer to his state of mind to engage in sexual intercourse, as that is rarely at issue.⁵⁹ Rather, proof concerning the perpetrator's state of mind refers more to his state of mind regarding whether the victim consented to having sexual contact with him on the occasion in question.⁶⁰

3. *Additional Noteworthy Characteristics*

There are some noteworthy characteristics of current rape law that are important to elaborate upon at this point because they are important to an understanding of the concerns raised in this Article.

a. *Victim Consent.* Rape in most jurisdictions today still requires proof of the victim's nonconsent.⁶¹ As explained earlier,⁶² whether the victim

of "knowingly" or "intentionally" for crime of rape); MONT. CODE ANN. § 45-5-503 (2005) (requiring mental state of "knowingly" to support conviction for crime of sexual intercourse without consent); N.M. STAT. ANN. § 30-9-11 (LexisNexis 2004) (requiring mens rea of "intentionally" for the crime of criminal sexual penetration); OHIO REV. CODE. ANN. § 2907.02(A)(2) (LexisNexis 2006) (defining mens rea for forcible rape as "purposely"); TEX. PENAL CODE ANN. § 22.011(a)(1) (Vernon 2003) (defining sexual assault requiring perpetrator act "intentionally" or "knowingly"); Reynolds v. State, 664 P.2d 621, 625 (Alaska Ct. App. 1983) ("[T]he state must prove that the defendant knowingly engaged in sexual intercourse and recklessly disregarded his victim's lack of consent."); Trump v. State, 753 A.2d 963, 973 (Del. 2000) (requiring that the prosecution establish that the conduct was intentional).

58. See Taslitz, *supra* note 3, at 384 (explaining that negligence is the current mens rea requirement for rape prosecution in a majority of jurisdictions); see also Kerry M. Hodak, Note, *Court Sanctioned Mediation in Cases of Acquaintance Rape: A Beneficial Alternative to Traditional Prosecution*, 19 OHIO ST. J. ON DISP. RESOL. 1089, 1095-96 (2004) (explaining that a man can be convicted of rape based on an unreasonable belief that the victim consented).

59. See David P. Bryden & Roger C. Park, "Other Crimes" Evidence in Sex Offense Cases, 78 MINN. L. REV. 529, 554 (1994) (discussing that in most adult rape cases the defendant's intent to engage in sexual contact is not at issue). "Where the charge is of rape, the doing of the act being disputed, it is perhaps still theoretically possible that the intent should be in issue; but practically, if the act is proved, there can be no real question as to intent; and therefore the intent principle has no necessary application." *Id.* (quoting 2 JOHN HENRY WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 357, at 334 (1979)).

60. See Bryden & Park, *supra* note 59, at 554-55 (explaining that in acquaintance rape scenarios, the defendant often claims that the accuser consented to sexual contact).

61. See, e.g., State v. Adams, 880 P.2d 226, 234 (Haw. Ct. App. 1994) (defining consent as voluntary agreement or concurrence, either express or implied). Some authorities describe the "without her consent" element of forcible rape as an attendant circumstance—a circumstance that must be present at the time of the actus reus component of the crime. *But see, e.g.,* State v. Jiminez, 556 P.2d 60, 63 (N.M. Ct. App. 1976) (ruling that lack of consent is not an element of the crime of criminal sexual penetration in New Mexico).

62. See *supra* notes 32-34 and accompanying text.

consents must emanate from the victim, not the perpetrator.⁶³ Although virtually every jurisdiction requires proof of the victim's nonconsent, *how* that nonconsent is established varies from jurisdiction to jurisdiction. In many jurisdictions, the perpetrator's belief about the victim's consent is immaterial.⁶⁴

Recall that at common law, proof of the victim's nonconsent required proof that the victim resisted her attacker to the utmost.⁶⁵ However, proof of victim resistance was a much-criticized requirement—and for good reason.⁶⁶ For instance, evidence firmly established that victims who resisted their attackers were more likely to sustain more serious injuries. Accordingly, rather than subjecting rape victims to potentially more grave injuries, most jurisdictions have moved away from requiring physical resistance as proof of the victim's nonconsent and now allow for proof of the victim's nonconsent to be either physical or verbal.⁶⁷ Some jurisdictions recognize proof that a woman communicated “no” to her attacker, whether verbally or otherwise, as sufficient proof establishing her lack of consent.⁶⁸ In such jurisdictions, her failure to communicate “no,” whether physically or otherwise, signifies her consent.⁶⁹ Other jurisdictions allow proof of the victim's nonconsent upon a showing that the victim did not affirmatively communicate “yes” or otherwise affirmatively grant permission to the perpetrator to engage in a particular sexual act.⁷⁰ In such jurisdictions, the responsibility is on the perpetrator to ascertain whether the woman consents to the sexual contact.⁷¹

63. See *State v. Jardine*, No. 95-1856-CR, 1996 WL 279702, at *3 (Wis. Ct. App. May 29, 1996) (“The element of consent in the sexual assault statutes deals with the conduct of the victim and not the state of mind of the accused.”).

64. See, e.g., *Commonwealth v. Lopez*, 745 N.E.2d 961, 966 (Mass. 2001).

65. See David P. Bryden, *Redefining Rape*, 3 BUFF. CRIM. L. REV. 317, 356 (2000) (explaining the resistance requirement).

66. See *infra* Part II.B.3.b.

67. *But see Commonwealth v. Berkowitz*, 609 A.2d 1338, 1348 (Pa. Super. Ct. 1992) (explaining that resistance can be verbal, but verbal protestations alone are not sufficient).

68. See, e.g., *People v. Richardson*, 728 N.Y.S.2d 605, 606 (Sup. Ct. 2001) (holding that crying, saying “no,” and that he was hurting her” was sufficient to demonstrate lack of consent).

69. See *id.*

70. See, e.g., *In re M.T.S.*, 609 A.2d 1266, 1277 (N.J. 1992) (“[P]ermission to engage in sexual penetration must be affirmative and it must be given freely, but that permission may be inferred either from acts or statements reasonably viewed in light of the surrounding circumstances.”). The court in *M.T.S.* elaborated on the requirement that permission for the sexual contact be affirmatively given:

Persons need not, of course, expressly announce their consent to engage in intercourse for there to be affirmative permission. Permission to engage in an act of sexual penetration can be and indeed often is indicated through physical actions rather than words. Permission is demonstrated when the evidence, in whatever form, is sufficient to demonstrate that a reasonable person would have believed that the alleged victim had affirmatively and freely given authorization to the act.

Id.; see also *State v. Clark*, 275 N.W.2d 715, 720 (Wis. 1979) (interpreting the language of the sexual assault statute to require “words or overt acts” demonstrating a victim's freely given consent).

71. Cf. Michelle J. Anderson, *Negotiating Sex*, 78 S. CAL. L. REV. 1401, 1407 (2005)

Some jurisdictions make it clear that the defendant need not have been aware of the victim's nonconsent at all in order to be prosecuted for rape.⁷² Although nonconsent remains a material element of rape, in these jurisdictions, it is entirely immaterial whether the defendant was aware—or indeed even should have been aware—of whether the woman consented; he may still be convicted of rape.⁷³ This distinction is important, because although lack of consent must be proven, in jurisdictions such as these, the defendant's awareness or lack of awareness of that consent at the time of the sexual contact is immaterial to his rape prosecution. What is material is whether the victim in fact consented at the time, regardless of whether that was effectively communicated to the defendant and regardless of whether he knew or even should have known that she did not consent.

b. *Victim Resistance.* One of the most controversial elements of many common law rape prosecutions was the requirement of proof that the victim physically resisted her attacker.⁷⁴ This resistance requirement was highly criticized for valid reasons. Criticisms included an emphasis on the reality that many victims of rape are unable, for a variety of reasons, to resist the attacker either physically or verbally. Many victims may be unable to resist at the time, for example, out of fear, disbelief, or shock.⁷⁵

Other well-founded criticisms of the resistance requirement include the reality that victims who resist their attackers are likely to sustain more severe injuries as a result of the attack than they would had they not resisted.⁷⁶ Accordingly, many (but not most) jurisdictions have eliminated the requirement of proof of victim resistance.⁷⁷ Most jurisdictions still require

(promoting a negotiation model as a means for sexual partners to ascertain consent).

72. See, e.g., *Dunton v. People*, 898 P.2d 571, 573 (Colo. 1995); *Commonwealth v. Lopez*, 745 N.E.2d 961, 965–66 (Mass. 2001) (explaining that consent has very little application under Massachusetts' rape provision, and because the rape statute does not require proof of the defendant's knowledge of the victim's lack of consent or intent to engage in nonconsensual intercourse as a material element of the offense, mistake cannot negate the mental state required for commission of the prohibited conduct).

73. See, e.g., *Lopez*, 745 N.E.2d, at 965–66.

74. See *supra* notes 36–38.

75. See, e.g., *People v. Oliphant*, 250 N.W.2d 443, 450 (Mich. 1976) (“It has sometimes been said that a showing of ‘resistance to the utmost’ by the woman is necessary to convict. . . . It is now well settled in this state, however, that failure to physically resist to the utmost is excused if the complainant's will was overcome by fear of the defendant.”); *Seeley v. State*, 715 P.2d 232, 240–41 (Wyo. 1986) (holding that a showing of resistance is required unless “(1) resistance would be futile, (2) the victim is ‘overcome by superior strength,’ or (3) the victim is ‘paralyzed by fear’”).

76. See, e.g., *People v. Barnes*, 721 P.2d 110, 119–21 (Cal. 1986).

77. See, e.g., ALASKA STAT. § 11.41.410(1)–(2) (2006) (recognizing prosecution for rape with or without victim resistance); IOWA CODE ANN. § 709.5 (West 2004) (providing that resistance is not necessary to establish the crime of sexual abuse); OHIO REV. CODE ANN. § 2907.02(C) (LexisNexis 2006) (providing that physical resistance is not required to establish rape in Ohio); VA. CODE ANN. § 18.2-67.6 (2004) (providing that proof that the victim physically resisted is not required for criminal sexual assault prosecution in Virginia); *State v. Willcoxson*, 751 P.2d 1385, 1387 (Ariz. Ct. App. 1987) (explaining that under Arizona law, a rape victim has no duty to resist her attacker, and the only issue is

proof of victim resistance.⁷⁸ Victim resistance may be either physical or verbal, depending on the jurisdiction.⁷⁹ The requirement of victim resistance is much criticized. Criticisms range from asking victims to do something they may be unable to do under the circumstances to increasing the likelihood that a victim will sustain more severe injuries. In response to the criticisms, many jurisdictions have eliminated the resistance requirement all together.

As compelling as the objections to the requirement of victim resistance may be, proof of victim resistance is a necessary and important component to a rape conviction. First, proof of resistance helps prove portions of the *actus reus* component of rape. Forcible rape requires proof that the perpetrator used force.⁸⁰ Proof of resistance is helpful in establishing that the defendant acted with an amount of force necessary to support a charge of forcible rape inasmuch as the perpetrator's force must overcome her resistance.⁸¹ Moreover, proof of resistance may be helpful in establishing the victim's lack of consent, another essential component of the *actus reus*.⁸² Requiring proof that the

whether the victim consented); *People v. Iniguez*, 872 P.2d 1183, 1187 (Cal. 1994) (stating that a victim is not required to resist her attacker in California); *State v. Adams*, 880 P.2d 226, 235 (Haw. Ct. App. 1994) (explaining that physical or verbal resistance is not a requirement for a conviction for sexual assault in Hawaii); *Commonwealth v. Caracciola*, 569 N.E.2d 774, 777 (Mass. 1991) (explaining that a victim is not required to use physical force to resist under Massachusetts law); *People v. Gregory ZZ.*, 521 N.Y.S.2d 873 (App. Div. 1987) (concluding that "earnest resistance" is not required to establish rape in New York); *State v. Hall*, 293 N.C. 559, 563, 238 S.E.2d 473, 476 (N.C. 1977) (ruling that "physical resistance is not necessary to prove lack of consent in a rape case" in North Carolina); *Commonwealth v. Jones*, 672 A.2d 1353, 1355 (Pa. Super. Ct. 1996) (explaining that a rape victim in Pennsylvania "need not resist"); *State v. Jones*, 521 N.W.2d 662, 672 (S.D. 1994) (explaining that resistance is not required in a rape prosecution in South Dakota).

78. *But see* 18 PA. CONS. STAT. § 3107 (West 2000) (providing that proof of resistance is not required in a prosecution for rape).

79. Jurisdictions define resistance variously. *See, e.g.*, *State v. Prado*, 552 P.2d 1317, 1318 n.1 (Or. Ct. App. 1976) (referring to Oregon State Bar Uniform Jury Instructions which define "earnest resistance" as meaning "that the female did not consent to the sexual intercourse either expressly or impliedly, and resisted in reasonable proportion to her strength and her abilities under the circumstances"); *State v. Hodgdon*, 99 A.2d 615, 616 (Vt. 1953) ("[R]esistance must be proportioned to the outrage, and the amount of resistance required necessarily depends on the circumstances, such as the relative strength of the parties, the age and condition of the female, the uselessness of resistance, and the degree of force manifested." (quoting 75 C.J.S. *Rape* § 12c)); *State v. Miller*, 336 S.E.2d 910, 918 (W. Va. 1985) (requiring "earnest resistance" to establish a charge of sexual assault).

80. *See, e.g. Hall*, 293 N.C. at 561, 238 S.E.2d at 475 (1977) (quoting *State v. Hines*, 286 N.C. 377, 380, 211 S.E.2d 201, 203 (1975)).

81. *See, e.g.*, MO. ANN. STAT. § 566.030 cmt. 1(1) (West 1999) (defining "forcible compulsion" necessary for a forcible rape conviction as including "physical force that overcomes reasonable resistance"); *State v. Gomez*, 92 S.W.3d 253, 255 (Mo. Ct. App. 2002) (explaining that force used must be sufficient to overcome victim's reasonable resistance).

82. *See, e.g.*, OR. REV. STAT. § 163.315(2) (2005) (providing that in Oregon "lack of verbal or physical resistance does not, by itself, constitute consent but may be considered by the trier of fact along with all other relevant evidence"); 18 PA. CONS. STAT. § 3107 (West 2000) (providing that resistance is not required, but the fact that the victim did not resist

victim resisted either physically or verbally helps to establish her lack of consent. Resistance indicates that she did not consent at the time; it also indicates that she communicated her nonconsent to the defendant. This leads to the next point, that proof of resistance can be very helpful in establishing that the perpetrator acted with the requisite mens rea⁸³—proof that the victim resisted and that the defendant had to overcome that resistance is probative evidence that the defendant knowingly had sex with the woman against her wishes.⁸⁴ Proof that the victim resisted, therefore, is helpful in at least three respects—proving the victim’s nonconsent, proving the defendant’s threat or use of force, and proving the defendant’s culpability. As sexual intercourse is an activity engaged in frequently by consenting adults, it should be important—essential, in fact—to a rape conviction that the prosecution prove that the sexual contact at issue was not a typical sexual contact, but was rather nonconsensual, forced sex, i.e., rape.⁸⁵

c. *Force and Nonconsent.* One of the other elements—and a most critical feature of the actus reus component of forcible rape—is the requirement that the sexual intercourse transpire through the defendant’s use of force or threat of force.⁸⁶ Distinct from the nonconsent element, the force⁸⁷ or

does not prohibit the defendant from introducing evidence that the alleged victim consented); *State v. Red Kettle*, 476 N.W.2d 220, 227 (Neb. 1991) (“Where resistance would obviously be useless, futile, or foolhardy, it is wholly unrealistic to require affirmative direct demonstration of the utmost physical resistance as proof of the female’s opposition and lack of consent.” (quoting *State v. Campbell*, 206 N.W.2d 53, 56 (Neb. 1973)); *Haury v. State*, 533 P.2d 991, 995 (Okla. Crim. App. 1975) (“[A] rape victim is not required to do more than her age, strength, surrounding facts, and all attending circumstances make it reasonable for her to do in order to manifest her opposition.”); *Hodgdon*, 99 A.2d at 616 (citing 75 C.J.S. *Rape* § 12c) (requiring actual resistance or excuse for lack of resistance that is incompatible with consent).

83. See, e.g., *Ayers v. State*, 594 So. 2d 719, 721 (Ala. Crim. App. 1991) (explaining proof that the defendant acted with force may be established by proof of either (1) physical force used to overcome the victim’s earnest resistance or (2) an express or implied threat that placed the victim “in fear of serious physical injury or death”); cf. *Pollard v. State*, 580 S.E.2d 337, 340 (Ga. Ct. App. 2003) (“Lack of resistance, induced by fear, is force, and may be shown by the prosecutrix’[s] state of mind from her prior experience with appellant and subjective apprehension of danger from him.” (citation omitted)).

84. See *State v. Adams*, 880 P.2d 226, 235 (Haw. Ct. App. 1994) (“Although physical or verbal resistance is not an element that needs to be proven, evidence of its absence is probative of the defendant’s state of mind. Additionally, its absence may be considered by the jury in determining whether the alleged victim impliedly consented.”).

85. See *Carroll v. State*, 324 N.E.2d 809, 811 (Ind. 1975) (noting that a victim “must resist to a degree which would indicate the act was against her will,” but adding that “the required resistance need not take the form of an actual attempt to escape or to fight off the attacker in every conceivable set of circumstances”); see also *Bryden & Park*, *supra* note 59, at 554 n.103 (explaining that as modern statutes and decisions dispense with the resistance requirement, it is more plausible that the defendant may have performed the actus reus of rape without intending to do so). It is true that the resistance requirement is unique to the rape law context. Criminal offenses such as kidnapping, assault, or robbery similarly require proof of force or nonconsent in order to secure a conviction, but do not require proof that the victim resisted.

86. See, e.g., *State v. Fowler*, 500 N.E.2d 390, 395 (Ohio Ct. App. 1985) (“Force need

threat of force emanates from the perpetrator rather than the victim⁸⁸ and may take various forms.⁸⁹ It is critical to a finding of forcible rape that the perpetrator use force or threat of force to secure the nonconsensual sex. Doing so transforms the nonconsensual sex into rape.⁹⁰

In some jurisdictions, the element of force has been merged into lack of consent.⁹¹ Some jurisdictions that have not gone so far as to eliminate the requirement of force have instead ruled that the required force element can be established by proof that the victim did not consent to the sexual encounter.⁹² In other words, the force element has merged into the lack of consent element, and proof of the victim's nonconsent establishes both her nonconsent and the fact that the accused perpetrator used force during the sexual act.⁹³ Other jurisdictions have held that the touching involved in the sex act itself constitutes force.⁹⁴

d. *Penalties and Collateral Consequences.* As a serious felony, the penalties for a rape conviction are severe. In addition to society condemning

not be overt and physically brutal, but can be subtle and psychological. As long as it can be shown that the rape victim's will was overcome by fear or duress, the forcible element of rape can be established.”).

87. “Force” typically results in either a physical injury to the victim or an offensive touching. *See In re M.T.S.*, 609 A.2d 1266, 1276 (N.J. 1992).

88. *See Pollard v. State*, 580 S.E.2d 337, 340 (Ga. Ct. App. 2003) (“[T]he terms ‘forcibly’ and ‘against her will’ are two separate elements of proving rape. The term ‘against her will’ means without consent; the term ‘forcibly’ means acts of physical force, threats of death or physical bodily harm, or mental coercion, such as intimidation.”).

89. What constitutes force varies from jurisdiction to jurisdiction. *See, e.g., Commonwealth v. Rhodes*, 510 A.2d 1217, 1226 (Pa. 1986) (“[F]orcible compulsion . . . includes not only physical force or violence but also moral, psychological or intellectual force used to compel a person to engage in sexual intercourse against a person’s will.”).

90. Many would conclude that the societal harms currently sought to be prevented by enactment of rape provisions are physical violence against a person and the right of a person to choose with whom he or she will engage in sexual intimacy. *Cf. Pillsbury, supra* note 24, at 879 (describing the social harm of forced sex as “a wound to the victim’s inner self, to her spirit, and that this injury occurs because the attack is sexual,” and arguing that the focus of acquaintance rape should center more on the sexual aspects of offense). *But see WIS. STAT. ANN. § 940.225(1)(a)* (West 2005) (proscribing nonconsensual sex causing pregnancy as sexual assault).

91. *See Bryden & Park, supra* note 59, at 555 (describing the difficulty of drawing “sharp lines between [forcible rape elements] of consent, force, and mistake”); *see, e.g., MONT. CODE ANN. § 45-5-501(1)(a)(ii)* (2007) (defining the element “without consent,” in part, as meaning whether “the victim is compelled to submit by force”); *Mosley v. State*, 914 S.W.2d 731, 734 (Ark. 1996) (defining the “force” element of rape as whether the act was committed against the victim’s will); *Commonwealth v. Lopez*, 745 N.E.2d 961, 965 (Mass. 2001) (describing “by force or threat of force and against the will of the victim” as an element that is “truly encompassing two separate elements each of which must independently be satisfied”).

92. *See State v. Rusk*, 424 A.2d 720, 726 (Md. 1981) (holding that lack of consent constitutes force when the defendant intended to induce fear).

93. *See id.*

94. *See, e.g., In re M.T.S.*, 609 A.2d 1266, 1277–78 (N.J. 1992).

the rapist as one of the worst kinds of criminals,⁹⁵ statutes often mandate lengthy prison terms for convicted rapists.⁹⁶ In addition to the lengthy prison stays, convicted sex offenders who have already served their term of imprisonment are often required to register as sex offenders in their jurisdiction,⁹⁷ and many jurisdictions require such registration for life.⁹⁸

95. See Pillsbury, *supra* note 24, at 881 (explaining that rape was historically considered one of the most heinous crimes).

96. See, e.g., MO. ANN. STAT. § 566.030 (West 2007) (setting a term of life in prison or a term of not less than ten years for any forcible rape in which a defendant inflicts serious injury or displays a deadly weapon).

97. See, e.g., FLA. STAT. ANN. § 943.0435(2)(a) (West 2006 & Supp. 2007) (requiring registration within forty-eight hours of release from prison or upon moving to new address); GA. CODE ANN. § 42-1-12 (1997) (requiring registration within ten days from release from prison or changing address); IDAHO CODE ANN. § 18-8307 (2004 & Supp. 2007) (requiring registration as sex offender upon release from prison); IOWA CODE ANN. § 692A.16(1) (West 2003); KAN. STAT. ANN. § 22:4904(a) (2006) (requiring sex offender registration within ten days of release from prison); KY. REV. STAT. ANN. §§ 17.495–580 (LexisNexis Supp. 2006); LA. REV. STAT. ANN. §§ 15:540–50 (2005) (requiring sex offender registration within ten days of release from prison); ME. REV. STAT. ANN. tit. 34, §§ 11201–228 (Supp. 2006) (requiring registration within twenty-four hours of release from prison); MD. CODE ANN., CRIM. PROC. §§ 11-701 to -722 (LexisNexis Supp. 2006); MICH. COMP. LAWS SERV. §§ 28.721–732 (LexisNexis 2001); MINN. STAT. ANN. § 243.166 (West 2003 & Supp. 2007) (containing sexual offender registration requirements); MISS. CODE ANN. §§ 45-33-27 to -59 (2004 & Supp. 2007) (requiring sexual offenders to register within three days of release from prison); MO. ANN. STAT. §§ 589.400–425 (West 2003 & Supp. 2007) (requiring offenders to register within three days of release from prison or assignment of parole); MONT. CODE ANN. §§ 46-23-501 to -520 (2007) (containing sexual offender registration requirements); NEB. REV. STAT. §§ 29-4001 to -4014 (Supp. 2006) (providing requirements for registration of sex offenders); NEV. REV. STAT. ANN. §§ 179D.350–.550 (LexisNexis 2006) (providing sex offender registration requirements); N.H. REV. STAT. ANN. §§ 651-B:1 to :12 (LexisNexis 2007) (containing sexual offender registration requirements); N.J. STAT. ANN. §§ 2C:7-1 to -19 (West 2005 & Supp. 2007) (containing sexual offender registration requirements); N.M. STAT. ANN. §§ 29-11A-1 to -10 (LexisNexis 2004 & Supp. 2007) (containing sex offender registration requirements); N.Y. CORRECT. LAW § 168 (McKinney 2003 & Supp. 2007) (containing sex offender registration requirements); N.C. GEN. STAT. §§ 14-208.5–.32 (2005 & Supp. 2006) (requiring sex offenders to register within ten days of prison release); N.D. CENT. CODE § 12.1-32-15 (Supp. 2007) (requiring sex offender registration within three days of prison release); OHIO REV. CODE ANN. §§ 2950.01–.99 (LexisNexis 2006) (requiring sex offenders to register within five days of release from prison); OKLA. STAT. ANN. tit. 57, §§ 581–590 (West 2004 & Supp. 2007) (requiring registration of sex offenders within three days of prison release); 42 PA. CONS. STAT. ANN. §§ 9791–9799.9 (West 2006 & Supp. 2007) (requiring registration of sex offenders upon release from prison); R.I. GEN. LAWS §§ 11-37.1-4 to -19 (2002 & Supp. 2006) (containing sex offender registration requirements); TENN. CODE ANN. §§ 40-39-201 to -211 (2006) (containing sex offender registration requirements); TEX. CODE CRIM. PROC. ANN. arts. 62.001–408 (Vernon 2006) (containing sex offender registration requirements); UTAH CODE ANN. § 77-27-21.5 (2003 & Supp. 2007) (containing sex offender registration requirements); VT. STAT. ANN. tit. 13, §§ 5401–5414 (Supp. 2006) (same); VA. CODE ANN. § 9.1-900 to -921 (2006) (containing sex offender registration requirements); WASH. REV. CODE ANN. §§ 9A.44.130–145 (West 2000 & Supp. 2007) (containing sex offender registration requirements); W. VA. CODE ANN. §§ 15-12-1 to -10 (LexisNexis 2004 & Supp. 2007) (containing sex offender registration requirements); WIS. STAT. ANN. § 301.45 (West Supp. 2006) (containing sex offender registration requirements); WYO. STAT. ANN. §§ 7-19-

301 to -308 (2007) (requiring sex offenders to register within three days of release from custody).

98. *See, e.g.*, ALA. CODE § 15-20-33 (LexisNexis 2006) (requiring registration of adult sex offenders for life); ALASKA STAT. § 12.63.020 (2006) (requiring lifetime registration for those convicted of “one aggravated sex offense” or “two or more sex offenses”); ARK. CODE ANN. § 12-12-919 (2003) (requiring lifetime registration for repeat sex offenders, sex offenders determined to be sexually violent, or aggravated sex offenders); CAL. PENAL CODE § 290 (Deering Supp. 2007) (requiring lifetime registration upon release from prison for all but minor sexual offenders); COLO. REV. STAT. §§ 16-22-108, -113 (2006) (requiring lifetime registration as well as registration every ninety days, but convicted offenders may petition for discontinuation after at least five years); DEL. CODE ANN. tit. 11, § 4120 (2001) (requiring registration every ninety days for life); GA. CODE ANN. § 42-1-12(f)(7) (Supp. 2007) (requiring lifetime registration for offenders with more than one prior conviction or conviction for aggravated offense); HAW. REV. STAT. § 846E-2 (Supp. 2006) (requiring registration for life unless certain exceptions are met); IND. CODE ANN. § 11-8-8-19 (LexisNexis 2006) (requiring lifetime registration for some offenders); KAN. STAT. ANN. §§ 22-4901 to -4912 (Supp. 2006) (requiring lifetime registration of sex offenders); KY. REV. STAT. ANN. § 17.520 (LexisNexis 2003) (requiring lifetime registration for those convicted of first degree rape or those with multiple convictions); ME. REV. STAT. ANN. tit. 34-A, §§ 11201-28 (Supp. 2006) (requiring lifetime registration for those who commit a “sexually violent offense” or a sex “offense when the person also has a prior conviction for or attempt to commit an offense that includes the essential elements of a sex offense or sexually violent offense”); MD. CODE ANN., CRIM. PROC. §§ 11-701 to -721 (LexisNexis Supp. 2006) (requiring lifetime registration for sexually violent offenders); MISS. CODE ANN. § 45-33-47 (Supp. 2007) (providing that any offender convicted of rape or sexual battery must register for life and cannot petition to have the requirement lifted); MO. ANN. STAT. § 589.400(3) (West Supp. 2007) (requiring lifetime registration unless “[a]ll the offenses are reversed” or one of the other exceptions is met); MONT. CODE ANN. § 46-23-506 (2007) (requiring some repeat sex offenders to register for life); N.H. REV. STAT. ANN. § 651-B:6 (LexisNexis 2007) (requiring lifetime registration for those convicted of various sexual offenses); N.Y. CORRECT. LAW § 168-h(2) (McKinney Supp. 2007) (requiring high-risk sexual offenders to register for life); N.C. GEN. STAT. §§ 14-208.6(A), 14-208.23 (2005) (requiring lifetime registration for recidivists and aggravated offenses); N.D. CENT. CODE § 12.1-32-15 (Supp. 2007) (requiring lifetime registration for repeat offenders and those convicted of forcible gross sexual imposition); OKLA. STAT. ANN. tit. 57, § 583(B)(4) (West Supp. 2007) (requiring lifetime registration of habitual and aggravated sex offenders); 42 PA. CONS. STAT. ANN. § 9795.1 (West 2007) (requiring lifetime registration for sex offenders convicted of rape, sexual assault, and multiple offenses); S.C. CODE ANN. §§ 23-3-430, -460 (2007) (requiring lifetime registration for all sex offenders); TENN. CODE ANN. § 40-39-207(f)(1)(B) (2006) (requiring violent sexual offenders to register for life); UTAH CODE ANN. § 77-27-21.5(10)(c) (Supp. 2007) (requiring lifetime registration for those convicted of aggravated sexual assault, among other offenses); VT. STAT. ANN. tit. 13, § 5405(i) (Supp. 2006) (requiring lifetime registration for sexually violent offenders); VA. CODE ANN. § 9.1-908 (2006) (requiring lifetime registration of sexually violent offenders); WASH. REV. CODE ANN. § 9A.44.140(b)(ii) (West Supp. 2007) (requiring lifetime registration for repeat offenders and those convicted of aggravated offenses); W. VA. CODE ANN. § 15-12-4(a)(2)(D) (LexisNexis 2004) (requiring lifetime registration for those convicted of violent sex offenses).

In some jurisdictions, juvenile defenders required to register are permitted to do so for a term of years less than life. *See, e.g.*, ALA. CODE § 15-20-33(b) (Supp. 2006) (requiring registration of juvenile defenders for ten years); CAL. PENAL CODE § 290.5 (Deering Supp. 2007) (allowing for minor sex offenders to obtain certificate of rehabilitation seven to ten years after release in order to no longer be required to register for life).

Although the United States Supreme Court has ruled that registration of sex offenders is not an additional punishment,⁹⁹ being a registered sex offender carries with it various collateral consequences, including, for example, not being able to live within a certain distance of schools and childcare centers,¹⁰⁰ not being able to change one's address or leave the state of residence without notice,¹⁰¹ having to register one's place of employment,¹⁰² and being prohibited from unsupervised parenting time or acquiring legal custody of

99. See *Smith v. Doe*, 538 U.S. 84, 102 (2003).

100. See, e.g., ALA. CODE § 15-20-26(a) (LexisNexis Supp. 2006) (prohibiting sex offenders from residing or accepting employment within 2000 feet of any school or child care facility); OHIO REV. CODE ANN. § 2950.031(A) (LexisNexis 2006) (prohibiting sex offenders from residing within 1000 feet of a school); TENN. CODE ANN. § 40-39-211(a) (2006) (prohibiting sex offenders from residing or working within 1000 feet of any school or day care center when the victim was a minor). *But see* NEB. REV. STAT. §§ 29-4001 to -4013, -4016 to -4017 (Supp. 2006) (providing no restrictions on where sex offender can live unless the offender is classified as a sexual predator as a result of a high risk of recidivism and victimization of a person under eighteen).

101. See, e.g., ARIZ. REV. STAT. ANN. § 13-3822(A) (Supp. 2006) (requiring sex offenders to notify authorities of a new place of residence with seventy-two hours); CAL. PENAL CODE § 290(f)(1)(A) (Deering Supp. 2007) (requiring notification within five days of an address change); DEL. CODE ANN. tit. 11, § 4120(f)(1) (Supp. 2006) (requiring notification of an address change to authorities within seven days); GA. CODE ANN. § 42-1-12(f)(5) (2007) (requiring notification of an address change to authorities within seventy-two hours); IND. CODE ANN. § 11-8-8-11(a) (LexisNexis Supp. 2006) (requiring offenders to report a change of information within three days); IOWA CODE ANN. § 692A.3(2) (West Supp. 2007) (requiring any changes in information to be reported within five days); MD. CODE ANN., CRIM. PROC. § 11-705(d) (LexisNexis Supp. 2006) (requiring notification of authorities within ten days of change of address); MICH. COMP. LAWS SERV. § 28.725(1), (4) (LexisNexis Supp. 2007) (requiring registrants to report any change of address within ten days); MINN. STAT. ANN. § 243.166(3)(b) (West 2003 & Supp. 2007) (requiring a change of address to be reported within at least five days); MISS. CODE ANN. § 45-33-29(1) (Supp. 2007) (requiring any change of address to be reported within ten days); MONT. CODE ANN. § 46-23-505(1) (2007) (requiring notification of a change of address to be reported within three days); NEV. REV. STAT. ANN. § 179D.460(2)-(4) (LexisNexis 2006) (requiring notification within forty-eight hours of a change of address); N.H. REV. STAT. ANN. § 651-B:5 (LexisNexis 2007) (requiring notification of any change within five days); N.J. STAT. ANN. § 2C:7(2)(d) (West 2005) (requiring notification within ten days); N.M. STAT. ANN. § 29-11A-4 (LexisNexis Supp. 2006) (requiring notification of any change of address within ten days if moving within New Mexico); N.Y. CORRECT. LAW § 168 (McKinney Supp. 2007) (requiring notification of registration information within ten days); OR. REV. STAT. § 181.597(1)(a) (2005) (requiring notification within ten days of change in status); S.C. CODE ANN. § 23-3-460 (2007) (requiring a change of address to be reported within ten days); S.D. CODIFIED LAWS § 22-24B-12 (2006) (requiring notification of an address change within five days); TEX. CODE CRIM. PROC. ANN. art. 62.051(a) (Vernon 2006) (requiring notification of an address change within seven days of change); UTAH CODE ANN. § 77-27-21.5(10)(a) (Supp. 2007) (requiring any change of address to be reported within ten days); WASH. REV. CODE ANN. § 9A.44.130(5)(a) (West Supp. 2007) (requiring notification of an address change to a new county fourteen days prior to a move to a new county).

102. See, e.g., 730 ILL. COMP. STAT. ANN. § 150/3(a) (West Supp. 2007) (requiring registration of the offender's place of employment); *cf.* IND. CODE ANN. § 11-8-8-8(3) (LexisNexis 2006) (requiring registration of all employers' addresses); 42 PA. CONS. STAT. ANN. § 9795.2(2)(ii) (West 2007) (requiring notification of a change of address or employment within two days).

one's own child.¹⁰³ Additionally, many jurisdictions permit registration information to be available on the Internet.¹⁰⁴ In at least one jurisdiction, the registration law goes so far as to prohibit use of an emergency shelter with one's family in the event of a hurricane,¹⁰⁵ and some jurisdictions have recently enacted legislation requiring sex offenders to be tracked by satellite.¹⁰⁶

III. THE NEED FOR A CLEARER LINE BETWEEN FORCIBLE RAPE AND NONCONSENSUAL SEX

There is a need for a clearer line between forcible rape and nonconsensual sex.¹⁰⁷ Some rape provisions are so broad that they criminalize widely varying conduct as the same crime.¹⁰⁸ Learning that a person is a convicted forcible rapist does little to inform about the reprehensibility of the crime of which the particular individual is convicted. In fact, a convicted rapist may be anyone from a predatory individual who used violence or threats of violence to secure sex from his victim to a young man who genuinely (and sometimes even

103. See, e.g., ARIZ. REV. STAT. ANN. § 25-403.05(1) (2007) (providing that a registered sex offender shall not be granted sole or joint physical or legal custody of a child or unsupervised parenting time with a child without a court order).

104. See, e.g., CAL. PENAL CODE § 290.46 (Deering 2007) (providing for information regarding sex offenders to be available online); COLO. REV. STAT. §§ 16-22-111 (2006) (requiring offenders' "names, addresses, and physical descriptions" be available on internet site); CONN. GEN. STAT. ANN. § 54-258 (West 2001) (requiring sex offenders' registration information be available to the public on an Internet website).

105. See Preston Rudie, *New Policy Bans Sex Offenders From Hurricane Shelters*, TAMPA BAY'S 10 NEWS, July 17, 2005, <http://www.tampabay10.com/news/local/article.aspx?storyid=14973> (discussing the recent approval of a new policy banning registered sex offenders from using any Hillsborough County, Florida hurricane shelter).

106. See Wendy Koch, *More Sex Offenders Tracked by Satellite*, U.S.A. TODAY, June 7, 2006, at 3A (reporting that at least twenty-three states track convicted sex offenders by use of global positioning systems and that Wisconsin will begin doing so beginning in July 2007). Bills have been signed in Arkansas, Georgia, Kansas, Virginia, Washington, and Michigan in order to allow for GPS tracking of sex offenders. *Id.*

107. It is difficult to redefine any one area of law so that it works ideally most if not all of the time. See Stephen Schulhofer, *Society Needs Better Laws Against Rape*, in RAPE 143, 149 (Mary E. Williams ed., 2001) ("It is a daunting task to define, clearly and specifically, what an appropriate system for protection of sexual autonomy should look like."). However, several commentators have suggested that many of these recent efforts have been more harmful than beneficial. See, e.g., SOMMERS, WHO STOLE FEMINISM?, *supra* note 24, at 22 (discussing how the feminist movement has progressed from "First Wave," which strove for women to be treated equally, to "Second Wave" feminism, which seems bent on dismantling the perceived system of male dominance, focusing on women as a political class with interests at odds with interests of men); Brian Carnell, *Feminists Exaggerate the Prevalence of Rape*, in VIOLENCE AGAINST WOMEN, *supra* note 24, at 62 (explaining that for some feminists, rape is a tool used to extract political influence and has encouraged "advocacy researchers to exaggerate the number of women who are victims of rape, leading to increasingly inflated numbers based on methodologically suspect studies").

108. See Aya Gruber, *Pink Elephants in the Rape Trial: The Problem of Tort-Type Defenses in the Criminal Law of Rape*, 4 WM. & MARY J. WOMEN & L. 203, 206 (1997) (arguing that although recent rape law reforms may cause higher convictions rates, they also lead to more innocent individuals being reported for, accused of, and convicted of rape).

reasonably) misinterpreted a sexual situation. Not only do rape laws in many jurisdictions too often treat both types of individuals identically by, for instance, imposing lengthy prison terms and lifetime registration as convicted sexual offenders, they also do not adequately identify the type of sexual misconduct of which the defendant was convicted. This similar treatment for dissimilar crimes is a result of nationwide modification of rape law provisions in response to concerns regarding crimes against women and victims' rights.¹⁰⁹

However well-intentioned these modifications have been, rape law provisions in some jurisdictions are much too broad and risk resulting in rape convictions of undeserving individuals. Application of these provisions against some individuals risk violating one of the primary tenets of the criminal law: they allow for the criminal conviction of a person without a showing that he committed a criminal act with a criminal mind. Currently, forcible rape statutes are so broad that they risk ensnaring individuals who have engaged in nonconsensual sex and those who may not have acted with criminal culpability worthy of being branded forcible rapists.

Rape is complicated. On the one hand, the essence of any crime—rape included—is the state of mind of the alleged perpetrator. On the other hand, all crimes—rape included—criminalize engaging in conduct or causing a result that society recognizes as a social harm. The difficulty with rape is that an easily identifiable social harm may have occurred without the defendant acting with the necessary state of mind.

The most difficult cases arise in the acquaintance rape law context and are particularly troubling in view of some of the unique characteristics of the criminal law. Criminal law is a body of law that the government enforces on behalf of its citizens. Accordingly, prosecution within the criminal law signifies the moral condemnation of society. A criminal prosecution reflects society's outrage and collective disapproval of a person's conduct. This unique feature of the criminal law is important in at least one respect: conviction for a crime reflects the judgment of society; the judgment that the defendant's conduct was a wrong committed against society at large, not merely against the apparent victim or victims.¹¹⁰

Because of the societal indignation signified by entry of a criminal judgment, the criminal law is deliberately designed with certain safeguards in place that seek to ensure that the government condemns only those most deserving of society's collective denunciation.¹¹¹ For example, in pursuing a criminal case, the prosecution is required to prove beyond a reasonable doubt

109. See Bryden, *supra* note 65, at 317.

110. ROBERT W. FERGUSON & ALLAN H. STOKKE, *CONCEPTS OF CRIMINAL LAW* 61–62 (1976).

111. In the famed words of Blackstone, it is better for ten guilty men to go free than it is for one innocent to be imprisoned. See BLACKSTONE, *supra* note 2 § 406, at *358 (“[I]t is better that ten guilty persons escape than that one innocent suffer.”); see also Sanford H. Kadish, *Excusing Crime*, 75 CAL. L. REV. 257, 264 (1987) (“To blame a person is to express a moral criticism, and if the person's action does not deserve criticism, blaming him is a kind of falsehood and is, to the extent the person is injured by being blamed, unjust to him.”).

that the accused has caused a social harm and has done so in a morally blameworthy fashion. Therefore, prosecution for the vast majority of crimes requires strong proof of convergence of an actus reus and a mens rea—an evil act committed by the perpetrator with an evil mind.¹¹² Essential to this equation is the showing of the accused’s so-called evil mind, proving that the accused acted with a morally blameworthy mental state. It is the malevolence of the perpetrator’s thoughts coupled with the social harm that signify the degree of criminality of his conduct.¹¹³ Thus, only a very limited number of crimes allow prosecution of a defendant without regard to his state of mind.

Rape is a serious offense, and outside of the statutory rape context, it is an offense for which strict liability should not be an option or a de facto reality. Generally disfavored in the criminal law, strict liability offenses allow for prosecution of a defendant without proof of mens rea.¹¹⁴ Rather, a person can be convicted of a strict liability offense upon proof that the defendant committed the actus reus of the crime. The defendant’s state of mind or mens rea is essentially immaterial. Because they do not require a showing of a defendant’s state of mind, most strict liability offenses are either minor offenses or are predicated upon what is known as the “moral wrong” theory of criminal responsibility.¹¹⁵ The moral wrong theory of criminal responsibility recognizes the criminality of a perpetrator’s criminal act without regard to his state of mind because the act alone violates predominant moral teachings from an overwhelming societal standard.¹¹⁶ Although all crimes involve society’s moral judgments, strict liability offenses are unique from other crimes because society condemns the behavior alone without regard to the state of mind of the perpetrator at the time. For example, statutory rape—an adult having sex with a child—is a strict liability criminal offense.¹¹⁷ Society overwhelmingly condemns adults having sex with children. Thus, statutory rape as a strict liability offense has existed since the common law.¹¹⁸

It is wrong to use the strong arm of the criminal law to impose rules intended to change societal or cultural attitudes when doing so transforms conduct that many members of the community would regard as, at most,

112. Exceptions to this general rule are strict liability criminal offenses. *See supra* note 43 and accompanying text.

113. *See generally* GLANVILLE L. WILLIAMS, *THE MENTAL ELEMENT IN CRIME* (1965). Having an evil mind without an evil act does not constitute a criminal offense. The criminal law generally does not punish one for merely entertaining criminal thoughts. Rather, before prosecuting a person for a crime, we require that the person actually act upon his or her thoughts and engage in the criminal act. Likewise, committing a social harm or a criminal act without the requisite criminal mind is not a crime. Rather, it is the concurrence of both of these events that is critical to a finding of criminality. *See id.*

114. *See* DRESSLER, *supra* note 31, § 11.01[A]–[B], at 155–56.

115. *See* Catherine L. Carpenter, *On Statutory Rape, Strict Liability, and the Public Welfare Offense Model*, 53 AM. U. L. REV. 313, 359 (2003).

116. *See* Garnett v. State, 632 A.2d 797, 802 (Md. 1993) (explaining how the moral wrong theory is a justification for the strict liability crime of statutory rape).

117. *See* Carpenter, *supra* note 115, at 314–15.

118. *See id.* at 333.

unreasonable into one of the worst kinds of criminal offenses.¹¹⁹ Therefore, without proof that the perpetrator used, for example, force to continue the sexual contact, the withdrawal of previously granted consent in the middle of a lawful act should not constitute a grave felony. Although the victim may feel as violated as one who was forcibly raped, whether the victim actually was raped should turn on what was going on in the perpetrator's mind, not on how the victim felt. Rape law *should* concern the victim. However, what is even more important in criminal law is the accused's state of mind, not the victim's state of mind at the time of the alleged offense.¹²⁰

Rape is a crime that society appreciates as quite serious, and society regards rapists as some of its worst criminals. Since rape was governed by common law, the crime of rape has evolved primarily in a manner consistent with society's views on violence, sexual autonomy, and women's rights. Although some of the changes are progressive and serve the greater societal interests that rape law seeks to address, some of the changes have gone too far and likely contribute to forcible rape convictions of persons not deserving of such criminal sanctions.¹²¹

A. *Forcible Rape vs. Nonconsensual Sex*

As rape law currently stands today, individuals may be convicted of forcible rape for engaging in very different types of sexual misconduct. On the one hand, a person may be convicted of forcible rape when that person has violently secured sexual intercourse with his victim under circumstances clearly evidencing that he intended or was aware that his victim was unwilling for the sexual contact to occur. On the other hand, one may be convicted of "forcible" rape when he has engaged in sexual intercourse in a nonviolent manner with someone who, he only later learns, was not willing for the sexual contact to occur. It is the latter scenario that is often problematic in the rape law context. The distinction here is that forcible rape should be identified as

119. See SOMMERS, WHO STOLE FEMINISM?, *supra* note 24, at 226 ("Rape is just one variety of crime against the person, and rape of women is just one subvariety. The real challenge we face in our society is how to reverse the tide of violence. How to achieve this is a true challenge to our moral imagination. It is clear that we must learn more about why so many of our male children are so violent. And it is clear we must find ways to educate all of our children to regard violence with abhorrence and contempt. We must once again teach decency and considerateness.").

120. See Pillsbury, *supra* note 24, at 910–11 (discussing the need to be concerned with the perpetrator's state of mind rather than the victim's experience).

121. See Dressler, *supra* note 16, at 412 (explaining that many feminists have aligned themselves with political conservatives and that "[s]trange bedfellows like this can produce unwanted offspring"). See generally KATIE ROIPHE, THE MORNING AFTER: SEX, FEAR, AND FEMINISM ON CAMPUS (1993) (discussing how the feminist movement may have swung the pendulum too far). Although I disagree with some of what Roiphe discusses (including the implication that Alice Walker, author of *The Color Purple* and other outstanding pieces of literature, may be "just a bad writer," see *id.* at 5), Roiphe raises several compelling concerns that feminism has led to women seeing themselves as victims: "Now, if you're a woman, there's another role readily available[] . . . [a]mong other things, feminism has given us . . . [a] new stock plot, a new identity spinning . . . around . . . passivity and victimhood." *Id.* at 172.

using sex as a tool for violence, as contrasted with intending a sexual act, but not as a means of violence.

Acquaintance rape or date rape involves allegations by a victim claiming that someone whom she knows had forced sexual relations with her.¹²² Rape in this context is often difficult to prove for many reasons. The victim and the accused may genuinely have differences of opinion in terms of what the accused's state of mind was at the time. The factfinder is always called upon to determine whose story—the victim's or the alleged perpetrator's—is more accurate. It is not unusual for the facts to come down to his word against hers. A rape between two people who know one another does not make the rape in this context any less harmful or abhorrent.¹²³ Quite the contrary. That the crime occurred between two individuals who are acquainted may merely make the crime more difficult to prove,¹²⁴ but the effect on the victim can be equally as devastating. In fact, it may be even more devastating because it involves a violation of trust between people who know each other. That a crime may have occurred between two people who knew each other should not dictate what type of crime a person has committed. Rather, what should largely determine the type of crime committed is the alleged perpetrator's state of mind. The fact that the parties knew each other may help to inform about the state of mind of the perpetrator.

Although sexual victimizations may all feel the same to the victim, it is important to differentiate between types of sexual misconduct.¹²⁵ Just as the criminal law seeks to differentiate between different types of homicides, it is important to do the same in the rape law context as well.¹²⁶ This is true for several reasons. First, the culpability with which individuals act may be vastly different. The person who intentionally uses violence to secure a sexual act behaves with much more culpability or mens rea sufficient to be certain of his

122. See Kathryn Masterson, *Acquaintance Rape is a Serious Problem for Young Women*, in *VIOLENCE AGAINST WOMEN*, *supra* note 24, at 39 (noting that sexual assault between acquaintances on college campuses is one of the “most serious student life issue[s] today”); Pillsbury, *supra* note 24, at 865 (noting that “the traditional paradigm” of a stranger attacking a woman does not fit the pattern of most acquaintance rapes); Peggy Reeves Sanday, *Defining and Studying Acquaintance Rape*, in *RAPE*, *supra* note 107, at 21–28 (discussing history of recognition and evolution of acquaintance or date rape).

123. See Helen Power, *Towards a Redefinition of the Mens Rea of Rape*, 23 *OXFORD J. LEGAL STUD.* 379, 382 (2003) (criticizing a rape grading system recently proposed in England by the Home Office Sex Offences Review Team, based on the relationship between the parties, i.e., stranger rape versus acquaintance rape, because it “perpetuates the ‘real rape’ paradigm by effectively insisting that rape by an intimate or acquaintance is necessarily never as bad as when the perpetrator is a stranger”).

124. See Masterson, *supra* note 122, at 43 (discussing the difficulty of proving acquaintance rape unless the perpetrator badly battered his victim).

125. See Power, *supra* note 123, at 379 (recommending that England adopt a system of grading rape offenses based on mens rea, with first degree rape requiring proof that the defendant had knowledge that his victim did not consent, second degree rape requiring proof that the defendant was reckless as to consent, and third degree rape requiring proof that the defendant was negligent in believing the victim consented).

126. See *id.* at 401–02 (“Gradation [of criminal offenses] based on culpability is hardly a radical notion.”).

criminal responsibility. Evidence that he used force to overcome his victim's will and that he knew or, worse still, intended the contact to be against her wishes increases confidence that the defendant truly is a criminal. Second, the social harm is arguably different. The social harm sought to be prevented by rape statutes should be forced, nonconsensual sexual contact. If, as is the case in some jurisdictions, the defendant did not have to use force to overcome his victim, the social harm is different. Likewise, if he was not even aware that she did not consent, society can be much less certain that the defendant is a criminal.

In many jurisdictions, a defendant may be convicted of forcible rape, even upon a showing that the defendant genuinely and reasonably believed that his accuser had consented to the sexual contact. In other words, a defendant can be convicted of forcible rape with little regard to *his* state of mind or *his* reasonable belief. Instead, his conviction depends in large measure upon the state of mind of his victim. From the perspective of a criminal law theorist, this change in focus—from the mens rea of the accused to the mindset of the victim—is alarming.¹²⁷ Considering the purpose and function of the criminal law, that the state of mind of a *victim* may dictate whether society forever brands another person one of society's worst kinds of criminal is a genuine cause for concern.¹²⁸

The long and short of it is that forcible rape and nonconsensual sex are—and should be recognized in the criminal law as—two distinct types of sexual misconduct. To state that nonconsensual sex is a lesser offense than forcible rape is not to say that nonconsensual sex is not a criminal act. The distinction simply focuses on the difference in mens rea the perpetrator entertained when he engaged in the actus reus. To commit a criminal act without a criminal mind is not to commit a crime, unless it is a strict liability offense, which rape should not be.¹²⁹ But those convicted of forcible rape upon less than a showing that they were aware of the possibility that the victim did not consent are arguably being convicted of committing a rape without having the mind of a rapist.¹³⁰ There should be a distinction between a nonconsensual sex offender

127. See Pillsbury, *supra* note 24, at 866 (examining the reasons why it is not so unusual for men accused of acquaintance rape to believe they have done nothing wrong: “[T]hey firmly deny committing rape, or any wrong serious enough to be criminally punished. While in some cases this denial may be utterly duplicitous, in many cases it appears sincere. The man is stunned by the woman’s accusation of rape. This raises an important question. Why?”). This Article seeks to address a different question: not “why” men fail to realize they have behaved unacceptably, but rather what consequences the accused’s sincere belief should have on his criminal responsibility for forcible rape.

128. A novel by Ian McEwan concerns the issue of acquaintance rape and false accusations. IAN MCEWAN, *ATONEMENT* (2001).

129. See Pillsbury, *supra* note 24, at 881 (discussing that traditionally, rape law developed special procedures to ensure that extreme penalties were not inflicted upon innocent people, even if those procedures meant some guilty persons were not convicted or even prosecuted).

130. See Douglas N. Husak & George C. Thomas III, *Rapes Without Rapists: Consent and Reasonable Mistake*, in 11 *PHILOSOPHICAL ISSUES* 86, 86 (Ernest Sosa & Enrique Villanueva eds. 2001); see also JOSHUA DRESSLER, *CASES AND MATERIALS ON CRIMINAL LAW* 446 (3d ed. 1999) (“Is it fair or sensible to say, therefore, that the ‘reasonable mistake

and a forcible rapist. The crime prosecuted should reflect that distinction.

B. Rape, Nonconsensual Sex, and Criminal Law Doctrine

Retribution and utilitarianism are the primary tenets justifying society's punishment of criminals.¹³¹ It is important for the punishment of criminals to be based upon the reasons why society punishes, whether for the crime of rape or for any other crime.¹³² Criminal punishment must promote or otherwise serve the purpose or function of the criminal law. Without sound doctrinal justification for imposing punishment, justice is not served, and justice for those accused of forcible rape is best served by application of classic criminal law doctrine.

Retribution is the notion that punishment for crime is justified because a person is deserving of that punishment.¹³³ In many respects, this notion is part of what makes the criminal justice system unique. Our justice system provides for punishment of criminals because they deserve to be punished.¹³⁴ In most circumstances, they deserve to be punished based on the societal harm that they have caused and the evil state of mind with which they acted in causing that harm. Likewise, a person is not deserving of being branded a criminal if he did not act with an evil mind. A retributivist believes in punishing criminals because they deserve to be punished.¹³⁵

Utilitarianism justifies the punishment of criminals only if such punishment serves the overall greater good of increasing societal happiness.¹³⁶ Utilitarian principles encourage punishment of criminals only when the punishment augments happiness in society, thereby reducing negative influences or negative factors in society.¹³⁷ Thus, the punishment of a criminal or any person is not useful if it reaches unjust results.

Common utilitarian purposes of punishment in the criminal law include deterrence, rehabilitation, and incapacitation.¹³⁸ Deterrence may be either general or specific. General deterrence is when the punishment of one individual prevents or discourages other members of society from engaging in the same behavior or conduct for which the individual was punished.¹³⁹ Punishing one individual thereby deters other members of society from engaging in the condemned conduct or behavior. General deterrence serves

defense' means that 'a woman [was] raped but not by a rapist?'" (quoting Catherine A. MacKinnon, *Feminism, Marxism, Method, and the State: Toward Feminist Jurisprudence*, 8 SIGNS 635, 654 (1983)).

131. See WAYNE R. LAFAVE, CRIMINAL LAW § 1.5, at 25–30 (4th ed. 2003).

132. See Richard G. Singer, *The Resurgence of Mens Rea: III — The Rise and Fall of Strict Criminal Liability*, 30 B.C. L. REV. 337, 389 (1989) (explaining the justifications for strict liability).

133. See LAFAVE, *supra* note 131, § 1.5(a)(6), at 29–31.

134. See *id.*

135. See *id.*

136. See *id.* § 1.5, at 25–26 (discussing the general purpose of punishment as benefiting society).

137. See *id.*

138. See *id.* § 1.5(a)(1)–(4), at 27–29.

139. See *id.* § 1.5(a)(4), at 28.

utilitarian principles in that the general happiness of society is increased when other members of society are encouraged and choose not to engage in criminal or socially harmful conduct.¹⁴⁰

The utilitarian function of specific deterrence is served when a person's punishment for criminal conduct prevents that very same person from engaging in that conduct or behavior in the future.¹⁴¹ The utilitarian concern of increasing the happiness or welfare of society is promoted when the criminal justice system specifically deters an individual from engaging in criminal conduct because it prevents or encourages that one person from harming society in the future.¹⁴²

Another function of punishment that further serves utilitarian purposes is incapacitation. When a person is convicted of a criminal offense, oftentimes that person is placed in prison, jail, or otherwise secluded from society at large. When a person is prevented from being in contact with the rest of society and thereby is unable to commit additional crimes against society, he or she is said to be incapacitated.¹⁴³ Incapacitation serves the utilitarian purpose of increasing the greater good of society by preventing that person from committing further criminal acts while incapacitated.¹⁴⁴

C. *The Unique Character of Rape and a Spectrum of Nonconsensual Sexual Misconduct*

Rape is a unique crime.¹⁴⁵ Obviously, a critical component of rape is the sexual contact.¹⁴⁶ People commonly engage in consensual sexual contact. Usually, consensual sexual activity is conducted in private, with the only witnesses being the two participants.¹⁴⁷ Furthermore, men and women often communicate differently and the differences in communication can lead to misunderstandings and miscues in the bedroom. The combination of these factors makes the issue of acquaintance rape quite complicated.¹⁴⁸

Nonconsensual sex may arise in a variety of contexts. Of course, when the defendant is aware of the victim's nonconsent to the sexual intercourse and he forcibly proceeds with full knowledge that she is unwilling, this conduct is easily identifiable as rape. However, there is a range of sexual conduct (or

140. *See id.* § 1.5, at 26.

141. *See id.* § 1.5(a)(1), at 26–27.

142. *See id.* § 1.5, at 26.

143. *See id.* § 1.5(a)(2), at 27.

144. *See id.*

145. *See Osolin v. The Queen*, [1993] 4 R.C.S. 595, 669 (Can.) (explaining that “sexual assault is very different from other assaults” inasmuch as it is “gender based” and “an assault upon human dignity [that] constitutes a denial of any concept of equality for women”).

146. *See supra* notes 48–50 and accompanying text (describing the requirement of sexual contact as part of the actus reus of rape).

147. *See* 1 MATTHEW HALE, *THE HISTORY OF THE PLEAS OF THE CROWN* 635 (W.A. Stokes & E. Ingersoll eds., 1847) (1778) (“[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.”).

148. *See ROIPHE, supra* note 121, at 174 (stating that issues like these are “vague[] and . . . complicated”).

misconduct) that does not so easily lend itself to clear identification as rape. This Section will describe various points on the spectrum between nonconsensual sex and perhaps more easily identifiable forcible rape. In particular, this Section considers situations when: (1) the victim initially consents to the sexual conduct, but at some point during the sexual encounter withdraws that consent; (2) the defendant reasonably, but mistakenly, believes that she consents; (3) the defendant unreasonably believes she consents; and (4) the defendant is aware that she may not consent, but proceeds with the sexual contact without finding out for sure.

1. Victim Withdraws Consent Postpenetration

Consider again the hypothetical of Walter and Amber.¹⁴⁹ Walter and Amber had consented to the initial sexual contact and penetration. It is at some point after penetration that Amber withdraws her consent. If Walter fails to cease with the sex quickly enough, a conviction for forcible rape may result.¹⁵⁰ Defendants like Walter can be and have been convicted for rape arising out of such a postpenetration or withdrawn consent situation.¹⁵¹

While a student at Florida State University (“FSU”), Rich Gorman was convicted of rape after an incident with a female FSU student.¹⁵² After a night of partying, Gorman and the female FSU student went to his apartment. After beginning to engage in consensual sexual relations, the female student asked Gorman to stop, which he immediately did. After inquiring whether everything was okay, Gorman took the young woman home. He then returned to his apartment. He learned the next day that the woman had reported him for rape—even though the sexual encounter was consensual to him, and as soon as it became nonconsensual, he stopped. He was tried and convicted by a jury of sexual battery, a form of rape in the jurisdiction in which he was tried. After the guilty verdict, he pleaded to a sentence of five years.¹⁵³

Without a showing that the defendant was aware that his sexual partner no longer consented and that the defendant used force (separate from the touching necessary for the already-commenced sex), it is inappropriate to convict the defendant for rape.¹⁵⁴ Without proof that the defendant knew or at least was aware of the risk that the victim did not consent, based on principles of why the criminal law punishes, it is not so clear that a defendant like this is deserving of punishment.

149. See *supra* pp. 101–02.

150. See 720 ILL. COMP. STAT. ANN. § 5/12-17(c) (West Supp. 2007) (defining postpenetration rape); see also *People v. John Z.*, 60 P.3d 183 (Cal. 2003) (convicting defendant of postpenetration rape).

151. See, e.g., *McGill v. State*, 18 P.3d 77 (Alaska Ct. App. 2001) (recognizing that consent may be withdrawn after initial sexual penetration).

152. See Kathleen Parker, *Date Rape Shouldn't Be Punished Like Child Sex Assault*, HOUSTON CHRON., May 14, 2006, at E4.

153. *Id.*

154. See, e.g., *State v. Way*, 297 N.C. 293, 296–97, 254 S.E.2d 760, 761–62 (1979) (concluding that when there is only one act of intercourse, to which the woman has initially consented, it is not rape if the woman later withdraws her consent after penetration has occurred).

2. *Accused Reasonably Believes that the Victim Consents*

The allegations against Kobe Bryant¹⁵⁵ are illustrative here. Kobe Bryant's accuser was a young woman who worked at a hotel at which the NBA player was visiting.¹⁵⁶ Until that fateful evening, she and Bryant had never met. The young woman first encountered Bryant when he checked into his room very late one evening. Upon meeting her, he asked her if she would join him in his room. She informed him that she would not be able to meet him until later that evening. She arrived at his room in the middle of the night. Kobe Bryant's accuser claims that she visited Bryant in his room, but never desired to engage in sexual conduct other than kissing and heavy petting. Bryant, on the other hand, believed that they both desired to engage in sexual intercourse. Either way, they did engage in sexual intercourse, after which she left his room. She later complained to the authorities that he had raped her.¹⁵⁷

Such cases are not so unusual.¹⁵⁸ Bryant could argue that although he was actually mistaken about whether she consented (because she did not), his mistake was entirely reasonable. Accusations of rape in these cases often turn on the issue of consent. However, as one might imagine, these cases are difficult to prove because, based on the history of the parties, whether the parties consented to the identified sexual contact on a particular occasion will turn on the credibility of the parties.

Like the postpenetration scenario, it is unfair to prosecute an individual for rape absent proof that the defendant was aware of the lack of consent or even aware of the risk that the victim did not consent. If he mistakenly believed she did consent and his belief was reasonable, it is not forcible rape. However, it was certainly sex that was against her will, or nonconsensual sex.

3. *Accused Unreasonably Believes that Victim Consents*

Consider the *Morgan* case.¹⁵⁹ The facts of this disturbing case were that the victim's husband told two men with whom he worked that his wife was into kinky sex and particularly enjoyed rough sex with multiple men.¹⁶⁰ The husband talked these two men into entering their home and having sex with his wife. He assured them that the more she protested and fought them off, the more she would be enjoying the sex.¹⁶¹ That these men believed the victim's husband is outrageous and certainly not reasonable. However, whether their unreasonable belief should be sufficient to support rape charges is something

155. See *infra* notes 227–31 and accompanying text (discussing the Kobe Bryant rape case).

156. Jon Sarche, *After Year of Scrutiny, Bryant Case Heads to Trial*, CHARLOTTE OBSERVER, Aug. 29, 2004, at 20A.

157. See *Id.* There were suggestions that, given the violent or rough nature of the sexual conduct between Kobe Bryant and his accuser, the sex between the parties was unlikely consensual. *Id.* However, speculations of the “unlikeliness” of consent—as contrasted to more certainty regarding consent—highlights a concern at issue in this Article.

158. See *State v. Clark*, 889 So. 2d 471, 473 (La. Ct. App. 2004).

159. *Regina v. Morgan*, [1976] A.C. 182, 186 (Eng.).

160. See *id.*

161. *Id.*

entirely different. The men were prosecuted and acquitted because their genuine belief regarding her consent, while entirely unreasonable, was mistaken.¹⁶² The court held that they could not be convicted without the honest belief that she did not consent.¹⁶³ This situation was without question nonconsensual sex; the victim was unwilling for the sexual contact to occur and thereby did not consent. However, whether nonconsensual intercourse constitutes forcible rape is the more difficult issue. Based on the perpetrators' state of mind—regardless of how outrageous their conduct—this should not constitute rape, and as despicable as the *Morgan* facts are, the court reached the correct result.¹⁶⁴

4. *Accused Recklessly Believes That Victim Consents*

Consider further a scenario where a man and a woman just met at a party. They decide to go back to her apartment where they enjoy a glass of wine together. She is not intoxicated; rather, her inhibitions are lowered, for which he is glad. They begin to kiss. As things escalate, he finds himself not wanting to ask her if she is really sure that she wants to have sex. He is afraid that she might say no. He does not understand any of her body language as protests. They have sex. Unlike the previous scenarios, this is a defendant who was aware of the risk that she did not consent.¹⁶⁵ He was aware that she may not consent if asked, and he proceeded with the sexual contact anyway.¹⁶⁶

162. *Id.* at 195–99.

163. *Id.* at 199. The *Morgan* court determined that this conduct did not constitute forcible rape. *Id.* at 195–99.

164. See *Man Convicted of Rape 'Believed Girl Consented,'* TIMES, May 8, 1975, at 3, quoted in SANDFORD H. KADISH & STEPHEN J. SCHULHOFER, CRIMINAL LAW AND ITS PROCESSES: CASES AND MATERIALS 322–23 (6th ed. 1995) (opining that people ought not be punished for rape upon a showing of negligence or lesser culpability).

165. The recent acquittal of rape charges against an ex-Navy quarterback is also worth noting. See Nelson Hernandez, *No Penalty for Midshipman: Owens Found Guilty of Two Non-Rape Charges*, WASH. POST, July 22, 2006, at B1. Lamar S. Owens, Jr. was acquitted on rape charges on July 21, 2006. Owens was accused of raping a fellow midshipman in her dormitory room. *Id.* After his acquittal, the trial judge noted that jurors found that Owens had wrongfully entered the female midshipman's room without permission and engaged in consensual sexual conduct. The jury apparently had difficulty rendering a guilty verdict, based at least in part on the fact that the victim had consumed several drinks the night of the incident and did not have a sufficient recollection of the evening's events in order to testify to details of the encounter. *Id.*

166. Another interesting area of rape law is allowing for a rape conviction when both the victim and the perpetrator have become intoxicated and, postcoitus, the victim decides it was rape. This scenario seems to give a victim too much control to say when another person is a rapist, while at the same time bearing no responsibility for her own decision to become intoxicated. Although beyond the scope of this Article, whether a woman who voluntarily drinks and, while intoxicated, engages in sex that she later regrets, has been raped is an interesting question. See Schulhofer, *supra* note 107, at 149 (“The law’s willingness to find consent in cases of severe alcohol impairment should be considered intolerable, but a standard suggesting that rape occurred whenever alcohol played a part in sexual consent would be intolerable as well.”); Sommers, *The Incidence of Acquaintance Rape is Inflated*, *supra* note 24, at 67 ([I]f you drink and, while intoxicated, engage in sex that you later come to regret, have you been raped?).

This should constitute rape, particularly considering the perpetrator's state of mind. The offender was consciously aware that his conduct may be wrongful, as contrasted with the previous example where the perpetrator *should* have been aware, but was genuinely not.¹⁶⁷ The actual awareness of the perpetrator should serve as the defining line between rape and nonconsensual sex.¹⁶⁸

D. Distinguishing Rape from Nonconsensual Sex and Fashioning Appropriate Consequences

Many modern sexual assault and rape provisions need to be reformulated in order to provide more justice to defendants who are accused, charged, and convicted of rape. This Article does not propose that current rape provisions be reformulated to return the crime of rape to its original characterization at common law. Rather, it proposes that current rape law provisions be tailored to classify sexual misconduct more appropriately in order to provide more justice to those defendants accused of rape.

Without question, the recent modifications to rape law provisions improved upon the common law and benefited society overall. The benefits to society are many. With their enactment came an awareness of and respect for female autonomy. Society—and male members of society in particular—became better informed regarding female autonomy. As a result of legislation seeking to improve upon the common law, society benefited because rape victims were more willing to come forward and report incidents of rape.¹⁶⁹ Society has also benefited because rape is now widely recognized as a crime of violence and many measures have been taken toward the prevention and hopeful elimination of the violence of rape.

However, some of the recent legislation has resulted in statutes that cast a wide net. Although the modifications in rape statutes appear to protect women and were initially enacted in order to protect women, the overcriminalization of sexual misconduct can actually be detrimental to women's cause.¹⁷⁰ As Vivian Berger has noted, "overprotection risks enfeebling instead of empowering women."¹⁷¹

With an eye on the prevention of unjustly identifying someone as a criminal and ensuring that the crime prosecuted reflects the crime committed, the proposal is twofold: first, rape law should be redefined to clearly identify

167. See *supra* Part III.C.3 (discussing the *Morgan* case).

168. See *infra* Part III.D.1.b.

169. See, e.g., Theresa M. Beiner, *Sexy Dressing Revisited: Does Target Dress Play a Part in Sexual Harassment Cases?*, 14 DUKE J. GENDER L. & POL'Y 125, 129 (2007) (noting that Federal Rule of Evidence 412(b)(2) was intended to protect plaintiffs from embarrassment).

170. See Vivian Berger, *Not So Simple Rape*, 7 CRIM. JUST. ETHICS 69, 75–76 (1988) (reviewing SUSAN ESTRICH, *REAL RAPE* (1987)) ("To treat as victims in a legal sense all of the female victims of life is at some point to cheapen, not celebrate, the rights to self-determination, sexual autonomy, and self- and societal respect of women."); Estrich, *supra* note 17, at 1094–105 (arguing that less focus on the victim's state of mind and more focus on the defendant's mens rea may benefit women overall).

171. Berger, *supra* note 170, at 76.

the line between forcible rape and nonconsensual sex;¹⁷² second, the punishments for nonconsensual sex should be tailored to fit the commission of that offense.¹⁷³

I. Redefining Forcible Rape and Nonconsensual Sex

In jurisdictions that have not already done so, rape law should redefine forcible rape as distinct from nonconsensual sex. That misconduct may occur between parties who are acquainted with one another and that these situations may make proof of forcible rape difficult (or sometimes disappointingly impossible) is an insufficient reason to unfairly neglect the rights of the criminally accused and abandon well-established principles of criminal law. Moreover, it is important that society be able to tell from one's conviction whether one is a forcible rapist or another type of sexual offender, such as one who has engaged in nonconsensual sex. As the law currently is applied in too many jurisdictions, it is difficult (if not impossible) to distinguish between the two with reference to the offense of conviction. To alleviate this problem, it is important for jurisdictions to give each offense a distinct label, thereby clearly indicating nonconsensual sexual intercourse as a lesser criminal offense than forcible rape.

a. *Sex Crime Statutes Should Clearly Demarcate the Line Between Forcible Rape and Nonconsensual Sex.* It is imperative that there be clear lines indicating the difference between forcible rape and nonconsensual sex.¹⁷⁴ As long as the line between the two offenses is not clearly drawn, there is a legitimate risk that society will misunderstand what conduct a defendant has been convicted of.¹⁷⁵ Nonconsensual sex should be clearly identified as a lesser offense. It should be separated as its own criminal offense distinct from rape.

Such a line should demarcate the difference between a criminal act committed by a person with a criminal mind and a criminal act committed by a person who did not at the time possess a criminal mind. There is a difference between these two perpetrators: one is a classic criminal, and the other is a

172. See *supra* Part III.A.

173. See *supra* Part III.D.

174. See Power, *supra* note 123, at 382 (“The point of grading rape by . . . the *mens rea* of the crime is[] that it creates the necessary space in which the decision-maker . . . can[] . . . register the view that the defendant is neither a monster nor a misunderstood innocent and, whilst deserving of punishment, does not merit being put at risk of a considerable sentence of imprisonment”)

175. Take, for instance, a common mischaracterization of rape contained in a book promoted as a comprehensive guide to preventing date rape: “Rape is not just ‘he said/she said.’ Rape is not just a misunderstanding or the result of a lack of communication. Rape is an act of choice to commit a crime, to forcibly obtain power over another individual through the means of sexual assault.” SCOTT LINDQUIST, *THE DATE RAPE PREVENTION BOOK: THE ESSENTIAL GUIDE FOR GIRLS AND WOMEN* 5–6 (2000). Although true in some circumstances, in the acquaintance or date rape scenario, the cases and application of the rape statutes unfortunately demonstrate the inaccuracy of this statement.

person who has committed an affront to another human being but who did so without a criminal mind. The law should recognize the former as the more serious offense and the latter as not criminal or, at a minimum, a lesser criminal offense.¹⁷⁶

One court deciding a postpenetration rape case failed to appreciate the contours of forcible rape when it ruled that withdrawn consent should constitute forcible rape without a showing that the defendant used force at the time or after the consent was withdrawn.¹⁷⁷ It is much too speculative to conclude that the perpetrator in a withdrawn consent or postpenetration circumstance—without a clear use of force or threat of force *after* the consent has been withdrawn—was acting with sufficient culpability to support a rape conviction.¹⁷⁸ Prosecution for forcible rape under those circumstances constitutes a prosecution based on proof of nonconsensual sex with no showing of force. Nonconsensual sex is different in kind than forcible rape, with the latter being the use of sex as a tool for violence as contrasted with intending a sexual act, but not as a means of violence.

When enacting any kind of criminal statute, it is important for legislators to focus on the social harm sought to be prevented by enactment of the statute. Forcible rape law provisions should seek to prevent nonconsensual sexual relations procured by violence, force, or threat of force. Nonconsensual sex is different.

b. To Ensure that the Perpetrator Acted with the Mind of a Rapist, Statutes Should Require a Minimum Culpable Mental State of Recklessness. The mens rea for forcible rape should, at a minimum, require a showing of recklessness. A defendant's negligence regarding the victim's consent should not support a finding of forcible rape. A finding of negligence as the mens rea is more appropriate in support of nonconsensual sex, but not forcible rape. One of the primary foci in determining whether an individual is a forcible rapist or a nonconsensual sex offender should be the mens rea of the perpetrator. The fact that a victim feels she has been raped should unfortunately not be enough to determine whether a person has truly been

176. See, e.g., FLA. STAT. ANN. §§ 794.005, .011 (West 2007) (defining nonconsensual sexual battery as a lesser crime than forcible rape); 18 PA. CONS. STAT. ANN. §§ 3101, 3124.1 (West 2000) (criminalizing nonforcible, nonconsensual sexual intercourse as a lesser offense than rape). But see JOAN MCGREGOR, IS IT RAPE? ON ACQUAINTANCE RAPE AND TAKING WOMEN'S CONSENT SERIOUSLY (2005) (arguing that rape laws are too narrow and wrongly exclude nonconsensual sex without legally recognized force).

177. See *People v. John Z.*, 60 P.3d 183, 187 (Cal. 2003) (holding that "grabb[ing] her waist and push[ing] her down onto him" was "clearly ample to satisfy" the force requirement).

178. See *State v. Smith*, 554 A.2d 713, 717 (Conn. 1989) ("Whether a complainant has consented to intercourse depends upon her manifestations of such consent as reasonably construed. If the conduct of the complainant under all the circumstances should reasonably be viewed as indicating consent to the act of intercourse, a defendant should not be found guilty because of some undisclosed mental reservation on the part of the complainant. Reasonable conduct ought not to be deemed criminal.").

raped.¹⁷⁹ What feels like rape to a victim may help establish the actus reus of forcible rape, but the victim's feeling about whether she has been raped is only part of proving rape.¹⁸⁰ In order to secure a forcible rape conviction, the prosecution should have to prove that the defendant had, at a minimum, a reckless state of mind as to each element of the crime of forcible rape. A forcible rape conviction should not be secured upon a showing that the alleged perpetrator acted negligently.¹⁸¹ The difference between acting recklessly and negligently is the defendant's awareness. Proof of a reckless state of mind requires proof that the defendant was aware of a substantial risk that the victim did not consent and proceeded with the sexual encounter anyway. Negligence does not require proof of his awareness at all. Rather, criminal negligence requires proof that he should have been aware of a substantial and unjustifiable risk, but proceeded anyway.

As rape is not a strict liability offense, a rape conviction should turn on what was going on in the defendant's mind at the time of the nonconsensual sexual contact. Permitting a mens rea requirement of negligence does not allow for that possibility; requiring a finding of recklessness as to each element of the crime of forcible rape does. Doing so ensures that the defendant had an evil mind—that he was at least *aware* that his victim did not consent to the sexual act, rather than establishing that he *should have been aware* of her consent.¹⁸² If he should have been aware and was not, he should be found

179. See Sommers, *Incidence of Acquaintance Rape*, *supra* note 24, at 67 (noting that women have sex after initial reluctance for many reasons not at all related to fear of being beaten by their dates).

180. See generally *id.* at 209–26 (discussing and criticizing various feminist reports that indicate that women underreport rape and sometimes even enter into subsequent relationships with the perpetrators because those same women do not know what constitutes rape). Sommers suggests a more respectful explanation that instead of insulting women's ability to know whether they have been raped, those responsible for those reports should consider these women quite capable of knowing when they have been raped. *Id.* at 214; see also Carnell, *Feminists Exaggerate the Prevalence of Rape*, *supra* note 107, at 63–64.

181. See, e.g., *Russell v. United States*, 698 A.2d 1007, 1016 n.12 (D.C. 1997) (“The correct standard under the new statute is whether a reasonable person would think that the complainant's ‘words or overt actions indicate[d] a freely given agreement to the sexual act or contact in question.’”); *People v. Fisher*, 667 N.E.2d 142, 146 (Ill. App. Ct. 1996) (“[I]f the defendant does not have a reasonable belief that the other party has consented, he must refrain.”); *State v. Ayer*, 612 A.2d 923, 926 (N.H. 1992) (recognizing mens rea of negligence for rape by ruling that a defendant can be found guilty upon a showing that the victim objectively communicated lack of consent, even if the defendant subjectively failed to receive the message, and concluding that the “appropriate inquiry is whether a reasonable person in the circumstances would have understood that the victim did not consent”); *State v. Jardine*, No. 95-1856-CR, 1996 WL 279702, at *3 (Wis. Ct. App. May 29, 1996) (“If the jury finds that the victim did not in fact consent, it apparently is no defense that the defendant believed there was consent, even if the defendant's belief is reasonable. . . . [B]ecause Wis. Stat. § 940.225 uses none of the ‘intent words’ which indicate that the defendant's knowledge of no consent is an element of the crime.”).

182. See, e.g., *Honeycutt v. State*, 56 P.3d 362, 368–69 (Nev. 2002) (noting that because sexual assault in Nevada is general intent crime, mistaken belief concerning victim's consent may operate as defense); *overruled on other grounds by Carter v. State*, 121 P.3d 592, 596 (Nev. 2005).

liable—either criminally, civilly, or both—as a nonconsensual sexual perpetrator. If he was aware and disregarded her lack of consent, or worse was aware and intended to have sex with her against her will, he has moved into a different sphere of criminal conduct and should be found guilty of forcible rape.

In this day and age, we can no longer be certain that members of our society genuinely appreciate nonconsensual sex as morally wrong.¹⁸³ And since we can no longer be certain of the societal condemnation and moral disapproval of sexual relations outside of marriage,¹⁸⁴ it is inappropriate to develop—whether legislatively or judicially—principles of law that conclude that individuals act with a blameworthy state of mind worthy of a rape conviction when they genuinely believed that they were participating in mutually acceptable sexual conduct.

The crime of rape is unique in that the state of mind of the victim is afforded great deference. There are no other crimes where such great attention is directed to the victim's state of mind rather than the perpetrator's state of mind. The victim's state of mind should not dictate whether the defendant committed a crime; the defendant's should. When the proof establishes that the defendant *should have known*, nonconsensual sex is the more appropriate offense.

c. *Forcible Rape Convictions Should (Continue to) Require Proof of Victim Resistance.* Prosecution for rape should continue to require proof of victim resistance.¹⁸⁵ Proof of victim resistance is useful to a rape prosecution.¹⁸⁶ Particularly where the victim was involved in an intimate relationship with the perpetrator—either by having dated the accused or initially consenting to the sexual contact and then withdrawing that consent—

183. One of my students once referred to this phenomenon as the “post-*Sex and the City*” effect. *See generally Sex and the City* (Home Box Office television broadcasts June 6, 1998 to Feb. 22, 2004). The message regarding morally acceptable sexual conduct in movies, television, music, and magazines has dramatically changed. *Cf.* JEFF BENEDICT, *OUT OF BOUNDS: INSIDE THE NBA'S CULTURE OF RAPE, VIOLENCE, AND CRIME* 29 (2004) (describing the life of professional basketball players as full of the opportunity to engage in a steady stream of consensual sex, an environment in which it is nearly impossible for a woman to file a viable rape claim).

184. *See Statutory Rape Laws: Does It Make Sense to Enforce Them in an Increasingly Permissive Society?*, A.B.A. J., Aug. 1996, at 86 (discussing California's current treatment of statutory rape as a strict liability offense, including Michelle Oberman's position that statutory rape should continue to be treated as a strict liability criminal offense and Richard Delgado's position that the selective enforcement of statutory rape provisions argues against their enforcement). Consider, as well, the increased recognition and acceptance of civil unions and other similar living arrangements.

185. *See supra* notes 69–80 and accompanying text (discussing the current resistance requirement).

186. *See, e.g., People v. Warren*, 446 N.E.2d 591, 594 (Ill. App. Ct. 1983) (“Complainant's failure to resist when it was within her power to do so conveys the impression of consent regardless of her mental state, amounts to consent and removes from the act performed an essential element of the crime. We do not mean to suggest [that she] did in fact consent; however, she must communicate in some objective manner her lack of consent.”).

there is too great of a risk of reasonable miscues between the parties involved. Requiring resistance is beneficial to avoiding sexual miscues.

In addition to subjecting the victim to potentially more severe physical and emotional injuries than she would otherwise endure had she not resisted, the resistance requirement is criticized for other reasons as well. For instance, that the woman communicates “no” should be sufficient to establish both her lack of consent as well as the accused’s culpable mental state. In theory, a woman should have confidence that a man understands her “no” as meaning “no.” However, the reality is that men and woman often communicate differently.¹⁸⁷ As misunderstandings can occur in the bedroom—not necessarily because men have not been trained to understand and appreciate a “no” for what it is,¹⁸⁸ but because sometimes genuine misconstructions, misinterpretations, and mixed messages can occur during even consensual sexual encounters¹⁸⁹—in the rape law context, it is critical to be certain that the accused understood that the victim did not consent to the sexual contact.¹⁹⁰ Requiring resistance allows society to be more certain that the perpetrator was acting with a culpable state of mind and that the accused was in fact a rapist, not just a person who misinterpreted what he genuinely believed to be just part of a consensual sexual encounter.¹⁹¹

The victim’s state of mind should not dictate whether the defendant committed a crime; the defendant’s should. Again, it is important to be certain that the alleged perpetrator was acting with a culpable state of mind, a state of mind indicating his desire, or at least his awareness, of his victim’s lack of consent. Requiring a showing of resistance helps to establish the alleged perpetrator’s culpable state of mind. Perhaps indefensible when based on a woman’s need to indicate that she sought to protect her virtue, the resistance requirement is still vital today in a rape prosecution. It is a necessary requirement designed to ensure that the victim clearly communicated to her attacker that she did not consent to the contact and that the perpetrator knew that she did not consent and had to employ or threaten force to achieve his unlawful goal.¹⁹²

187. See generally DEBORAH TANNEN, *YOU JUST DON’T UNDERSTAND: WOMEN AND MEN IN CONVERSATION* (1990). I call this the men-are-from-Mars-women-are-from-Venus phenomenon. See generally JOHN GRAY, *MEN ARE FROM MARS, WOMEN ARE FROM VENUS: A PRACTICAL GUIDE FOR IMPROVING COMMUNICATION AND GETTING WHAT YOU WANT IN YOUR RELATIONSHIP* (1992).

188. See, e.g., ELLEN FEIN & SHERRIE SCHNEIDER, *THE RULES: TIME-TESTED SECRETS FOR CAPTURING THE HEART OF MR. RIGHT* (1995) (suggesting that women have been following the same “rules” for dating men since about 1917).

189. Cf. Pillsbury, *supra* note 24, at 937 (explaining that an “ordinary male, subject to ordinary sexual desire, is a potential perpetrator of forced sex” where acquaintance rape is involved).

190. See *id.* at 934–37 (explaining that there is no question that acquaintance rape, what the author terms as “forced sex,” often involves serious miscommunication between the parties based on the different ways that men and women communicate and perceive sexual encounters).

191. See Dressler, *supra* note 16, at 432 (“With the abandonment or softening of the resistance requirement . . . the risk of conviction in the absence of *mens rea* is enhanced.”).

192. See, e.g., Childers v. State, 899 So. 2d 1025, 1029 (Ala. 2004) (holding that

The state of law seems to have moved regrettably from boys' rules to girls' beliefs.¹⁹³ In an effort to move rape law from boys' rules to something that is more amenable to women, the pendulum may have swung too far. Rape law now runs the risk of interfering with the rights of alleged perpetrators to require proof that they acted with culpability sufficient to sustain a rape conviction.

In his dissent in *Rusk v. State*, Judge Wilner questioned the resistance requirement:

If appellant had desired, and Pat had given, her wallet instead of her body, there would be no question about appellant's guilt of robbery. Taking the car keys under those circumstances would certainly have supplied the requisite threat of force or violence and negated the element of consent. No one would seriously contend that because she failed to raise a hue and cry she had consented to the theft of her money. Why then is such life-threatening action necessary when it is her personal dignity that is being stolen?¹⁹⁴

However, Judge Wilner's analogy does not withstand scrutiny. The distinction between resisting a robbery and resisting a sexual assault is that one does not ordinarily give up his money or his wallet. On the other hand, people do ordinarily have sex without protestation. Therefore, proof of resistance is beneficial in that it helps establish that the sex at issue was not ordinary sex, but was rather forced, nonconsensual sex or rape.

2. *Punishment and Remedies*

Nonconsensual sex is sexual misconduct distinct from forcible rape. As such, it should be treated in an appropriate manner. Unlike forcible rapists, nonconsensual sex offenders should not be subject to the harsh penalties appropriate for punishing forcible rapists. This Article makes the following proposals in an effort to begin a dialogue of some means by which the crime of

serious physical injury to victim is not necessary); *State v. Glidden*, 529 P.2d 1384, 1386 (Mont. 1974) (explaining that although resistance is required, continuous resistance against a perpetrator bent on raping his victim is not required for the law does not place a victim's life into even greater danger than it already is in); *State v. Jacques*, 536 A.2d 535, 538 (R.I. 1988) ("[T]he law does not expect a woman, as part of her proof of opposition or lack of consent, to engage in heroics when such behavior could be useless, fruitless, or foolhardy. *All that is required is that the woman offer such resistance as seems reasonable under all the circumstances.*"(citation omitted)); *State v. Stettina*, 635 P.2d 75, 77 (Utah 1981) (explaining that although resistance is required, it is not "necessary to resist with vigor if a reasonable person under similar circumstances would have feared that failure to comply with defendant's demand would have resulted in greater bodily harm or death"); *State v. Studham*, 572 P.2d 700, 702 (Utah 1977) ("The victim need do no more than her age and her strength of body and mind make it reasonable for her to do under the circumstances to resist.").

193. See Estrich, *supra* note 17, at 1091 (explaining that rape law requires women to play by "boys' rules").

194. *Rusk v. State*, 406 A.2d 624, 633 (Md. Ct. Spec. App. 1979).

nonconsensual sex can be remedied as well as prevented.¹⁹⁵

a. *Nonconsensual Sex Offenders Should be Subject to Less Stringent Registration Requirements than Forcible Rapists.* Nonconsensual sex offenders should be subject to less stringent registration requirements.¹⁹⁶ There is a difference in culpability between a forcible rapist and a nonconsensual sex offender. Nonconsensual sex offenders are not the violent, predatory, recidivist sex offenders that justify a community warning, or at least not the type of community warning that is currently required in most jurisdictions and being adopted in others.

The registration of sex offenders is a relatively new phenomenon in this country. Requiring sex offenders to register makes sense when those registered offenders have committed violent or predatory types of sex crimes. Sexual predators are usually recidivists, thereby justifying or necessitating a community warning.¹⁹⁷ However, the justifications for requiring predatory sexual offenders to register do not necessarily exist for the so-called acquaintance rapist. Although perhaps lacking the morals that were once possessed in this country, nonconsensual sex offenders are not the violent, predatory creatures that members of society would like to know may be living in their neighborhoods. Society should not expend community resources to keep up with such individuals.

This Article's proposal is not that registry requirements should be eliminated entirely for nonconsensual sex offenders. Rather, the requirements should just be less stringent for nonconsensual sex offenders than they are for forcible rapists and other sex offenders.¹⁹⁸ Registration of sexual offenders is a valuable tool. The problem is requiring nonconsensual sex offenders to register to the same extent as forcible rapists or perpetrators of child sexual assault, which is often a lifetime requirement.

b. *Nonconsensual Sex Should be an Independent, Well-Defined Civil Offense.* In addition to recognizing nonconsensual sexual assault as a separate and distinct crime apart from forcible rape, jurisdictions should also recognize nonconsensual sex as an additional civil offense.¹⁹⁹ Although sexual assaults

195. See generally Tom Lininger, *Bearing the Cross*, 74 *FORDHAM L. REV.* 1353 (2005) (suggesting proposals for reconceptualizing cross-examination in prosecutions of sexual assault cases).

196. See *supra* notes 97–106 and accompanying text (discussing sex offender registration requirements).

197. See Press Release, U.S. Dept. of Justice, Bureau of Justice Statistics, *5 Percent of Sex Offenders Rearrested for Another Sex Crime Within 3 Years of Prison Release* (Nov. 16, 2003), <http://www.ojp.usdoj.gov/bjs/pub/press/rsorp94pr.htm>.

198. One reason not to eliminate sex offender registration entirely is that it would not benefit society for very violent sexual assault perpetrators to be able to plead down to a lesser offense that does not require registration.

199. See Nora West, Note, *Rape in the Criminal Law and the Victim's Tort Alternative: A Feminist Analysis*, 50 *U. TORONTO FAC. L. REV.* 96, 111 (1992) (encouraging use of the tort system as more effective remedy in nonaggravated rape cases than criminal prosecution).

are recognized currently as civil batteries in all jurisdictions inasmuch as they are at a minimum both offense and harmful contact batteries, these nonconsensual sex acts should also be independently recognized as a distinct civil offense, separate from a civil battery.²⁰⁰ Nonconsensual sex is in significant aspects different in kind than a civil battery, and legislators and courts should recognize it as such.²⁰¹ The civil damages available for liability for the tort of nonconsensual sex should extend beyond monetary damages to include injunctions, sexual education courses, mediation between the plaintiff and the defendant, and peer education.²⁰²

Recognition of a specific tort claim for nonconsensual sex will empower the victim. In the tort claim, she—rather than the government—will be the party pursuing the action. Any control that is often lost when a woman is a victim of nonconsensual sex will be restored when she is the plaintiff in a civil cause of action. She will be in the position of power. This claim will still constitute a public vindication of rights, but it just will not be brought by the government on *behalf* of the public. Rather, it will be a public vindication of a private right, to be free from nonconsensual sex.

c. *Nonconsensual Sex Victims Should be Entitled to Court-Sanctioned Mediation.* At the discretion of the victim, the criminal justice system should make court-sanctioned mediation available to nonconsensual sex victims.²⁰³ If she so desires, the victim of nonconsensual sex should have available to her a streamlined process to have a court-sanctioned mediation between the parties.²⁰⁴ This remedy of mediation is not appropriate for forcible rape, but

200. Cf. Martha Chamallas & Linda K. Kerber, *Women, Mothers, and the Law of Fright: A History*, 88 MICH. L. REV. 814 (1990) (explaining that fright is one reason that tort law has proven inadequate at providing a remedy for victims of sexual assault).

201. The Violence Against Women Act of 1994 (“VAWA”) was one of the first statutes to define “gender-motivated violence” as an actionable civil offense. See Civil Rights Remedies for Gender-Motivated Violence Act, Pub. L. No. 103-322, 108 Stat. 1796 (codified as amended at 42 U.S.C. § 13981 (1994)), *invalidated by* United States v. Morrison, 529 US 598 (2000) (holding that neither the commerce clause nor section 5 of the fourteenth amendment give Congress this authority). VAWA expressly provides a zero tolerance standard for sexual violence. See *id.* VAWA has been revised several times since its enactment in 1994. See, e.g., Violence Against Women Act of 2000, 42 U.S.C. § 13701 (2000); Violence Against Women and Department of Justice Reauthorization Act of 2005, 42 U.S.C. § 13701 (LEXIS through 2007 Sess.). Similarly, in Illinois, there has been a movement toward adoption of the Gender Violence Act, which provides a civil remedy for sexual offenses. See 740 Ill. Comp. Stat. Ann. 82/5 (West 2007).

202. See, e.g., Masterson, *supra* note 122, at 44–45 (discussing a date rape perpetrator who is required to provide lectures on his college campus to incoming students and fraternal organizations to raise awareness of acquaintance rape).

203. Cf. Hodak, *supra* note 58, at 1089–91 (proposing victim-offender mediation as an alternative to acquaintance rape prosecutions at plea bargaining and sentencing stages or in lieu of prosecution entirely). I disagree with Mr. Hodak that mediation will work well in forcible acquaintance rape situations. Rather, mediation will be most effective, provided that the victim is willing and agrees, in nonconsensual sex cases.

204. See Deborah Gartzke Goolsby, Note, *Using Mediation in Cases of Simple Rape*, 47 WASH. & LEE L. REV. 1183, 1212–14 (1990) (encouraging the use of mediation as a remedy in simple rape cases as representing a more effective solution than traditional court remedies).

nonconsensual sex offenses may be particularly well-suited for victim and offender mediation.²⁰⁵ However, mediation should be a remedy available for nonconsensual sex offenses *only* when the victim is in favor of mediation and willing to participate.²⁰⁶

Unlike forcible rape, the crime of nonconsensual sex can result from misunderstandings or miscommunications within relationships.²⁰⁷ As one of the core values of restorative justice is the healing of relationships,²⁰⁸ restorative justice measures may be particularly well-suited to remedy nonconsensual sex offenses.²⁰⁹

Restorative justice is an alternative approach to crime and punishment.²¹⁰ It considers crimes as not just offenses against society, but as offenses against the victim as an individual.²¹¹ As a wrong against the victim, restorative justice seeks to mend damage done and prevent future damage to the victim and to the communities where the victim and the offender are from.²¹² Among the goals of restorative justice measures are the prevention of future offenses as well as the successful reintegration of both the accused and the victim into society as productive contributors.²¹³ Mediation in the nonconsensual sex context will further those goals.²¹⁴

205. Cf. Hodak, *supra* note 58, at 1114 (explaining that mediation may be particularly effective in the acquaintance rape context in part because the victim and offender most likely had a prior relationship); Barbara Hudson, *Restorative Justice and Gendered Violence: Diversion or Effective Justice?*, 42 BRIT. J. CRIMINOLOGY 616, 622 (2002) (explaining that victims of acquaintance-type sexual assaults are often more interested in having behavior stop rather than seeing the offender punished).

206. The accused must also be willing to participate, but an accused may very well be interested in participating because participation in mediation may be a more palatable option than other sanctions for his sexual misconduct.

207. Cf. Anderson, *supra* note 71, at 1407 (promoting the negotiation model of rape law reform to help change sexual mores in a positive manner to decrease miscommunication).

208. John Braithwaite, *Restorative Justice and Social Justice*, 63 SASK. L. REV. 185, 185 (2000) (identifying the healing of relationships as one of the core values of restorative justice).

209. See *id.* at 186 (describing the restorative justice process as providing all stakeholders an opportunity to be heard regarding an offense, as well as consider what should be done to repair the victim, offender, and community).

210. See Richard Delgado, *Goodbye to Hammurabi: Analyzing the Atavistic Appeal of Restorative Justice*, 52 STAN. L. REV. 751, 753–54 (2000) (describing restorative justice as a radically new approach to criminal justice in response “to perceived excesses of incarceration, as well as inattention to the concerns of victims”); cf. Hudson, *supra* note 205, at 616–17 (discussing the worldwide adoption of restorative justice).

211. Hodak, *supra* note 58, at 1099 (explaining the principles of restorative justice); see also Braithwaite, *supra* note 208, at 186 (describing restorative justice as a means by which all key players in an offense—including victim and offender—participate in an effort to repair the victim, offender, and community).

212. See Braithwaite, *supra* note 208, at 185 (describing restorative justice as an “innovative way[] to involve the community in the healing of the breaches in relationships caused by an offender’s offense” (quoting E.D. Bayda, *The Theory and Practice of Sentencing: Are They on the Same Wavelength?*, 60 SASK. L. REV. 317, 331 (1996))).

213. Hodak, *supra* note 58, at 1100 (explaining the principles of restorative justice).

214. Additionally, victim-offender mediation in sexual assault context is not entirely unprecedented. See, e.g., MARTIN WRIGHT, JUSTICE FOR VICTIMS AND OFFENDERS: A

Mediation, a form of restorative justice, would be a useful means to educate the accused about the wrongfulness of his conduct.²¹⁵ The basic structure would be something akin to the structure of most established victim-offender mediation programs.²¹⁶ Preliminarily, the case would be referred to mediation by the traditional criminal court system.²¹⁷ The mediator to whom the case was referred would then confirm that the particular nonconsensual sex offense is appropriate for mediation, primarily by establishing that both the victim and the offender are willing to engage in the mediation process.²¹⁸ The mediator would need to meet individually with both the victim and the accused in an effort to establish a rapport with both individuals and in order to set a date for the actual mediation itself.²¹⁹ Next, the case would proceed to the actual mediation with both the victim and the offender having an opportunity to discuss their points of view and come to know the other person's position.²²⁰ One of the goals of the mediation would be to have the victim, offender, and mediator agree upon an appropriate means of amends.²²¹ Such restitution could involve educational programs, community service, and perhaps in some cases monetary restitution. The mediation would be followed up to ensure the offender's compliance with the terms of the mediation agreement.²²²

The criticisms against putting in place restorative justice measures for crimes of sexual assault will not apply in this context of nonconsensual sex. Most commentators who have considered the wisdom of adopting restorative justice measures have done so by considering the effects of such an adoption for sexual assault cases or across the criminal law generally.²²³ This proposal is the first of its kind, suggesting the appropriateness of restorative justice measures, but only in cases of nonconsensual sexual assault.

Restorative justice can also be beneficial to the offender in other ways as

RESTORATIVE RESPONSE TO CRIME 56-63 (1991) (chronicling the spread of mediation); Delgado, *supra* note 210, at 757 (identifying existing victim-offender mediation programs for rapists); Hudson, *supra* note 205, at 245-49 (discussing the efficacy of restorative justice in the context of sexual assault); see also Hodak, *supra* note 58, at 1107-09, 1114-15 (describing the *Pierce* case, an Iowa case in which mediation was used to resolve accusation of acquaintance rape, and describing the outcome as being satisfactory to the accused, the victim, and their families).

215. See Pillsbury, *supra* note 24, at 937 (explaining that to get the message across to men accused of acquaintance rape that their behavior was unacceptable, one needs to speak to them in terms and language that is understandable to them, such as speaking to them about the power of sexual arousal and frustration, rather than speaking to them about their need to control women and the need for them to control rage).

216. See Delgado, *supra* note 210, at 756-57 (identifying the basic structure of most victim-offender mediation programs as consisting of four phases: (1) intake, (2) preparation for mediation, (3) mediation, and (4) follow-up).

217. See *id.* at 756.

218. See *id.* at 757.

219. See *id.*

220. See *id.*

221. See *id.*

222. *Id.*

223. See, e.g., *id.*; Hudson, *supra* note 205 (examining arguments in favor of and against the suitability of restorative justice for sexual assault and other crimes).

well.²²⁴ Mediation will serve the important function of allowing a more nonthreatening forum at which a victim can express her feelings and point of view to the accused. Nonconsensual sex victims often want the accused to understand their perspective and appreciate the extent of their injuries. A criminal sanction is sometimes less important than giving the victim a nonthreatening forum in which she can be heard and vindicated.²²⁵ Mediation may serve this important function quite well, particularly in the nonconsensual rape context.²²⁶

Restorative justice in this context allows the victim to heal. It also educates the offender in an effort to prevent a similar crime from being committed again. Nonconsensual sex is not so much a crime committed against the state as it is a crime against the victim herself, especially considering that part of any crime against society is based upon the state of mind of the perpetrator.

Consider the Kobe Bryant case as an example.²²⁷ After the dismissal of rape charges against him, in an apology to his accuser, Bryant acknowledged the misunderstanding between his accuser and him about whether their sexual conduct that evening was consensual. In doing so, he recognized that, although he did not believe himself to be a rapist, he appreciated her belief that she had been raped by him.²²⁸

I want to apologize directly to the young woman involved in this incident. I want to apologize to her for my behavior that night and for the consequences she has suffered Although I truly believe this encounter between us was consensual, I recognize now that she did not and does not view this incident the same way I did. After months of

224. See Braithwaite, *supra* note 208, at 194 (“Restorative justice has the potential to reduce the prevalence of school expulsion, unemployment, imprisonment, and the effects of imprisonment—suicide, drug addiction, disease, and physical abuse—among the poor.”).

225. Cf. Hodak, *supra* note 58, at 1089–90 (explaining that availability of mediation as remedy for rape will increase victim reporting).

226. See *id.* at 1100 (explaining that mediation process may empower rape victims “by allowing them to directly participate”).

227. See T.R. Reid, *Bryant Charged With Sex Assault: Lakers Star Calls Encounter Consensual*, WASH. POST, July 19, 2003, at A1. (describing the alleged facts in Bryant case).

228. See *supra* notes 26–94 (explaining the elements of rape); see also Kirk Johnson, *As Accuser Balks, Prosecutors Drop Bryant Rape Case*, N.Y. TIMES, Sept. 2, 2004, at A1. Regarding Kobe Bryant’s case, one author who has written extensively on crimes committed by professional athletes claims that he was repeatedly asked why a man with a beautiful wife such as Bryant’s would rape another woman and why a “handsome young millionaire” like Bryant, who could “have lots of women,” would resort to rape. BENEDICT, *supra* note 183, at xiv. Benedict suggests that “people have a hard time reconciling Kobe Bryant’s public image with the vicious crime” with which he was charged, and seems to find Bryant’s explanation that he “made the mistake of adultery” incredible. *Id.* I think a more accurate explanation is not the difficulty of reconciling his public persona with a vicious crime, but rather a mistaken belief regarding consent and the public’s image of what constitutes forcible rape in this country. For additional readings regarding crimes against women committed by professional athletes, see generally JEFFREY R. BENEDICT, *ATHLETES AND ACQUAINTANCE RAPE* (1998) and JEFF BENEDICT, *PUBLIC HEROES, PRIVATE FELONS: ATHLETES AND CRIMES AGAINST WOMEN* (1997).

reviewing discovery, listening to her attorney, and even her testimony in person, I now understand how she feels that she did not consent to this encounter.²²⁹

The result of the Kobe Bryant case is essentially what the result would typically be from mediation.²³⁰ Bryant's statement makes clear that he now understands that the woman did not consent to the sexual contact. He has a clearer understanding of what is appropriate and what is not.²³¹

The reason that mediation should be a remedy for the offense of nonconsensual sex is the recognition of the importance that the victim of a nonconsensual sexual event be vindicated. Although what has happened to her should not properly be characterized as rape, it is true that the nonconsensual sex victim has suffered a very serious wrong that needs to be acknowledged and corrected as much as is possible by society.

In dealing with the crime of nonconsensual sexual intercourse, the criminal justice system should have in mind not just the punishment of the offender (punishing the perpetrator because he deserves to be punished based on retributive ideologies), but also the prevention of these types of offenses in the future.²³²

Restorative justice has received its share of criticism, particularly by those concerned that permitting restorative justice measures for crimes against

229. In its entirety, Kobe Bryant's statement reads:

First, I want to apologize directly to the young woman involved in this incident. I want to apologize to her for my behavior that night and for the consequences she has suffered in the past year. Although this year has been incredibly difficult for me personally, I can only imagine the pain she has had to endure. I also want to apologize to her parents and family members, and to my family and friends and supporters, and to the citizens of Eagle, Colo.

I also want to make it clear that I do not question the motives of this young woman. No money has been paid to this woman. She has agreed that this statement will not be used against me in the civil case. Although I truly believe this encounter between us was consensual, I recognize now that she did not and does not view this incident the same way I did. After months of reviewing discovery, listening to her attorney, and even her testimony in person, I now understand how she feels that she did not consent to this encounter.

I issue this statement today fully aware that while one part of this case ends today, another remains. I understand that the civil case against me will go forward. That part of this case will be decided by and between the parties directly involved in the incident and will no longer be a financial or emotional drain on the citizens of the state of Colorado.

Kobe Bryant Apology Letter Statement. Kobe Bryant (Sept. 1, 2004) (available online at <http://www.insidehoops.com/kobe-bryant-apologyletter-shtml>.)

230. See *supra* notes 155–57 and accompanying text (discussing the Kobe Bryant case).

231. Publications have also endeavored to educate men on the issue of sexuality and rape. See, e.g., LINDQUIST, *supra* note 175, 173–86 (containing a chapter dedicated to advising men on the issue of male sexuality and acquaintance or date rape).

232. Cf. Kay L. Levine, *The New Prosecution*, 40 WAKE FOREST L. REV. 1125 (2005) (examining California's Statutory Rape Vertical Prosecution Program, and arguing for a change in the traditional prosecutorial goals of punishing the defendant for a crime committed and more toward the goal of reducing the occurrence of crime itself).

women and children may serve to minimize the seriousness of such offenses.²³³ My proposal is not to extend restorative justice measures to all sexual crimes, but rather to make them available under appropriate circumstances—where both the victim and the offender agree to victim-offender mediation—for the offense of nonconsensual sex.²³⁴ By limiting restorative justice measures to nonconsensual sex offenses, restorative justice measures can promote an atmosphere of apology and education in an effort to prevent the parties from being involved in nonconsensual sex in the future.²³⁵ An atmosphere of apology and education is more preferable than an atmosphere of denial and blame.

IV. CONCLUSION

Our criminal justice system is founded on the principle that it is better for ten guilty persons to go free than it is for one innocent person to go to jail.²³⁶ It is the reason we require proof beyond a reasonable doubt as to each and every material element of a charged offense. It is the reason why, for most crimes, an evil act without an evil mind is insufficient to sustain the charged criminal offense. It is the reason why we should be very careful when we convict people for very serious criminal offenses.

Perhaps some of the concerns raised in this Article can be eliminated with better prosecutorial decisions regarding who should be prosecuted for forcible rape and who should not. Certainly, the time is ripe for developing better working rules to guide prosecutors in their exercise of authority in these matters.²³⁷

The proposal is that jurisdictions should draw a clear line between rape and nonconsensual sex; that rape should require a showing that the perpetrator acted with culpability equivalent or greater than recklessness; and that the victim should be required to resist in order for rape to be proven. I appreciate that some may criticize this proposal by claiming that some criminals will be wrongfully exonerated, rather than imprisoned for their detestable sexual conduct. Perhaps. However, even during these times of terrorism and uncertainty, in my estimation it still *is* better for some guilty individuals to go

233. See Braithwaite, *supra* note 208, at 188–89 (discussing the feminist movement as providing a forceful critique of restorative justice); Hudson, *supra* note 205, at 627 (discussing feminist opposition to restorative justice for sexual crimes against women); cf. Delgado, *supra* note 210, at 767–68 (expressing skepticism regarding the effectiveness of restorative justice measures, particularly when they are employed throughout the criminal justice system for offenders who are racial minorities).

234. See Hudson, *supra* note 205, at 622 (identifying that “whether restorative justice offers better hope of protection and redress for women and children remains an open question”).

235. See Braithwaite, *supra* note 208, at 189 (explaining how restorative justice measures “foster[] a culture of apology,” rather than “foster[ing] a culture of denial”).

236. See BLACKSTONE, *supra* note 2, § 406, at *358 (“[I]t is better that ten guilty persons escape than that one innocent suffer.”).

237. See generally Bruce A. Green, *Prosecuting Means More Than Locking Up Bad Guys*, 32 *LITIG.* 12, 16 (2005) (encouraging broad public discussion about basic principles that should guide prosecutors’ discretion in charging defendants with criminal offenses).

free rather than for one innocent person to be imprisoned. That men are held liable for forcible rape essentially without an adequate showing that they possessed the requisite culpable mental state as it relates to each of the material elements of the offense is problematic.

I am not suggesting that a woman is to blame when she is the victim of nonconsensual sex. Not at all. Rape is a very serious crime. My intent is not to belittle or minimize the injury to rape victims. However, I *am* suggesting that in a society where morals have loosened to the point that premarital sex is not considered as immoral as it once was (or dare I say, is not considered immoral at all), and sex outside of marriage often appears to be and is encouraged as the norm in society, we should be very careful about convicting less culpable individuals for forcible rape. We should be very careful when convicting men and boys of rape in uncertain circumstances.²³⁸ As our society moves more toward treating women as equals, women should bear some of the responsibility for sexual misunderstandings as part of that equality.²³⁹ The old adage that even a dog can tell the difference between being kicked and being tripped over does not necessarily hold true in the acquaintance rape context.²⁴⁰ As explained in this Article, it *is* possible for a woman to feel as if she has been raped, but for the perpetrator not to be a “rapist” as society appreciates that label.

When one considers the many current formulations of rape law, it becomes clear that one of the aims of criminal law—to hold as criminal those who commit an evil act with an evil mind—has been lost, overshadowed by society’s understandable concern for and desire to be sensitive to crime victims, particularly female victims of sexual offenses. When enacting sex crime legislation, legislators should make clear the line between rape and nonconsensual sex and their respective punishments. Sexual miscues should not lead to prosecution for forcible rape absent proof beyond a reasonable doubt that the accused was at least aware of the risk that his sexual partner did not consent.

238. See Bryden & Park, *supra* note 59, at 583 (“If one thinks of rape as a crime similar to other violent felonies, comparable to homicide or nonsexual assault, for example, one is more likely to accept the idea that the character reasoning rules should be consistent across various crimes. If one regards rape as a society-defining crime, part of a system of oppression that promotes male supremacy, then one may think that the need to increase the conviction rate is greater than the need to maintain consistency across the law of character evidence and greater than the need to avoid speculative dangers of prejudice in the fact-finding process.”)

239. See Berger, *supra* note 170, at 75–76 (“To treat as victims in a legal sense all of the female victims of life is at some point to cheapen, not celebrate, the rights to self-determination, sexual autonomy, and self- and societal respect of women. . . . [O]verprotection risks enfeebling instead of empowering women.”); see also Estrich, *Rape*, *supra* note 17, at 1094–105 (arguing that less focus on the victim’s state of mind and more focus on the defendant’s mens rea may benefit women overall).

240. See OLIVER WENDELL HOLMES, JR., *THE COMMON LAW* 3 (1923) (“[E]ven a dog distinguishes between being stumbled over and being kicked.”).