

IT IS WHAT IT IS: LEGAL RECOGNITION OF ACQUAINTANCE RAPE

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INTRODUCTION

From 1993 to 2005, the frequency of rapes and sexual assaults in the United States decreased by an amazing 69%, thanks in large part to reformers who participated in decades of debate, lobbying, and crusades to raise public awareness.¹ Even with this significant improvement, however, the pause for celebration should be brief. For the estimated 191,670 women who fell victim to rape or sexual assault in 2005, the American legal system will provide little chance of justice.²

The decrease in rape and sexual assault is more attributable to increased public awareness than it is to legal reform.³ Despite significant changes in the law intended to facilitate rape prosecution,

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1. SHANNAN M. CATALANO, U.S. DEP'T OF JUSTICE, NCJ 214644, NATIONAL CRIME VICTIMIZATION SURVEY: CRIMINAL VICTIMIZATION, 2005, at 5 (2006).

2. *Id.* at 2 tbl.1; CASSIA SPOHN & JULIE HORNEY, RAPE LAW REFORM: A GRASSROOTS REVOLUTION AND ITS IMPACT 160 (1992) ("Most disappointing, in terms of reformers' expectations, is our finding that the legal changes had limited effects on reports of rape and the processing of rape cases. The reforms did not produce an increase in the likelihood of conviction . . .").

3. David P. Bryden, *Redefining Rape*, 3 BUFF. CRIM. L. REV. 317, 320 (2000) ("This progress, however, appears to be due mainly to evolving public attitudes toward acquaintance rape rather than specific legal changes, except insofar as national publicity accompanying the changes may have affected attitudes everywhere."); *see also* SPOHN & HORNEY, *supra* note 2, at 80 ("The factor most likely to compete with the legal changes is the influence of the women's movement. The activities of groups like the National Organization of Women's Task Force on Rape led to a national awareness of the rape problem and to a recognition of the need for greater sensitivity in the treatment of victims of rape.").

62% of victims still choose not to report the crime.⁴ As a general rule, “[t]he closer the relationship between victim and assailant, the less likely the woman [will] report.”⁵ Although some individuals fail to report the act because of feelings of shame and embarrassment, the chances of conviction make the intensely emotional and painful ordeal of reporting hardly worthwhile for many others, especially those who know their attacker because known attackers “are the men who are least likely to be arrested, prosecuted, and convicted.”⁶

According to statistics obtained throughout the 1990s, a reported rape resulted in an arrest in only 51% of cases⁷ despite the fact that 73% of victims knew their attackers prior to the assaults.⁸ Of those arrested, 80% were prosecuted, though only 58% of the prosecuted offenders ultimately faced conviction; of those convicted, only 69% were sentenced to time in prison.⁹ Thus, the system placed only 16% of reported rapists in prison.¹⁰ Factor in the low reporting rates for rape and sexual assault and the actual rate of imprisonment for rapists drops to a mere 6%.¹¹ Presumably, the majority of this small percentage consisted of stranger-rapists rather than offenders known to the victim.¹²

This Note identifies the causes for the dismal performance of modern acquaintance rape prosecution and proposes a solution. Although reformers have spent the last several decades attempting to achieve a cohesive statutory structure that provides justice for *all* rape victims, statistics clearly reveal the system’s remaining inadequacies.¹³

4. CATALANO, *supra* note 1, at 10.

5. SUSAN ESTRICH, REAL RAPE 11 (1987).

6. *Id.* at 3–4; *see also* MORGAN O. REYNOLDS, NAT’L CTR. FOR POLICY ANALYSIS, POLICY REPORT NO. 229, CRIME AND PUNISHMENT IN AMERICA: 1999, at 9 tbl.I (1999), *available at* www.ncpa.org/studies/s229/s229.pdf (indicating a 23.6% chance of felony conviction for reported rapes).

7. REYNOLDS, *supra* note 6, at 9 tbl.I.

8. CATALANO, *supra* note 1, at 9 tbl.9.

9. REYNOLDS, *supra* note 6, at 9 tbl.I.

10. *Id.*

11. *See* CATALANO, *supra* note 1, at 10 (indicating that only 38% of rapes are reported); REYNOLDS, *supra* note 6, at 9 tbl.I (only 16.3% of reported rapes in the 1990s resulted in prison time).

12. In 2005, 73% of female rape victims identified their attackers as “nonstrangers” (as either an intimate acquaintance, other relative, or friend/acquaintance). CATALANO, *supra* note 1, at 9 tbl.9. Nevertheless, even though it is “easier to find the man when the woman knows who he is,” attackers with whom the woman is acquainted are precisely the ones “least likely to be arrested, prosecuted, and convicted.” ESTRICH, *supra* note 5, at 4.

13. *See* discussion *infra* Part II; REYNOLDS, *supra* note 6, at 9 tbl.I.

While acknowledging that reformers have made significant and beneficial changes to traditional rape law, this Note contends that their proposals fail to fully account for the differences between “traditional” rape and acquaintance rape. Today’s reformers readily distinguish between these two types of rape but continue to propose reforms that either equate the two crimes or insufficiently take into account the unique features of acquaintance rape.¹⁴ This Note argues that bifurcating traditional rape and acquaintance rape into two distinct statutes will clearly align these crimes with criminal law’s culpability theories, present more realistic legal standards for the prosecution of offenders, and more readily comport with society’s expectations.

Each Part of this Note presents critical information to support this conclusion. Part I provides an analysis of the rape law reform movement. It begins by identifying the heart of the problem in rape reform by recognizing the different types of rape. This analysis continues by clarifying the meanings of the terms “traditional rape” and “acquaintance rape,” and considers the goals, merits, and drawbacks of commonly suggested rape law reforms. Part II presents an analysis of “reformed” rape law, summarizing the statutory schemes of the several states and considering the effects of a model rape reform law adopted in Michigan. Part III develops the underlying reasoning for this Note’s proposed solution. This Part discusses the theoretical differences between traditional rape and acquaintance rape and explains practical reasons for the institution of a bifurcated approach. Finally, Part IV offers a proposal for, and discussion of, a new statutory scheme for rape law. Rather than approaching all rape as varying degrees of one offense, the new scheme advocates adding a separate statute specifically tailored to the unique circumstances of acquaintance rape.

I. THE REFORM MOVEMENT

The rape law reform movement took hold with the feminist movement approximately three decades ago and has become a dominant and ongoing topic in criminal law debates.¹⁵ Reformers in this area of law include feminists, social scientists, legal scholars, and

14. See Bryden, *supra* note 3, at 318; discussion *infra* Parts II.B, IV.

15. See Ronet Bachman & Raymond Paternoster, *A Contemporary Look at the Effects of Rape Law Reform: How Far Have We Really Come?*, 84 J. CRIM. L. & CRIMINOLOGY 554, 554–58 (1993).

others.¹⁶ The early movement focused on removing antiquated obstacles to rape prosecution in common law rape doctrine that were subsequently adopted by the several states through precedent or statutory provision.¹⁷ These obstacles included, among others, the resistance requirement, the fresh complaint doctrine, the corroboration rule, and Lord Chief Justice Matthew Hale's cautionary jury instruction: "[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."¹⁸ As the movement progressed, reformers increasingly focused their efforts on establishing a statutory system that could adequately deal with what many came to recognize as different types of rape.¹⁹ The majority of discussion in this context focuses on the distinctions between traditional/stranger and acquaintance/date rape.²⁰

A. "Traditional Rape" and "Acquaintance Rape" Defined

Today's reformers readily acknowledge the differences between traditional rape and acquaintance rape.²¹ The different circumstances surrounding these types of rape present distinct challenges in achieving justice for their respective victims. Traditional rape, also referred to as stranger rape, involves the "classic image of an unknown man leaping from the bushes to assault a woman."²² In these cases, the victim has had no prior consensual contact with the assailant.²³ The main issue in such cases generally focuses on the

16. SPOHN & HORNEY, *supra* note 2, at 17.

17. Michelle J. Anderson, *Marital Immunity, Intimate Relationships, and Improper Inferences: A New Law on Sexual Offenses by Intimates*, 54 HASTINGS L.J. 1465, 1465-73 (2003).

18. 1 SIR MATTHEW HALE, *THE HISTORY OF THE PLEAS OF THE CROWN* 635 (Philadelphia, Robert H. Small 1847); Kathryn M. Stanchi, *The Paradox of the Fresh Complaint Rule*, 37 B.C. L. REV. 441, 442 (1996); Daphne Edwards, Comment, *Acquaintance Rape & the "Force" Element: When "No" Is Not Enough*, 26 GOLDEN GATE U. L. REV. 241, 245-50 (1996); Comment, *The Corroboration Rule and Crimes Accompanying a Rape*, 118 U. PA. L. REV. 458, 458 (1970).

19. See Bryden, *supra* note 3, at 317-23.

20. The author does not deny the existence of other types of rape, such as marital rape and statutory rape. Indeed, a considerable amount of literature is dedicated to these topics. Although these forms of rape are likewise deserving of attention, they are beyond the scope of this Note.

21. Bryden, *supra* note 3, at 318.

22. Andrew E. Taslitz, *Willfully Blinded: On Date Rape and Self-Deception*, 28 HARV. J.L. & GENDER 381, 400 n.99 (2005).

23. Michelle Oberman, *Regulating Consensual Sex with Minors: Defining a Role for Statutory Rape*, 48 BUFF. L. REV. 703, 749 (2000).

identity of the attacker and, consequently, the availability and analysis of forensic DNA evidence.²⁴ Once the attacker has been identified, the occurrence of a rape is generally presumed because most women would not willingly engage in sexual intercourse with a complete stranger.²⁵

In contrast, acquaintance rape involves individuals who knew each other in some capacity prior to the instance of nonconsensual intercourse.²⁶ In cases of acquaintance rape, the individuals “may have been relatives, close friends, classmates, co-workers, or merely casual acquaintances.”²⁷ “Date rape,” a narrower “subset of acquaintance rape,” refers to nonconsensual intercourse between individuals previously engaged in (or considering beginning) a relationship of a romantic nature.²⁸ Prior to an acquaintance rape, interactions between the individuals may have been overtly romantic and may have involved consensual sexual intercourse.²⁹ Or the acquaintances may have been involved in a social situation where the aggressor perceived a romantic element, while the victim did not.³⁰ This Note focuses on the broader concept of acquaintance rape which includes all of these possibilities.³¹

In 2005, 73% of rapes and sexual assaults occurred between acquaintances.³² Because of the accuser’s prior relationship with the victim, the defense typically focuses on consent rather than misidentification.³³ By placing consent at issue, the circumstances surrounding the alleged incident and the character of the complaining victim become

24. Taslitz, *supra* note 22, at 400 n.99; Jill E. Daly, Note, *Gathering Dust on the Evidence Shelves of the United States—Rape Victims and Their Kits: Do Rape Victims Have Recourse Against State and Federal Criminal Justice Systems?*, 25 WOMEN’S RTS. L. REP. 17, 18 (2003).

25. Bryden, *supra* note 3, at 359.

26. Corinne Casarino, Note, *Civil Remedies in Acquaintance Rape Cases*, 6 B.U. PUB. INT. L.J. 185, 186 (1996).

27. *Id.*

28. *Id.* at 186–87.

29. Samuel H. Pillsbury, *Crimes Against the Heart: Recognizing the Wrongs of Forced Sex*, 35 LOY. L.A. L. REV. 845, 858 (2002).

30. *Id.*

31. Although males may also fall victim to rape and sexual assault, this Note will refer to acquaintance rapes wherein a female is victimized. This comports with a recent study indicating that the vast majority of male victims are attacked by strangers rather than acquaintances. CATALANO, *supra* note 1, at 9 tbl.9.

32. *Id.*

33. David P. Bryden & Sonja Lengnick, *Rape in the Criminal Justice System*, 87 J. CRIM. L. & CRIMINOLOGY 1194, 1204 (1997).

significant to the outcome of the case.³⁴ Acquaintance rape frequently involves alcohol, rarely involves weapons, and rarely results in physical injuries to the woman beyond those inherent in the act itself.³⁵ These factors often present significant challenges for prosecutors.³⁶

B. *Common Rape Reform Proposals*

Satisfied for the most part that the law adequately ensures justice in cases of traditional rape, reformers have almost uniformly devoted their efforts to increasing prosecutions, convictions, and enforcement of rape law in the context of acquaintance rape.³⁷ The pursuit of this goal has yielded many diverse proposals for change.³⁸ Although statutory structures vary significantly from state to state,³⁹ most reformers base their proposals on a typical statute that requires the prosecution to prove sexual penetration, lack of consent, force or threat of force, and mens rea (the mental state and intent of the defendant).⁴⁰ These proposals seek the reformation or elimination of these elements or suggest new crimes to supplement or replace existing law.⁴¹

1. *Reduce Mens Rea to Negligence*

Although courts infrequently considered mens rea in the context of rape, and some courts went so far as to denounce a mens rea requirement,⁴² several reformers insist that rape laws must adopt a negligent mens rea standard to be effective.⁴³ Since a jury lacks reliable means to determine the defendant's state of mind, evaluating mistakes under a subjective standard could lead to "excessive jury

34. *Id.* at 1204–06.

35. ROBIN WARSHAW, I NEVER CALLED IT RAPE 44 (1988); Edwards, *supra* note 18, at 269.

36. See Nicholas J. Little, Note, *From No Means No to Only Yes Means Yes: The Rational Results of an Affirmative Consent Standard in Rape Law*, 58 VAND. L. REV. 1321, 1332–33 (2005).

37. See Bryden, *supra* note 3, at 318.

38. See *id.* at 322–23; SPOHN & HORNEY, *supra* note 2, at 20–23.

39. See discussion *infra* Part II.A.

40. See, e.g., SPOHN & HORNEY, *supra* note 2, at 20–23; Dana Berliner, Note, *Rethinking the Reasonable Belief Defense to Rape*, 100 YALE L.J. 2687, 2689 (1991).

41. See SPOHN & HORNEY, *supra* note 2, at 20–23.

42. ESTRICH, *supra* note 5, at 94.

43. See, e.g., Susan Estrich, *Rape*, 95 YALE L.J. 1087, 1102 (1986) (“My view is that such a ‘negligent rapist’ should be punished, albeit—as in murder—less severely than the man who acts with purpose or knowledge, or even knowledge of the risk.”).

leniency."⁴⁴ Reformers assert that mens rea levels above negligence allow for subjective mistakes and, accordingly, permit men to avoid conviction on the grounds that they honestly, though unreasonably, believed the victim consented to the act.⁴⁵ Reformers reject that possibility and argue that a standard of negligence provides the appropriate remedy.⁴⁶

This negligence proposal sparked significant opposition. Many scholars argue that, except for minor crimes, negligence has no place in criminal law because the diminished moral culpability of the defendant cannot justify the punishments and stigma associated with criminal convictions.⁴⁷ Others suggest that criminal laws based on negligence cannot achieve the deterrence goals of the penal system because such laws criminalize inadvertent behaviors.⁴⁸ Reformers counter that the severe harms of rape justify criminal liability and suggest that the negligence standard would raise the level of care undertaken by all men in the context of sexual activity.⁴⁹

Ultimately, these arguments remain irrelevant to the practical application of rape law. Rape is typically classified as a general intent offense⁵⁰ and, "[i]n general intent crimes[,] a mistake of fact must be both honest and reasonable to excuse the commission of the offense."⁵¹ Therefore, without explicitly adopting the negligence standard, most states already require mistakes regarding consent in rape cases to be reasonable.⁵² Furthermore, just like crimes of recklessness, crimes of negligence require mistakes to be reasonable before the court will excuse the offender.⁵³ According to *Black's Law*

44. Bryden, *supra* note 3, at 335.

45. *See id.* at 329–30 ("Issues of mistake should be resolved by asking whether the mistake nullifies the mens rea required for the crime. . . . If a defendant mistakenly believed that he had consent, then (however unreasonable the mistake) he did not intend to rape.").

46. *See, e.g.,* Estrich, *supra* note 43, at 1104–05 (arguing in favor of a negligence mens rea standard for rape).

47. *See* Stephen J. Schulhofer, *The Gender Question in Criminal Law*, 7 SOC. PHIL. & POL'Y 105, 131–32 (1990).

48. Jerome Hall, *Negligent Behavior Should Be Excluded from Penal Liability*, 63 COLUM. L. REV. 632, 641 (1963).

49. Bryden, *supra* note 3, at 337–38.

50. Valerie M. Ryan, Comment, *Intoxicating Encounters: Allocating Responsibility in the Law of Rape*, 40 CAL. W. L. REV. 407, 418 (2003).

51. Victoria J. Dettmar, Comment, *Culpable Mistakes in Rape: Eliminating the Defense of Unreasonable Mistake As to Victim Consent*, 89 DICK. L. REV. 473, 483 (1985).

52. Karen M. Kramer, Note, *Rule by Myth: The Social and Legal Dynamics Governing Alcohol-Related Acquaintance Rapes*, 47 STAN. L. REV. 115, 130 (1994).

53. Bryden, *supra* note 3, at 333.

Dictionary, reckless knowledge consists of “[a] person’s awareness that a prohibited circumstance may exist, regardless of which the person accepts the risk and goes on to act.”⁵⁴ Many reformers advocating a negligence standard acknowledge that even those men who subjectively believe that consent exists are aware, on at least some level, of the possibility that their belief is wrong.⁵⁵ For example, a man may honestly believe a woman has consented although she explicitly declined to engage in intercourse.⁵⁶ When he continues to engage in intercourse in the face of such overt refusals, the man accepts the risk that a prohibited circumstance—lack of consent—may exist.⁵⁷ In this sense, reformers describe acquaintance rapists as being reckless rather than negligent.⁵⁸ Ultimately, the distinctions in rape cases “among intention, recklessness, and negligence are at best exceedingly thin.”⁵⁹

A final difficulty with the negligence debate is that the problem it seeks to remedy is virtually nonexistent: most men accused of acquaintance rape do not utilize the mistake defense.⁶⁰ On the contrary, men accused of acquaintance rape assert that the woman actually consented and, therefore, the state failed to meet its burden of proof regarding the presence of force or lack of consent.⁶¹ These observations led one scholar to conclude that “[t]he dispute about negligent rape illustrates the tyranny of abstractions.”⁶²

2. *Abolish the Force Element*

Abolition of the force element is probably the most commonly advanced proposal among modern rape law reformers.⁶³ Ironically,

54. BLACK’S LAW DICTIONARY 888 (8th ed. 2004).

55. See, e.g., Taslitz, *supra* note 22, at 382.

56. Susan Estrich describes this situation: “More common is the case of the man who could have done better but did not; could have paid attention, but did not; heard her refusal or saw her tears, but decided to ignore them.” ESTRICH, *supra* note 5, at 97.

57. Michelle J. Anderson, *Reviving Resistance in Rape Law*, 1998 U. ILL. L. REV. 953, 993 (1998) (“[V]erbal resistance, by definition, puts the attacker on notice that the woman does not consent.”).

58. Bryden, *supra* note 3, at 342 (“In most realistic scenarios, unreasonable mistakes about a woman’s consent are more akin to recklessness . . .”).

59. *Id.* at 341.

60. *Id.* at 414.

61. *Id.* at 415.

62. *Id.* at 341.

63. *Id.* at 321–22 (“Virtually all modern rape scholars want to modify or abolish the force requirement as an element of rape.”).

the current focus on the force element in rape law resulted from early demands by these same reformers that the law cease to require utmost resistance by the victim.⁶⁴ The common law required a victim to resist the attacker in order to satisfy the element of nonconsent.⁶⁵ Early reformers objected to this resistance requirement because it inappropriately focused the inquiry on the victim's response as opposed to the defendant's prohibited conduct.⁶⁶ Furthermore, reformers argued that the resistance requirement unfairly required a woman to choose between submitting to the rape—at the price of being deemed to have consented—and subjecting herself to an increased risk of death or serious injury by resisting.⁶⁷

Reformers' arguments eventually prevailed in most states, but "the formal elimination of a resistance requirement from codified law has often been a victory more apparent than real."⁶⁸ The deceptive nature of the victory lies in the modern judicial interpretation of the force element. Typically, courts require physical force beyond that inherent in the act of sexual penetration to fulfill the element of force.⁶⁹ The result is that "[i]n most cases involving acquaintances the force element is, in effect, a resistance requirement . . . because an unarmed acquaintance rapist typically does not employ force unless he meets resistance."⁷⁰

Because of the close relationship between the resistance requirement and the force requirement, modern reformers cite the same arguments—improper focus on the victim and increased risk of death or injury—to support their proposals for eliminating the force element.⁷¹ The precise reasoning for the proposal, however, is largely irrelevant. In practice, laws with force requirements ineffectively combat acquaintance rape because the victims rarely offer more than verbal resistance and the offenders rarely engage in physical force beyond that inherent in sexual penetration.⁷² As a result, reformers generally agree that the law's inadequacy in the context of

64. See Anderson, *supra* note 57, at 964.

65. ESTRICH, *supra* note 5, at 29.

66. *Id.* at 58–59.

67. *Id.* at 58.

68. Anderson, *supra* note 57, at 967.

69. Bryden, *supra* note 3, at 358–59 ("Although precise definition of 'force' is impossible, courts insist on something more than the movements that are customary in sex."). *But see In re M.T.S.*, 609 A.2d 1266, 1279–80 (N.J. 1992) (a notable exception to this general rule).

70. Bryden, *supra* note 3, at 356.

71. ESTRICH, *supra* note 5, at 63; Edwards, *supra* note 18, at 282–83.

72. See *supra* text accompanying note 35.

acquaintance rape will persist as long as the force element, as currently defined, remains in effect.⁷³

In an attempt to criminalize nonconsensual sexual penetration,⁷⁴ reformers seeking abolition of the force requirement often battle an ongoing circular argument.⁷⁵ If force was no longer an element, the courts could put more emphasis on the common law nonconsent standard that required victim resistance.⁷⁶ In defining nonconsent as necessarily requiring resistance, the argument comes full circle to the same problems engendered by the force requirement. As noted by one prominent reform advocate, “the problem has never been so much the terms of statutes as our understanding of them: it is not that ‘consent’ is the right test and ‘force’ the wrong one, or vice versa, but that both can be interpreted to require women to resist, and to protect the simple [acquaintance] rapist.”⁷⁷ Therefore, reformers advocating the abolition of the force element combine the proposal with additional measures intended to create new interpretative paradigms.⁷⁸ Generally, “reformers seeking to expand what makes sexual intercourse . . . criminal have two basic choices: to focus on the man and seek a broader definition of force; or to focus on the woman and rely on her word as to nonconsent (not saying yes, or at least saying no).”⁷⁹ Significant disagreement persists, however, in regard to the appropriate structure of supplemental provisions and upon which party the provisions should focus.⁸⁰

3. *Require Affirmative Consent*

Many reformers opposed to the force requirement—or, more specifically, to the requirement that a woman resist her aggressor—advocate the imposition of an affirmative consent standard.⁸¹ These reformers assert that such a standard would be beneficial to both men and women: men would enjoy the benefit of knowing precisely what conduct is considered criminal and women would retain sexual

73. See *supra* note 63.

74. Anderson, *supra* note 57, at 1002–03.

75. *Id.* at 1005.

76. *Id.*

77. ESTRICH, *supra* note 5, at 90.

78. See Anderson, *supra* note 57, at 1002.

79. ESTRICH, *supra* note 5, at 84.

80. The merits of the two most common supplemental provisions will be considered separately as individual reform proposals. See *infra* Parts I.B.3–4.

81. See, e.g., Little, *supra* note 36, at 1356.

autonomy.⁸² As the cornerstone of this proposal, reformers hope to establish a legal framework wherein a lack of consent, and therefore passivity, would be equivalent to nonconsent.⁸³ This standard would promote prosecutions in abusive relationships where the victim submits out of fear of continued abuse and in situations involving alcohol-induced passivity.⁸⁴ Ultimately, the proponents of the affirmative consent standard view the reform as requiring a man to simply “behave with a civilized regard for his companion’s wishes.”⁸⁵

Despite the apparent simplicity of the affirmative consent standard, reformers disagree as to the exact manner of its implementation. While some reformers would allow affirmative consent to be expressed through either words or actions,⁸⁶ others suggest this approach is overly subjective since it would allow fact-finders to impose a force requirement or to make unjust inferences regarding the victim’s behavior.⁸⁷ To avoid this problem, some reformers advocate “a standard mandating that the only legally recognizable signals of consent are verbal statements.”⁸⁸ Under this approach, the defendant could offer an affirmative defense of consent-by-action, but the burden would then be on the defendant to prove such consent beyond a reasonable doubt.⁸⁹ Those in support of

82. Little, *supra* note 36, at 1354–55 (“This standard clearly benefits men, who purport to want more certainty in the dating process that their behavior is acceptable and desired by their date. Additionally, women, the majority of whom actually mean ‘no’ when they say ‘no,’ will also benefit from the affirmative consent standard.”); Lani Anne Remick, Comment, *Read Her Lips: An Argument for a Verbal Consent Standard in Rape*, 141 U. PA. L. REV. 1103, 1147 (1993) (“[I]t promotes female self-determination. . . . It also sends a clear message to every man that when he has sex with a woman who willingly states her consent, he is not raping her. . . .”).

83. Bryden, *supra* note 3, at 400–01 (“[T]here would be a rebuttable presumption of nonconsent . . . [I]t criminalizes sex in cases where the woman is verbally as well as physically passive, and signifies neither assent nor rejection of the man’s advances.”); Remick, *supra* note 82, at 1120 (“[O]nly overt behavior should be construed as consent; a lack of consent therefore must be interpreted to indicate nonconsent.”).

84. Bryden, *supra* note 3, at 401–02.

85. *Id.* at 400.

86. *Id.* at 398 (“A requirement that sex be preceded by verbal consent would be foolish. A woman who after being propositioned, walks into her host’s bedroom and disrobes, may not have given verbal consent. But she has ‘affirmatively’ manifested her intentions, and that should suffice.”).

87. *Id.* at 405 (“If juries are left free to define ‘consent’ for themselves they may in effect create a force requirement . . . even if force (or verbal protest) is not a nominal element of the crime.”); Remick, *supra* note 82, at 1123 (“[T]here is essentially no limit to the type of behaviors jurors have considered indicative of a woman’s consent.”).

88. Remick, *supra* note 82, at 1121.

89. *Id.* at 1129.

this approach argue that shifting the burden on the defendant will make a substantial difference in the reform's efficacy.⁹⁰

In addition, reformers disagree about the structure of the affirmative consent reform. While some suggest using the affirmative consent standard to define rape in general,⁹¹ others recommend using the standard as a lesser degree of forcible rape or as the standard for a different offense such as sexual abuse.⁹² Regardless of its form, however, the ultimate goal is to provide legal recourse for passive victims.⁹³

Opponents of affirmative consent most frequently take issue with the reform's divergence from social norms and its threat to sexual intimacy.⁹⁴ Those concerned with social norms fear that some men will be sacrificed and subjected to incarceration under a standard that deviates from social custom.⁹⁵ Proponents of the change respond based on a Holmesian approach to the situation.⁹⁶ They view law as an appropriate tool to force changes in social norms and, accordingly, consider the short-term sacrifices of a few men beneficial.⁹⁷ In addressing the threat to intimacy, the affirmative-consent-standard advocates uniformly assert that "rather than taking romance and spontaneity out of the relationship, verbal communication is likely to enhance the probability of mutually satisfactory sexual encounters."⁹⁸ To date, eight jurisdictions have been persuaded by this reasoning and have adopted the affirmative consent standard as their statutory definition of consent.⁹⁹

90. *Id.*

91. *See, e.g.,* Little, *supra* note 36, at 1335 ("Given that the victim suffers great harm from assaults by acquaintances, such attacks should be included in the legal definition of rape. . . . This Note takes the stance that rape occurs whenever a woman is subjected to sexual intercourse to which she does not consent.").

92. *See, e.g.,* Bryden, *supra* note 3, at 402. Redefining rape in this way is discussed in detail *infra* Part I.B.6.

93. *See supra* note 83.

94. *See* Bryden, *supra* note 3, at 405; Remick, *supra* note 82, at 1148.

95. Bryden, *supra* note 3, at 406–07.

96. *Id.* at 408 ("Holmes may well have been right when he contended that larger interests dictate sacrificing the ignorant.").

97. Little, *supra* note 36, at 1356.

98. Remick, *supra* note 82, at 1149.

99. *See infra* note 145 and accompanying text.

4. "No" Means "No" and Affirmative Nonconsent

Reformers who disagree with the modern interpretation of the force requirement but concede the inappropriateness of an affirmative consent standard have settled on the middle ground of "no means no," also known as affirmative *nonconsent*.¹⁰⁰ Despite their rallying slogan, "no means no," advocates of this proposal seem to agree that sexual intercourse would be criminal when "nonconsent is either obvious from the circumstances or else manifested by *physical* or verbal resistance prior to intercourse."¹⁰¹ Affirmative nonconsent thereby avoids the danger of subjecting innocent men to incarceration by requiring the woman, absent other extreme circumstances, to put a man on notice that he is exceeding her boundaries.¹⁰² As stated by one proponent, "[I]ntercourse accompanied by expressed nonconsent demonstrates criminal intent."¹⁰³ And while some would challenge this proposal's emphasis on the woman's conduct, supporters argue that the reform simply places shared responsibility on both men and women in the context of sexual relations.¹⁰⁴

Attacks on the affirmative nonconsent proposal have been mostly dispelled. The most common concern regarding "no means no" is that "no," in some circumstances, could actually mean "yes."¹⁰⁵ To support this argument, opponents of affirmative nonconsent frequently cite a study of Texas undergraduates that found 39.3% of women had sometimes offered token resistance when they actually wanted sex.¹⁰⁶ But the study also noted that 75% of the women who offered token resistance did so only a few times (five or less), and that ultimately, "when a woman says no, chances are that she means it."¹⁰⁷ This clarification, and the obvious fact that the harm of misinterpreting "no" to mean "yes" far exceeds the harm of

100. Estrich, *supra* note 43, at 1182; Kathleen F. Cairney, Note, *Addressing Acquaintance Rape: The New Direction of the Rape Law Reform Movement*, 69 ST. JOHN'S L. REV. 291, 310–11 (1995).

101. Bryden, *supra* note 3, at 396 (emphasis added) (internal quotation marks omitted).

102. Anderson, *supra* note 57, at 993.

103. Cairney, *supra* note 100, at 320.

104. *Id.* at 323.

105. See Bryden, *supra* note 3, at 388.

106. Charlene L. Muehlenhard & Lisa C. Hollabaugh, *Do Women Sometimes Say No When They Mean Yes? The Prevalence and Correlates of Women's Token Resistance to Sex*, 54 J. PERSONALITY & SOC. PSYCHOL. 872, 874 (1988).

107. *Id.* at 878.

misinterpreting “no” to mean “no,” quickly deflates the opponents’ arguments.

A final concern with the “no means no” proposal involves the possibility that a woman may change her mind.¹⁰⁸ Opponents suggest that a man could be found guilty of rape if a woman said no earlier in the night but subsequently and legitimately changed her mind.¹⁰⁹ The response to this allegation from advocates of “no means no” is simple: after the passage of time “the nonconsenting woman would be expected to decline again, either verbally or physically.”¹¹⁰ Because advocates of “no means no” have met challenges to the proposal with reasonable answers and because the approach represents a compromise of competing issues, a few states have adopted this reform measure in their rape statutes.¹¹¹

5. *Consolidate Rape with Other Nonsexual Assaults and/or Eliminate the Term “Rape”*

Apart from reforms to change the actual elements of the crime, others advocate regrouping sexual offenses with nonsexual offenses or eliminating the term “rape” from the statute books.¹¹² Those proposing the consolidation of rape with nonsexual assault and battery claim that the combination would help prosecutors obtain convictions, reduce the prevalence of consent defenses, block the introduction of the victim’s sexual history, and remove the resistance requirement from the legal analysis.¹¹³ Those opposing the proposal have often called it naïve and assert that identical facts will create identical issues regardless of the name of the offense.¹¹⁴ Furthermore, opponents suggest the proposal disregards “the traditional view that rape is a uniquely devastating type of assault” and raises issues with regard to appropriate sentencing.¹¹⁵ These opponents claim that the

108. See Bryden, *supra* note 3, at 389.

109. *Id.* at 396.

110. *Id.*

111. See *infra* note 146 and accompanying text.

112. See Martin D. Schwartz & Todd R. Clear, *Toward a New Law on Rape*, 26 CRIME & DELINQ. 129, 134–35 (1980); Cheryl A. Whitney, *Non-Stranger, Non-Consensual Sexual Assaults: Changing Legislation to Ensure that Acts Are Criminally Punished*, 27 RUTGERS L.J. 417, 440 (1996) (“The use of the term ‘sexual assault’ eliminates some of the fear and prejudices that accompany the term ‘rape’” (citation omitted)).

113. Schwartz & Clear, *supra* note 112, at 137, 143–51.

114. Bryden, *supra* note 3, at 429–31.

115. *Id.* at 433–34.

more suitable approach would be to attempt to achieve the cited changes within the field of rape law.¹¹⁶

Despite the criticisms, some reformers continue to believe that, at a minimum, a name change would improve rape law. These reformers assert that “[t]he use of the term ‘sexual assault’ eliminates some of the fear and prejudices that accompany the term ‘rape’”¹¹⁷ Others, however, describe the change as simply sugarcoating the offense.¹¹⁸ Those opposed to a name change assert that, as a practical matter, the reform “obscures [rape’s] unique indignity” and confuses jurors who expect charges of rape.¹¹⁹ Regardless of these complaints, this approach has been adopted in a majority of states, the term “sexual assault” having become the most popular.¹²⁰

6. *Create a New Crime and/or Divide Rape into Varying Degrees*

Finally, some rape reform proposals that are frequently suggested in combination with one of the aforementioned changes involve creating entirely new sexual offenses or dividing the traditional rape offense into varying degrees. Proposals regarding the creation of new crimes are numerous and vary significantly.¹²¹ The only unifying concept among the proposals for new crimes is that each would target a sexual offense that lacks violent uses of force.¹²² While the extreme

116. *Id.* at 431 (“If further reforms such as abolition of the FRR [force resistance requirement] are thought desirable, this can be done without changing the name of the crime”).

117. Whitney, *supra* note 112, at 440.

118. SPOHN & HORNEY, *supra* note 2, at 161.

119. ESTRICH, *supra* note 5, at 81; *see also* SPOHN & HORNEY, *supra* note 2, at 161.

120. *See infra* note 140 and accompanying text.

121. *See, e.g.*, MODEL PENAL CODE § 213.1(2) (1962) (criminalizing “gross sexual imposition”); Ian Ayres & Katharine K. Baker, *A Separate Crime of Reckless Sex*, 72 U. CHI. L. REV. 599, 631–33 (2005) (proposing to criminalize “reckless sexual conduct” as an offense involving intentional engagement in “unprotected sexual activity”); Donald A. Dripps, *Beyond Rape: An Essay on the Difference Between the Presence of Force and the Absence of Consent*, 92 COLUM. L. REV. 1780, 1797–1805 (1992) (proposing two new crimes: “purposely or knowingly facing the victim with the alternatives of sexual submission or physical violence” (sexually motivated assault) and “purposely or knowingly engag[ing] in a sexual act with another person, knowing that the other person has expressed a refusal to engage in that act” (sexual expropriation)); Stephen J. Schulhofer, *Taking Sexual Autonomy Seriously: Rape Law and Beyond*, 11 LAW & PHIL. 35, 67 (1992) (proposing a crime of sexual abuse or sexual misconduct to deal with “nonviolent interference with freedom of choice”).

122. *See supra* note 121.

proposals often result in academic pontifications rather than practical change,¹²³ many states have proved open to supplementing their rape statutes with a less serious offense.¹²⁴

A related proposal entails creating various degrees of rape rather than entirely new crimes. The most common structure divides rape—or sexual assault in the case of renamed offenses—into varying degrees based upon the amount of force used by the assailant.¹²⁵ Other proposals consider factors such as the amount of injury, the victim's age, the existence of accomplices, and the victim's physical or mental incapacity.¹²⁶ Convictions on the lower degrees of the offense would result in less severe punishments, although most reformers insist that all of the offenses should be classified as felonies.¹²⁷ Reformers contend that gradation would clearly establish nonconsensual intercourse as criminal, provide prosecutors with options, and present juries (which may be wary of convicting for first degree rape) with alternatives.¹²⁸ This reasoning ultimately persuaded many state legislators and similar proposals were adopted in a majority of states throughout the 1970s and 1980s.¹²⁹

The reforms described above represent the most common and influential proposals in the rape reform movement. While such reforms differ significantly, their proponents all express a desire to increase rape law's efficacy in the context of acquaintance rape. The following considers the effects these reforms have had on the form and application of statutory law.

II. "REFORMED" RAPE LAW: STATUTORY ANALYSIS

The effects of the rape reform movement on the statutory laws of the states are as varied and numerous as the reform proposals

123. See, e.g., Bryden, *supra* note 3, at 393–96 (analyzing Dripps's proposals of sexually motivated assault and sexual expropriation and Schulhofer's sexual abuse); Kimberly Kessler Ferzan, Essay, *A Reckless Response to Rape: A Reply to Ayres and Baker*, 39 U.C. DAVIS L. REV. 637 (2006); Schulhofer, *supra* note 121, at 78 (analyzing the model penal code's offense of gross sexual imposition).

124. See *infra* note 143 and accompanying text.

125. See, e.g., Remick, *supra* note 82, at 1118.

126. Cf. Andrea A. Curcio, *The Georgia Roundtable Discussion Model: Another Way to Approach Reforming Rape Laws*, 20 GA. ST. U. L. REV. 565, 573 (2004) (discussing enacted reforms).

127. See, e.g., Whitney, *supra* note 112, at 438 ("Both assaults constitute felonies, although the second would carry a lesser punishment.").

128. Curcio, *supra* note 126, at 573; Whitney, *supra* note 112, at 439–40.

129. See *infra* notes 141–43 and accompanying text.

themselves.¹³⁰ The majority of rape law reform took place in the late 1970s and the early 1980s.¹³¹ Despite the reformers' high hopes, these extensive reforms have had little practical impact on acquaintance rape prosecution.¹³² This Part first attempts to provide a general overview of the various rape statutes throughout the nation. After describing the national landscape, it focuses on the effects of the Michigan reform—considered the most extensive and progressive and, therefore, the most likely to instill change.¹³³

A. *Statutory Overview*

In response to the rape law reform movement, states began adopting various proposals to change rape law and, “[b]y the mid-1980s, nearly all states had enacted some type of rape reform legislation.”¹³⁴ Some states enacted the reform with one comprehensive bill, while others adopted a series of changes over the course of several years. Some states adopted reform proposals in full, while others chose limited versions.¹³⁵ While the exact changes varied from state to state, common themes included:

- (1) redefining rape and replacing the single crime of rape with a series of graded offenses defined by the presence or absence of aggravating conditions;
- (2) changing the consent standard by eliminating the requirement that the victim physically resist her attacker;
- (3) eliminating the requirement that the victim's testimony be corroborated; and
- (4) placing restrictions on the introduction of evidence of the victim's prior sexual conduct.¹³⁶

In general, the reforms sought to eliminate the obstacles of common law rape and to facilitate prosecution of acquaintance rape.¹³⁷ Nonetheless, the variation among modern rape laws makes it difficult

130. SPOHN & HORNEY, *supra* note 2, at 35.

131. *Id.* at 38–39 tbl.2.1 (identifying changes in six jurisdictions in the late 1970s and early 1980s); Edwards, *supra* note 18, at 251.

132. SPOHN & HORNEY, *supra* note 2, at 159–60.

133. *Id.* at 78–79.

134. *Id.* at 20.

135. *Id.* at 35.

136. *Id.* at 21.

137. *See supra* notes 17–18 and accompanying text; *see also* discussion *supra* Part I.B.6.

to group the states according to any specific themes. Accordingly, this Note groups the states into categories based on single factors.¹³⁸

Twenty-four states continue to use the term “rape,”¹³⁹ while twenty-six states and the District of Columbia have eliminated the term from their statute books.¹⁴⁰ Furthermore, twenty-five states and the District of Columbia use at least one graded offense,¹⁴¹ while

138. The analysis contained in this Part, consistent with the scope of this Note, only considers offenses targeting sexual penetration and sexual touching. Statutes specifically addressing attempted or completed sexual crimes against children or spouses, sodomy, oral sex, penetration with foreign objects, male on male assaults, or assaults by health professionals are beyond the scope of this analysis.

139. ALA. CODE §§ 13A-6-61 to -62 (LexisNexis 2005); ARK. CODE ANN. § 5-14-103 (2006); CAL. PENAL CODE § 261 (West 1999); DEL. CODE ANN. tit. 11, §§ 770-773 (2007); GA. CODE ANN. § 16-6-1 (2007); IDAHO CODE ANN. § 18-6101 (2004); IND. CODE ANN. § 35-42-4-1 (LexisNexis 2004); KAN. STAT. ANN. § 21-3502 (1995); KY. REV. STAT. ANN. § 510.040 (LexisNexis Supp. 2007); LA. REV. STAT. ANN. §§ 14:41-42 (2007); MD. CODE ANN., CRIM. LAW §§ 3-303 to -304 (LexisNexis 2002); MASS. GEN. LAWS ANN. ch. 265, § 22 (West 2000); MO. ANN. STAT. § 566.030 (West Supp. 2008); N.Y. PENAL LAW §§ 130.25-.35 (McKinney 2004); N.C. GEN. STAT. §§ 14-27.2 to -27.3 (2005); OHIO REV. CODE ANN. § 2907.02 (West 2006); OKLA. STAT. ANN. tit. 21, §§ 1111-1116 (West 2002); OR. REV. STAT. §§ 163.355-.375 (2003); 18 PA. CONS. STAT. ANN. § 3121 (West Supp. 2007); S.D. CODIFIED LAWS § 22-22-1 (2006); TENN. CODE ANN. §§ 39-13-502 to -503 (2006); UTAH CODE ANN. § 76-5-402 (2003); VA. CODE ANN. § 18.2-61 (2004); WASH. REV. CODE ANN. §§ 9A.44.040-.060 (West 2000).

140. ALASKA STAT. §§ 11.41.410-.427 (2006); ARIZ. REV. STAT. ANN. §§ 13-1401 to -1423 (2001); COLO. REV. STAT. ANN. §§ 18-3-401 to -404 (West 2004); CONN. GEN. STAT. ANN. §§ 53a-70 to -73a (West 2001); D.C. CODE §§ 22-3002 to -3006 (2001); FLA. STAT. ANN. § 794.011 (West 2007); HAW. REV. STAT. ANN. §§ 707-730 to -733.6 (LexisNexis 2007); 720 ILL. COMP. STAT. ANN. 5/12-13 to -15 (West 2002); IOWA CODE ANN. §§ 709.1-.4 (West 2003); ME. REV. STAT. ANN. tit. 17-A, §§ 251-260 (2006); MICH. COMP. LAWS ANN. §§ 750.520a-.520e (West 2004); MINN. STAT. ANN. §§ 609.341-.3451 (West 2003 & Supp. 2008); MISS. CODE ANN. §§ 97-3-71, -95 (West 2005) (although there is a provision on the books for “statutory rape” (§ 97-3-65) and two other evidentiary provisions mentioning “rape” (§§ 97-3-68 to -69) the general name of the offense is now “sexual battery”); MONT. CODE ANN. §§ 45-5-501 to -503 (2007); NEB. REV. STAT. ANN. §§ 28-317 to -320 (LexisNexis 2003); NEV. REV. STAT. ANN. §§ 200.364-.73 (LexisNexis 2006); N.H. REV. STAT. ANN. §§ 632-A:1-A:4 (LexisNexis 2007); N.J. STAT. ANN. §§ 2C:14-1 to -3 (West 2005); N.M. STAT. ANN. §§ 30-9-10 to -12 (LexisNexis 2007); N.D. CENT. CODE §§ 12.1-20-02 to -07 (Supp. 2007); R.I. GEN. LAWS §§ 11-37-2 to -7 (2002); S.C. CODE ANN. §§ 16-3-651 to -654 (2003); TEX. PENAL CODE ANN. §§ 22.011, 22.021 (Vernon Supp. 2006); VT. STAT. ANN. tit. 13, §§ 3251-3253 (Supp. 2007); W. VA. CODE ANN. §§ 61-8B-3 to -7 (LexisNexis 2005); WIS. STAT. ANN. § 940.225 (West 2005); WYO. STAT. ANN. §§ 6-2-301 to -313 (2007).

141. ALA. CODE §§ 13A-6-61 to -65.1 (LexisNexis 2005); ALASKA STAT. §§ 11.41.410-.427 (2006); ARK. CODE ANN. §§ 5-14-124 to -127 (2006); CONN. GEN. STAT. ANN. §§ 53a-70 to -73a (West 2001); DEL. CODE ANN. tit. 11, §§ 767-773 (2007); D.C. CODE §§ 22-3002 to -3005 (2001); HAW. REV. STAT. ANN. §§ 707-730 to -733 (LexisNexis 2007); IOWA CODE ANN. §§ 709.2-.4 (West 2003); KY. REV. STAT. ANN. §§ 510.040-.140 (LexisNexis 1999 & Supp. 2007); MD. CODE ANN., CRIM. LAW §§ 3-303 to -308 (LexisNexis 2002); MICH. COMP. LAWS ANN. §§ 750.520b-.520e (West 2004); MINN. STAT. ANN. §§ 609.342-.3451 (West 2003 & Supp. 2008); MO. ANN. STAT. §§ 566.090-.095 (West 1999 & Supp. 2008); NEB. REV. STAT. ANN. §§ 28-319 to -320 (LexisNexis 2003); N.M. STAT. ANN. § 30-9-11 (LexisNexis 2007); N.Y. PENAL LAW §§ 130.20-.70 (McKinney 2004); N.C. GEN. STAT. §§ 14-27.2-.5 (2005); OKLA. STAT. ANN. tit. 21, § 1114 (West 2002); OR. REV. STAT. §§ 163.355-.445 (2003); R.I. GEN. LAWS §§ 11-37-2 to -7 (2002); S.C. CODE ANN. §§ 16-3-652 to -654 (2003); S.D. CODIFIED LAWS § 22-22-1 (2006); WASH. REV. CODE ANN. §§ 9A.44.040-.060 (West 2000); W. VA. CODE ANN. §§ 61-8B-3 to -5 (LexisNexis 2005); WIS. STAT. ANN. § 940.225 (West 2005); WYO. STAT. ANN. §§ 6-2-302 to -304 (2007).

another thirteen adopted variations of the same offense such as “sexual imposition” and “gross sexual imposition” or “sexual assault” and “aggravated sexual assault.”¹⁴² There are also twenty-nine states combating sex crimes by differentiating offenses such as “rape” and “sexual abuse” or “sexual assault” and “sexual battery.”¹⁴³ Only seventeen states and the District of Columbia explicitly define “consent,” “nonconsent,” “lack of consent,” or “without consent.”¹⁴⁴ Those defining “consent” seem to use an affirmative consent standard requiring that words or actions explicitly indicate voluntary participation.¹⁴⁵ When defining “nonconsent,” “lack of consent,” or

142. ARIZ. REV. STAT. ANN. §§ 13-1406, -1423 (2001); 720 ILL. COMP. STAT. ANN. 5/12-13 to -16 (West 2002); KAN. STAT. ANN. §§ 21-3517 to -3518 (1995); LA. REV. STAT. ANN. §§ 14:41-43 (2007); N.H. REV. STAT. ANN. §§ 632-A:2-4 (LexisNexis 2007); N.J. STAT. ANN. §§ 2C:14-2, -3 (West 2005); N.D. CENT. CODE §§ 12.1-20-03 to -04 (Supp. 2007); OHIO REV. CODE ANN. §§ 2907.05-.06 (West 2006); 18 PA. CONS. STAT. ANN. §§ 3125-3126 (West Supp. 2007); TENN. CODE ANN. §§ 39-13-502 to -505 (2006); TEX. PENAL CODE ANN. §§ 22.011, .021 (Vernon Supp. 2006); VT. STAT. ANN. tit. 13, §§ 3252-3253 (Supp. 2007); VA. CODE ANN. §§ 18.2-67.3 to 67.4 (2004).

143. ALA. CODE §§ 13A-6-61 to -65 (LexisNexis 2005); ARIZ. REV. STAT. ANN. §§ 13-1404 to -1406, -1423 (2001); ARK. CODE ANN. §§ 5-14-103 to -127 (2006); COLO. REV. STAT. ANN. §§ 18-3-402, -404 (West 2004); DEL. CODE ANN. tit. 11, §§ 767-773 (2007); GA. CODE ANN. §§ 16-6-1 to -5.1 (2007); 720 ILL. COMP. STAT. ANN. 5/12-13 to -16 (West 2002); IND. CODE ANN. §§ 35-42-4-1 to -2, -8 (LexisNexis 2004); KAN. STAT. ANN. §§ 21-3502, -3517 to -3518 (1995); KY. REV. STAT. ANN. §§ 510.040-.140 (LexisNexis 1999 & Supp. 2007); LA. REV. STAT. ANN. §§ 14:41-43.2 (2007); ME. REV. STAT. ANN. tit. 17-A, §§ 253, 255-A, 260 (2006); MD. CODE ANN., CRIM. LAW §§ 3-303 to -308 (LexisNexis 2002); MISS. CODE ANN. §§ 97-3-71, -95 to -97 (West 2005); MO. ANN. STAT. §§ 566.030-.100 (West 1999 & Supp. 2008); MONT. CODE ANN. §§ 45-5-502 to -503 (2007); N.J. STAT. ANN. §§ 2C:14-2, -3 (West 2005); N.M. STAT. ANN. §§ 30-9-11 to -12 (LexisNexis 2007); N.Y. PENAL LAW §§ 130.20-.70 (McKinney 2004); N.C. GEN. STAT. §§ 14-27.2 to -27.5A (2005); N.D. CENT. CODE §§ 12.1-20-03 to -04, -07 (Supp. 2007); OHIO REV. CODE ANN. §§ 2907.02-.06 (West 2006); OR. REV. STAT. §§ 163.355-.427 (2003); 18 PA. CONS. STAT. §§ 3121-3126 (West 2000 & Supp. 2007); TENN. CODE ANN. §§ 39-13-502 to -505 (2006); UTAH CODE ANN. §§ 76-5-402 to 405 (2003); VA. CODE ANN. §§ 18.2-61, -67.3 to -67.4 (2004); W. VA. CODE ANN. §§ 61-8B-3 to -9 (LexisNexis 2005); WYO. STAT. ANN. §§ 6-2-302 to -304, -313 (2007).

144. ALA. CODE § 13A-6-70(b) (LexisNexis 2005); ALASKA STAT. § 11.41.470(8) (2006); ARIZ. REV. STAT. ANN. § 13-1401.5 (2001); CAL. PENAL CODE § 261.6 (West 1999); COLO. REV. STAT. ANN. § 18-3-401(1.5) (West 2004); DEL. CODE ANN. tit. 11, § 761(i) (2007); D.C. CODE § 22-3001(4) (2001); FLA. STAT. § 794.011(1)(a) (West 2007); KY. REV. STAT. ANN. § 510.020(2) (LexisNexis Supp. 2007); MINN. STAT. ANN. § 609.341(4)(a) (West 2003); MONT. CODE ANN. § 45-5-501(1) (2007); NEB. REV. STAT. ANN. § 28-318(8) (LexisNexis 2003); N.Y. PENAL LAW § 130.05(2) (McKinney 2004); TEX. PENAL CODE ANN. § 22.011(b) (Vernon Supp. 2006); UTAH CODE ANN. § 76-5-406 (2003); VT. STAT. ANN. tit. 13, § 3251(3) (Supp. 2007); WASH. REV. CODE ANN. § 9A-44.010(7) (West 2000); WIS. STAT. ANN. § 940.225(4) (West 2005).

145. CAL. PENAL CODE § 261.6 (West 1999); COLO. REV. STAT. ANN. § 18-3-401(1.5) (West 2004); D.C. CODE § 22-3001(4) (2001); FLA. STAT. ANN. § 794.011(1)(a) (West 2007); MINN. STAT. ANN. § 609.341(4)(a) (West 2003); VT. STAT. ANN. tit. 13, § 3251(3) (Supp. 2007); WASH. REV. CODE ANN. § 9A-44.010(7) (West 2000); WIS. STAT. ANN. § 940.225(4) (West 2005).

“without consent,” five states refer to a “no means no” standard,¹⁴⁶ while another five require force or threat of force (or incapacitation).¹⁴⁷ Finally, fifteen states and the District of Columbia chose to explicitly state that the victim need not resist for the elements of the crime to be satisfied.¹⁴⁸ While demonstrating the numerous possibilities for statutory structures, these groupings unfortunately do little to illuminate the workings of rape law in modern America.

No understanding of statutory law can be complete without the assistance of case law, which provides further clarification to the statutory language and applies laws to real-world situations. This is certainly true with rape law, where courts in some states have instituted virtual resistance requirements despite explicit language in a statute stating the contrary, while other courts have interpreted “force” as only the physical action necessary to complete a sexual act.¹⁴⁹ Unfortunately, however, case law within the field of rape is “often highly misleading concerning the relationship between the law and social reality.”¹⁵⁰ Authors of rape reform literature often focus on cases found in criminal law casebooks that were only included “because their facts are provocative; they raise interesting doctrinal issues; and they were at least arguably wrongly decided.”¹⁵¹ Therefore, while case law may provide fertile ground for rape law debate, especially when considering cases on the extreme ends of the spectrum, it is not necessarily informative regarding the practical effects of reform.¹⁵² Because reformers sought to achieve increases in

146. ALA CODE § 13A-6-70(b)(3) (LexisNexis 2005); KY. REV. STAT. ANN. § 510.020(2)(c) (LexisNexis Supp. 2007); NEB. REV. STAT. ANN. § 28-318(8) (LexisNexis 2003); N.Y. PENAL LAW § 130.05(2)(c) (McKinney 2004); UTAH CODE ANN. § 76-5-406(1) (2003).

147. ALASKA STAT. § 11.41.470(8) (2006); ARIZ. REV. STAT. ANN. § 13-1401.5 (2001); DEL. CODE ANN. tit. 11, § 761(i) (2007); MONT. CODE ANN. § 45-5-501(1) (2007); TEX. PENAL CODE ANN. § 22.011(b) (Vernon Supp. 2006).

148. ALASKA STAT. § 11.41.470(8)(A) (2006); D.C. CODE § 22-3001(4) (2001); FLA. STAT. ANN. § 794.011(1)(a) (West 2007); IOWA CODE ANN. § 709.5 (West 2003); KY. REV. STAT. ANN. § 510.010(2) (LexisNexis Supp. 2007); ME. REV. STAT. ANN. tit. 17, § 251(1)(E) (2006); MICH. COMP. LAWS ANN. § 750.520i (West 2004); MINN. STAT. ANN. § 609.341(4)(a) (West 2003); MONT. CODE ANN. § 45-5-511(5) (2007); N.J. STAT. ANN. § 2C:14-5a (West 2005); N.M. STAT. ANN. § 30-9-10A (LexisNexis 2007); OHIO REV. CODE ANN. § 2907.02(C) (West 2006); OR. REV. STAT. § 163.315(2) (2003); 18 PA. CONS. STAT. § 3107 (West 2000); VT. STAT. ANN. tit. 13, § 3254(1) (Supp. 2007); VA. CODE ANN. § 18.2-67.6 (2004).

149. See, e.g., *Commonwealth v. Berkowitz*, 641 A.2d 1161, 1164 (Pa. 1994); *In re M.T.S.*, 609 A.2d 1266, 1279–80 (N.J. 1992); see also Cairney, *supra* note 100, at 301–02 (discussing *Berkowitz*).

150. Bryden, *supra* note 3, at 478.

151. *Id.*

152. See *id.*

reporting and conviction rates, fully analyzing the effects of rape law reform requires looking beyond case law in order to identify changes at the pretrial and trial levels.¹⁵³

B. *The "Model" Rape Reform: Michigan's "Criminal Sexual Conduct"*

One would expect to find rape reform's most significant impact in Michigan since "the comprehensive Michigan statute enacted in 1975 is regarded by many as a model rape reform law."¹⁵⁴ The statute created four degrees of criminal sexual conduct.¹⁵⁵ The first and third degrees address crimes involving sexual penetration, while the second and fourth degrees address sexual contact in parallel with sexual penetration.¹⁵⁶ Under the statute, force and coercion include, but are not limited to, circumstances:

(i) When the actor overcomes the victim through the actual application of physical force or physical violence.

(ii) When the actor coerces the victim to submit by threatening to use force or violence on the victim, and the victim believes that the actor has the present ability to execute these threats.

(iii) When the actor coerces the victim to submit by threatening to retaliate in the future against the victim, or any other person, and the victim believes that the actor has the ability to execute this threat. As used in this subdivision, "to retaliate" includes threats of physical punishment, kidnapping, or extortion.

(iv) When the actor engages in the medical treatment or examination of the victim in a manner or for purposes that are medically recognized as unethical or unacceptable.

(v) When the actor, through concealment or by the element of surprise, is able to overcome the victim.¹⁵⁷

153. *See id.*

154. SPOHN & HORNEY, *supra* note 2, at 36.

155. MICH. COMP. LAWS ANN. §§ 750.520b–.520e (West 2004).

156. *Id.*

157. *Id.* § 750.520b(1)(f)(i)–(v).

First degree criminal sexual conduct includes, among other things, sexual penetration where the actor is armed with a weapon and where the actor uses force or coercion to cause personal injury to the victim.¹⁵⁸ On the other hand, in third degree criminal sexual conduct, the actor need not cause personal injury to the victim, but still must use force or coercion.¹⁵⁹ Separate provisions explicitly state that neither corroboration of the victim's testimony nor resistance by the victim is required for prosecution under any degree of criminal sexual conduct.¹⁶⁰ Overall, reformers viewed the Michigan statute as a comprehensive and far-reaching change that would send a powerful message to decision makers in the criminal justice system and potentially achieve significant, instrumental progress.¹⁶¹

Unfortunately, the results of an in-depth study by Cassia Spohn and Julie Horney "indicate that the legal changes did not produce the dramatic results that were anticipated . . ."¹⁶² In the nine years following the adoption of the Michigan reform, reported rapes increased by an average of twenty-six reports per month in Detroit.¹⁶³ While this number seems to indicate a successful legal change, studies concede that the increase likely resulted from the "publicity effect" which was especially strong in Michigan in 1975 when the statute passed.¹⁶⁴ The rate of increase in indictments rose more than the rate of increase in reports, indicating that the legal changes resulted in a higher prosecution rate.¹⁶⁵ Unfortunately, there was no corresponding change in the rate of convictions or in the rate of convictions involving the aggressor's incarceration.¹⁶⁶

Other expected benefits of the Michigan reform also failed to materialize. For example, the availability of a lesser offense did not lead to increased plea bargaining, as some reformers had hoped.¹⁶⁷ Some speculate "that the reforms' implicit focus on the seriousness of the crime of rape may have created an unwillingness to plea bargain

158. *Id.* § 750.520b(1)(e)-(f).

159. *Id.* § 750.520d(1)(b).

160. *Id.* §§ 750.520h-i.

161. SPOHN & HORNEY, *supra* note 2, at 78-79.

162. *Id.* at 100.

163. *Id.* at 86.

164. *Id.* at 101-02.

165. *Id.* at 90.

166. *Id.* at 92.

167. *Id.* at 90-91.

that counteracted the facilitative effects of the definitional changes."¹⁶⁸ In regard to the possibility that *juries* would convict on the lesser charge, prosecutors admitted reluctance to ask for instructions on the lesser offense for fear of causing confusion.¹⁶⁹ Furthermore, the Michigan Supreme Court interpreted the force requirement for third degree criminal sexual conduct to require "the use of force against a victim to either induce the victim to submit to sexual penetration or to seize control of the victim in a manner to facilitate the accomplishment of sexual penetration without regard to the victim's wishes."¹⁷⁰ This level of force would be difficult to prove in many acquaintance rape scenarios.¹⁷¹ Finally, eliminating the corroboration and resistance requirements also had little impact.¹⁷² Decision makers within the criminal justice system still consider corroboration and resistance especially relevant in the acquaintance rape context and allow the factors to affect charging decisions.¹⁷³ Ultimately, the findings indicate that reformers' high hopes "were overly optimistic."¹⁷⁴

Overall, many reformers successfully lobbied for the adoption of their reform proposals. During the wave of reform legislation in the 1970s and 1980s, many states removed resistance requirements, adopted graded offenses, removed the term "rape" or supplemented it with other offenses, and adopted statutory definitions of consent or nonconsent. Unfortunately, for a number of reasons, including unexpected interpretations of statutes and reluctance to change among those individuals responsible for implementing criminal law, the reforms had little impact on acquaintance rape prosecution. Despite these disappointing findings, some reformers still remain optimistic and assert that the symbolic message retains importance even in the absence of instrumental legal change.¹⁷⁵ In this regard, it is certainly possible that "the reforms may have started a process of long-term attitude change that is difficult to measure in a legal impact

168. *Id.* at 161.

169. *Id.*

170. *People v. Carlson*, 644 N.W.2d 704, 709 (Mich. 2002).

171. *See supra* notes 35, 70 and accompanying text.

172. SPOHN & HORNEY, *supra* note 2, at 161–62.

173. *Id.* at 163.

174. *Id.* at 159.

175. *Id.* at 175.

study.”¹⁷⁶ And it is arguable that this attitude change caused the 69% decrease in sexual assaults since 1993.¹⁷⁷

III. TWO SEPARATE CRIMES

Although the long-term attitude change indicates some progress, reformers should not abandon efforts to institute *legal* changes that will similarly improve the law’s performance with regard to acquaintance rapes.¹⁷⁸ To date, reformers have successfully lobbied to remove most of the antiquated obstacles to rape prosecutions;¹⁷⁹ but these changes have had little impact on the prosecution of acquaintance rape cases.¹⁸⁰ In order to affect acquaintance rapes specifically, statutory law should deal with traditional rapes and acquaintance rapes as separate and distinct crimes. This Part considers the theoretical and practical reasons supporting such an approach.

A. *The Theory Supporting Separation: Defendant Culpability*

General principles regarding culpability and punishment guided the formation of the criminal law. Notably, criminal law operates on a theory of proportionality between an actor’s mens rea, his culpability, and appropriate punishment.¹⁸¹ Additionally, “[c]riminal law focuses on retribution, judging the defendant’s culpability for an alleged criminal act; it does not make restitution to a victim”¹⁸² The offenses governing homicide show these principles at work. The person who kills another after meticulous planning will receive a

176. *Id.*

177. *See supra* text accompanying note 1.

178. *See supra* text accompanying notes 1, 163; *see also* SPOHN & HORNEY, *supra* note 2, at 175 (discussing the more positive treatment of rape victims by actors within the criminal justice system).

179. *See supra* text accompanying note 136.

180. *See supra* text accompanying note 174.

181. Sean E. Brotherson & Jeffrey B. Teichert, *Value of the Law in Shaping Social Perspectives on Marriage*, 3 J.L. & FAM. STUD. 23, 27 (2001) (“The reason that different degrees of mental culpability result in different sanctions is not for deterrent value, but because our tradition of justice demands that we attempt to achieve proportionality between the moral blameworthiness of the defendant and the sanction for his wrong.”).

182. Norman J. Finkel, *Haute Couture, Poorly Tailored Crimes, and Ill-Fitting Verdicts*, 10 DUKE J. GENDER L. & POL’Y 173, 193 (2003).

greater penalty than the person who kills in the heat of passion.¹⁸³ In both scenarios, the victim loses his life and the offender is considered a danger to society. Nevertheless, the heat of passion killer receives a more lenient sentence in order to reflect his lower level of culpability.¹⁸⁴ The terminology associated with these crimes also signals the differing levels of culpability: the person who kills in the heat of passion will be guilty of voluntary manslaughter, while the person who premeditates will be considered a murderer.¹⁸⁵ The lower sentence and the use of different terminology indicate criminal law's constancy to judgments based on culpability.

For a system firmly rooted in culpability, the topic is noticeably absent from most rape law literature. Reformers who choose to consider culpability generally initiate the discussion only to show that the acquaintance rapist is, in fact, culpable.¹⁸⁶ Though these discussions may lead to the conclusion that rape law should use various levels of mens rea to prosecute rapists, they rarely include in-depth comparisons of distinguishing factors between acquaintance rapists and stranger rapists.¹⁸⁷ Other reformers implicitly acknowledge culpability differences by proposing various degrees of rape,¹⁸⁸ but typically take for granted the difference in mens rea and fail to offer it as a justification for making acquaintance rape a lesser crime.¹⁸⁹ Still other reformers shift their focus to the *harms* of acquaintance rape and only grudgingly acquiesce to the imposition of lesser penalties in order to

183. See 40 AM. JUR. 2D *Homicide* § 48 (1999) ("A homicide which, even though intentional, is committed under the influence of passion . . . is regarded as an offense of a less heinous character than murder" (citations omitted)).

184. Daina C. Chiu, Comment, *The Cultural Defense: Beyond Exclusion, Assimilation, and Guilty Liberalism*, 82 CAL. L. REV. 1053, 1114 (1994) ("Having acted in the heat of passion, his criminal culpability is reduced from murder to manslaughter.").

185. 40 AM. JUR. 2D *Homicide* § 48 (1999).

186. Andrew E. Taslitz, *Race and Two Concepts of the Emotions in Date Rape*, 15 WIS. WOMEN'S L.J. 3, 75 (2000) ("The indifference of the sexually insensitive personality, however, justifies serious punishment even if the defendant was 'merely' negligent in being unaware of the harm that he did because he did not ask."); see also discussion *supra* Part I.B.1 (regarding whether the indifference described by reformers constitutes negligence or recklessness).

187. Taslitz, *supra* note 186, at 75 ("The more aware the defendant was of the pain he might cause, the closer he comes to pure evil. Date rape involving recklessness thus merits even more punishment (a higher degree of felony), and forcible rape more punishment still.").

188. See discussion *supra* Part I.B.6.

189. See, e.g., Kramer, *supra* note 52, at 157 ("Making nonconsensual penetration a felony rated as a second or third degree offense, which carries a lesser penalty, offers the most promising model, because it realistically reflects the belief that an aggravated rape is a worse offense.").

make their reforms plausible in modern society.¹⁹⁰ These approaches fail to acknowledge the difference between a man who seeks out a victim after deciding he will forcefully engage in sexual intercourse at any cost, and a man who begins his night hoping to find a voluntary sexual partner and ends it choosing to ignore, without using physical violence, the signs of nonconsent offered by his social companion. Failure to acknowledge this difference ultimately proved fatal to the degrees reform proposal because the proposal assumed that both types of offenders could be described by one word: “rapist.”¹⁹¹

To be effective, reforms targeting acquaintance rape need to conform to the underlying culpability theories that have guided the formation of criminal law. Namely, laws aimed at acquaintance rape need to identify the offender’s state of mind and his corresponding culpability as central considerations. Separating acquaintance rape from traditional rape is not dictated by the fact that “society is not ready to accept non-consensual sexual assault as a crime to the degree it accepts forcible sexual assault.”¹⁹² Rather, the separation is necessary because the mental states and corresponding levels of culpability of acquaintance and stranger rapists are so different that they constitute *different crimes*. Viewed in this light, society’s refusal to accept equalization of the crimes is not surprising. Separating the crimes and adopting appropriate terminology would more accurately reflect the actual conduct at issue, which, in the end, should be the true focus of criminal laws.

B. *The Practical Approach*

Discussions about rape frequently include an analysis of various factual differences between traditional rape and acquaintance rape.¹⁹³ Typically, reformers point to differences in order to indicate the

190. See, e.g., Whitney, *supra* note 112, at 443–44 (“[A]lthough both are serious crimes, and although non-stranger non-consensual sexual assault is at least as damaging to the victim as forcible stranger sexual assault, society is not ready to accept non-consensual sexual assault as a crime to the degree it accepts forcible sexual assault.” (footnote omitted)). But see Emily C. Shanahan, Note, *Stranger and Nonstranger Rape: One Crime, One Penalty*, 36 AM. CRIM. L. REV. 1371, 1375 (1999) (“[N]onstranger rape, as measured in terms of harm, is as serious as stranger rape; and . . . regardless of whether physical force is used against the victim, there should be one crime of rape. Consequently, stranger and nonstranger rape warrant the same (serious) baseline sentence.”).

191. See discussion *supra* Part II.B.

192. Whitney, *supra* note 112, at 443–44.

193. See, e.g., ESTRICH, *supra* note 5, at 8–26 (discussing whether acquaintance rape is actually rape).

difficulties in prosecuting acquaintance rape and to explain why the law, as currently embodied, inadequately deals with acquaintance rapes.¹⁹⁴ The real differences between the circumstances of acquaintance rape and traditional rape do more than explain the failure of traditional rape law. Ultimately, these differences, together with the culpability consideration, justify dividing “rape” into separate laws against traditional rape and acquaintance rape.

1. *Types of Offenders and Jury Apprehension*

Jurors’ attitudes toward the two types of offenders reflect the significant differences between traditional and acquaintance rape. Because “[t]he image of the rapist as psychopath has a long history in this country,” members of the public selected to sit on a jury for a rape trial expect to see a psychopath sitting at the defendant’s table.¹⁹⁵ When the trial begins, however, juries find that, “[f]ar from being a noticeable miscreant in a dirty raincoat lurking in the bushes, the typical rapist is likely to be literally the boy next door.”¹⁹⁶ Generally, the acquaintance rapist “is what most people would consider a ‘regular’ guy who looks like part of the community and has ‘the same range of physical, personality and sociocultural characteristics found in the general population of men.’”¹⁹⁷ As a result, prosecutors believe that many juries become biased by the defendant’s appearance.¹⁹⁸

Because of this bias, juries hesitate to conclude “that an eighteen year old college freshman who has non-consensual sexual intercourse with an acquaintance should receive the same penalty as an older man who uses physical force to have sexual intercourse with a stranger.”¹⁹⁹ With this frame of mind, juries fear convicting when physical violence is absent or if there is any indication of victim misconduct, and often assume no rape occurred where there are no physical injuries.²⁰⁰ As a result, “the problem in acquaintance-rape

194. See, e.g., Cairney, *supra* note 100, at 291–304.

195. Christina E. Wells & Erin Elliott Motley, *Reinforcing the Myth of the Crazy Rapist: A Feminist Critique of Recent Rape Legislation*, 81 B.U. L. REV. 127, 154 (2001).

196. Little, *supra* note 36, at 1331–32.

197. Edwards, *supra* note 18, at 267 (quoting MARCIA M. BOUMIL ET AL., DATE RAPE: THE SECRET EPIDEMIC 37 (1993)).

198. Whitney, *supra* note 112, at 433–34.

199. *Id.* at 431.

200. Allison West, *Tougher Prosecution When the Rapist Is Not a Stranger: Suggested Reform to the California Penal Code*, 24 GOLDEN GATE U. L. REV. 169, 182, 185 (1994); Edwards, *supra* note 18, at 264.

cases has been undue leniency, not convictions based on flimsy evidence."²⁰¹ Separating acquaintance rape from traditional rape in the statutory law may help combat this problem by acknowledging the jury's instinct that the acquaintance rapist is, in fact, different from the traditional stranger rapist.

2. *False Reporting*

In addition to the different types of offenders, the risk of false reporting presents an obstacle to the successful prosecution and conviction of acquaintance rapists. The problem is not a new one: "For centuries people have been concerned with false reporting."²⁰² The fear stems from the possibility that "vindictive or mentally disturbed women . . . would deliberately lie about being sexually assaulted to explain away premarital intercourse, infidelity, pregnancy, or disease, or to retaliate against an ex-lover or some other man."²⁰³ These possibilities tend to make people particularly suspicious when a woman names an acquaintance as her attacker.²⁰⁴

To date, most reformers deal with this issue by simply denying the existence of a false reporting rate beyond that found in other serious crimes.²⁰⁵ Unfortunately, however, reformers have failed to convince everyone and "[t]he conclusions of . . . studies vary radically, with the estimated percentages of false reports ranging from 2% to 41%."²⁰⁶ After significant consideration of a study that found a 41% false reporting rate, one set of scholars concluded "that false rape complaints may be much more common than most recent rape scholars have supposed."²⁰⁷

In formulating a law that will effectively criminalize acquaintance rape, the *actual* percentage of false reports is largely irrelevant. Of course, reformers should recognize that most jurors will consider the risk of false reporting in their determination of guilt or innocence. In an acquaintance rape trial, some jurors would consider the risk of

201. Bryden, *supra* note 3, at 385–86.

202. Whitney, *supra* note 112, at 442.

203. SPOHN & HORNEY, *supra* note 2, at 24.

204. Bryden & Lengnick, *supra* note 33, at 1195–96.

205. See Whitney, *supra* note 112, at 442; Bryden, *supra* note 3, at 377; see also Bryden & Lengnick, *supra* note 33, at 1295 ("In contemporary rape scholarship, the topic of false rape reports is normally discussed, if at all, only in passing.").

206. Bryden & Lengnick, *supra* note 33, at 1303–04 (footnote omitted).

207. *Id.* at 1313.

false reporting an automatic reasonable doubt. A statute recognizing acquaintance rape as a separate offense sends the message that the act is considered criminal even in the face of such risks and, therefore, could help the jury focus on the actual elements of the crime.

3. *Alcohol*

Another distinguishing factor between traditional and acquaintance rapes is the presence of alcohol. Alcohol commonly affects the drinker's ability to act rationally and can therefore contribute to poor decision making.²⁰⁸ In stranger rape, the consumption of alcohol by either the defendant or the victim prior to the attack rarely assumes significance because the defense generally focuses on identification rather than consent.²⁰⁹ On the other hand, "[o]ne of the most difficult practical problems with acquaintance rape is the presence of alcohol and its effects on communication and perception."²¹⁰ With a consent defense, interpreting the meaning of the victim's and defendant's actions becomes key, and the presence of alcohol generally only serves to cloud the issue.²¹¹

A woman who consumes alcohol and is subsequently raped by an acquaintance receives little sympathy.²¹² Intoxicated women present targets for men seeking sexual victims and, despite the higher risk that they will be raped, intoxicated women generally receive less protection from the law.²¹³ Some women take comfort in the existence of laws prohibiting rape by intoxication or have been led to believe that they cannot legally consent while intoxicated, but the majority of such statutes only address situations where the defendant causes the intoxication of the victim without her knowledge.²¹⁴ Additionally,

208. Ferzan, *supra* note 123, at 662.

209. See *supra* text accompanying note 24.

210. Ferzan, *supra* note 123, at 662.

211. Ryan, *supra* note 50, at 412.

212. Kramer, *supra* note 52, at 121 ("[I]ntoxicated women are perceived as bearing greater responsibility for being raped.").

213. Ryan, *supra* note 50, at 413.

214. See, e.g., ARK. CODE ANN. § 5-14-101(5) (2006) ("'Mentally incapacitated' means that a person is temporarily incapable of appreciating or controlling the person's conduct as a result of the influence of a controlled or intoxicating substance: (A) Administered to the person without the person's consent . . ."). Many universities provide sexual violence education programs during which young-adult female students will be informed that they cannot legally consent to a sexual encounter if intoxicated. See, e.g., N.C. State University, Health Promotion: Rape and Relationship Violence: Consent, http://www.ncsu.edu/health_promotion/Relationship/consent.html (last visited Jan. 28, 2008) ("An intoxicated partner cannot legally give consent."); Ryan, *supra* note

finding that a woman is *incapable* of consenting due to intoxication generally requires that the victim “be so ‘out of it’ that she does not understand what she is doing or what is going on around her.”²¹⁵ Contrary to the expectations of many women, the victim who consumes alcohol becomes, in a sense, responsible for the behavior of her male assailant.²¹⁶ Because alcohol consumption is so common in acquaintance rapes,²¹⁷ this factor must be considered in the drafting of a law that will effectively combat the crime. Separating acquaintance rape from traditional rape, where alcohol rarely presents a problem, affords reformers such an opportunity.

4. *Harm to the Victims*

The harm inflicted upon acquaintance rape victims is a double-edged sword. On one side, it justifies the recognition of acquaintance rape as a real crime with a real victim; on the other, it provides the reason why most acquaintance rapists are never found guilty of a crime.²¹⁸ To establish that acquaintance rape is and should be legally recognized as a crime, reformers emphasize the psychological damage to the victim.²¹⁹ Prior to an assault, acquaintance rape victims place some level of trust in their attackers; accordingly, after an assault, they doubt their judgments about others in both intimate and social settings.²²⁰ Because the victim voluntarily allowed the attacker into her life, she will be more prone to feelings of guilt and will

50, at 407 (“All too often this position—that the man is automatically guilty of rape if he engaged in sexual intercourse with an intoxicated woman—is promoted by colleges and rape counseling centers.”).

215. Ryan, *supra* note 50, at 416 (quoting Telephone Interview with Nancy O’Malley, Chief Assistant District Attorney, Alameda County District Attorney’s Office (Nov. 11, 2003)); *see, e.g.*, ARK. CODE ANN. § 5-14-101(5) (2006) (“‘Mentally incapacitated’ means that a person is temporarily incapable of appreciating or controlling the person’s conduct as a result of the influence of a controlled or intoxicating substance . . . (B) That renders the person unaware a sexual act is occurring . . .”).

216. Ryan, *supra* note 50, at 413.

217. WARSHAW, *supra* note 35, at 44 (noting 75% of men and 55% of women report drinking or taking drugs immediately prior to an acquaintance rape).

218. Whitney, *supra* note 112, at 421 (“Springing from the historical roots is another reason for criminalizing non-consensual sexual assaults: the damage done to the victim. . . . [V]ictims of sexual assault by non-strangers are affected at least as much as victims attacked by strangers.”); Shanahan, *supra* note 190, at 1377 (“Limiting the cognizable harm of rape to physical injury means that nonstranger rape, because it often involves no physical injury, will not be recognized as a serious crime.”); *see also* ESTRICH, *supra* note 5, at 11.

219. *See, e.g.*, Whitney, *supra* note 112, at 422.

220. West, *supra* note 200, at 177.

wonder what more could have been done to avoid the assault.²²¹ Adding insult to injury, when the attacker is a friend in a social group, other members may pick sides and refuse to offer emotional support.²²² In light of these effects, reformers assert acquaintance rape “is a crime to be taken seriously.”²²³

The acknowledgment that most acquaintance rape victims do not suffer physical injury lies on the other side of the victim harm argument. Although victims may experience physical manifestations of their emotional harm, such as sleep and eating pattern disturbances, acquaintance rape victims rarely suffer external or internal physical injuries.²²⁴ Acquaintance rapists typically rely on verbal coercion or manipulation in combination with their size, rather than physical violence, to secure the victim’s submission.²²⁵ As a result, the circumstances surrounding acquaintance rapes often fail to meet the statutory definition of rape.²²⁶ Many reformers suggest redefining rape or creating separate degrees of the crime, but these proposals are inadequate to solve the problem.²²⁷ “Traditionally, rape has been thought of in terms of a stranger putting a gun to the head of his victim, threatening to kill or beat her, and then forcing her to have intercourse.”²²⁸ Because of these expectations, the absence of physical injury in a rape prosecution is likely to be critical regardless of the degree or statutory definition. A separation of acquaintance rape from traditional rape, however, recognizes the dual nature of the victim’s harm in acquaintance rape. A separate crime of acquaintance rape would provide recognition of a real crime and reduce the expectation of physical injury.

After the publicity effect of the last wave of reform, many people are now familiar with the term acquaintance rape and know how it is distinguishable from traditional rape.²²⁹ The law should follow society and recognize the important differences between traditional and acquaintance rape. Separating acquaintance rape into a different

221. JULIE A. ALLISON & LAWRENCE S. WRIGHTSMAN, *RAPE: THE MISUNDERSTOOD CRIME* 165 (1993); West, *supra* note 200, at 177.

222. Little, *supra* note 36, at 1334.

223. Whitney, *supra* note 112, at 444.

224. Edwards, *supra* note 18, at 269; Whitney, *supra* note 112, at 421.

225. Edwards, *supra* note 18, at 268–69.

226. See discussion *supra* Part I.B.2.

227. See discussion *supra* Parts I.B.2–4, 6.

228. West, *supra* note 200, at 175.

229. Ferzan, *supra* note 123, at 665 (“Date rape has entered the public consciousness. It is the subject of everything from freshman dorm meetings to afternoon soap operas.”).

statute, wholly independent of traditional rape, will acknowledge the offender's culpability and allow for the drafting of elements that conform to the different circumstances of acquaintance rape.

IV. PROPOSED STATUTES

First and foremost, this Note seeks to give legal recognition to the realities and expectations that accompany traditional and acquaintance rapes. Accordingly, this proposal requires, at a minimum, two distinct criminal offenses to combat sex crimes.²³⁰ One statute should be tailored to fit the circumstances of acquaintance rape, while another should be similarly tailored for traditional rape. This Part considers the appropriate content of such statutes in greater detail.

A. "*Acquaintance Rape*"

No statute currently enacted gives full legal recognition to acquaintance rape. In order to increase prosecutions and convictions of acquaintance rape, the law must recognize that it is what it is. The following proposed statute can achieve that goal:

Acquaintance Rape:

An actor is guilty of acquaintance rape if he engages in sexual penetration with an acquaintance who does not consent and:

- (1) the actor knows that the acquaintance does not consent; or
- (2) the actor is reckless in determining whether the acquaintance consents.

Definitions:

As used in this section:

- (1) "*Acquaintance*" means another person with whom the actor has had some voluntary social interaction (privately or in groups) at any time prior to sexual penetration. Voluntary social interaction

230. The author expects that a realistic and comprehensive statutory structure would make use of more than two offenses to deal with the other sex crime scenarios that are beyond the scope of this Note. *See supra* note 20.

includes, but is not limited to, talking, attending social events and/or activities, drinking, and engaging in romantic activities. This term encompasses a variety of relationships including, but not limited to, friends, dates, coworkers, classmates, relatives, and cohabitants.²³¹ This term is not intended to extend to people with whom the actor has had only fleeting encounters.²³²

(2) "Actor" means a person accused of acquaintance rape.²³³

(3) "Consent" means words or overt actions by an acquaintance indicating a freely given present agreement to participate or engage in a particular act of sexual penetration with the actor.²³⁴ Presumptively no consent is obtained in circumstances where:

(a) the agreement is expressed by the words or conduct of a person other than the acquaintance;²³⁵

(b) the acquaintance expresses, by words or conduct, a lack of agreement to participate or engage in the particular sexual penetration;²³⁶

(c) the acquaintance, having consented to participate or engage in sexual penetration, expresses, by words or conduct, a lack of agreement to continue participating or engaging in that or other sexual penetration;²³⁷

(d) the acquaintance is wholly or intermittently unconscious during the sexual penetration;²³⁸

(e) the acquaintance was asleep at the time the sexual penetration was initiated;²³⁹ or

(f) the acquaintance's ability to affirmatively communicate willingness or unwillingness to participate or engage in the sexual penetration is hindered by reason of intoxication with alcohol or

231. BLACK'S LAW DICTIONARY 1288 (8th ed. 2004) (defining relationship rape).

232. *Id.*

233. *See* MICH. COMP. LAWS ANN. § 750.520a(a) (West 2004).

234. *See* MINN. STAT. ANN. § 609.341(4)(a) (West 2003).

235. Canada Criminal Code, R.S.C., ch. C-46 § 273.1(2)(a) (1993).

236. *See id.* § 273.1(2)(d).

237. *See id.* § 273.1(2)(e).

238. Kramer, *supra* note 52, at 152.

239. *Id.*

other substances substantially enough to cause visible physical weakening or impaired verbal ability.²⁴⁰

(4) "Reckless" means willful blindness or failure to take reasonable steps, in the circumstances known to the actor at the time, to ascertain that the acquaintance was consenting.²⁴¹ The actor's self-induced intoxication does not reduce his responsibility to take reasonable steps to ascertain whether the acquaintance consents.²⁴²

(5) "Sexual Penetration" means sexual intercourse, cunnilingus, fellatio, anal intercourse, or any other intrusion, however slight, of any part of an acquaintance's body, but emission of semen is not required.²⁴³

This proposal accounts for the unique factors of acquaintance rape, addresses the offender's culpability, and suggests a fully developed notion of consent. Although defining consent in affirmative consent terminology, the proposed statute still allows for reasonable interpretations of a woman's conduct to prevent the sacrifice of men who truly lack culpable states of mind. In most situations, this will simply require the woman to express her lack of consent in some manner. While some may argue that such a statute unfairly focuses the attention on the woman, it is a slight burden compared to the criminal liability that could otherwise be imposed upon the man. Furthermore, by carefully defining when consent is presumed to be absent, this law requires the man to respond to a woman's expression of nonconsent to avoid criminal liability. Concededly, some cases could still be reduced to a he said/she said debate under this statute, but that is seemingly inevitable when dealing with acquaintance rape. At a minimum, this statute will require the man's interpretations to be reasonable and will dictate the role of alcohol in resolution of the debate.

This statute would also prevent the man from relying on voluntary intoxication to excuse his conduct. At the same time, however, it does not make the man strictly liable any time that he or the victim consumes alcohol. The burden on the man is increased only when he becomes aware by some external manifestation that the

240. *Id.*

241. Canada Criminal Code, R.S.C., ch. C-46 § 273.2 (1993).

242. *Id.*

243. MICH. COMP. LAWS ANN. § 750.520a(o) (West 2004).

woman's intoxication could interfere with her ability to communicate consent. This requirement simply ensures that the man does not behave recklessly.

Because this statute is intended to recognize the differences in mental states between acquaintance and traditional stranger rapists, the appropriate punishment for acquaintance rape should be lower than that imposed upon traditional rapists. But the offense should remain a felony to account for the gravity of the crime.²⁴⁴ Those who condemn a decreased punishment scheme as being inconsiderate of the intense harm inflicted on the victim fail to acknowledge that the criminal law is primarily concerned with the acts of offenders and their corresponding mental states.²⁴⁵ Finally, under this statute, the existence of an acquaintance relationship between the actor and victim would not preclude charging the actor with traditional rape if the circumstances warranted it.

In short, this proposed statute recognizes the serious differences between traditional and acquaintance rape. By making the acquaintance relationship an element of the crime, it explicitly acknowledges the difference between stranger rape and acquaintance rape and explicitly proclaims that the underlying conduct remains criminal despite the relationship. The statute acknowledges that the perpetrator will be the kind of man a woman would choose to befriend and, as a result, will focus the jury's attention on his conduct rather than his identity. Contrary to many modern sexual assault laws that attempt to address all sex crimes under one comprehensive statute, this proposed statute defines an offense so precisely that, upon hearing the facts of a given case, police officers, prosecutors, judges, and juries cannot help but feel that the offender embodies this law. Ultimately, acquaintance rape is what it is and the time is ripe for the law to recognize it as such.

B. *Traditional Rape*

Although the design of a comprehensive statute targeting traditional rape is beyond the scope of this Note, the use of a separate statute for acquaintance rape would also improve traditional rape

244. Consideration of sex offender registries remains beyond the scope of this Note; however, the author believes that, in addition to discouraging plea bargaining, the registries contribute to jury apprehension in convicting offenders. See Wells & Motley, *supra* note 195, at 128–30 (considering the negative impact of sex offender registries on rape prosecutions).

245. See discussion *supra* Part I.B.1.

law. First, with acquaintance rape relegated to its own statute, removing the force and coercion element from traditional rape law would no longer be necessary because the statute would only target offenders who used force and coercion. Second, a separate statute for acquaintance rape would not necessarily render a graded traditional rape statute useless. Consistent with the theories underlying the proposed statute, a graded traditional rape statute could be instrumental in recognizing the differences in culpability among traditional rapists. Additionally, the acquaintance rape statute will not account for sexual touching, spousal rape, sexual assault with a foreign object, sexual assault on a child or mentally or physically incapacitated person, or sexual assault by prison or health care staff. While it would seem inappropriate to group all of these crimes into one, it would be plausible to design a traditional rape statute to account for more than just sexual penetration by force or coercion. These considerations, in combination with experience and ideas gleaned from rape laws as currently embodied, should guide the development of a complementary traditional rape offense.

Bifurcating acquaintance rape and traditional rape has one additional benefit: improved terminology. As previously noted, the proposed statute values the recognition of realities and expectations, and with such recognition comes the need for accurate labeling. Because society may have become accustomed to terms such as "sexual assault" after the last wave of reforms, this proposal does not *require* that offenses aimed at traditional rape once again adopt the term "rape." At the same time, however, there is no reason to fear the prejudices and stereotypes that accompany "rape" when the term is actually aimed at offenders who fit the prejudices and stereotypes. Ultimately, resolution of the naming issue would require a state-by-state analysis. Some states could easily revert to the term "rape," while such a reversion in other states might undermine the efficacy of a comprehensive statute designed to combat several types of sexual crimes. In any case, the adoption of an acquaintance rape statute will require reconsideration of the sex crimes currently in place to ensure cohesiveness.

CONCLUSION

Because the reforms of the 1970s and 1980s failed to sufficiently improve the criminal law's response to acquaintance rape, reformers must make further efforts to change the system. In order to more

directly affect acquaintance rape, the statute proposed above fully acknowledges the differences between acquaintance rape and traditional rape. In addition to recognizing fundamental differences, the proposed statute will conform to society's expectations of these crimes. An inherently sensible system will be more easily and successfully implemented than systems that equate traditional rape with acquaintance rape. Recognizing that acquaintance rape is what it is must be the first step toward achieving a criminal justice system that efficiently deals with this crime.