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Acquaintance Rape & The "Force" Element: When "No" is Not Enough

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COMMENT

ACQUAINTANCE RAPE & THE "FORCE" ELEMENT: WHEN "NO" IS NOT ENOUGH

It is widely accepted that most rapes are acquaintance rapes.[1] Prosecutors and law enforcement officials, however, have repeatedly testified it is almost "impossible to obtain" acquaintance rape convictions.[2] As under the common law,

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1. Dana Berliner, *Rethinking the Reasonable Belief Defense to Rape*, 100 YALE L.J. 2687 n.1 (1991) (citing study which found 81 percent of rapes are acquaintance rapes); TRANSFORMING A RAPE CULTURE 8-9 (Emilie Buchwald et al. eds., 1993) (citing a 1991 National Crime Victimization Survey Report conducted by the Department of Justice which found that 70 percent of rapes are committed by acquaintances); ROBIN WARSHAW, I NEVER CALLED IT RAPE 14 (1988). A 1982 study by Mary P. Koss conducted across the country involving 6,159 college students from thirty-two schools found that 84 percent of the women raped knew their attackers. *Id.* at 11, 189-195. A study by Diana Russell of 930 women in San Francisco revealed of the 88 percent of the victims knew their attackers. *Id.* at 14. A 1986 Massachusetts Department of Public Health study found that two-thirds of the victims who contacted rape crisis centers knew their attackers. *Id.* The American Medical Association issued statistics in 1995 showing that 75 percent of all rapes are perpetrated by "a friend, acquaintance, intimate partner or family member." *Sexual Assault Called 'Silent Violent Epidemic,'* WASHINGTON POST, Nov. 6, 1995, at A03.

The definition of acquaintance rape includes a broad range of relationships between the assailant and the victim. LINDA A. FAIRSTEIN, SEXUAL VIOLENCE 130-131 (1995). The continuum of relationships between the two range from the victim barely knowing the assailant to the victim having an intimate relationship with the assailant. *Id.* The assailant may be a co-worker, neighbor, client, date or someone the victim met at a party or bar. LINDA E. LEDRAY, RECOVERING FROM RAPE 21-24 (1986).

2. Amy McLellan, *Post-Penetration Rape-Increasing the Penalty*, 31 SANTA CLARA L. REV. 779, 783 (1991) (quoting a New York prosecutor who stated, in 1985, that it was almost impossible to prosecute date rape cases). One trial judge recently stated:

> It is almost impossible in this country to get a conviction of rape . . . [I]nstead of trying the defendant, you make the poor girl the defendant . . .

inadequate legal definitions of rape continue to act as a primary barrier to convictions.[3]

Today the element of "force" is one statutory barrier that is almost as great an obstacle to obtaining acquaintance rape convictions as the "old consent approach."[4] Although the definition of the "force" element allows for broad application, overt physical force is often required because courts narrowly construe the element.[5] Narrow application of the "force" element, then, serves to perpetuate the myth that rape is accomplished by physical violence beyond unwanted penetration.[6] The result is that the typical verbal coercion used in acquaintance rapes is not recognized as "forcible rape," but instead rationalized as legal "seduction."[7] Thus, the victim may be sobbing, begging, or pleading with the assailant to stop, but the act will not be "rape" unless some kind of violence, such as kicking, choking, or hitting, has been used by the perpetrator to satisfy the "force" element.[8]

> [G]irls don't report rape for the humiliation involved in it, the degradation they go through in trial . . . They are made the defendant, and they walk out of this court with one thought on their mind: In our courts there is no justice for the victims of rape. And I can't say I disagree with them.

Commonwealth v. Mlinarich, 498 A.2d 395, 415 (Pa. Super. Ct. 1985) (dissenting Judge Spaeth quoting another trial judge). The unlikelihood of conviction in acquaintance rape cases leads many prosecutors to not even file a rape complaint. Barbara Fromm, *Sexual Battery: Mixed Signal Legislation Reveals Need for Further Reform*, 18 FLA. ST. U. L. REV. 599, 600 (1991).

3. McLellan, *supra* note 2, at 783 (citing a New York prosecutor who stated that date rape prosecution was impossible because of state law, lack of public support, and the victim's reluctance to become involved). This comment will only address how the legal definition of rape hinders convictions. Public opinion is only addressed to illustrate how the law reinforces false notions of what the crime involves.

4. SUSAN ESTRICH, REAL RAPE 71 (1987).

5. *Id.*

6. *Id.* at 69.

7. *Id.*; WARSHAW, *supra* note 1, at 139.

8. *See* Goldberg v. State, 395 A.2d 1213 (Md. Ct. Spec. App. 1979); Commonwealth v. Berkowitz, 609 A.2d 1338 (Pa. Super. Ct. 1992); *Mlinarich*, 498 A.2d 395; State v. Weisburg, 829 P.2d 252 (Wash. Ct. App. 1992); Karen Kramer, *Rule by Myth: The Social and Legal Dynamics Governing Alcohol-Related Acquaintance Rapes*, 47 STAN. L. REV. 115, 141 (citing State v. Thomas, No. B9198729, Palo Alto Mun. Ct. Preliminary Examination, Nov. 13, 1991).

This comment will show that courts have construed the "force" element to exclude a broad range of coercive conduct.[9] This application perpetuates rape myths and enables assailants to use a broad range of force without the act being legally recognized as "rape."[10]

Part I explains the development of rape jurisprudence to illustrate how the law has evolved to emphasize the "force" element. Part II examines rape myths that affect the courts' application of the "force" element. The purpose of this section is to dispel the "violent stranger" rape myth and to illustrate that the most typical "force" used by perpetrators is verbal coercion. Part III examines acquaintance rape cases where convictions were reversed due to insufficient "force." These cases illustrate the courts' inability to recognize verbal coercion as sufficient to satisfy the "force" element. The cases also show that when the victim says "no," the assailant's physical aggression against her, which *overrides* and ignores her verbal resistance, is not viewed as sufficient "force."[11]

Part IV endorses and proposes Washington's third degree rape statute,[12] which does not require the "force" element to

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9. *See* cases cited *supra* note 8. Each of these cases show courts narrowly construe the 'force' element, excluding a broad range of coercive conduct. *Id.*

10. *See generally id.*

11. This comment does not address rape cases where overt physical violence beyond penetration is used. This choice is intentional. Cases involving "strangers, weapons, and "positive violence" [stand] the highest chance of being believed." SUSAN BROWNMILLER, AGAINST OUR WILL: MEN, WOMEN AND RAPE 366 (1975). On the other hand, in acquaintance rape cases where subtle force is used, the victim is more likely not to report the crime, the police are more likely to conclude that the complaint is unfounded, prosecutors are more likely to dismiss the complaint, and juries are more likely to acquit. *Id.*; ESTRICH, *supra* note 4, at 8-9, 15; Patricia Lopez, *He said . . . She said . . . An Overview of Date Rape From Commission Through Prosecution Through Verdict,* 13 CRIM. JUST. J. 275 (1992).

This comment also only addresses male on female rapes. Ninety percent of all rape victims are female. Kramer, *supra* note 8, at 116 n.10. Thus, female pronouns will be used when discussing the victims and male pronouns will be used when discussing the assailants. The use of gender specific pronouns is meant to tailor the comment and be a reflection of reality.

12. WASH. REV. CODE ANN. § 9A.44.060 (West Supp. 1995). Rape in the third degree is defined as sexual intercourse with another person where the victim does not consent, and such lack of consent was clearly ex-

prove rape, as a rape statute that more accurately reflects the reality of the crime. Under this statute, courts would not have to muddle through the assailant's behavior to find a push, kick, or shove to call the act rape. If the victim says "no," and the assailant continues, then the act is against the victim's will and is legally recognized as rape. Unlike rape statutes that require "force," this statute recognizes the victim's right to simply say "no" and not be physically assaulted beyond the penetration to prove rape.

I. BACKGROUND

To prove rape,[13] in most states the prosecution must establish four elements beyond a reasonable doubt: sexual penetration, lack of consent, force or threat of force, and mens rea.[14] Sexual penetration requires the penetration of a sexual organ, however slight.[15] Mens rea, although required in most states, is rarely the focus of rape trials.[16] Lack of consent is

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pressed by the victim's words or conduct. *Id.*

13. Under several rape reform statutes, the crime of rape has been renamed to 'sexual assault' or 'criminal sexual conduct.' *See, e.g.*, MICH. COMP. LAWS ANN. § 750.520 (West 1995); MINN. STAT. ANN. § 609.344 (West 1987); S.C. CODE §§ 16-3-651 to -654 (1985); VT. STAT. ANN. tit. 13, § 3254 (Supp. 1994).).

14. Lani A. Remick, *Read Her Lips: An Argument For A Verbal Consent Standard in Rape,* 141 U. PA. L. REV. 1103, 1108 (1993); *See, e.g.*, ALA. CODE §§ 13A-6-60 to 61 (1994); CAL. PENAL CODE § 261 (West Supp. 1996); MD. ANN. CODE art. 27, § 463 (1987); MASS. GEN. LAWS ANN. ch. 265, § 22(b) (West 1990); N.Y. PENAL LAW § 130.05, 130.30 (McKinney 1987); VA. CODE ANN. § 18.2-61(A)(i) (Michie Supp. 1995); State v. Hosey, 339 S.E.2d 414 (N.C. Ct. App. 1986), *modified on other grounds*, 348 S.E. 2d 805 (N.C. 1986) (stating both force and nonconsent are essential elements of rape).

Nonconsent has been eliminated as an element the state must prove in only a handful of states. *See, e.g.,* ILL. REV. STAT. ch. 38, para. 12-17 (1984); MICH. COMP. LAWS ANN. §§ 750.520a-.520l (West 1991); N.J. STAT. ANN. § 2c:14-1 to -8 (West 1982 & Supp. 1992). However, a consent defense is still available and once raised the burden shifts to the prosecution to prove nonconsent beyond a reasonable doubt. Remick, *supra,* note 14, at 1108-09.

15. Lucy R. Harris, Comment, *Towards a Consent Standard in the Law of Rape*, 43 U. CHI. L. REV. 613, 615 (1976). *See, e.g.,* State v. Bruno, 424 S.E.2d 440, 448 (N.C. Ct. App. 1993), *cert. denied and appeal dismissed*, 428 S.E.2d 185 (N.C. 1993) (slightest penetration of the female sex organ by the male sex organ is sufficient to constitute intercourse). Sexual penetration is beyond the scope of this article and will not be addressed.

16. Remick, *supra* note 14, at 1108. Some courts have expressly stated that mens rea is not a required element under their statutes. *Id. See, e.g.,* State v. Reed, 479 A.2d 1291, 1296 (Me. 1984) (explaining that rape does not

rarely defined by statute[17] so many courts refer to the common-law definition to establish the element. Force or threat of force is also rarely defined by statute, but instead is determined on a case-by-case basis, looking at the totality of the circumstances.[18]

A. COMMON-LAW DEFINITION: THE ELEMENT OF "FORCE" IS A SECONDARY ISSUE

English common law defined rape as the carnal knowledge of a woman against her will.[19] American courts adopted this definition of rape, adding the element of force.[20] Thus, under the common law, the prosecution had to prove three elements beyond a reasonable doubt: carnal knowledge, force, and lack of consent.[21]

Although force was an element the state had to prove, "the

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require a culpable state of mind); State v. Houghton, 272 N.W.2d 788, 791 (S.D. 1978) (holding intent is not an element of rape).

17. Berliner, *supra* note 1, at 2689. The few states that define consent by statute usually define it as words or actions indicating "freely given consent." *Id. See, e.g.*, ILL. ANN. STAT. ch. 38, para. 12-17 (Smith-Hurd Supp. 1990); NEV. REV. STAT. ANN. § 200.366(1) (Michie 1986); WASH. REV. CODE ANN. § 9A.44.010 (West Supp. 1995); WISC. STAT. ANN. § 940.225(4) (West Supp. 1995). The California statutory definition of consent also states that any previous dating or marital relationship between the defendant and victim does not by itself constitute consent. CAL. PENAL CODE § 261.6 (West Supp. 1996). To determine lack of consent courts look at the victim's resistance, behavior, and appearance during the assault. Cynthia A. Wicktom, Note, *Focusing on the Offender's Forceful Conduct: A Proposal for the Redefinition of Rape Laws*, 56 GEO. WASH. L. REV. 399, 403-10 (1988).

18. Berliner, *supra* note 1, at 2689-90.

19. Wicktom, *supra* note 17, at 401 (citing E. COKE, THE THIRD PART OF THE INSTITUTES OF THE LAWS OF ENGLAND *60). Under the English common-law, husbands had absolute legal immunity from raping their wives. Leigh Bienen, *Rape III-National Developments in Rape Reform Legislation*, 6 WOMEN'S RTS. L. REP. 170, 184 (Spring 1980). Rape laws were originally "designed to protect the property rights of men to their wives and daughters." *In re* M.T.S., 609 A.2d 1266, 1273 (N.J. 1992).

20. Wicktom, *supra* note 17, at 402; *In re* M.T.S., 609 A.2d at 1270 (explaining that the 1796 New Jersey rape statute had three elements: carnal knowledge, forcibly, and against her will).

21. *See, e.g.*, Askew v. State, 118 So. 2d 219, 221 (Fla. 1960) ("[t]he common-law crime of rape is composed of three essential elements: carnal knowledge, force and the commission of act without consent or against the will of the victim.").

focus was on female nonconsent . . . [and] force was decidedly a secondary issue and remained essentially unaddressed."[22] Force was "only relevant as a means of showing nonconsent."[23] The essence of the crime was lack of consent, which could only be established if the victim physically resisted the assailant to the "utmost" of her ability throughout the assault.[24] To satisfy the "utmost" resistance requirement, the victim had to use all her physical power to combat the assailant until she was overpowered or exhausted.[25] If the victim surrendered or abandoned resistance at any point during the attack, this eventual acquiescence or submission was considered consent.[26]

Courts required "utmost" resistance to establish "nonconsent" primarily due to a lack of faith in women's credibility.[27] The victim was viewed with distrust and thus, courts

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22. ESTRICH, *supra* note 4, at 20.

23. Christina M. Tchen, *Rape Reform and a Statutory Consent Defense*, 74 J. CRIM. L. 1518, 1521 (1983). The addition of the 'force' element prompted courts to require physical resistance. Wicktom, *supra* note 17, at 402.

24. McLain v. State, 149 N.W. 771 (Wis. 1941) ("[t]o constitute rape there had to be an entire absence of consent, and there had to be utmost resistance by the woman by all means within her power."); Starr v. State, 237 N.W. 96 (Wis. 1931) ("[t]o constitute rape, a woman must resist to utmost, and voluntary submission, though yielded after assault and attempt to accomplish act by force, takes away essential element of crime."). Evidence of utmost resistance was also required to prove the secondary element of 'force.' Mills v. United States, 164 U.S. 644, 648-49 (1897) (explaining the requirement that the victim must give utmost resistance to the extent of her ability); *In re* M.T.S., 609 A.2d at 1272.

25. King v. State, 357 S.W.2d 42, 45 (Tenn. 1962) (holding that the jury had to find "that the act was committed . . . against the will and consent of the female who must have resisted the attack in every way possible and continued such resistance until she was overcome by force, was insensible through fright, or ceased resistance from exhaustion, fear of death or great bodily harm.").

26. Susan Schwartz, *An Argument for the Elimination of the Resistance Requirement from the Definition of Forcible Rape*, 16 LOY. L.A. L. REV. 567, 569 (1983); State v. Burgdorf, 53 Mo. 65, 67 (1873) (stating that "[i]t certainly must have been a very amicable struggle indeed, which would inflict no bruises on the girl . . . "); Moss v. State, 45 So. 2d 125, 127 (Miss. 1950) (stating that "[i]nitial force was . . . not enough, for submission may follow.").

27. Schwartz, *supra* note 26, at 568, 569. Courts also asserted other rationales for the 'utmost' resistance requirement. Some courts insisted 'utmost' physical resistance was the natural response of a virtuous woman. ESTRICH, *supra* note 4, at 30. Other courts argued that the 'utmost' physical resistance requirement was legitimate because if a woman did respond

did not want to rely on the victim's subjective testimony alone to establish nonconsent.[28] Physical resistance was then preferred because it provided objective proof of nonconsent.[29] The result of this "death before dishonor"[30] principle in practice, however, caused rape trials to focus almost exclusively on whether the *victim* responded *appropriately* to the assault; i.e., the court determined whether the victim was raped by analyzing her degree of resistance.[31]

B. COMMON LAW: SPECIAL EVIDENTIARY RULES & RATIONALES

The courts' distrust of rape victims was also manifested in three special evidentiary rules: the corroboration requirement, the doctrine of "fresh complaint," and the cautionary instruction.[32] The corroboration requirement forced the victim to produce independent evidence of every element of the crime.[33] The "fresh complaint" doctrine required the victim to report

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with utmost force, it was impossible to rape her. Tchen, *supra* note 23, at 1522, 1524; Bohmer & Blumberg, *Twice Traumatized: The Rape Victim and the Court*, 58 JUDICATURE 391, 398 (1975) (One judge, echoing this sentiment, stated that "a hostile vagina will not admit a penis. . . ."). Thus, this latter rationale essentially asserted that it is impossible to rape a woman.

28. Schwartz, *supra* note 26, at 569; Tchen, *supra* note 23, at 1523 (stating that rape victims were viewed with "distrust").

29. People v. Barnes, 721 P.2d 110, 118 (Cal. 1986). The court explained that "wariness of the complainant's credibility created 'an exaggerated insistence on evidence of resistance'." *Id.* (quoting Lucy Harris, Comment, *Towards a Consent Standard in the Law of Rape*, 43 U. CHI. L. REV. 613, 619 (1976)).

30. Schwartz, *supra* note 26, at 569.

31. *In re* M.T.S., 609 A.2d at 1271. In a 1938 Wisconsin case, for example, the doctor who examined the victim testified that "she was absolutely terrified; she was shaking like a leaf and so incoherent it almost took half an hour to make anything out she said. She was very hysterical. . . .finally she told me she had been out, been raped." State v. Hoffman, 280 N.W. 357, 361 (Wis. 1938). Although the jury convicted the defendant, the Wisconsin Supreme Court reversed the conviction due to lack of sufficient fear and utmost resistance. *Id.*

32. Wicktom, *supra* note 17, at 410, 411.

33. FAIRSTEIN, *supra* note 1, at 15. The corroboration requirement typically forced the victim to produce evidence of torn clothing, injury or bruises since it was rare that a witness could corroborate that the rape had occurred. *Id.* The effect of this requirement meant that in the "most intimate of all assaults, the crime least likely to be witnesses by anyone, the overwhelming percentage of victims were legally barred from ever presenting their stories to a jury." *Id.*

the rape immediately or right after it occurred, or there would be a "strong but not conclusive presumption against a woman."[34] Unlike any other crime, American juries were also given a cautionary instruction[35] based on Lord Hale's warning in 1671 that rape "is an accusation easily made and hard to be proved, and harder to be defended by the party accused, tho never so innocent."[36]

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34. ESTRICH, *supra* note 4, at 53; Morrison Torrey, *When Will We Be Believed? Rape Myths and the Idea of a Fair Trial in Rape Prosecutions*, 24 U.C. DAVIS L. REV. 1013, 1042 (1991); People v. Lutzow, 88 N.E. 1049, 1052 (Ill. 1907) (explaining that where the victim is old enough to understand the offense, "it is usually regarded as a suspicious circumstance if she fails to make the complaint of her mistreatment as soon as she has a reasonable opportunity to do so."). This rule was also justified on the grounds that it was the natural response of a rape victim to immediately report the rape, thus this requirement would deter false complaints. Torrey, *supra* at 1042; Steven I. Friedland, *Date Rape and the Culture of Acceptance*, 43 FLA. L. REV. 487, 513 (1991).

35. Commonwealth v. Mlinarich, 498 A.2d 395, 414 (Pa. Super. Ct. 1985) (Spaeth, J., dissenting) (explaining that the cautionary instruction, among other special rules, was "the most striking feature of the common law . . . that [showed that] the alleged victim was *not* treated by the standard that victims of other crimes were treated.").

36. 1 M. HALE, THE HISTORY OF THE PLEAS OF THE CROWN 635 (1971); Bienen, *supra* note 19, at 184 n.78. The California jury instruction, for example, read: "A charge such as that made against the defendant in this case is one which is easily made and, once made, difficult to defend against, even if the person accused is innocent." People v. Barnes, 721 P.2d 110, 120 n.18. (Cal. 1986); Harris, *supra* note 16, at 617. In 1975, the California Supreme Court held that the cautionary instruction was no longer mandatory. People v. Rincon-Pineda, 538 P.2d 247, 256 (Cal. 1975). The court stated that it found nothing in Lord Hale's writings that supported the belief that juries should be instructed to view the victim's testimony as "presumptively entitled to less credence than those who testify as the alleged victim of other crimes." *Id.* Some judges however still believe juries should be warned about the 'lying rape victim.' People v. Phillips, 536 N.E.2d 1242, 1246 (Ind. Ct. App. 1989) (Pincham, J., dissenting) ("This admonitory truism by Lord Hale approved by our supreme court [in 1930] is just as accurate and viable today as it was when it was first uttered by Lord Hale."). In keeping with this sentiment, some states also presently require rape victims to submit to lie detector tests to decide whether to prosecute the case. Jeanette Krebs and Suzanne Cassidy, *Raped, Then a Lie Detector Test: In Some States, Sexual Assault Victims Suffer Added Indignity of Taking a Polygraph Exam*, SAN FRANCISCO EXAMINER, Oct. 15, 1995, at A8. In California, however, law enforcement officials are prohibited from asking the victim to take a lie detector test and will be subject to a misdemeanor if they do. *Id.* Arizona, Illinois, Maryland, Virginia, New York, Oregon and Michigan have also either banned the requirement that rape victims submit to lie detector tests or limited their use. *Id.* In Illinois, the polygraphing of rape victims was outlawed in 1988. *Id.* In states where the

Each special evidentiary rule was based on a presumption that the accused was often an "innocent" victim who needed extra protection from the vindicative woman who falsely cried rape.[37] This fundamental distrust of the female rape victim was evident in characterizations of her as a "spurned female," "revengeful mistress," or a woman of "excessive or perverted sexuality."[38] Scholars advocated tipping the scales in favor of the accused to protect him from juries who would be inordinately swayed by the victim's colorful lies and rush to convict.[39] Accordingly, the scales were tipped and the evidentiary

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rape victims are required to take a lie detector test, which are inadmissible in court, the lie detector tests are "frequently used when women accuse men they know of raping them." *Cheers & Jeers*, THE PLAIN DEALER, Dec. 29, 1995, at 8B. "In some areas, prosecution of a rape suspect may hinge on a woman's willingness to take a polygraph and on how well she fares on [the] exam" - even though the test itself is "too unreliable to be used as evidence in a trial . . . " Jeanette Krebs and Suzanne Cassidy, *Many Rape Victims Encounter Polygraph Tests*, THE PLAIN DEALER, Dec. 26, 1995, at 5E.

37. Vivian Berger, *Man's Trial, Woman's Tribulation: Rape Cases in the Courtroom*, 77 COL. L. REV. 1, 21 (1977) (quoting 1 J. WIGMORE, J. WIGMORE ON EVIDENCE, § 200, at 683). Dean Wigmore warned courts about the "evil of putting an innocent man's liberty at the mercy of an unscrupulous and revengeful mistress," declaring that "[t]he real victim . . . too often . . . is the innocent man. . . ." *Id.*; Tchen, *supra* note 23, at 1522.

38. Berger, *supra* note 37, at 21, 27. Judge Ploscowe instructed attorneys to be "continually on guard" for rape complaints asserted "by the spurned female that has as its underlying basis a desire for revenge, or a blackmail or shakedown scheme." *Id.* at 21; *See,* MORRIS PLOSCOWE, *Sex Offenses: The American Legal Context,* 25 LAW & CONTEMP. PROBS. 217, 223 (1960); MORRIS PLOSCOWE, SEX AND THE LAW 187-90 (1951). Wigmore also cautioned about "female types of excessive or perverted sexuality," advising that all rape victims should be psychologically tested. Berger, *supra* note 37, at 25. Wigmore stated that "[n]o judge should ever let a sex offense charge go to the jury unless the female complainant's social history and mental makeup ha[s] been examined and testified to by a qualified physician." *Id.* at 22 (quoting 3A WIGMORE, EVIDENCE § 924A, at 737 (Chadburne rev. 1970)). Wigmore stated that "[m]odern psychiatrists have amply studied the behavior of errant young girls and women coming before the court in all sorts of cases. Their psychic complexes are multifarious, distorted partly by inherent defects, partly by diseased derangements or abnormal instincts, partly by bad social environments, partly by temporary physiological or emotional conditions. One form taken of these conditions is that of contriving false charges of sexual offenses by men." 3A WIGMORE, EVIDENCE § 924A, at 737 (Chadburne rev. 1970).

39. Berger, *supra* note 37, at 22. Lord Hale expressed fears that the jury would rush to judgment. *Id.* The rationale was that the public seemed preinclined to think a man would have committed any sex crime, and thus the defendant needed extra protection against "the respect and sympathy naturally felt by any tribunal for a wronged female." ESTRICH,

rules remained in full force until the 1970s,[40] even though the caricature of the lying rape victim was never substantiated.[41]

Today, although all three evidentiary rules have been formally repealed in most jurisdictions,[42] vestiges of the rules remain.[43] Despite rape law reform, police, prosecutors, and jurors still give great weight to evidence of prompt complaint[44] and corroboration.[45]

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supra note 4, at 55-56 (quoting 3A WIGMORE, EVIDENCE § 924A, at 736 (Chadburne rev. 1970)).

40. ESTRICH, *supra* note 4, at 42.

41. Note, *The Victim in a Forcible Rape Case: A Feminist View*, 11 AM. CRIM. L. REV. 335, 337 (1973); Leigh Bienen, *A Question of Credibility: John Henry Wigmore's Use of Scientific Authority in Section 942a of the Treatise on Evidence*, 19 CAL. W. L. REV. 235 (1983).

42. ESTRICH, *supra* note 4, at 42.

43. The Model Penal Code authors advised retaining the corroboration requirement and the cautionary instruction when they revised the Code in 1962. Tchen, *supra* note 22, at 1531 n.75; Bienen, *supra* note 19, at 176. Under the Code, conviction was prohibited based on the victim's testimony without corroboration. The authors explained that "[t]he corroboration requirement is an attempt to skew resolution of such disputes in favor of the defendant . . . [it is] . . . a determination to favor justice to the defendant, even at some cost to the societal interest in effective law enforcement and to the personal demands of the victims for redress." ESTRICH, *supra* note 4, at 46. Authors of the Code also retained the prompt complaint doctrine. MODEL PENAL CODE § 213.6(4) (Proposed Official Draft 1962); ESTRICH, *supra* note 4, at 46.

44. ESTRICH, *supra* note 4, at 46. Although prompt complaint is not legally required by the majority of states, police and prosecutors still consider it important. Torrey, *supra* note 34, at 1043 (noting a national study which found that evidence of prompt complaint was the third most important factor to prosecutors in deciding whether to file a criminal charge). Some prosecutors may not believe the victim has been raped if she does not report the crime immediately. Lisa Frohmanm, *Discrediting Victims' Allegations of Sexual Assault: Prosecutorial Accounts of Case Rejections*, *in* RAPE & SOCIETY 207 (Patricia Searles et al. eds., 1995). One prosecutor, for example, recently stated that the victim "didn't call the police until four hours later. That isn't consistent with someone who has been raped." *Id.* Some courts have also refused to admit the complaint if the victim did not report the rape as soon as practicable. Torrey, *supra,* note 34, at 1043-1044. *See* People v. Fuelner, 432 N.E.2d 986, 994 (Ill. App. Ct. 1982) (victim didn't report rape until 24 hours after assault); People v. Szybeko, 181 N.E.2d 176, 179 (Ill. 1962). Courts have also found that the failure to make a prompt complaint casts doubt on the victim's credibility. *See, e.g.*, People v. Hughes, 343 N.Y.S.2d 240, 243 (N.Y. App. Div. 1973); People v. Bain, 283 N.E.2d 701, 703 (Ill. App. Ct. 1972). Giving weight to delayed reporting however is endorsing another rape myth since it is the normal and common reaction to delay reporting for many rape victims. Fromm, *supra* at 207-08. For criticism of the above cases, *see*, Dawn M. DuBois, Note, *A Matter of*

C. RAPE LAW REFORM: "FORCE" BECOMES A PRIMARY ELEMENT

Rape law reform within the last twenty years has made the element of "force" a primary issue in rape trials.[46] This change is illustrated by the Model Penal Code[47] and Michigan[48] rape reform statutes. Under both statutes, the element of nonconsent has been eliminated and replaced by "force" as the primary element.[49] Other states have emulated this approach, giving new meaning to the amount of force used by the perpetrator.[50]

Most rape law reform occurred during the late 1970s.[51] One important goal of rape law reform was to redefine rape to shift the focus away from scrutinizing the victim's behavior at trial.[52] The element of lack of consent and resistance had enabled courts to focus attention solely on the propriety of the victim's behavior.[53] Reformers hoped to redefine the offense to

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Time: Evidence of a Victim's Prompt Complaint in New York, 53 BROOK. L. REV. 1087 (1988).

45. Torrey, *supra*, note 34, at 1049 n.177 (citing Feild and Bienen study which found that jurors typically look for injuries on the victim and their absence often suggests to them that no rape has occurred.); *see infra* note 36.

46. ESTRICH, *supra* note 4, at 84. Professor Estrich explains that most rape reform statutes have chosen to redefine rape, focusing on the 'force' element. *Id.*

47. MODEL PENAL CODE § 213 (1980).

48. MICH. COMP. LAWS ANN. § 750.520(b)-(e) (West 1991).

49. Tchen, *supra* note 23, at 1530, 1537.

50. *See* ESTRICH, *supra* note 4, at 59, 71.

51. Bienen, *supra* note 19, at 172. Feminists, law and order groups, and victims rights groups led the reform movement. Wallace D. Loh, *The Impact of Common Law and Reform Rape Statutes on Prosecution: An Empirical Study*, 55 WASH. L. REV. 543, 567 (1980). *See generally*, Ronald J. Berger et al., *Rape-Law Reform: Its Nature, Origins, and Impact*, *in* RAPE & SOCIETY 227 (Patricia Searles et al. eds., 1995). The feminist movement and feminist groups were considered the driving force behind reform. Loh, *supra* at 569-70.

52. Patricia Searles and Ronald J. Berger, *The Current Status of Rape Reform Legislation: An Examination of State Statutes,* 10 WOMEN'S RTS. L. REP. 25-26 (1987). Until the late 1970s, rape continued to be legally defined as it had been from the 18th century. *In re* M.T.S., 609 A.2d 1266, 1270 (N.J. 1992) (explaining that 'carnal knowledge,' 'force,' and 'against her will' remained the primary elements of the crime until 1979.).

53. *In re* M.T.S., 609 A.2d at 1270-72 (stating that, "[r]ape prosecutions turned then not so much on the forcible or assaultive character of the defendant's actions as on the nature of the victim's response. "). *Id.* at 1272.

focus on the defendant's criminal conduct or his use of "force" instead.[54] The result was that many states reformed their statutes based on the Model Penal Code, which advocated limited reform,[55] or the Michigan statute,[56] hailed as the first victim-oriented reform statute.[57]

The Model Penal Code authors created the first rape reform statute in 1962.[58] The Code's authors divided the crime into three degrees of sexual offenses based on the amount of force used and the relationship between the victim and offender.[59] Rape in the first degree was defined as sexual intercourse when the offender "compels her to submit by force or threat of force of imminent death, serious bodily injury, extreme pain or kidnapping . . . ."[60] To prove first degree rape, the victim needed to have been seriously injured or not the voluntary social companion of the offender.[61] Second degree rape was defined according to the same elements, except the victim could be a social companion of the offender and did not have to suffer any injury.[62] Finally, the third degree "Gross

54. Searles, *supra* note 52, at 25-26.

55. Tchen, *supra* note 23, at 1531 n.75; MODEL PENAL CODE § 213.1 (1980).

56. Tchen, *supra* note 23, at 1537; MICH. COMP. LAWS ANN. § 750.520(b)-(e) (West 1991).

57. Bienen, *supra* note 19, at 172. Professor Estrich asserts that reformers have two 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)." ESTRICH, *supra* note 4, at 84. Most reform statutes have chosen to focus on the assailant's force. *Id.*

58. Tchen, *supra* note 23, at 1529; Susan Estrich, *Rape*, 95 YALE L.J. 1087, 1134 (1986). The Code's rape provisions were presented to the American Law Institute in 1955 and then adopted in 1962. *Id.* (citing Model Penal Code § 213.1 cmt. at 274 n. (1980)).

59. MODEL PENAL CODE § 213.1. (1980). The Code defines first degree rape as sexual intercourse where the actor compels her to submit by force or threat of imminent death, serious bodily injury, extreme pain or kidnapping, to be inflicted by anyone. Rape is a felony of the second degree unless (i) in the course thereof the actor inflicts serious bodily injury upon anyone, or (ii) the victim was not a voluntary social companion of the actor upon the occasion of the crime and had not previously permitted him sexual liberties, in which cases the offense is a felony of the first degree. The third degree gross sexual imposition statute is defined as sexual intercourse he compels her to submit by any threat that would prevent resistance by a woman of ordinary resolution. *Id.*

60. *Id.*

61. *Id.*

62. *Id.*

Sexual Imposition" statute was defined as sexual intercourse when the offender "compels her to submit to any threat that would prevent resistance by a woman of ordinary resolution . . . ."[63]

In their comments, the Code's authors explained that the element of nonconsent had been eliminated and the crime defined solely in terms of "force" because traditional rape law had placed "disproportionate emphasis upon the objective manifestations by the woman."[64] Nonconsent, however, was not irrelevant, i.e., the authors explained that the term "compulsion" was intended to encompass the element of nonconsent.[65]

Resistance by the victim also remained a focus. The Code's commentary suggested that the authors intended to require the rape victim to earnestly resist under the first and second degree rape statutes.[66] Resistance also remained a fo-

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63. *Id.*

64. MODEL PENAL CODE § 213.1 commentaries at 303-04, 280-81(American Law Institute, 1980); ESTRICH, *supra* note 4, at 58-59. The Code's authors stated:

> There are a number of problems that arise if too much emphasis is placed upon the non-consent of the victim as opposed to the overreaching of the actor. In the first place, overemphasis on non-consent tends to obscure differences among the various circumstances covered by the law of rape. An exclusive focus on non-consent would collect under one label the wholly uninvited and forceful attack by a total stranger, the excessive zeal of a sometime boyfriend, and the clever seducer who dupes his victim into believing that they are husband and wife. In the words of one commentator, such an approach would compress into a single statute a diversity of conduct ranging from "brutal attacks . . . to half won arguments . . . in parked cars.

MODEL PENAL CODE Commentaries § 213.1 comment at 302 (1980) (quoting Comment, *Forcible and Statutory Rape: An Exploration of the Operation and Objectives of the Consent Standard*, 62 YALE L.J. 55, 55-56 (1952).

65. MODEL PENAL CODE § 213.1 comment at 306 (Official Draft and Revised Commentaries 1980); Tchen, *supra* note 23, at 18 (explaining that the Code's commentary stated that "[c]ompulsion plainly implies non-consent.").

66. MODEL PENAL CODE § 207.4 comment at 246 (Tent. Draft No. 4, 1955). In these comments the authors stated that: "[S]ometimes, in order to make it perfectly clear that a token initial resistance is not enough, existing law specifies that the woman must resist 'to the utmost.' We believe that

cus under third degree because the statute expressly required force to be measured against resistance.[67]

Many states followed the Code's approach, revising their statutes to define the "force" element as "forcible compulsion," "compulsion," or that which "causes" the victim to submit.[68] Statutes that used the "forcible compulsion" term typically defined it as force that overcomes the victim's resistance, thus continuing to make resistance an issue.[69] States that emulated the Code's new emphasis on "force" also continued to formally require the element of nonconsent.[70]

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the requirements that she be 'compelled to submit' is adequate for this purpose." *Id.*

67. Tchen, *supra* note 23, at 1530.

68. ESTRICH, *supra* note 4, at 59; Tchen, *supra* note 23, at 1531-1532. *See*, ALA. CODE § 13A-6-61 (1994) (rape in the first degree is when a man engages in sexual intercourse with a female by forcible compulsion); ARK. CODE ANN. § 5-14-103 (Michie 1993) (rape defined as sexual intercourse by forcible compulsion); COLO. REV. STAT. ANN. §§ 18-3-402(3) (West 1990) (second degree sexual assault is when the actor causes the victim's submission to sexual penetration by means reasonably calculated to cause submission against the victim's will); HAW. REV. STAT. § 707-730 (Supp. 1992) (sexual assault in first degree if person knowingly subjects another person to an act of sexual penetration by strong compulsion); KY. REV. STAT. ANN. § 510.040 (Baldwin 1994) (first degree rape is sexual intercourse by forcible compulsion); ME. REV. STAT. ANN. tit. 17-A, § 253 (West Supp. 1994) (gross sexual assault is when a person engages in a sexual act with another and other person submits as a result of compulsion); MO. ANN. STAT. § 566.030 (Vernon 1995) (rape defined as sexual intercourse by forcible compulsion); N.D. CENT. CODE 12.1-20-03 (1985) (gross sexual imposition is when the actor compels the victim to submit by force or threat of force to a sexual act); OR. REV. STAT. § 163.375 (1990) (first degree rape is sexual intercourse accomplished by forcible compulsion); WYO. STAT. § 6-2-302 (1977) (first degree sexual assault is where the actor inflicting sexual intrusion on victim causes victim to submit through force which is reasonably calculated to cause submission).

69. Berliner, *supra* note 1, at 2692 n.36; *See, e.g.*, ALA. CODE § 13A-6-60(8) (1994); 18 PA. CONS. STAT. ANN. § 3121 (Supp. 1995); WASH. REV. CODE ANN. § 9A.44.040 to 05 (WEST 1988).

70. Tchen, *supra* note 23, at 1531-32. The statutes in Pennsylvania and New York are typical examples of those states that followed the Code, defining rape in terms of 'forcible compulsion' but still requiring the element of nonconsent. Bienen, *supra* note 19, at 175 n.37 and n.38;); N.Y. PENAL LAW § 130.35 (McKinney 1987) (first degree rape is sexual intercourse with a female by forcible compulsion); 18 PA. CONS. STAT. ANN. § 3121 (Supp. 1995) (first degree rape defined as sexual intercourse accomplished by forcible compulsion or by threat of forcible compulsion that would prevent resistance by a person of reasonable resolution).

Essentially, although the Code created many significant changes that reformers later used, other aspects of the Code's reformulation limited its appeal.[71] The Code's inclusion of a corroboration requirement, the prompt complaint doctrine, and the defense of mistake of age "were incompatible with the goals of feminist lobbying for rape reform legislation."[72] Other ostensible limitations were the resistance requirement and categorical rejection of allowing married women to assert rape charges against their husbands.[73] The Code's biases against other acquaintance rapes also limited the effect the statute would have on the majority of rape cases.[74] Although these factors limited its appeal to feminist reformers, by 1980, thirty-nine states had revised their statutes based on some aspects of the Model Penal Code.[75]

The limited changes brought about as a result of the Code's redefinition prompted "reformers to write their own laws."[76] The result was the 1974 Michigan "criminal sexual conduct" statute, which divided sex offenses into four different degrees.[77] First and third degree criminalized sexual penetra-

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71. Bienen, *supra* note 19, at 175 (stating that " . . . the Model Penal Code's formulation of sex offenses was based upon a 1950's view that rape was a crime fantasized by pseudo-victims . . . " *Id.* at 176).

72. *Id.* at 175.

73. MODEL PENAL CODE § 213.6(2) (1980). The Code's authors stated that the traditional reason for not allowing married women to assert rape charges against their husbands is probably based in the "wife as chattel" idea. MODEL PENAL CODE § 213.1 comment at 343 (1980). The author argued that this aspect of rape law should be retained to avoid "unwarranted intrusion of the penal law into the life of the family." *Id.* at 345.

74. MODEL PENAL CODE § 213.1 comment at 307 (1980). The Code's authors stated that "the gravity of the wrong is arguably less severe" when there is a prior relationship between the victim and accused. *Id.*

75. Bienen, *supra* note 19, at 175 n.31.

76. Tchen, *supra* note 23, at 1537. "The Michigan reform statute was largely the work of the Michigan Women's Task Force on Rape." Estrich, *supra* note 58, at 1147.

77. MICH. COMP. LAWS ANN. § 750.520 (West 1995). Section 750.520(b): First degree criminal sexual conduct includes in part:

> (1) A person is guilty of criminal sexual conduct in the first degree if he or she engages in sexual penetration with another person and if any of the following circumstances exists:
>
> (a) That other person is under 13 years of age.
>
> (c) Sexual penetration occurs under circumstances involving the commission of any other felony.

(d) The actor is aided or abetted by 1 or more other persons and either of the following circumstances exists:

(i) The actor knows or has reason to know that the victim is mentally incapable, mentally incapable, mentally in capacitated, or physically helpless.

(ii) The actor uses force or coercion to accomplish the sexual penetration. Force or coercion includes but is not limited to any of the circumstances listed in subdivision (f) (i) to (v).

(e) The actor is armed with a weapon or any article used or fashioned in a manner to lead the victim to reasonably believe it to be a weapon.

(f) The actor causes personal injury to the victim and force or coercion is used to accomplish sexual penetration. Force or coercion includes but is not limited to any of the following 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 the threat . . .

Section 750.520(c): Second degree criminal sexual conduct includes in part:

(1) A person is guilty of criminal sexual conduct in the second degree if the person engages in sexual conduct with another person and if any of the following circumstances exist:

(iii) The actor is in a position of authority over the victim and the actor used this authority to coerce the victim to submit.

(d)(ii) The actors uses force or coercion to accomplish the sexual contact . . .

Section 750.520(d): Third degree criminal sexual conduct includes in part:

(1) A person is guilty of criminal sexual conduct in the third degree if the person engages in sexual penetration with another person and if any of the following circumstances exist:

(b) Force or coercion is used to accomplish the sexual penetration. Force and coercion includes but is not limited to any of the circumstances listed in section 520(1)(f)(i) to (v).

Section 750.520(e): Fourth degree criminal sexual conduct includes in part:

(1) A person is guilty of criminal sexual conduct in the

tion by *"force or coercion."*[78] Second and fourth degree criminalized sexual contact by *"force or coercion."*[79] Nonconsent was eliminated as an element[80] and the statute expressly stated that the victim did not need to resist under any degree.[81]

Although the Michigan law criminalized a broader range of conduct by allowing *"force or coercion,"*[82] only a handful of states adopted this approach by "explicitly including coercion."[83] In addition, only three other states eliminated nonconsent as an element the state had to prove.[84] More states, however, did follow Michigan's lead by repealing the resistance requirement.[85]

> fourth degree if he or she engages in sexual contact with another person and if any of the following circumstances exist:
>
> (a) Force or coercion is used to accomplish the sexual contact. Force or coercion includes but is not limited to any of the circumstances listed in section 520b(1)(f)(i) to (iv).

MICH. COMP. LAWS ANN. § 750.520 (West 1995).

78. MICH. COMP. LAWS ANN. § 750.520(b)(d) (West 1991).

79. MICH. COMP. LAWS ANN. § 750.520(c)(e) (Supp. 1995).

80. *Id.;* People v. Nelson, 261 N.W.2d 299, 307 n.31 (Mich. Ct. App. 1977), *modified on other grounds*, 281 N.W.2d 134 (Mich. 1979) (quoting The Michigan House Judiciary which stated that: "[t]he question as to whether or not the victim "consented" is not an issue in any other felony other than rape. This bill would make the rape standard consistent with the standard for other felonies by allowing the victim to assess rationally the danger of injury or death and conduct herself/himself accordingly.") (House Judiciary Committee analysis of Senate Bill 1207 (June 27, 1974)).

81. ESTRICH, *supra* note 4, at 85-86.

82. MICH. COMP. LAWS ANN. § 750.520(b) to (e) (Supp. 1995). The statute also provided a non-exclusive list of objective factors which satisfied the 'force' or 'coercion' element. Wicktom, *supra* note 16, at 419.

83. CAL. PENAL CODE § 261 (West 1988) (rape is sexual intercourse accomplished by force, violence, duress, menace, or fear of immediate and unlawful bodily injury); MINN. STAT. ANN. § 609.344 (West 1987) (third degree criminal sexual conduct is defined as sexual penetration accomplished by force or coercion); N.J. STAT. ANN. § 2C:14-2 (West 1982); N.M. STAT. ANN. § 30-9-11 (Michie 1994) (first degree criminal sexual penetration is sexual penetration by the use of force or coercion that results in great bodily harm or great mental anguish to the victim); R.I. GEN. LAWS §§ 11-37-1, -2 (1994); S.C. CODE §§ 16-3-651 to -654 (1985); S.D. CODIFIED LAWS ANN. § 22-22-1 (1988); TENN. CODE ANN. §§ 39-13-503 (Supp. 1995).

84. Berliner, *supra* note 1, at 2789 (explaining that "[s]ome states have eliminated lack of consent as an element of the crime but provide that victim consent is a defense.").

85. States that repealed the resistance requirement include: ALASKA

Despite the fact that the Michigan statute has been considered the first victim-oriented rape law, commentators have criticized it as traditional in some aspects.[86] Professor Estrich has criticized the statute's definition of "force or coercion" as limiting the "statute's application to cases of conventional violence" while not addressing non-violent rape cases.[87] One definition of "force or coercion," for example, requires the perpetrator to overcome the victim through actual physical violence or force.[88] Professor Estrich has argued that this definition enables courts to apply a limited understanding of what "force" is and ignore the vast majority of rape cases that occur without injury or physical brutality.[89]

Others have criticized the elimination of the element of consent as "less consistent with the feminist goal of criminalizing a wider range of nonconsensual contacts, since the only illegal contacts are those associated with a particular specified set of criminal circumstances."[90] Again, this criticism is directed at the narrow definition of rape which only criminalizes rape when physical force is used.[91] Statutes that prohibit nonconsensual penetration without any showing of force, unlike the Michigan statute, are considered to be more consistent with feminist goals of reform.[92]

D. RESULTS OF REFORM: HOW THE "FORCE" ELEMENT IS PRESENTLY DEFINED

Rape law reform increased emphasis on the assailant's use of force, but left the element essentially undefined.[93] Courts

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STAT. § 11.41.470(4)(A) (1989); ILL. REV. STAT. ch. 38, para. 12-17 (Supp. 1987); MICH. COMP. LAWS ANN. § 750.520(i) (West 1991); MINN. STAT. ANN. § 609.347(2) (West 1987); OHIO REV. CODE ANN. § 2907.02(C) (Anderson 1993); PA. STAT. ANN. tit. 18, § 3107 (1983); R.I. GEN. LAWS § 11-37-12 (1994); VT. STAT. ANN. tit. 13, § 3254 (Supp. 1994).

86. Estrich, *supra* note 58, at 1150-1151; ESTRICH, *supra* note 4, at 84-88.

87. Estrich, *supra* note 58, at 1151.

88. MICH. COMP. LAWS ANN. § 750.520b(1)(f)(i) (West 1991).

89. Estrich, *supra* note 58, at 1155.

90. Searles, *supra* note 52, at 26.

91. *Id.*

92. *Id.*

93. Berliner, *supra* note 1, at 2689-2690. In New Jersey, for example, rape reform occurred in 1978. *In re* M.T.S., 609 A.2d 1266 (1992). "Since the

and legislatures, in fact, have rarely defined what "force" or "threat of force" actually is,[94] indicating the standard may simply be a "I know it when I see it" rule.[95] One court has argued that "force" does not need to be defined because "a person of common intelligence and experience [can] distinguish, without difficulty, between sexual acts accomplished by force . . . and for example sexual activity between consenting adults."[96] Courts, however, have often struggled to distinguish what kind of conduct satisfies the element of "force" or "threat of force."[97]

Despite the ambiguity, the state must show that the defendant used either actual physical force or threatened to use actual physical force likely to cause serious bodily injury.[98] Courts typically require the "force" to be beyond that inherent in penetration and enough to establish that the sex was involuntary.[99] Again, most courts do not mandate that a par-

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1978 reform, the [New Jersey] Code has referred to the crime that was once known as "rape" as "sexual assault." The crime now requires "penetration," not "intercourse." It requires "force" or "coercion," not "submission" or "resistance."" *Id.* at 1275. However, "the reform statute defines sexual assault as penetration accomplished by the use of "physical force" or "coercion," but it does not define either "physical force" or "coercion" . . . [t]he task of defining "physical force" therefore was left to the courts. That definitional task runs the risk of undermining the basic legislative intent to reformulate rape law." *Id.*

94. *Id.*

95. ESTRICH, *supra* note 4, at 60.

96. People v. Bowen, 609 N.E.2d 346, 354 (Ill. App. Ct. 1993) (defendant asserted that the definition of 'force' was unconstitutionally vague and an average, intelligent person could not determine what degree of 'force' was required.).

97. *See In re* M.T.S., 609 A.2d 1266 (N.J. 1992) (holding 'force' can be satisfied by penetration in order to avoid requiring the victim to resist); Commonwealth v. Berkowitz, 609 A.2d 1338, 1346 (Pa. Super. Ct. 1992) (stating that "[w]hat is comparably uncertain, however, in the absence of either an injury or resistance requirement, is the precise degree of actual physical force necessary to prove "forcible compulsion."); Commonwealth v. Mlinarich, 498 A.2d 395 (Pa. Super. Ct. 1985).

98. JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW 523 (1993).

99. State v. McKnight, 774 P.2d 532, 535 (Wash. Ct. App. 1989). Professor Estrich explains that the kind of 'force' many courts look for "is force used to overcome female nonconsent." ESTRICH, *supra* note 4, at 60. For some courts, the concept of consent is retained in the 'force' element, which is considered its "conceptual opposite." State v. Camara, 781 P.2d 483, 486 (Wash. 1989). One court states that "[w]hile some have suggested that rape law reform has eliminated consent as an issue in rape prosecu-

ticular amount of force or threatened force be used, stating that the degree of force is relative and depends on the totality of the circumstances.[100] In practice, this means that many courts determine if force is present on a case-by-case basis, depending on the particular facts of each case and each judge's understanding of what type of conduct is equivalent to "force."[101]

Where the victim asserts that the threat of force was used, as is often the case in acquaintance rapes, some courts have set out factors to be considered. First, the threat does not need to be expressly made by words or the brandishing of a weapon, i.e., the threat of force can by implied by the defendant's acts alone.[102] The threat of force must, however, usually show that the victim was placed in real apprehension of imminent and serious bodily harm and that this fear was objectively reasonable under the circumstances.[103] To determine if the fear was reasonable, courts may consider the respective ages, physical sizes and mental conditions of the victim and defendant.[104] Other factors to consider include the physical setting of the

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tions, . . . the substitution of "forcible compulsion" for lack of consent seems more of a refinement than a reformulation." *Id.*

100. People v. Patterson, 410 N.W.2d 733, 740 (Mich. 1987) (stating that coercive circumstances are determined looking at the totality of the circumstances); Prokop v. State, 28 N.W.2d 200, 203 (Neb. 1947) (explaining that the degree of force is relative and depends on the circumstances, but must be enough to overcome the victim); Commonwealth v. Rhodes, 510 A.2d 1217, 1226 (Pa. 1986) (stating that determination of forcible compulsion or threat of forcible compulsion depends on the totality of circumstances in each case).

101. State v. Rusk, 424 A.2d 720, 726 (Md. Ct. App. 1981) (explaining that no particular amount of force is required but depends on the circumstances); Berliner, *supra* note 1, at 2690.

102. State v. Gossett and Clapper, 808 P.2d 1326, 1328 (Idaho Ct. App. 1991).

103. People v. Barnes, 721 P.2d 110, 122 n.20 (Cal. 1986) (holding that the victim's fear must be reasonable, but it may be unreasonable if the defendant "knowingly takes advantage of that fear."); Goldberg v. State, 395 A.2d 1213 (Md. Ct. Spec. App. 1979); *Rusk*, 424 A.2d at 726-27 (holding that the victim's fear must be reasonable as well as honest); *Mlinarich*, 498 A.2d at 398 (stating coercion is established according to an objective test). At least one court has held that the victim's fear does not have to be reasonable, but is instead to be viewed subjectively, from the eyes of the victim. Salsman v. Commonwealth, 565 S.W.2d 638 (Ky. Ct. App. 1978).

104. *Mlinarich*, 498 A.2d at 419 (Spaeth, J., dissenting); *Berkowitz*, 609 A.2d at 1344.

assault, such as whether the victim was in an isolated place, and "the extent to which the accused may have been in a position of authority, domination or custodial control over the victim . . . ."[105]

In some states, the victim is required to resist the assailant in order to satisfy the "force" element.[106] In states that require victim resistance, "force" is not defined independently but is instead defined in relation to the victim's response.[107] Some states require "earnest" resistance,[108] while others require "reasonable" resistance.[109] In a few states, resistance may also include means other than just physical.[110] If, however, the victim did not resist, she must show that the resistance was futile or that the "physical resistance would increase the likelihood of violence by the perpetrator."[111] Still, despite the

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105. *Berkowitz*, 609 A.2d at 1344.

106. *See, e.g.*, ALA. CODE § 13A-6-60(8) (1994); WASH. REV. CODE ANN. § 9A.44.010(6) (Supp. 1995). Although Pennsylvania has repealed the resistance requirement, the court has continued to require resistance in practice. *Berkowitz*, 609 A.2d at 1338.

107. Berliner, *supra* note 1, at 2692. (explaining that forcible compulsion statutes usually define that term to mean force or threats of force to overcome some level of resistance).

108. Powe v. State, 597 So. 2d 720, 721 (Ala. Crim. App. 1991) (requiring the victim show earnest resistance to satisfy forcible compulsion element); State v. Lima, 643 P.2d 536, 540 (Haw. 1982) (requiring the victim to show earnest resistance which must involve "a genuine physical effort" by victim); State v. Archuleta, 747 P.2d 1019, 1022 (Utah 1987) (requiring the victim show earnest resistance); State v. O'Donnell, 433 S.E.2d 566, 570 (W. Va. 1993) (requiring the victim to show she responded with earnest resistance to satisfy the forcible compulsion element).

109. McQueen v. State, 473 So. 2d 971 (Miss. 1985); State v. Marlow, 888 S.W.2d 417, 422 (Mo. Ct. App. 1994) (forcible compulsion requires physical force that overcomes reasonable resistance); People v. Dozier, 85 A.2d 846 (N.Y. 1981) (reasonable resistance required).

110. *McKnight*, 774 P.2d at 534 (forcible compulsion does not require that the victim show she offered just physical resistance in all cases); People v. Dozier, 85 A.2d 846 (N.Y. 1981) (reasonable resistance is not confined to physical resistance but also includes escaping or crying out only if the resistance would increase the likelihood of violence); State v. Reed, 276 S.E.2d 313, 317 (W.Va. 1981) (earnest resistance includes means other than just physical).

111. State v. Simmons, 621 So.2d 1135, 1137-1138 (La. Ct. App. 1993) (victim must show that she was prevented from resisting by force or the threat of physical force and show that it was reasonable to believe that resistance would not prevent the rape). The recent trend has been for states to eliminate the resistance requirement or enlarge the definition of resistance to include non-physical resistance. *McKnight*, 774 P.2d at 534.

acknowledgment that resistance may be impossible, some courts have reserved the right to require physical resistance.[112]

Resistance may also remain a factor in states that have repealed the resistance requirement[113] for two reasons. First, some courts have simply ignored legislative intent and required resistance in practice.[114] In Alaska, for example, even

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112. *McKnight*, 774 P.2d at 534 (court has reserved right to require physical resistance if it feels it should have been manifested under the circumstances).

113. These states have repealed the resistance requirement: ALASKA STAT. § 11.41.470(4)(A) (1989); ILL. REV. STAT. ch. 38, para. 12-17 (Supp. 1987); MICH. COMP. LAWS ANN. § 750.520(i) (West 1991); MINN. STAT. ANN. § 609.347(2) (West 1987); OHIO REV. CODE ANN. § 2907.02(C) (Anderson 1993); PA. STAT. ANN. tit. 18, § 3107 (1983); R.I. GEN. LAWS § 11-37-12 (1994); VT. STAT. ANN. tit. 13, § 3254 (Supp. 1994). States which have "forcible compulsion" as an element, however, generally define it as force that overcomes resistance. *See, e.g.*, ALA. CODE § 13A-6-60(8) (1994); 18 PA. CONS. STAT. ANN. § 3121 (Supp. 1995); WASH. REV. CODE ANN. § 9A.44.050 (West 1988). Thus, resistance is still a factor in these states.

114. *Berkowitz*, 609 A.2d 1338 (although the resistance requirement had been repealed, the court reversed the rape conviction based on lack of physical resistance by victim); Wicktom, *supra* note 17, at 405 (explaining that although Alaska has repealed the resistance requirement the courts have continued to require physical resistance as a practical matter). In California, for example, although the resistance requirement has been repealed, the trial judge in a sexual harassment suit indicated that the victim should have resisted. The plaintiff alleged her supervisor had raped her. The judge, however, was "so convinced that a woman who is "truly" raped must offer physical resistance that, even though the supervisor admitted the assault in a phone call monitored by the police, the judge was unable to see past his own preconceptions." Lynn Hecht Schafran, *Blinded By Rape Myths*, THE NATIONAL LAW JOURNAL, Sept. 11, 1995, at A21 (discussing *Catchpole v. Brannon*, 36 Cal. App. 4th 237 (1995)). The trial judge said the" plaintiff was at fault for not successfully resisting," called the case "nonsense," and subjected the plaintiff to a brutal interrogation in court. *Id.* When an expert witness from a rape crisis team testified that the plaintiff had symptoms of rape trauma syndrome, the "judge derided her testimony by suggesting the witness "*should check and see if they come in with a big 'R' stamped on their forehead in red letters, and then we'll all know.*" *Brannon*, 36 Cal. App. 4th at 253. The plaintiff appealed asking for the judgment to be set aside on the grounds of judicial gender bias and violation of due process of law. *Id.* at 245-246. The appellate court concluded that "the judgment seems to have improperly turned on stereotypes about women rather than a realistic evaluation of the facts, . . . a problem apparently all too common in sexual harassment cases." *Id.* at 260. The court stated that "[m]en, who are rarely victims of sexual assault, may view sexual conduct in a vacuum without a full appreciation of the social setting or the underlying threat of violence that a woman may perceive.

though the statute does not require physical resistance, the courts have interpreted it to require physical resistance as a practical matter.[115] Second, resistance has been "maintained as a 'ghost element of rape,'"-although explicitly not required by some states, "it nevertheless remains an unacknowledged yardstick for courts when evaluating evidence of force . . . ."[116] Thus, in many states, courts continue to require the victim to resist in practice or by law.

II. ACQUAINTANCE RAPE MYTHS & THE ELEMENT OF "FORCE"

Despite rape law reform, the "violent stranger" rape myth continues to hinder acquaintance rape prosecution. The tendency to believe that "real" rape is committed by a stranger and is necessarily violent causes the acquaintance rape to look like it is not "rape," but is instead consensual sex.[117] Thus, dispelling the myth is necessary to successfully prosecute acquaintance rape and accurately apply the "force" element.

The immobilizing fear a physically powerful and sexually driven man may understandably inspire in a woman and the possibility resistance might exacerbate the danger may not be obvious to some men, but it cannot be fairly ignored by the trier of fact in a sexual harassment case." *Id.* The court also stated that the resistance requirement had been repealed in criminal law, and that the same standard should apply to civil cases. *Id.* at 262. Thus, the court reversed the judgment, stating that trial court's decision had been "based on stereotyped thinking about the nature and roles of women and myths and misconceptions about the economic and social realities of women's lives." *Id. See also In re* Marriage of Iverson, 11 Cal. App. 4th 1495, 1498-1500 (1992) (finding trial judge's gender bias deprived female litigant of fair trial where judge found against the wife while referring to her as a "lovely girl," stating that she had "nothing going for her except for her physical attractiveness," and thus was not credible, and referring "to the fact that the couple was living together before their marriage," stated "[a]nd why, in heaven's name, do you buy the cow when you get the milk free . . . ").

115. Wicktom, *supra* note 17, at 405.

116. Remick, *supra,* note 14, at 1113 (quoting Berliner, *supra* note 1, at 2691-2692).

117. ESTRICH, *supra* note 4, at 69.

A. RAPE MYTHS

Many people believe that rape occurs in only narrowly defined scenarios, where a mentally deranged stranger[118] spontaneously jumps out from an alley and attacks the victim, either brandishing a weapon or physically injuring her.[119] Indicative of the violence jurors believe rape involves, many jurors also believe that the absence of injuries proves there was no rape.[120] Again expecting violence, many jurors believe that victims physically resist assailants and that resistance should be a major factor to determine if the act was rape.[121]

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118. Torrey, *supra* note 34, at 1048. A 1980 study conducted by Field and Bienen involving 1,056 male and female subjects found that 57 percent of the potential jurors believed that rapists are mentally ill, 83 percent believed that rapists are sexually frustrated persons, and 85 percent of the potential jurors believed that rapists are not 'normal' men. *Id.* (citing HUBERT S. FIELD & LEIGH B. BIENEN, JURORS AND RAPE 56, 57 (1980)).

119. Berger, *supra* note 37, at 24.

120. Torrey, *supra* note 34, at 1049.

121. The Field and Bienen study also found that 59 percent of the jurors believed that the victim should physically resist as much as possible and 32 percent felt that the victim's resistance should be the major factor to determine whether a woman was raped. Torrey, *supra* note 34, at 1049. Based on these findings, Feild and Bienen concluded:

> In deciding rape cases, jurors typically look for corroborating evidence as an indication that a rape has occurred. One form of proof frequently considered as evidence of forcible rape is the physical condition of the victim. The presence of bruises, scratches, or cuts is taken as one form of proof that the victim did not consent to intercourse. *Their absence, however, may suggest to some jurors that a rape did not take place.* The insistence of active victim resistance by jurors, the courts, or the police may produce a conflict situation for [the victim]. On the one hand, she may be told by the police or experts in victimology to do as her attacker directs; compliance is the best course for self-protection. Society as well as the criminal justice system, however, typically insists upon resistance as proof of rape. Our data confirm this insistence among many of the citizens in the sample.

Id. at n.177. (quoting FIELD & BIENEN, *supra* note 117 at 57) (emphasis added). The study also found that 66 percent of the potential jurors also believed that rape is the victim's fault. *Id.* at 1047-1048. Researchers of this study concluded that, "Most of the potential jurors in the study fared only slightly better on the rape knowledge test than if they had simply guessed on the fourteen questions." *Id.* at 1049.

Due to the expectation of violence, jurors feel the victim's verbal plea to stop the assault is not necessarily probative.[122]

This view of "rape" leads both jurors and judges to discount acquaintance rape. Some trial judges, for example, recently characterized acquaintance rape as "friendly rape," "felonious gallantry," "assault with failure to please," and "breach of contract."[123] Another trial judge justified sentencing a convicted rapist to probation because the victim and assailant had been friends.[124] A good number of rape trial judges also reveal their biases against the acquaintance rape victim and convey this bias to the jury by non-verbal cues, such as shaking their head in disbelief while the victim is testifying.[125]

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122. HUBERT S. FIELD & LEIGH B. BIENEN, JURORS AND RAPE 51 (1980). The Field and Bienen study found that 29 percent of the potential jurors questioned believed that the acquaintance rape victim is merely a "woman who [has] changed her mind afterwards." *Id.* In keeping with this sentiment, one judge presiding over a rape trial in 1982 stated:

> Women who say no do not always mean no. It is not just a question of saying no, it is a question of how she says it, how she shows it and makes it clear. If she doesn't want it she only has to keep her legs shut and she would not get it without force and there would be marks of force being used.

Torrey, *supra* note 34, at 1046 n.161.

123. Torrey, *supra* note 34, at 1055, 1056 (citing a Carol Bohmer study which involved interviewing 38 Pennsylvania rape trial judges who gave these responses to a scenario where a woman goes to a bar, meets a man, gets a ride home from him, and he rapes her). Judges have also made statements that justify rape or express empathy for the rapist. John Ingram, *Date Rape: It's Time for "No" to Really Mean "No,"* 21 AM. J. CRIM. L. 3, 9 (1993). One judge, for example, stated that "I believe that it is wrong to entice a man knowing the situation you're creating and then saying 'no.' There is a button a man has that cannot be turned off and on like a light switch. And a man can go to prison for a very long time because of it." *Id.*

124. Allison West, *Tougher Prosecution When the Rapist is Not a Stranger*, 24 GOLDEN GATE L. REV. 169, 186 n.57 (1994). This case was decided in 1993 in Baltimore. *Id.* The judge compared the rape to larceny, where a person may "leave your pocketbook on the bench and I take it . . . which is less serious." *Id.* Other judges have found similar justifications for giving convicted rapists light sentences. In 1989, for example, a judge gave a lenient sentence to a convicted rapist and justified his decision by explaining, "it's not like she was chopped up." Friedland, *supra* note 34, at 495. Another example is a 1990 Florida case. There, the judge ignored sentencing guidelines and gave the self-admitted rapist probation. In open court, the judge called the rape victim "pitiful," and stated that "[a]nyone who could be so stupid to take up with this woman deserves some consideration." Torrey, *supra* note 34, at 1056-1057 n. 216 (quoting Florida judge Kenneth Leffler).

125. ALICE VACHSS, SEX CRIMES 87 (1993). Sex crimes prosecutor Alice

Mirroring beliefs of many judges, jurors also tend to discount acquaintance rape or acquit the defendant due to unreasonable doubts.[126] If the victim and defendant know each other, for example, juries are simply less likely to convict.[127] Kalven and Zeisel's noted jury study supports this contention,[128] finding that jurors convicted the acquaintance rapist only three times out of forty-two cases when the presiding judge would have convicted the accused seven times as often.[129] Juror statements reveal similar biases. As one jury

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Vachss has stated that a good number of judges let the jury know their biases against the rape victim by non-verbal cues, such as shaking their head in disbelief while the rape victim is testifying. *Id.* Vachss explained that in one rape trial she prosecuted, the "judge spent all her time during the victim's testimony shaking her head in disbelief." *Id.* Vachss stated that the victim "had enough belief in herself, at least, to walk into a courtroom and tell a jury that it was wrong for her to be raped," but "[t]he judge, sitting behind the victim, judgmental, told the jury by her conduct that wasn't true," i.e., that the teenage girl had not really been raped. *Id.* Vachss also stated that this behavior by judges was unfortunate because juries often look to the judge for permission to allow rape myths to determine the verdict. *Id.*

126. Roger C. Park, *The Crime Bill of 1994 and the Law of Character Evidence: Congress was Right About Consent Defense Cases*, 22 FORDHAM URB. L.J. 271 (1995) (explaining that in acquaintance rape cases jurors tend to act on doubts that are not reasonable doubts).

Jurors also tend to act on irrational doubts in some stranger rape cases as well, although this is more rare. Two cases illustrate this. In a 1989 Florida rape case, the jury acquitted the defendant who had kidnapped and raped the victim at knifepoint ostensibly because she was wearing a short skirt without underwear. State v. Lord, *Jury Blames Woman in Rape Case*, MIAMI HERALD, October 5, 1989, at 1A (Broward Cir. Ct. Oct. 4, 1989). The foreman explaining that "[s]he asked for it . . . [s]he was advertising for sex," while another juror stated that "[w]e felt she was up to no good [by] the way she was dressed." FORT LAUDERDALE NEWS-SUN SENTINEL, October 6, 1989, at 1A. In a 1992 Texas rape case, the grand jury refused to indict a man who had broken into the victim's apartment at 3 a.m. and raped her at knifepoint since the victim had begged the man to wear a condom so that she would not get AIDS. Ross E. Milloy, *Furor Over a Decision Not to Indict a Rape Case*, N.Y. TIMES, Oct. 25, 1992, at A30. One juror explained that the "woman's act of self-protection might have implied her consent." *Second Jury to Hear Condom Rape Case*, ST. PETERSBURG TIMES, Oct. 25, 1992, at A10. *See,* Carla M. da Luz et al, *The Texas 'Condom-Rape' Case: Caution Construed As Consent*, 3 U.C.L.A. WOMEN'S L.J. 95 (1993).

127. GARY LAFREE, RAPE AND CRIMINAL JUSTICE: THE SOCIAL CONSTRUCTION OF SEXUAL ASSAULT 155, 226 (1989).

128. H. KALVEN & H. ZEISEL, THE AMERICAN JURY 253-254 (1966).

129. *Id.*; Berger, *supra,* note 37, at 30. Acquaintance rapists have often been acquitted even though their conduct was similar to the stranger rapist who was convicted. Berliner, *supra* note 1, at 2690. Courts have found the defendant's intimidating behavior to constitute an implied

foreman explained after a 1991 rape trial, "if it had been a stranger who broke into the house, we probably would have taken it more seriously, but this was a neighbor, someone she knew."[130]

B. THE REALITY

The myths adhered to by judges and jurors are worlds away from how the vast majority of rapes actually occur. First, the assailant 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."[131] Most rapists also

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threat of force when the defendant and victim are strangers, for example, but exhibit reluctance to view similar conduct an implied threat of force when the two are acquainted. *Id. See, e.g.*, the following stranger rape cases where implied threat of force was found: People v. La Salle, 103 Cal. App. 3d 139 (1980) (defendant coerced victim into car by refusing to return her child); People v. Dorsey, 429 N.Y.S.2d 828 (1980) (defendant trapped woman in elevator). *See, e.g.*, for examples of acquaintance rape cases where the court did not find an implied threat of force: State v. Lester, 321 S.E.2d 166 (N.C. Ct. App. 1984) (victim's father beat mother and got angry at victim's refusal); People v. Evans, 379 N.Y.S.2d 912 (1975) (defendant suggested that he may kill or hurt the victim).

130. West, *supra* note 124, at 187. Judges and jurors are not the only participants in the criminal justice system who discount acquaintance rape. Many police officers believe that a "woman who has been raped by a man she knows is a woman 'who changed her mind afterward.' *Id.* Reporter Mark Richie explained one acquaintance rape victim's encounter with the police in Florida on the CBS Evening News, April 5, 1991. Lopez, *supra* note 11, at 286-287 n.54. The man went to the victim's house, just to talk, and then raped her. *Id.* After the victim reported the assault to the police, she returned to the police station with her underwear. *Id.* The police told her, "Honey, why don't you go home and forget about it." *Id.*

131. MARCIA M. BOUMIL et al., DATE RAPE 37 (1993); FAIRSTEIN, *supra* note 1, at 135. A study by Eugene Kanin of Purdue University found that 71 self-disclosed date rapists were all men from middle-class backgrounds who had no history of violence; all the men stated that before the rape they had "planned or hoped for a seduction to result." WARSHAW, *supra* note 1, at 86. Other studies indicate that 'regular' guys are the assailants. JAMES V.P. CHECK & NEIL M. MALAMUTH, *An Empirical Assessment of Some Feminist Hypotheses About Rape*, 8 INT'L J. WOMEN'S STUDIES 415 (1985). One study found that "[d]espite . . . numerous efforts to identify ways in which rapists are abnormal, the results have generally indicated very few differences between rapists and nonrapists which could justify any conclusion that rapists are grossly abnormal." *Id. See also* Todd Tieger, *Self-Rated Likelihood of Raping and the Social Perception of Rape*, 15 J. RES. PERSONALITY 147 (1981). A 1982 study at Kent State University found that "more than 30

"present an "attractive" package, in that they are usually employed, often married with children, [and] rarely [have] any documented criminal history . . . "[132] Based on these findings, it is not surprising that many victims are voluntarily with the "attractive" assailant and allow themselves to be vulnerable at the time of the attack.[133]

Studies have also demonstrated that assailants do not typically use physical violence to rape,[134] but instead general-

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percent of the male students admitted to using physical force or threats and coercion to get sex when the women they were with were unwilling to consent, and 4 percent more actually admitted to using violence." LEDRAY, *supra* note 1, at 21. Other studies have shown that gang rape frequently occurs at elite college fraternity organizations. WARSHAW, *supra* note 1, at 104-105. In 1985, for example, "the Association of American Colleges' Project on the Status and Education of Women reported that it had found more than 50 incidents of gang rape on U.S. campuses, most occurring at fraternity parties." *Id.* at 105. Evidence also suggests that rape is "particularly pervasive" among college athletes as well and that both the athletes and fraternity men view rape as "sport." Fromm, *supra* note 2, at 598-99.

132. FAIRSTEIN, *supra* note 1, at 135, 240. One acquaintance rape victim explained that the men who had raped her blended into the community. WARSHAW, *supra*, note 1, at 86. The victim stated that, "[b]oth of the guys were Joe Average types. The first was reasonably attractive; the second, less so. Both were intelligent and articulate. Nothing about their exterior packaging spelled RAPIST. Neither of them, especially in the free climate of the 1970s, needed to rape women in order to have sex." *Id.*

133. FAIRSTEIN, *supra* note 1, at 133. Fairstein explains that in acquaintance or "confidence" rape, "the rapist has gained control over the victim by winning her trust to at least some degree before the crime occurs." *Id.* at 132. Fairstein states that "most sexual assaults occur when there is a combination of two critical conditions: opportunity and vulnerability. The rapist needs the *opportunity* to commit the crime, and he succeeds when a victim is *vulnerable* at the moment of his opportunity . . . She was vulnerable precisely because she did know her assailant; she was vulnerable because she trusted him. And we rarely speak with a survivor attacked by a co-worker, date, friend, or relative who doesn't tell us that the reason they were together (and usually together alone) was because she knew and trusted him." *Id.* Thus, although the public often blames the victim for the assault, the only crime she has committed is trusting the untrustworthy. *Id.* Research also shows that the victim is clearly not responsible for the rape since 82 percent of sexual assaults are planned or partly planned by the assailant before the rape occurs. Torrey, *supra* note 34, at 1027. Thus, the victim's behavior at the time of the assault also does not cause the rape. DIANA E. H. RUSSELL, THE POLITICS OF RAPE: THE VICTIM'S PERSPECTIVE 189 (1975) (citing the Federal Commission on Crimes of Violence report which found that only "4% of reported rapes involved any precipitative behavior on the part of the victim.").

134. *In re* M.T.S., 609 A.2d 1266, 1278 (N.J. 1992) (explaining that "contrary

ly use verbal coercion[135] or manipulation.[136] Indicative of the subtle force used, most assailants do not use weapons and the victims rarely have any external or internal injuries.[137] What victims point to instead as the "force" used is the assailant's size, his verbal attacks, his anger, and his refusal to acknowledge repeated verbal resistance.[138] A low-level of "force" then, which is often quite subtle, is the most typical degree of force used.[139] These findings support the assertion that, while the presence of overt force may be probative of rape, its absence is not.

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to common myths, perpetrators generally do not use guns or knives and victims generally do not suffer external bruises or cuts); Loh, *supra* note 51, at 590 (explaining that the "typical assault itself is not of an aggravated kind. One-fourth of the assaults involve no physical force (other than the act of penetration. When extrinsic force is used, it is moderate (retraining; 42%), rather than high (choking, hitting; 32%).").

135. Menachim Amir, *Forcible Rape*, *in* RAPE VICTIMOLOGY 45 (1975). Another study also found that a "large percentage of women will capitulate on verbal threats alone." WARSHAW, *supra* note 1, at 89.

136. West, *supra* note 124, at 172.

137. *M.T.S.*, 609 A.2d at 1278; FAIRSTEIN, *supra* note 1, at 153, 261-262. Sex crimes prosecutor Linda Fairstein explained: "I came to learn that the overwhelming number of rape cases occur with no demonstrable physical injury done to the victim. Injury is not an element of the crime." *Id.* at 57-58.

138. WARSHAW, *supra* note 1, at 89. For example, one rape victim stated that "I felt physically threatened because of his anger . . . [h]e kept attacking me verbally . . . " *Id.* Another acquaintance rape victim explained that after she went to the assailant's home with him, he kept begging with her to have sex with him. *Id.* at 37. The man placed himself on top of her so she couldn't move and essentially argued with her while she was crying and saying 'no.' *Id.* Despite her repeated verbal refusals, he eventually raped her. *Id.*

139. Loh, *supra* note 51, at 590. Loh states:

> [t]here is a direct correlation between pre-existing social relationship and the use of force. A high degree of force (including the use of a weapon) occurs in 28% of rapes by strangers, 17% by casual acquaintances, 14% by close acquaintances, and 3% by relatives. There is also a direct relationship between these two factors and the verbal resistance of victims. In assaults by strangers, one-half of victims resist, but in assaults by close acquaintances or relatives, less than one-third resist. Similarly, in rapes by strangers the physical injury rate (40%) is higher than in rapes by close acquaintances or relatives (23%). Greater social distance thus is associated with greater force, greater resistance, and greater physical injury.

Id.

The victims also respond to the assailant in a more subtle fashion than the violent rape myth would lead one to believe. Instead of physically resisting, several studies have found that the overwhelming response by victims is *verbal*: victims try to reason with the assailant, tell him no, make him feel guilty, cry, or tell him to stop.[140] Other victims are unable to respond because they experience a paralyzing fear.[141] Victims may also not resist to inhibit the assailant's use of violence, force, or aggression.[142] For whatever reason, not resisting is often the wiser choice since the risk of injury may increase with any kind of resistance.[143] Thus, rape victims are advised that "[w]hen confronted with attack, each woman must make a choice which is highly personal and may be affected by situational factors beyond her control."[144] The woman should "evaluate the threat she faces and decide how to react based on the kind of person she is."[145]

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140. WARSHAW, *supra* note 1, at 11 (explaining that 84 percent of the acquaintance rape victims interviewed verbally resisted); State v. Rusk, 406 A.2d 624, 629 (Md. Ct. Spec. App. 1979) (dissenting judge stating that studies have shown that the most typical resistance given by victims is verbal resistance and that urban studies showed that only 12 percent of rape victims responded to the assailant with physical resistance); People v. Barnes, 721 P.2d 110, 118-119 (citing QUEEN'S BENCH FOUNDATION, RAPE PREVENTION AND RESISTANCE 20 (1976)). The Queen's Bench study found that 70 percent of the rape victims responded verbally. The range of resistance included adamant refusals to meek appeals. Examples of verbal responses included: appeals to conscience ("this isn't right" or "what if someone were doing this to your sister); attempts to make herself appear less desirable (saying she had a venereal disease or cancer); telling the assailant her "husband will be home soon," or stalling (saying "I have to go to the bathroom first"). Schwartz, *supra* note 26, at 577 n.97. Interviews with acquaintance rape victims supports these findings. WARSHAW, *supra* note 1, at 32. As one rape victim related, "I started to cry. It was the only coping mechanism I had. I remember saying, "No, no, no," and crying profusely." *Id.* Another rape victim explained her lack of physical resistance by stating that she "only wanted to come out alive." Tchen, *supra* note 23, at 1525 n.43. Another victim stated that she "didn't know how to" resist. *Id.* at 1527 n.49.

141. People v. Barnes, 721 P.2d 110, 118-19 (Cal. 1986); Amir, *supra* note 134, at 52. Amir found that many rape victims do not resist the assailant in any manner. *Id.* Amir based the study on 646 rape cases that were on file in the Philadelphia Police Department. *Id.* at 43.

142. *Barnes*, 721 P.2d at 119.

143. *Id.* The Queen's Bench study found that the victim's injuries "correlated with some form of resistance, including verbal stalling, struggling and slapping." *Id.*

144. *Barnes*, 721 P.2d at 119.

145. *Id.* at 119-20. This advice reflects an understanding of how the

III. THE COURTS' APPLICATION OF THE "FORCE" ELEMENT IN ACQUAINTANCE RAPE CASES

In keeping with the "violent stranger" rape myth, courts often require the assailant to use overt physical violence and the victim to resist to establish rape.[146] These de facto requirements are manifested through the "force" element.[147] The amorphous definition of "force"and "threat of force," which allows for broad application, is not the culprit.[148] Instead, the courts' tendency to narrowly apply the element results in excluding a broad range of coercive conduct from the "force" rubric.[149] If the victim tells the assailant to "stop," for example,

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crime occurs since research has shown that when a woman "is faced with a sexual attack and realizes her psychological and physical inability to protect herself, she is immobilized by fear, at least until she perceives and defines the situation, at which time it may be impossible to fight, flee or summon help successfully." Harris, *supra* note 15, at 626-27 n.75.

146. See *infra* notes 156-214 and accompanying text. This section of the comment reviews acquaintance rape cases where the courts have reversed convictions due to insufficient force. While explaining the facts of each case, the word "rape" has been used to convey the perpetrated behavior. This section uses the word "rape" as it is commonly understood (sex without consent) and not according to the courts narrow legal definition. This comment asserts that the legal definition of rape is inadequate and does not include situations that are properly characterized as "rape."

147. *Id.*

148. Estrich, *supra* note 58, at 1105. The Maryland Court of Appeal's definition of 'force' exemplifies this. The court stated:

> [f]orce is an essential element of the crime and to justify a conviction, the evidence must warrant a conclusion either that the victim resisted and her resistance was overcome by force or that she was prevented from resisting by threats to her safety. But no particular amount of force, either actual or constructive, is required to constitute rape. Necessarily, that fact must depend upon the prevailing circumstances. As in this case force may exist without violence. If the acts and threats of the defendant were reasonably calculated to create in the mind of the victim having regard to the circumstances in which she was placed a real apprehension, due to fear, of imminent bodily harm, serious enough to impair or overcome her will to resist, then such acts and threats are the equivalent of force.

State v. Rusk, 406 A.2d 624 (Md. Ct. Spec. App. 1979) (en banc), *rev'd*, 424 A.2d 720, 726 (Md. 1981).

149. See *infra* notes 156-214 and accompanying text.

and he continues, this is not legally regarded as "coercion" or "force."[150] Since research shows that many assailants use verbal coercion and victims verbally resist,[151] this application of the "force" element necessarily impedes prosecution.[152]

There are two reasons courts may be unable to recognize coercion as "force." First, the law is applied from a male perspective.[153] This is problematic because behavior the female

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150. Commonwealth v. Berkowitz, 609 A.2d 1338, 1348 (Pa. Super. Ct. 1992) (explaining that evidence of verbal resistance is only sufficient where coupled with a sufficient threat of forcible compulsion, mental coercion or actual physical force *of a type inherently inconsistent with consensual sexual intercourse*)(emphasis added).

151. See *supra* notes 134-145 and accompanying text.

152. The crime of robbery may illustrate the point. Robbery is the "felonious and forcible taking from the person of another of goods or money to any value by violence or putting in fear." Commonwealth v. Brown, 484 A.2d 738, 740 (Pa. 1984). To prove the force element, the state may show the force was either actual or constructive force (such as by threatening words or gestures). *Id.* at 741. The victim does not have to show overt physical violence occurred. *Id.* at 742. A "slight tug" on the arm to take the property will do. *Id.* If, however, the robbery victim had to suffer physical violence to satisfy the force element, some robbers would simply not be convicted. Commonwealth v. Brown, 484 A.2d 738 (Pa. 1984) (finding sufficient evidence of 'force' to sustain robbery conviction where defendant did not physically harm victim but grabbed her purse and ran away).

153. Leslie Bender and Perette Lawrence, Symposium: Is the Law Male?, *Is Tort Law Male?: Foreseeability Analysis and Property Managers' Liability for Third Party Rapes of Residents*, 69 CHI.-KENT L. REV. 313 (stating that "[r]ecent feminist legal scholarship discloses how law is male both on its face and as applied"); CATHERINE A. MACKINNON, *Feminism, Marxism, Method and the State: Toward Feminist Jurisprudence*, 8 SIGNS 635, 642-45 (1983) (explaining that "[t]he law sees and treats women the way men see and treat women."). It is predominantly male judges applying the law. Torrey, *supra* note 34, at 1055 n.208 ("According to the American Bar Association's Commission on Women in the Profession, as of 1988 women comprised only 7.4% of federal, district, circuit, and U.S. Supreme Court judges. Women represented 7.2% of state court judges, but only 6.8% of judges on state courts of last resort and 6.5% of intermediate appellate judges. Women are very much under-represented considering they comprise 20% of the legal profession."). The gender bias is also present in the practice of law. ZILLAH R. EISENSTEIN, THE FEMALE BODY AND THE LAW 52-53 (1988). The 1986 New York State Task Force/Report *Women in the Courts* found "consistent bias against women in New York in all aspects of litigation-as judges, lawyers, clients, defendants, and jurors. Gender bias was defined from the outset by Chief Judge Lawrence H. Cooke as decisions made or "actions taken because of weight given to preconceived notions of sexual roles rather than upon a fair and unswayed appraisal of merit as to each person or situation." The study found that "cultural *stereotypes* of women's role in marriage and in society daily *distort the courts' application of substantive law*";

victim finds "forceful," the court, applying a male perspective, does not.[154] Second, courts appear to condone the assailant's use of a certain amount of "coercion" by likening the conduct to "seduction."[155] Thus, the typical behavior in an acquaintance rape scenario, with the assailant using verbal coercion and the victim verbally resisting, is characterized as legal consensual behavior.

A. ACQUAINTANCE RAPE CONVICTIONS REVERSED DUE TO INSUFFICIENT "FORCE"

Commonwealth v. Mlinarich[156] illustrates the tendency by courts to narrowly construe the element of "force," ignore the reality of the crime, and protect "seduction."[157] In *Mlinarich*, the defendant and his wife agreed to assume custody of the 14-year-old victim after she had been sent to a juve-

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women face "a judiciary uninformed about matters integral to many women's welfare." *Id.* (emphasis added).

154. CATHERINE A. MACKINNON, TOWARD A FEMINIST THEORY OF THE STATE 171-183 (1989); *See also* Kim L. Scheppele, *The Reasonable Woman*, LSA magazine, Spring 1993.

155. Fromm, *supra* note 2, at 593-594.; ESTRICH, *supra* note 4, at 69. Estrich, for example, states:

> . . . in a classic simple rape-where only one man is involved, even if he bears responsibility for intentionally creating the situation that the woman finds threatening-the force standard continues to protect, as "seduction," conduct which should be considered criminal. It ensures broad male freedom to "seduce" women who feel themselves to be powerless, vulnerable, and afraid. It effectively guarantees men freedom to intimidate women and exploit their weakness and passivity, so long as they don't "fight" with them. And it makes clear that the responsibility and blame for such seductions should be placed squarely on the woman.

Id. See People v. Evans, 379 N.Y.S.2d 912 (Sup. Ct. 1975) *aff'd*, 390 N.Y.S.2d 912 (Sup. Ct. 1976) (labeling 'rape' the "more overt, aggressive and outrageous behavior of some men toward women" while stating that "there are some patterns of . . . aggressive male sexual behavior toward females which do not deserve . . . extreme penalties," therefore, "[w]here force is not employed to overcome reluctance, and where consent, however reluctant initially, can be spelled out, this we label seduction, which society may condone, even as it disapproves.").

156. Commonwealth v. Mlinarich, 498 A.2d 395 (Pa. Super. Ct. 1985).

157. See notes 159-178 and accompanying text.

nile detention home.[158] After the victim lived with the defendant for a short period, the defendant began threatening to send the girl back to the detention home unless she had sex with him.[159] The defendant then threatened the child three separate times, finally raping her the third time despite her crying and pleading with him to stop.[160]

The majority in *Mlinarich* concluded that the defendant's threat to send the victim back to the detention home if she refused penetration was not a "threat of force."[161] Equating "force" with physical violence,[162] the majority stated that a "threat of force" should be confined to threats of physical injury and not include any threat since it would "create a veritable parade of threats, express and implied, in support of rape accusations . . . " and "intolerable uncertainty."[163] Quoting one source, the court explained that "[t]o constitute rape, where there is no force used, the woman must have been unconscious, or unable fairly to comprehend the nature and consequence of the sexual act. If not, there is no distinction between rape, where the force used is constructive, and *seduction*."[164] Thus, the court explained,"[t]o allow a conviction for rape where the alleged victim has deliberately chosen intercourse in preference to some other *unpleasant sensation not amounting to physical injury or violence would be to trivialize the plight of the helpless victim of a violent rape*."[165]

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158. *Id.* at 396.

159. *Id.*

160. *Id.*

161. *Id.* at 403.

162. *Mlinarich*, 498 A.2d at 400. In its opinion, the court quoted the American Jurisprudence definition of 'force,' which "uses the terms "force" and "violence" synonymously." *Id.* ; 65 Am.Jur. 2d *Rape* § 4 (1972). The court stated that, "[t]he term "force" and its derivative, "forcible," when used to define the crime of rape, have historically been understood by the courts and legal scholars to mean physical force or violence." *Id.* at 400.

163. *Mlinarich*, 498 A.2d at 402.

164. *Id.* at 400 (quoting 65 Am.Jur. 2d *Rape* § 4 (1972); (emphasis added)).

165. *Id.* at 402 (emphasis added). By this statement, the court is intimating that the rape victim who experiences violence beyond unwanted penetration is the more worthy victim. How the court arrives at this conclusion is unclear. Typically, survivors of both stranger and acquaintance rape may experience what is called 'posttraumatic stress disorder.' WARSHAW, *supra* note 1, at 68. For the acquaintance rape victim, however, the psychological effects often differ and may be more severe in certain aspects. *Id.* at 70. The acquaintance rape victim "may become afraid of be-

Intimating that violent rape is the only "real" rape, the majority in *Mlinarich* excluded a broad range of coercive behavior from the "force" definition.[166] Coercion in sexual relations was not, however, merely excluded: it was *normalized* as an "unpleasant sensation."[167] The assailant taking physically aggressive acts against the victim's body while she begged and pleaded was not illegal, because, according to the court, the child *chose* to have sex.[168] The power imbalance, not only between the typical male and female, but also between a girl child and her male guardian, was ignored.[169] If the guardian

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ing in crowds or of being alone . . . [s]he may become distrustful of even close friends . . . [t]hese fears are especially understandable given the unique nature of date rape and acquaintance rape. Both the woman's personal world and the world at large are now seen as threatening: There is nowhere that is safe, no one who may be trusted." *Id.* As opposed to stranger rape victims, "[a]cquaintance-rape victims may have an even more difficult time [with sex] due to the new loss of trust in men who are close to them." *Id.* at 73. When the acquaintance rape victim tells her male partner about the rape, many times the relationship ends due to doubts about the rape itself. *Id.* at 76. Unlike many stranger rapes, the acquaintance rape victim is also often blamed for the rape or not believed by close family members and friends. *Id.* at 77.

166. *Id.*

167. *Id.*

168. *Id.*

169. By applying the 'force' element in this narrow manner, the court ignores the fact that rape is typically a male against female crime, and thus, necessarily includes a power imbalance. Susan Brownmiller explains this unequal battle ground succinctly:

> Reality replaces myth with shocking swiftness. The female did not choose this battlefield, this method of warfare, this surprise contestant. Her position, at once, is unprepared and defensive. She cannot win; at best she can escape defeat. Force, or the threat of force, is the method used against her, and a show of force is the prime requisite of masculine behavior that she, as a woman, has been trained from childhood to adjure. She is unfit for the contest. Femininity has trained her to lose. According to the odds, she is three inches shorter and 24 pounds lighter than her male assailant. This works to her disadvantage psychologically as well as physically, but worse than the difference in size is the lifelong difference in mental attitude toward strength. He has been encouraged from childhood to build his muscles and toughen his fists. She has been encouraged to value soft skin, her slender wrist, her smooth, unmuscled thigh and leg.

BROWNMILLER, *supra* note 11, at 360.

had assaulted the victim in addition to the rape or had specifically threatened to commit an additional assault, only then would the force element have been satisfied.[170] The assailant, then, is allowed to use all the means within his power to coerce sex, short of explicit violence, thereby illustrating that "acceptable sex, in the legal perspective, can entail a lot of force."[171] Thus, the majority defined rape in the most narrow of terms and excluded the vast numbers of rapes that are perpetrated through verbal coercion.

The dissent in *Mlinarich*, on the other hand, argued that the definition of "force" should include coercion that is both moral and intellectual, and should not be limited to violence or threats of violence.[172] Concluding that the threat was sufficient "force,"[173] the dissent emphasized the importance of the coercive atmosphere: the victim had been afraid; she had told the assailant to "stop;" she had screamed and cried throughout the assault.[174] The dissent also stressed that, on previous occasions, the guardian had: pushed the victim's head to his penis while she struggled, cried, and yelled at him to stop; yelled at her, called her names and told her that she would never see her father again unless she capitulated, and threatened to send her away.[175]

By emphasizing the coercive atmosphere, the dissent gave weight to the female victim's perspective and did not succumb to the violent rape myth. The dissent acknowledged that rape occurs in a variety of circumstances where the assailant may often subject the victim to the "power" and "weight" of his authority.[176] The dissent argued that limiting the inquiry to whether the victim had been beaten, choked, or threatened with death, was contrary to rape law reform.[177] "Force," the dissent stated, should include the use of "strength, power,

170. *Id.*
171. MACKINNON, *supra* note 154, at 173.
172. *Mlinarich*, 498 A.2d at 407-08.
173. *Id.* at 404.
174. *Id.* at 405-06.
175. *Id.*
176. *Id.* at 408.
177. *Mlinarich*, 498 A.2d at 412.

weight, stress, and duress,"[178] because rape "can be accomplished by compulsion arising from *something less than violence or the threat of violence*."[179]

Other courts, however have adopted reasoning similar to the *Mlinarich* majority. In *State v. Rusk*[180] and *Goldberg v. State*,[181] for example, the courts were also unable to recognize the coercion typically used by assailants as "force." As in *Mlinarich*, the *Rusk* and *Goldberg* courts exhibited the tendency to recognize only a "traditional male notion of a fight" as sufficient "force," essentially defining "force" according to "boy's rules applied to a boy's fight,"[182] — "the sort of punching, kicking, brawling violence that is required to get a conventionally socialized man to do something against his will."[183] The gender bias is apparent, for in both cases, the court was unable to comprehend the factors that instill fear and terror in a woman who is faced with a threatening man. Thus, unable to understand the subtle force that frightens a female victim, the courts in *Rusk* and *Goldberg*, like the *Mlinarich* court, defined the "force" element narrowly, excluding the vast majority of rapes that occur through verbal coercion.[184]

In *State v. Rusk*, the victim met the defendant in a bar and agreed to give him a ride home.[185] After refusing to go inside his home, the defendant forcibly took her car keys and told her to go inside.[186] The victim testified that once she was inside the apartment, she "was still begging him to please . . . let me leave. I said, "You can get a lot of other girls . . . for

178. *Id.* at 408.

179. *Id.* at 412 (emphasis added).

180. State v. Rusk, 406 A.2d 624 (Md. Ct. Spec. App. 1979) (en banc), *rev'd*, 424 A.2d 720 (Md. 1981). By similar reasoning, the author means that each of these courts has narrowly construed the "force" element and refused to look at the assault through the eyes of the female victim to see how a man's behavior could be threatening to a woman without the use of actual physical force.

181. Goldberg v. State, 395 A.2d 1213 (Md. Ct. Spec. App. 1979).

182. ESTRICH, *supra* note 4, at 60, 62.

183. Kim L. Scheppele, *The Revision of Rape Law*, 54 U. CHI. L. REV. 1095, 1102 (1987) (reviewing SUSAN ESTRICH, REAL RAPE: HOW THE LEGAL SYSTEM VICTIMIZES WOMEN WHO SAY NO (1987)).

184. Fromm, *supra* note 2, at 594.

185. *Rusk*, 406 A.2d at 626.

186. *Id.*

what you want," and he just kept saying, "no"; and then I was really scared, because I can't describe . . . what was said. It was more the look in his eyes . . . "[187] When the victim started to cry, the defendant began "lightly" choking her.[188] She asked him if would let her go without killing her if she did what he wanted.[189] He replied affirmatively, and then raped her.[190]

The Maryland Court of Special Appeals reversed the conviction based on insufficient "force."[191] Disregarding evidence that the defendant forcibly took her car keys, refused to let her leave, and said he would release her if she complied - the court stated that the *only* evidence of "force" was the "light choking" and the victim's testimony about the "look" in the defendant's eyes.[192] The court concluded that the "threat of force" element was not satisfied because the victim's fear was "unreasonable."[193]

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187. *Id.*
188. *Id.*
189. *Id.*
190. *Rusk*, 406 A.2d at 626.
191. *Id.* at 628 (concluding that the victim's fear was not reasonable).
192. *Id.*
193. *Id.* Professor Estrich has argued that, "[t]heir version of a reasonable person is one who does not scare easily, one who does not feel vulnerability, one who is not passive, one who fights back, not cries. The reasonable woman, it seems, is not a schoolboy sissy; She is a real man." Estrich, *supra* note 58, at 1114.

The Maryland Court of Appeals later reinstated this conviction. State v. Rusk, 406 A.2d 624 (Md. Ct. Spec. App. 1979) (en banc), *rev'd*, 424 A.2d 720 (Md. 1981). The court stated that a jury could conclude that the victim was raped based on all the evidence, particularly focusing on the "light choking." Thus, although the state prevailed, the court once again focused on actual physical force to justify its decision. The court did, however, display an ability to understand the plight of a frightened female. The court stated:

> [f]rom [the victim's] testimony, the jury could have reasonably concluded that the taking of her car keys was intended by Rusk to immobilize her alone, late at night, in a neighborhood with which she was not familiar; that after Pat [the victim] had repeatedly refused to enter his apartment, Rusk commanded in firm tones that she do so; that Pat was badly frightened and feared that Rusk intended to rape her; that unable to think clearly and believing that she had no other choice in the circumstances, Pat entered Rusk's apartment; that once inside Pat asked

In *State v. Goldberg*, the court concluded that the victim's fear was also unreasonable based on circumstances similar to *Rusk*.[194] In *Goldberg*, the 18-year-old victim went with the defendant to his "studio"[195] because he told her he was an agent who could help her become a model.[196] At the "studio," even though the victim told the defendant that she wanted to go home, "didn't want to do this," and "didn't want to be a model anymore,"[197] the defendant pushed her on the bed, removed her clothes and raped her.[198] As he raped her, she "started crying real hard."[199]

Equating "force" with "violence," the *Goldberg* court held that the "force" element had not been satisfied because there was no evidence that the defendant was going to *physically harm her*.[200] The victim's pleas to be left alone, and the defendant's physical actions overriding these pleas, were insufficient to establish "forceful" behavior.[201] Again, the court displayed an inability to recognize that if the victim has said "no," and the perpetrator continues, the next physical action is in itself, coercive. The assailant *knows* the victim has refused, and thus his action can only be characterized as intentionally coercive and threatening. His actions, at this point, speak louder than words: by ignoring her "no," he is telling her *she will participate*.

Both *Rusk* and *Goldberg* illustrate the courts' tendency to

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> permission to leave but Rusk told her to stay; that he then pulled Pat by the arms to the bed and undressed her; that Pat was afraid that Rusk would kill her unless she submitted; that she began to cry and Rusk then put his hands on her throat and began 'lightly to choke' her; that Pat asked him if he would let her go without killing her if she complied with his demands; that Rusk gave an affirmative response, after which she submitted.

Rusk, 424 A.2d at 728.

194. MYRON MOSKOVITZ, CASES AND PROBLEMS IN CRIMINAL LAW 416 (1992) (stating that the facts of *Rusk* and *Goldberg* seem very similar).

195. *Goldberg*, 395 A.2d at 1214-15.

196. *Id.*

197. *Id.* at 1215-16.

198. *Id.*

199. *Id.* at 1216.

200. *Goldberg*, 395 A.2d at 1219-20.

201. *Id.*

require greater violence, beyond coercion, to satisfy the force element. In both decisions, the courts felt "there was not enough violence to take it beyond the category of "sex"; *they were not coerced enough.*"[202] If coercion is excluded, the typical verbal coercion used by perpetrators is then sanctioned and normalized. The female victim's most effective self-defense tool, her words, are taken from her. Being generally smaller than the attacker, the female victim's best weapon is often her ability to reason and verbally dissuade the attacker. By not giving sufficient weight to this evidence, the courts are effectively telling the victim that she must physically fight back - even though she will risk greater injury.[203] If the victim does not physically assault her attacker, then the act may be labelled seduction, rather than rape.

Commonwealth v. Berkowitz[204] also illustrates the courts' tendency to exclude coercion. In *Berkowitz*, the court reversed the defendant's rape conviction stating that the victim's behavior represented only "reluctant submission."[205] In *Berkowitz*, the victim, who had been drinking alcohol, went to the defendant's dorm room to talk.[206] Inside the dorm room, the

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202. CATHERINE MACKINNON, *Sex and Violence: A Perspective*, *in* FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW, at 88 (1987). MacKinnon argues that the "level of acceptable force is adjudicated starting just above the level set by what is seen as normal male sexual behavior, including a normal level of force, rather than at the victim's, the woman's, point of violation." MACKINNON, *supra* note 154, at 173.

203. See *supra* notes 140-145 and accompanying text.

204. Commonwealth v. Berkowitz, 609 A.2d 1338 (Pa. Super. Ct. 1992).

205. *Id.* at 1342. Ironically, the defendant argued that the court should overturn his rape conviction and "define the parameters between what may have been unacceptable social conduct and the criminal conduct necessary to support the charge of forcible rape." *Id.*

206. *Id.* at 1339. Like the victim in *Berkowitz*, many acquaintance rape victims have been drinking at the time of the assault and are "often less able to resist because their reflexes are impaired by drug or alcohol intoxication, making them easier targets." LEDRAY, *supra* note 1, at 21. In the 1985 study involving 6,100 undergraduate men and women by Mary P. Koss, Ph.D., "75 percent of the men and at least 55 percent of the women involved in acquaintance rapes had been drinking or taking drugs before the attack." WARSHAW, *supra* note 1, at 44. A 1986 study revealed that 75 percent of the college men interviewed "reported using alcohol or drugs in an attempt to obtain sex from an unwilling woman: Sixty-six percent of the men had given a woman alcohol, and 42 percent had gotten a woman high on marijuana or pills in the belief that intoxication would make her more willing to have sex. Kramer, *supra* note 8, at 115, 122-23. In State v.

defendant moved on top of the victim, "kind-of pushed" her, and started kissing her.[207] The victim asked the defendant to stop, told him she had to go, but he persisted.[208] As she continued to say "no," he tried to put his penis in her mouth.[209] Then, the defendant got up, locked the door, "kind-of pushed" her on the bed, and raped her.[210]

Finding insufficient "force," the *Berkowitz* court explained that the victim had "walked freely into [his] dorm room in the middle of the afternoon," stayed there of her own volition, and had not physically resisted or screamed out.[211] Scrutinizing the victim, the court stated that there was no reason the victim could not simply have left.[212] Thus, although both the victim and defendant testified that she repeatedly said "no," the court stated that "evidence of verbal resistance [is] only sufficient where coupled with a *sufficient threat of forcible compulsion* . . . ."[213] If the victim had been struck,[214] pinned down,[215] or choked,[216] then rape would have been estab-

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Oltarsh, the victim was gang raped by several fraternity men who plied her with alcohol while one of the fraternity man raped her. *Id.* at 132-36 (citing State v. Oltarsh, No. 88-2002-CF (Fla. Cir. Ct. Sentencing Proceedings July 10, 1990)). The victim could not stand up on her own and was sliding down the wall she was propped up next to during the ordeal. *Id.* at 133. During the assault, the victim was also penetrated with a toothpaste tube and woke up to find 'slut,' 'whore,' and 'bitch' written on her thighs. *Id.* In State v. Draghi, Gabrinowitz & Grandinetti, one defendant repeatedly insisted that the victim drink, despite her refusals, eventually forcing the cup of alcohol to her lips. *Id.* at 136-41 (citing State v. Draghi, Gabrinowitz & Grandinetti, No. 23/25 90 (N.Y. Sup. Ct. 1991)). The victim passed out, and intermittently regained consciousness to find the defendants raping and sodomizing her, one defendant banging his penis against her head. *Id.* at 137-38. Despite corroboration by one eyewitness who verified the victim's testimony, the defendants were acquitted. *Id.* at 140.

207. *Berkowitz*, 609 A.2d at 1339-40.

208. *Id.* at 1340.

209. *Id.*

210. *Id.*

211. *Id.* at 1342, 1344.

212. *Berkowitz*, 609 A.2d at 1347.

213. *Id.* at 1348 (emphasis added).

214. Commonwealth v. Rough, 418 A.2d 605 (Pa. Super. Ct. 1980) (finding forcible rape where victim was forced to floor and struck).

215. Commonwealth v. Meadows, 553 A.2d 1006 (Pa. Super. Ct. 1989) (finding forcible rape where victim was pinned to the ground).

216. Commonwealth v. Irvin, 393 A.2d 1042 (Pa. Super. Ct. 1978) (finding forcible rape where the victim was choked and defendant placed hands

lished. Kind-of pushing the victim while she said "no," however, was simply *not enough force*.[217]

These decisions illustrate the courts' inability to recognize behavior that is coercive to a female victim as sufficient evidence of "force."[218] Some type of physical violence or an explicit threat of physical violence is often required to satisfy the "force" element.[219] By defining "force" in this manner, the courts are subjecting the victim to greater danger and excluding the vast majority of rape cases that occur through verbal coercion.[220] In a crime that typically involves male assailants and female victims, the definition of "force" should necessarily take the power imbalance between the sexes into account, rather than condone forced sex through coercion.

B. ACQUAINTANCE RAPE CONVICTIONS REVERSED DUE TO INSUFFICIENT RESISTANCE

The resistance requirement of the "force" element, required in many states,[221] also forces the victim to behave in

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over her mouth to silence her screams).

217. Other courts have displayed similar limitations in applying the 'force' element. In Washington, for example, the court has found sufficient force where the defendant grabbed the victim, pulled her hair, or covered her mouth to stop the screaming. State v. Ieremia and Singh, 899 P.2d 16, 17-18 (Wash. Ct. App. 1995) (sufficient force where defendant Singh forced the victim to drink, grabbed her arm, and covered her mouth; sufficient force where defendant Ieremia grabbed the victim's wrists, pulled her hair, and covered her mouth). In another case, however, the court held there was insufficient force where the defendant ordered a mentally handicapped woman to lie down on the bed after she had refused. State v. Weisburg, 829 P.2d 252, 253-54 (Wash. Ct. App. 1992).

218. Commonwealth v. Berkowitz, 609 A.2d 1338 (Pa. Super. Ct. 1992); Goldberg v. State, 395 A.2d 1213 (Md. Ct. Spec. App. 1979); State v. Rusk, 406 A.2d 624 (Md. Ct. Spec. App. 1979) (en banc), *rev'd*, 424 A.2d 720 (Md. 1981); Commonwealth v. Mlinarich, 498 A.2d 395 (Pa. Super. Ct. 1985).

219. See *infra* notes 156-216 and accompanying text.

220. See *infra* notes 131-145 and accompanying text.

221. State v. O'Donnell, 433 S.E.2d 566, 568 (W.Va. 1993) (victim is required to show she responded with earnest resistance to satisfy the forcible compulsion element); Powe v. State, 597 So. 2d 720, 721 (Ala. 1991) (victim must show earnest resistance to satisfy forcible compulsion element); State v. Archuleta, 747 P.2d 1019, 1022 (Utah 1987) (victim must show earnest resistance); State v. Lima, 643 P.2d 536, 540 (Haw. 1982) (victim must show earnest resistance which must involve "a genuine physical effort" by victim); State v. Marlow, 888 S.W.2d 417, 422 (Mo. Ct. App. 1994) (forcible

an atypical manner and subjects her to greater physical brutality.[222] Studies have shown that the risk of injury increases with physical resistance and that most victims do not respond in this manner - out of fear, inability, or wisdom.[223] Instead, many victims respond with verbal resistance,[224] which fails to satisfy the resistance requirement.[225] The law's requirement that the victim physically resist, then, fails to maintain an appropriate legal standard and ignores how the vast majority of rapes occur.

Several cases illustrate that some courts require physical resistance even though victims typically resist verbally. In *Commonwealth v. Berkowitz*,[226] for example, the court stated that the victim's repeated verbal pleas were insufficient resistance.[227] Although resistance was not required under Pennsylvania law, the court explained that the "'no resistance requirement' . . . must have limits."[228] The court stated that because the law required a "threat of forcible compulsion that would prevent resistance by a reasonable person,"[229] verbal pleas were insufficient.[230]

In *McQueen v. State*,[231] the court reversed the defendant's rape conviction based on insufficient "force" because the victim had offered only verbal resistance.[232] In *McQueen*, the defendant drove his wife's sister, a 14-year-old girl, to a secluded spot, ordering her to disrobe and lie down, and then raped her.[233] The victim refused to open her car

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compulsion requires physical force that overcomes reasonable resistance); People v. Dozier, 85 A.2d 846 (N.Y. 1981) (reasonable resistance required).

222. People v. Barnes, 721 P.2d 110, 118-19 (Cal. 1986).

223. *Id.*

224. WARSHAW, *supra* note 1, at 49; State v. Rusk, 406 A.2d 624, 634 (Md. Ct. Spec. App. 1979).

225. *See, e.g.*, Commonwealth v. Berkowitz, 609 A.2d 1338 (Pa. Super. Ct. 1992); State v. Lima, 624 P.2d 1374 (Haw. Ct. App. 1981), *rev'd.*, 643 P.2d 536 (Haw. 1982); Powe v. State, 597 So. 2d 720 (Ala. Crim. App. 1991).

226. Commonwealth v. Berkowitz, 609 A.2d 1338 (Pa. Super. Ct. 1992).

227. *Id.* at 1344-45.

228. *Id.* at 1347.

229. *Id.* at 1345.

230. *Id.* at 1344-55.

231. McQueen v. State, 423 So. 2d 800 (Miss. 1982).

232. *Id.* at 800-01.

233. *Id.* at 801. The victim was visiting her sister, who was separated

door to the defendant, told him she was scared, said she wanted to go home, cried and told him that he was hurting her.[234]

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from the defendant, when the attack occurred. *Id.* at 800. The defendant had dropped by his wife's house to deliver furniture. *Id.* He then asked if he could take their 2 year old daughter to the store with him. *Id.* The wife, Elizabeth McQueen, didn't want the baby to be alone with the defendant and so she asked her sister, the victim, to accompany him and the baby to the store. *Id.* After the defendant and the victim left the store, the victim testified that:

> he [the assailant] said he was lost, and he brought me back on this road, and he said he had to use the bathroom, and he turned the truck around, and he turned the lights off, and I locked my side of the door, and he come around on my side and told me to get out, so I did. He told me to take off my clothes, but leave one leg on, and I was scared, and I told him that I wanted to go home. So he told me to go around on the other side and lay on the driver's seat side and lay half way. So I did, and he told me to put my legs up on his shoulders and I did, and I was crying, and he made the baby sit on the other side of the truck, on the passenger's side, and he told me that he wasn't going to hurt me, and it wasn't going to take long, and while we was doing it and that, he told that, I've got news for you, it's in, and I started crying and I told him that I wouldn't—that I didn't want to get pregnant, and he told me that he wasn't going to come inside me, and so after he was finished, he told me, he says not to say anything to Tootie (her sister) . . .

Id. at 801.

234. *Id.* at 801. In describing the 'force' the defendant used, the victim explained: "Well, the tone of his voice and that, for first of all. Okay, second of all, by not letting me get up when I wanted to, when I wanted to stop and just making me do something that went against my will." *Id.* at 801-802. She also stated that she "was just scared of him because he was drinking and that, and I was scared he was going to hurt me." *Id.* at 801. The court, however, stated that the evidence

> not only fails to satisfy the mind of the guilt of the accused but suggests grave doubt of it. No bruises or marks of violence were evident except reddening of the vulva. No weapon was exhibited and the evidence falls far short of showing that the prosecutrix submitted because of a reasonable apprehension that she would suffer injury if she refused. Appellant did not threaten to injure prosecutrix, did not forcibly remove her from the truck, did not remove her clothes, and did not forcibly make her lie down in the truck. The evidence presented on behalf of the state is legally insufficient to support a conviction for the crime of forcible rape.

The court explained that because the defendant did not physically force the victim to comply and the victim failed to physically resist, the "force" element was not satisfied. In sharp contrast, the dissent argued that physical resistance should not be required.[235] In addition, the dissent explained that it "is lamentable but true that too many times cases have come before this Court showing that where a rape victim kicked, screamed, and physically fought to the bitter end—she became a victim of homicide following the rape."[236]

Still, other cases show courts require physical resistance. In *State v. Lima,*[237] the court reversed the defendant's rape conviction due to insufficient resistance because the 14-year-old victim offered only verbal resistance.[238] Though the defendant had pinned the victim to the ground while he raped her,[239] the court emphasized that the victim had not physically resisted.

In *Powe v. State*,[240] the court reversed the defendant's rape conviction on the grounds that the 11-year-old victim did not resist.[241] Although the victim testified that she was scared throughout the assault of the defendant, *her father*, the

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McQueen, 423 So. 2d at 803.

235. *Id.* at 806-07. The dissent argued that it was 'reasonable' that a 13 year old child "would be terrified of the older (double her age) and obviously physically superior male, and that his threatening conduct and actions in her mind were as real as if he had actually threatened to kill her with a deadly weapon." *Id.* at 806. The dissent explained that the defendant "was a 28-year-old male and she was 1/2 his age. She knew that he had been drinking. Further she was afraid of him because of the following: his tone of voice, his actions, and because of what he had done in the past . . . She was in a remote area where there were no people to hear her screams for help; she was afraid that he would hurt her; and although she did cry, it was to no avail." *Id.*

236. *Id.*

237. State v. Lima, 624 P.2d 1374 (Haw. Ct. App. 1981), *rev'd.*, 643 P.2d 536 (Haw. 1982).

238. *Id.* The Supreme Court, however, affirmed the conviction asserting that the victim did employ some physical resistance. The reasoning of the appellate court, however, shows that courts are struggling with the resistance requirement and reluctant to find crying or verbal resistance as genuine resistance.

239. *Lima*, 624 P.2d at 1375-1376.

240. Powe v. State, 597 So. 2d 720 (Ala. Crim. App. 1991).

241. *Id.*

court emphasized that the child did not offer any physical resistance and the defendant had not made an express threat.[242] Oral protests alone, the court held, were insufficient.[243]

These cases illustrate that courts continue to require resistance, despite the fact victims rarely physically resist. As with the courts' application of the "force" element, the reality of acquaintance rape is denied. When the victims offer verbal resistance the "force" element and resistance requirement will not be satisfied. When the victim offers verbal resistance, however, this puts the perpetrator on notice that his actions were unwanted. The victim should not be required to suffer greater harm to prove rape. Thus, the resistance requirement should be eliminated, both in practice and by law.

IV. THE WASHINGTON THIRD DEGREE RAPE STATUTE

Washington's third degree rape statute,[244] which criminalizes nonconsensual intercourse without any showing of force, creates a legal standard that most accurately fits the reality of the crime.[245] If available in other jurisdictions, this statute could increase acquaintance rape convictions without requiring the victim to suffer additional violence. The difficulty courts appear to have with finding sufficient force would also be circumvented. Thus, this statute maintains a legal standard that is both realistic and provides greater protection for the victim.

242. *Id.* at 721.

243. *Id.*

244. WASH. REV. CODE ANN. § 9A.44.060 (West 1988).

245. Searles, *supra* note 52, at 32. As of January 1986, only five states criminalized nonconsensual penetration-or rape without force. *Id.* The five states are Washington, Iowa, Mississippi, Nevada, and Vermont. *Id.* In the vast majority of states, then, rape without "force" is legal. *Id.*

A. WASHINGTON RAPE LAW REFORM: THIRD DEGREE RAPE STATUTE CREATED

Before 1975, Washington's rape statute was typical of pre-reform rape statutes in many other jurisdictions.[246] Rape was defined as sexual intercourse with a person not the wife or husband of the perpetrator committed against the person's will and without the person's consent.[247] Lack of consent was the primary element,[248] and physical resistance was required.[249]

In the 1970s, the Washington state legislature selected drafters to rewrite the state's criminal code.[250] The first revisions, written by two men picked by the Washington Legislative Council Judiciary Committee, primarily mirrored the Mod-

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246. Loh, *supra* note 51, at 549.

247. WASH. REV. CODE Ch. 154, § 122 Wash. Sess. Laws. (1st Ex. Sess.) 1198 (repealed 1975) provided:

> Rape is an act of sexual intercourse with a person not the wife or husband of the perpetrator committed against the person's will and without the person's consent. Every perpetrator of such an act of sexual intercourse with a person of the age of ten years or upwards not his wife or husband:
>
> (1) When, through idiocy, imbecility or any unsoundness of mind, either temporal or permanent, the person is incapable of giving consent; or
>
> (2) When the person's resistance is forcibly overcome; or
>
> (3) When the person's resistance is prevented by fear of immediate and great bodily harm which the person has reasonable cause to believe will be inflicted upon her or him; or
>
> (4) When the person's resistance is prevented by stupor or weakness of mind produced by an intoxicating narcotic or anaesthetic agent administered by or with the privity of the defendant; or
>
> (5) When the person is at the time unconscious of the nature of the act, and this is known to the defendant;
>
> Shall be punishable by imprisonment in the state penitentiary for not less than five years.

Loh, *supra* note 51, at 548-49 n.21.

248. Helen G. Tutt, *Washington's Attempt to View Sexual Assault as More Than a "Violation" of the Moral Woman-The Revision of the Rape Laws*, 11 GONZ. L.R. 145, 155-56 (1975).

249. Loh, *supra* note 51, at 549.

250. *Id.* at 568.

el Penal Code revision.[251] Like the Model Penal Code, the proposal had four different degrees based on culpable conduct, a corroboration requirement, and lacked a shield law for victims.[252]

After the proposal was published, several dissatisfied groups,[253] including the Seattle Women's Commission, drafted counter-proposals.[254] Ultimately, the proposal by the Seattle Women's Commission prevailed and was enacted in full by the legislature one year later.[255]

The rape statute drafted by the Seattle Women's Commission divided the crime into three degrees based on the amount of force used by the assailant.[256] The first two degrees resem-

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251. *Id.* The Washington state legislature assigned the duty to rewrite the state's criminal code to the Washington Legislative Council's Judiciary Committee in 1967. *Id.* The two men specifically assigned this duty were University of Washington Law Professor John Junker and his former student, Richard Holmquist. *Id.* at n.136. The authors also used aspects of the pre-reform Michigan statute and the New York rape statute when creating the proposal. *Id.* at 568.

252. Loh, *supra* note 51, at 568. Prior to this proposal, the Washington rape law did not have a corroboration requirement. Thus, the inclusion of a corroboration requirement was actually a step backwards, reversing "existing Washington case law." *Id.*

It should be noted that Loh is only researcher who has documented the legislative history of rape law reform in Washington. Loh explained that because there was "no formal history of the legislative history and purposes of the Washington law" all the data from his article was derived from interviews with "state legislators, attorneys, and representatives of women's groups involved in the legislative reform process." *Id.* at 558 n.80.

253. *Id.* at 568-569. Prosecutors objected to the different mens rea requirement for the different degrees as unnecessarily complex and "women's groups were incensed at the evidentiary provisions of the rape section." *Id.* at 568.

254. Loh, *supra* note 51, at 568-569.

255. *Id.* at 569.

256. The Washington rape statutes are as follows:

WASH. REV. CODE ANN. § 9A.44.040 (West 1988): Rape in the first degree:

> (1) A person is guilty of rape in the first degree when such a person engages in sexual intercourse with another person by forcible compulsion where the perpetrator or an accessory:
>
> (a) Uses or threatens to use a deadly weapon or what appears to be a deadly weapon; or
>
> (b) Kidnaps the victim; or
>
> (c) Inflicts serious physical injury; or
>
> (d) Feloniously enters into the building or vehicle

ble the Model Penal Code by eliminating nonconsent as an element and emphasizing "force" and "resistance."[257] Like the Model Penal Code, both degrees also require the assailant to use "forcible compulsion" which overcomes or prevents resis-

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where the victim is situated.

(2) Rape in the first degree is a class A felony.

WASH. REV. CODE ANN. § 9A.44.050 (West Supp. 1995): Rape in the second degree:

(1) A person is guilty of rape in the second degree when, under circumstances not constituting rape in the first degree, the person engages in sexual intercourse with another person:

(a) By forcible compulsion;

(b) When the victim is incapable of consent by reason of being physically helpless or mentally incapacitated;

(c) When the victim is developmentally disabled and the perpetrator is a person who is not married to the victim and who has a supervisory authority over the victim;

(d) When the perpetrator is a health care provider, the victim is a client or patient, and the sexual intercourse occurs during a treatment session, consultation, interview, or examination. It is an affirmative defense that the defendant must prove by a preponderance of the evidence that the client or patient consented to the sexual intercourse with the knowledge that the sexual intercourse was not for the purpose of treatment; or

(e) When the victim is a resident of a facility for mentally disordered or chemically dependent persons and the perpetrator is a person who is not married to the victim and has supervisory authority over the victim.

(2) Rape in the second degree is a class A felony.

WASH. REV. CODE ANN. § 9A.44.060 (West 1988): Rape in the third degree:

(1) A person is guilty of rape in the third degree when, under circumstances not constituting rape in the first or second degrees, such a person engages in sexual intercourse with another person, not married to the perpetrator:

(a) Where the victim did not consent as defined in RCW 9A.44.010(6), to sexual intercourse with the perpetrator and such lack of consent was clearly expressed by the victim's words or conduct, or

(b) Where there is threat of substantial unlawful harm to property rights of the victim.

(2) Rape in the third degree is a class C felony.

WASH. REV. CODE ANN. § 9A.44 (West 1988).

257. WASH. REV. CODE ANN. §§ 9A.44.040 (West 1988), 9A.44.050 (West Supp. 1995); MODEL PENAL Code § 213.1.

tance.[258] Since the first and second degrees require the state to prove the "force" element, both statutes could present problems for the acquaintance rape case where overt force is not used.

To address this problem, a third degree rape statute[259] was specifically created for acquaintance rapes based on the understanding that "the use of force and subsequent resistance is reduced when the victim and assailant are acquainted."[260] Under the third degree statute, the "force" element and "resistance" requirement were eliminated.[261] In addition to penetration, the state must instead prove only lack of consent "clearly expressed by the victim's words or conduct."[262]

By eliminating the "force" element, Washington has acknowledged the manner in which acquaintance rapes are generally perpetrated. Instead of requiring a push or a shove to prove rape, the court may instead circumvent the "force" problem and look only for nonconsent clearly conveyed. Under this standard, the victim is not required to endure greater physical brutality and the perpetrator is legally required to respond accordingly if the victim says "no."[263] Since many victims respond with verbal resistance, this statute, unlike the "forcible compulsion" statutes, has elements which can realistically be satisfied.[264]

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258. WASH. REV. CODE ANN. §§ 9A.44.040 (West 1988), 9A.44.050 (West Supp. 1995); MODEL PENAL CODE § 213.1. The difference between Washington's first and second degree rape is that first degree also requires aggravating circumstances. WASH. REV. CODE § 9A.44.040 (West 1988).

259. WASH. REV. CODE ANN. § 9A.44.060 (West 1988).

260. Tchen, *supra* note 23, at 1535 n.103.

261. *Id.* at 1536.

262. *Id.*

263. Some commentators have criticized this aspect of the statute. Tchen, *supra* note 23, at 1535-36. One criticism is that the statute criminalizes conduct without requiring criminal intent. *Id.* at 1536. If the victim says 'no,' however, and the assailant continues to take action against her body, then criminal intent should be established. Disregarding the woman's plea to stop indicates that the assailant intends to rape - not have consensual sex with a willing partner. In addition, if the statute can be read to eliminate intent, this is not unusual since "most American courts have omitted mens rea altogether" from the elements the state must prove in rape cases. Estrich, *supra* note 58, at 1097.

264. Critics of the statute have also argued that the victim should be required to physically resist to give the assailant adequate notice of

The addition of the third degree statute has also produced tangible benefits; rape convictions have increased 19 percent under the third degree statute.[265] One study of the conviction rates before and after reform, however, suggests that the increase in rape convictions is due to offenders not being convicted of lesser offenses.[266] The study found that before rape law reform, "35% of initially filed rape cases were convicted of other sentences,"[267] such as assault.[268] After reform, "only 15% of rape filings result in convictions of other offenses."[269] Thus, although the "total pool of offenders" has not increased, assailants previously convicted of assault and other lesser offenses are now convicted of rape.[270] Also, "[d]efendants are more likely now to plea to rape or statutory rape than to another charge, just as they are more likely to be convicted of the charged offense rather than of assault."[271] The statute, there-

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nonconsent. Tchen, *supra* note 23, at 1536. The statute, however, requires that the victim clearly communicate nonconsent by words or conduct, thus *clearly* giving notice to the perpetrator that she is unwilling.

265. Loh, *supra* note 51, at 591.

266. *Id.* at 592-93.

267. *Id.* at 593. Loh states that, "[i]n support of the establishment of degrees of rape, it is often said that juries under the old law had to acquit rather than convict in instances of lesser culpability. This undoubtedly occurred in some cases. The more common result, as these data show, was to convict them of another lesser offense when that option was available." *Id.* at 593 n.262.

268. *Id.* at 591. Loh states:

> This relabelling has occurred primarily in less aggravated cases. Under the new law, the most successful prosecutions are those filed under rape 1. Their conviction rate for rape is 66%. Of the 39 cases in which forcible rape was charged under the old law, 21 (or 53%) were of an aggravated nature. These cases could have been filed as rape 1 had the new law been in effect; under the old law 61% of them resulted in rape convictions, approximately the same conviction rule as for rape 1 cases. Thus, prosecutors have been highly successful in "hardcore" cases regardless of the substantive law. The more aggravated the circumstances, the less probable the inference of victim consent, and the more likely a conviction.

Id. at 593 n.263.

269. Loh, *supra* note 51, at 593.

270. *Id.* at 593, 618. Loh explains that "[i]ncreasing rape convictions was one of the principal motivations of law reform advocates. This objective has been achieved." *Id.* at 593.

271. *Id.* at 598.

fore, has had a significant impact. Rape offenders are now being convicted of rape, and not assault.

The more accurate labelling of the offense is of enormous importance. First, a rape conviction establishes that the wrong being punished is not a simple assault. Instead, the crime being punished is one of the most humiliating, degrading, and life-altering experiences any victim may ever endure.[272] As one commentator explains, rape "is considered criminal because of the outrage committed on the victim's personhood, and the infringement of the individual's freedom of choice. If the reason for punishment was mainly the physical violence involved, the crime would simply be a species of assault."[273] Thus, under the third degree statute, the criminal behavior is not excused or downgraded as an assault, but is instead recognized as one of the most traumatic invasions a victim may experience.[274]

Second, the third degree statute shows *society's acknowledgment* that this behavior is rape and not merely assault. The statute, then, reflects a studied understanding of how rape occurs and does not force the rape victim to suffer the further indignity of having the perpetrator's behavior trivialized.[275] In addition, by labelling nonconsensual intercourse rape, the

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272. LEDRAY, *supra* note 1, at 70. Ledray's book provides guidance to rape survivors. Ledray states:

> For most of you, rape is the most serious life crisis you will have to face, with few exceptions. It is a time of overwhelming turmoil, confusion, and disorganization. You may be concerned about the way you are feeling in response to the rape. You've probably never felt the extreme and conflicting emotions you do now-the fears, the rage, the panic attacks, or the worthlessness. You may even be afraid that you are "going crazy," or that you will never recover and be able to go on with life again. But you will. What you are experiencing is normal after a very serious life crisis.

Id.

273. Loh, *supra* note 51, at 593 n.264.

274. LEDRAY, *supra* note 1, at 70.

275. *Id.* "To highlight the outrage involved, many women victims prefer to see their assailants convicted of third degree rape rather than first or second degree assault, even though the penalty for the rape offense is much lower." *Id.*

statute promotes a civilized understanding of how sex should occur between two willing partners. Thus, the "correct label" is not merely symbolic, but has tangible benefits for the rape victim and for society at large.

B. THE COURT'S APPLICATION OF THE THIRD DEGREE RAPE STATUTE: *STATE V. WEISBERG* & *STATE V. MCKNIGHT*

State v. Weisberg[276] and *State v. McKnight*[277] are acquaintance rape cases which discussed application of the third degree rape statute. In both cases, the perpetrator did not inflict actual violence or explicitly threaten to inflict violence.[278] Both victims, however, clearly conveyed nonconsent.[279] In *Weisberg*, the presence of the third degree rape statute enabled the court to sustain the rape conviction without a showing of "force."[280] In *McKnight*, although the "forcible compulsion" conviction was sustained, the court discussed application of the third degree rape statute.[281]

1. *State v. Weisberg*: Convicted of Third Degree Rape

In *State v.Weisberg*,[282] a 54-year-old clothing salesman enticed his mentally retarded female neighbor to his apartment by promising her a birthday gift.[283] In the apartment, the defendant stated that the gift, which was clothing, was in the bedroom.[284] In the bedroom, he told the victim that she should take off her underwear and bra to try on the clothes because they would fit better.[285] When the victim didn't respond, he took them off for her.[286] After the victim put her clothes back on, the salesman told her to lie down on the

276. State v. Weisberg, 829 P.2d 252 (Wash. Ct. App. 1992).
277. State v. McKnight, 774 P.2d 532 (Wash. Ct. App. 1989).
278. *Id.*; State v. Weisberg, 829 P.2d 252 (Wash. Ct. App. 1992).
279. See *supra* notes 282-323 and accompanying text.
280. *Weisberg*, 829 P.2d at 256.
281. *McKnight*, 774 P.2d at 536-537.
282. *Weisberg*, 829 P.2d 252.
283. *Id.* at 253.
284. *Id.*
285. *Id.*
286. *Id.*

bed.[287] The victim told him that she didn't want to, but he told her to "go ahead and lay on the bed anyway."[288] He then proceeded to rape her, immediately afterwards telling her not to "say anything to anybody [about] what I did."[289] Based on the foregoing, the jury convicted the defendant of second degree rape by forcible compulsion.[290]

The Washington appellate court then reversed the defendant's second degree rape conviction because of insufficient "force."[291] The court reasoned that there was no "force" because the defendant did not expressly threaten to injure the victim and the victim had not tried to escape.[292] The defendant's command to lie down on the bed was also not implied force.[293] Indicating that only an express threat of physical violence would suffice, the court stated that the defendant's "*communications*" did not indicate violence or "cause one to interpret 'lay down on the bed anyway' as a veiled threat of *physical injury*."[294]

Although the second degree conviction was reversed, the court held that the defendant could be convicted under the third degree rape statute instead.[295] Here, the state need only prove lack of consent, and not "force."[296] The victim had clearly conveyed her lack of consent by refusing to remove her clothes and refusing to lie down on the bed.[297] When the defendant told her to lie down on the bed anyway, he was aware that this conduct was against her will. The defendant's plea "not to tell anyone" also indicated knowledge that the victim had been unwilling and that he needed to hide his behav-

287. *Weisberg*, 829 P.2d at 253-254.
288. *Id.* at 254.
289. *Id.*
290. *Id.*
291. *Id.* at 255.
292. *Weisberg*, 829 P.2d at 254.
293. *Id.* at 255. The court, in fact, reduced the defendant's order to lie on the bed as merely a "disregard for [her] feelings." *Id.*
294. *Id.* (emphasis added).
295. *Id.* at 256.
296. WASH. REV. CODE ANN. § 9A.44.060 (West 1988).
297. *Weisberg*, 829 P.2d at 253-254. The court did not explain how the victim had clearly conveyed lack of consent. Thus, it is reasonable to assert that the court drew on these factors since these two actions were the only clear responses taken by the victim.

ior.[298] Thus, by not requiring "force," the court was able to convict the defendant of knowingly using verbal coercion, authority, and manipulation to perpetrate rape.

2. *State v. McKnight*: Struggling to find sufficient force

In *State v. McKnight,*[299] the court also dealt with an acquaintance rape case where overt force and physical resistance were not present. In this case, however, the majority sustained the defendant's conviction of second degree rape by forcible compulsion.[300] The dissent argued that the defendant should be convicted of third degree rape instead because the facts failed to establish the "force" element of second degree rape.[301] Thus, although the conviction was upheld, this case shows that the tenuous method of determining "force" may lead to reversals in other jurisdictions where a third degree statute is unavailable.

In *McKnight*, the 14-year-old victim was vaguely acquainted with the 17-year-old defendant from riding the same school bus.[302] The victim was walking to her health club when she ran into the defendant.[303] At this point, the victim changed her mind about going to the health club and the two returned to the victim's apartment.[304] Inside the victim's apartment, the victim and defendant began kissing.[305] The victim testified that she told the defendant to "stop" kissing her, but he ignored her plea and "started [to] slowly push [her] on the couch."[306] The defendant then started to pull on the victim's clothes and she told him to stop again.[307] After the defendant removed her clothes, the defendant undid his pants and placed himself on top of her.[308] As he penetrated her, the victim tes-

298. *Id.* at 254.
299. State v. McKnight, 774 P.2d 532 (Wash. Ct. App. 1989).
300. *Id.* at 535-536.
301. *Id.* at 537.
302. *Id.* at 532.
303. *Id.*
304. *McKnight*, 774 P.2d at 532.
305. *Id.* at 533.
306. *Id.* at 533.
307. *Id.*
308. *Id.*

tified that she "told him it hurt and he still didn't stop."[309] After the defendant left, the victim called her cousin and stated that "she had gotten raped."[310]

The majority upheld the "forcible compulsion" conviction, stating that the defendant's act of "*slowly pushing*" the victim onto the bed was sufficient "force."[311] The majority explained that the victim's lack of resistance was reasonable because she was scared, physically weak, naive, a virgin, and had never gone out on a date before.[312] From her perspective, the court explained, to struggle . . . would have been a futile gesture."[313] Thus, even though the victim did not resist and was not expressly threatened, the court held that the "force" element had been satisfied for second degree rape.[314]

The dissent, on the other hand, argued that the defendant should be convicted of third degree rape because the facts failed to establish the "force" element for second degree rape.[315] The dissent stated that "force" was absent because the assailant did not inflict actual violence or threaten to inflict injury and the victim had not physically resisted.[316] A finding of insufficient "force," however, did not mean that the victim was not raped.[317] Instead, the dissent agreed that the victim had been raped - and had clearly expressed nonconsent by repeatedly saying "stop."[318] Thus, the dissent concluded

309. *McKnight*, 774 P.2d at 533.

310. *Id.*

311. *Id.* at 535-536.

312. *Id.* at 535.

313. *Id.* at 535.

314. *McKnight*, 774 P.2d at 536.

315. *Id.* at 537. The dissent explained that "[t]he only evidence of "resistance" is that [the victim] told the defendant to stop kissing her and to stop disrobing her. The only evidence of physical force "which overcomes resistance" is that McKnight slowly pushed [the victim] onto the couch and laid on top of her . . . *He never hit her or threatened to hit her.*" *Id.* (emphasis added).

316. *Id.* at 537.

317. *Id.* at 536. The dissent stated that the issue was "not whether she was raped. She was." *Id.*

318. *Id.* at 537. The dissent argued that it was important to maintain the distinction between second degree rape, which requires "force," and third degree rape, which does not require "force." Ironically, the reason it was important to discern between these two degrees was "to avoid elevating relatively minor acts of sexual misconduct, " i.e., third degree rape, to a

that since there was insufficient evidence of "force" for the second degree conviction, the defendant should be convicted of third degree rape instead.[319]

Although the defendant's second degree conviction was sustained, *McKnight* illustrates that the court's determination of whether "force" is present can often be tenuous and arbitrary. The majority's finding of sufficient "force" rested on the victim's naivete and sexual inexperience.[320] The victim's virginity was an important factor, for there was no evidence indicating that the victim was "physically weak" or mentally incompetent.[321] The dissent's reasoning, on the other hand, was more commonplace.[322] This indicates that in other jurisdictions where a third degree statute is unavailable, the *McKnight* conviction, as well as other rape cases where overt force is absent, could be subject to reversal. If a third degree rape statute is available, however, the courts have an alternative and may sustain the conviction based on nonconsent clearly conveyed.[323]

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felony. *Id.*

319. *McKnight*, 774 P.2d at 537.

320. *Id.* at 534-535. The court stated:

> C [the victim] testified that she had never been out on a date with a boy. The evidence showed that this was her first sexual intercourse. Her cousin characterized her as naive and unsophisticated. Indeed, the investigating officer testified that when he interviewed C at the scene, she told him, "I think I've been raped." A reasonable fact finder could infer from this evidence that C was sufficiently naive not to comprehend fully what was happening during the assault. A reasonable fact finder could conclude that a rape victim who is unsophisticated about sexual matters and who has never been sexually active might only offer resistance commensurate with her limited understanding of what was occurring.

Id.

321. *Id.* at 537.

322. *See, e.g.,* Commonwealth v. Berkowitz, 609 A.2d 1338 (Pa. Super. Ct. 1992); State v. Rusk, 406 A.2d 624 (Md. Ct. Spec. App. 1979) (en banc), *rev'd*, 424 A.2d 720 (Md. 1981); Goldberg v. State, 395 A.2d 1213 (Md. Ct. Spec. App. 1979); Powe v. State, 597 So. 2d 720 (Ala. Crim. App. 1991); Commonwealth v. Mlinarich, 498 A.2d 395 (Pa. Super. Ct. 1985); State v. Weisberg, 829 P.2d 252 (Wash. Ct. App. 1992).

323. *See* State v. Weisberg, 829 P.2d 252 (Wash. Ct. App. 1992).

C. REVISITING *BERKOWITZ, RUSK, GOLDBERG, LIMA & MCQUEEN*: APPLICATION OF WASHINGTON'S THIRD DEGREE RAPE STATUTE

If an offense such as Washington's third degree rape statute had been available in Maryland and Pennsylvania, the rape convictions in *Berkowitz*,[324] *Rusk*,[325] and *Goldberg*,[326] which were reversed due to insufficient "force," might have been sustained. In each case, the courts reversed the rape convictions based on insufficient "force" - despite the fact that each victim clearly communicated nonconsent.[327] Thus, the presence of a third degree rape statute without the "force" element would have enabled the courts to sustain the convictions.

In *Berkowitz*, for example, both the victim and the defendant testified that the victim repeatedly said "no."[328] These "no's" clearly indicated nonconsent and thus, should have been sufficient under Washington's third degree rape. In *Rusk*, the victim's pleas to leave (while the defendant said "no") also clearly communicated her nonconsent.[329] Again, her pleas should have been sufficient to sustain a conviction without evidence of violence. In *Goldberg*, the victim told the defendant that she did not want to have sex, wanted to go home, and did not want to be a model anymore.[330] This also clearly conveyed her nonconsent and under Washington's third degree rape statute, should have been sufficient to sustain the conviction.

Rape cases reversed due to insufficient resistance, such as *Lima*[331] and *McQueen*,[332] might also have been sustained if a third degree rape statute had been available. In *Lima*, for

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324. Commonwealth v. Berkowitz, 609 A.2d 1338 (Pa. Super. Ct. 1992).

325. State v. Rusk, 406 A.2d 624 (Md. Ct. Spec. App. 1979) (en banc), *rev'd*, 424 A.2d 720 (Md. 1981).

326. Goldberg v. State, 395 A.2d 1213 (Md. Ct. Spec. App. 1979).

327. See *supra* notes 65-67.

328. *Berkowitz*, 609 A.2d at 1348.

329. State v. Rusk, 406 A.2d 624, 626 (Md. Ct. Spec. App. 1979).

330. *Goldberg*, 395 A.2d at 1215-1216.

331. State v. Lima, 624 P.2d 1374 (Haw. Ct. App. 1981), *rev'd*, 643 P.2d 536 (Haw. 1982).

332. McQueen v. State, 423 So.2d 800 (Miss. 1982).

example, the victim's pleas to "stop" the assault should have been sufficient to sustain the conviction.[333] In *McQueen*, the victim's refusal to open the car door to the defendant and her pleas to go home should have also been sufficient to enable conviction.[334]

The foregoing cases illustrate that Washington's third degree rape statute could have broad implications. Rape convictions could be sustained without a showing of overt violence and the victim would not be required to suffer greater indignities to prove rape. The perpetrator's conduct would also not be dismissed under the guise of insufficient force. Instead, the perpetrator would be held accountable for his criminal behavior, despite the absence of overt violence or an explicit threat of violence.

V. CONCLUSION

Courts often apply the "force" element in a manner that requires the perpetrator to use actual violence or an explicit threat of violence. This observable force that courts tend to recognize, however, is not typically used in acquaintance rapes. The assailant's "force" is more akin to acts of duress and coercion, and the victims typically respond with verbal resistance. Thus, the courts have maintained a legal standard for rape that is contrary to how the crime actually occurs, and how its victims respond.

Washington's third degree rape statute, which does not require the "force" element to prove rape, more accurately fits the reality of the crime. The victim is not required to endure greater physical danger, and can instead convey lack of consent through a medium within her means, i.e., verbally. Use of this statute in other jurisdictions could provide the courts with an alternative to conviction where overt "force" is absent. Use of this standard in other jurisdictions would also represent the

333. *Lima*, 624 P.2d at 1375-1376.
334. *McQueen*, 423 So.2d at 800-801.

criminal justice system's acknowledgment of what defines rape: It is the violation, not the violence, that is criminal.

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