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RAPE REFORM AND A STATUTORY CONSENT DEFENSE

I. INTRODUCTION

For the past three hundred years, rape has been defined as sexual intercourse by force and against the victim's will.¹ The essential element distinguishing rape from non-criminal sexual intercourse was the victim's lack of consent.² In order to convict a defendant of rape, the prosecution has been required to prove the subjective element of lack of consent through a number of "objective" criteria, including proof that the victim resisted the assailant to the "utmost,"³ that the victim cried out while being attacked,⁴ that the victim filed a complaint "promptly,"⁵ and that her testimony has been corroborated.⁶ The requirement of such objective criteria has undoubtedly contributed to the fact that most rapes are never reported to the police, and that, of those

¹ See, e.g., ILL. REV. STAT. ch. 38, § 11-1 (1981) ("A male person of the age of 14 years and upwards who has sexual intercourse with a female, not his wife, by force and against her will, commits rape"); see also *infra* notes 19-21 and accompanying text.

Rape reform laws in many states have made the crime gender neutral and expanded the definition to include anal and oral intercourse, as well as penetration by an object, and have changed the name to "sexual assault" or "criminal sexual conduct." See *infra* note 14. For purposes of historical clarity and consistency in this Comment, the term "rape" will be used here to denote the traditional definition of the crime, and the term "sexual assault" or "sexual conduct" will be used to denote the broader, reform definitions and to refer to specific statutes using those terms. This Comment will not discuss issues involving child sexual assault or the sexual assault of the mentally ill or incapacitated, since the non-consent of the victim is not a factor in these cases.

² In *People v. Fryman*, 4 Ill. 2d 224, 229, 122 N.E.2d 573, 576 (1954), the Illinois Supreme Court stated: "Want of consent on the part of the prosecutrix is of the essence of the crime of forcible rape. . . ."

³ One court has held that a "mere tactical surrender in the face of an assumed superior force is not enough. Where the penalty for the defendant may be supreme, so must resistance be unto the uttermost." *Moss v. State*, 208 Miss. 531, 536, 45 So. 2d 125, 126 (1950); see also *State v. Cowing*, 99 Minn. 123, 108 N.W. 851 (1906); *Prokop v. State*, 148 Neb. 582, 28 N.W.2d 200 (1947).

⁴ "Failure on the part of the woman to cry out when she is being attacked tends to show consent." Note, *Consent as a Defense to Crimes Against the Person*, 54 DICK. L. REV. 186, 189 (1950); see also, *People v. Morrow*, 132 Ill. App. 2d 293, 270 N.E.2d 487 (1971).

⁵ The Colorado Supreme Court has stated: "Evidence of the failure of the person assaulted to make complaint soon after the commission of the outrage is a circumstance which tends to discredit her testimony." *Padilla v. People*, 156 Colo. 186, 188, 397 P.2d 741, 743 (1964).

⁶ See N.Y. PENAL LAW § 130.16 and practice commentary (McKinney 1975).

that are, only two percent result in convictions.⁷

Misconceptions about the crime of rape and mistrust of the female accuser led to the development of this "peculiar" body of law.⁸ Consent has been the essential element of the crime because rape has been thought to be the same act as consensual sexual intercourse, except that one of the participants does not consent. The accusations of female complainants, however, have not been trusted. Courts and legal scholars have long held the belief that most women lie about their lack of consent in such situations, because they either desire forceful intercourse, imagine that a rape occurred, or use such accusations for revenge or blackmail.⁹

During the last twenty years, however, scientific studies on rape and the growth of the women's movement have dispelled these misconceptions, and led to efforts to reform the definition of rape. In light of recent psychological and sociological research characterizing rape as primarily a crime of violence rather than a crime of sex,¹⁰ some reformers have eliminated the consent element and defined rape solely in terms of the force or violence used by the assailant.¹¹ Other reformers argue that a woman's right to privacy and to say no to sexual advances should be protected, and thus a new definition of lack of consent should be made a part of the definition of rape.¹² Many states continue to use the traditional definition of non-consent, although the statutory language may have been updated.¹³ These changes have taken place as states across the country have completely rewritten the evidentiary, sentencing, and definitional laws concerning rape.¹⁴ The definition of lack of consent,

⁷ A number of studies indicate that only one rape out of every four committed is reported; other studies estimate that only one rape out of every ten committed is reported. See BATTELLE MEMORIAL INSTITUTE LAW AND JUSTICE STUDY CENTER FOR THE NATIONAL INSTITUTE FOR LAW ENFORCEMENT AND CRIMINAL JUSTICE, LAW ENFORCEMENT ASSISTANCE ADMINISTRATION, *FORCIBLE RAPE: FINAL REPORT 15* (1978) [hereinafter cited as *BATTELLE INSTITUTE REPORT, FINAL REPORT*]; *Rape: The Sexual Weapon*, Time Magazine, September 5, 1983, at 27. The Battelle Institute Report also noted that fear of police, prosecutors, and trial procedures were the leading reasons why rape victims did not report the crime. *BATTELLE INSTITUTE REPORT, FINAL REPORT, supra*, at 15.

⁸ Berger concludes that "[t]he 'peculiar' law of rape has produced evidentiary oddities that have marked it out for criticism and change." Berger, *Man's Trial, Woman's Tribulation: Rape Cases in the Courtroom*, 77 COLUM. L. REV. 1, 7 (1977). Berger also observes that this singularity "stems mainly from a deep distrust of the woman accuser." *Id.* at 10.

⁹ For an extensive discussion of the reasons why the accusations of female complainants could not be trusted, see Note, *Forcible Rape and Statutory Rape: An Exploration of the Operation and Objectives of the Consent Standard*, 62 YALE L.J. 55 (1952).

¹⁰ See *infra* notes 54-59 and accompanying text.

¹¹ See *infra* notes 112-18 and accompanying text.

¹² See *infra* notes 141-50 and accompanying text.

¹³ See *infra* notes 64-69 and 86-91 and accompanying text.

¹⁴ Since 1969, every state in the country has made *some* change in their rape or sexual assault statute. See Bienen, *Rape IV*, supplement to 6 WOMEN'S RTS. L. RPTR. (1980) (com-

however, continues to be "the single most unresolved issue in the area of rape reform."¹⁵

This Comment will examine rape and the consent issue. The Comment begins by reviewing the common law origins of the definition of rape and consent, and surveys the reform statutes which have attempted to formulate a new definition of the crime. The last section of the Comment analyzes a new rape statute, recently enacted in Illinois. The statute defines rape solely in terms of the force used by the assailant and creates an affirmative defense of consent. This formulation may finally address the concerns of rape reformers and dispel the misconceptions and mistrust underlying the traditional law of rape.

II. CONSENT AND THE COMMON LAW

A. HISTORICAL ORIGINS OF THE LAW

Rape statutes date back to the earliest codifications of ancient law.¹⁶ The key element in the definitions of these ancient crimes was the

plete survey of all state rape laws as of 1980 [hereinafter cited as Bienen, *Rape IV*]. Three jurisdictions, including the District of Columbia, made changes only in the penalties levied or evidentiary requirements, but did not change the basic definition of the crime. See D.C. CODE ANN. § 22-2801 (1981); GA. CODE ANN. § 16-6-1 (Supp. 1982); KAN. STAT. ANN. § 21-3502 (1981).

Many of the reform statutes have been drafted by victims or victim-advocate groups, and are aimed at eliminating those elements of the law most offensive and detrimental to victims of rape. See Bienen, *Rape III—National Developments in Rape Reform Legislation*, 6 WOMEN'S RTS. L. RPTR. 170, 171-72 (1980) [hereinafter cited as Bienen, *Rape III*]; BATTELLE MEMORIAL INSTITUTE LAW AND JUSTICE STUDY CENTER FOR THE NATIONAL INSTITUTE FOR LAW ENFORCEMENT AND CRIMINAL JUSTICE, LAW ENFORCEMENT ASSISTANCE ADMINISTRATION, FORCIBLE RAPE: AN ANALYSIS OF LEGAL ISSUES 46-47 [hereinafter cited as BATTELLE INSTITUTE REPORT, FORCIBLE RAPE: LEGAL ISSUES]. For example, 44 states have enacted evidentiary laws that limit the admissibility of a victim's sexual history or reputation at trial. See, e.g., ILL. REV. STAT. ch. 38, § 115-7 (1981); MICH. COMP. LAWS ANN. § 750.520j (Supp. 1982); cf. FED. R. EVID. 412. Thirty-eight states have created penalty structures with different degrees of rape based on the dangerousness of the offender or the vulnerability of the victim. See, e.g. COLO. REV. STAT. §§ 18-3-402-403 (1978); MICH. COMP. LAWS ANN. §§ 750.520(b), (d)(Supp. 1982); N.C. GEN. STAT. § 14-27.3 (1981). Forty-one states have made their rape statutes gender neutral, and most of these states have also expanded the definition of the crime to include vaginal, oral, and anal penetration by objects as well as by a penis. Because some states have felt that a broader definition of the crime warranted a broader name for the crime, 21 reform statutes have changed the title of the crime from "rape" to "sexual assault" or a similar term. See e.g., N.J. REV. STAT. ANN. § 2C:14-2 (West 1982) ("sexual assault"); FLA. STAT. ANN. § 794.011 (West 1976) ("sexual battery"); MICH. COMP. LAWS ANN. § 750.520b (West Supp. 1982) ("criminal sexual conduct"); N.M. STAT. ANN. § 30-9-11 (Supp. 1982) ("criminal sexual penetration"). A number of other statutes also deal with "sexual contact" crimes that involve touching of the breast or genitalia, but not penetration. See, e.g., MICH. COMP. LAWS ANN. §§ 750.520la, c, e (West Supp. 1982).

¹⁵ Bienen, *Rape III*, *supra* note 14, at 181; see also Loh, *The Impact of Common Law and Reform Rape Statutes on Prosecution: An Empirical Study*, 55 WASH. L. REV. 543, 548 (1980) ("[T]he definitional standard is the most important conceptual issue in rape law . . .").

¹⁶ The Babylonian Code of Hammurabi, dating from approximately 1900 B.C., defined a

marital status of the woman. The most serious punishment for rape was levied when the victim was a virgin betrothed to another man because the valuable possession of that man was forever destroyed.¹⁷ In contrast, rape of a virgin who was not betrothed was treated as a minor offense, punished by an order to marry the woman and a fine to be paid to the victim's father.¹⁸

The classic definition of rape was formulated by Lord Edward Coke in 1628, and is the basis for modern-day rape laws: "Rape . . . is when a man hath carnall [sic] knowledge of a woman by force and against her will."¹⁹ Matthew Hale defined the crime in similar terms, as "the carnal knowledge of any woman above the age of ten years with or against her will,"²⁰ omitting the force element.²¹ This discrepancy does not seem to have been significant, as the key element in the definition was lack of consent. Force was only relevant as a means of showing non-consent.²²

series of crimes involving "lying" with women who were betrothed or married to others. Gold & Wyatt, *The Rape System: Old Roles and New Times*, 27 CATH. U.L. REV. 695, 696-98 (1978). One thousand years later, a similar series of laws appeared in the Book of Deuteronomy, the compilation of ancient Hebrew law. See *Deuteronomy* 22:28-29; Smith, *History of Rape and Rape Laws*, 60 WOMEN LAWYERS J. 188, 189 (1974).

¹⁷ The punishment exacted was death by stoning. If the crime took place outside the city, in the deserted field, only the assailant was punished. If, however, the crime took place within the city wall, both victim and attacker were stoned, since it was believed that a truly virtuous woman would have cried out and been saved from an attack occurring in the city. S. BROWNMILLER, *AGAINST OUR WILL: MEN, WOMEN AND RAPE* 10-11 (1975); Smith, *supra* note 16, at 189.

¹⁸ Gold & Wyatt, *supra* note 16, at 699; Smith, *supra* note 16, at 189. This historical legacy has led many modern feminist commentators to find that "[t]he crime of rape is . . . considered an offense not against the woman herself, but against the men who made the law, fathers, husbands and kin." Greer, *Seduction is a Four-Letter Word*, in RAPE VICTIMOLOGY 374, 378 (L. Schultz ed. 1975); see also, BROWNMILLER, *supra* note 17, at 8 ("Rape entered the law through the back door, as it were, as a property crime of man against man. Woman, of course, was viewed as the property."); Griffin, *Rape: The All-American Crime*, in FORCIBLE RAPE: THE CRIME, THE VICTIM AND THE OFFENDER 47, 61 (D. Chappell, R. Geis & G. Geis eds. 1977) ("Laws against rape exist to protect the rights of male as possessor of the female body and not the right of the female over her own body.").

¹⁹ 1 E. COKE, *FIRST PART OF THE INSTITUTES OF THE LAWS OF ENGLAND* § 190, at *124a; cf. GA. CODE ANN. § 16-6-1(a) (Supp. 1982) ("A person commits rape when he has carnal knowledge of a female, forcibly and against her will").

²⁰ 1 M. HALE, *THE HISTORY OF THE PLEAS OF THE CROWN* 628. The differentiation between the rape of adults and the rape of children is also maintained in all modern rape laws. The age of consent varies from jurisdiction to jurisdiction, but it is generally true that sexual penetration of children is a crime, whether consensual or not. See Bienen, *Rape III*, *supra* note 14, at 189-97.

²¹ See Gold & Wyatt, *supra* note 16, at 699-700; Snelling, *What is Rape?*, in RAPE VICTIMOLOGY 145, 146-47 (L. Schultz ed. 1975).

²² One commentator explains: "Rather than seeing the nonconsensual conduct of the victim as relevant to show that the actor must have used force, the carnal knowledge statute sees force only as relevant to show nonconsent." Note, *Recent Statutory Developments in the Definition of Forcible Rape*, 61 VA. L. REV. 1500, 1504 (1975). Blackstone credited English law with

This emphasis on non-consent has prevailed in the United States as well. In many jurisdictions, lack of consent was and is "of the essence of the crime of forcible rape. . . ." ²³ The problem American jurists found with using non-consent as the controlling criminal standard was its subjectivity. In order to prove lack of consent, the testimony of the female accuser would have to be believed, as she was the only person who could testify to her state of mind at the time of the attack. Courts were reluctant to convict accused rapists on such testimony alone, primarily because of a fundamental distrust of the female complainant. ²⁴ As in the Biblical story of Joseph and the deceptive wife of Potiphar, a woman who cries rape was traditionally suspected of having ulterior motives, or of inviting the so-called attack. ²⁵ One commentator suggested that "[m]any women, for example, require as part of ordinary 'love play' aggressive overtures by the man." ²⁶ Courts have attributed motives such as money, ²⁷ or shame at being discovered in an illicit tryst ²⁸ to rape victims, and have thereby acquitted the accused assailants. Leading legal scholars, such as John Henry Wigmore, warned against the "contriving false charges of sexual offenses" brought by women, and claimed that "[t]he real victim . . . too often in such cases is the innocent man. . . ." ²⁹

making non-consent an element of rape, in contrast to Roman law which punished accused rapists without regard to the consent of the woman:

[O]ur English law does not entertain quite such sublime ideas of the honour of either sex as to lay the blame of a mutual fault upon one of the transgressors only; and therefore makes it a necessary ingredient in the crime of rape, that it must be against the woman's will.

4 W. BLACKSTONE, COMMENTARIES 211.

²³ *People v. Fryman*, 4 Ill. 2d 224, 229, 122 N.E.2d 573, 576 (1954); *see supra* note 2.

²⁴ *See generally* Berger, *supra* note 8, at 21-30.

²⁵ The wife of Potiphar, who was an officer of the Pharaoh of Egypt, attempted to seduce Joseph. When he spurned her advances and fled, she accused him of rape and had him thrown into prison. *Genesis* 39: 7-20; *see also* BROWNMILLER, *supra* note 17, at 12-13.

²⁶ Note, *supra* note 9, at 66.

²⁷ One court stated that "[the complainant] further testified. . . . [t]hat she had already become a girl of bad character at the time [the defendant] had relations with her, and that she was induced to make the false statements by her mother, to enable the latter to force money from [the defendant]. . . ." *Dunn v. State*, 127 Tenn. 267, 281, 154 S.W. 969, 972 (1912).

²⁸ The Illinois Supreme Court stated:

Further, [the rape charge] may as well be accounted for by a belated sense of guilt occurring when a dalliance unintentionally extended into the daylight hours and the prosecutrix felt the need to explain the presence of the defendant's auto on the driveway and his departure from the house in case they had been observed.

People v. DeFrates, 33 Ill. 2d 190, 196, 210 N.E.2d 467, 470 (1965).

²⁹ WIGMORE, EVIDENCE § 924a (Chadbourne rev. 1970). Wigmore's recommendation was that *all* complainants in rape cases be required to undergo careful psychiatric screening because of the pathological complexes inherent in all women. Critics of this section of his evidence treatise note, however, that Wigmore fails to cite one actual case of a man falsely convicted of rape, although he does relate five case histories of female sex fantasies, none of

As a result of this distrust of the rape complainant's testimony, a specialized consent standard evolved that differed from other legal definitions of consent. The standard was not a contractual one, where evidence of a meeting of the minds of the parties was examined. Nor was the standard one of freely given agreement, where any coercion negated the apparent consent. Consent in rape was formulated in terms more analogous to duress.³⁰ As in duress, force and acquiescence could co-exist in the same incident. The definition of rape required that both force and lack of consent be proved, creating an inference that most forceful sexual penetration was consensual.³¹ It was believed that many women enjoyed forceful sexual intercourse, or had such ambivalent feelings about the act that although she did not expressly consent to the act, a woman may have desired intercourse and used the excuse of forceful penetration to mitigate her own guilt.³²

Because such ambivalence or misleading actions by the female accuser could entrap a man, the consent standard used by the courts was not only express consent, but also included "implied consent." As one court explained,

[T]he consent given by prosecutrix may be implied as well as expressed, and the defendant would be justified in assuming the existence of such

which resulted in the conviction of a man for a sex crime. See Note, *The Victim in a Forcible Rape Case: A Feminist View*, 11 AM. CRIM. L. REV. 335, 337 (1973). One detailed study of this section of Wigmore's treatise contends that Wigmore deliberately misrepresented the authorities he relied on to substantiate the assertions made in § 924a. Bienen, *A Question of Credibility: John Henry Wigmore's Use of Scientific Authority in Section 924a of the Treatise on Evidence*, 19 CAL. W.L. REV. 235 (1983).

³⁰ Pateman explains the standard as follows:

The standard of "consent" in rape has been formulated within the same narrow boundaries as "duress" in the performance of criminal acts. The legal failure to distinguish between "acts of sexual assault" and "consenting relations among adults" or between enforced submission and consent, is grounded in a complex of beliefs about the "natural" characteristics of sex.

Pateman, *Women and Consent*, 8 POL. THEORY 149, 158 (1980).

³¹ One commentator has explained the elements as follows:

The relationship between the concepts of force, lack of consent, and compelled conduct is a lesson of life taught by experience. Society and the law have decided that compelled conduct is not an exercise of freedom of choice. . . . [A] literal reading of the statutory definition of rape indicates that the use of force and consent can coexist. In addition to proof of force, the prosecutor must establish the negative, that the victim did not consent, because there is an inference that the victim consented to the sexual conduct.

Note, *Rape in Illinois: A Denial of Equal Protection*, 8 J. MAR. J. PRAC. & PROC. 457, 459-60 (1975).

³² One commentator suggests that "a woman's need for sexual satisfaction may lead to the unconscious desire for forceful penetration, the coercion serving neatly to avoid the guilt feelings which might occur after willing participation." Note, *supra* note 9, at 67. Lord Byron expressed a similar attitude in his poem, *Don Juan*:

A little still she strove, and much repented,
And whispering, "I will ne'er consent," — consented.

G. BYRON, DON JUAN, Canto the first, CXVII (Marchand ed. 1958).

consent if the conduct of the prosecutrix toward him at the time of the occurrence was of such a nature as to create in his mind the honest and reasonable belief that she had consented by yielding her will freely to the commission of the act.³³

The issue was not *actual* consent, "but rather behavior by the victim short of consent that is taken to signal her sexual availability."³⁴ A woman who sends out signals, such as drinking, dancing, or hitchhiking, is assumed to have invited the rape.³⁵ A victim's "provocative clothing" or "sexually promiscuous" behavior are also signals of "implied" consent that incriminate the testimony of the female complainant and pardon the actions of the male defendant.³⁶

Although establishing consent in rape law does not appear to have been difficult, proving non-consent was. The complainant's testimony that "I did not give my consent" was insufficient, because women might lie or mislead men.³⁷ Instead of simply relying on such subjective evidence, an "objective" standard, resistance, was used to prove lack of consent beyond a reasonable doubt. Under the resistance standard, a victim was required to physically resist the assailant, as an outward manifestation of her lack of consent.³⁸ Many jurisdictions held that "a

³³ Taylor v. State, 249 Ala. 130, 133, 30 So. 2d 256, 258 (1947).

³⁴ Ireland, *Rape Reform Legislation: A New Standard of Sexual Responsibility*, 49 U. COLO. L. REV. 185, 189; cf. State v. Myers, 606 P.2d 250 (Utah 1980).

³⁵ See, e.g., Gordon v. State, 32 Ala. App. 398, 26 So. 2d 419 (1946) (conviction reversed where victim was drinking and implied consent given); *People v. Hunt*, N.Y. Times, July 31, 1977, at 24, col. 1 (Cal. Ct. App. July 20, 1977) (California Court of Appeals overturns rape conviction because a hitchhiking victim "advertise[d]" consent to sexual advances); see also cases described in H. KALVEN & H. ZEISEL, *THE AMERICAN JURY* 250 (1966). Kalven and Zeisel found that even in cases where the law does not recognize such actions as consent, juries will use a modified "assumption of risk" notion on their own and refuse to convict defendants in such cases. See generally Comment, *The Rape Victim: A Victim of Society and the Law*, 11 WILLAMETTE L.J. 36, 47 (1974). But see State v. Overman, 269 N.C. 453, 153 S.E.2d 44 (1967) (a woman's "contributory negligence" in going to a dance hall without "proper escort" does not establish consent, although it is evidence to be considered by the jury on that question).

³⁶ See New York Times, May 27, 1977, at 9, col. 1 (Madison, Wisconsin trial court judge placed fifteen-year-old boy who raped a sixteen-year-old girl on probation at home, stating that boy responded "normally" to woman's provocative clothing); Chicago Sun-Times, July 27, 1982, at 4 (cites case of Wisconsin Circuit Judge who referred to a five-year-old sexual assault victim as an "unusually sexually promiscuous young lady" and sentenced the attacker to probation).

³⁷ One commentator describes a case where the victim "failed to testify that she made the least effort to prevent the defendant from having intercourse with her. . . . She testified, 'I did not give my consent.' The [state] Supreme Court interpreted this to mean 'I did not give my *express* consent' and held that this was not a sufficient manifestation of unwillingness to negative consent." Note, *supra* note 4, at 189 (emphasis in original).

³⁸ See Washburn, *Rape Law: The Need for Reform*, 5 N.M.L. REV. 279, 283 (1975); Note, *Rape Reform Legislation: Is It the Solution?*, 24 CLEV. ST. L. REV. 463, 474 (1975); Note, *The Resistance Standard in Rape Legislation*, 18 STAN. L. REV. 680, 682 (1966); Note, *Towards a Consent Standard in the Law of Rape*, 43 U. CHI. L. REV. 613, 618 (1976).

mere tactical surrender in the face of an assumed superior physical force is not enough. Where the penalty for the defendant may be supreme, so must resistance be unto the uttermost."³⁹ The "most vehement exercise of every physical means" had to be used and continued "as long as [the victim] has the power to do so until the offense is consummated."⁴⁰ The resistance standard was justified by some courts on the grounds that it was impossible to rape a woman against her will: "Indeed, medical writers insist that these obstacles are practically insuperable in absence of more than the usual relative disproportion of age and strength between men and women."⁴¹ In recent years, those states continuing to use the resistance standard have modified it to require only "earnest resistance"⁴² or "such resistance as will demonstrate that the act was against [the victim's] will."⁴³

³⁹ *Moss v. State*, 208 Miss. 531, 536, 45 So. 2d 125, 126 (1950); *see also State v. Cowing*, 99 Minn. 123, 108 N.W. 851 (1906).

⁴⁰ *Cascio v. State*, 147 Neb. 1075, 1078-79, 25 N.W.2d 897, 900 (1947); *see also People v. Geddes*, 301 Mich. 258, 261, 3 N.W.2d 266, 267 (1942). The court in *Moss* explained the resistance standard as follows:

Initial force was . . . not enough, for submission may follow. The courts were led therefore to examine the extent and duration of such force lest it fail to persist to the end. It was logical to test this element by inquiring whether the victim failed to resist to the end. It may be that capitulation has too often been construed as an abandonment, rather than an exhaustion, of resistance.

208 Miss. at 537-38, 45 So. 2d at 125-27. The inference, of course, is that abandonment of resistance after a struggle, or forced submission is consent, and renders the forcible act non-criminal, while total exhaustion of a woman's physical resistance is required for legal non-consent in rape.

⁴¹ *Brown v. State*, 127 Wis. 193, 200, 106 N.W. 536, 538 (1906). Anthropologist Margaret Mead expressed similar misconceptions: "By and large, within the same homogenous social setting, an ordinarily strong man cannot rape an ordinarily strong healthy woman." M. MEAD, *SEX AND TEMPERMENT IN THREE PRIMITIVE SOCIETIES* 207 (1963), *quoted in Schwendinger & Schwendinger, Rape Myths: In Legal, Theoretical and Everyday Practice*, CRIME AND SOC. JUST., 19 (Spring-Summer 1974). One judge has expressed the opinion that "he himself could not conceptualize 'rape;' in his words, 'a hostile vagina will not admit a penis. . .'" Bohmer & Blumberg, *Twice Traumatized: The Rape Victim and the Court*, 58 JUDICATURE 391, 398 (1975).

⁴² *See, e.g., ALA. CODE* § 13-A-6-60(8) (1982) (definition of "forcible compulsion" as "physical force that overcomes earnest resistance"); *see also infra* notes 89-94 and accompanying text.

⁴³ *People v. Wilcox*, 33 Ill. App. 3d 432, 435, 337 N.E.2d 211, 215 (1975). "Utmost" resistance is still required in Louisiana, however, for the crime of aggravated rape. *See LA. REV. STAT. ANN.* § 14:42 (West Supp. 1983).

In Illinois, resistance is not required "where it would be futile" or "endanger the life of the [victim], or where the victim is overcome by superior strength or paralyzed by fear." *People v. Smith*, 32 Ill. 2d 88, 92, 203 N.E.2d 879, 881 (1965). Unless these circumstances are shown, if the victim has use of her faculties and physical powers, she is required to resist. *People v. Faulisi*, 25 Ill. 2d 457, 461, 185 N.E.2d 211, 213 (1962); *People v. Warren*, 113 Ill. App. 3d 1, 6, 446 N.E.2d 591, 594 (1983). If the victim's actions fail to meet Illinois' resistance requirement, the defendant is acquitted, even in cases where a trial court has made a factual determination that resistance was sufficient or futile. *See People v. Taylor*, 48 Ill. 2d 91, 268 N.E.2d 865 (1971) (although defendant forced victim to enter his car with the threat

B. THE MISCONCEPTIONS IN THE COMMON LAW

In recent years, the inadequacies of the common law definition of consent have been revealed. The obstacles the common law created for victims contributed to the low conviction rates reported for rape cases.⁴⁴ The law's underlying assumptions that women lie about rape charges or desire forceful sexual intercourse are now seen as unfounded and offensive.⁴⁵ Thus, the idea that women "imply" consent by engaging in otherwise normal activities, such as drinking or dancing, is clearly misconceived. These may be activities designed to find companionship, or they may be inherently risky activities, such as hitchhiking, but they are in no way activities that presume an outcome that involves forceful sexual penetration.⁴⁶ As one legal commentator observed nearly thirty years ago, "The fiction of 'implied consent' has been used as a device to assign certain consequences to certain factual situations despite the absence of an agreement, wish, desire or similar state of mind on the part of a person. . . ." ⁴⁷

The resistance requirement has also been criticized, as it is based on the assumption that rape occurs in situations that permit a planned,

of a gun he never revealed and was not proved in court to exist, this is not a situation where resistance would be futile and victim should have resisted); *People v. Faulisi*, 25 Ill. 2d 457, 185 N.E.2d 211 (1962) (where defendant drove to victim's house at 3:00 a.m. and they engaged in conversation, there should be substantial physical evidence of a struggle to sustain a conviction); *People v. Warren*, 113 Ill. App. 3d 1, 446 N.E.2d 591 (1983) (in conviction for deviate sexual conduct, fact that 6-foot 3-inch, 185-pound defendant carried 5-foot 2-inch, 100-pound victim into a secluded woods was not sufficient to show that victim was overcome by superior strength to justify lack of resistance); *People v. Rosario*, 110 Ill. App. 3d 1020, 443 N.E.2d 273 (1982) (victim testified that she did not cry out or attempt to leave the car, so resistance was insufficient to sustain conviction).

This resistance standard was one of the motivating factors behind recent efforts to reform Illinois rape laws. The victim in the *Warren* case spoke out vigorously for passage of the Illinois rape reform bill. In explaining her failure to resist, she stated, "I only wanted to come out alive. When somebody tells you he's desperate, there are times when you believe that person." Donosky, *Rape victims relive horror to push new law*, Chicago Tribune, June 21, 1983, at 1, col. 1.

⁴⁴ See *supra* note 7 and accompanying text; see also Washburn, *supra* note 38, at 306-07.

⁴⁵ One commentator concludes:

The idea, so commonly entertained, that women somehow enjoy rape is absolutely unfounded, and a further indication of the contempt that men feel for women and their sexual functions. One might as well argue that because most men have repressed homosexual or feminine elements in their personalities, they enjoy buggery and humiliation.

Greer, *supra* note 18, at 381; see also Schwendinger & Schwendinger, *Rape Victims and the False Sense of Guilt*, 13 CRIME & SOC. JUST. 4, 16 (1980).

⁴⁶ Women may put themselves in hazardous predicaments, but as Cook County Assistant State's Attorney Julie Hamos noted, "I do believe, as does the women's community, that even stupid women can be raped." Chicago Sun-Times, July 27, 1982, at 1, col. 2 (quoting Ms. Hamos).

⁴⁷ Note, *Consent, Liability and Guilt: A Study in Judicial Method*, 7 STAN. L. REV. 507, 511 n.19 (1955).

deliberative response by the victim.⁴⁸ It is also presumed that when faced with such a situation, all rape victims will know how to respond appropriately. Given historical and cultural patterns, however, women have not generally been taught self-defense, but instead have been taught to be submissive and passive.⁴⁹ For example, one victim testified that she did not resist her assailant because she " 'didn't know how to,' adding that she had never had any training and that no one had told her what to do in such a situation."⁵⁰ Furthermore, studies indicate that victims who resist are more likely to be injured than victims who do not.⁵¹ The resistance standard defines rape in terms of the actions of the victim, rather than the culpable conduct of the assailant, condemning the victim for failing to resist.⁵²

The common law focus on lack of consent stems from a belief that the act of rape is the same as consensual sexual intercourse, except that one of the participants does not consent. Commentators have stated that rape "is the only form of violent criminal assault in which the physical act accomplished by the offender (sexual intercourse) is an act which may, under other circumstances, be desirable to the victim."⁵³

Modern sociological and psychological works have established, however, that rape is not primarily a sexual crime, motivated by a desire for sexual gratification. Instead, it is a violent assault motivated by hostility, anger, and a need to dominate the victim.⁵⁴ The leading psychological study of convicted rapists found that

rape, rather than being primarily an expression of sexual desire, is, in fact, the use of sexuality to express these issues of power and anger. Rape, then, is a pseudo-sexual act, a pattern of sexual behavior that is concerned much more with status, hostility, control, and dominance than with sensual pleasure or sexual satisfaction.⁵⁵

⁴⁸ Schwendinger & Schwendinger, *supra* note 41, at 21.

⁴⁹ Weis & Borges, *Victimology and Rape: The Case of the Legitimate Victim*, 8 ISSUES IN CRIMINOLOGY 71, 83 (1973); Schwendinger & Schwendinger, *supra* note 45, at 7.

⁵⁰ *People v. Taylor*, 48 Ill. 2d 91, 95, 268 N.E.2d 865, 867 (1971); *see also Greer, supra* note 18, at 376.

⁵¹ BATTLE MEMORIAL INSTITUTE LAW AND JUSTICE STUDY CENTER, NATIONAL INSTITUTE OF LAW ENFORCEMENT AND CRIMINAL JUSTICE, LAW ENFORCEMENT ASSISTANCE ADMINISTRATION, FORCIBLE RAPE: POLICE VOLUME I 22 (1977).

⁵² *See* cases cited *supra* note 43.

⁵³ Note, *supra* note 22, at 1503.

⁵⁴ *See, e.g., A. GROTH, MEN WHO RAPE* (1979); Quenneville, *Will Rape Ever Be A Crime of the Past?: A Feminist View of Societal Factors and Rape Law Reforms*, 9 GOLDEN GATE L. REV. 581, 586-87 (1978-79); Weis & Borges, *supra* note 48, at 92.

⁵⁵ A. GROTH, *supra* note 54, at 13. Groth, one of the leading authorities on sex offenders, corroborates this statement by observing that rape is not the result simply of sexual arousal that has no outlet, as one-third of the offenders studied were married and sexually active at the time they committed the sexual assaults. *Id.* at 5. Groth also noted that one out of every three offenders experienced some sort of sexual dysfunction during the assault, an indication that rape is symptomatic of psychological conflict and anxiety, not sexual desire. *Id.* at 84-85.

The nature of the act of rape is also markedly different from normal voluntary sexual intercourse. Rape is characterized by the use of force, coercion, or threats that place the victim in a state of fear and submission, rather than the willing participation usually experienced in sexual intercourse. One survey found that some type of non-physical aggression, coercion, or intimidation was used in 87% of the rapes studied,⁵⁶ while actual physical force was used in 85% of the cases.⁵⁷ The victim was brutally beaten or choked in 32% of the cases.⁵⁸ Rape is *not* an act a victim would find desirable under consensual circumstances. As one rape victim noted, "Who would consent to lying flat on her back in a dark alley in January?"⁵⁹

Commentators have pointed out that the physiological differences between men and women may be the source of misconceptions concerning the impossibility of rape and the sexual pain or pleasure experienced by rape victims. For the male perpetrator, the physical aspects of rape and sexual intercourse are the same. For female victims, however, the act of penetration can occur without sexual stimulation and with significant pain:

Physiologically, male sexuality, . . . is dependent upon penile reactions. Thus the male must experience some stimulation, and the result must be physically pleasurable even if the situation is psychologically distasteful. Therefore it may be difficult for a man to comprehend rape as anything but a basically sexual experience for anyone who is engaged in it. . . . The woman's claim that the rape was physically only painful and without any pleasurable sensation . . . may be unintelligible to a man. . . .⁶⁰

Men may feel that despite the forceful or coercive aspects of an act, a woman who does not actively resist must experience some sexual stimulation and pleasure, and thus that act is like consensual sexual intercourse. Objective, visible proof of the woman's distress and trauma was thought to be necessary to distinguish the criminal act from the consensual act.⁶¹

The old common law, defining rape in terms of the victim's lack of consent, thus does not accurately characterize what is actually criminal

⁵⁶ M. AMIR, *PATTERNS IN FORCIBLE RAPE* 152 (1971).

⁵⁷ *Id.* at 155.

⁵⁸ *Id.*

⁵⁹ Bohmer, *Judicial Attitudes Toward Rape Victims*, 59 *JUDICATURE* 303, 304 (1974) (quoting victim).

⁶⁰ Weis & Borges, *supra* note 49, at 104. The same physiological characteristics may have contributed to the notion that "a hostile vagina will not admit a penis," since it is generally true that a hostile penis cannot penetrate a vagina. *See* Bohmer & Blumberg, *supra* note 41, at 398.

⁶¹ One court noted that "[i]t certainly must have been a *very amicable struggle* indeed, which would inflict no bruises on the girl. . . ." *State v. Burgdorf*, 53 Mo. 65, 67 (1873) (emphasis in original); *see also supra* notes 38-41 and accompanying text.

about rape. Rape is an act of violence, anger, and power, distinguished by its coercive and sometimes brutal nature, and so the essence of rape is the force or coercion used by the defendant, not the lack of consent of the victim. The changing attitudes toward women brought about by the women's movement have also dispelled notions that women desire forceful sexual intercourse and will lie about the circumstances under which it occurs. The goals of drafters writing new rape reform statutes, therefore, are to identify force or coercion as the key element of the crime, to eliminate the use of implied consent and the resistance standard, and to punish the defendant for his culpable actions, rather than the victim for the failure to communicate her lack of consent. A survey of those rape reform efforts follows in Section III.

III. CONSENT AND RAPE REFORM LAWS

A. EARLY ATTEMPTS AT REFORM AND THE MODEL PENAL CODE

In 1962, the American Law Institute issued its final draft of the Model Penal Code, which was a comprehensive effort to update and revise the criminal laws of the United States.⁶² The sexual offenses section was a significant departure from the common law definition of rape, and it is the earliest rape reform statute.⁶³

The Model Penal Code creates two degrees of rape and a third sexual crime called "Gross Sexual Imposition."⁶⁴ Second degree rape is

⁶² The Code was not intended as a mere restatement of the laws that already existed in the various states, but was instead an attempt to strike a "fresh approach." MODEL PENAL CODE § 213.1 comment, at 306 (Official Draft and Revised Commentaries 1980); *see also* BATTELLE INSTITUTE REPORT, FORCIBLE RAPE: LEGAL ISSUES, *supra* note 14, at 5.

⁶³ The section on sexual offenses was first submitted to the American Law Institute in 1955, and was accepted without substantial change in 1962. BATTELLE INSTITUTE REPORT, FORCIBLE RAPE: LEGAL ISSUES, *supra* note 14, at 5.

⁶⁴ The Model Penal Code provides:

(1) *Rape*. A male who has sexual intercourse with a female not his wife is guilty of rape if:

(a) he compels her to submit by force or by threat of imminent death, serious bodily injury, extreme pain or kidnapping, to be inflicted on anyone; or

(b) he has substantially impaired her power to appraise or control her conduct by administering or employing without her knowledge drugs, intoxicants or other means for the purpose of preventing resistance; or

(c) the female is unconscious; or

(d) the female is less than 10 years old.

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.

(2) *Gross Sexual Imposition*. A male who has sexual intercourse with a female not his wife commits a felony of the third degree if:

(a) he compels her to submit by any threat that would prevent resistance by a woman of ordinary resolution. . . .

MODEL PENAL CODE § 213.1.

committed when a man has sexual intercourse with a female, not his wife, and "compels her to submit by force or by threat of imminent death, serious bodily injury, extreme pain or kidnapping, to be inflicted on anyone. . . ."65 If the accused causes serious bodily injury or if the victim was not a "voluntary social companion" of the accused at the time the second degree rape was committed, the crime is first degree rape.66

The Code definition of rape bears little resemblance to the definition under the common law.67 Not only is the use of force prohibited, but serious threats against the victim, or anyone else, can be punished.68 In addition, explicit reference to the victim's lack of consent, as a separate element of the crime, is deleted, and the focus of the definition is on the defendant's actions that "compel" the victim. Compulsion, however, is defined in terms of the victim's submission. The Code does not, therefore, completely discard the consent standard, as the comments explaining the Code indicate.69

The authors of the sexual offense section explain in their comments that the Code approach "is not . . . that consent by the victim is irrelevant or that inquiry into the level of resistance by the victim cannot or should not be made. Compulsion plainly implies non-consent. . . ."70 The resistance standard is rejected where force is proved,71 but "resistance by a woman of ordinary resolution" is the statutory standard used to define Gross Sexual Imposition, where the force exerted by the defendant is not an element.72 Thus, while the drafters intended to focus primarily on the actions of the defendant, they continued to stress the importance of the victim's non-consent. The drafters noted that "the possibility of consent by the victim, even in the face of conduct that may give some evidence of overreaching, cannot be ignored,"73 and echoed the concern of other commentators concerning the ambivalence of women toward forceful sexual intercourse.74 It was therefore clearly in-

65 *Id.*

66 *Id.*

67 *See supra* note 19 and accompanying text.

68 *See supra* note 64.

69 MODEL PENAL CODE § 213.1 comment, at 301-06.

70 *Id.* at 306.

71 The Code provides that "[w]here the proof establishes that the actor did compel submission to intercourse by force, the failure of a weak or fearful victim to display 'utmost' or even 'earnest' resistance should not be exculpatory." *Id.*

72 *Id.* at § 213.1(2).

73 *Id.* at § 213.1 comment, at 303.

74 The commentary explains:

Often the woman's attitude may be deeply ambivalent. She may not want intercourse, may fear it or may desire it, but feel compelled to say "no." The confusion at the time of the act may later resolve into non-consent. Some have expressed the fear that a woman who subconsciously wanted to have sexual intercourse will later feel guilty and cry rape.

tended that the language "compels [the victim] to submit by force" includes proof of the victim's non-consent.⁷⁵

Currently, no state uses the entire sexual offenses section of the Code, but ten states have enacted statutes based on the Code's definition of rape.⁷⁶ None of these statutes make any explicit reference to the victim's lack of consent as a separate element of the crime. Rape is defined, instead, as sexual intercourse by force which "compels" or "causes" the victim to submit.⁷⁷ In accord with the intent of the drafters of the Code,

Id. at 301-02; *cf. supra* note 32 and accompanying text.

⁷⁵ Other aspects of the sexual offenses section of the Code have been sharply criticized and have limited the appeal of the Code as a model statute. Section 213.6 of the Code, for example, requires that juries be instructed to "evaluate the testimony of a victim . . . with special care in view of the emotional involvement of the witness and the difficulty of determining the truth with respect to alleged sexual activities carried out in private." *See* MODEL PENAL CODE § 213.6(5). This is a loose paraphrasing of the jury instruction formulated by Matthew Hale, which stated that rape is "an accusation easily to be made and hard to be proved, and harder yet to be defended by a party accused, though never so innocent." *See generally* Note, *Rape Instructions—Requiring Jury to Examine Rape Victim's Testimony With Caution is Inappropriate to Modern Trial Proceedings*—*People v. Rincon-Pineda*, 14 Cal. 3d 864, 538 P.2d 247, 123 Cal. Rptr. 119 (1975), 16 SANTA CLARA L. REV. 691 (1976). The cautionary instruction has been either judicially or statutorily eliminated in most jurisdictions. *See, e.g.*, *People v. Rincon-Pineda*, 14 Cal. 3d 864, 538 P.2d 247, 123 Cal. Rptr. 119 (1975); COLO. REV. STAT. § 18-3-408 (1978); 18 PA. CONS. STAT. ANN. § 3106 (Purdon 1973).

The Code also prohibits the conviction of a defendant when the testimony of the victim is uncorroborated. *See* MODEL PENAL CODE § 213.6(5). This rule also has been abolished in most jurisdictions. *See, e.g.*, FLA. STAT. ANN. § 794.022(1)(West 1976); MICH. COMP. LAWS ANN. § 750.520h (West Supp. 1982); N.H. REV. STAT. ANN. § 632-A:6 (West Supp. 1981); 18 PA. CONS. STAT. ANN. § 3106 (Purdon 1973). *See generally* Note, *The Rape Corroboration Requirement: Repeal Not Reform*, 81 YALE L.J. 1365 (1972).

These sections have led one commentator to characterize the Code as being based on a "1950's view that rape was a crime fantasized by pseudo-victims. . . ." Bienen, *Rape III*, *supra* note 14, at 176.

⁷⁶ COLO. REV. STAT. § 18-3-402 (1978); CONN. GEN. STAT. ANN. § 53-70 (West Supp. 1982); DEL. CODE ANN. tit. 11, § 767 (1979); IND. CODE ANN. § 35-42-4-1 (Burns 1979); MASS. GEN. LAWS ANN. ch. 265, § 22 (West Pam. 1982); MONT. CODE ANN. § 45-5-501 (1981); N.H. REV. STAT. ANN. § 632-A:2 (Supp. 1981); N.D. CENT. CODE § 12.120-03 (Supp. 1981); OHIO REV. CODE ANN. § 2907.02 (Baldwin 1979); WYO. STAT. § 6-2-302 (1977).

⁷⁷ The 1975 Ohio rape statute reads: "(A) No person shall engage in sexual conduct with another, not the spouse of the offender, when any of the following apply: (1) The offender purposely compels the other person to submit by force or threat of force. . . ." OHIO REV. CODE ANN. § 2907.02. Note that the language "force or threat of force" replaces the Code's more restrictive definition of "force or by threat of imminent death, serious bodily injury, extreme pain or kidnapping. . . ." *See supra* note 64. The Ohio statute also explicitly eliminates the resistance standard for rape, but like the Code, uses the resistance of "a person of ordinary resolution" to define the lesser crime of "Sexual Battery." *See* OHIO REV. CODE ANN. § 2907.03.

The Wyoming statute, enacted in 1977, uses the following language:

- (a) Any actor who inflicts sexual intrusion on a victim commits a sexual assault in the first degree if:
 - (i) The actor causes submission of the victim through the actual application, reasonably calculated to cause submission of the victim, of physical force or forcible confinement;

these definitions have not eliminated lack of consent as an element, nor have they eliminated use of the resistance standard.⁷⁸ For example, the Indiana Supreme Court, interpreting the 1976 Indiana rape statute,⁷⁹ held that "an element of the crime of rape is that the carnal knowledge of the woman must be had against her will and consent, that is, it must be compelled by force or imminent threat of force."⁸⁰ Resistance continues to be necessary, according to the Indiana courts, "to a degree which would indicate that the performance of the act is not voluntary."⁸¹ The Colorado Supreme Court has given a similar interpretation of the Colorado sexual assault statute.⁸² The court has held that

(ii) The actor causes submission of the victim by threat of death, serious bodily injury, extreme physical pain or kidnapping to be inflicted on anyone and the victim reasonably believes that the actor has the present ability to execute these threats. . . .

WYO. STAT. § 5-4-302. Compare this, however, with the language used to define second degree sexual assault, which uses the victim's resistance as the measure of compulsion where threats or coercion are used:

(a) Any actor who inflicts sexual intrusion on a victim commits sexual assault in the second degree if, under circumstances not constituted [sic] sexual assault in the first degree:

(i) The actor causes submission of the victim by threatening to retaliate in the future against the victim or the victim's spouse, parents, brothers, sisters or children, and the victim reasonably believes the actor will execute this threat. "To retaliate" includes threats of kidnapping, death, serious bodily injury or extreme physical pain; (ii) The actor causes submission of the victim by any means that would prevent resistance by a victim of ordinary resolution;

(vi) The actor is in a position of authority over the victim and uses this position of authority to cause the victim to submit. . . .

WYO. STAT. § 6-2-303.

⁷⁸ The Ohio statute, however, expressly eliminates the resistance requirement. See OHIO REV. CODE ANN. § 2907.02(C) ("A victim need not prove physical resistance to the offender in prosecutions under this section").

⁷⁹ The Indiana rape statute reads: "*Rape*. — (a) A person who knowingly or intentionally has sexual intercourse with a member of the opposite sex when: (1) The other person is compelled by force or imminent threat of force. . . ." IND. CODE ANN. § 35-42-4-1; see Indiana Criminal Law Study Commission Comments to § 35-42-4-1 on the influence of the Model Penal Code in Indiana, IND. CODE ANN. § 35-42-4-1 (comments).

⁸⁰ *Lottie v. State*, 406 N.E.2d 632, 636 (Ind. 1980).

⁸¹ *Birch v. State*, 401 N.E.2d 750, 751 (Ind. App. 1980); see also *Tillman v. State*, 408 N.E.2d 1250 (Ind. 1980).

⁸² The Colorado sexual assault statute provides in part:

18-3-402. Sexual Assault in the first degree. (1) The actor who knowingly inflicts sexual penetration on a victim commits sexual assault in the first degree if: (a) The actor causes submission of the victim through the actual application of physical force or physical violence; or (b) The actor causes submission of the victim by threat of imminent death, serious bodily injury, extreme pain, or kidnapping, to be inflicted on anyone, and the victim believes that the actor has the present ability to execute these threats; or (c) The actor causes submission of the victim by threatening to retaliate in the future against the victim, or any other person, and the victim reasonably believes the actor will execute this threat. . . .

18-3-403. Sexual Assault in the second degree.

(1) Any actor who knowingly inflicts sexual penetration or sexual intrusion on a victim commits sexual assault in the second degree if:

the sexual assault definition makes the absence of consent "of critical importance," as the "words 'causes submission' imply non-consensual yielding to the actor's demands."⁸³

Thus, although the Model Penal Code and those states which have followed its lead differ markedly from the common law, the practical effect of these definitions of rape does not appear to have been very significant. The victim's lack of consent continues to play an essential role in rape prosecutions, and in most of the jurisdictions, the resistance standard has not been eliminated. Indeed, it has been noted that the "basic change brought about by the Code is not so much with regard to definition as it is to grade the offense. . . ."⁸⁴ The approach of the Model Penal Code and its progeny, while stressing the aspect of force involved in rape, still does not clearly define rape as a crime of force and coercion exerted by the defendant.

B. THE RESISTANCE STANDARD AND THE PENAL LAWS OF NEW YORK AND WASHINGTON

At the same time the American Law Institute was considering the Model Penal Code, New York enacted its own rape reform law.⁸⁵ The New York law explicitly maintains lack of consent as an element of each sex crime by providing that "[w]hether or not specifically stated, it is an element of every [sex] offense . . . that the sexual act was committed without consent of the victim."⁸⁶ There are three degrees of rape, although only the most serious degree involves adult victims capable of consent.⁸⁷ First degree rape is committed when a man engages in sexual intercourse with a female "[b]y forcible compulsion."⁸⁸ When the New York law was enacted in 1965, "forcible compulsion" was defined as "physical force that overcomes earnest resistance; or a threat, express or implied, that places a person in fear of immediate death or serious physical injury to himself or another person, or in fear that he or another

(a) The actor causes submission of the victim to sexual penetration by any means other than those set forth in section 18-3-402, but of sufficient consequence reasonably calculated to cause submission against the victim's will. . . .

COLO. REV. STAT. §§ 18-3-402, -403.

⁸³ *People v. Smith*, 638 P.2d 1, 4 n.5 (Colo. 1981).

⁸⁴ Stone & Hall, *The Model Penal Code in Idaho?*, 8 IDAHO L. REV. 219, 237 (1972).

⁸⁵ The New York statute was based, in part, on the early drafts of the MODEL PENAL CODE. The New York law, however, bears little resemblance to the Code. *See Note, supra* note 22, at 1512.

⁸⁶ N.Y. PENAL LAW § 130.05 (McKinney 1975).

⁸⁷ Third degree rape, § 130.25, involves females less than 17, or otherwise incapable of consent; second degree rape, § 130.30, involves girls under the age of 14. N.Y. PENAL LAW §§ 130.05, 130.25.

⁸⁸ *Id.* at § 130.35.

person will immediately be kidnapped."⁸⁹

The New York statute codified the resistance standard and made it the central focus of the definition of rape. Although the term "forcible compulsion" alone seems to describe the actions of the assailant, the definition of the term refers primarily to the victim's resistance. The degree of resistance required was not even "reasonable," but "earnest."⁹⁰ The New York statute has been criticized as "a regressive step in the development of modern rape law,"⁹¹ but it has been very influential. Seven states currently use the term forcible compulsion, together with the 1965 definition.⁹²

In New York, the term "earnest resistance" was interpreted to mean utmost resistance by the state appellate courts. In *People v. Yanik*, the trial court conviction was overturned on appeal because "[r]ape is not committed unless the woman oppose[d] the man to the utmost limit of her power. . . . A feigned or passive or perfunctory resistance is not enough. It must be genuine and active and proportioned to the outrage."⁹³ The *Yanik* decision, however, prompted the New York legislature to modify "earnest resistance" by defining it as only such resistance as was reasonable under the circumstances.⁹⁴ Finally, in 1982, the term "earnest resistance" was eliminated completely in New York, although it persists in the seven states that continue to use the 1965 definition.⁹⁵

Five other states have codified the resistance standard, although their definitions of rape do not correspond to the New York formulation.⁹⁶ Three additional states use the New York language "forcible

⁸⁹ *Id.* at § 130.00(8).

⁹⁰ See *supra* note 43 and accompanying text.

⁹¹ Note, *supra* note 22, at 1513.

⁹² ALA. CODE §§ 13-A-6-60, -6-61, -6-70 (1982); KY. REV. STAT. ANN. §§ 510.010, .020, .040 (Baldwin 1975); MO. ANN. STAT. §§ 566.030, .061 (Vernon's 1979 & Supp. 1983); OR. REV. STAT. §§ 163.305, .375 (1981); TEX. PENAL CODE ANN. § 21.02 (Supp. 1982) (uses "earnest resistance" to define "without consent," rather than forcible compulsion); UTAH CODE ANN. § 76-5-406 (1978 & Supp. 1981) ("earnest resistance" used to define situation where "actor compels the victim"); W. VA. CODE §§ 61-8B-1, -2, -3 (1977) ("earnest resistance" modified by additional statement that "[f]or purposes of this definition, 'resistance' includes physical resistance or any clear communication of the victim's lack of consent"). Hawaii used the New York formulation until 1981, when it amended the statute to delete all references to "earnest resistance." See HAWAII REV. STAT. § 707.700 (Supp. 1982).

⁹³ *People v. Yanik*, 55 A.D.2d 164, 167, 390 N.Y.S. 2d 98, 101 (1977) (quoting *People v. Carey*, 223 N.Y. 519, 520, 199 N.E. 83, 83 (1918)).

⁹⁴ See NEW YORK PENAL LAW § 130.00 and supplementary commentaries (McKinney Supp. 1982-1983).

⁹⁵ *Id.*; see *supra* note 92. The new definition of "forcible compulsion" is the use of "physical force or threat, express or implied, which force or threat places a person in fear of immediate death or serious physical injury to himself, herself or another person, or in fear that he, she or another person will immediately be kidnapped." NEW YORK PENAL LAW § 130.00(8).

⁹⁶ IDAHO CODE § 18-6101 (1979) (rape is sexual intercourse "where the victim resists but her resistance is overcome by force or violence"); KAN. STAT. ANN. 21-3502 (1981) (rape is

compulsion" or "compulsion" as the key element in rape, but define the term without reference to the victim's resistance.⁹⁷

The Washington rape law, which has been widely recognized as a major rape reform statute, uses the term "forcible compulsion," but provides its own definition. Under the Washington statute, "forcible compulsion" is "physical force which overcomes resistance, or a threat, express or implied, that places a person in fear of death or physical injury."⁹⁸ Lack of consent is not expressly referred to in the definition of first and second degree rape "in order to deflect attention away from the victim."⁹⁹ The use of the term "resistance," however, is simply a restatement of the common law objective standard that was used to prove lack of consent, and therefore places a burden on the victim to resist to show her non-consent.¹⁰⁰ Rather than deflecting attention away from the victim, the resistance standard focuses attention on the victim.

The relevancy of consent in rape cases under the Washington statute is further underscored by the definition of third degree rape. Force need not be used to accomplish the sexual act; the statute simply re-

committed when "a woman's resistance is overcome by force or fear"); LA. REV. STAT. ANN. § 14:42 (West Supp. 1983) (aggravated rape occurs without the lawful consent of the victim and where the victim "resists the act to the utmost, but whose resistance is overcome by force"); OKLA. STAT. ANN. tit. 21, § 1111 (West Supp. 1982) (rape occurs where the victim resists but the resistance is overcome by force and violence); 18 PA. CONS. STAT. ANN. § 3121 (rape is committed by forcible compulsion or threat of forcible compulsion that would "prevent resistance by a person of ordinary resolution"). The California Code previously defined rape as sexual intercourse "where the person resists but the resistance is overcome by force or violence"; this definition was repealed in 1980 and replaced by the phrase "where it is accomplished against a person's will." CAL. PENAL CODE § 261 (West 1970 & Supp. 1982-83).

⁹⁷ ARK. STAT. ANN. §§ 41-1801(2), -1803(b) (1977) ("forcible compulsion" means physical force or threat, express or implied, of death or physical injury to or kidnapping of any person"); HAWAII REV. STAT. § 707.700 (Supp. 1982) (forcible compulsion means the use of or attempt to use a threat of bodily injury, a dangerous weapon, or physical force); ME. REV. STAT. ANN. tit. 17-A, §§ 251, 252 (1983) ("compulsion" means physical force or a threat of physical force . . . which makes a person unable to physically repel the actor or which produces . . . a reasonable fear").

⁹⁸ WASH. REV. CODE ANN. § 9A.44.010 (Supp. 1982). Forcible compulsion is used to define both first and second degree rape:

§ 9A.44.040, Rape in the first degree:

(1) A person is guilty of rape in the first degree when such person engages in sexual intercourse with another person not married to the perpetrator by forcible compulsion where the perpetrator or an accessory:

(a) Uses or threatens to use a deadly weapon; or (b) Kidnaps the victim; or (c) Inflicts serious physical injury; or (d) Feloniously enters into the building or vehicle where the victim is situated.

§ 9A.44.050, 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, not married to the perpetrator:

(a) By forcible compulsion. . . .

⁹⁹ Loh, *supra* note 15, at 551.

¹⁰⁰ See *supra* notes 37-43 and accompanying text.

quires that "the victim did not consent . . . and such lack of consent was clearly expressed by the victim's words or conduct."¹⁰¹ Consent is defined to mean "that at the time of the act of sexual intercourse there are actual words or conduct indicating freely given agreement to have sexual intercourse."¹⁰² Third degree rape is an attempt to recognize a victim's right to privacy, to simply refuse sexual intercourse and be protected by the criminal law, even though no force or coercion was used.¹⁰³

Washington's third degree rape section, however, has been criticized because it appears to create a crime without respect to the criminal intent of the accused. Since the definition assumes that no force or coercion is used, the accused assailant may not have intended to commit a criminal act; the victim may have simply failed to communicate effectively her non-consent.¹⁰⁴ The use of a different criminal standard in third degree rape in contrast to the resistance standard used in first and second degree rape confuses the relationship between consent and resistance.¹⁰⁵ It also appears that this statutory effort to encourage the prosecution of acquaintance rapes has not had a substantial effect. Out of 122 rape cases analyzed in one Washington study, only two were third degree rape cases,¹⁰⁶ and one Washington prosecutor stated that third degree rape is only rarely charged.¹⁰⁷

The use of the resistance standard, even when couched in terms of "forcible compulsion," is simply a continuation of the common law emphasis on non-consent. The victim's reaction defines the criminal standard, rather than the defendant's culpable conduct. In addition, the

¹⁰¹ WASH. REV. CODE ANN. § 9A.44.060.

¹⁰² *Id.* at § 9A.44.010(6); *cf. infra* note 142 and accompanying text.

¹⁰³ According to one Washington study, the use of force and subsequent resistance is reduced when the victim and assailant are acquainted, so the intent of the third degree rape section is to facilitate the conviction of more acquaintance rapes. *See* Loh, *supra* note 15, at 590. New York and West Virginia have similar statutes, labelled "sexual misconduct." *See* N.Y. PENAL CODE § 130.20; W. VA. CODE § 61-8B-9. A similar recognition of the particular circumstances of acquaintance rape is expressed in the MODEL PENAL CODE usage of the term "voluntary social companion." *See supra* note 63; Loh, *supra* note 15, at 555-56, 620-21.

¹⁰⁴ BATTELLE INSTITUTE REPORT, FORCIBLE RAPE: LEGAL ISSUES, *supra* note 14, at 11. The Battelle Institute Report noted that "it has been suggested that consent be obtained in writing before engaging in intercourse in Washington." *Id.*

¹⁰⁵ Questions are also raised as to whether third-degree rape is a lesser included offense of the more serious crimes. *Id.* at 10. The New York statute, which labels a similar crime "sexual misconduct" as opposed to "rape," may signify that sexual misconduct is not intended as a lesser included offense of rape. At least one New York court, however, has held that even in sexual misconduct cases, the lack of consent must be the result of the same forcible compulsion as in rape cases. *People v. Dailey*, 94 Misc. 2d 941, 405 N.Y.S.2d 986 (1978); *cf. rationale expressed supra* note 103 and accompanying text.

¹⁰⁶ Loh, *supra* note 15, at 602.

¹⁰⁷ Telephone Interview with Becky Roe, Office of the Prosecuting Attorney, King County, Washington (May 27, 1983).

Washington combination of resistance and consent in one statutory section confuses the standard of proof and is apparently unsuccessful in reaching those acquaintance rape cases it is intended to cover. The New York and Washington definitions of rape obviously do not meet the goals of rape reformers in updating the law's attitude and approach to victims and to the crime of rape.

C. THE ELIMINATION OF NON-CONSENT AS AN ELEMENT AND THE MICHIGAN CRIMINAL SEXUAL CONDUCT ACT

The limited changes brought about by the Model Penal Code and the New York Penal Code disappointed victim-advocates, and prompted those reformers to write their own laws.¹⁰⁸ The Michigan Criminal Sexual Conduct Act,¹⁰⁹ passed in 1974, was the first victim-oriented and -initiated rape statute enacted.¹¹⁰ It has served as a model for eight other state statutes and had a significant influence on Illinois' recently enacted rape reform bill.¹¹¹

Under the Michigan statute, "criminal sexual conduct" is defined as sexual penetration where "[f]orce or coercion is used to accomplish the sexual penetration."¹¹² The definition does not mention the victim's lack of consent or the victim's submission to intercourse. In addition,

¹⁰⁸ Bienen, *Rape III*, *supra* note 14, at 171-76. For a history of attempts to pass reform legislation, see J. MARSH, *THE LIMITS OF RAPE REFORM*, 11-19 (1982); Bienen, *Rape I*, 3 *WOMEN'S RTS. L. RPTR.* 45-57 (1976); Weddington, *Rape Law in Texas: H.B. 284 and the Road to Reform*, 4 *AM. J. CRIM. LAW* 1 (1975).

¹⁰⁹ MICH. COMP. LAWS ANN. §§ 750.520 (a)-(l) (West Supp. 1982).

¹¹⁰ Commentators have characterized the Michigan statute as one of the most far-reaching reforms enacted to date. See Note, *Michigan's Criminal Sexual Assault Law*, 8 *U. MICH. J.L. REF.* 217, 217-18 (1974).

¹¹¹ See *infra* note 129.

¹¹² MICH. COMP. LAWS ANN. § 750.520d. The statute divides criminal sexual conduct into four degrees; second and fourth degree criminal sexual conduct involve sexual contact or touching by force or coercion, and first and third degree sexual conduct involve sexual penetration by force or coercion, as follows:

§ 750.520b. Criminal sexual conduct in first degree.

(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:

(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 defective, mentally incapacitated 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

the resistance standard is expressly eliminated by the statute.¹¹³ The crime is defined solely in terms of the defendant's use of "force or coercion."

The Michigan act provides a lengthy definition of "force or coercion," which "includes but is not limited to" overcoming the victim through the actual application of physical force or violence, threats to use force or violence, threats to retaliate in the future against the victim or anyone, or concealment or surprise.¹¹⁴ This language "eliminates where possible any reference to the victim's conduct as a separate element of the crime," making force or coercion the essence of rape, rather than lack of consent.¹¹⁵ It is not necessary, therefore, to prove non-consent beyond a reasonable doubt at the outset.¹¹⁶ Moreover, the Michigan House Judiciary Committee stated that

[t]he question as to whether or not the victim "consented" is not an issue in any felony other than rape. This bill [the Criminal Sexual Assault Act] 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 himself/herself accordingly.¹¹⁷

The Michigan statute has been hailed as a major revision refuting

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 this threat. As used in this subdivision, "to retaliate" includes threats of physical punishment, kidnapping, or extortion.

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

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

§ 750.520d. Criminal sexual conduct in third degree.

(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 exists:

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

¹¹³ Michigan Law provides that "[a] victim need not resist the actor in prosecution under [this act]." MICH. COMP. LAWS ANN. § 750.520i.

¹¹⁴ *Id.* at § 750.520b(1)(f); *see supra* note 112.

¹¹⁵ Note, *supra* note 22, at 1513; *see also* Note, *supra* note 110, at 226.

¹¹⁶ *See* *People v. Jansson*, 116 Mich. App. 674, 682, 323 N.W.2d 508, 512 (1982).

¹¹⁷ House Judiciary Committee analysis of Senate Bill 1207 (June 27, 1974), *quoted in* *People v. Nelson*, 79 Mich. App. 303, 318 n.31, 261 N.W.2d 299, 307 n.31 (1977), *modified on other grounds*, 406 Mich. 1020, 281 N.W.2d 134 (1979).

the common law assumptions about rape.¹¹⁸ The law's proponents praise the reform as properly directing the "court's attention to the level of violence used, rather than to the victim's prior sexual activity. The legislation reflects the fact that the motives of the rapist are not primarily sexual and therefore, traditional ideas about sex do not apply to the rape situation."¹¹⁹ Critics, however, charge that the law is overbroad and covers entirely innocent conduct.¹²⁰ The American Law Institute contends that the Criminal Sexual Conduct Act "gives virtually no indication of the intended reach of the serious sanctions employed."¹²¹ According to the American Law Institute, the language which states that the definition of force or coercion "includes but is not limited to" the enumerated circumstances¹²² makes the entire definition vague and open-ended. In addition, the use of the phrase "overcomes the victim" in combination with the provision eliminating the resistance standard puts the question of force "in terms that seem hardly intelligible."¹²³

The American Law Institute's criticisms of the Michigan law are based on the Institute's continuing view of rape as a crime that would be desirable to the victim under other circumstances.¹²⁴ This apparently makes rape a unique crime, where the defendant's use of force can only be measured in terms of the victim's resistance. In other felonies, such as robbery, the resistance of the victim is not a factor at all, as a forceful taking is presumed to be without the consent of the victim.¹²⁵ The Michigan statute creates the same presumption in rape cases. Rape is presumed to be an act of anger or violence that is non-consensual, rather than a sexually gratifying experience that is usually consensual and desirable.

Under the Michigan statute, the word "consent" is not mentioned at all.¹²⁶ It appears, however, that the drafters of the law intended that

¹¹⁸ Note, *supra* note 110, at 235.

¹¹⁹ *Id.* at 236.

¹²⁰ MODEL PENAL CODE § 213.1 comment, at 295. The Michigan Court of Appeals, however, has upheld the criminal sexual conduct act as not overbroad; the court found that the statute did not cover innocent as well as criminal conduct. *People v. Dalton*, 83 Mich. App. 725, 729, 269 N.W.2d 280, 282 (1978).

¹²¹ MODEL PENAL CODE § 213.1 comment, at 295.

¹²² *Id.*; *see also* MICH. COMP. LAWS ANN. § 750.520b(1)(f); *supra* note 114 and accompanying text.

¹²³ MODEL PENAL CODE § 213.1 comment, at 296-97.

¹²⁴ *See supra* note 53 and accompanying text.

¹²⁵ For example, Illinois defines robbery as follows: "A person commits robbery when he takes property from the person or presence of another by the use of force or by threatening the imminent use of force." ILL. REV. STAT. ch. 38, § 18-1 (1981); *see also supra* note 115 and accompanying text.

¹²⁶ *See People v. Jansson*, 116 Mich. App. 674, 682, 323 N.W.2d 508, 512 (1982) ("[t]he statute is silent on the defense of consent").

consent be used as an affirmative defense. During the legislative debate on the act, one of the drafters explained that

if actual force or threats of force sufficient to meet the "force" requirement can be shown, it is redundant to also require a separate showing of "non-consent" as part of the case in chief. . . . When the victim is threatened with a dangerous weapon, or is beaten, robbed or kidnapped, the possibility of her willingly consenting to sexual intercourse is so unlikely that it ought to be raised as an alternative theory for the defense rather than have to be shown from the outset.¹²⁷

Although the statute itself does not state that consent is available as a defense, the Michigan appellate courts have followed the drafters' intent and have established that consent can be raised as a defense to charges of criminal sexual conduct. In *People v. Hearn*, the court of appeals held that

[a]lthough the statute does not specifically address the consent defense, its various provisions when considered together clearly imply the continuing validity of that defense. Certainly the Legislature, in eliminating the necessity of proof of nonconsent by the prosecution, did not intend to preclude an accused from alleging consent as a defense to the charge.¹²⁸

The courts, however, have not defined consent. The statute itself provides no guidance, except to preclude the use of the resistance standard.¹²⁹

¹²⁷ V. NORDBY, LEGAL EFFECTS OF PROPOSED RAPE REFORM BILLS S.B. 1207, H.B. 5802 at 7-8 (submitted to Michigan House Judiciary Committee on April 23, 1974). This analysis, written by one of the drafters of the Michigan bill, is cited in *People v. Nelson*, 79 Mich. App. 303, 321 n.36, 261 N.W.2d 299, 308-09 n.36 (1977), *modified on other grounds*, 406 Mich. 1020, 281 N.W.2d 134 (1979), and *People v. Kahn*, 80 Mich. App. 605, 619 n.5, 264 N.W.2d 360, 366-67 n.5 (1978).

¹²⁸ 100 Mich. App. 749, 755, 300 N.W.2d 396, 398 (1980); *see also Kahn*, 80 Mich. App. at 619 n.5, 264 N.W.2d at 366-67 n.5. In *Hearn*, the defendant testified that the act of sexual intercourse was consensual, while the victim and her boyfriend testified that the defendant forced the victim into his car with a gun and knife. 100 Mich. App. at 752, 300 N.W.2d at 397-98. The trial court instructed the jury only on the elements of sexual penetration and the defendant's use of force (being armed with a weapon). *Id.* at 755, 300 N.W.2d at 398. The defendant appealed the failure to instruct the jury on the consent defense. The prosecution argued that as non-consent was not an element of the crime, consent could not be a defense. *Id.* at 753, 300 N.W.2d at 398. The court of appeals reversed, holding that failure to instruct the jury on the consent defense was reversible error. *But see Jansson*, 116 Mich. App. at 686, 323 N.W.2d at 514, where the court of appeals held that failure to give a jury instruction on consent was not reversible error for a charge of third degree criminal assault (use of force to overcome the victim without the use of a weapon). The court in *Jansson* explained its holding, stating that

[p]roving in *Hearn* that the defendant was armed with a weapon at the time of the act would not, in and of itself, prove nonconsent as would proving that the act was committed by force or coercion in this case. In other words, the issue of consent is not necessarily implicated in a decision as to whether the defendant was armed with a weapon whereas the question of consent is, of necessity, addressed in a determination as to whether the act was committed by force or coercion.

116 Mich. App. at 686, 323 N.W.2d at 514. *But see supra* note 127 and accompanying text.

¹²⁹ *See supra* note 113 and accompanying text.

Eight other states have based their definition of rape on Michigan's formulation of "force or coercion."¹³⁰ None of the statutes explicitly provide that consent may be a defense to a charge of rape,¹³¹ although the New Jersey Code of Criminal Justice defines a consent defense that is available for all criminal prosecutions.¹³² That provision is not very effective in rape cases, however, since it states that consent will not be legally recognized if it is "induced by force, duress, or deception of a kind sought to be prevented by the law defining the offense."¹³³

The omission of a statutory definition of consent in these statutes poses a real possibility that the courts will rely on precedents using the common law definitions of consent. In many jurisdictions, this could mean that the "fiction of implied consent" will be applied, and actions

¹³⁰ MINN. STAT. ANN. §§ 609.341-.343 (West Supp. 1982) ("force or coercion"); NEB. REV. STAT. § 28-319 (1979) ("force, threat of force, express or implied, coercion or deception"); N.J. REV. STAT. ANN. § 2C:14-2 (West 1982) ("force or coercion"); N.M. STAT. ANN. §§ 30-9-10, -11 (Supp. 1982) ("force or coercion"); R.I. GEN. LAWS §§ 11-37-1, -2 (1981) ("force or coercion"); S.C. CODE ANN. §§ 16-3-651 to -654 (Law. Co-op. Supp. 1982) ("aggravated force," "aggravated coercion" and "force or coercion"); S.D. CODIFIED LAWS ANN. § 22-22-1 (Smith Supp. 1983) ("force or coercion"); TENN. CODE ANN. §§ 39-2-602 to -604 (1982) ("force or coercion"). The rape reform bill recently passed by the Illinois General Assembly was also based on the Michigan statute, but uses the term "force or threat of force." *See infra* note 177 and accompanying text.

¹³¹ The South Carolina statute, like the Michigan law, does not mention the term consent at all, but the South Carolina Supreme Court has held that consent is available as a defense, since the term "force or coercion" in the statute appears to mean that the sexual assault "occurred under circumstances where the victim's consent was lacking." *State v. Hamilton*, 276 S.E.2d 784, 786 (S.C. 1981) (quoting *State v. Cox*, 266 S.E.2d 784, 786 (S.C. 1980)). The court did not, however, describe the circumstances under which the consent defense could be raised, nor did it define what conduct constituted consent. The New Mexico law also leaves the consent issue open. Although the New Mexico Court of Appeals has stated that "[a]bsence of consent is not an element of the crime as defined by the Legislature," the court did not address the question of consent as a defense under the rape statute. *State v. Jiminez*, 89 N.M. 652, 655, 556 P.2d 60, 63 (N.M. Ct. App. 1976).

¹³² N.J. REV. STAT. ANN. § 2C:2-10 (West 1982) provides:

a. In general. The consent of the victim to conduct charged to constitute an offense or to the result thereof is a defense if such consent negatives an element of the offense or precludes the infliction of the harm or evil sought to be prevented by the law defining the offense.

b. Consent to bodily harm. When conduct is charged to constitute an offense because it causes or threatens bodily harm, consent to such conduct or to the infliction of such harm is a defense if:

(1) The bodily harm consented to or threatened by the conduct consented to is not serious; or

(2) The conduct and the harm are reasonably foreseeable hazards of joint participation in a concerted activity of a kind not forbidden by law. . . .

c. Ineffective consent. Unless otherwise provided by the code or by the law defining the offense, assent does not constitute consent if:

. . . .

(3) It is induced by force, duress or deception of a kind sought to be prevented by the law defining the offense.

See also Bienen, *Rape III*, *supra* note 14, at 183.

¹³³ N.J. REV. STAT. ANN. § 2C:2-10(c)(3).

by the victim such as hitchhiking or drinking will be construed by the court as consent.¹³⁴ In those states where the use of the resistance standard has not been expressly precluded by statute, a victim's failure to resist the assailant could also be considered consent.¹³⁵

In contrast, the Minnesota Criminal Code includes a reform definition of consent. The basic elements of the crime of criminal sexual conduct are sexual penetration accomplished by force or coercion.¹³⁶ The victim's lack of consent is not included in the definition of the crime. In a separate "Definitions" section, however, the statute explains that "'Consent' means a voluntary uncoerced manifestation of a present agreement to perform a particular sexual act."¹³⁷ This definition clearly precludes the use of implied consent, as a present agreement to the particular *sexual* act must be manifested. The Minnesota Code also clearly states that consent is not a defense in crimes involving minors.¹³⁸ The statute does not indicate whether consent is to be used as a defense in adult cases. The term appears only in the definitions section and the provisions dealing with children and teenagers. The language, however, appears to indicate that consent was intended to be used as a defense in

¹³⁴ See *supra* notes 33-36 and accompanying text.

¹³⁵ See *supra* notes 37-43 and accompanying text.

¹³⁶ MINN. STAT. ANN. § 609.342 (West Supp. 1982) provides:

A person is guilty of criminal sexual conduct in the first degree . . . if he engages in sexual penetration with another person and if any of the following circumstances exist:

(a) The complainant is under 13 years of age and the actor is more than 36 months older than the complainant. Neither mistake as to the complainant's age nor consent to the act by the complainant is a defense; or

(b) The complainant is at least 13 but less than 16 years of age and the actor is more than 48 months older than the complainant and in a position of authority over the complainant, and uses this authority to cause the complainant to submit. Neither mistake as to the complainant's age nor consent to the act by the complainant is a defense; or

(c) Circumstances existing at the time of the act cause the complainant to have a reasonable fear of imminent great bodily harm to the complainant or another; or

(d) The actor is armed with a dangerous weapon or any article used or fashioned in a manner to lead the complainant to reasonably believe it to be a dangerous weapon and uses or threatens to use the weapon or article to cause the complainant to submit; or

(e) The actor causes personal injury to the complainant and either of the following circumstances exist:

(i) The actor uses force or coercion to accomplish sexual penetration; or

(ii) The actor knows or has reason to know that the complainant is mentally defective, mentally incapacitated, or physically helpless; or

(f) The actor is aided or abetted by one or more accomplices . . . and either of the following circumstances exist:

(i) An accomplice uses force or coercion to cause the complainant to submit; or

(ii) An accomplice is armed with a dangerous weapon or any article used or fashioned in manner to lead the complainant reasonably to believe it to be a dangerous weapon and uses or threatens to use the weapon or article to cause the complainant to submit.

¹³⁷ *Id.* at § 609.341(4).

¹³⁸ See, e.g., *id.* at § 609.342.

adult cases, not as an element of the crime.¹³⁹ The Minnesota Jury Instructions, however, list lack of consent as an element of criminal sexual conduct that must be proved by the prosecution beyond a reasonable doubt.¹⁴⁰

This confusion over the use of the Minnesota definition of consent limits the effectiveness of the statute in changing the traditional misconceptions about rape. Although implied consent and the resistance standard appear to have been eliminated by the Minnesota definition, lack of consent continues to be an element of rape. The omission of a consent definition in Michigan raises the possibility that an implied consent standard will be used by the courts. Despite these drawbacks, however, the Michigan model defining rape in terms of "force or coercion" is the most significant victim-oriented reform statute to date, and has led the nationwide reform movement.

D. THE STATUTORY DEFINITION OF CONSENT AND THE WISCONSIN SEXUAL ASSAULT STATUTE

In contrast to the Michigan approach, other statutes have dealt with the problem of implied consent and resistance by retaining lack of consent as an element of rape, but redefining the term. A consent definition that protects an individual's ability to expressly consent or withhold consent to sexual intercourse reflects recent changes in the law regarding personal privacy rights.¹⁴¹

The Wisconsin sexual assault statute, enacted in 1975, codifies this alternative, and defines sexual assault as "sexual contact or sexual intercourse with another person without consent of that person by use or threat of force or violence."¹⁴² Consent is explicitly defined as "words or

¹³⁹ Lack of consent is not mentioned at all as part of the definition of the crime; indeed, the only reference to consent is to preclude its use as a defense in child sexual assault cases. Telephone Interview with Jerry Anderson, Minnesota Attorney General's Office (May 27, 1983).

¹⁴⁰ MINNESOTA PRACTICE-MINNESOTA JURY INSTRUCTION GUIDES § 12.02 (1983 Pocket Part). One Minnesota District Attorney speculated that the District Judges Association, when drafting the instructions, inferred that lack of consent was to be included as a basic element of the crime from the wording of the statute. Telephone Interview with Mike Kolitch, Hennepin County District Attorney's Office, Minnesota (September 26, 1983).

¹⁴¹ See Weiner, *Shifting the Communication Burden: A Meaningful Consent Standard in Rape*, 6 HARV. WOMEN'S L.J. 143, 155-58 (1983); Note, *Abolishing the Marital Exemption for Rape: A Statutory Proposal*, 1983 U. ILL. L. REV. 201, 207.

¹⁴² WIS. STAT. ANN. § 940.225 (West 1982) provides:

(1) First degree sexual assault. Whoever does any of the following is guilty of a Class B felony:

(a) Has sexual contact or sexual intercourse with another person without consent of that person and causes pregnancy or great bodily harm to that person.

(b) Has sexual contact or sexual intercourse with another person without consent of that person by use or threat of use of a dangerous weapon or any article used or fashioned in a manner to lead the victim reasonably to believe it to be a dangerous weapon.

(c) Is aided or abetted by one or more other persons and has sexual contact or

overt actions by a person who is competent to give informed consent indicating a freely given agreement to have sexual intercourse or sexual contact."¹⁴³

Like the common law definition of rape,¹⁴⁴ the Wisconsin statute includes both force and lack of consent as elements of the crime. The specific, almost contractual, definition of consent¹⁴⁵ precludes the use of implied consent or lack of resistance by the victim. That definition was challenged in *Gates v. State*¹⁴⁶ as an unconstitutional shift in the burden of proof. The defendant claimed that the definition of consent created a "presumption . . . that all acts of sexual contact or intercourse are without consent unless shown to have been preceded by words or overt actions of consent."¹⁴⁷ The Wisconsin Court of Appeals rejected this claim because the statute required that the prosecution prove not only the existence of force and sexual penetration, but also lack of consent.¹⁴⁸

sexual intercourse with another person without consent of that person by use or threat of force or violence.

(d) Has sexual contact or sexual intercourse with a person 12 years of age or younger.

(2) Second degree sexual assault. Whoever does any of the following is guilty of a Class C felony:

(a) Has sexual contact or sexual intercourse with another person without consent of that person by use or threat of force or violence.

(b) Has sexual contact or sexual intercourse with another person without consent of that person and causes injury, illness, disease or impairment of a sexual or reproductive organ, or mental anguish requiring psychiatric care for the victim.

(c) Has sexual contact or sexual intercourse with a person who suffers from a mental illness or deficiency which renders that person temporarily or permanently incapable of appraising the person's conduct, and the defendant knows of such condition.

(d) Has sexual contact or sexual intercourse with a person who the defendant knows is unconscious.

(e) Has sexual contact or sexual intercourse with a person who is over the age of 12 years and under the age of 18 years without consent of that person, as consent is defined in sub. (4).

(3) Third degree sexual assault. Whoever has sexual intercourse with a person without the consent of that person is guilty of a Class D felony.

(3m) Fourth degree sexual assault. Whoever has sexual contact with a person without the consent of that person is guilty of a Class A misdemeanor.

(4) Consent. "Consent," as used in this section, means words or overt actions by a person who is competent to give informed consent indicating a freely given agreement to have sexual intercourse or sexual contact. A person under 15 years of age is incapable of consent as a matter of law. The following persons are presumed incapable of consent but the presumption may be rebutted by competent evidence. . . .

(a) A person who is 15 to 17 years of age,

(b) A person suffering from a mental illness or defect which impairs capacity to appraise personal conduct,

(c) A person who is unconscious or for any other reason is physically unable to communicate unwillingness to an act.

¹⁴³ *Id.*

¹⁴⁴ See *supra* note 19 and accompanying text.

¹⁴⁵ Note, *supra* note 22, at 1516 n.91.

¹⁴⁶ 91 Wis. 2d 512, 283 N.W.2d 474 (Wis. Ct. App. 1979).

¹⁴⁷ *Id.* at 520, 283 N.W.2d at 477.

¹⁴⁸ *Id.*

One commentator has criticized this combination of force and consent as meaningless, since proof of force or coercion would appear to preclude the need for further proof of a lack of voluntary agreement.¹⁴⁹ Retaining consent as part of the basic definition of rape also perpetuates the notion that sexual assault is simply non-consensual sexual intercourse.¹⁵⁰

The Wisconsin definition of consent does, however, eliminate the resistance requirement and the implied consent standard. The Wisconsin Supreme Court, in *State v. Clark*,¹⁵¹ held that "[t]he plain wording of the statutory definition of consent demonstrates that the failure to resist is not consent; the statute requires 'words' or 'overt acts' demonstrating 'freely given consent.'"¹⁵² The court also rejected the defendant's contention that the "passive cooperation" of the fifteen-year-old victim constituted consent.¹⁵³ Although the victim's actions were "arguably ambiguous or even demonstrative of consent," the court was unwilling to imply consent from those actions, and upheld the defendant's conviction.¹⁵⁴ Two years later, the Wisconsin Court of Appeals reinforced this rejection of implied consent in *State v. Lederer*.¹⁵⁵ The court there held that a victim's verbal protests were sufficient to indicate non-consent, and concluded that "'No' means no. . . ."¹⁵⁶

Only one other state, Vermont, has used Wisconsin's language concerning consent.¹⁵⁷ Although Florida has enacted a similar statute de-

¹⁴⁹ See Note, *supra* note 22, at 1516 n.91 (criticizing the Minnesota statute).

¹⁵⁰ See *supra* note 53 and accompanying text.

¹⁵¹ 87 Wis. 2d 804, 275 N.W.2d 715 (1978).

¹⁵² *Id.* at 815, 275 N.W.2d at 721.

¹⁵³ *Id.* at 816, 275 N.W.2d at 721.

¹⁵⁴ *Id.* at 818, 275 N.W.2d at 721.

¹⁵⁵ 99 Wis. 2d 430, 299 N.W.2d 457 (Wis. Ct. App. 1980). In *Lederer* the victim had voluntarily accompanied the defendant to an empty house. When the defendant threatened the victim, she did not resist and only verbally protested as the defendant committed acts of sexual penetration. In upholding the defendant's conviction, the court disagreed with the defendant's argument that "two parties may enter into consensual sexual relations without manifesting freely given consent through words or acts. We reject this contention as we know of no other means of communicating consent." *Id.* at 435, 299 N.W.2d at 460.

¹⁵⁶ *Id.* at 436, 299 N.W.2d at 461.

¹⁵⁷ The Vermont statute, enacted in 1977, defines consent as "words or actions by a person indicating a voluntary agreement to engage in a sexual act. . . ." VT. STAT. ANN. tit. 13, § 3251(3) (Supp. 1982). Sexual assault occurs when an accused "compels [a] person to participate in a sexual act: (A) Without the consent of [that] person; or (B) By threatening or coercing the other person; or (C) by placing [that] person in fear that any person will be harmed imminently." *Id.* at § 3252. The Vermont courts have not expressed an opinion on whether the consent definition eliminates implied consent. The Vermont statute, however, specifically eliminates the need for resistance by the victim, in a separate section. See VT. STAT. ANN. tit. 13, § 3254(1). The Minnesota statute contains language defining consent similar to Wisconsin and Vermont, but the term consent is not part of the definition of the crime. See *supra* notes 136-40 and accompanying text; see also CAL. PENAL CODE § 261.6 (West Supp. 1983), which states that in rape cases, where consent "is at issue, 'consent' shall

fining lack of consent,¹⁵⁸ the experience in Florida indicates that even a consent definition using the concept of a knowing and voluntary consent may still allow the courts to use the resistance standard and implied consent. The Florida sexual battery statute, which defines consent as "intelligent, knowing and voluntary consent and shall not be construed to include coerced submission," includes non-consent as an element in all degrees of sexual battery.¹⁵⁹ This definition appears to connote an express consent only, although the Florida Court of Appeals has held that "consent may be actual or implied."¹⁶⁰ The Florida courts also continue to use the resistance standard,¹⁶¹ but proof of physical resistance is not required "where other circumstances show the victim did not intelligently and knowingly agree to the battery."¹⁶²

The definition of consent in the Wisconsin statute is the most progressive in the country and provides the most protection to an individ-

be defined to mean positive cooperation in an act or attitude pursuant to an exercise of free will. The person must act freely and voluntarily and have knowledge of the nature of the act or transaction involved." The term consent is not used in the California definition of rape, although the statute does use the term "against a person's will." *Id.* at § 261; *see supra* note 95.

Nine other states use non-consent as an element of the crime of rape, but define lack of consent in terms of traditional standards, such as forcible compulsion or resistance. *See, e.g.,* DEL. CODE ANN. tit. 11, § 767 (1979); KAN. STAT. ANN. § 21-3502 (1981).

¹⁵⁸ FLA. STAT. ANN. § 794.011 (West 1976):

(1) Definitions:

(h) "Consent" means intelligent, knowing and voluntary consent and shall not be construed to include coerced submission.

(3) A person who commits sexual battery upon a person over the age of 11 years, without that person's consent and in the process thereof uses or threatens to use a deadly weapon or uses actual physical force likely to cause serious personal injury shall be guilty of a life felony. . . .

(4) A person who commits sexual battery upon a person over the age of 11 years, without that person's consent, under any of the following circumstances shall be guilty of a felony of the first degree. . . .

(a) When the victim is physically helpless to resist.

(b) When the offender coerces the victim to submit by threatening to use force or violence likely to cause serious personal injury on the victim, and the victim reasonably believes that the offender has the present ability to execute these threats.

(c) When the offender coerces the victim to submit by threatening to retaliate against the victim, or any other person, and the victim reasonably believes that the offender has the ability to execute these threats in the future. "Retaliation," as used in this section, includes, but is not limited to, threats of future physical punishment, kidnapping, false imprisonment or forcible confinement, or extortion.

(5) A person who commits sexual battery upon a person over the age of 11 years, without that person's consent, and in the process thereof uses physical force and violence not likely to cause serious personal injury shall be guilty of a felony of the second degree. . . .

¹⁵⁹ *Id.* at § 794.011(1)(h).

¹⁶⁰ *Ralston v. State*, 350 So. 2d 791, 792 (Fla. App. 1977).

¹⁶¹ *See State v. Hudson*, 397 So. 2d 426, 428 (Fla. App. 1981).

¹⁶² *McIlwain v. State*, 402 So. 2d 1194, 1196-97 (Fla. App. 1981).

ual's privacy rights and sexual freedom.¹⁶³ The combination of force and freely given consent is not logical, however, in certain situations where the proof of force makes it clear that no freely given agreement could possibly be given. For example, if it is proved that the defendant severely beat the victim, it should be unnecessary to establish separately the fact that the victim did not freely agree to the sexual penetration. The continuing use of non-consent as an element of rape also perpetuates the view that rape is distinguished from sexual intercourse primarily by the victim's non-consent, rather than by the violent or coercive nature of the assailant's behavior.¹⁶⁴ Thus, although the Wisconsin definition effectively eliminates the resistance standard and the use of implied consent, the statute as a whole has not completely discarded all traditional misconceptions about rape.

IV. A SUGGESTION FOR REFORM—THE STATUTORY AFFIRMATIVE CONSENT DEFENSE

A. THE GOALS OF RAPE REFORM

Despite over twenty years of rape reform, the questions of how to define consent and how to use it in a reform statute are still unresolved. A variety of statutory models have been enacted throughout the country, but none of these formulations have adequately addressed all the concerns posed by the traditional common law. In order to rectify the misconceptions in the common law, rape reform statutes have attempted to focus on force or coercion as the key element of the crime; eliminate the use of implied consent and the resistance standard; and punish the defendant for his culpable actions, rather than the victim for failing to fight back.

The Model Penal Code,¹⁶⁵ the New York forcible compulsion law, and the codified resistance standards do not meet any of these goals.¹⁶⁶ Instead, these statutory models maintain a focus on the victim's non-consent or resistance, and are based on the same misconceptions as the common law. The Michigan model of force or coercion is a major improvement and makes the defendant's use of force or coercion the key element of rape. The statute, however, fails to deal with the consent issue, and so the courts are left to define when consent can be raised as an affirmative defense and what will constitute consent.¹⁶⁷ The Wisconsin statute provides the most progressive definition of consent, but the

¹⁶³ See Weiner, *supra* note 141, at 158-61.

¹⁶⁴ See *supra* note 53 and accompanying text.

¹⁶⁵ See *supra* notes 64-84 and accompanying text.

¹⁶⁶ See *supra* notes 86-107 and accompanying text.

¹⁶⁷ See *supra* notes 111-40 and accompanying text.

law does not change the common law notion that lack of consent is the essence of rape.¹⁶⁸

B. THE STATUTORY AFFIRMATIVE CONSENT DEFENSE

The goals of rape reformers can be met by combining the provisions of the Michigan and Wisconsin statutes. The basic definition of the crime would be based on the Michigan model, which defines rape as sexual penetration by force or coercion. Instead of leaving the consent question open, however, as the Michigan statute does, the Wisconsin definition of consent would be added.¹⁶⁹ This is similar to the approach taken by the Minnesota statute,¹⁷⁰ although the proposed reform statute should explicitly state that consent shall be available as an affirmative defense to sexual assault crimes involving adults. A clear statement of how and when the consent issue can be raised will avoid the confusion in the present Michigan and Minnesota statutes.

One commentator, criticizing the Michigan statute, posed the possibility of eliminating consent altogether, both as an element of the crime and as a defense.¹⁷¹ If consent is completely eliminated, a defendant who exerts force or coercion to sexually penetrate another person would be guilty, regardless of the actions of that person. Consent by the victim could never excuse the use of force. The elimination of consent, however, poses possible civil liberty questions. If consent cannot be raised as a defense, then consensual sado-masochistic acts are made criminal. In addition, in cases where coercion or threats are alleged as opposed to physical force, there may be very little physical evidence of the alleged coercion or threat. In those cases, the fact-finder should be allowed to weigh the evidence concerning both the perceived threat and the perceived consent.¹⁷²

On one hand, a statutory consent defense will permit defendants to allege that the victim consented to the physical force. On the other hand, the prosecution is not burdened with a requirement of proving non-consent at the outset in cases where it is unlikely that the victim consented, as when the victim has been seriously injured. Use of the Wisconsin definition eliminates the problem of implied consent¹⁷³ and identifies a clear standard of behavior for both defendant and victim.

¹⁶⁸ See *supra* notes 142-64 and accompanying text.

¹⁶⁹ See *supra* note 143 and accompanying text.

¹⁷⁰ See *supra* notes 136-40 and accompanying text.

¹⁷¹ BATTLE INSTITUTE REPORT, FORCIBLE RAPE: LEGAL ISSUES, *supra* note 14, at 8.

¹⁷² Wiener states: "[A] gender gap in sexual communications exists. Men and women frequently misinterpret the intent of various dating behaviors and erotic play engaged in by their opposite-sexed partners." Wiener, *supra* note 141, at 147.

¹⁷³ See *supra* notes 151-56 and accompanying text.

Although the Wisconsin courts have held that under the consent definition resistance is not necessary,¹⁷⁴ it would be prudent to include an explicit statutory provision to that effect in a rape reform bill.¹⁷⁵ It would then be clearly stated that victims are under no obligation to resist their attackers.

C. THE ILLINOIS CRIMINAL SEXUAL ASSAULT ACT OF 1983

On March 9, 1983, House Bill 606, the Illinois Criminal Sexual Assault Act, was introduced in the Illinois General Assembly.¹⁷⁶ The Bill is a comprehensive rape reform law, modelled in part on the Michigan statute. The original draft of the Bill as introduced defined rape, or criminal sexual assault, as "an act of sexual penetration by the use of force or threat of force."¹⁷⁷ The proposed Bill also established consent as an affirmative defense: "If the accused raises consent as a defense . . . it shall be an affirmative defense. . . . For the purposes of this Section, consent means words or overt actions by a person indicating a freely given agreement to the specific acts of sexual penetration or sexual conduct in question."¹⁷⁸ The section also provided that the consent defense shall not apply in cases involving minors. The Bill did not originally include a section on resistance, but it was later amended to read: "Lack of verbal or physical resistance or submission by the victim resulting from the use of force, threat of force, coercion or duress by the accused shall not constitute consent."¹⁷⁹

Affirmative defenses in Illinois are defined and governed by Section 3-2 of the Illinois Criminal Code:

(a) "Affirmative defense" means that unless the State's evidence raises the

¹⁷⁴ See *supra* note 152 and accompanying text.

¹⁷⁵ See, e.g., MICH. COMP. LAWS ANN. § 750.520i (Supp. 1982); N.J. REV. STAT. ANN. § 2C:14-5 (West 1982).

¹⁷⁶ H.B. 606, 83d Ill. Gen. Ass. (1983). H.B. 606 was signed into law January 5, 1984, and will take effect on July 1, 1984. Illinois Criminal Sexual Assault Act, P.A. 83-1067, 1983 Ill. Laws —. The current Illinois rape law is based on the seventeenth century English common law definition: "§ 11-1 Rape. (a) A male person of the age of 14 years and upwards who has sexual intercourse with a female, not his wife, by force and against her will, commits rape . . ." ILL. REV. STAT. ch. 38, § 11-1 (1981).

¹⁷⁷ H.B. 606, 83d Ill. Gen. Ass. (1983). "Force or threat of force" was defined in the Bill, as introduced, as:

[T]he use of coercion, physical force or violence, or the threat of physical force or violence; including but not limited to the following situations:

(1) when the accused makes a threat . . . and where the victim under the circumstances reasonably believed that the accused had the ability to execute that threat immediately or in the future; or

(2) when the accused has overcome the victim by use of superior strength or size, physical restraint, physical confinement, or an element of surprise.

¹⁷⁸ H.B. 606, 83d Ill. Gen. Ass.

¹⁷⁹ H.B. 606, 83d Ill. Gen. Ass., 1983 Ill. Laws —.

issue involving the alleged defense, the defendant, to raise the issue, must present some evidence thereon.

(b) If the issue involved in an affirmative defense is raised then the State must sustain the burden of proving the defendant guilty beyond a reasonable doubt as to that issue together with all the other elements of the offense.¹⁸⁰

Thus, under House Bill 606, once a defendant comes forward with *some* evidence of the victim's words or overt actions indicating a freely given agreement, the consent issue is raised. The prosecution then assumes the burden of disproving consent beyond a reasonable doubt. At no time does the defendant assume the burden of proving the existence of consent beyond a reasonable doubt.

During the legislative debate on House Bill 606, the American Civil Liberties Union (ACLU) raised objections to the affirmative consent defense. The ACLU claimed that the consent defense was an unconstitutional shift in the burden of proof, in violation of the Supreme Court decision in *Mullaney v. Wilbur*.¹⁸¹ Non-consent, according to the ACLU, "must be an essential element of the crime" of rape because "[w]ithout it, there is nothing criminal about sexual intercourse between adults."¹⁸² Non-consent is seen only as the "flip-side" of force or coercion, and the notion that non-consent need not be shown by the prosecution "is to suggest that in all cases of sexual assault involving no force, the only thing necessary to prove beyond a reasonable doubt is sexual intercourse."¹⁸³

This position, like the traditional common law, confuses rape with consensual sexual intercourse.¹⁸⁴ Such a position ignores the data indicating that rape is primarily an act of force and violence, rather than a sexual act.¹⁸⁵ Current Illinois law treats force and non-consent as distinct elements, rather than the "flip-side" of one another, and requires proof that an alleged rape occurred both by force and against the will of the victim. Illinois courts have held that "[v]oluntary submission by a

¹⁸⁰ ILL. REV. STAT. ch. 38, § 3-2.

¹⁸¹ 421 U.S. 684 (1975); see Susan Bandes, Staff Counsel, ACLU, Memorandum on ACLU Position on H.B. 606; Letter from Susan Bandes, Staff Counsel, American Civil Liberties Union of Illinois, to State Representative Aaron Jaffe, Sponsor of H.B. 606 (Mar. 14, 1983) [hereinafter cited as Letter from Susan Bandes].

¹⁸² Letter from Susan Bandes, *supra* note 181, at 2.

¹⁸³ *Id.* at 3. The Illinois State Bar Association echoed a similar concern, stating that House Bill 606 "would criminalize 'force' independent of any consideration of the effect of that force upon the victim. We believe that proposal creates an unacceptably lax standard of criminality." Letter from Daniel L. Houlihan, Legislative Counsel, and Mary Lou Lowder Kent, Director of Legislative Affairs, Illinois State Bar Association to Members of the Illinois State Senate (Spring 1983).

¹⁸⁴ See *supra* note 53 and accompanying text.

¹⁸⁵ See *supra* notes 54-58 and accompanying text.

female . . . no matter how reluctantly yielded, amounts to consent."¹⁸⁶ This holding presumes that both force and consent can exist at the same time and requires proof of both elements. Consent by the victim may either negate or justify the evidence of force, and is analogous to an insanity or emotional duress defense that negates evidence of the *mens rea* necessary to commit a crime, or justifies the defendant's actions. Under House Bill 606, eliminating lack of consent as an element of the crime does not leave the act of sexual penetration as the only remaining element. The defendant's use of force or threat of force must still be proved beyond a reasonable doubt.

The ACLU also neglects to consider the Supreme Court's decision in *Patterson v. New York*.¹⁸⁷ *Patterson*, decided in 1977, limited the Supreme Court's holding in *Mullaney v. Wilbur*.¹⁸⁸ The *Mullaney* decision struck down a Maine statute which allowed a defendant to rebut a statutory presumption of "malice aforethought" in homicide cases by proving that he acted in the heat of passion.¹⁸⁹ According to one commentator, the holding in *Mullaney*, carried to a logical extreme, would have required that the prosecution assume the burden of proving every fact affecting guilt or innocence.¹⁹⁰ In *Patterson*, the Court expressed a desire to avoid such an interpretation of *Mullaney*. The Court held that states did not have to require prosecutors to "prove beyond a reasonable doubt every fact, the existence or nonexistence of which [they are] willing to recognize as an exculpatory or mitigating circumstance affecting the degree of culpability or the severity of punishment."¹⁹¹ The Court recognized the states' authority to "reallocate burdens of proof by labelling as affirmative defenses at least some elements of the crimes now defined in their statutes."¹⁹² Such authority, however, is constitutionally limited by the Due Process Clause, and states cannot, for instance, declare individuals presumptively guilty of crimes or define essentially innocent behavior as criminal conduct.¹⁹³

The affirmative consent defense is constitutional under the limits identified by the Court in *Patterson*. Under House Bill 606, the prosecution would still be required to prove the existence of force or threat of force. The act of forceful sexual penetration is the criminal behavior

¹⁸⁶ *People v. Rosario*, 110 Ill. App. 3d 1020, 1025, 443 N.E.2d 273, 276-77 (1982); see also *supra* note 43.

¹⁸⁷ 432 U.S. 197 (1977).

¹⁸⁸ 421 U.S. 684 (1975).

¹⁸⁹ *Id.* at 685-86.

¹⁹⁰ Comment, *The Constitutionality of Affirmative Defenses After Patterson v. New York*, 78 COLUM. L. REV. 655, 659 (1978).

¹⁹¹ *Patterson*, 432 U.S. at 207.

¹⁹² *Id.* at 210.

¹⁹³ *Id.*

sanctioned by the Bill.¹⁹⁴ In addition, unlike the statute upheld in *Patterson*, Illinois law does not require the defendant to prove the existence of the exculpatory factor beyond a reasonable doubt. Once the defendant shows "some evidence" of consent, the burden of refuting consent beyond a reasonable doubt is shifted to the prosecution.¹⁹⁵

Opponents of House Bill 606 also raised concerns that the affirmative consent defense would violate a defendant's fifth amendment privilege against self-incrimination by requiring that a defendant testify on the consent issue.¹⁹⁶ The fifth amendment prohibits compelling persons to be witnesses against themselves.¹⁹⁷ It does not guarantee, however, that a defendant will be able to mount a successful, or even adequate, defense by not testifying. The Supreme Court has held that a defend-

¹⁹⁴ In their objections to this bill, *see supra* notes 181-83 and accompanying text, the ACLU ignores the element of force or threat of force and assumes that removal of the lack of consent as an element means that House Bill 606 criminalizes the simple act of sexual penetration without any other showing of culpable conduct.

¹⁹⁵ *See* *People v. Smith*, 71 Ill. 2d 95, 105, 374 N.E.2d 472, 476 (1978) (upholding the constitutionality of the Illinois affirmative defense statute). Note also that a common law affirmative defense has existed in Michigan for nearly ten years and has not yet been found unconstitutional. *See supra* note 128 and accompanying text.

Despite the flaws in the ACLU's analysis of the affirmative consent defense, House Bill 606 was amended by the Illinois House of Representatives in an apparent effort to allay the concerns of the ACLU. The House amendment deleted the word "affirmative" from the defense section of the Bill, leaving consent available as a "defense." Interview with Polly Poskin, Executive Director, Illinois Coalition of Women Against Rape (Feb. 22, 1984). The ACLU dropped its objections to House Bill 606 following the adoption of that amendment. *Id.*; *see also* Lawson, *Sex Crimes: Revised*, 10 ILLINOIS ISSUES 6, 11 (February 1984). It is not at all clear why changing the consent provision from an affirmative defense to a "defense" answers any of the question raised by the ACLU. The procedural implications of a "defense" as opposed to an affirmative defense are also unclear under Illinois law. *See* Lawson, *supra*, at 11 (referring to one State's Attorney's comment that "lawyers are still puzzling over what will happen to the consent defense under the new Criminal Sexual Assault Act.")

Legislators and proponents of the new law believe that deletion of the word "affirmative" should have no impact on the procedural use of the consent defense. During the final floor debate on House Bill 606, Representative John Cullerton stated:

Under House Bill 606, the defendant may raise consent as a defense to any of the offenses requiring proof of force or threat of force. The defendant may raise the defense by cross-examining the complaining witness or any other witnesses, or by taking the stand himself or herself, or by offering any other evidence. Once the defendant has presented some evidence as to the [defense] of consent, the state sustains the burden of proving the defendant guilty beyond a reasonable doubt as to that issue as well as other elements of the offense.

83d Ill. Gen. Ass., House of Representatives, TRANSCRIPTION DEBATE 1 (Oct. 19, 1983). The procedural process described by Representative Cullerton is identical to the process followed for an affirmative defense. *See supra* text accompanying note 180.

¹⁹⁶ Interview with Polly Poskin, Executive Director, Illinois Coalition of Women Against Rape, and Julie Hamos, Cook County Assistant State's Attorney, two of the drafters of House Bill 606 (Aug. 12, 1983).

¹⁹⁷ The fifth amendment provides: "No person . . . shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law. . . ." U.S. CONST. amend. V.

ant's dilemma of "demanding a choice between complete silence and presenting a defense has never been thought an invasion of the privilege against compelled self-incrimination."¹⁹⁸

Opponents expressed objections to the consent definition contained in House Bill 606. The legislation as introduced contained language borrowed from the Wisconsin statute, defining consent as "words or overt actions . . . indicating a freely given agreement to the specific acts of sexual penetration . . . in question."¹⁹⁹ The Illinois State Bar Association criticized the definition as "practically requir[ing] a written document before . . . engaging in sex."²⁰⁰ The Illinois Senate Judiciary Committee staff commented that the "'specific acts' requirement seems a bit too constraining and businesslike for your average tryst."²⁰¹

Proponents noted that a statutory definition of consent was essential.²⁰² Without one, Illinois courts were likely to rely on prior case law, which held that a "[c]omplainant's failure to resist when it was within her power to do so conveys the impression of consent regardless of her mental state, [and] amounts to consent. . . ."²⁰³ The Wisconsin definition used in House Bill 606 completely changes current Illinois law, and clearly establishes that a victim's mental state is important in determining the existence of consent.

The "specific acts" requirement was included to address the problem of acquaintance rapes, where the victim and assailant may have previously engaged in sexual intercourse. Proponents of the Bill felt that consent to prior sexual relations should not constitute an "irrevocable" consent to any future acts.²⁰⁴ Implied consent, inferred from previous acts or any acts short of express consent, should not be used to justify sexual assault. Proponents however, did, agree to remove the phrase "words or overt actions" to satisfy those critics who found the consent definition too limiting and difficult to prove.²⁰⁵ As finally enacted by

¹⁹⁸ *Williams v. Florida*, 399 U.S. 78, 84 (1970); *see also Barnes v. United States*, 412 U.S. 837, 847 (1973) ("[t]he mere massing of evidence against a defendant cannot be regarded as a violation of his privilege against self-incrimination").

¹⁹⁹ *See supra* text accompanying note 178.

²⁰⁰ Legislative Advisory Letter from Daniel L. Houlihan, Legislative Counsel, and Mary Lou Lowder Kent, Director of Legislative Affairs, Illinois Bar Association, to Members of the Senate Judiciary II Committee, at 4 (May 18, 1983).

²⁰¹ Assorted Concerns Regarding House Bill 606, Staff Summary prepared for Illinois Senate Judiciary II Committee, at 9 (June, 1983).

²⁰² Interview with Polly Poskin, Executive Director, Illinois Coalition of Women Against Rape, and Julie Hamos, Cook County Assistant State's Attorney (Aug. 12, 1983).

²⁰³ *People v. Warren*, 113 Ill. App. 3d 1, 6, 446 N.E.2d 591, 594 (1983); *see also People v. Borak*, 13 Ill. App. 3d 815, 821, 301 N.E.2d 1, 6 (1973); *supra* note 43.

²⁰⁴ Interview with Linda Miller, Legislative Director, Illinois chapter of the National Organization for Women, and Barbara Engel, Director of Women's Services, Chicago Loop Young Women's Christian Association (Aug. 12, 1983).

²⁰⁵ *But see supra* notes 155-56 and accompanying text.

the Illinois General Assembly, the affirmative consent defense provision in the Illinois Criminal Sexual Assault Act reads as follows:

It shall be a defense to any offense requiring proof of force or threat of force under [this Act] that the victim consented. "Consent" means a freely given agreement to the act of sexual penetration or sexual conduct in question. Lack of verbal or physical resistance or submission by the victim resulting from the use of force or threat of force by the accused shall not constitute consent.²⁰⁶

V. CONCLUSION

An affirmative consent defense meets the goals of rape reform by placing the focus of judicial inquiry on the defendant, eliminating implied consent and the resistance standard, and protecting an individual's right to sexual privacy. Reformers hope that in cases where use of a weapon or the infliction of serious injury seems to preclude a finding of consensual intercourse, both prosecutors and victims will be saved the burden and trauma of proving that a victim did not consent. In reality, however, consent is perhaps the most frequently raised defense in rape cases,²⁰⁷ and if the experience in Michigan is any indication, consent will continue to be used even in the most obviously forceful cases. In *People v. Hearn*,²⁰⁸ the defendant and victim were strangers, he used a gun and a knife, and her story was corroborated by her boyfriend, who was also attacked.²⁰⁹ Even under those circumstances, the Michigan Court of Appeals held that the trial court's refusal to instruct the jury on the defendant's consent defense was reversible error. Apparently, the defendant's testimony alone was sufficient to raise the consent issue. If consent can be an issue in a case such as *Hearn*, it is likely to be considered in most cases where a defendant chooses to raise it.

The affirmative consent defense is, however, a significant improvement in rape reform laws. The presumption that victims consent to forceful sexual assault is reversed, and the focus of the definition of rape is on the force used by the defendant, rather than on the victim's lack of consent. When consent is an issue, a victim's submission in the face of force or coercion will not constitute consent, nor will a victim's unrelated actions, such as drinking, dancing, or dressing in certain clothing. The affirmative consent defense eliminates the vestiges of a common law

²⁰⁶ P.A. 83-1067, ch. 38, § 12-17, 1983 Ill. Laws —.

²⁰⁷ Bohmer & Blumberg, *supra* note 41, at 393. The Bohmer and Blumberg study found that consent was raised in 11 of 17 cases. *Id.*

²⁰⁸ 100 Mich. App. 749, 300 N.W.2d 396 (1980).

²⁰⁹ *Id.* at 751-52, 300 N.W.2d at 397; *see also supra* note 128.

founded on misogynist misconceptions, and codifies instead an approach based on modern research and attitudes.

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