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Tougher Prosecution When the Rapist Is Not a Stranger: Suggested Reform to the California Penal Code

Allison West

TOUGHER PROSECUTION WHEN THE RAPIST IS NOT A STRANGER: SUGGESTED REFORM TO THE CALIFORNIA PENAL CODE

Allison West*

I. INTRODUCTION

Sue had known Gary for about three years. He was Tony's best friend, and she had dated Tony for almost one year. Tony frequently teased her that Gary had "a thing for her," but her interest was in Tony; Gary was just a friend. Sue and Tony were having difficulties, and she and Gary had gotten together casually a few times to discuss her feelings. These were casual get-togethers. Recently, Sue invited Gary over to her apartment for one of her famous Mexican meals. She explained that her roommate was out of town and it would be nice for them to talk alone.

While Sue fixed dinner they chatted, drank margueritas and teased each other in their normal way. However, the conversation turned serious when Gary told Sue that he would like to date her. Sue listened and then responded by saying that she was flattered, but confused. She still cared for Tony, yet she really enjoyed being with

* Golden Gate University School of Law, Class of 1994; B.A., Communications, University of Colorado, 1980. Many thanks to Gina Harmon for her continued support and input, Stacey Kepnes and Dona Skeren for their able editing, Professor Joan Howarth for her guidance and encouragement and Alex Frasco for providing a different point of view. Special thanks and acknowledgement to the rape survivors who taught me so much while I was a crisis counselor with the Marin Rape Crisis Center from 1984 through 1987.

Gary. She wanted some time to think about whether she was ready or even wanted to get involved with him. Sue then took Gary's hand and led him to the living room couch.

They sat close together on the couch and continued their conversation. Gary told Sue that he understood her confusion and that he would wait. Sue gave Gary a kiss on the cheek and a hug. As she started to get up, Gary told Sue that he knew she would change her mind if she would let him show her how much he cared for her. He gently pulled Sue back onto the couch and started to kiss her. She initially responded, but pulled her head back and again told him that she was confused. Sue explained that she was not interested in having any type of physical relationship with him, she just enjoyed having him as a friend. She cupped her hands around his face and told him again that she valued their friendship. Gary tried to kiss Sue again and she pulled away, and tried to get off the couch.

Gary started yelling, saying that he thought she had been leading him on in the past and was leading him on now. Sue again explained her feelings for him as a friend and that her affection only went that far. He kept calling her a tease and said that she was drinking just to have the courage to be with him. Sue attempted to explain, but Gary appeared not to listen. He threatened to sabotage any efforts by Sue to work out her problems with Tony. Gary then pushed Sue down on the couch, pinned her arms down, proceeded to take off her pants and have intercourse with her. She asked him not "to do this" but Gary told her it was his way to show her he cared and that her kisses told him that she cared too. Afterward Gary dressed and told Sue that he still really liked her and hoped that they could see each other again.

Was Sue raped?[1]

1. The definition of rape under CAL. PENAL CODE § 261 (West 1988) provides in

When a woman[2] does not consent[3] to engage in sexual intercourse or other sexual relations and she is then forced to have sex against her will, it seems reasonable to assume that a rape has been committed. In the case study above, Sue did not consent, yet, because she knew her rapist, the picture suddenly changes.

Because the victim of nonstranger rape[4] has consented to

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pertinent part:

> (a) Rape is an act of sexual intercourse accomplished with a person not the spouse of the perpetrator, under any of the following circumstances:
> (2) Where it is accomplished against a person's will by means of force, violence, duress, menace, or fear of immediate and unlawful bodily injury on the person or another.
> (3) Where a person is prevented from resisting by any intoxicating or anesthetic substance, or any controlled substance, administered by or with the privity of the accused.
> (6) Where the act is accomplished against the victim's will by threatening to retaliate in the future against the victim or any other person, and there is a reasonable possibility that the perpetrator will execute the threat. As used in this paragraph "threatening to retaliate" means a threat to kidnap or falsely imprison, or to inflict extreme pain, serious bodily injury, or death.
> (b) As used in this section, "duress" means a direct or implied threat of force, violence, danger, hardship, or retribution sufficient to coerce a reasonable person of ordinary susceptibilities to perform an act which otherwise would not have been performed, or acquiesce in an act to which one otherwise would not have submitted. The total circumstances, including the age of the victim, and his or her relationship to the defendant, are factors to consider in appraising the existence of duress.
> (c) As used in this section, "menace" means any threat, declaration, or act which shows an intention to inflict injury upon another.

CAL. PENAL CODE § 263 (West 1988) provides "the essential guilt of rape consists in the outrage to the person and feelings of the victim of the rape. Any sexual penetration, however slight, is sufficient to complete the crime." This section is applicable to all subdivisions of § 261 defining the crime of rape. People v. Sheffield, 98 P. 67 (Cal. 1908).

The infamous legal scholar Blackstone provided the traditional definition of rape which was "carnal knowledge of a woman forcibly and against her will." 4 WILLIAM BLACKSTONE, COMMENTARIES 210. Most states used a version of this definition in enacting rape legislation. Leigh Bienen, *Rape III — National Developments in Rape Reform Legislation*, 6 WOMEN'S RTS. L. REP. 170, 174 (1980).

2. Although men may also be the victims of nonstranger rape, the focus of this article will be on women because they are the most commonly reported victims of this crime.

3. Consent is defined under CAL. PENAL CODE § 261.6 (West 1988) as "positive cooperation in act or attitude pursuant to an exercise of free will. The person must act freely and voluntarily and have knowledge of the nature of the act or transaction involved."

4. The terms "date rape" and "acquaintance rape" are commonly used to describe

some degree of familiarity or intimacy with the accused, prosecution of these types of cases is difficult.[5] The issues of consent and credibility of the victim move to the forefront, often blinding the fact-finder from what should be the central issue, namely, the defendant's conduct. The cultural assumption remains that, absent a weapon being present, if a woman does not want to be raped she can prevent the attack against her because she is in control of her body. Otherwise, she must either "want" or "deserve" what is inflicted upon her. In other words, "female passivity implies that women do not consent to sex, but rather permit it."[6] This view is consistent in cases of nonstranger rape. As will be discussed more fully in the following sections, the typical case of a nonstranger rape usually involves elements of duress and coercion, not heinous acts of violence. Because the victim knows her rapist, the perception is that the woman impliedly consented to all sexual contact.[7]

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forced, coercive sex occurring between persons who know each other. However, because these terms are often descriptive of a certain type of relationship, e.g., dating refers to some type of romantic relationship where the parties often engage in intimate relations, the wide variety of other interpersonal relationships between persons who know each other are excluded. This is problematic as it limits the protections afforded to victims. For example, see CAL. PENAL CODE § 261.6 which provides that "a current or previous dating relationship shall not be sufficient to constitute consent where consent is at issue. . . ." Therefore, the term nonstranger rape will be used throughout this article and will encompass the enormity of relationships that include but are not limited to: friends, neighbors, co-workers, former lovers, social companions, and all interactions between persons who recognize one another but have not communicated. For example, a daily wave to a postal carrier may not result in any communication but under this definition would fall under a nonstranger relationship. See Section IV for a further critique of the California Penal Code.

See also Alice Vachss, *All Rape Is 'Real' Rape*, N.Y. TIMES, Aug. 11, 1993, at A15 (noting that using the term "date rape" is misguided because it suggests a fallacious scenario of how rape occurs between people who know each other). Regardless of whether the accused knew the victim or used a weapon, if force was used, including extortion, to achieve sex, the line was crossed and a crime was committed. *See generally* Marcia G. Pfeiffer, Note, *Date Rape: The Reality*, 17 S.U. L. REV. 283 (1990).

5. *See* Pfeiffer, *supra* note 4, at 285; *see also* Beverly Balos & Mary L. Fellows, *Guilty of the Crime of Trust: Nonstranger Rape*, 75 MINN. L. REV. 599, 604-05 (1991).

Statutory rape which can occur between persons who know each other, and spousal rape, will not be discussed in this article.

6. Marilyn J. Ireland, *Reform Rape Legislation: A New Standard Of Sexual Responsibility*, 49 U. COLO. L. REV. 185, 189 (1978).

7. *See* Lois Pineau, *Date Rape: Feminist Analysis*, 8 LAW & PHIL. 217, 221 (1989). Ms. Pineau posits that it is not reasonable to believe that women consent "to the kind of sex involved in 'date rape' or that it is reasonable for men to think that they have agreed." If a woman consents on one occasion to a sexual contact, it does not necessarily follow that consent is automatic for all subsequent contact. A woman has the right to decline or withdraw her consent at *any* time without fear of violent or coercive repercus-

Although public awareness and rape laws have changed since 1975 when Susan Brownmiller's powerful book on the politics of rape, *Against Our Will: Men, Women and Rape*, first revealed the realities of sexual violence against women, statistics show that a majority of rapes go unreported.[8] Most rape laws were enacted under the notion of contributory behavior of the victim, with prosecutors having the burden of proving the victim's nonconsent.[9] The goals behind rape law reform have shifted the focus from the victim's nonconsent to the offender's forceful or violent conduct because of the difficulty in overcoming the burden of the victim's nonconsent.[10] Nevertheless, the reform in most instances still does not acknowledge or incorporate situations involving relationships where the victim and rapist know each other. In fact, the penal codes in a majority of jurisdictions have not been amended to reflect nonstranger rape.[11]

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sion. If she is then forced to proceed against her will, she has been raped.

8. The following statistics were issued in a recent report by the Senate Judiciary Committee after a charge that our system is 30 percent more likely to lock up a robber than a rapist, and are illustrative to show why many rape victims feel reluctant to pursue their cases:

> - Only 2 percent of rape victims will see their attackers caught, convicted or imprisoned.
>
> - 54 percent of all rape cases end in acquittals or are dismissed before trial.
>
> - Nearly one-fourth of convicted rapists are released on probation and never serve prison time.

The report acknowledged that "survivors fear that they will not be believed, that reporting will be futile and that they will be revictimized by the system," and that police are often reluctant to file rape reports in cases where victims know their attackers. Although rape reports increased by 6 percent between 1989 and 1990, victims' advocates still estimate that 84 percent of all rapes go unreported. The committee estimates that 2,000 women report rapes in the United States every week; figuring in those unreported cases, there may be as many as 12,000 rapes a week. The Senate's findings are confirmed by state and federal statistics that note that "less than half of those arrested for rape are convicted, compared with 69 percent convicted of murder and 61 percent convicted of robbery, the committee found." Penny Bender, *Report Rips U.S. Rape Record*, SACRAMENTO BEE, May 28, 1993, at A21.

9. For example, a California jury instruction provides, "[t]here is no criminal intent if the defendant had a reasonable and good faith belief that the female person voluntarily consented to engage in . . . [some sexual act]." CALJIC § 10.65 (5th ed. 1990 & Supp. Jan. 1991). While the defendant presumably has the burden of proving his reasonable good faith belief, the prosecutor must, in order to defeat the consent defense, put on evidence to show the victim's lack of consent.

10. Cynthia A. Wicktom, Note, *Focusing on the Offender's Forceful Conduct: A Proposal for the Redefinition of Rape Laws*, 56 GEO. WASH. L. REV. 399, 415 (1988).

11. It is questionable whether the absence of any reference to nonstranger type rapes is deliberate. Over 30 years ago, the drafters of the Model Penal Code, which often

This article advocates changes to existing California statutes to better protect the rights of victims of nonstranger rape. As this article will show, the mere happenstance that a victim knows her rapist too often changes the dynamics of the prosecution and the perception of the victim. A significant problem is that many rape statutes are vague either because they provide ambiguous and outdated definitions or no definitions at all.[12] This ambiguity and vagueness translates into fewer prosecutions of nonstranger rape. Reform is necessary in order to protect the rights of victims of nonstranger rape, and to provide prosecutors with a fair chance to achieve convictions in these kinds of cases.

Section II of this Article discusses the differences between stranger and nonstranger rape, looking specifically at the psychological factors that distinguish the victims of each type of crime. What is often not realized is that being raped by a friend or acquaintance may be no less traumatic or painful than being raped by a complete stranger.[13] By virtue of knowing her assailant, the nonstranger rape victim faces distinct challenges in presenting her case to law enforcement and in recovering from

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provides the framework for statutory reform, specifically included the situation where the victim and perpetrator knew each other through some social relationship. The Code provides that if "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 . . ." the crime is a first degree felony. MODEL PENAL CODE § 213.1 (Adopted 1962). Unfortunately, by making this type of nonstranger rape a second degree felony, the Code implies that these situations are not as "legitimate" and worthy of protection.

The author acknowledges that California has not completely neglected the area of nonstranger rape. In 1990, CAL. PENAL CODE § 261.6 (West 1988) was amended to include situations where "a current or previous dating relationship shall not be sufficient to constitute consent where consent is at issue in a prosecution under Sections 261, 286, 288a, or 289. Nothing in this section shall affect the admissibility of evidence or the burden of proof on the issue of consent." However, as will be discussed more fully in Section III, the current amendment is inadequate to protect the rights of victims whose rapes occur by someone known to them but not while in any type of dating relationship. *See also* COLO. REV. STAT. ANN. § 18-3-401(1.5) (West Supp. 1993) which includes a similar, but somewhat broader provision than California concerning "a current or previous relationship;" the word "dating" is not included.

12. *See, e.g., In re* M.T.S., 609 A.2d 1266, 1267 (N.J. 1992) (noting that the state's sexual assault statute does not define the phrase "physical force").

13. *See* ROBIN WARSHAW, I NEVER CALLED IT RAPE: THE MS. REPORT ON RECOGNIZING, FIGHTING AND SURVIVING DATE AND ACQUAINTANCE RAPE 65 (1988). In one study conducted by researchers with the Urban Institute, "acquaintance-rape victims rate themselves less recovered than do stranger-rape victims for up to three years following their rape experiences." *Id.* A date-rape expert noted that victims of stranger-rape more readily seek counseling or other support whereas many date-rape victims will repress the experience and harbor feelings connected to the assault for a longer time period.

her rape. The nonstranger rape victim is often concerned about being believed by the police, prosecutor and even her friends. Section II also focuses on the nonstranger rape victim's difficulty in reconciling that the randomness of the violence against her is absent compared to the victim of stranger rape.

Section III explores the obstacles associated with prosecuting nonstranger rape cases focusing on low reporting rates and the reluctance of prosecutors to file charges and for judges and juries to convict.[14] Section IV examines the inadequacy of the current California rape statutes and critiques five specific sections of the Penal Code that may contribute to the low rate of prosecutions of nonstranger rape. Finally, Section V provides suggestions for reform and proposes a model rape statute that would more fairly protect the rights of women raped by either strangers or nonstrangers. The proposed statute clarifies what rape is, and does not focus on the victim's actions or inactions, her consent or lack of consent, or her state of mind, because to do so would keep the focus of the crime on the woman as opposed to the perpetrator.[15]

Unless nonstranger rape situations are incorporated and recognized in rape law reforms, few cases of nonstranger rape cases will be prosecuted. Women will continue to be victimized by the system, believing that violence against them will be tolerated.

II. CHARACTERISTICS OF NONSTRANGER RAPE

Traditionally, rape has been thought of in terms of a stranger putting a gun to the head of his victim, threatening to kill or beat her, and then forcing her to have intercourse.[16] Over time,

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14. While the focus of this article is on nonstranger rape, the suggestions for reform are also applicable to and necessary for fair prosecution of stranger rapes.

15. The California Supreme Court acknowledged in a recent opinion that "[t]he statutory definition of the offense [forcible rape] focuses on the victim's frame of mind, asking whether her participation in the sexual act was coerced by threat or use of force. . . ." People v. Williams, 841 P.2d 961, 974 (Cal. 1992) (Kennard, J., concurring). The crime of rape is about a woman forced to submit to some sexual act against her will. It is not about the victim's state of mind, she is not on trial for her actions.

16. SUSAN ESTRICH, REAL RAPE 4, 8 (1987). This type of rape, where no prior relationship existed between the victim and defendant, is often referred to as aggravated rape. Also found within this classification of rape is the use of "extrinsic violence," the

more women have come forward to describe being raped by someone they know, either intimately, casually or just in passing.[17] However, this rape victim often looks different: no bruises, cuts or torn clothing. Although the bruises are frequently absent, the emotional horrors for the victims of nonstranger rape may linger indefinitely.

A. PSYCHOLOGICAL FACTORS

The general assumption is that the psychological and physical reaction of a victim of nonstranger rape typically bears little resemblance to the reaction of a victim who has been subjected to a violent attack at the hands of a stranger. The myth is that the nonstranger rape victim usually does not fear for her life, run screaming from the scene, or "resist" in the same manner as when a stranger uses either a weapon or force to compel his victim to submit to sexual advances. The reasoning follows that, when the victim knows her attacker, she is not as severely traumatized as when the attacker is a stranger. Nothing could be farther from the truth.[18] Countless victims of nonstranger rape

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use of weapons or beatings. *Id.* Other commentators refer to this type of rape as "blitz" rape. *See* MARCIA M. BOUMIL ET AL., DATE RAPE - THE SECRET EPIDEMIC 3 (1993); *see also* Deborah G. Goolsby, Note, *Using Mediation in Cases of Simple Rape*, 47 WASH. & LEE L. REV. 1183 (1990); Pfeiffer, *supra* note 4, at 287.

17. This type of "rape" was first given legitimacy in Susan Estrich's 1987 book, *Real Rape*. Prior to this time, rapes involving persons who had dated or who were acquaintances were not seriously considered rapes because the requisite violence, resistance and obvious nonconsent were absent. *See* ESTRICH, *supra*, note 16 at 8-15. In a Ms. magazine national research project on acquaintance rape, statistics show that one in four women were the victim of rape or attempted rape and of those women, 84% knew their assailant and 57% percent of the attacks occurred on dates. WARSHAW, *supra* note 13, at 11. *See generally* Cindi Leive, *Women Right Now, The Dangerous Truth About Acquaintance Rape*, GLAMOUR, June 1993, at 79 (noting that "[67] percent of all rapes by nonrelatives are committed by a man the victim knew before the attack" and that most nonstranger rapes are committed by someone other than a former lover). Some commentators find that "the crucial distinction [between stranger and nonstranger] rape is that there must be some basis for an ongoing relationship that creates an element of trust in the victim." BOUMIL, *supra* note 16, at 3. However, narrowing the definition to include this element of trust once again places the victim on a slippery slope. She is obliged to justify her "predicament" of being forced to have sex with someone she knew, implying that she got herself into the situation because of her poor judgment in trusting someone. This article suggests that a victim would only have to show that the rapist was not a stranger to her to have the assault labeled nonstranger rape.

18. In a nationwide survey conducted by Ms. magazine psychologist Mary P. Koss and the National Institute for Mental Health, it was reported that many victims of stranger rape seek help from professionals and their personal support system, while victims of nonstranger rape are often reluctant to discuss their experience and tend to have

are still recovering from their rape experience years later.[19] Many of these victims suffer from post-traumatic stress disorder, similar to victims of stranger rape.[20]

The nonstranger victim experiences not only the feeling of having survived a traumatic violation, but betrayal of trust by someone she knew or who was close to her. This betrayal of trust distinguishes her trauma from the victim of a random, stranger rape. After being raped, many victims experience self-doubt in trusting men in either intimate or social situations.[21] This self-doubt is frequently an impediment in the recovery from the rape.[22] In particular, when the victim and her attacker travel in the same social circle, the victim's support system may be affected permanently. She will often remain silent about her rape for two reasons: 1) to avoid any change in her social relationships, and 2) because she fears she will not be believed.

Not surprising, many nonstranger rape victims are reluctant to use the word "rape" when describing their assault. This is true even though all the factors that comprise the crime of rape are present. These victims do not perceive themselves as rape victims because they know their rapists and were not physically harmed.[23] A Ms. magazine study identified three common traits

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a more difficult time understanding what happened to them. WARSHAW, *supra* note 13, at 66.

19. *Id.* at 65.

20. *Id.* at 68. In a Glamour magazine report on acquaintance rape, Dr. Pat Zielger, director of the Grady Memorial Hospital Rape Crisis Center in Atlanta, noted that "the effects of the trauma are as serious for acquaintance rape as they are for stranger rape." Dr. Ziegler reported that the aftereffects include "nightmares, depression, suicidal impulses and, in the words of one woman, 'hating yourself for being dumb enough to trust a maniac.' " Leive, *supra* note 17, at 80.

21. *See* BOUMIL ET AL., *supra* note 16, at 148.

22. *See* WARSHAW, *supra* note 13, at 70.

23. Only 27% of women raped by men they knew thought of themselves as rape victims. *Id.* at 26. Researchers have noted that verbal aggression is more pronounced in nonstranger rapes while the use of a weapon is found to occur in significantly higher numbers of stranger rape cases. Ian T. Bownes et al., *Rape - A Comparison of Stranger and Acquaintance Assaults*, 31 MED. SCI. L. 102 (1991). Studies also reveal that rapists who verbally threaten their victims, without physical force, are often successful in completing the rape. *Id.* at 104.

According to the Bureau of Justice Statistics (BJS), nonstranger rape victims do resist their attacker as much as stranger rape victims. Ironically, the BJS also found that nonstranger rapes "are more than twice as likely as stranger rapes to happen in a victim's home." Leive, *supra* note 17 at 80 (quoting the Bureau of Justice Statistics). According to the Glamour report on acquaintance rape, this makes it harder to yell for help

in nonstranger rape victims that prevented them from perceiving what happened to them as rape: 1) when the rape took place between dating partners, 2) when prior consensual sexual intimacy occurred between the rapist and the victim, and 3) when minimal violence was involved.[24] These three traits, coupled with the victim's subsequent experience of shame, guilt and reluctance to seek help, often contribute to the under-reporting of nonstranger rape.

Sadly, because the word "rape" conjures up images of horrific violation and violence, the victims seem to know through unspoken words and wayward glances that society is telling them that "rape" should only be used in situations involving strangers or when the victim truly looks like a victim. Notwithstanding this view, regardless of who the perpetrator is, all victims of rape share much in common. Each victim fears that she will be harmed, and each is the victim of a man who uses his sexuality as a weapon of anger, power and hostility to terrorize and brutalize.

B. Randomness of the Crime Is Missing

One of the discernable differences between nonstranger rape and stranger rape is that the randomness of the crime is absent.[25] Numerous types of crimes are inflicted indiscriminately upon people who find themselves the victims of bad timing or unusual circumstances. In these instances, the mere randomness of the crime can assuage feelings of guilt or personal attack and vulnerability. Generally, victims of random acts of violence are considered "real victims," that is, they are not responsible for the acts forced upon them. The fear of these random criminal

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and supports the BJS findings that there are more completed rapes in nonstranger situations. *Id.*

24. Warshaw, *supra* note 13, at 50. According to the Ms. study, women were concerned about how their behavior would be scrutinized and were reluctant to get the men they knew in trouble.

25. According to one commentator, "most rapes are apparently planned in advance, either by a single perpetrator or a group of men. In many cases a particular victim is targeted, the victim and the perpetrator are known to each other, and the plan is geared toward luring her into an advantageous situation where they are unlikely to be detected. . . . The targeted victim is selected with sexual domination in mind. . . . By contrast, in cases of stranger rape, the act but not the victim is usually planned in advance." Boumil et al., *supra* note 16, at 26.

events is a fear that is often genderless. However, rape creates a different type of fear, a fear that women uniquely possess.[26] The fear of rape has been described as one that "[m]ost women experience . . . a nagging, gnawing sense that something awful could happen, an angst that keeps them from doing things they want or need to do, or from doing them at the time or in the way they might otherwise do."[27] Women share this fear in many unspoken ways: looking in the back seat of a car before entering alone, avoiding walking alone on a dark street, and checking out the surroundings when going somewhere new.[28] As commentators have noted, "a prerequisite for securing a woman's selfhood is assurance of her physical security against male aggression."[29]

Typically, a woman's sense of physical safety is strongest when she trusts the people surrounding her. Familiarity is often equated with trust. The fear of rape is commonly related to the fear of being violated and attacked by a stranger. It seems logical that a woman would have a greater fear of being raped by a stranger than being raped by someone in her inner circle or by anyone she knows. In the nonstranger rape scenario described in the Introduction, Sue probably gave no thought to spending time alone with Gary, nor was she fearful that she would ever be unsafe in his company.

The fear of rape was once confined to scenarios involving dark alleys and parking lots. The harshness of the reality that rape occurs between social acquaintances may have a profound effect on a nonstranger rape victim in her future relationships with men. A woman's natural response with someone familiar is to let her guard down because she does not believe she is in jeopardy of physical harm. Understandably, when a woman is then raped by someone she knows, the guilt and self-recrimination can be immense. Her feeling of personal vulnerability is heightened and it is not difficult to imagine why the trauma and recovery for a nonstranger rape victim is long and exacting.

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26. "The only crime women fear more than rape is murder." MARGARET T. GORDON & STEPHANIE RIGER, THE FEMALE FEAR 2 (1989) (citing L. Brodyaga et. al., *Rape and its Victims: A Report for Citizens, Health Facilities and Criminal Justice Agencies*, (Washington, D.C.: U.S. Government Printing Office 1975)).

27. *Id.* at 2-3.

28. *See* Barbara Fromm, *Sexual Battery: Mixed-Signal Legislation Reveals Need For Further Reform*, 18 FLA. ST. U. L. REV. 579, 590-91 (1991).

29. Balos & Fellows, *supra* note 5, at 599.

Although a woman may put her trust in a friend, neighbor, co-worker or anyone else she comes in contact with in the course of her day, the law is a reminder that she impliedly assumes the risk in all of her relationships.[30] When she becomes a victim of rape, her judgment and actions are called into question, creating an aura of culpability. Society and the legal system are not forgiving of a victim when the randomness of the crime is missing. Women are given the extra burden of weighing every situation because they are accountable not just for their own actions but even for violent acts directed towards them.

C. CAMPUS NONSTRANGER RAPE

A new area of concern is the growing number of rapes committed on college campuses around the country,[31] many of which are nonstranger rapes.[32] In response to the dramatic increase in

30. The realities of nonstranger rape are now presented to young girls. *See* Ed Jahn, *Girl Scouts Break the Mold, Deal with Sordid Side of Life*, THE SAN DIEGO UNION-TRIBUNE, Aug. 1, 1993, at B-3. At a conference for girl scouts, local clinical psychologist Karen Anderson explained how to avoid being raped by a date or acquaintance. The girls were told that "according to rape statistics, one or more of them is likely to be raped by the time they reach adulthood." *Id.*

31. A noteworthy topic, but one that will not be addressed more than briefly, is the feminist backlash at the increasing press given to the subject of nonstranger and campus date rape. Certain commentators decry the attempts of women's groups who promote the awareness of chronic violence against women in our society as a ploy to contain women as victims. At the lead of the "rape crisis" bashing is Katie Roiphe, author of THE MORNING AFTER: SEX, FEAR AND FEMINISM ON CAMPUS (1993). Ms. Roiphe does not believe that campuses are in a state of rape crisis although statistics indicate that one in four college women has been the victim of rape or attempted rape. She postulates that the current climate on campuses promotes victimization as a type of status. Ms. Roiphe also suggests that bringing charges of acquaintance or date rape trivializes "severe rape" as she does not think that most men want to use force. *NOW: Date Rape* (NBC television broadcast, Sept. 29, 1993).

Supporting her theory, Ms. Roiphe points to findings by Neil Gilbert, a professor of social welfare at the University of California at Berkeley, who found in a 1985 survey that 73% of the women classified as rape victims did not initially define their experience as rape; it was Mary Koss, the psychologist conducting the study, who did. Katie Roiphe, *No Means No. But What Does Rape Mean?* THE INDEPENDENT, Aug. 21, 1993. However, Professor Gilbert's findings parallel research that found when a woman is raped by someone she knows and does not have the bruises or scars as evidence of the attack she may initially be reluctant to call what happened rape. *See* WARSHAW, *supra* note 13, at 26; *see also* Terence Moran, *Socializing Resistance to Date Rape*, LEGAL TIMES, Dec. 9, 1991, at 25.

32. The Chronicle of Higher Education compiled statistics from 2,400 campuses and found that nearly 1,000 rapes occurred on America's college campuses in 1991. Several campuses reported an unusually high number of rapes, a statistic that reflects the phenomenon of "date" or acquaintance rape and how broadly a campus defines rape. For

campus rapes, some colleges have created policies requiring students to ask for express verbal consent before they proceed with any physical contact.[33] While this approach is a recent development, statistics are not available to indicate the effectiveness of such a policy. One thing that may hinder the success of campus "sex" policies is that the majority of campus based crime is either drug or alcohol related.[34]

III. OBSTACLES IN BRINGING CHARGES OF NONSTRANGER RAPE—FROM POLICE TO PROSECUTOR TO JURY

A. Nonstranger Rape Is Even More Difficult to Prove

Nonstranger rape is more difficult to prove and prosecute than traditional stranger rape.[35] The victim of nonstranger rape is met with a higher degree of suspicion than the victim of rape by a stranger.[36] When a woman claims that she was raped by a man she knows, her credibility, demeanor and frame of mind are on trial from the moment she meets with the police, to her first interview with the prosecutor, and continues until the ultimate judgment by the jury. No wonder the statistics are low for reporting this type of rape.[37] In the nonstranger rape example provided in the Introduction, Sue and Gary were friends and spent social time together. Those who doubt Sue's version of what happened that evening may think that she consented to Gary's advances and later regretted her actions because of how it might appear to her boyfriend. As in all cases, the fact-finder must

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example, out of the 12 rapes reported at Michigan State University in East Lansing in 1991, 10 were "acquaintance rapes." Carol Innerst, *Campus Crime Detailed; 30 Murders Cited in First Report*, The Wash. Times, Jan. 20, 1993, at A3.

33. *See Sober Orgies Only!*, Time, Oct. 11, 1993, at 24 (excerpts from the new sexual-offense policy at Antioch College in Ohio).

34. *See* Boumil et al., *supra* note 16, at 118.

35. *See* Estrich, *supra* note 16, at 15-25.

36. *See* Boumil et al., *supra* note 16, at 11.

37. A Justice Department survey reports that 47% of nonstranger rapes and 57% of stranger rapes are reported to the police. Bureau of Justice Statistics, U.S. Dep't of Justice, Special Report NCJ-12682, Female Victims of Violent Crime 13 (1991); *see also* Pfeiffer, *supra* note 4, at 284 (noting the closer the relationship between the victim and assailant, the less likely the victim was to report the crime); Warshaw, *supra* note 13, at 11, 140-41 (reporting a study in Seattle which indicated that if a victim had a prior relationship with her attacker she was less likely to report the crime).

The statistics used in this article may be inconsistent due to the various methods of gathering and analyzing data.

weigh the credibility of each witness; however, with most sexually violent crimes the only witnesses are the accused and his accuser.

Because prosecuting rape cases is difficult enough when two strangers are involved, the hesitancy in both investigating and prosecuting a case where the parties know each other increases dramatically.[38] The case becomes focused on who is the more believable - the victim or the accused. Probably the most difficult aspect of a nonstranger rape case is that these rapes frequently occur under circumstances where consensual sex seems plausible.[39] Juries often fear convicting someone when physical evidence of violence is absent. A finding that the victim consented seems to give juries an easier way to acquit the defendant.[40]

Also difficult is the scenario found in *Commonwealth v. Berkowitz*,[41] where the defendant acknowledged that he had initiated the first physical contact but stated he believed the woman had warmly returned his kisses and that her protests were thinly veiled acts of encouragement. The victim in turn denied consenting. No evidence was presented that the defendant threatened the victim which in turn caused her to perform an act she would not normally do. The Pennsylvania court reversed Berkowitz' conviction finding that the defendant used no additional force to commit the rape other than the force necessary to

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38. See ESTRICH, *supra* note 16, at 17-18; *see also* BATTELLE MEMORIAL INSTITUTE, LAW AND JUSTICE STUDY CENTER, FORCIBLE RAPE: A NATIONAL SURVEY OF THE RESPONSE BY PROSECUTORS (1977).

39. *See generally* Lieve, *supra* note 17.

40. *See* Sandra McIntosh, *Getting Away With Rape*, THE ATLANTA J./THE ATLANTA CONST., Oct. 10, 1993, at F4.

Part of the jury's reluctance to convict the defendant is founded on the notion that society must protect the male defendant from the "untrustworthy" woman victim, especially when no corroborating witness is available. Over three hundred years ago, Sir Matthew Hale, Lord Chief Justice of the Court of King's Bench, noted that "[i]t is true rape is a most detestable crime, and therefore ought severely and impartially to be punished with death; but it must be remembered, that it is an accusation easily to be made and hard to be proved, and harder to be defended by the party accused, tho never so innocent." Based on Lord Hale's saying, the California courts required a mandatory, cautionary jury instruction in all sex offense cases. In 1975, the California Supreme Court held that the cautionary instruction that a charge of rape is easily made and difficult to defend against is no longer mandatory. People v. Rincon-Pineda, 538 P.2d at 259-60 (finding the instruction inappropriate in any context and overruling decisions to the contrary).

41. 609 A.2d 1338 (Pa. Super. 1992).

complete the penetration and that the victim minimally resisted. Although the victim and defendant testified that the victim "repeatedly and continually said 'no'," the court was not persuaded that the sexual contact was without the victim's consent.[42] Specifically, the court noted that verbal resistance was relevant to show that the act was against the will of the victim. However, in order to be guilty of rape, the court required an additional showing of forcible compulsion beyond the effort needed to accomplish the act.

What the intermediate Pennsylvania court overlooked was that consent to engage in sexual intercourse or other sexual relations must be given freely, voluntarily and knowingly. As long as consent is not freely given, the amount or quality of the force used is irrelevant. Such criminal behavior cannot be rewarded with a reversal or acquittal of charges because that particular rapist was fortuitous in needing less force to accomplish his crime.[43]

B. Skepticism from the Police

> Police precincts still operate from the assumption that a woman who has been raped by a man she knows is a woman "who changed her mind afterward."[44]

This comment was written in 1975, yet the view remains pervasive today. Nonstranger rape cases are complicated; "[s]tranger-rape has clearly been the preferred category from the point of view of the police . . . [w]hen a woman is raped by a total stranger, her status as victim is clean and untarnished in

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42. *Id.* at 1347-48.

43. Another nonstranger rape case concerning lack of force and no overt physical resistance is *In re* M.T.S., 609 A.2d 1266, 1278-79 (N.J. 1992). In that case, a minor boy engaged in consensual kissing and petting of another minor and then engaged in nonconsensual intercourse. No apparent force was used other than that necessary to accomplish the act. The New Jersey Supreme court held that "the focus of attention must be on the nature of the defendant's actions." The court went on to explain that "reasonable people do not engage in acts of penetration without permission" and that it is the role of the fact finder to "decide not whether engaging in an act of penetration without permission of another person is reasonable, but only whether the defendant's belief that the alleged victim had freely given affirmative permission was reasonable."

44. Susan Brownmiller, Against Our Will: Men, Women and Rape 393 (1975).

the station-house mentality."[45] Police are often quick to judge the circumstances surrounding nonstranger rape charges with the final conclusion that the woman originally consented, was asking for it, or acting in retaliation. Add the presence of alcohol or drugs to a nonstranger rape case, and the police bias against rape victims increases, and the willingness to investigate the charge decreases.[46] However, not all rapes are viewed similarly.[47] Rape by a stranger is viewed as "real rape," and forced rape between parties who know each other is not always given that classification.[48]

In the nonstranger rape scenario involving Sue, the police might be leery of any complaint brought by Sue because she had willingly spent time with Gary, did not appear to have any physical injury and, most importantly, she had been drinking. Sue's credibility and consistency of her story will be weighed heavily as the police decide whether in fact she did anything to suggest to Gary that she was a willing participant.[49]

Although women are encouraged to report violent crime to the police, researchers have noted that women "under-report rape as a function of degree of acquaintance with the offender and that rapes by strangers are more likely to be reported to the police."[50] Additionally, the media and the legal system have not always been kind to rape victims. Women often feel reluctant to pursue their case when they know that they may not be believed because they knew the accused.

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45. *Id.* at 392-93.

46. *See* BOUMIL ET AL., *supra* note 16, at 11; *see generally* WARSHAW, *supra* note 13, at 44. ("[a]bout 75 percent of the men and at least 55 percent of the women involved in acquaintance rapes had been drinking or taking drugs just before the attack.")

47. ESTRICH, *supra* note 16, at 8-9, 18 (noting the relationship of the parties and the happenings surrounding the assault is a key factor in determining the outcome of rape cases); *see also* Steven I. Friedland, *Date Rape and the Culture of Acceptance*, 43 FLA. L. REV. 487, 488 (1991) (rape committed by an acquaintance or date is often viewed as a far less serious offense than rape by a stranger); GORDON & RIGER, *supra* note 26, at 25 (explaining that police tend to categorize rapes according to the relationship of the people involved).

48. Friedland, *supra* note 47, at 488.

49. BOUMIL ET AL., *supra* note 16, at 11.

50. *See* Bownes ET AL., *supra* note 23, at 102 (citing J. Rabkin, *The Epidemiology of Forcible Rape*, 49 AM. J. ORTHOPSYCHIAT. 634-47 (1979)).

C. Increased Ambivalence from Prosecutors

A victim's prior relationship with the accused is often a significant factor when prosecutors decide to prosecute a rape case.[51] Convictions are often impossible to get.[52] The significant media focus on the trials of Mike Tyson and William Kennedy Smith highlighted the problems associated with prosecuting nonstranger rape.[53] What makes nonstranger rape so difficult to prove beyond a reasonable doubt? The absence of any physical injury is the most frustrating aspect to both police and prosecutors. Bruises, cuts and other wounds may be absent because the victim has consented to some degree of physical closeness, however minimal the contact.[54] Physical injury of any type lends credibility to the victim, her story and the violent nature of rape.[55]

Ultimately, the prosecution of nonstranger rape turns on the behavior of the victim, her consent or nonconsent, and the mental state of the defendant: did he or did he not reasonably believe there was consent? The defendant will often try to argue that the victim impliedly consented by her behavior or the fact that she did not resist. This plays on the fact that juries are often reluctant to convict rapists if there is any suggestion of the victim's culpability.[56] In the scenario above, could Gary convince a jury that he reasonably believed Sue consented? Gary will most likely argue that he was invited over to Sue's house and that once he kissed her, she responded by kissing him back and holding his hand. His view of what happened that evening may be believed by the jury because Sue did not initially rebuke Gary's advances, therefore giving the impression that she impliedly consented.

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51. Estrich, *supra* note 16, at 17-18.

52. *Id.* at 15.

53. *See generally* Moran, *supra* note 31, at 25.

54. Researchers have also found that in situations involving nonstranger rape, verbal threats alone were often sufficient to force the victim to submit to the rape. *See* Bownes et al., *supra* note 23, at 104.

55. Nonstranger, acquaintance, or date rapes are also referred to as "simple rape," where no aggravating circumstances are present; i.e., the accused knew the victim but the force or violence or threats of violence found in aggravated rape cases is missing. Estrich, *supra* note 16, at 4.

56. *See* McIntosh, *supra* note 40, at F4.

D. Failure of Judges and Juries to Understand the Nature of the Crime

Rape is one of the only crimes where the victim's consent is at issue. What is frequently forgotten when making the leap from seeing the woman as a victim to seeing her as an accuser, is that rape is a crime of violence and power, not passion or sexual pleasure. A rapist sexually violates a woman to gain power and control over someone he perceives as weaker. The woman goes from being the victim to the accuser, and often *her* state of mind, not the defendant's, is considered when the jury or judge deliberate towards a verdict.

Judges and juries bring their own biases to the courtroom and often discount a charge of rape where the victim and the accused know each other.[57] In Georgia, a retired judge commented, "[h]ere was a woman that sometime after midnight gets off work and goes to a bar. Had she gone home this would have never happened. . . . I don't say that the woman didn't have a right to say no at any time. I think that is the law. But human nature being what it is . . . if you put yourself in that position, what do you expect?"[58] The victim in question had left the bar with a man she didn't know and smoked some marijuana before he raped and sodomized her for two hours.[59] Although a prosecutor may be able to rebut the consent issue, many jurors still refuse to convict because they blame the victims for placing themselves in the predicament in which they were raped.[60] Understandably, victims are often bewildered at the response of judges and juries who tend to cast judgment not only on the ac-

57. For example, in April, 1993, Baltimore Circuit Judge Thomas J. Bollinger sentenced a convicted rapist to only probation, rejecting a recommendation for a 20 year prison sentence. The judge justified his decision on the basis that the man and woman were friends, and she was raped only after she voluntarily laid down on his bed fully clothed, to sleep off a drinking binge. The Judge felt it was not really rape. Analogizing the matter to a property claim, the judge said, "if I grab your purse, its robbery, but if you leave your pocketbook on the bench and I take it, its larceny, which is less serious." Another sad commentary is when a Newport, Wales judge planned to sentence a 15 year old boy to probation for raping another 15 year-old on the condition that he pay her approximately $700 so that the victim could take a vacation and forget the rape. The Fairfield County Weekly, Week of October 21 through October 27, 1993, at 13.

58. *See* McIntosh, *supra* note 40, at F4.

59. Retired Superior Court Judge Jack N. Gunter sentenced the rapist to ten years although he is eligible for parole in two and a half years. *Id.*

60. *Id.* at F2.

cused but also on the victim. The Georgia judge implied that women need to be cautious at every turn and are not entitled to the same freedoms as men. They cannot choose when to get a drink, or with whom to socialize, without knowing that a repercussion for every act is that a man may rape her.

There is also a reluctance on the part of judges and juries to convict if there is any indication of "victim misconduct."[61] Examples of misconduct include drinking and how the victim dressed.[62] The trier of fact evaluates the credibility, trustworthiness and overall believability of the victim. Weighing the witness' credibility is standard in all trials, however, in a rape case, the trier of fact often sets out with an eye towards *disbelieving* the victim's story, particularly when the victim knew her rapist. Indeed, even if no misconduct is found, juries are loath to point an accusatory finger at someone whose only crime may have been misunderstanding the word "no."[63] When the parties know each other, the reluctance to convict escalates. For example, a jury foreman in a 1991 Georgia rape trial stated to reporters, "[i]f it had been a stranger who broke into the house, we probably would have taken it more seriously, but this was a neighbor, someone she knew."[64]

IV. INADEQUACIES IN CURRENT CALIFORNIA LAW AS IT RELATES TO NONSTRANGER RAPE[65]

The California legislature has attempted to create a statutory scheme that best balances the rights of both the accused and the victim of rape. Nevertheless, the current laws provide

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61. WARSHAW, *supra* note 13, at 142.

62. *See id.* at 42-43. On October 4, 1989, a jury in Fort Lauderdale, Florida, acquitted a defendant charged with kidnapping and sexual assault with a deadly weapon presumably on the ground that the victim induced the assault by her provocative attire; she had worn a short lace skirt with no underwear. *Id.* at 580. In response to the obvious bias against the victim, during the 1990 session, the Florida Legislature amended Fla. Stat. § 794.022(3) to preclude the admissibility in a prosecution for sexual battery of "evidence presented for the purpose of showing that [the] manner of dress of the victim at the time of the offense incited the sexual battery shall not be admitted into evidence . . . ." Fromm, *supra* note 28, at 579.

63. *See* WARSHAW, *supra* note 13, at 142-43.

64. McIntosh, *supra* note 40, at F2.

65. Although the focus of this article is on nonstranger rape and the problems associated with prosecuting those cases, certain inadequacies in the current rape law pertain to both stranger and nonstranger rape scenarios.

little justice for the victims of nonstranger rape. As discussed above, nonstranger rape is difficult to prosecute and is frequently not considered as serious as stranger rape.[66] Frequently the victim's actions, not the defendant's, are examined first. A victim may be criticized for acting or failing to act: why didn't she yell or she didn't yell loud enough. Although resistance is no longer an element of rape, juries expect that when a woman knows a man that is attacking her she should be able to resist and fight off his advances; in fact, she should be able to talk her way out of the situation.

In order to overcome some of the biases and uneven application of the law, the laws need to be unambiguous, with clear definitions. The following sections critique five areas of concern that arise in applying California Penal Code sections 261 and 261.6 to nonstranger rape cases: 1) acknowledging non-dating relationships under the penal code; 2) the definition of duress may place extra burdens on the prosecution; 3) using a reasonable person standard in rape cases is inappropriate; 4) a backlash may result when the trier of fact considers the circumstances involving duress; and 5) defining rape as "sexual intercourse" may limit prosecutions.

A. Critique of California Penal Code Section 261.6

1. Acknowledgement of Prior Relationship Between Victim and Perpetrator in a Non-Dating Situation

Countless scenarios exist where rape occurs between people who know each other but who have never had any type of dating or romantic relationship. Yet, under Penal Code section 261.6, a dating or romantic relationship is the only type that cannot be considered when consent is an issue; otherwise, a prior relationship can be the basis for a finding of consent.[67] The nonstranger rape scenario provided in the Introduction is an example of the flaw in this section. Sue knew Gary and had socialized with him on several occasions, yet they had never dated. What happened to Sue on that evening was rape; Sue was forced to have inter-

66. *See* discussion *supra* section III.

67. Section 261.6 provides, "[a] current or previous dating relationship shall not be sufficient to constitute consent where consent is at issue in a prosecution under Section 261 [rape]. . . ." Cal. Penal Code § 261.6 (West 1988 & Supp. 1990).

course against her will. Nonetheless, the existing code allows her prior relationship to establish consent by implying that any relationship other than a current or previous dating relationship *is* admissible to prove consent.

The legislature surely intended section 261.6 to quash the notion that "a woman who has done . . . things voluntarily in the past would be much more likely to consent. . . ."[68] In order for section 261.6 to be effective, the legislature must recognize that *any* social relationship raises a potential bias toward consent. The critical point is that no one consents to forced sex, regardless of the prior social relationship. The jury must be instructed that *no* type of relationship between the victim and the accused is sufficient - by itself - to constitute consent.

B. Critique of California Penal Code Section 261

1. The Definition of Duress May Place Additional Burdens on the Prosecution

In 1990, the legislature amended section 261 and added "duress" as another means of accomplishing rape. Section 261(b) defines "duress" as:

> [A] direct or implied threat of force, violence, danger, hardship, or retribution sufficient to coerce a reasonable person of ordinary susceptibilities to perform an act which otherwise would not have been performed, or acquiesce in an act to which one otherwise would not have submitted. The total circumstances, including the age of the victim, and his or her relationship to the defendant, are factors to consider in appraising the existence of duress.[69]

While specific and unambiguous statutory language is necessary in order to have a more evenhanded application of the law and to obtain convictions, this definition of duress may undermine the intended effect of easing the burden for prosecutors. When a prosecutor alleges that the rape was "accomplished against a person's will by means of . . . duress, . . . on the per-

68. People v. Johnson, 39 P. 622, 623 (Cal. 1895).
69. Cal. Penal Code § 261(b) (West 1988 & Supp. 1990).

son or another,"[70] all that need be shown is that the victim was threatened with physical or some other harm which was coercive and induced the victim to do an act that was against her will.[71] *Any* use of threats or force, however minor or slight, that compels a person to do some act against his or her free will, should be sufficient to show duress. This concept is familiar in our laws; under the crime of battery, any amount of force that results in either physical injury or offensive touching is sufficient to establish a battery.[72] The current definition of duress places a harsh burden on the prosecution as they not only have to show some "direct or implied" threat but connect it to a reasonable person standard. However, when the use of threats is evaluated by a reasonable person standard then a significant problem emerges—the spotlight is placed on the victim's actions or inactions. This is inappropriate because the perpetrator commited the wrong. Moreover, focus on the victim's actions or inactions allows judges and juries to evaluate what is reasonable for a woman.

2. *The Use of a Reasonable Person Standard Is Inappropriate in Rape Crimes*

The reasonable person clause in Section 261(b) implies that duress only exists when "force . . . sufficient to coerce a reasonable person of ordinary susceptibilities to perform an act which otherwise would not have been performed, or acquiesce in an act to which one otherwise would not have submitted. . . ."[73] First, this use of a reasonable person standard is inappropriate in stranger rape and nonstranger rape cases because the conduct and state of mind of the victim, not the defendant, are placed under scrutiny.[74] Next, what is a reasonable person of ordinary susceptibilities? What is a "reasonable" response to an attempted rape? When the reasonable person standard is used in other contexts in the law, for example, in self-defense, the conduct under scrutiny focuses on whether the amount of force

70. CAL. PENAL CODE § 261(a)(2) (West 1988 & Supp. 1990).

71. BLACK'S LAW DICTIONARY 452 (5th ed. 1979) defines duress as "threats of bodily or other harm, or other means amounting to or tending to coerce the will of another, and actually inducing him to do an act contrary to his free will."

72. *See* WAYNE LAFAVE & AUSTIN SCOTT, CRIMINAL LAW, § 7.15, at 685 (2d ed. 1986).

73. CAL. PENAL CODE § 261.6 (West 1988 & Supp. 1990).

74. *See* Pineau, *supra* note 7, at 221.

used was reasonable for the protection of the intended victim. The use of self-defense would be justified when a woman is unlawfully attacked by another and she reasonably believes that she is in immediate danger of unlawful bodily harm and the use of force is necessary to avoid the danger.[75] What of the instance when the victim believes that danger exists and submits to some activity and elects not to fight back or use nondeadly force? Who is entitled to judge her actions?

Rape is treated differently from other crimes that involve force or violence. When someone is robbed, something physical is taken. The fear element required in robbery is what sets it apart from larceny, but the actual property that was taken constitutes the offense. What is taken when a women is raped? Is it something you can hold on to? Are men able to understand the difference between rape and other violent crimes?

These questions counsel against attempting to set any objective standard for a rape victim's resistance to coercion. Instead of invoking the "reasonable woman" standard, the legislature and trier of fact must try to understand *subjectively* why a victim would submit to something distasteful and against her will instead of fending off or disbelieving the intended threat. The problem is particularly severe in a case of nonstranger rape where some relationship between the victim and rapist exists. As indicated above, the reaction of a nonstranger rape victim does not always mirror that of a victim of stranger rape or assault. Questioning whether Sue's reaction to Gary's threats was reasonable focuses on her intent, and once again takes the focus off Gary's conduct.

In the aftermath of a rape, two scenarios are left to unfold. One focuses on the rapist who claims that he reasonably believed that the woman consented. The other focuses on a woman who claims that she reasonably believed she would be harmed if she did not comply with the demand for sex. The ultimate question is: Whose reasonable belief is controlling?[76] It seems almost impossible to categorize how a person is supposed to act reasonably when faced with bodily harm. Yet, a woman is required to

75. *See* LAFAVE & SCOTT, *supra* note 72, at § 5.7.

76. *See* People v. Williams, 841 P.2d 961 (Cal. 1992) (discussing the use of the reasonable belief defense).

know how to behave "reasonably" according to male standards.[77] Rape is the only crime where a victim's response is judged on whether it was reasonable. When you have a crime that is not reasonable it seems inconceivable that a reasonable person standard would be placed on the victim. The entire clause concerning the reasonable person standard should be eliminated.

3. *Potential Backlash in Allowing Trier of Fact to Consider Total Circumstances When Appraising the Existence of Duress*

Section 261(b) also suggests factors to consider when evaluating whether a victim submitted to the rape because of duress.[78] In a nonstranger rape situation, it is particularly difficult to appraise the existence of duress. Reviewing the total circumstances, as section 261(b) suggests, allows jurors with a predisposition to disbelieve the victim of nonstranger rape, to question in their mind the character and behavior of the victim. The trier of fact may require the victim to justify her behavior even though that is not her burden. This shifting of the burden is extremely prejudicial to the prosecution's case because the prosecutor must prove the case against the defendant, not explain away the victim's actions or inactions.

The problems associated with using a reasonable person standard continue when the trier of fact is given permission to judge the victim's actions or inactions. The judge or the jury will undoubtedly view the total circumstances from *their* view and may actually judge the victim more harshly. For example, a jury scrutinizing Sue's behavior might find that she somehow lead Gary on and should have known better than to put herself in a "compromising" situation. In considering duress, the jury should be instructed to determine whether certain actions or threats

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77. For an excellent article on the issues surrounding reasonableness and rape, *see* Pineau, *supra* note 7, at 221. Ms. Pineau noted, "[t]here is a presumption in favour of the connection between sex and sexual enjoyment, and that if a man wants to be sure that he is not forcing himself on a woman, he has an obligation either to ensure that the encounter really is mutually enjoyable, or to know the reasons why she would want to continue the encounter in spite of her lack of enjoyment." *Id.* at 234.

78. CAL. PENAL CODE § 261(b) (1988 & Supp. 1990) provides, "[t]he total circumstances, including the age of the victim, and his or her relationship to the defendant, are factors to consider in appraising the existence of duress."

were used against the woman that caused to her act in a certain way. If certain circumstances warrant a jury to examine all the factors of the crime, then a specific jury instruction may be tailored for this purpose. While the total circumstance provision may be appropriate in a number of situations, it may be risky for the victim who knows her rapist.

4. *Defining Rape As "An Act Of Sexual Intercourse" May Limit Prosecutions*

The current rape statute defines rape as an "act of sexual intercourse." However, this section of the code does not specify what act or acts constitute "sexual intercourse" in order to be considered rape. Intercourse against a woman's will is only one example of the numerous ways that a woman may be sexually violated.[79] California Penal Code section 263 is the only code provision that furnishes any clue to this query. Section 263 provides that "the essential guilt of rape consists in the outrage to the person and feelings of the victim of the rape. Any sexual penetration, however slight, is sufficient to complete the crime."[80]

While section 263 provides some clarification, it does not go far enough. Incorporating a definition of acts that constitute the crime of rape within the rape statute is necessary both to ensure prosecution of the wide range of sexual offenses that occur, and to provide clarity as to what is "rape." Further, a suggestion for reform is to replace the term "sexual intercourse" with the term "sexual conduct." This change would identify a broader range of sexual offenses that may be used in an unlawful way, for example, penile/vaginal penetration, cunnilingus, fellatio, anal intercourse, or any other penetration to any orifice of a person's body, however slight, by a penis, other body part, or by any foreign object, substance, instrument or device. The acts become unlawful sexual conduct when done against the will of the victim. Continuing to limit the definition of rape to sexual intercourse may restrict the prosecutor in bringing charges against an

79. There must be penetration in order to complete the crime. People v. Ray, 187 Cal. App. 2d 182 (1961). Case law tends to refer to vaginal penetration. People v. Scott, 270 Cal. App. 2d 773 (1969).

80. CAL. PENAL CODE § 263 (West 1966 & Supp. 1994).

alleged rapist based on an act that does not fall under traditional notions of sexual intercourse.[81]

V. SUGGESTIONS FOR REFORM UNDER THE CALIFORNIA PENAL CODE

Reform of rape laws is not a new issue. Over the last twenty years, California has enacted and amended legislation, mostly at the behest of women's groups such as the National Clearinghouse for Marital and Date Rape. Notable changes in the California codes include restricting the admissibility of the victim's prior sexual conduct,[82] eliminating the requirement of resistance,[83] and eliminating a cautionary jury instruction on the difficulty of defending against a charge of rape.[84]

In 1990, Penal Code section 261.6 was amended by statute (A.B. 2631) to reflect the growing number of rapes involving persons who had a current or previous dating relationship. These amendments, however, do not recognize the differences between "nonstranger" and "date" rape and harsh burdens continue to be placed in subtle ways on victims of these types of crimes.

The California courts have not been entirely unsympathetic concerning rape cases that involve parties that know each other. In *People v. Salazar*,[85] the defendant was casually acquainted with the victim. The court rejected defendant's argument that his sentence should not be enhanced because the rape had occurred in a private residence. The court specifically found that "a person in a private residence, especially that of her attacker, is more vulnerable than a woman fending off a rapist in a car on a dark street or in a public restroom."[86] The key to successfully

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81. Only in the California Jury Instructions is there any mention of other types of sexual relations that fall under the definition of rape. The instructions also refer to penetration by a foreign object, but this does not include a penis. For example, see CALJIC § 10.65 (1990 provision).

82. Amending CAL. EVID. CODE § 1103 (West 1966 & Supp. 1994) and adding CAL. EVID. CODE § 782 (West 1966 & Supp. 1994).

83. Except under CAL. PENAL CODE § 261(3); *see* People v. Barnes, 721 P.2d 110, 113-20 (Cal. 1986).

84. *See supra* note 40.

85. 144 Cal. App. 3d 799, 813 (1983).

86. *Id.* While the court's compassion for the victim in this case is admirable, the woman attacked in her car is no less vulnerable than the Salazar victim.

mandating change in existing rape laws is to treat rape as other crimes that involve force and assault. The spotlight in a rape case must be taken off the victim's conduct and placed on the accused's conduct. The accused must take responsibility for his own sexual conduct. Normally the prosecutor must demonstrate the victim's nonconsent through her actions and character. The time is ripe for a change from the traditional role of the victim proving her nonconsent.

Following this section is a proposed rape statute that attempts to respond to the concerns outlined in Section IV. The proposed statute includes a broader definition of nonstranger rape to include any type of relationship involving nonstrangers, not just a dating relationship. The statute also defines acts of sexual conduct, other than intercourse, that if done against the will of another would constitute unlawful behavior and be punishable. Missing from the statute, however, is a reasonable person standard. The intent of this proposed rape statute is to create equal justice for both the accused and the victims of nonstranger rape.[87]

VI. PROPOSED RAPE STATUTE

A. DEFINITION - RAPE

(1) Rape is an unlawful act of sexual conduct as defined in subsection (B), against the will of another without his or her consent, including but not limited to the following circumstances:

(a) Where the accused knows or has reason to know that a person suffers from a mental disorder or developmental or physical disability;

(b) Where the accused uses any means to accomplish or attempt to accomplish any act of unlawful sexual conduct. This requires only the effort necessary to accomplish the act. The means used may include but are not limited to force, violence, duress or menace, or threats to use force or violence on the vic-

87. Certain portions of California Penal Code sections 261 and 261.6 remain in the proposed statute. Only provisions that the author felt were inadequate to protect the rights of victims and provide a fair prosecution were changed.

tim or another to accomplish or attempt to accomplish any act of unlawful sexual conduct. As used in this section, "duress" means a direct or implied threat of force, violence, danger, extortion or any other means that coerces the will of another and actually induces him or her to do an act contrary to his or her free will. As used in this section, "menace" means any threat, declaration, or act which shows an intention to inflict fear or injury whether physical or psychological.

(c) Where a person is prevented from resisting by any intoxicating or anesthetic substance, or any controlled substance, administered by or with the privity of the accused.

(d) Where a person is at the time unconscious of the nature of the act, and this is known to the accused.

(e) Where a person submits under the belief that the person committing the act is the victim's spouse, and this belief is induced by any artifice, pretense or concealment practiced by the accused, with intent to induce the belief.

(f) Where the act is accomplished by threatening to retaliate in the future against the victim or any other person, for any reason. As used in this subsection "threatening to retaliate" means a threat to kidnap or falsely imprison; to inflict extreme pain, serious bodily injury, or death; extortion or any act which the victim believes will jeopardize his or her livelihood, personal safety or personal or professional relationships.

(g) Where the act is accomplished by threatening to use the authority of a public official to incarcerate, arrest, or deport the victim or another, and the victim believes that the accused is a public official. As used in this subsection, "public official" means a person employed by a governmental agency who has the authority, as part of that position, to incarcerate, arrest, or deport another. The accused does not actually have to be a public official.

B. DEFINITION - SEXUAL CONDUCT

Sexual conduct means penile/vaginal penetration, cunnilingus, fellatio, anal intercourse, or any other penetration to any

orifice of a person's body, however slight, by a penis, other body part or by any foreign object, substance, instrument or device.

C. CONSENT

(1) As used in this section consent means positive cooperation in act or attitude pursuant to an exercise of free will. The person must act freely and voluntarily and have knowledge of the nature of the act or transaction involved.

(2) Any evidence showing that the accused knew the victim or the victim knew the accused in any manner, regardless of how formal, personal, intimate, informal, or minimal the prior contact, shall not be sufficient to constitute consent where consent is at issue.

VII. APPLYING THE PROPOSED STATUTE

The goal behind this proposed statute is not to make it impossible for a defendant to defend himself. Rather, the proposed statute clarifies sections of the existing code which have created ambiguity, unfairness in application, and permitted too many types of nonstranger rape cases to go unprosecuted.

Using the nonstranger rape scenario from the Introduction, should Sue decide to go to the police to press charges against Gary, she will probably encounter the skepticism discussed previously. Assuming the case goes to trial, in all likelihood Gary will pursue a defense of consent. Under section C(2) of the proposed statute, any evidence of Sue's social relationship with Gary will not be used against her. Under current California Penal Code section 261.6, Sue would not be afforded this protection.

Additionally, because Gary threatened Sue, the prosecutor will charge that rape was accomplished by duress. All that the prosecutor must show is that the threats caused Sue to act in a way or do something that she normally would not do. Also, the proposed statute provides that the crime of rape is accomplished by any means and requires only the effort necessary to accomplish the act. While current California law does not define "force," the code provides that rape is accomplished "against a

person's will by means of force, violence, duress, menace, or fear of immediate and unlawful bodily injury on the person or another" and implies that there must be an injury or fear of injury to accomplish the crime.[88] The proposed statute requires only that the sexual conduct be unlawful. Even in a situation where there are no threats, duress or violence, this code still protects a woman's right to say no. For example, in the *Berkowitz* case,[89] the Pennsylvania court required more force than that needed to accomplish the act. If that case were tried under the proposed statute, Mr. Berkowitz' conviction would not have been overturned. No one can guess what kind of fear or force would cause someone to submit to an act of sexual conduct against her will. Requiring that the only force necessary is the force to complete the act puts men on notice that they must be accountable for making sure that all sexual encounters are consensual. Under the proposed statute, Sue is provided with more protection and Gary is held accountable for his actions.

VIII. CONCLUSION

As sad as it seems, society's message to women is that certain types of crime are more legitimate than others and are afforded full support from law enforcement and the legal system. Although California has not neglected the crime of nonstranger rape, the reform enacted in 1990 has not gone far enough. Rape laws must reflect that all rape is "real rape."

Nonstranger rape victims need to know that nonconsensual sexual conduct will not be tolerated even when it occurs between people who know each other. This article has highlighted some compelling reasons why reform is urgently needed. Our laws must maintain the integrity of a woman's right to absolute privacy of her body and promote her right to redress crimes committed against her.

88. CAL. PENAL CODE § 261(a) (West 1988 & Supp. 1990).
89. Commonwealth v. Berkowitz, 609 A.2d 1338 (Pa. Super. 1992).