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Winter 1-1-2017

# Rape by Malice

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## Recommended Citation

Kari E. Hong. "Rape by Malice." *Montana Law Review* 78, no.1 (2017): 187-224.

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## RAPE BY MALICE

Kari Hong\*

### I. INTRODUCTION

*When people seek to reform rape law, the focus is on changing the actus reus—either abandoning the force element or redefining consent. This article argues that both approaches overlook a critical opportunity for reform, which is the crime’s mens rea. Knowledge, or general intent, is the most common mens rea in rape offenses. The problem with this mental state is that proving what a defendant knew is one of the hardest parts of any criminal prosecution. Although scholars have explored reckless or negligent standards, this article proposes that states adopt the mens rea of malice—a callous indifference towards the risk of whether the defendant had secured the consent of his sexual partner. If someone shoots a gun in a crowd and kills someone, that person had no knowledge or intent to kill. But the shooter would be liable for murder under the mens rea of malice because the person acted with callous disregard to the objective risk of harm that her conduct involved. When imported to rape, malice effectively captures what is the precise social wrong in having unwanted sex—it is a defendant acting with callous indifference to whether his or her actions present an objective risk that he or she is engaging in sexual activity without the consent of his or her partner.*

When discussing contemporary rape, a couple statistics stand out: approximately 80% of all rapes are committed by people known to the victim<sup>1</sup>; and only 3% of all rapes result in a conviction.<sup>2</sup> In Jon Krakauer’s 2015 book *Missoula: Rape and the Justice System in a College Town*, Krakauer attempts to find answers to why the systems that serve the public—police, prosecutors, courts, and college disciplinary forums—fail when it comes to prosecuting acquaintance rape. In exploring this issue, he focuses on half a dozen specific incidents of sexual assault and weaves in

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\* Assistant Professor, Boston College Law School. Thanks to Anthony Johnstone, the Montana Law Review, and the Alexander Blewett III School of Law at the University of Montana for organizing the excellent symposium on campus sexual assault. Kevin Cole and Susan Ridgeway provided tremendous feedback on this essay and Michelle Anderson, Elizabeth Foote, Linda McClain, and Catharine Wells provided comments on prior drafts. I wish to thank Saba Habte and Dustin Dove for incredible research assistance and Megan Timm, Marin Keyes, and Constance Van Kley for extraordinary editorial assistance.

1. The reports of rape by non-strangers range from 72% to 82%. *Perpetrators of Sexual Violence: Statistics, RAPE, ABUSE & INCEST NATIONAL NETWORK (RAINN)* (May 28, 2013), <https://perma.cc/FP29-T63P> (reporting that 21% of rapes are by strangers, 43% by a friend or acquaintance, 2% by relative, and 27% by spouse or partner for a total of 72% of attacks by those known to the victim); *Facts and Quotes, RAPE TREATMENT CENTER: UCLA MEDICAL CENTER*, <https://perma.cc/Q2N9-BCEC> (citing two reports that claim that 82% and 80% of rapes were by those known by the victim).

2. *97 of Every 100 Rapists Receive No Punishment, RAINN Analysis Shows, RAPE, ABUSE & INCEST NATIONAL NETWORK (RAINN)* (Mar. 27, 2012), <https://perma.cc/QU4T-VG8X>.

larger issues of sexism, entitlement, systemic indifference, and political forces, including the role of the Department of Justice in challenging entrenched practices in a county attorney's office.<sup>3</sup> This book surprised me in two ways. As a preliminary matter, borrowing from the mythology that critics contend the term "date rape" perpetuates, I had assumed that rape on college campuses would be "an unfortunate encounter in which the two parties share culpability because of too much alcohol and too little clear communication."<sup>4</sup> I was taken aback by how most of the sexual encounters Krakauer described involved aggressive sexual conduct by men, which could not be written off as mere poor judgment clouded by alcohol. The other surprise for me was that it appears outdated to contend that juries do not convict because the trials are a battle of the accused's credibility against the victim's. In a revealing interview with a juror who acquitted the University of Montana's football quarterback, the juror succinctly explained that the jurors did not doubt the victim's claim that she had been raped. But, to convict the quarterback of a crime, the prosecution needed to provide proof that he engaged in the prohibited conduct (known as *actus reus*, which is defined in Montana as sex without consent) and that he knew the conduct was without consent (known as *mens rea*, which is defined as the mental state of knowledge).<sup>5</sup> The juror noted that there was no proof the quarterback had knowledge that the sex was without the woman's consent.<sup>6</sup> Because knowledge is a high standard to meet in criminal law, the juror's insight compels reconsidering how statutes define the culpable mental state in the crime of rape. Although scholars and reformers have focused on different ways to define the culpable conduct in sexual assault, this article criticizes the statutes' routine reliance on knowledge as the culpable mental state and takes from homicide law to introduce a different mental state, malice, which more accurately captures the social harm that occurs in sexual assault.

Part II provides a brief introduction into the criminal law concepts of *actus reus*—what conduct is actionable—and *mens rea*—the mental state attached to crime. The crimes of homicide and theft are sophisticated and nuanced, using various mental states and conduct to capture exactly what

3. JON KRAKAUER, *MISSOULA: RAPE AND THE JUSTICE SYSTEM IN A COLLEGE TOWN* (2015).

4. David Lisak, *Understanding the Predatory Nature of Sexual Violence*, 14 *SEXUAL ASSAULT REPORT*, Mar.–Apr. 2011, at 50 (citing scholars who argue that the term date rape perpetuates false narratives around campus rape).

5. See *infra* nn.128–130 and accompanying text for citations to Montana law; see *infra* Part I(A) for discussion of *mens rea* and *actus reus*; see also Ian P. Farrell & Justin F. Marceau, *Taking Voluntariness Seriously*, 54 *B.C. L. REV.* 1545, 1548–52 (2013) (discussing the *actus reus* doctrine); Jeremy M. Miller, *Mens Rea Quagmire: The Conscience or Consciousness of the Criminal Law?*, 29 *W. ST. U. L. REV.* 21, 22–27 (2001) (discussing *mens rea*).

6. KRAKAUER, *supra* note 3, at 116; see *infra* Part II(B)(2).

anti-social conduct is criminal. Furthermore, homicide and theft offer an example of how the definitions of crime can change in response to changing times to better fit current social norms.

Part III starts with the assumption that criminal law is best when it can accurately cabin socially undesirable conduct as a crime and let alone lawful activity. Current definitions of rape offenses that focus on the actus reus of force and non-consent fail to conform with this assumption. Defining rape as a crime having an element of force was never designed to distinguish unwanted sex from wanted sex. At a time when all sex outside of marriage was criminalized, the element of force was necessary to ensure that a woman who reports being the victim of rape would not in fact be unwittingly confessing to the crime of adultery (sex with a married person) or fornication (sex with a single person).<sup>7</sup> It then is of no surprise that in acquaintance rape, the level of violence that constitutes the legal definition of force is rarely present. In the absence of knives, guns, and threats, an acquaintance rape that occurs from confusion, obtuseness, and entitlement is not actionable as a forcible crime. As much as forcible rapes capture the harm arising when a stranger attacks from behind the bushes, defining rape by the force element does not capture the social harm found in all of unwanted sex.

Likewise, when rape law was reformed to define the actionable conduct in sexual assault as non-consent, this codification of the crime was never meant to capture all forms of unwanted sex. Rather, legislatures limited non-consent to unwanted sex that arises in the specific context of power imbalances that are enumerated by statute. For instance, most states confine non-consent to a situation in which an age difference, state of intoxication, incapacity arising from mental or physical disability, or legal duty of care existed between the assailant and victim.<sup>8</sup>

In these instances, the definitions of rape were grossly underinclusive with respect to the harm arising in acquaintance rape, where neither force nor power imbalance is present. This statement is not at all surprising given that the social harm of unwanted sex was not the animating principal of the crime's development.

In Part IV I turn to the most common reform that is proposed to improve the definition of the crime of rape: affirmative consent. Affirmative consent laws are being proposed as alternatives to capture more unwanted sex as crimes.<sup>9</sup> The problem with these laws is that they are overinclusive. These laws again disregard the difference between unwanted and wanted sex, and instead focus on whether the parties communicated in the very

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7. See *infra* Part I(D)(2).

8. See *infra* Part I(D)(3)(a).

9. See *infra* Part II(A).

specific manner and method prescribed by statute. There is no doubt that following the letter of the law will prevent a person from engaging in unwanted sex. A problem still arises, however, because there are numerous acts of wanted sex where both parties do not communicate as required by the statute, but neither party experiences the sexual encounter as unwanted. The affirmative consent laws then raise grave concerns over selective and arbitrary enforcement. Of more concern to this project, the affirmative consent definitions further fail to use criminal law to clearly explain what is and is not lawful activity.

The article then turns away from the actus reus and focuses on the mens rea of rape offenses. Regardless of whether rape is defined by force or non-consent, as illustrated in the Montana quarterback case, knowledge (or general intent) is a common mental state used in defining rape and sexual assault.<sup>10</sup> This mental state is a critical problem, because proving what a defendant knew is often the hardest part of criminal prosecution. As demonstrated in Krakauer's interview with a juror who acquitted the quarterback,<sup>11</sup> it is no longer accurate to contend that rape trials are simply a contest between his word and hers. The criminal law instead requires heightened proof that the defendant had affirmative knowledge that he was proceeding without his partner's consent. Under such a standard, it is possible for the jury to believe a woman's claim that she was raped, but not find sufficient evidence that the defendant knew the woman had not consented to sex, which is necessary to hold the rapist liable.

The law of homicide recognizes this dilemma and, instead of requiring that a defendant has knowledge that his conduct will result in the death of another, introduces the mental state of malice—a callous disregard of an objective risk that his conduct may result in serious bodily injury or death—to make more deaths actionable.<sup>12</sup> When a person shoots a gun into a crowd and the bullet hits and kills another, the shooter can be convicted without the prosecution proving the shooter knew he would or wanted to kill any specific person. Rather, under the mental state of malice, the shooter is convicted when the prosecution establishes that the conduct of shooting a gun

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10. See *infra* nn.128–130 and accompanying text for citations to Montana law; Kit Kinports, *Rape and Force: The Forgotten Mens Rea*, 4 BUFF. CRIM. L. REV. 755, 760 (2001) (“In rape cases involving physical violence or express threats of physical harm, proof of the actus reus obviously does establish mens rea with respect to force as well as nonconsent. A defendant who beat or threatened to kill his victim could hardly raise a plausible argument that he did not know he was using force. But in other circumstances, the defendant's mens rea vis-a-vis force may be less clear, and it may therefore make a difference whether a rape conviction requires proof that the defendant purposely intended to use force, or whether it is enough that he knew he was exercising force, that the woman thought he was using force, or that a reasonable person viewing the situation would have thought so.”).

11. See *infra* Part II(B)(2).

12. See *infra* Part II(B)(1).

into a crowd of people was done with a wanton disregard for the objective risk that such conduct could hurt another.

Rape by malice is a suggested means to get closer to the precise harm that unwanted sex implicates. Criminalizing engagement in sex with a callous indifference to the risk that it may not be consensual imports a mens rea from the homicide context. The mens rea of malice captures the anti-social mindset that arises when one acts without regard to the objective risk that one's conduct poses.<sup>13</sup> An assailant does not need to know that the partner is not consenting. But to avoid liability, a person must care whether consent is or is not present. The questions become what specific facts of the sexual conduct were present—whether there was a limited prior sexual history, the partner was asleep, the partner was intoxicated, the partner only had verbally communicated consent to kissing, the partner was crying—and did the defendant callously disregard these facts in seeking sex without regard to whether it was consensual.

## II. A PRIMER ON ACTUS REUS AND MENS REA

As a quick primer on criminal law, a crime has two components: the mens rea, which is a person's mental state or bad thoughts, and the actus reus, which is the bad conduct in which the person voluntarily engaged.<sup>14</sup> A crime is not defined simply by a bad result, but whether the defendant engaged in the specific mens rea and actus reus proscribed by law.

### A. *Homicide's Nuanced Response to Unlawful Killings*

To illustrate, in the homicide context, many states define murder as an unlawful killing of another person (actus reus) with premeditation, or an intent to kill another (mens rea).<sup>15</sup> When a wife who harbors hatred for her husband and wishes to kill him places arsenic in her husband's coffee and the husband dies, she is prosecuted for premeditated murder because she had the bad thoughts (intent to kill) coupled with the bad conduct (poisoning her husband). However, if a driver who parks her car kills a passing cyclist when she opens her car door, the death of the cyclist cannot be prosecuted as premeditated murder. The driver lacked an intent to kill, so even though her conduct is directly responsible for the death of another, she does not meet the proscribed mens rea of the offense. Likewise, a different

13. See *infra* Part II(B)(1).

14. See Miller, *supra* note 5, at 27 (“In all of the traditional crimes, as well as most modern crimes, there must exist a prohibited action or result (‘actus reus’) and a certain mental state (‘mens rea’).”).

15. Matthew A. Pauley, *Murder by Premeditation*, 36 AM. CRIM. L. REV. 145, 146–47 (1999) (“in most American states, there are degrees of murder, and premeditation remains a very common dividing line between murders of the first and second degree”).

housewife can wish her husband dead and every day deliberately plan elaborate ways for his demise. If the husband is killed when a bus hits him, the wife cannot be prosecuted for premeditated murder. There is a dead body and a desire to kill, but the wife did not undertake any action. Her failure to engage in any bad conduct makes her bad thoughts, standing alone, beyond the reach of the criminal law. Lastly, a person can have an intent to kill another and inject an overdose of morphine that stops the heart. But if that person is a doctor who is engaging in physician-assisted suicide in a state such as Oregon where it is legal,<sup>16</sup> the doctor did not commit murder because the law recognizes that the death was a lawful, not unlawful, one.

These examples illustrate a number of important aspects of criminal law. First, not every instance where one person kills another meets the definition of premeditated murder. A crime is not simply defined by its result, but rather, a person is liable for homicide only when the specific mental state and specific conduct occur at the same time. Second, in homicide, the states have developed numerous crimes to capture the various wrongs of intentional murder, unintentional manslaughter, and vehicular homicide.<sup>17</sup> The driver who hits the cyclist may be prosecuted for reckless homicide or manslaughter, but her actions do not meet the heightened definition of premeditated murder. The criminal code reflects a sophisticated set of homicide offenses to capture the different social wrongs and different degrees of culpability that arise from the ways in which one person can cause the death of another.

The value of homicide's multi-tiered offenses is that each type of homicide offense effectively categorizes which killings arise from dangerous individuals who planned and executed a killing, which ones are accidents for which circumstances exist to justify culpability, and which ones are tragedies that are outside of the law's reach. The law properly holds responsible people culpable but—equally importantly—does not sweep in tragedies or lawful killings as criminal offenses. As set forth below, the crime of rape lacks this nuance and ability to effectively separate unwanted sex from legal activity.

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16. Or. Rev. Stat. §§ 127.800 to 127.897.

17. Walter Dickey, David Schultz & James L. Fullin, Jr., *The Importance of Clarity in the Law of Homicide: The Wisconsin Revision*, 1989 WIS. L. REV. 1323, 1325, 1329 (1989) (when discussing first degree murder, second degree murder, manslaughter—distinguished by intentional, reckless, and negligent mental states—the authors comment that the gradations “express[] virtually all of the principles that are applied in the criminal law, especially a carefully delineated distinction among culpable mental states”); Francis Bowes Sayre, *Mens Rea*, 45 HARV. L. REV. 974, 994–95 (1932) (“The history of homicide during the next few centuries is the story of the emergence of the mental element as a factor of prime importance, the gradual freeing from criminal responsibility of those who killed without guilty intent, and the separation of different kinds of homicide into more and less serious offenses dependent upon the psychical element.”).

*B. Theft Offenses Also Are Precise and Nuanced to Capture  
the Social Harm in Each Crime*

It is a mistake to presume that a criminal law cannot keep pace with changing social values and conduct. The crux of this article is that rape is a failed offense because it has not reflected social changes in the manner that other offenses have. Theft is an example that illustrates how effective criminal law can be in stopping socially undesirable conduct when various statutes alter mental states and conduct to capture the nuance of the social wrong. Theft offenses, like homicide, have numerous iterations that effectively target the social harm arising in each form.<sup>18</sup> Although the offense of “thieving” can be traced to the Bible and through the Middle Ages, scholars trace the origins of the modern common law crime of larceny to a 1473 case from the Star Chamber.<sup>19</sup> In the United States, larceny is generally defined as the capture and asportation of property without the owner’s consent and with the intent to permanently deprive the owner of possession.<sup>20</sup> For example, both a shoplifter and a customer leave a grocery store with a loaf of bread. Whereas the customer took possession with the store owner’s consent during a commercial sale, the shoplifter took the bread without the owner’s consent. The definition of larceny is effective because it can easily draw a line between lawful and unlawful conduct that matches social norms of desirable behavior (transferring possession through negotiation and the marketplace) and undesirable conduct (theft).

It was not long, however, before the definition of larceny was exposed as being too narrow. Starting with the famous case of *The King v. Pear*,<sup>21</sup> the House of Lords realized that there was something important to recognizing that not all consent was equal. In 1779, an English man named Pear rented a horse from the true owner. The owner consented to transfer possession of the horse to Mr. Pear. However, Mr. Pear did not take a trip with the horse and instead sold the horse to another. Under a strict application of the elements of larceny, no crime occurred because the true owner’s transfer of

18. See George P. Fletcher, *The Metamorphosis of Larceny*, 89 HARV. L. REV. 469, 470–71 (1976) (discussing the evolution of larceny into larceny-by-trick, embezzlement, and false pretenses and commenting on how the law “generated a continuous expansion of criminal liability for dishonest acquisitions”); Michael J. Stephan et al., *Identity Burglary*, 13 TEX. REV. L. & POL. 401 (2009) (commenting that “identity theft as a crime is a relatively nascent development in criminal law. . . due in large part to technological advance, identity theft as an act has experienced a significant evolution in terms of both scope and complexity”).

19. See Fletcher, *supra* note 18, at 477–81.

20. “Common-law larceny is the felonious taking by trespass and carrying away by any person of the goods or personal property of another, without the latter’s consent and with the felonious intent permanently to deprive the owner of his property and to convert it to the taker’s own use.” N.C. v. Carswell, 243 S.E.2d 911, 912 (N.C. Ct. App.) (quoting 8 STRONG’S N.C. INDEX 3D *Larceny* § 1 (1976)), *rev’d*, 249 S.E.2d 427 (N.C. 1978).

21. *The King v. Pear*, 168 Eng. Rep. 208, 1 Leach 212 (1779).



possession to Mr. Pear was actionable only if it was done without the consent of the owner. In this instance, the owner willingly consented to give the horse to Mr. Pear. Instead of recommending an acquittal, however, the House of Lords announced a new crime of larceny-by-trick, which recognized that when an owner's consent is procured by fraud, a crime involving the wrongful deprivation of property has in fact occurred.<sup>22</sup>

Larceny and larceny-by-trick encountered technical limits when faced with the conduct of a bank teller who, after dutifully recording a customer's deposit to the bank, pocketed the funds. In 1799, the English courts found that neither larceny nor larceny-by-trick captured this conduct because, unlike Mr. Pear's horse, the bank never received possession of the deposit, a condition precedent for the teller to have unlawfully taken possession from the bank (or any other true owner of the funds).<sup>23</sup> Due to the public outcry of the teller's acquittal, the English Parliament responded by creating a new crime called embezzlement,<sup>24</sup> which is the unlawful conversion of property lawfully obtained from another.<sup>25</sup> Parliament recognized that there should be another type of crime that, unlike larceny, does not involve a trespassory taking but a betrayal of trust, for which the elements of conversion and appropriation were developed to capture.<sup>26</sup>

Since that time, state legislatures have effectively responded by redefining theft offenses to fit circumstances arising in society. Consent cannot fully divide lawful from unlawful conduct because an owner may voluntarily transfer possession where fraud, coercion, or force exist. Accordingly, legislatures developed the crimes of false pretenses, extortion, and robbery to capture the fraudulent or forceful inducement of consent.<sup>27</sup> As property interests became intangible, crimes such as theft of services and corruption

22. *Id.*; see also *Possession and Custody in the Law of Larceny*, 30 YALE L.J. 613, 614 (1921) ("In 1779 the doctrine of larceny by trick was introduced by *Pear's Case* . . .").

23. *Rex v. Bazeley*, 168 Eng. Rep. 517, 2 Leach 835 (1799).

24. *Fletcher*, *supra* note 18, at 489 n.83.

25. See *Embezzlement—Appropriation by Agent of Funds Collected on Commission*, 21 HARV. L. REV. 287, 287–88 (1908) (comparing three cases where key facts determined if the employee was or was not guilty of embezzlement).

26. GEORGE P. FLETCHER, *RETHINKING CRIMINAL LAW* 24–25 (Oxford University Press 2000) ("It is not entirely clear why this possibility for extending the scope of larceny never appealed to the same judges who readily inflated the crime of larceny to cover [larceny by trick, false pretenses, and finders of property who know the property does not belong to them].").

27. *Robbery Becomes Kidnapping*, 3 STAN. L. REV. 156, 157 (1950) ("In 1901, California, following the trend in other states, enacted Penal Code Section 209, the avowed purpose being to punish kidnappings for ransom or extortion. Robbery was included because at that time, the Code definition of 'extortion' was limited to a taking with consent"); *California v. Ashley*, 267 P.2d 271, 279 (Cal. 1954) ("Although the crimes of larceny by trick and device and obtaining property by false pretenses are much alike, they are aimed at different criminal acquisitive techniques. Larceny by trick and device is the appropriation of property, the possession of which was fraudulently acquired; obtaining property by false pretenses is the fraudulent or deceitful acquisition of both title and possession.").

developed.<sup>28</sup> With the advancement of the internet, identity theft and copyright infringement were reformed to capture the crimes that could exist in the new virtual world but were unimaginable in the 1770s of England.<sup>29</sup> State legislatures then either modified or developed new theft offenses to ensure that the bad conduct arising in new circumstances was actionable.<sup>30</sup>

In addition to capturing bad conduct as new crimes, theft offenses were effective in not sweeping in similar lawful conduct. From ten thou-

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28. Paul J. Mass & Carl S. von Mehren, *Cable Theft: The Problem, the Need for Useful State Legislation, and A Proposed Solution for Georgia*, 35 EMORY L.J. 643, 652 (1986) (discussing limitations in current statutes and a proposal to capture the harm in cable theft):

The general theft of services statute prohibits a person from knowingly obtaining services, accommodations, or entertainment, or the use of personal property made available only for compensation, by deception with intent to avoid payment. Although this statute could be used to prosecute cable theft, since cable services can be considered entertainment, the necessity of proving knowledge, deception, and intent to avoid payment makes it difficult to use the statute in cable theft cases.

See also *Skilling v. United States*, 561 U.S. 358, 400 (2010):

In 1909, Congress amended the [mail fraud] statute to prohibit [money or property]. . . . Emphasizing Congress' disjunctive phrasing, the Courts of Appeals, one after the other, interpreted the term 'scheme or artifice to defraud' to include deprivations not only of money or property, but also of intangible rights. . . . The Fifth Circuit's opinion in *Shushan [v. United States]*, 117 F.2d 110 (1941) stimulated the development of an 'honest-services' doctrine. Unlike fraud in which the victim's loss of money or property supplied the defendant's gain, with one the mirror image of the other, see, e.g., *United States v. Starr*, 816 F.2d 94, 101 (C.A.2 1987), the honest-services theory targeted corruption that lacked similar symmetry. While the offender profited, the betrayed party suffered no deprivation of money or property; instead, a third party, who had not been deceived, provided the enrichment.

29. Debra Sherman Tedeschi, *Identity Theft: A Primer*, 19 MAR S.C. LAW 20, 23 (2008) ("In 1998, Congress passed the Identity Theft and Assumption Deterrent Act (ITADA), which made identity theft a federal crime."); Grace Espinosa, *Internet Piracy: Is Protecting Intellectual Property Worth Government Censorship?*, 18 TEX. WESLEYAN L. REV. 309, 309 (2011) ("Intellectual property law has struggled to keep up with new technologies and the issues posed by new mediums of communication. With the rise of the Internet, digital piracy has led to millions of dollars worth of losses in American intellectual property. The Digital Millennium Copyright Act ('DMCA') was intended to address some of the problems related to online infringement; however, at the time the DMCA was drafted, the legislature did not foresee that peer-to-peer file sharing software would give millions of users instant illegal access to copyrighted works."); *Newberger v. Florida*, 641 So. 2d 419, 422 (Fla. Dist. Ct. App. 1994) (reversing conviction and suggesting that the legislature enact a statute like other states have adopted to capture computer crime that occurred but fell outside of current law).

30. The crime of homicide has a similar history of matching social norms regarding what conduct is or is not undesirable. At common law, a cuckolded husband who killed his wife or her paramour was afforded the defense of self-defense, which mitigated or eliminated liability. As women became equal, the injuries to honor were perceived anew as an inappropriate reaction arising from fragile notion of masculinity. As such self-defense was no longer categorically afforded to spouses avenging adultery with death. See generally Aya Gruber, *A Provocative Defense*, 103 CAL. L. REV. 273, 284 (2015) ("Some critics take the hardline position that any adultery killing, even one as sanitized as Gere's, reflects masculinist norms of violence and gender subordination and should not be mitigated."). Likewise, contemporary definitions of murder are shaped by the societal norms in myriad ways. See generally Joanne Pedone, *Filling the Void: Model Legislation for Fetal Homicide Crimes*, 43 COLUM. J.L. & SOC. PROBS. 77 (2009) (discussing the various statutory frameworks defining fetal homicide and whether they take into account the definition's effect on abortion rights).

sand feet up, theft cannot be defined as simply the transfer of property to another because our society requires the lawful transfer of property in the form of negotiation, commercial sales, borrowing, sharing, and gifting. As each new theft offense developed, it carefully carved out bad conduct from the realm of lawful transfers that continue to occur in society. Theft offenses thus are specific enough to reach numerous forms of wrongdoing without trampling on lawful conduct involved in transferring property to another.<sup>31</sup>

### III. DUE TO SEXISM, CURRENT DEFINITIONS OF RAPE HAVE NOT EVOLVED TO CAPTURE THE EXACT HARM OF UNWANTED SEX

Rape is currently defined by the actus reus of force or non-consent.<sup>32</sup> As illustrated below, definitions of both arose from historical circumstances in which the crime of rape was tainted by sexist notions that, one, a woman may not have sex outside of marriage, and two, if the crime was more broadly defined, innocent men would be falsely accused.<sup>33</sup> The fatal flaw in continuing to repurpose these elements as the defining features of rape is that they fail to capture many instances of unwanted sex as a crime.

#### A. Rape Law Does Not Accurately Differentiate Unwanted Sex from Lawful Activity

Simply put, rape law lacks the precision, sophistication, and evolution that homicide and theft law have undergone. As a result, the contemporary definitions of rape offenses fail to capture the social harm of unwanted sex.

31. See generally David Gray & Chelsea Jones, *In Defense of Specialized Theft Statutes*, 47 NEW ENG. L. REV. 861, 878–82 (2013) (in discussing the evolution of theft offenses and the debate over specialized or consolidated offenses, “the essence of Professor Green’s position is that not all property can be stolen and only some interferences with property rights can accurately be categorized as ‘theft’”); *United States v. Sun-Diamond Growers of California*, 526 U.S. 398, 412 (1999) (“More important for present purposes, however, this regulation, and the numerous other regulations and statutes littering this field [in white collar crime], demonstrate that this is an area where precisely targeted prohibitions are commonplace, and where more general prohibitions have been qualified by numerous exceptions. Given that reality, a statute in this field that can linguistically be interpreted to be either a meat axe or a scalpel should reasonably be taken to be the latter. Absent a text that clearly requires it, we ought not expand this one piece of the regulatory puzzle so dramatically as to make many other pieces misfits. As discussed earlier, not only does the text here not require that result; its more natural reading forbids it.”).

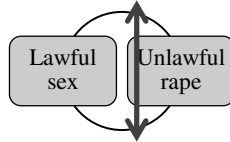
32. Kinports, *supra* note 10, at 755–56.

33. Deborah W. Denno, *Why the Model Penal Code’s Sexual Offense Provisions Should Be Pulled and Replaced*, 1 OHIO ST. J. CRIM. L. 207 (2003) (commenting that a “major force” behind the formulation of Model Penal Code’s definition of rape “was to protect the defendant against unfair prosecution”). Indeed, still today, the Editor’s Notes to the MPC definitions of rape justify its differentiation of crimes based on whether the victim was a “voluntary social companion of the actor upon the occasion of the crime,” whether she “had not previously permitted him sexual liberties,” and proposing that the victim’s “promiscuity” with others was a defense to the conduct engaged by the rapist. MODEL PENAL CODE § 213.1 Editor’s n. § 213.1.

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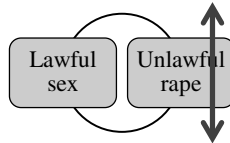
The criminal law works best when it is able to effectively create a clear separation between lawful and unlawful conduct.<sup>34</sup> As demonstrated in Illustration 1, in the context of rape, that means the criminal law should effectively capture unwanted sex as a crime and leave wanted sex as non-actionable.

*Illustration 1: Ideal*



When the law works, all of the bad conduct of unwanted sex will fall in a definition of the crime of rape, and the good conduct of wanted sex will be left alone as lawful conduct. The line in the illustration represents the ideal conviction rates. Of note, it is slightly to the right of center to reflect that, under the presumption of innocence, when there is reasonable doubt over where the conduct at the margins fall, slightly more criminal conduct will be non-actionable to avoid having an innocent person be found guilty.<sup>35</sup>

*Illustration 2: Current 3% Conviction Rate*



At a 3% conviction rate,<sup>36</sup> the current definitions of rape are failing tremendously to meet this ideal. Here the line is far to the right, barely capturing any of the unlawful rape as an actionable offense.

There can be no doubt that sexism is to blame for stunting the understanding of this crime. Since Roman times, rape has been recognized as a crime, but not because the conduct violated a woman’s sexual autonomy or consent. Rather, rape was a crime because the act violated a woman’s chastity. The victim was never the woman; rather, the law redressed rape be-

34. See Sanford H. Kadish, *Excusing Crime*, 75 CAL. L. REV. 257, 270 (1987).

35. See *In re Winship*, 397 U.S. 358, 372 (1970) (Harlan, J., concurring) (“I view the requirement of proof beyond a reasonable doubt in a criminal case as bottomed on a fundamental value determination of our society that it is far worse to convict an innocent man than to let a guilty man go free.”).

36. See *97 of Every 100 Rapists Receive No Punishment*, *supra* note 2.

cause the rapist had injured the honor of the victim's father and brother.<sup>37</sup> The origins of rape do not align with the contemporary concerns over the need to criminalize unwanted sex. As set forth below, the contemporary actus reus of force and non-consent fail to capture the social harm that unwanted sexual activity presents.

*B. The Actus Reus of Force Does Not Capture the Actual Social Harm of Acquaintance Rape*

*1. Rape by Force Does Not Capture the Harm in Unwanted Sex*

When first introduced in the United States, the crime of rape was defined as having an actus reus of force and lack of consent.<sup>38</sup> Although the statutes mention consent, as explained below, the crux of the crime was whether a man in fact used violent force and the woman displayed convincing levels of physical resistance to prove her lack of consent to separate the offense from societal norms surrounding lawful sex. Maryland's statute from 1980 is representative, defining rape in the second degree as a person having "vaginal intercourse with another person by force or threat of force against the will and without the consent of the other person."<sup>39</sup> A few preliminary observations should be made.

First, Maryland, like all other states, recognized the marital rape exemption, which meant that husbands were legally incapable of raping their wives.<sup>40</sup> Between 1975 and 1993, all states formally abolished the marital

37. Janet Halley, *Rape at Rome: Feminist Interventions in the Criminalization of Sex-Related Violence in Positive International Criminal Law*, 30 MICH. J. INT'L L. 1, 57, n.198 (2008) (In discussing the efforts to reform international law, Professor Halley observed, "There was complete consensus that the pictorial output of [International Humanitarian Laws]'s most authoritative statements of law must not legitimate and entrench the ideas that the rape of a woman harmed her because of its meaning to the men in her family or culture, or that it harmed a wife, daughter, or sister because it impugned a husband's, father's, or brother's honor. Charlesworth, for instance, objected that Article 27 of the Fourth Geneva Convention, 'assumes that women should be protected from sexual crimes because they implicate a woman's honor, reinforcing the notion of women as men's property, rather than because they constitute violence.'").

38. Kinports, *supra* note 10, at 755 ("The crime of rape has traditionally been defined to require proof of both force on the part of the defendant and lack of consent on the part of the victim. In the words of Blackstone, rape is 'carnal knowledge of a woman forcibly and against her will.'"); Michelle J. Anderson, *Reviving Resistance in Rape Law*, 1998 U. ILL. L. REV. 953, 962 (1998) ("Rape law has traditionally emphasized a woman's physical resistance to evaluate her lack of consent and the defendant's use of force. At common law, the state had to prove beyond a reasonable doubt that the woman resisted her assailant to the utmost of her physical capacity to prove that an act of sexual intercourse was rape.").

39. MD. CODE ANN., Crimes & Punishments § 463(a)(1) (repealed 2002), *cited in* Maryland v. Rusk, 424 A.2d 720, 720 (Md. 1981).

40. Jessica Klarfeld, *A Striking Disconnect: Marital Rape Law's Failure to Keep Up with Domestic Violence Law*, 48 AM. CRIM. L. REV. 1819, 1819 (2011).

rape exemption as a doctrine providing full immunity to the husband.<sup>41</sup> The American Law Institute's Model Penal Code ("MPC"), which is usually recognized, if not praised, for introducing salient legal reforms, breaks from its track record of being a model of laws by still recommending that states codify the marital rape exemption.<sup>42</sup> This definition has been met with decades of criticism to no avail.<sup>43</sup> Although no state currently follows the MPC's recommendation to codify this exemption, a number of states follow the MPC's recommendations to provide lesser offenses or lesser punishment when the defendant is married to his victim, when the defendant and victim live together, and when the defendant and victim have engaged in prior lawful acts of sexual intercourse.<sup>44</sup>

Second, by defining the actus reus of rape to be "vaginal intercourse," Maryland, like most states, codified that only women could be victims and only men could be perpetrators of rape. Indeed, it was not until 2012 that the federal government expanded its definition of rape to account for same-sex rape and the victimization of men.<sup>45</sup>

Third, a rape legally occurred when the man forced a woman to submit to sexual conduct. The degree of force was quite high, usually requiring a label of violence that is foreign by today's standard. In 1982, in *Illinois v. Rosario*,<sup>46</sup> the appellate court of Illinois reversed a conviction of rape for insufficient evidence that the defendant used force. In *Rosario*, a man drove to his girlfriend's workplace at around 4:30 p.m. to pick her up from work. The girlfriend was 17 years old and mostly spoke Spanish rather than English. In the car, she broke up with him. He responded by suggesting that they have dinner. He then drove to his workplace where he had forgotten his wallet. Once they arrived at the parking lot of the assailant's workplace,

41. In 1975, South Dakota was the first state to abolish the marital rape exemption and, in 1993, North Carolina was the last. See J.C. Barden, *Marital Rape: Drive for Tougher Laws Is Pressed*, N.Y. TIMES (May 13, 1987), <https://perma.cc/UW4Y-JB9L>; Sarah M. Harless, *From the Bedroom to the Courtroom: The Impact of Domestic Violence Law on Marital Rape Victims*, 35 RUTGERS L.J. 305, 318 (2003).

42. See MODEL PENAL CODE § 213.1 (2015) (In relevant part the crime of rape is defined as a crime that occurs when "A male who has sexual intercourse **with a female not his wife** is guilty of rape if: [certain conduct occurs] . . .") (emphasis added).

43. See Beverly J. Ross, *Does Diversity in Legal Scholarship Make a Difference?: A Look at the Law of Rape*, 100 DICK. L. REV. 795, 851 (1996) ("It is difficult to separate this rationale from the old theory that a woman who marries or agrees to cohabit with a man thereby consents to all intercourse, including that which is coerced."); see also Denno, *supra* note 33, at 213–14; Hava Dayan & Emanuel Gross, *Between the Hammer and the Anvil: Battered Women Claiming Self-Defense and a Legislative Proposal to Amend Section 3.04(2)(B) of the U.S. Model Penal Code*, 52 HARV. J. ON LEGIS. 17, 30–31 (2015).

44. See Michelle J. Anderson, *Marital Immunity, Intimate Relationships, and Improper Inferences: A New Law on Sexual Offenses by Intimates*, 54 HASTINGS L.J. 1465, 1521 (2003).

45. Roni Caryn Rabin, *Men Struggle for Rape Awareness*, N.Y. TIMES (Jan. 23, 2012), <https://perma.cc/EM57-93ZC>.

46. 443 N.E.2d 273 (Ill. App. Ct. 1982).

he said he was tired of the victim saying no and physically grabbed her. They struggled for 30 minutes; he hit her in the face, pulled down her pants, and had sexual intercourse with her. The defendant retrieved his wallet while the victim stayed in the car, and before driving her home, he raped her a second time.<sup>47</sup>

By present-day standards, there is no question that this conduct is unwanted sex. I think most would presume that a physical struggle and hitting a person's face constitutes what the term force should mean. In 1982, this was not a shared understanding of the term force. Rather, the appellate court reversed the conviction, in part because the "defendant made no threats of physical violence whatsoever."<sup>48</sup> What this heightened standard reveals is that this crime was highly underinclusive with respect to which bad acts were in fact prosecuted as crimes. In addition, the definition of forcible rape was not grounded in what contemporary norms define as the nature and harm of unwanted sex.

Fourth, the element of a defendant's force was accompanied by an element requiring that a woman proved that she had resisted—often with her utmost ability—her attacker's use of force during intercourse.<sup>49</sup> Returning to the *Rosario* case, the appellate court also overturned the rape conviction for want of proof of resistance. In its reasoning, the young woman had not displayed adequate resistance to prove that she did not consent to the sex because she remained in the car after the first rape instead of fleeing (her explanation of being ashamed was not accepted), she did not yell for help during either attack or when they stopped at a gas station (because she believed her boyfriend's threat that he would not drive her home if she did), and during the intercourse, she did not bite, scratch, or kick.<sup>50</sup>

In the first attempt at rape reform that began in the 1980s, the element of resistance was dropped from the definition of rape.<sup>51</sup> One of the most

47. *Id.* at 274–77.

48. *Id.* at 276.

49. Anderson, *supra* note 38, at 962–64 ("Rape law has traditionally emphasized a woman's physical resistance to evaluate her lack of consent and the defendant's use of force. . . . For many women, the utmost resistance requirement made rape nearly impossible to prove. Most rape victims could not meet the rigid standard of physically resisting an assailant to the utmost of their physical capacity and maintaining that level of resistance throughout the sexual act. The utmost resistance requirement eventually came under intense scrutiny because of its harmful effect on victims. Many states thereafter decided to change the utmost resistance requirement").

50. *Rosario*, 443 N.E.2d at 275–76.

51. See Anderson, *supra* note 38, at 967:

Eventually, however, many other states eliminated the formal resistance requirement altogether, concluding that prosecutors should be able to establish that a rape occurred even in the absence of any resistance by the woman. The Model Penal Code has also eliminated resistance as a legal prerequisite for a rape conviction. Thirty-one state statutes as well as the District of Columbia Code and the Uniform Code of Military Justice do not mention resistance in the statutory language describing rape. Six more states explicitly note in their criminal codes that

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pointed criticisms of the resistance element was the expectation that a victim resist rape through violence. This expectation of resistance arose from a misguided assumption of what a reasonable man would do in a bar fight, rather than what a reasonable woman in fact does—or should do—during the fear and trauma experienced during rape to avoid further injury or harm to herself.<sup>52</sup> The resistance element was viewed as an anomaly in that no other crime, such as robbery or assault, required a victim's resistance to prove that the defendant was culpable.<sup>53</sup> Further, there was concern that requiring this element was actually requiring a victim to risk serious bodily injury or death to prove she was in fact being raped.<sup>54</sup> Legislatures re-

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physical resistance is not required to substantiate a rape charge. This last step in the history of the place of resistance in rape law—omitting a resistance requirement altogether—appears to be a major change. However, the formal elimination of a resistance requirement from codified law has often been a victory more apparent than real. Although resistance is not formally required in these states, courts today often evaluate a woman's actions in the same way as they did when resistance was required.

Only Louisiana still requires a showing of resistance “to the utmost” to sustain a charge of aggravated rape. However, aggravated rape can also be met if the rapist uses a dangerous weapon. LA. REV. STAT. ANN. § 14:42(A)(1)–(3) (2016) (“[A] rape committed . . . where the anal, oral, or vaginal sexual intercourse is deemed to be without lawful consent of the victim because it is committed under any one or more of the following circumstances: (1) When the victim resists the act to the utmost, but whose resistance is overcome by force. (2) When the victim is prevented from resisting the act by threats of great and immediate bodily harm, accompanied by apparent power of execution. (3) When the victim is prevented from resisting the act because the offender is armed with a dangerous weapon.”).

52. See *Rusk v. Maryland*, 406 A.2d 624, 634 (Md. Ct. Spec. App. 1979) (Wilner, J., dissenting), *rev'd*, 424 A.2d 720 (Md. 1981). In critiquing the initial reversal of the conviction, the dissenting appellate judge criticized the majority's focus on the victim's lack of physical resistance as proof of consent. Judge Wilner noted:

The most common type of resistance offered by victims is Verbal. Note: verbal resistance Is resistance! In cases arising in the large cities, only 12.7% Of the victims attempted flight, and only 12% Offered physical resistance. The reason for this is apparent from the next thing learned: that “(r)ape victims who resisted were more likely to be injured than ones who did not.” The statistics showed, for rapes in large cities, that, where physical resistance was offered, over 71% Of the victims were physically injured in some way, 40% Requiring medical treatment or hospitalization. Said the Report: “These results indicate one possible danger of the popular notion (and some statutory requirements) that a victim of an attack should resist to her utmost.

*Id.* (quoting Battelle Memorial Institute Law and Justice Study Center Report (1978)).

53. *Id.* at 633 (in criticizing the majority's decision that discounted evidence of coercion as sufficient amount of force, the dissent argued, “If [the defendant] had desired, and [the victim] had given, her wallet instead of her body, there would be no question about appellant's guilt of robbery. Taking the car keys under those circumstances would certainly have supplied the requisite threat of force or violence and negated the element of consent. No one would seriously contend that because she failed to raise a hue and cry she had consented to the theft of her money. Why then is such life-threatening action necessary when it is her personal dignity that is being stolen?”).

54. Anderson, *supra* note 38, at 958 (“One reason that only 13% of rape victims physically fight back against their sexual attackers is that they have been warned that fighting back will result in their own serious bodily injury or death. A number of rape victims have testified in rape trials that they had heard and believed this warning. As one rape victim said: ‘I remember talking with people about rape and they always said not to resist . . . that a female could be killed, beaten, or mutilated. I didn't want that to happen.’ Many police departments have explicitly discouraged women from active, physical

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sponded to these criticisms by redefining the crime of rape as occurring without the element of resistance.<sup>55</sup>

Requiring a victim's resistance as proof that sex was unwanted is at odds with how our society understands the harm of unwanted sex. Rape by force was not concerned with nuanced questions of consent because it was a crime focused more on stopping false accusations against men than adjudicating real crimes committed by them.<sup>56</sup>

## 2. *Rape by Force Developed when All Non-Marital Sex Was Criminalized and Non-Procreative Marital Sex Was Regulated*

Defining rape only by force and resistance, limiting violations to vaginal penetration, and giving immunity to husbands to rape their wives is ridiculous and offensive by today's standards. But when this crime was created, it was not focused on remedying the social problem of unwanted sex. Rather, it is critical to understand that rape by force was part of a larger regulatory scheme where sex outside of marriage was criminalized and non-procreative sex within marriage was regulated.

One important factor is that up until the 1960s, when *Griswold v. Connecticut*<sup>57</sup> carved out a penumbra of privacy from state regulation, sex outside of marriage was criminalized.<sup>58</sup> The person who had sex outside of

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resistance, and instead encouraged women to employ 'passive resistance' and to do 'what you were taught to do as girls growing up.'") (footnotes omitted).

55. *See id.*

56. The existing comments to the proposed crime of rape found in the MPC illustrate this problem. For example, the MPC recommends a defense to the crime of rape when the woman had prior "promiscuous" sex with other men. MODEL PENAL CODE § 213.6(3) (2015) ("It is a defense to prosecution under Section 213.3 and paragraphs (6), (7) and (8) of Section 213.4 for the actor to prove by a preponderance of the evidence that the alleged victim had, prior to the time of the offense charged, engaged promiscuously in sexual relations with others."). Even more offensive, the MPC requires corroboration of the victim's testimony and instructions to the jury that the victim may be emotionally unstable. MODEL PENAL CODE § 213.6(5) (2015) ("No person shall be convicted of any felony under this Article upon the uncorroborated testimony of the alleged victim. Corroboration may be circumstantial. In any prosecution before a jury for an offense under this Article, the jury shall be instructed to evaluate the testimony of a victim or complaining witness 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.**") (emphasis added); *see also* Denno, *supra* note 33, at 207 ("Only because of the passage of time, the Code's sexual offense provisions and Commentaries now misrepresent the progressive thinking of the Code's reporters. For these reasons, I think the Model Penal Code's sexual offense provisions should be pulled, revised, and replaced.")

57. 381 U.S. 479 (1965).

58. *Griswold v. Connecticut*, 381 U.S. 479 (1965), was the first case to establish a fundamental right to privacy in the context of a married couple's access to procreation. Over time, the Supreme Court invalidated numerous other regulations that were deemed to be unwarranted intrusions over decisions around adult intimacy; *see, e.g.*, *Loving v. Virginia*, 388 U.S. 1 (1967) (criminalization of interracial marriages); *Eisenstadt v. Baird*, 405 U.S. 438 (1972) (criminalization of providing contraception to unmarried persons); *Lawrence v. Texas*, 539 U.S. 558 (2003) (criminalization of sodomy laws that targeted only same-sex intimacy).

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a marital relationship was punished (either for a felony or misdemeanor) for the crimes of fornication—sex between unmarried adults—or adultery—sex outside of marriage where both parties were married to others.<sup>59</sup> In these prosecutions, a person’s marital status was a critical element of the crime. Defendants routinely would cite their own or their partner’s marital status as a defense to the charged crimes.<sup>60</sup>

Illicit cohabitation—the crime of people of the opposite sex living together—was also criminalized out of concerns that unmarried individuals were having sex.<sup>61</sup> These statutes gained popularity after the Civil War as a means to harass individuals in interracial relationships<sup>62</sup> and members of the Church of the Latter Day Saints before the church banned polygamist practices.<sup>63</sup> Despite their nefarious origins, by the 1960s, the majority of

59. *Hopgood*, 45 S.E.2d at 716.

60. *Id.* The Court granted a motion for a new trial on the basis that there was insufficient evidence to establish the crimes of fornication and adultery. The charge of fornication was not supported because “the proof shows that one of the parties was married at the time the offense is alleged to have been committed; therefore, a verdict of guilty was contrary to the evidence.” Although not charged, the Court observed that it could not construe the indictment to allege the crime of adultery because to sustain a charge, “[t]he evidence must show that the accused and the other person alleged to have participated in the criminal act were married persons.” *Id.* (internal citations omitted).

61. Matthew J. Smith, *The Wages of Living in Sin: Discrimination in Housing Against Unmarried Couples*, 25 U.C. DAVIS L. REV. 1055, 1058 (1992) (“One of the most significant changes has occurred in the criminal law. Historically, most states criminalized cohabitation. Today, most states have repealed these criminal statutes. In addition, many states have decriminalized fornication.”); Unlawful cohabitation became a crime in the United States with the enactment of the Edmunds Act in 1882. Erin P. B. Zasada, *Civil Rights—Rights Protected and Discrimination Prohibited: Living in Sin in North Dakota? Not Under My Lease* North Dakota Fair Housing Council, Inc. v. Peterson, 78 N.D. L. REV. 539, 541 (2002) (“Under the Edmunds Act [of 1882], prosecution of polygamists was facilitated through the creation of a new offense called unlawful cohabitation. According to the Act, a male committed the crime of unlawful cohabitation when he cohabited with more than one woman.”); *United States v. Higgerson*, 46 F. 750, 751 (C.C.D. Idaho 1891) (“The crime of unlawful cohabitation is the living with two or more women as wives; of treating and associating with them as such; the giving to the world the appearance that the marital relation exists with them. It is the living with them in the habit and repute of marriage.”).

62. See generally RANDALL KENNEDY, *INTERRACIAL INTIMACIES: SEX, MARRIAGE, IDENTITY, AND ADOPTION* 70–91 (Pantheon Books 2003) (discussing various laws and cases criminalizing interracial relationships from 1876 to the 1950s).

63. See generally *Utah v. Holm*, 137 P.3d 726, 764, 773 (Utah 2006) (Durham, C.J., dissenting) (when addressing challenges to polygamy law, discussing the history by which the federal government conditioned Utah’s statehood on its criminalization of polygamy within the LDS church. “Specifically, the majority emphasizes some delegates’ concern that the federal government intended, through the Enabling Act, not only to prevent Utah from recognizing polygamous unions as valid marriages, but also to require that the state impose criminal penalties on polygamy.”); *Brown v. Buhman*, 947 F. Supp. 2d 1170, 1193 (D. Utah 2013), *vacated* 822 F.3d 1151 (10th Cir. 2016) (although the case involved a religion that was separate and apart from the LDS church, the district court judge discussed the anti-LDS animus that formed the basis of the polygamy laws of the late 1800s. “Of course, *Reynolds* held that Congress’s long history of specifically targeting Mormons based on the fear that their practice of polygamy posed a threat to American democracy, see *Holm*, 2006 UT at ¶ 167 & n.20, 137 P.3d at 771 (Durham, C.J., dissenting), and the resulting federal legislation prohibiting polygamy did not violate the Mormons’ right to the free exercise of their religion.”).

states had enacted and used them against cohabitating couples.<sup>64</sup> Even through the 2000s, these statutes were invoked in various property, intestacy, and landlord-tenant disputes as evidence of legitimate public policy and morals.<sup>65</sup>

In this context, the force and resistance elements served an essential function. Without it, a victim of rape who was not married to her attacker would turn her victim statement into a confession to the crimes of fornication or adultery.<sup>66</sup> Although this absurdity is no longer a part of U.S. law, in 2013, a Norwegian tourist visiting Dubai was imprisoned for adultery after reporting that she had been raped in public.<sup>67</sup>

In states that limit the definition of rape by only having a forcible compulsion element, a victim of unwanted sex arising from a defendant's coercion, confusion, or cluelessness has no recourse. As a result, the numerous—and, arguably, the majority of—situations in which acquaintance rape occurs without physical violence are non-actionable under law. Relevant here, one of the most important criticisms is that defining unwanted sex by only the elements of force and resistance captures the crime of the stranger

64. See Margaret M. Mahoney, *Forces Shaping the Law of Cohabitation for Opposite Sex Couples*, 7 J. L. & FAM. STUD. 135, 141 (2005) (“When the Model Penal Code [MPC] was published in 1962, most states in the United States criminalized nonmarital cohabitation.”).

65. Katherine C. Gordon, *The Necessity and Enforcement of Cohabitation Agreements: When Strings Will Attach and How to Prevent Them—A State Survey*, 37 BRANDEIS L.J. 245, 253 (1999) (observing that some “states refuse to recognize property agreements or rights arising between unmarried cohabitants for two reasons: such relationships are against public policy and cohabitation remains a crime in some states.”); One of the most famous examples was a North Dakota Supreme Court decision from 2001, holding that landlords could lawfully refuse to rent to unmarried tenants. See *N.D. Fair Hous. Council, Inc. v. Peterson*, 625 N.W.2d 551, 553 (N.D. 2001); see also Kari E. Hong, *Obergefell’s Sword: The Liberal State Interest in Marriage*, 2016 U. ILL. L. REV. 1417, 1425–27 (2016) (discussing other state regulations used to discourage sex outside of marriage by penalizing the children of unmarried parents with the substantial legal disadvantages arising from illegitimacy and discouraging non-procreative sex in marriages by punishing doctors who provided information or access to contraception).

66. See Anne M. Coughlin, *Sex and Guilt*, 84 VA. L. REV. 1, 27–28 (1998) (“[A]s Kristin Bumiller puts it—the woman’s nonconsent was the element that divided one heterosexual crime from another, namely, the woman’s nonconsent distinguished the man’s crime (rape) from the couple’s crime (fornication or adultery). (In the former world, the parties’ marriage—not their consent to the intercourse—was the element that distinguished lawful from unlawful sex.) The meaning of nonconsent (and, concomitantly, of consent) in the context of sexual encounters necessarily would be conditioned by the fact that it served this function. Moreover, contrary to the political assumptions that permeate the modern critique of rape law, in a world in which all nonmarital intercourse is criminalized, we would not expect or desire law enforcement authorities to approach a report of sexual misconduct with the conviction that, if an offense had occurred, the man inevitably would turn out to be the guilty party. Rather, given the range of potentially applicable offenses, the authorities at least would be obliged to consider whether, and might even be predisposed to believe that, both the male and the female participants shared responsibility for the criminal intercourse.”) (footnotes omitted).

67. See Nicola Goulding et al., *Dubai Rule Pardons Norwegian Woman Convicted After She Reported Rape*, CNN (July 22, 2013), <https://perma.cc/L34V-WHQQ> (After international outcry, the rape victim was pardoned for the crime of unlawful sex outside of marriage. With her pardon, her rapist too was released from prison).

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jumping out of the bushes, but it does not capture the social harm that occurs in the more than three-fourths of rapes in which the victim knows his or her assailant.<sup>68</sup>

*C. The Actus Reus of Non-Consent Does Not Capture the Actual Social Harm of Acquaintance Rape*

*1. Non-Consent Is Limited to Power Imbalances*

The next wave of reform sought to replace the element of force with an element of non-consent when defining unwanted sex. As a preliminary matter, most if not all of the states retain some sort of aggravated rape offense that is meant to capture the harm arising when a rapist uses a weapon or inflicts serious bodily injury on the victim. Force is obviously the actus reus used in these crimes.<sup>69</sup> But numerous states also have included a lesser degree of rape that, in many jurisdictions, is defined by the absence of consent.<sup>70</sup>

The difficulty in defining rape through the element of non-consent is that it is a limited actus reus. It is not simply a question of whether the sexual intercourse occurred with the victim's consent. To the contrary, for the most part, states define this element as involving a power differential between the victim and defendant, usually arising out of age, state of intoxication, incapacity arising from a mental or physical disability, or specific contexts such as the defendant having a legal duty of care over the victim. For instance, Alabama defines rape in the second degree through two subsections: the first criminalizes "sexual intercourse" between someone who is at least 16 years old and a child who is between the ages of 16 and 12; the second criminalizes sexual intercourse between someone who "is incapable of consent by reason of being mentally defective."<sup>71</sup> Alaska defines sexual assault in the third degree as including the situation whereby an assailant is

68. See *supra* note 1.

69. See, e.g., 720 ILL. COMP. STAT. 5/11-1.30 (2016) (Illinois' statute heightens the offense of rape to aggravated rape if the defendant uses a weapon, inflicts serious bodily harm during the rape, or rapes a particularly vulnerable victim such as a child or an elderly or disabled person).

70. For instance, Illinois defines "Criminal Sexual Assault" as having an actus reus of "force or threat of force" or a non-consent actus reus, in which a family member is the assailant or the defendant knows that the victim is unable to understand or give consent. 720 ILL. COMP. STAT. 5/11-1.20 (2016). Iowa divides the crimes of sexual assault into degrees. The first-degree arises when the defendant "causes another serious injury." IOWA CODE § 709.2 (2016). A second-degree sexual assault occurs when the defendant uses a weapon or force or the victim is under 12. IOWA CODE § 709.3 (2016). A third-degree sexual assault arises when rape occurs by force or in one of ten circumstances of non-consent that include a victim's disability based on age, member of the assailant's household, or under the influence of specific substances. IOWA CODE § 709.4 (2016).

71. See ALA. CODE § 13A-6-62(a)(2)-(2) (2016).

employed by the state as a law enforcement or probation officer and “engages in sexual intercourse” knowing that the victim is in state custody.<sup>72</sup>

This parsing of non-consent as more akin to an exploitation of power captures an important social harm, but again does not extend to all forms of unwanted sex. A primary problem of limiting consent to this actus reus is that most states accompany these crimes with general intent (if a common law jurisdiction) or knowledge (if an MPC jurisdiction). With such a mens rea, the defendant actually must know of the existence of the facts that create the power differential. In Ohio, for instance, the legislature criminalizes a person’s conduct as rape if he

engage[s] in sexual conduct with another . . . when . . . [t]he other person’s ability to resist or consent is substantially impaired because of a mental or physical condition . . . and the offender knows or has reasonable cause to believe that the other person’s ability to resist or consent is substantially impaired . . . .<sup>73</sup>

In 2010, in *Ohio v. Hatten*,<sup>74</sup> a young woman identified as A.R. went to a bar with her roommate. The woman was 5’0" tall and weighed 120 pounds. Over the course of a six-hour time span, she consumed half a pitcher of beer, three cans of beer, and seven shots of liquor. She and her roommate returned home, and a neighbor named Hatten stopped by and invited them both to his apartment to watch a movie. At that point in time, the versions of events diverged. A.R. claimed that Hatten invited her to his bedroom. Without her consent, he engaged in penetration, and she fled his apartment. By 7:00 a.m., she was at a hospital receiving an examination by a Sexual Assault Nurse Examiner.

Of note, the jury convicted Mr. Hatten of rape, but on appeal, the conviction was reversed. The appellate court noted that the prosecutor had failed to introduce evidence that the man knew that the woman had consumed as much alcohol as she had that evening.<sup>75</sup> The record lacked evidence that the victim exhibited any outward signs of alcohol impairment (no stumbling, no slurring).<sup>76</sup> The court in turn held that Mr. Hatten could not be found liable for the crime of rape.

Starting with the assumption that A.R. was telling the truth, these facts expose a couple of problems with the non-consent formulations. The first is that non-consent is narrowly written to include only specific instances of power imbalances enumerated by statute. Assuming that the facts were true, it is disturbing that Hatten’s conduct is non-actionable if A.R. was sober because the reach of the statute does not include penetration when the as-

72. See ALASKA STAT. ANN. § 11.41.425(a)(4) (West 2016).

73. OHIO REV. CODE ANN. § 2907.02(A)(1)(c) (West 2016).

74. 927 N.E.2d 632, 635–36, 638 (Ohio Ct. App. 2010).

75. *Id.* at 641, 647.

76. *Id.* at 637, 640.

sailant knows that the victim has not given affirmative consent. It is only if she was intoxicated and nonconsenting that the rape may be criminal.

The second, which will be discussed in more detail below, is that the incapacity prong has a mistake-of-fact defense. Because the mens rea is knowledge, a defendant will escape liability if he had no actual knowledge of the circumstances—which focuses not on whether sex is unwanted, but whether the defendant had knowledge of the victim’s impairment. *Hatten* then illustrates how the element of non-consent is underinclusive in rendering significant types of unwanted sex as criminal.

## 2. *The Mistake-of-Fact Defense*

Another notable limitation of the actus reus of non-consent is that an accused can only be convicted upon a showing that he knew he had sex without the consent of his partner. For instance, New Jersey—ironically one of the states that pioneered the movement to reform rape laws to abandon the traditional actus reus of force—codified the mistake-of-fact defense in the following manner. In directing the jury on how to consider evidence, the following instructions are given:

You must decide whether the defendant’s alleged act of penetration was undertaken in circumstances that led the defendant reasonably to believe that the victim had freely given affirmative permission to the specific act of sexual penetration. Simply put, affirmative given permission means the **victim did or said something which would lead a reasonable person to believe [he/she] was agreeing to engage in the act of sexual penetration**, and freely given permission means the victim agreed of [his/her] own free will to engage in the act of sexual penetration.<sup>77</sup>

Instead of reforming rape law to turn attention away from whether the victim resisted with the expected amount of force, the new non-consent statutes keeps the focus on what the victim did or did not do to communicate “consent.” The jury was—and still is—directed to scrutinize the victim’s actions to determine whether she should have been more clear, more communicative, or more direct to avoid permitting the defendant to infer, assume, or presume consent. What is troubling with this conception of rape is illuminated by the fact that shoplifters are not permitted a defense that the store owner’s seductive display of goods and promises to buy one, get one free invited a reasonable mistake that payment was not required for the goods that were stolen. Rape victims, however, retain the burden to prove that their attackers were rapists, and not simply honest men who could not have known better.

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77. N.J. STANDARD CRIM. JURY INSTR. 2C:14–2a(3) (2011) (emphasis added, square brackets in original).

The prevalence of the mistake-of-fact defense arises from the reality that rape is defined in most states as a crime with a knowledge mens rea. Because knowledge is an element of the crime, it is understandable why criminal law permits the defendant to raise the defense that he did not have reasonable knowledge that he lacked the victim's consent to engage in sex.<sup>78</sup> A number of states codify this defense.<sup>79</sup> In others, the judiciary has written in the mistake-of-fact defense in order to have the rape statutes comport with due process.<sup>80</sup>

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78. See *Tyson v. Trigg*, 50 F.3d 436, 447 (7th Cir. 1995) (“In a situation of alleged “date rape,” the alleged rapist may have thought the woman was consenting to have sex with him, though she was not. And if his mistake was reasonable, that is a defense under Indiana law, just as in the parallel case of self-defense in a prosecution for murder. . . .”); *California v. Alvarez*, 246 Cal. App. 4th 989, 1001 (Cal. Ct. App. 2016) (noting that on the facts of the case, there was no misinstruction that interfered with the defendant’s “defense of consent based on a reasonable mistake of fact”); *Oregon v. Simonov*, 368 P.3d 11, 15 n.3 (Or. 2016) (“[I]f lack of consent is based on the victim’s incapacity, then an honest mistake, even if unreasonable, will excuse the defendant’s conduct, meaning that the applicable mental state is knowingly.”) (citing Or. Rev. Stat. 163.325(3) (providing that, in such circumstances, “it is an affirmative defense for the defendant to prove that at the time of the alleged offense the defendant did not know of the facts or conditions responsible for the victim’s incapacity to consent”)); see generally CAL. JURY INSTR.—CRIM. 10.65 (2016) (square brackets in original) for a variation of New Jersey’s instruction:

There is no criminal intent if the defendant had a reasonable and good faith belief that the other person voluntarily consented to engage in [sexual intercourse] [sexual battery] [oral copulation] [sodomy] [or] [penetration of the [genital] [anal] opening by a foreign object, substance, instrument, or device]. Therefore, a reasonable and good faith belief that there was voluntary consent is a defense to such a charge[.] [, unless the defendant thereafter became aware or reasonably should have been aware that the other person no longer consented to the sexual activity.]

This instruction is available only when evidence supports the mistake. See *California v. Martinez*, 224 P.3d 877, 908 (Cal. 2010). But see *California v. Allen*, No. B260165, 2016 WL 4482933, at \*4 (Cal. Ct. App. Aug. 25, 2016) (rejecting mistake of fact defense as applied to statutory rape because of the public policy considerations arising from statutory rape’s protection of youth).

79. See *Utah v. Marchet*, 284 P.3d 668, 674 (Utah App. 2012) (commenting that the judiciary may craft a mistake of fact defense when an appropriate case arises: “[i]n the proper case, it may be wise to consider the standards established by other jurisdictions, like California, when developing such a jury instruction.”).

80. In *Massachusetts v. Blache*, the Massachusetts Supreme Judicial Court created a mistake of fact defense for offenses involving incapacity:

[I]f the complainant’s capacity to consent is again at issue, the defendant will be entitled to an instruction that, in order to sustain a conviction on a theory of incapacity to consent, the Commonwealth must prove that the defendant knew or reasonably should have known that the complainant’s condition rendered her incapable of consenting.

880 N.E.2d 736, 747 (Mass. 2008). That rule does not apply to the charges involving forcible rape because lack of consent is immaterial to the element of force. *Blache*, 880 N.E.2d at 748 (“[b]ecause G.L. c. 265, § 22, does not require proof of a defendant’s knowledge of the victim’s lack of consent or intent to engage in nonconsensual intercourse as a material element of the offense . . . [a]ny perception (reasonable, honest, or otherwise) of the defendant as to the victim’s consent is . . . not relevant to a rape prosecution.”) (quoting *Massachusetts v. Lopez*, 745 N.E.2d 961, 966 (Mass. 2001)).

### 3. *Consent Secured by Fraud Is Deemed Valid Consent*

Another important criticism of the operation of the non-consent actus reus is that rape law, just like larceny before it evolved to include larceny-by-trick, considers consent obtained by fraud or deceit as still valid consent.<sup>81</sup> California's rape statute is notable for many reasons. California, like all of the states, has formally abolished the marital rape exception, which used to prevent a man from being prosecuted for rape if the victim was his wife.<sup>82</sup> However, like half of the states, California retains the concept that a rapist's marriage to the victim reduces the seriousness of the offense and length of punishment.<sup>83</sup> In California Penal Code § 261, the crime of rape is defined as "an act of sexual intercourse accomplished with a person not the spouse of the perpetrator, under any of the following circumstances[.]"<sup>84</sup> The enumerated circumstances include: incapacity due to a mental or physical condition, force, incapacity to resist arising from intoxication, and unconsciousness because the victim

(A) [w]as unconscious or asleep; (B) [w]as not aware, knowing, perceiving, or cognizant that the act occurred; (C) [w]as not aware, knowing, perceiving, or cognizant of the essential characteristics of the act due to the perpetrator's fraud in fact; [or] (D) [w]as not aware, knowing, perceiving, or cognizant of the essential characteristics of the act due to the perpetrator's fraudulent representation that the sexual penetration served a professional purpose when it served no professional purpose.<sup>85</sup>

This unconscious prong has received attention arising from two public cases. In the 1985 case of *Boro v. Superior Court*,<sup>86</sup> Mr. Boro falsely told a young woman that he was a doctor, that he had the results of her recent blood test, and that she had a dangerous, infectious, and potentially fatal disease. He claimed she had two days to treat the disease, by electing for either a painful \$9,000 surgery or a \$1,000 procedure involving sex with a donor who had been injected with a serum that could cure the disease. The rape victim chose the latter option and engaged in sexual intercourse, and the police apprehended Mr. Boro after being contacted by the woman's em-

81. For an excellent discussion and criticism of this part of rape law, see Jed Rubenfeld, *The Riddle of Rape-by-Deception and the Myth of Sexual Autonomy*, 122 *YALE L.J.* 1372 (2013).

82. See *supra* note 41 and accompanying text.

83. Although few states follow the Model Penal Code's recommendation to codify the marital rape exemption, they do follow the MPC's recommendation to grade the seriousness of the offense based on the marital status of the parties rather than the nature of harm inflicted. See Anderson, *supra* note 44, at 1521. Approximately half of the states "prescrib[e] lower punishment for marital rape, or . . . permit [ ] prosecution only when the husband has used the most serious forms of force." SANFORD KADISH ET AL., *CRIMINAL LAW AND ITS PROCESSES CASES AND MATERIALS* 407 (9th ed. 2012).

84. CAL. PENAL CODE § 261(a) (West 2013).

85. *Id.* § 261(a)(1)–(4).

86. 163 Cal. App. 3d 1224 (Cal. Ct. App. 1985).

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ployer who saw the scheme for what it was.<sup>87</sup> The rapist was acquitted under the old version of the law that only had the first three subsections defining fraud. Because the victim consented to the rape, even though the consent was induced by fraud, the rape was not actionable. As the court explained, the rapist did not misrepresent that sexual intercourse would occur, he only misrepresented the reasons for it.<sup>88</sup> Because the victim consented to sexual intercourse, there was no fraud with respect to the essential characteristics of how unwanted sex was defined as rape under the statute. To prevent this circumstance in the future, the California Legislature added subsection 4, which explicitly makes misrepresentations of professional purpose a crime.<sup>89</sup>

Another recent case that illustrates the problem of how consent induced by fraud is still deemed consent is *California v. Morales*,<sup>90</sup> a 2013 case decided by the California Court of Appeal. In *Morales*, an 18-year-old woman referred to as Jane went to a party with her boyfriend and other friends. The defendant, Julio, was also attending the party. After three to five beers, Jane left the party with her boyfriend and friends, and they returned to her house where they had food before going to sleep. One of the friends invited Julio to the house.<sup>91</sup>

Jane and her boyfriend retired to her bedroom where they talked about having sex. When they realized they did not have a condom, they decided not to have unprotected sex. Jane fell asleep next to her boyfriend. Sometime later, the boyfriend left the bedroom to sleep at his house.<sup>92</sup>

Jane woke up to the “sensation of having sex . . . . She was confused because she and [her boyfriend] had agreed not to have sex that night.”<sup>93</sup> She nonetheless engaged in sex until a light through a crack in the bedroom door revealed that the face of the person whom she had assumed to be her boyfriend was in fact that of Julio. Jane immediately attempted to push him away, cried, and yelled. Julio then left the room.<sup>94</sup>

In determining whether Julio was guilty of rape, the California Court of Appeal noted that consent procured by deceit is only actionable under subsection 5 of California Penal Code § 261.5 when “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

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87. *Id.* at 1226–27.

88. *Id.* at 1228.

89. CAL. PENAL CODE § 261(a)(4)(D); see Patricia Falk, *Rape by Fraud and Rape by Coercion*, 64 BROOK. L. REV. 39, 111 (1998).

90. 212 Cal. App. 4th 583 (Cal. Ct. App. 2013).

91. *Morales*, 212 Cal. App. 4th at 587.

92. *Id.*

93. *Id.* at 587–88.

94. *Id.* at 588.

by the accused, with intent to induce the belief.”<sup>95</sup> Because the plain meaning of the statute limited deceit to impersonating a person’s spouse, and because the legislature undertook many reforms to the statute without disturbing this limitation, the Court “reluctantly h[e]ld that a person who accomplishes sexual intercourse by impersonating someone other than a married victim’s spouse is not guilty of the crime of rape.”<sup>96</sup> The California Legislature subsequently and quickly (within nine months) enacted legislation to change the phrase “victim’s spouse” to “someone known to the victim other than the accused.”<sup>97</sup> Nonetheless, this case illustrates how the actus reus of non-consent is underinclusive in defining unwanted sex as criminal rape.

The 2006 case of *Iowa v. Bolsinger*<sup>98</sup> is another example of how fraud in fact immunizes unwanted sex from actionability. In *Bolsinger*, a program supervisor for juvenile delinquents was convicted of third-degree sexual assault, which in relevant part criminalizes a sex act if it occurs by “force or against the will of the other person.”<sup>99</sup> The jury was instructed that “against the will of another” includes “deception concerning the nature of the act.” In the facts of *Bolsinger*, the program supervisor would meet with boys in private rooms, explain that he was checking for bruises and testicular cancer, and ask permission to touch the boys’ genitals. The boys testified that the program supervisor did not appear to gain any sexual gratification from touching the boys. They further testified that they gave permission at the time of the touching, but if they had known the supervisor was not conducting a genuine medical exam, they would have withheld consent.<sup>100</sup>

Again, due to the limited definition of consent in rape statutes, the program supervisor’s conviction was overturned for not matching the elements of the crime of sexual assault.<sup>101</sup> The boys did consent to the touching of their genitals, which as explained by the court was fraud in the inducement and not fraud in fact (which would have occurred if the boys had

95. *Id.* at 595 (quoting CAL. PENAL CODE § 261(a)(5) (2012)) (emphasis added).

96. *Id.* at 595.

97. The new provision provides: “Where a person submits under the belief that the person committing the act is someone known to the victim other than the accused, and this belief is induced by any artifice, pretense, or concealment practiced by the accused, with intent to induce the belief.” CAL. PENAL CODE § 261(a)(5); *see also* Crimes and Offenses—Sex Offenses—Expanded Definition, Assemb. 65, 2013 Reg. Sess. (Cal. 2013), 2013 Cal. Legis. Serv. Ch. 259 (Lexis Advance) (“Existing law provides various circumstances that constitute sodomy against an individual’s will, including an act accomplished with an individual who is not the spouse of the perpetrator . . . . This bill would instead provide that these types of rape and sodomy occur where the person submits under the belief that the person committing the act is someone known to the victim other than the accused.”).

98. 709 N.W.2d 560 (Iowa 2006).

99. *Id.* at 561–62 (quoting IOWA CODE § 709.4 (2006)).

100. *Id.* at 562.

101. *Id.* at 566.

consented to being touched on the knee and the supervisor secretly touched their genitals).<sup>102</sup> A common limitation then of the actus reus of non-consent is that the vast majority of states relying on such non-consent codify that, in the context of rape, consent secured by fraud or deceit remains valid.

#### IV. NEEDED REFORM TO OLD UNDERSTANDINGS OF RAPE

Unlike the crime of rape, as detailed above, the crimes of larceny and homicide evolved into sophisticated and myriad offenses. In recognizing computer crimes, larceny responded to the needs of defining criminal conduct from legal behavior in emerging technologies.<sup>103</sup> In homicide law, states responded to both changing technologies and social norms. In the 1930s, the new crime of vehicular homicide punished those whose negligent driving of a car caused the death of another.<sup>104</sup> Starting in the 1980s, in response to the social opprobrium towards drunk drivers, prosecutors charged and convicted what would have been vehicular homicide as second-degree murder to punish the egregious callousness of the driver.<sup>105</sup> It is well past the time for rape law to evolve to comport with contemporary norms over what separates wanted sex from unwanted sex.

102. *Id.* at 564.

103. Catherine Pelker et al., *Computer Crimes*, 52 AM. CRIM. L. REV. 793, 795–96 (2015) (“While the term ‘computer crime’ includes traditional crimes committed with the use of a computer, the rapid emergence of computer technologies and the Internet’s exponential growth spawned a variety of new, technology-specific criminal behaviors that must also be included in the ‘computer crimes’ category. To combat these criminal behaviors, prosecutors rely on technology-specific legislation passed by Congress as well as applications of conventional law to activities in cyberspace.”).

104. *California v. Watson*, 637 P.2d 279, 283–84 (Cal. 1981) (“When the Penal Code was enacted in 1872, manslaughter was defined in section 192 as an unlawful killing of a human being without malice, and was characterized as being either voluntary or involuntary. A specific statute directed at vehicular homicides was enacted in 1935 as Vehicle Code section 500 (Stats. 1935, ch. 764, p. 2141). That section provided for imprisonment of one year in the county jail or three years in the state prison for deaths which occurred within one year as the proximate result of injuries caused by the *negligent* driving of a vehicle.”) (emphasis in original).

105. *Washington v. Barstad*, 970 P.2d 324, 328–29 (Wash. Ct. App. 1999) (In rejecting a defendant’s challenge to being charged with second degree murder instead of vehicular homicide, the Washington Court of Appeals justified the higher charge because “the facts must evidence the defendant’s subjective knowledge his act is extremely dangerous, and his indifference to the consequences.”) (citing *United States v. Fleming*, 739 F.2d 945 (4th Cir. 1984); *Slaughter v. Alabama*, 424 So. 2d 1365 (Ala. Crim. App. 1982); *Michigan v. Vasquez*, 341 N.W.2d 873 (Mich. Ct. App. 1983); *New Mexico v. IBN Omar–Muhammad*, 694 P.2d 922 (N.M. 1985); *North Carolina v. Snyder*, 317 S.E.2d 394 (N.C. 1984); *Tennessee v. Moss*, 727 S.W.2d 229 (Tenn. 1986); *Wagner v. Wisconsin*, 250 N.W.2d 331 (Wis. 1977)); Kenneth F. Lewis, *Pennsylvania’s Limitations on Social Host Liability: Adding Insult to Injury?*, 97 DICK. L. REV. 753, 753 (1993) (“National, state and local governments, as well as a variety of citizen groups have been working to keep drunk drivers off the road. Congress recently passed the Omnibus Drug Initiative Act of 1988 which gives states monetary incentives to implement programs designed to ameliorate the drunk driving problem, and the states have individually initiated a variety of measures to combat drunk driving.”).

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## RAPE BY MALICE

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A. *The Actus Reus of Affirmative Consent Does Not Capture the Actual Social Harm of Acquaintance Rape*

A response to outdated aspects of force and non-consent has been the proposal to define the consent element in rape more broadly. Known as affirmative consent laws, or colloquially “yes means yes” laws, California was the first state to respond to sexual assault on college campuses by requiring “affirmative, conscious and voluntary agreement to engage in sexual activity.”<sup>106</sup> Of note, this law is not part of the penal code in defining degrees of sexual assault. Rather, included under California Educational Code § 67386, the California Legislature conditions state funds for student financial assistance on the enactment of a sexual assault policy on campus.<sup>107</sup>

This standard requires that campuses adopt an affirmative consent policy that requires participants in sexual activity to engage in continuous communication regarding consent. California’s law provides:

‘Affirmative consent’ means affirmative, conscious, and voluntary agreement to engage in sexual activity. It is the responsibility of each person involved in the sexual activity to ensure that he or she has the affirmative consent of the other or others to engage in the sexual activity. Lack of protest or resistance does not mean consent, nor does silence mean consent. Affirmative consent must be ongoing throughout a sexual activity and can be revoked at any time. The existence of a dating relationship between the persons involved, or the fact of past sexual relations between them, should never by itself be assumed to be an indicator of consent.<sup>108</sup>

The policy also requires that the colleges adjudicate the complaints under a preponderance of the evidence standard, and it excludes a number of defenses relating to the victim’s mental and physical state (including intoxication) and the accused’s lack of knowledge arising from not undertaking affirmative steps to secure consent.<sup>109</sup> In 2015, California codified this policy to apply to its public universities.<sup>110</sup> California was not alone. By 2015, often without the action of state legislatures, “[a]n estimated 1,400 institutions of higher education ha[d] adopted disciplinary standards that codify an affirmative definition of sexual consent.”<sup>111</sup>

106. Kevin de León & Hannah-Beth Jackson, *Why We Made ‘Yes Means Yes’ California Law*, WASH. POST (Oct. 13, 2015), <https://perma.cc/3Q26-TE2E>.

107. CAL. EDUC. CODE § 67386(a) (West 2016).

108. *Id.* § 67386(a)(1).

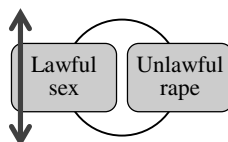
109. *Id.* § 67386(a)(2)–(3).

110. *Id.* § 67386.

111. Deborah Tuerkheimer, *Affirmative Consent*, 13 OHIO ST. J. CRIM. L. 441, 442 n.1 (2016) (citing Sandy Keenan, *Affirmative Consent: Are Students Really Asking?*, N.Y. TIMES (July 28, 2015), <https://perma.cc/9JDH-KTVS> (citing 2015 estimate of National Center for Higher Education Risk Management)).

There is no doubt that the affirmative consent standard is an attempt to reform the myriad problems that have prevented fair, proper, and actual adjudication of rape in the courts and through college disciplinary proceedings. However, critics have leveled some fair and growing critiques over this policy. Some have commented on the due process problems that arise in lowering the burden from reasonable doubt to a preponderance of evidence.<sup>112</sup> I join those who have noted that as much as it is true that anyone following this law cannot be found guilty of rape or having unwanted sex, this definition fails because it is overinclusive.<sup>113</sup> It is hard to imagine that individuals in relationships free from abuse and violence regularly comport with this law and utilize the level of prescribed communication when engaging in what both partners consider consensual sex. Returning to the earlier visual chart, affirmative consent laws sweep in too much wanted sex as actionable rape.

*Illustration 3: Affirmative Consent Laws*



A central problem with affirmative consent laws is that the offense is simply a failure to communicate in the manner prescribed by statute. Such a detailed, affirmative, and continuing level of communication is not followed by numerous individuals who nonetheless consider their activity consensual. Affirmative consent laws then do not effectively capture the essence of what makes some sex unwanted and other sex wanted. Stated another way, as much as affirmative consent laws can set forth what one type of wanted sex looks like, they cannot capture what is the precise harm in unwanted sex. In this respect, this law lacks the defining feature of capturing the social wrong in acquaintance rape as much as the force and non-consent statutes did.

112. See Alan Dershowitz, *Innocent Until Proven Guilty? Not Under 'Yes Means Yes'*, WASH. POST (Oct. 14, 2015), <https://perma.cc/DNT4-HD72>; Aya Gruber, *Rape Law Revisited*, 13 OHIO ST. J. CRIM. L. 279, 288–89 (2016) (“The preponderance-of-the-evidence standard, accordingly, produces disproportionately frequent findings of guilt (in relation to other types of disciplinary allegations) when decision-makers are predisposed toward finding rape occurred, just as the beyond-a-reasonable-doubt standard arguably permitted disproportionate acquittals, when criminal jurors were predisposed toward disbelieving or disliking rape complainants.”).

113. See, e.g., Gruber, *supra* note 112, at 289–90 (“Is proceeding with sex without a ‘yes’ retributively wrongful?”).

### B. *Developing the Crime of Rape by Malice*

As set forth above, much attention has been paid to finding an actus reus that captures the crime of rape. This has been the focus of legislative reforms over the past forty years. Such reforms abolished the resistance element and marital rape exemption, while crafting non-consent, and more recently affirmative consent, as a replacement or supplement to rape by forcible compulsion. Less legislative attention has been paid to grading rape on the basis of mens rea. Statutory rape (sex between an adult and a minor) is an exception simply because it persists as a rare status crime not requiring a mens rea in a majority of—but not all—states.<sup>114</sup>

For rape between adults, however, the legislatures have not undertaken the same desire to grade rape by the mens rea found in other crimes.<sup>115</sup> Over a decade ago, Professor Robin Charlow started an important conversation, asking whether the concepts of willful blindness, callous indifference, and moral indifference could be imported into defining unwanted sex as crimes.<sup>116</sup> Although she rejected these concepts out of concern of their practical implementations,<sup>117</sup> I wish to revive the question of whether rape

114. DAVID CRUMP ET AL., *CRIMINAL LAW: CASES, STATUTES, AND LAWYERING STRATEGIES* 356 (3d ed. 2013) (“A majority of states make statutory rape (typically a person under seventeen years of age) a strict liability offense with respect to the child’s age. This principle results in some prosecutions in which the intercourse is undisputedly consensual and the child is nearly the age of consent, with the defendant reasonably believing her to be of lawful age.”).

For a number of states, however, marriage is a defense to statutory crime. Maura Strassberg, *The Crime of Polygamy*, 12 *TEMP. POL. & CIV. RTS. L. REV.* 353, 378 n.177 (2003) (“It is generally understood, in Utah and elsewhere, that sexual relations in the context of a valid marriage to a minor is a defense to what otherwise would be statutory rape.”); *Quintero-Salazar v. Keisler*, 506 F.3d 688, 693–94 (9th Cir. 2007) (California’s crime of statutory rape is not a crime of moral turpitude in part “because some conduct criminalized under § 261.5(d) would be legal if the adult and minor were married.” This exception arises because the social ill is not sex between adults and minors but stopping births of children to unwed mothers. “California’s purpose in passing the law reveals that it was not moral, so much as pragmatic—they were attempting to reduce teenage pregnancies.”); *Quintero-Salazar*, 506 F.3d at 693 (citing *Michael M. v. Superior Court of Sonoma County*, 450 U.S. 464, 471 (1981)) (“[T]he justification for the statute offered by the State, and accepted by the Supreme Court of California, is that the legislature sought to prevent illegitimate teenage pregnancies.”).

115. See Robin Charlow, *Bad Acts in Search of a Mens Rea: Anatomy of a Rape*, 71 *FORDHAM L. REV.* 263, 267–68 (2002) (“The mens rea of rape usually refers instead to the defendant’s mental attitude toward the element of nonconsent. Thus, what one cares about is whether the defendant, who had intercourse without consent, wanted to have sex without consent, knew he did not have consent, or was reckless or negligent as to whether he had the complainant’s consent. When I refer to the mens rea of rape, I mean to refer to whichever of these is required to prove a charge of rape.”); see Kinports, *supra* note 10, at 759 (“Very little attention has been paid to the mens rea applicable to the element of force, that is, the defendant’s state of mind with respect to the presence of force.”).

116. Charlow, *supra* note 115, at 315 (“One promising prospect to resolve the issue of noncriminal bad acts is to formulate an entirely new mens rea that identifies what is going on in the minds of the individuals whose mental states do not conform to traditional knowledge or willful blindness requirements. In recent years, several writers have named various forms of “indifference,” that appear to encompass the relevant state of mind, as sufficiently culpable mental states to warrant criminal sanction.”).

117. *Id.* at 298.

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can benefit from the lessons of other crimes. I think the most compelling reason to revive that discussion is that the limitations of the element of non-consent arise in large part from having a knowledge mens rea or consent mens rea that permits certain unwanted sex to remain non-actionable.

### 1. *The Mens Rea of Malice*

The concept of malice is an important one to define. Arising in homicide, malice is a term of art that arises not simply from ill will or the character of the actor.<sup>118</sup> Malice is usually described as acting with an abandoned and malignant heart, which captures a wanton indifference—whether it arises from recklessness or callousness or anti-social motives—towards the risk of harming or killing another.<sup>119</sup> Malice has a subjective component which “requires a defendant’s awareness of engaging in conduct that endangers the life of another—no more, and no less.”<sup>120</sup> Malice also has an objective component of risk of harm. “If a reasonable person in [the] defendant’s position would have been aware of the risk involved, then [the] defendant is presumed to have had such an awareness.”<sup>121</sup>

As an example, in Washington State a person is guilty of first-degree murder when “[u]nder circumstances manifesting an extreme indifference to human life, he or she engages in conduct which creates a grave risk of death to any person, and thereby causes the death of a person.”<sup>122</sup> To find someone guilty, a jury is directed to find the elements: (1) that the defendant “created a grave risk of death to another person”; (2) that subjectively “the defendant knew of and disregarded the grave risk of death”; and (3) that objectively “the defendant engaged in that conduct under circumstances manifesting an extreme indifference to human life.”<sup>123</sup>

The most common illustration of malice is a person shooting a gun into a crowd. The shooter may have had no intent to kill any specific person, but the term malice captures and punishes the harm arising from gross indifference towards whether the bullets would in fact harm another. But

118. *California v. Phillips*, 414 P.2d 353, 363–64 (Cal. 1966), *overruled on other grounds by California v. Flood*, 957 P.2d 869 (Cal. 1998) (“The charge in the terms of the ‘abandoned and malignant heart’ could lead the jury to equate the malignant heart with an evil disposition or a despicable character; the jury, then, in a close case, may convict because it believes the defendant a ‘bad man.’ We should not turn the focus of the jury’s task from close analysis of the facts to loose evaluation of defendant’s character.”).

119. *California v. Knoller*, 158 P.3d 731, 738 (Cal. 2007) (Recognizing that malice is defined as “a base, antisocial motive and with wanton disregard for human life . . .” (quoting *People v. Thomas*, 261 P.2d 1, 7 (Cal. 1953)).

120. *Knoller*, 158 P.3d at 733.

121. *California v. Watson*, 637 P.2d 279, 283 (Cal. 1981) (citing *Weber v. Pinyan*, 70 P.2d 183 (Cal. 1937)).

122. WASH. REV. CODE ANN. § 9A.32.030(1)(b) (West 2016).

123. WASH. PATTERN JURY INSTR. CRIM. 26.06 (4th ed. 2016).

malice is often used in other contexts where the actor exhibits a high disregard over whether his or her conduct presents a risk of harm to another.

For instance, in Washington State, a man named James Barstad drove a car that hit and killed two women.<sup>124</sup> Prior to their deaths, Mr. Barstad had consumed a large quantity of alcohol and gotten into a fight with his girlfriend. A little after 7:00 p.m., Mr. Barstad's girlfriend asked him to leave her house. He complied with her request, intending to drive his truck to a park to sleep off the alcohol. Mr. Barstad was agitated and emotionally angry. At one point, a couple saw Mr. Barstad pacing in the road, and when they slowly drove past him, he charged at them and gestured as if he were shooting at them. Shortly after, Mr. Barstad got back in his truck and drove forty to fifty miles per hour towards another driver. Mr. Barstad applied his brakes, creating blue smoke. He grinned at the driver he nearly hit, jumped a curb, and drove on a lawn around a building. Following this, Mr. Barstad ran a red light, driving forty-five to fifty miles an hour, flipping off motorists as he drove past. Mr. Barstad then accelerated into a second intersection, running a red light at a speed of fifty-five to sixty miles an hour. Mr. Barstad testified that he knew he was going too fast to stop and accelerated to get through the intersection before the cross traffic started. This time, Mr. Barstad's truck hit two cars, killing a passenger and driver. After the collision, he had a 0.16 blood alcohol level, was angry, and failed to show remorse.<sup>125</sup>

The prosecutor charged Mr. Barstad with two counts of first-degree murder based on his reckless indifference towards life.<sup>126</sup> He objected to the charge and instructions, but the Court of Appeals was satisfied that the objective component met the "extreme indifference" prong because of the "level of intoxication, his excessive speed, the fact he had run a red light and confronted other motorists even before he reached the Hamilton/Mission intersection, and his expressed contempt for the injuries he caused, [gave] meaning to the term 'extreme indifference' in this case."<sup>127</sup> Mr. Barstad contended that he lacked the subjective intent to kill. The court disagreed that an intent to kill was required: "It is not required that the offender intended to commit the offense. He need only know of and disregard the fact his conduct presents a grave risk of death to others, as evidenced by circumstances that manifest his extreme indifference to human life."<sup>128</sup>

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124. *Washington v. Barstad*, 970 P.2d 324, 326 (Wash. Ct. App. 1999).

125. *Id.* at 326–27.

126. *Id.*

127. *Id.* at 325.

128. *Id.* at 329.



The *Barstad* case, then, is a template to explain how facts evincing an extreme indifference to human life ratchet up a drunk driving offense to murder by malice.

## 2. *Defining the Elements of Rape by Malice*

This article proposes using malice to define the crime of rape. In Montana, the crime of sexual intercourse without consent is defined as “[a] person who knowingly has sexual intercourse without consent with another person.”<sup>129</sup> The jury is directed to find three elements: (1) that the defendant “had sexual intercourse” with the victim; (2) that the sexual intercourse was without the consent of the victim; and (3) “[t]he defendant acted knowingly.”<sup>130</sup> “Knowingly” is defined to occur when either a person “is aware of his or her conduct,” “is aware there exists a high probability that [his or her] conduct will cause a specific result,” or “is aware of a high probability of that fact’s existence.”<sup>131</sup>

Returning to Krakauer’s *Missoula*, the Jordan Johnson case helps illustrate the value of this proposed reform. In that case, Johnson and the victim, referred to as Cecilia Washburn, were both students at the University of Montana. Johnson was the star quarterback. On one fateful Saturday, they texted in the afternoon and planned to meet up that evening to watch a movie at Washburn’s house.<sup>132</sup> After drinking for five hours, Johnson sent Washburn a text asking her to pick him up because he had been drinking, and when they returned to her house, they started watching a movie.<sup>133</sup> They began kissing, and Jordan grabbed her arm and started “getting really excited.” Washburn said she told him to take a break and watch the movie. Johnson rolled back on top of her and “[s]eemed determined to have intercourse.” He pinned her down, took off her clothes, grabbed her hips, turned her over, and told her, “You said you wanted it,” and then penetrated her vagina with his penis.<sup>134</sup> As soon as he was finished, he put on his clothes, and she texted her roommate in the next room, reporting, “I think I might have just gotten raped. He kept pushing and pushing and I said no but he wouldn’t listen. . . omg what do I do!”<sup>135</sup> Shocked, the roommate waited a few minutes and then replied for her to get out of the room, which she did

129. MONT. CODE ANN. § 45–5–503 (2015).

130. MONT. CRIM. JURY INSTR. 5–125(a) (2009).

131. *Id.* 2–104.

132. KRAKAUER, *supra* note 3, at 135.

133. *Id.* at 135–36.

134. *Id.* at 137–38.

135. *Id.* at 260, 281.

minutes later. Washburn looked like she was about to cry, drove Johnson home, and then returned upset.<sup>136</sup>

Johnson also testified and provided a different account of the sexual encounter. Johnson described that he took off Washburn's clothes; that he touched her genitals; and that, once naked, Washburn asked if he had a condom and when he said he did not, she answered "It's okay."<sup>137</sup> He testified that they had sex in the missionary position and she switched to her stomach before continuing intercourse. He testified that she was moaning and had no outward signs of resistance or non-consent.<sup>138</sup> He ejaculated in his hand, he cleaned off his hand, and they both put on their clothes. He testified that Washburn did not have an orgasm, that they did not kiss or cuddle afterwards, and that Washburn drove him home.<sup>139</sup>

The jury acquitted Johnson.<sup>140</sup> In a post-trial interview with Krakauer, one juror explained that the jurors found Ms. Washburn truthful and her account of the rape credible.<sup>141</sup> Indeed, at the first vote, three or four jurors initially voted for a guilty verdict.<sup>142</sup> The juror nonetheless defended the final unanimous acquittal because the verdict was "based wholly on the letter of the law as instructed by the judge" and that there was not convincing evidence that Mr. Johnson "was aware . . . the sex was non-consensual."<sup>143</sup>

The juror's comment is correct. Under the facts given, there was not sufficient evidence that Johnson knew that he was having sex without Washburn's consent because knowledge is defined as his "awareness" or "high probability" that the sex was not consensual.<sup>144</sup> According to his testimony, there was no awareness of non-consent.<sup>145</sup> Looking just at Washburn's testimony, it establishes that the sex occurred without her consent, but there is insufficient evidence that Johnson was **aware** that that was the case.<sup>146</sup>

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136. *Id.* at 138–39.

137. *Id.* at 278–79.

138. *Id.* at 280–81.

139. *Id.* at 281–82.

140. *Id.* at 299.

141. *Id.* at 302 ("The juror found Ms. Washburn completely credible. She seemed invested in her studies and focused on her career. I did not believe she manufactured her story of vengeance or malice of any kind. She seemed far too intelligent to have attempted to profit by false claims. . . .").

142. *Id.* at 303.

143. *Id.*

144. *See* MONT. CRIM. JURY INSTR. 2–104.

145. KRAKAUER, *supra* note 3, at 276–88 (Johnson's recitation of the encounter did not contain admissions of having sex without Washburn's consent).

146. *Id.* at 135–39 (Krakauer's narrative of the rape, which included Washburn's testimony, describes the sex as having occurred without her consent, but there was no testimony that Johnson ever admitted to her or to anyone else that the sex was without consent).

The Jordan Johnson case is significant in establishing that some acquittals in rape charges do not arise because the jury believes the defendant's side and disbelieves the victim's testimony. To the contrary, a barrier to conviction arises from the high standard of awareness that a defendant must have to be found guilty of rape. It is no longer a question of credibility. It is an evidentiary problem in establishing that a defendant was aware that the sex is unwanted—even when a jury found it to have been unwanted.

This is where changing the mens rea from knowledge to malice could be significant. Instead of instructing a jury that there must be evidence that Johnson knew the sex was not consensual, the jury could have been instructed to find the elements that (1) the defendant created a grave risk of having sex without consent (objective); (2) the defendant knew of and disregarded the grave risk of having sex without consent (subjective); and (3) the defendant engaged in that conduct under circumstances manifesting an extreme indifference to whether the sex was without consent.

Just like homicide cases, the specific facts of any given circumstance are relevant in assessing whether the objective risk was present to a reasonable person. Applied to the facts of the Jordan Johnson case, the following facts from Washburn's and Johnson's testimony—deemed credible—would be legally relevant to the first element: showing up to a date intoxicated, never having had sex with this partner before, not using a condom,<sup>147</sup> proceeding to sex after being told to watch a movie instead of kissing, not discussing and asking about current desires, not kissing or cuddling after sex, and not providing the partner with sexual gratification. These facts could have been evidence establishing a grave risk of having sex without consent.

Turning to the second element, the jury may have inferred that Johnson knew and disregarded the risk of having sex without consent by acts and omissions such as ignoring signals of non-consent, failing to secure actual consent, and after ejaculation, not speaking or acting in ways consistent with consensual intimate interactions.

Under rape by malice, the evidence from Johnson's trial presents a different inquiry for the jury than just the question of whether he had knowledge that his actions were without consent. I would contend that more jurors would agree that the evidence adds up to an objective risk of non-

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147. Some states have clarified by statute that even when sex occurs with protection, that fact cannot disprove a victim's claim that the sex was without consent. *See, e.g.*, CAL. PENAL CODE § 261.7 (“In prosecutions under Section 261, 262, 286, 288a, or 289, in which consent is at issue, evidence that the victim suggested, requested, or otherwise communicated to the defendant that the defendant use a condom or other birth control device, without additional evidence of consent, is not sufficient to constitute consent.”).

2017

RAPE BY MALICE

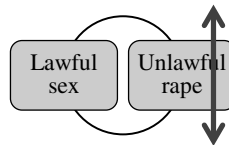
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consent and a subjective disregard of that risk even if the evidence does not establish knowledge of consent.

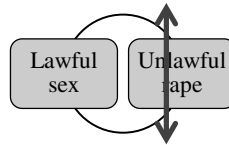
The malice standard will not render all instances of unwanted sex as criminal, but it will increase the conduct it criminalizes from the current knowledge standard. Given that the current definitions of rape result in a 3% conviction rate,<sup>148</sup> even a modest capture of more unwanted sex as actionable rape will increase convictions.

*Illustration 4: Existing Convictions Versus Rape by Malice*

*Existing Definition:*



*Rape by Malice?*



Furthermore, rape by malice achieves what affirmative consent attempts to do—it renders actionable behaviors of those who have sex without the consent of his or her partner. But unlike the overinclusive nature of affirmative consent, a jury must assess the specific facts and circumstances of any given encounter to evaluate an objective assessment of risk. Unlike affirmative consent, malice then will not be overinclusive in capturing unwanted sex as a criminal offense.

### 3. *Potential Criticism of Rape by Malice*

A primary criticism with using the term malice, most notably from those who prefer the MPC, is that the term is imprecise. In the homicide context, drafters of the MPC rejected the term and notion of malice “because they saw this phrase as a sentimental, ambiguous, holdover of an ancient common law.”<sup>149</sup> In criminal law, the need for precision is even more present than other areas of the law because due process demands that

148. See 97 of *Every 100 Rapists Receive No Punishment*, *supra* note 2.

149. V.F. Nourse, *Hearts and Minds: Understanding the New Culpability*, 6 *BUFF. CRIM. L. REV.* 361, 371 (2002).

a defendant have an opportunity to follow the law, which a vague or ambiguously defined crime prevents.

A likely secondary criticism is that malice is simply attempting to replace knowledge with a recklessness or negligence mens rea. I share the viewpoint that civil negligence has no place in criminal law because penal sanctions, as a normative matter, should not apply to “misfortune or accident.”<sup>150</sup> For clarification, malice is not simply a more confusing way to define recklessness.

Professor V. F. Nourse wrote a lengthy and powerful article defending use of the term malice at common law and in contemporary criminal law.<sup>151</sup> In responding to the criticism that the term malice is vague and sentimental, he asserted that the term was grounded in reason, or the lack of reason that arises from the anti-social behavior in having contempt towards others. “A man was also depraved or of ‘bad heart’ who could not recognize the appropriate limits of his relations to others or who simply acted for no reason at all.”<sup>152</sup>

The very breadth of the term malice then is its greatest strength. Whereas the MPC’s alternative term “recklessness” is simply a gauge of risk,<sup>153</sup> malice captures both reckless conduct and an actor’s contempt animating his conduct.

In the context of campus rape, it is precisely a person’s contempt—not simply reckless behavior—for another that is often the cause for unwanted sex. For years, scholars have argued against using the term “date rape” because it minimizes sexual assault, suggesting that the attack was a mere “unfortunate encounter in which the two parties share culpability because of

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150. California, like other states, has codified the principle that civil negligence is not actionable in criminal law; see CAL. PENAL CODE § 26 (2008) (No crime occurs if the act or omission arises “through misfortune or by accident, when it appears that there [is] no evil design, intention, or culpable negligence.”).

151. See generally Nourse, *supra* note 149.

152. *Id.* at 376–77.

153. Samuel H. Pillsbury, *Crimes of Indifference*, 49 RUTGERS L. REV. 105, 120 (1996) (“The Model Penal Code’s (‘MPC’) definition of reckless murder provides a good example of the view that full awareness of risk is critical to criminal responsibility. The MPC divides the mens rea for reckless murder into four parts: that the offender have (1) consciously disregarded, (2) a substantial, and (3) unjustifiable risk to human life, (4) under circumstances manifesting extreme indifference to the value of human life. These components are referred to as the awareness, danger, necessity and indifference elements. The danger and necessity elements require proof that the defendant’s conduct created a significant risk to human life for no good reason. The risk must be so substantial and unnecessary that ‘its disregard involves a gross deviation from the standard of conduct that a law-abiding person would observe in the actor’s situation.’ The standard permits risk-taking where an overriding concern justifies it. Surgeons and police officers may knowingly risk others’ lives if they have an overriding medical or legal reason for their conduct.”).

too much alcohol and too little clear communication.”<sup>154</sup> The term and its resulting mythology obscures the reality that assailants of sexual assault that fall in the category of “date rape” are much more predatory than the term suggests. In research with assailants who were convicted of only one sexual offense but were granted immunity to discuss their prior conduct, the assailants admitted to multiple attacks—ranging from seven to eleven—against women for which they were never prosecuted.<sup>155</sup> As argued by Diane Rosenfeld, a more apt term for date rape or acquaintance rape than is “target rape.”<sup>156</sup> To the extent that acquaintances are formed, they are formed out of predatory impulses to groom the victim to be less wary of the attack.<sup>157</sup>

In this respect, rape by malice serves this article’s call to have the crime’s definition effectively separate legal behavior from criminal conduct. Sexual conduct with contempt or indifference towards whether the partner is providing consent captures a very meaningful harm in unwanted sex. It is not the result of force; it is not the omission of consent. Rather, it is the assailant’s mindset and assumption that he is entitled to engage in intimacy with another without care or concern for whether the intimacy is being freely given. Recklessness does not capture that harm, but malice—one “who could not recognize the appropriate limits of his relations to others or who simply acted for no reason at all” does.<sup>158</sup>

## V. CONCLUSION

It is clear that if rape law were to be written today, its essence would neither be force nor simply power imbalance. The sexist origins of rape no doubt stunted its evolution into multiple and sophisticated offenses that crimes such as homicide and theft undertook. But the good news is that there is absolutely no reason to be beholden to the past. Unlike the extensive and lengthy court battles citizens engaged in to claim constitutional equality in schools, workplaces, and marriage, criminal statutes are within

154. Lisak, *supra* note 4, at 50 (Dr. Lisak continues to argue that this mythology leads to jurors to be inclined to apportion blame rather than find an assailant culpable). R

155. *Id.* at 55 (citing studies); *see also* Karen Herzog, *Graphic Details Emerge in University of Wisconsin-Madison Rape Case*, USA TODAY, (Oct. 28, 2016), <https://perma.cc/BUG7-HBEH> (reporting that a college student arrested for acquaintance rape had in his possession a notebook documenting his “stalking and grooming” techniques and at least five women have come forward alleging that he had sexually assaulted them).

156. Diane Rosenfeld, Harvard Law School Lecturer on Law, *Mont. L. Rev. Browning Symposium: Sexual Assault on Campus; Conflicts Between Campus and Courts* (2016).

157. *See* Rosenfeld, *supra* note 156; *see also* Herzog, *supra* note 155 (reporting that a college student arrested for acquaintance rape had in his possession a notebook documenting his “stalking and grooming” techniques and at least five women have come forward alleging that he had sexually assaulted them). R

158. *See* Nourse, *supra* note 149, at 376. R

the province of the legislature. Modified and new crimes are created every day with a simple majority vote and signature of the governor.

Why not then write the crime of rape to capture the nature of unwanted sex and to precisely define unwanted sex to exclude wanted sexual activity? Rape by malice is a suggested means to do just that. Altering the mens rea from knowledge to callous disregard for the risk that one's actions are without the consent of another will sweep in more unwanted sex than what current definitions of the offense do. But unlike affirmative consent laws, it will not sweep in lawful sex that occurs without the specific form and method of communication prescribed by statute.