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# A NEW MENS REA FOR RAPE: MORE CONVICTIONS AND LESS PUNISHMENT

Kari Hong\*

## INTRODUCTION

In what is now the “Post-Weinstein era,” victims of sexual assault and harassment are finally being believed. As much as this is overdue, in the context of rape, simply believing victims will not be enough to fix endemic problems arising in how rape is defined, prosecuted, and punished. This Article grapples with two problems presented by contemporary prosecutions of acquaintance rape. The first problem is that it is too difficult to obtain a conviction for rape under existing definitions of the crime: of every 1000 rapes that are estimated to occur, seven will result in a conviction.<sup>1</sup> By contrast, of every 1000 estimated robberies, twenty-two will result in a conviction.<sup>2</sup> Of every 1000 estimated assault and batteries, forty-one result in conviction.<sup>3</sup> Stated another way, reported rapes are convicted at only 1/3 of the rate of robberies and 1/6 the rate of assaults. This discrepancy is odd because a rapist is known to the victim in approximately 80% of the attacks, and the robber is known to the victim in approximately 25% of those crimes.<sup>4</sup> Knowing the identity of one’s assailant should make the conviction rate for rape higher than

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1. *The Vast Majority of Perpetrators Will Not Go to Jail or Prison, RAPE, ABUSE & INCEST NAT’L NETWORK (RAINN)*, <https://www.rainn.org/statistics/criminal-justice-system> (last visited Nov. 13, 2017). The numbers are that out of 1000 rapes, 310 are reported, 57 lead to arrests, 11 are referred to prosecution, and 7 lead to conviction. *Id.*

2. *Id.*

3. *Id.*

4. The reports of rape by non-strangers range from 71% to 82%. *Perpetrators of Sexual Violence: Statistics, RAPE, ABUSE & INCEST NAT’L NETWORK (RAINN)*, <https://www.rainn.org/statistics/perpetrators-sexual-violence> (last visited Jan. 11, 2018) (reporting that 28% of rapes are by strangers, 45% by a friend or acquaintance, 1% by a non-spouse relative, and 25% by spouse or partner for a total of 71% of attacks by those known to the victim); Rape Treatment Ctr., *Facts & Quotes, UCLA MED. CTR.*, <http://www.911rape.org/facts-quotes/statistics> (last visited Nov. 13, 2017) (citing two reports that claim that 82% and 80% of rapes were by those known by the victim). For information on robberies, see generally CAROLINE WOLF HARLOW, BUREAU OF JUSTICE STATISTICS, ROBBERY VICTIMS 1, 3 (1987) (reporting that robbery offenders were strangers in 75% of the 14.6 million reported

that of robberies and assaults; the fact that it does not suggests that something is amiss in how rape is legally defined.

When discussing rape, this Article focuses exclusively on what people think of as acquaintance rapes. All states have an aggravated form of rape, usually defined as a situation with an offender using a weapon, the victim being a child, or both.<sup>5</sup> For clarification, aggravated rape is not the subject of this Article. This Article is focused on rape without these aggravating circumstances, defined as the crime involving one adult (usually a man) who engages in sexual contact with another adult (usually a woman) who did not intend or desire to have the sexual contact. Limiting an inquiry to just acquaintance rapes is not misplaced because approximately 80% of all rapes that occur are committed by people known to the victim.<sup>6</sup>

The second problem is that when a rapist is convicted, the offender is subjected to excessive and disproportionate punishment. Although convictions are rare, when they occur, an offender is punished with a prison term approximately 95% of the time, which is more than double than the approximate 40% rate of prison sentences that other convicted felons serve.<sup>7</sup> These prison sentences are lengthy: over 1/3 of all states (nineteen to be precise) authorize maximum sentences of life terms for rape; twelve states have minimum sentences for rape that start at ten years or more.<sup>8</sup> Although comprehensive national sentencing data is not collected, where information is known, actual prison terms range from eight to thirty years long.<sup>9</sup> By contrast, other Western countries punish the same criminal acts with much shorter prison sentences that are between one and seven years in length.<sup>10</sup> These two problems share a common solution: reforming rape law to increase the numbers of those who are convicted, but also, reduce the length of incarceration and include science-based treatment that other countries successfully use to cure

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robberies between 1973 and 1984 and that “[r]obbery victims were more likely than rape or assault victims to encounter multiple offenders, strangers, or offenders with weapons”).

5. See, e.g., ALA. CODE § 13A-6-61(a)(3)(2017) (defining rape in the first degree as arising when a person sixteen or older “engage[d] in sexual intercourse with a member of the opposite sex who is less than 12 years old”); ARIZ. REV. STAT. ANN. § 13-1423(A) (2017) (defining “violent sexual assault” as arising when a person commits sexual assault and the “offense involved the discharge, use or threatening exhibition of a deadly weapon or dangerous instrument . . .”).

6. See *supra* note 4.

7. See *infra* notes 52, 322 and accompanying text (statutes listing maximum terms); *infra* notes 327–34 and accompanying text (actual lengths of sentences); *infra* notes 335–42 and accompanying text (international comparisons); *infra* notes 279, 333, 342 and accompanying text (rates for prison terms imposed in state and federal courts for rape convictions). In addition, according to Bureau of Justice Statistics data from 2000, state courts “sentenced 40% of convicted felonies to a state prison, 28% to a local jail and 32% to straight probation.” MATTHEW R. DUROSE & PATRICK A. LANGAN, BUREAU OF JUSTICE STATISTICS, NCJ 198821, FELONY SENTENCES IN STATE COURTS, 2000, at 1 (2003). In 2006, the rate was similar, with 41% of convicted felonies punished in state prison and 28% in local jails. SEAN ROSENMERKEL ET AL., BUREAU OF JUSTICE STATISTICS, NCJ 226846, FELONY SENTENCES IN STATE COURTS, 2006—STATISTICAL TABLES 1 (2009).

8. See *infra* notes 52, 323 and accompanying text.

9. See *infra* notes 327–34 and accompanying text.

10. See *infra* notes 335–42 and accompanying text.

offenders. Increasing convictions will never be enough to mete out justice. Only when sentences are fair, shorter, and effective can the most amount of offenders be held accountable.

As a practical matter, a state legislature must clearly define a crime by using elements, which enumerate the discrete conduct (*actus reus*) and mental state (*mens rea*) that an actor must engage in to be prosecuted. As set forth in Part I, the crime of rape, by contemporary standards, is the social harm of a person having unwanted sex with another. But, due to sexism, the vast majority of states fail to define the crime of rape in this manner.

Rather, forty-five states and the District of Columbia require rape to be prosecuted if the unwanted sex also has an additional element of force.<sup>11</sup> Referred to here as “rape by force,” the reason for the additional element arises from sexist origins: rape was not initially understood as a crime involving unwanted sex. Instead, the crime originally was prosecuted to aggrieve the honor of the father or husband of a violated woman rather than as redress for the harm a woman who had been raped experienced.<sup>12</sup>

In addition, in the United States, up until the 1960s, all sex outside of marriage was a crime.<sup>13</sup> The element of force was necessary to separate rape from the crimes of adultery (sex with a married person) and fornication (sex outside of marriage), which the victim would be confessing to when reporting the rape. The crime of rape then was never developed to respond to the social harm of unwanted sex. The contemporary definition of rape by force reflects this limitation, being unable to reach all forms of unwanted sex instead of unwanted sex accompanied by weapons and violence.<sup>14</sup>

Through reform efforts that began in the 1980s, rape was redefined to be a crime without force and with an *actus reus* of consent, or technically non-consent. As a result, thirty-six jurisdictions now include an element of non-consent, often supplementing their definitions of rape by force with non-consent as an alternative means to violate the statute.<sup>15</sup> Referred to here as “rape by non-consent,” the legal definition still fails to define a large amount of unwanted sex as criminal conduct. Only eight jurisdictions define rape exclusively as sex with another without the person’s consent.<sup>16</sup> Rather, twenty-eight of these thirty-six jurisdictions qualify and condition the element of non-consent to specific circumstances such as the parties’ age, employment status, or state of intoxication.<sup>17</sup>

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11. See *infra* note 98 (listing states and statutory provisions).

12. See *infra* notes 78–84 and accompanying text.

13. See *infra* notes 102–15 and accompanying text.

14. See *People v. Brown*, 217 Cal. Rptr. 3d 589, 595 (Cal. Ct. App. 2017); *People v. Anderson*, 314 N.E. 2d 651, 652–53 (Ill. App. Ct. 1974). These cases are further discussed *infra* notes 85–97 and accompanying text.

15. See *infra* notes 126–30 (listing states and statutory provisions).

16. See *infra* notes 126–27 (listing states and statutory provisions).

17. See *infra* notes 128–30 (listing states and statutory provisions).

Although rape defined by a lack of consent should have expanded the actionable types of unwanted sex, in reality, it too has been rendered underinclusive by sexism. Men's fears of false accusations stunted the reach of rape defined by non-consent to arise only in codified power imbalances (where the offender is a state officer or medical professional with power over the victim) or when the victim is incapable of giving consent (most often defined as mental disability or impairment and more recently intoxication).

More contemporary efforts at reforms, including rape by affirmative consent and rape by intoxication, also do not reach the social harm of unwanted sex. These reforms present an additional overinclusive problem of proscribing sex based on a failure to communicate or a failure of sobriety, which can occur when the parties are engaged in what both consider consensual intimacy.

When thinking about criminal law, many think of non-vagueness and non-retroactivity as bedrock principles. However, it is actually the criminal law's evolution that has given it the most legitimacy. Horseless carriages forced states to update manslaughter statutes to apply to drivers. Computers challenged states to develop hacking offenses. It is now time for rape too to reflect contemporary norms of unwanted sex when defining sex crimes, free from the lens of sexist presumptions of conduct, behavior, and entitlements.

As set forth in Part I, the existing definitions of rape that focus on actus reus fail to define the social harm of unwanted sex as a crime. Accordingly, Part II then sets forth a proposed offense of a "rape by malice" that has an actus reus of non-consent and a mens rea of malice. The preliminary value of this proposed new crime is that it more effectively targets unwanted sex as the definition of actionable rape. In the book *Missoula*, Jon Krakauer interviewed a juror about her reasons for acquitting a rapist under Montana's definition of rape, which is one of the eight states that defines rape in its broadest reach as sex without the consent of another.<sup>18</sup> An important insight from this interview is that even when rape is defined broadly, the mens rea of knowledge requires proof that the defendant in fact *knew* he was having sex without his partner's consent. When framed in this manner, it is possible for the jury to both believe a woman's testimony that she was raped but not have evidence that the defendant knew the victim was not consenting. The proposed crime of rape by malice responds to this problem.

Affirmative knowledge is one of the most difficult mental states to prove in criminal law. The crimes of larceny and homicide have avoided this roadblock by evolving into myriad offenses (larceny by trick, embezzlement, vehicular homicide, murder by malice) that consider sophisticated and varied mental states. But rape has not adopted more nuanced mental states, which is a glaring omission.

Malice is a legal term of art that is more than simply a desire to inflict harm on another. In the homicide context, malice is a capacious term that captures the

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18. See JON KRAKAUER, *MISSOULA: RAPE AND THE JUSTICE SYSTEM IN A COLLEGE TOWN* 302–05 (2015).

mental state that arises when someone intentionally wants to kill another, recklessly causes the death of another, or acts with “an abandoned and malignant heart,” with such extreme indifference towards human life that she has no regard over whether her conduct harms another. Although thoughtful scholars have argued that the term malice is too vague, unworkable, or implicates character instead of conduct,<sup>19</sup> those criticisms do not arise from the prosecutors, defendants, and judges that use that term each and every day to effectively adjudicate the thousands of homicide cases in common law jurisdictions. To the contrary, the mens rea of malice has resulted in murder convictions for socially contemptuous conduct that would have otherwise not been prosecuted or prosecuted only for negligent or vehicular manslaughter.

One example is the *Knoller* case involving a woman who owned a vicious and uncontrollable 150-pound dog, unhabituated to humans, who attacked others, and lived with this dog in a residential apartment building in San Francisco.<sup>20</sup> The dog attacked and killed a neighbor.<sup>21</sup> In the immediate aftermath, the dog owner returned to the crime scene, not to call 911 or check on the victim, but to look for lost keys.<sup>22</sup> Another is *Fleming*, in which a drunk driver with a 0.315 blood alcohol level who, akin to the Frogger video game, drove against rush hour traffic up to 80 mph in a 45 mph zone before killing a person in a head-on collision.<sup>23</sup> In both instances, malice expanded the reach of murder to also include killings that arose from people who held contempt for the safety and well-being of others.

As applied to the crime of rape, the value of the malice mens rea is that it is nimble enough to capture rapes arising from a defendant’s deliberate plan to engage in sex without the victim’s consent, reckless disregard of risk that he is having sex without the victim’s consent, and extreme indifference over whether he is having sex without the consent of victim. It also includes evidence after the encounter to gauge if the accused had a malignant heart when engaging in sexual conduct. Like the dog owner in *Knoller*, whose disinterest in calling 911, lack of inquiry about the victim, and return to the crime scene to look for her keys all helped prove inferences that she held the same extreme indifference toward the well-being of victim before the dog attack, so too can evidence of how a man acts after a sexual encounter prove whether he knew or cared if the encounter was consensual or not.<sup>24</sup> For example, in the famous rape case profiled in *Missoula*, would the college quarterback also have been acquitted if the jury was directed to consider factors such as the fact that he abruptly ended the sexual encounter

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19. See *infra* Part II.B (defining malice); *infra* Part II.C (discussing criticisms and responses to such criticisms of the definition of malice).

20. *People v. Knoller*, No. A123272, 2010 WL 3280200, at \*2 (Cal. Ct. App. Aug. 20, 2010).

21. *Id.*

22. *Id.* at \*43.

23. See *United States v. Fleming*, 739 F.2d 945, 946–47 (4th Cir. 1984).

24. See *infra* note 215 and accompanying text (discussing *Knoller*); *infra* Part II.D (explaining how different facts would become relevant in a rape by malice prosecution).

without any efforts to kiss, cuddle, or provide her with sexual gratification, actions consistent with consensual activity? Or why, after weeks of endless texts with the woman, did the quarterback suddenly cease all communication after their sexual encounter? The mens rea of malice would direct the jury to consider whether the defendant's indifference towards the victim's well-being after their encounter was also evidence of indifference over whether the sex act was consensual when it was happening.<sup>25</sup>

Rape by malice would more effectively police and convict those for engaging in unwanted sex than do current definitions of rape. As a result, more rapists will be convicted. But under our current punishment practices, punishing more rapists must give us pause. In 1897, Oliver Wendell Holmes stressed "we must consider the criminal rather than the crime."<sup>26</sup> Part III attempts to do both. Our society is painfully aware of how our Tough-on-Crime era increased our prison population by 400% in only one generation.<sup>27</sup> The United States has 5% of the world's population and over 20% of the world's prison inmates.<sup>28</sup> It is widely recognized that mass incarceration has been too costly with respect to long prison sentences, the loss of human capital, the racial disparities in convictions, the financial toll of mass incarceration, and the ineffectual nature of prisons to stop crime.<sup>29</sup>

Potential and actual sentences for rape are excessive. Nineteen states have maximum sentences of 99, 100 years, or life terms. Twelve states have minimum sentences that begin at ten years and range as high as twenty-five years. Although reliable and accurate statistics are hard to come by, where data has been made available, it shows that a person convicted of rape is sentenced to prison terms in approximately 95% of cases (as opposed to 40% for other felonies), and the length

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25. See *infra* notes 254–61 and accompanying text (discussing facts from the prosecution of the college quarterback who was acquitted of rape).

26. Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 470 (1897) (quoting Franz Joseph Gall's theory regarding his studies of nature versus nurture).

27. JONATHAN WROBLEWSKI, U.S. DEP'T OF JUSTICE, SENTENCING AND CORRECTIONS REFORM: WHERE WE ARE AND WHERE WE'RE HEADED 5 (2016) (on file with author). This current mass incarceration has not been the norm. To the contrary, in 1972, there were 196,092 prisoners in federal and state prisons. By 2014, the numbers had risen over 400%, to a population of 1,508,636. *Id.*; see also Sharon Dolovich, *Cruelty, Prison Conditions, and the Eighth Amendment*, 84 N.Y.U. L. REV. 881, 886–87 (2009) ("Over the last 35 years, the population of America's prisons and jails has soared from approximately 360,000 to over 2.3 million people. More than one in a hundred American adults is currently behind bars.")

28. *The Prison Crisis*, ACLU, <https://www.aclu.org/prison-crisis> (last visited Nov. 4, 2017).

29. See generally MICHELLE ALEXANDER, *THE NEW JIM CROW* 93–94 (rev. ed. 2012) (discussing racial disparities and the exponential rise in the U.S. prison population); Emily Badger, *The Meteoric, Costly and Unprecedented Rise of Incarceration in America*, WASH. POST (Apr. 30, 2014), [https://www.washingtonpost.com/news/wonk/wp/2014/04/30/the-meteoric-costly-and-unprecedented-rise-of-incarceration-in-america/?utm\\_term=.f0edc1583594](https://www.washingtonpost.com/news/wonk/wp/2014/04/30/the-meteoric-costly-and-unprecedented-rise-of-incarceration-in-america/?utm_term=.f0edc1583594); Alana Semuels, *What Incarceration Costs American Families*, ATLANTIC (Sept. 15, 2015), <http://www.theatlantic.com/business/archive/2015/09/the-true-costs-of-mass-incarceration/405412/> (describing the ongoing financial burdens faced by families of those who have been incarcerated).

of those sentences are between eight and thirty years long.<sup>30</sup> By contrast, countries in Western Europe impose a sentence for rape at lengths that are half to one-fifth these terms.<sup>31</sup>

In reforming rape law, it is not naïve or misguided then to recognize that lighter sentences have enormous value to society, victims, and defendants. This Article proposes a five-year maximum prison term for acquaintance rape. This proposed lighter sentence neither suggests that the crime of rape is not serious and worthy of serious consequences nor that the offender is not depraved. To the contrary, the reasons for this proposal arise from the following three factors that seek to hold more offenders accountable for rape:

*First*, lengthy prison terms may be causing more crime than whatever deterrence and incapacitation from prison time prevents.<sup>32</sup> Nationally, state and federal governments spend \$80 billion—each year—on maintaining prisons,<sup>33</sup> an investment that results in three of every four prisoners reoffending within five years of being released.<sup>34</sup> Are prisons simply an expensive means to maintain an unusually high prison population, or are efforts being made to rehabilitate? For those answering with the latter, rehabilitation is not advanced simply for the sake of saving the offender. The Republican-activist Koch Brothers have joined with left-leaning organizations to support criminal justice reform efforts.<sup>35</sup> Whether motivated by money or morality, ending recidivism is more beneficial for all sectors in society.<sup>36</sup>

The starting point in sentencing reform is the reality that 95% of all state prisoners are released when their sentences are over.<sup>37</sup> State and federal jurisdictions that have successfully reduced recidivism have provided means for offenders to reattach to the community with jobs, family ties, community ties, and educa-

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30. See *infra* notes 52, 322 and accompanying text (statutes listing maximum terms); *infra* notes 327–34 and accompanying text (actual lengths of sentences); *infra* notes 279, 333, 342 and accompanying text (rates for prison terms imposed in state and federal courts for rape convictions).

31. See JUSTICE POLICY INST., FINDING DIRECTION: EXPANDING CRIMINAL JUSTICE OPTIONS BY CONSIDERING POLICIES OF OTHER NATIONS 22 (2011); *infra* notes 335–42 and accompanying text (international comparisons).

32. See *infra* Part III.D.

33. See Semuels, *supra* note 29.

34. *Recidivism*, NAT'L INST. JUST., <http://www.nij.gov/topics/corrections/recidivism/pages/welcome.aspx> (last updated June 17, 2014) (reporting a 76.6% recidivism rate for persons within five years of their prison release date).

35. See, e.g., Molly Ball, *Do the Koch Brothers Really Care About Criminal-Justice Reform?*, ATLANTIC (Mar. 3, 2015), <https://www.theatlantic.com/politics/archive/2015/03/do-the-koch-brothers-really-care-about-criminal-justice-reform/386615> (discussing the alliance between liberal activists and the conservative Koch brothers on criminal justice reform efforts). The general counsel for Koch Industries explained, “[C]riminal-justice reform is good for all of us—the rich, the poor, and everyone else.” *Id.*

36. See *id.*

37. Timothy Hughes & Doris James Wilson, *Reentry Trends in the United States*, BUREAU JUST. STAT., <https://www.bjs.gov/content/reentry/reentry.cfm> (last visited Nov. 4, 2017).



tion.<sup>38</sup> Lighter sentences increase the likelihood of maintaining positive community ties, which will in turn reduce the cost of incarceration and repeat offenders.<sup>39</sup> A criminal sentence cannot just be an outlet of community outrage—the pitchforks and torches of yore—but must meaningfully engage the societal goods of rehabilitation of the wrongdoer and include post-conviction reintegration into the community.

*Second*, efforts to reform rape laws are being stalled without penal reforms. The American Law Institute—an elite and influential group of judges, attorneys, and law professors—created the Model Penal Code, a set of proposed crimes.<sup>40</sup> Although there is varying influence on any given proposed crime and defense, every state has adopted some aspect of the Model Penal Code at least in part, and about half of all states have adopted it to a large degree.<sup>41</sup> Despite the Model Penal Code being heralded as a thoughtful and influential code, its definition of rape (first created in 1962 and reformed in 1980) is laden with sexist and limited definitions. Over a dozen years ago, Professor Deborah Denno, among others, criticized this definition in detail and called for “the Model Penal Code’s sexual offense provisions . . . be pulled, revised, and replaced.”<sup>42</sup> On its own website, the American Law Institute recognizes these limitations, cautioning readers that its model definition of rape is “outdated and no longer a reliable guide for legislatures and courts.”<sup>43</sup> Despite this remarkable internal rebuke, in May 2017, members of the American Law Institute again failed to agree on how to reform its definition of

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38. See *infra* notes 346–52 and accompanying text; see also MINN. STAT. § 364.01 (2017) (“The legislature declares that it is the policy of the state of Minnesota to encourage and contribute to the rehabilitation of criminal offenders and to assist them in the resumption of the responsibilities of citizenship. The opportunity to secure employment or to pursue, practice, or engage in a meaningful and profitable trade, occupation, vocation, profession or business is essential to rehabilitation and the resumption of the responsibilities of citizenship.”).

39. See James Gilligan, Opinion, *Punishment Fails. Rehabilitation Works.*, N.Y. TIMES (Dec. 19, 2012), <https://www.nytimes.com/roomfordebate/2012/12/18/prison-could-be-productive/punishment-fails-rehabilitation-works>.

40. See MODEL PENAL CODE (AM. LAW INST. 1981).

41. DAVID CRUMP ET AL., CRIMINAL LAW: CASES, STATUTES, AND LAWYERING STRATEGIES 13 (3d ed. 2013) (“The ‘Model Penal Code’ . . . was the result of nine years of work by a group of experts working with the American Law Institute to provide a model for states to use in reforming their own criminal codes. Since its promulgation in 1962, it has been enormously—although unevenly—influential . . .”). For instance, the Model Penal Code’s recommendation to eliminate the defense of impossibility has been adopted in most states but its recommendations to provide for generous defenses based on mental illness and insanity have not. See Matthew C. Campbell, *Crossing the Rubicon: An Argument for Adopting the Model Penal Code Formulation of Criminal Attempt in Massachusetts*, 47 NEW ENG. L. REV. 949, 957 n.79 (2013) (impossibility defense); Henry F. Fradella, *From Insanity to Beyond Diminished Capacity: Mental Illness and Criminal Excuse in the Post-Clark Era*, 18 U. FLA. J.L. & PUB. POL’Y 7, 25 (2007) (discussing how the states and federal government rejected the Model Penal Code insanity defense after the attempted assassination of President Reagan).

42. Deborah W. Denno, *Why the Model Penal Code’s Sexual Offense Provisions Should Be Pulled and Replaced*, 1 OHIO ST. J. CRIM. L. 207, 207 (2003).

43. *Sexual Assault and Related Offenses*, AM. L. INST., <https://www.ali.org/projects/show/sexual-assault-and-related-offenses/> (last visited Nov. 6, 2017).

rape.<sup>44</sup> A sizeable number of experts resisted reform because improving the definition of rape would lead to more convictions, which creates a larger social problem of mass incarceration without an end in sight.<sup>45</sup> Combining sentencing reforms alongside statutory reforms then is neither misguided nor overly ambitious. To the contrary, because our prisons are at the breaking point, discussing any reform to conviction rates without addressing the penological consequences is myopic at best. Rape by malice then strives to both provide a better definition of the crime and a meaningful attempt to redress what is the best punishment for the offenders, victims, and society.

*Third*, it is not unreasonable to attribute the low rate of rape convictions, at least in part, to jurors', prosecutors', and victims' concerns about overpunishment. There are of course instances of acquaintance rape in which the facts of the case, on their face, are despicable and revealing of a predatory and craven offender.<sup>46</sup> But there are other instances, too, that arise from more ambiguous circumstances of intoxication or which involve an offender who committed a harm animated from confusion and stupidity.<sup>47</sup> In all scenarios, a reasonable juror or prosecutor might pause in seeking a conviction, even though the criminal conduct is morally reprehensible, because of the excessive punishment that often comes with that conviction.

Forty years ago, states had an analogous problem in figuring out the best punishment for a driver who killed another while operating a car. The crime could be punished with either misdemeanor offenses or involuntary manslaughter, which carried a sentence of twenty years. “[P]rosecutors faced with this choice hesitated to proceed on a manslaughter theory, even when the facts so warranted, because of the reluctance of jurors to convict fellow drivers on such a serious charge.”<sup>48</sup> This

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44. See Ashe Schow, *Campus Rape Polices as Law for All? Legal Group Says No*, REALCLEARINVESTIGATIONS (May 29, 2017), [http://www.realclearinvestigations.com/articles/2017/05/29/legal\\_group\\_rejects\\_endorsing\\_campus\\_rape\\_policies.html](http://www.realclearinvestigations.com/articles/2017/05/29/legal_group_rejects_endorsing_campus_rape_policies.html).

45. See *id.*

46. See KRAKAUER, *supra* note 18, at 12–15 (discussing Beau Donaldson’s sexual assault of a childhood friend while she was sleeping); *id.* at 153–57 (describing Donaldson’s unreported rape of another woman that stopped when friends knocked down a locked door in response to her screams); *id.* at 19–21 (describing unreported sexual assault by an acquaintance while the victim was intoxicated and unconscious); *id.* at 34–40 (describing a sexual assault on an intoxicated woman by four football players); *id.* at 119–21 (interview with a rapist describing other encounters where he physically held down the victim during the assault); *id.* at 327–28 (report of a woman who reported being sexually assaulted and statement by alleged rapist that he placed Xanax in the woman’s drink before the alleged assault occurred).

47. *Id.* at 69–70, 74–83 (discussing Calvin Smith, who had been a virgin, who sexually assaulted a woman by engaging in aggressive, unusual conduct he learned from pornography that he thought was commonplace); *id.* at 51–53 (describing an attempted sexual assault that occurred after drinking, consensual activity, and clear communication).

48. *Commonwealth v. Jones*, 416 N.E.2d 502, 505 (Mass. 1981). The court stated:

Before the enactment of [the vehicular manslaughter statute] in 1976, a defendant who had killed another person unintentionally by reason of his improper operation of a motor vehicle might have been prosecuted for any of a variety of misdemeanor offenses, such as driving so as to

recognition of this problem is significant because jurors often are not told of the potential sentence, or if they are, are routinely told to disregard it when deciding guilt.<sup>49</sup> Nonetheless, policy makers properly diagnosed that jurors did not convict obviously guilty people to avoid excessive punishment. In response, state legislatures developed the crime of vehicular manslaughter that carried approximately two-year prison terms for the precise purpose of developing a crime that had serious consequences but not excessive prison terms that deterred convictions.<sup>50</sup> So, too, can rape reformers learn that reducing punishment for rape can result in more convictions and be the needed reform that holds more wrongdoers accountable.

In some states, rape is punished with an actual prison term of thirty years,<sup>51</sup> and in nineteen states, rape carries a maximum sentence of either 99 years, 100 years, or life.<sup>52</sup> Those numbers need to be digested. A person convicted of second-degree

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endanger . . . or for involuntary manslaughter, which carries a maximum penalty of twenty years imprisonment in State prison. The legislative history of [the vehicular manslaughter statute] indicates that prosecutors faced with this choice hesitated to proceed on a manslaughter theory, even when the facts so warranted, because of the reluctance of jurors to convict fellow drivers on such a serious charge . . . . On the other hand, the penalties established for the misdemeanor of driving to endanger did not seem commensurate with the crime of causing a death.

*Id.* (citations omitted).

49. See Andrew Fleischman, *Why Don't Prosecutors Want Jurors to Know the Sentence?*, MIMESIS L. (Sept. 25, 2015), <http://mimesislaw.com/fault-lines/why-dont-prosecutors-want-jurors-to-know-the-sentence/3350>.

50. See *Jones*, 416 N.E.2d at 505 (“From this history, it seems clear that the purpose of [the vehicular manslaughter statute] was to provide a middle ground between the felony of manslaughter and the misdemeanor of driving so as to endanger.”). The court noted that the punishment for manslaughter was twenty years, as opposed to the 2.5-year prison term for vehicular manslaughter. *Id.* at 505 n.6.

51. In Alaska, for the 579 reported rapes in 2012, thirteen ended in convictions, and the average sentence imposed was 29.9 years. See REBECCA ROENFANZ, ALASKA DEP’T OF PUB. SAFETY, CRIME IN ALASKA 2012, at 33 (2012).

52. The following states have the maximum terms for the crimes of rape that would include acquaintance rape listed as 99 years, 100 years, or life: ALA. CODE § 13A-6-61(b) (2017) (stating rape in the first degree is a Class A felony, where the sentence shall be for “life or not more than 99 years” per § 13A-5-6); ALASKA STAT. § 12.55.125(i)(1) (2016) (99 years); DEL. CODE ANN. tit. 11, § 773 (2017) (stating rape in the first degree is a Class A felony, where the sentence shall be fifteen years to life per § 4205(b)(1)); D.C. CODE §§ 22-3002, 22-3020(a) (2013) (stating a person convicted of first degree sexual abuse combined with aggravating circumstances may be subject to life in prison); GA. CODE ANN. § 16-6-1(b) (2017) (“A person convicted of the offense of rape shall be punished by death, by imprisonment for life without parole, by imprisonment for life, or by a split sentence that is a term of imprisonment for not less than 25 years and not exceeding life imprisonment, followed by probation for life.”); IDAHO CODE § 18-6104 (2017) (one year to life); IOWA CODE § 709.2 (2017) (stating sexual abuse in the first degree is a class A felony, subject to life imprisonment per § 902.1(1)); LA. STAT. ANN. § 42(D)(1) (2017) (“life imprisonment at hard labor”); MD. CODE ANN., CRIM. LAW § 3-303(d)(1) (LexisNexis 2017) (life); MICH. COMP. LAWS § 750.520b(2)(a) (2017) (life); MISS. CODE ANN. § 97-3-65(4)(a) (2017) (“imprisoned for life in the State Penitentiary if the jury by its verdict so prescribes; and in cases where the jury fails to fix the penalty at life imprisonment, the court shall fix the penalty at imprisonment in the State Penitentiary for any term as the court, in its discretion, may determine”); MO. REV. STAT. § 566.030(2) (2017) (life); MONT. CODE ANN. § 45-5-503(2)-(3)(a) (2017) (life imprisonment or a term of four to 100 years); N.J. STAT. ANN. § 2C:14-2 (West 2017) (twenty-five years to life); 11 R.I. GEN. LAWS § 11-37-3 (2017) (ten years to life); UTAH CODE ANN. § 76-5-402(3) (LexisNexis 2017) (life); VT. STAT. ANN. tit. 13, § 3252(f)(1) (2017) (three years to life); VA. CODE ANN. § 18.2-61(B) (2017) (five years to life); WASH. REV. CODE §§ 9A.44.040(2), 9A.44.050(2) (2017) (rape in first and second degree are

murder is sentenced to between four to forty years in prison.<sup>53</sup> Why is acquaintance rape often punished more harshly than murder? To the extent that concerns about overpunishment lead a single victim to not report, a prosecutor not to charge, and a juror not to convict, the sentence for a rape conviction must be reformed.

The 2016 conviction of Brock Turner, the Stanford swimmer who attacked an unconscious woman brought with it much attention and public outrage.<sup>54</sup> Even though the conviction did not technically involve the charge of rape, the public believed it did and was outraged by what was seen as an over-privileged white man who received a “free pass” by getting a light sentence.<sup>55</sup> The outrage arose in part because the sentencing judge spoke of Mr. Turner’s equities and sentenced him to what amounted to only a three-month prison term. Much has been written about the racial and class disparities arising from this sentence.<sup>56</sup> But this Article asks, what if Brock Turner deserved this proverbial break? And what if the lesson learned should be that all acquaintance rapists must have the same opportunity for rehabilitation and reform—even when, and especially when, the acts are depraved, despicable, and worthy of unequivocal condemnation?

Many recoil at light sentences for rapists, on the assumption that a light sentence is letting a very bad person off. But it is a mistake to contend that the problem with mass incarceration starts and ends with drug offenders. Retribution for even the most craven of conduct is no longer a tenable option for prisons, prisoners, and the society that must reintegrate offenders. Moreover, national surveys of crime victims lend support to the policy goals of rehabilitation over lengthier sentences: 82% support “[i]ncreasing education and rehabilitation services for the people in the justice system.”<sup>57</sup> Of the male crime victims, 87% attribute crime to alcohol and drug addiction or poor parenting; 81% of the female crime victims agree.<sup>58</sup>

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Class A felonies and may be punishment with a sentence up to life per § 9A.20.021(1)(a)); *see also* notes 322–23 and accompanying text (compiling sentences from states where data is available).

53. *See, e.g.*, CAL. PENAL CODE § 190(a) (West 2014) (fifteen years to life); 730 ILL. COMP. STAT. ANN. 5/5-4.5-30 (2017) (four to twenty years); MONT. CODE ANN. § 45-5-103(4) (2017) (murder punished from two to forty years), VA. CODE ANN. § 18.2-32 (2017) (second-degree murder punished from five to forty years).

54. Emanuella Grinberg & Catherine E. Shoichet, *Brock Turner Released from Jail After Serving 3 Months for Sexual Assault*, CNN (Sept. 2, 2016), <http://www.cnn.com/2016/09/02/us/brock-turner-release-jail/index.html> (“The case drew national attention after the victim’s wrenching impact statement went viral. The brevity of Turner’s sentence triggered outrage against the judge and controversy over how the justice system treats sexual assault survivors.”).

55. *See* Michael Vitiello, *Brock Turner: Sorting Through the Noise*, MCGEORGE L. REV. (forthcoming) (on file with author) (discussing the complicated legal issues that justify the shorter sentence and factors that compel against judicial recall).

56. *See* Gabby Bess, *How Racial Bias Influenced Stanford Swimmer’s Rape Case*, VICE (June 7, 2016), [https://broadly.vice.com/en\\_us/article/bjgg95/brock-turner-rape-case-sentencing-racial-bias](https://broadly.vice.com/en_us/article/bjgg95/brock-turner-rape-case-sentencing-racial-bias); Joseph Margulies, *Racism, Classism, Feminism . . . and Brock Turner*, VERDICT (Sept. 6, 2016), <https://verdict.justia.com/2016/09/06/racism-classism-feminism-brock-turner>.

57. DAVID BINDER RESEARCH, CRIME SURVIVORS’ VIEWS ON TRUMP ADMINISTRATION’S CRIMINAL JUSTICE AGENDA 7 (2017); *see also* ALL. FOR SAFETY & JUSTICE, CRIME SURVIVORS SPEAK: THE FIRST-EVER NATIONAL SURVEY OF VICTIMS’ VIEWS ON SAFETY AND JUSTICE 4 (2016).

58. DAVID BINDER RESEARCH, *supra* note 57, at 5.

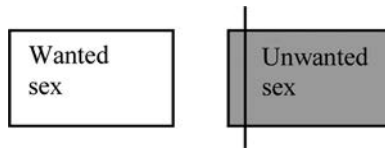


Figure 1. Ideal definition (all conduct to the right of the line would be convicted as a crime and conduct to the left, including some unwanted sex, would be non-actionable).

Only 4% of all surveyed crime victims attribute “too few people in prison” as a cause of crime.<sup>59</sup> In this respect, reforms to rape sentences must be accompanied by a call for more effective criminal justice intervention rather than simply incarceration and more of it. Instead of channeling outrage for the first rape, sentencing must also meaningfully seek to rehabilitate and prevent a second. This Article advances the normative position that a lighter sentence for acquaintance rape serves retribution, and just as importantly, serves the societal goals of ending crime by increasing convictions and reintegrating offenders who complete shorter sentences.

#### I. CONTEMPORARY DEFINITIONS OF ACQUAINTANCE RAPE FAIL TO REFLECT THE SOCIAL HARM OF UNWANTED SEX

Because criminal law is most effective when it captures and criminalizes social harm, the current definitions of rape fail this test. The crimes of rape by force and rape by non-consent are both underinclusive in their reach, failing to capture numerous instances of unwanted sex. Part I explores how and why this came to be.

##### A. *Current Rape Laws Do Not Adequately Criminalize Unwanted Sex, The Social Harm in The Offense of Acquaintance Rape*

In 1998, Professor Stephen Schulhofer offered an elegant definition of the social harm of contemporary rape as simply being unwanted sex.<sup>60</sup> In his groundbreaking book, Professor Schulhofer discussed the problems of rape law as it was then formulated and how the definition lacked a way to distinguish wanted sex from unwanted sex. Building on this insight, as argued in more detail below, criminal law is effective when it both evolves to reflect emerging social harms and separates out legal conduct from criminal behavior. In the context of rape then, an ideal definition of rape would not criminalize wanted sex and would define unwanted sex as a crime. As shown in Figure 1, all lawful sex, which is in the white box, would not fall within the definition of rape. And, most—but not all—of unwanted sex, which is in the gray box, would be captured by the statutory definition.

59. *See id.*

60. *See* STEPHEN J. SCHULHOFER, UNWANTED SEX: THE CULTURE OF INTIMIDATION AND THE FAILURE OF LAW 274 (1998) (“Of all our rights and liberties, few are as important as our right to choose freely whether and when we will become sexually intimate with another person.”).

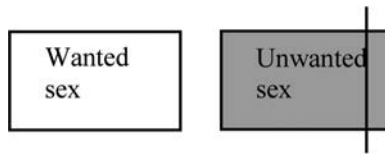


Figure 2. Contemporary low conviction rate (all conduct to the right of the line would be convicted as a crime, which leaves the majority of unwanted sex as not being a crime).

Of note, the line demarcating lawful from unlawful conduct is not drawn perfectly between the two categories. There will always be conduct that easily falls in the definition of wanted sex and conduct that that easily falls in what the reasonable jury would deem unwanted sex. But at the margins, the legal standard requiring a jury to convict a defendant beyond a reasonable doubt, will permit some unwanted sex to be non-actionable as a crime. This error rate that favors defendants is the reality and, as many can defend, a normative good of our legal system. As most poignantly defended by Supreme Court Justice John Marshall Harlan, “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.”<sup>61</sup>

However, the contemporary conviction rate for rape is low, which is estimated to be around seven convictions for every 1000 rapes that occur.<sup>62</sup> Such a low conviction rate demands reconsideration of how rape is currently defined. A conviction rate that barely prosecutes any unwanted sex as a crime establishes a disconnect between the contemporary social harm of rape constituting unwanted sex and contemporary definitions of the crime. As illustrated in Figure 2, the line demarcating what is criminal from what is not is no longer slightly to the right of the gap between wanted and unwanted sex.

Rather, current definitions of what constitutes rape classify only a very small number of acts of unwanted sex as the crime of rape.<sup>63</sup> In the gray box, containing all “unwanted sex,” a line would be at the very far right, capturing only a small number of unwanted sex as a crime. As a corollary, the contemporary definition of rape is equally flawed in permitting the majority of unwanted sex to be non-

61. *In re Winship*, 397 U.S. 358, 372 (1970) (Harlan, J., concurring).

62. See *supra* note 1. The data from RAINN is generally viewed as reliable, but the reported data can range from a 3% to 18% conviction rate. See Tyler Kingkade, *Prosecutors Rarely Bring Charges in College Rape Cases*, HUFFPOST (June 17, 2014), [http://www.huffingtonpost.com/2014/06/17/college-rape-prosecutors-press-charges\\_n\\_5500432.html](http://www.huffingtonpost.com/2014/06/17/college-rape-prosecutors-press-charges_n_5500432.html). One reason for the discrepancy is that it is difficult to accurately estimate how many unreported rapes exist. As demonstrated in this Article, comparing the definitions of rape from one state to another is not always comparing the same crime, and not all states keep statistics. See *infra* note 98 (providing various definitions of what “force” establishes rape by force); *infra* notes 76–77, 320–22 (discussing limitations of available data and comparisons between states).

63. See *infra* Part I.B (discussing limitations of defining rape by force); *infra* Part I.C (discussing limitations of defining rape by non-consent).

actionable. For the victims who experience sexual assault, as explained in more detail below, the contemporary definitions of the crime of rape laws are inadequate.

In any given criminal offense, the legislature defines the mental state, known as the *mens rea*, as what a defendant must have when engaging in the prohibited conduct—known as the *actus reus*. Together the bad thoughts and the bad act combine to constitute the elements of the crime.<sup>64</sup> If murder was defined as a person with the purpose to kill who causes the death of another, then Person X who wishes to kill her neighbor, but does not, does not commit the crime of murder, even if the neighbor dies from some unrelated accident. Person X had the needed *mens rea* (a desire to kill), but lacked the *actus reus* (any conduct that “causes the death”) to meet all elements of the crime.

State legislatures have enormous power in defining what conduct constitutes a crime. As relevant both to Part I and Part II, how a state defines a crime and which elements it requires the prosecution to prove deserves attention because what conduct is criminal reflects policy choices over what social harm is the target of criminal law and what conduct will be let alone by the criminal code. For instance, before 1990, the crime of stalking—obsessive attention towards another that presents a threat of harm—did not exist as an actionable offense.<sup>65</sup> It was only after the 1989 murder of a well-known actress by her obsessive fan that California become the first state to define the stalker’s obsessive and threatening behavior as a criminal offense.<sup>66</sup> Likewise, the recent legalization of marijuana in eight states and the District of Columbia is an example of how conduct once the target of criminal law—possessing, growing, and consuming marijuana—is no longer deemed (at least by the jurisdictions pursuing legalization) a social harm worthy of policing and criminalization.<sup>67</sup>

For some newly-emerging behavior and technologies, legislatures needed to create new types of crimes previously unimaginable to prior generations. For instance, Congress defined new types of intangible property—honest services—to capture the social harms of government corruption that were not captured by theft or state bribery law alone.<sup>68</sup> “Hacking” needed its own set of laws to capture the

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64. CRUMP ET AL., *supra* note 41, at 21–22.

65. Melissa A. Knight, *Stalking and Cyberstalking in the United States and Rural South Dakota: Twenty-Four Years After the First Legislation*, 59 S.D. L. REV. 392, 394 (2014).

66. *Id.* at 394–95.

67. See *State Marijuana Laws in 2017 Map*, GOVERNING, <http://www.governing.com/gov-data/state-marijuana-laws-map-medical-recreational.html> (last updated Sept. 14, 2017); see also Gina Belafonte et al., *What Jeff Sessions Is Getting Wrong About Legal Weed*, CNBC (July 18, 2017), <http://www.cnbc.com/2017/07/18/jeff-sessions-misguided-marijuana-crackdown-commentary.html> (discussing reasons to support legalization of marijuana, the social good that arises from legalization marijuana, and social harms that arise from criminalizing recreational marijuana use).

68. *Skilling v. United States*, 561 U.S. 358, 400 (2010). The court stated:

[T]he 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. For example, if a city mayor (the offender)

social harm that arises when a computer user entered into a computer system and the cyber-burglars were no longer “disenchanted teenagers” but sophisticated actors seeking to “potentially destabilize society.”<sup>69</sup> More recently, “upskirting” is a new crime responding to the social harm of strangers taking photographs of someone’s underwear in public spaces.<sup>70</sup> In 2014, the Supreme Judicial Court of Massachusetts held that the state’s Peeping Tom statute used to prosecute a man in that case did not apply to the conduct of upskirting.<sup>71</sup> Peeping Tom statutes responded to the surreptitious surveillance of people in various states of nudity; taking photos of a person’s underwear on public transportation did not involve nudity.<sup>72</sup> In the last footnote of the case reversing the conviction, however, the Supreme Judicial Court listed other state statutes that did adequately reach and criminalize upskirting as a means to suggest a legislative fix if the legislature deemed the reversal inappropriate.<sup>73</sup> The public outcry from the reversal motivated the legislature to act, and act quickly. The decision was issued on March 5, 2014, and within two days of this decision, on March 7, 2014, the Massachusetts legislature passed, and the governor signed, a new law criminalizing upskirting, capturing the social harm that ubiquitous smart phones presented.<sup>74</sup>

All of these examples illustrate how new social harms borne from new social interactions and technology demanded the invention of new, previously unknown crimes. In each example, the criminal law has been effective in being nimble, creative, and responsive to newly-recognized social harms. It then is all the more

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accepted a bribe from a third party in exchange for awarding that party a city contract, yet the contract terms were the same as any that could have been negotiated at arm’s length, the city (the betrayed party) would suffer no tangible loss. Even if the scheme occasioned a money or property *gain* for the betrayed party, courts reasoned, actionable harm lay in the denial of that party’s right to the offender’s “honest services.”

*Id.* (citations omitted).

69. Eric J. Sinrod & William P. Reilly, *Cyber-Crimes: A Practical Approach to the Application of Federal Computer Crime Laws*, 16 SANTA CLARA COMPUTER & HIGH TECH. L.J. 177, 229 (2000) (“Over the course of the past ten years, cyber-crimes have progressed from being malicious pranks by disenchanted teenagers to a serious threat that will tax the resources of crime enforcement and potentially destabilize society. Successful criminal prosecution and civil litigation will require that members of the legal community familiarize themselves with the various hacking techniques to ensure that the perpetrators are tried and convicted under the relevant statutes.”); see also Ben Yagoda, *A Short History of “Hack”*, NEW YORKER (Mar. 6, 2017), <http://www.newyorker.com/tech/elements/a-short-history-of-hack>.

70. See *Commonwealth v. Robertson*, 5 N.E.3d 522, 529 n.17 (Mass. 2014) (“Other States, recognizing that women have such an expectation of privacy, have enacted provisions specifically criminalizing the type of upskirting the defendant is alleged to have attempted.”).

71. *Id.* at 529 (“At the core of the Commonwealth’s argument to the contrary is the proposition that a woman, and in particular a woman riding on a public trolley, has a reasonable expectation of privacy in not having a stranger secretly take photographs up her skirt. The proposition is eminently reasonable, but § 105(b) in its current form does not address it.”).

72. *Id.* at 527–28.

73. *Id.* at 529 n.17 (discussing statutes from Florida and New York)

74. Jessica Ravitz, *‘Upskirt’ Ban in Massachusetts Signed into Law*, CNN (Mar. 7, 2014), <http://www.cnn.com/2014/03/07/justice/massachusetts-upskirt-bill/index.html>.



glaring that rape law has not evolved to capture the modern social harm of unwanted sex.

Comparing crimes across states is inherently difficult, given that states have different definitions and often different names for similar conduct. In comparing statutes that covered what is thought of as burglary, Judge Posner observed that the same conduct would be prosecuted as “theft” in Indiana, “entry into a locked vehicle” in Wisconsin, “burglary” in Illinois, and one of seven grades of “breaking and entering” in Michigan.<sup>75</sup>

Despite these limitations, generalities about rape law can be made. For acquaintance rape, the actus reus of the offense is defined either as rape by force or rape by non-consent. As an example of rape by force, Connecticut defines rape by the elements of a person who:

compels another person to engage in sexual intercourse by the use of force against such other person or a third person, or by the threat of use of force against such other person or against a third person which reasonably causes such person to fear physical injury to such person or a third person . . . .<sup>76</sup>

As an example of rape by non-consent, Missouri defines the crime of second-degree rape as occurring when a person “has sexual intercourse with another person knowing that he or she does so without that person’s consent.”<sup>77</sup> As an important starting point, both definitions of the actus reus in rape are underinclusive in capturing the majority of unwanted sexual encounters as crime. In the following sections, I explore how and why this is so and the failure then of existing law to capture the social harm in unwanted sex.

### *B. The Contemporary Actus Reus of Rape by Force Is Underinclusive to the Social Harm of Unwanted Sex*

Statutes that define rape by force fail to capture the majority of unwanted sex. As explained in this section, the reason for this underinclusive reach is that when these statutes were formed, the social harm was never identified as unwanted sex. The social harm of rape was either the wounded honor of a male relative of a rape victim or the act of sex occurring outside of the confines of marriage. The Roman Empire recognized rape as a crime, but the social harm of that offense was not concern over the violation of a woman’s autonomy. Instead, the crime was a salve to the wounded honor of the victim’s father, husband, or brother.<sup>78</sup> Even in

75. *Solorzano-Patlan v. INS*, 207 F.3d 869, 873–75 (7th Cir. 2000).

76. CONN. GEN. STAT. § 53a-70(a)(1) (2017).

77. MO. REV. STAT. § 566.031(1) (2017).

78. 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 (2008) (observing that the Roman law criminalized rape “because of its meaning to the men in [the rape victim’s] family or culture, or that it harmed a wife, daughter, or sister because it impugned a husband’s, father’s, or brother’s honor”).

contemporary times, a number of countries in the Middle East have laws that permit a rapist to avoid criminal prosecution if he marries his victim. “The laws were built around patriarchal attitudes that link a family’s honor directly to a woman’s chastity; the marriage option is aimed at shielding the victim’s family from ‘the scandal,’ as one victim’s brother put it in an interview.”<sup>79</sup>

Likewise, when rape was first defined in America, the social harm was not responding to unwanted sex. In the first rape statutes, the *actus reus* also was limited to vaginal penetration, preventing men from being victims of rape and women from being perpetrators<sup>80</sup> (even today, some states such as Alabama continue to limit rape to heterosexual encounters only, and it was not until 2017 when Maryland contemplated rape as involving more than vaginal penetration).<sup>81</sup> Husbands were immune from raping their wives (a now sexist idea originating from legal coverture doctrine that marriage collapses the legal identity of a married woman into her husband’s and unsophisticated presumptions that marriage entitled a husband to sex on demand).<sup>82</sup> Most important and relevant to how rape continues to be defined in contemporary jurisdictions, the definition of force was surprisingly restrictive, usually requiring proof that the defendant engaged in substantial physical violence and the victim engaged in physical resistance (and usually by her “utmost”), which limits the number of defendants who can be guilty of rape.<sup>83</sup> By contrast, modern domestic violence statutes often define the force element very broadly as force resulting in minor injury, which captures many more crimes than

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79. Somini Sengupta, *One by One, Marry-Your-Rapist Laws Are Falling in the Middle East*, N.Y. TIMES (July 22, 2017), [https://www.nytimes.com/2017/07/22/world/middleeast/marry-your-rapist-laws-middle-east.html?\\_r=0](https://www.nytimes.com/2017/07/22/world/middleeast/marry-your-rapist-laws-middle-east.html?_r=0).

80. In 2012, the federal government first expanded its definition of rape to account for same-sex rape and the victimization of men. Roni Caryn Rabin, *Men Struggle for Rape Awareness*, N.Y. TIMES (Jan. 23, 2012), <http://www.nytimes.com/2012/01/24/health/as-victims-men-struggle-for-rape-awareness.html>.

81. Alabama defines rape in the first and second degree and both definitions are defined as “engag[ing] in sexual intercourse with a member of the opposite sex.” ALA. CODE § 13A-6-61(a) (rape in the first degree) (2017); *id.* § 13A-6-62(a) (rape in the second degree); MD. CODE ANN., CRIM. LAW § 3-304(a) (LexisNexis 2017) (rape in the second degree). In 2017, first degree rape was amended to include “sexual act” alongside “vaginal intercourse.” *See id.* § 3-303(a)(1). In both states, lesser crimes expand liability without regard to a victim’s gender. *See* ALA. CODE § 13A-6-65(a) (2017) (the crime of “sexual misconduct” is not limited to heterosexuality); MD. CODE ANN., CRIM. LAW § 3-307 (LexisNexis 2017) (partially defining the crime of “sexual offense in the third degree” without regard to specific genitalia).

82. Between 1975 and 1993, all states formally abolished the marital rape exemption as a doctrine providing full immunity to the husband. 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), <http://www.nytimes.com/1987/05/13/us/marital-rape-drive-for-tougher-laws-is-pressed.html>; Samantha Allen, *Marital Rape is Semi-Legal in 8 States*, DAILYBEAST (June 9, 2015), <https://www.thedailybeast.com/marital-rape-is-semi-legal-in-8-states>.

83. Michelle J. Anderson, *Reviving Resistance in Rape Law*, 1998 U. ILL. L. REV. 953, 962 (“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.”); *see also* Kari Hong, *Rape by Malice*, 78 MONT. L. REV. 187, 199–202 (2017) (citing to commentary and cases discussing reforms to rape by force statutes).

what rape by force does.<sup>84</sup>

Up until modern reforms, the degree of force required to be used before unwanted sex was actionable as a crime was astonishingly high. In a 1974 Illinois case, *People v. Anderson*, an 18-year-old woman was walking on a public street at 5:00 p.m.<sup>85</sup> A man approached her from the rear, put his right arm around her shoulder, and told her: “Do as I say or I’m going to shoot. I have a gun.”<sup>86</sup> She felt what she believed to be a gun against her side and returned to his apartment, where he choked her, struggled with her, and then engaged in acts of intercourse.<sup>87</sup> A doctor who examined her after the incident reported a bruise under her eye, a scratch on her neck, abrasions on her cheek and forehead, vaginal bleeding, and the presence of sperm in her vagina.<sup>88</sup>

The Illinois appellate court reversed the rape conviction because the victim did not see the gun (negating proof of force), and the victim did not resist because she failed to cry out for assistance or attempt to escape during the encounter.<sup>89</sup> Stated another way, proof of bruises, abrasions, and the threat of death did not rise to the force needed to secure a rape conviction. Such a conclusion should be surprising to most readers as the facts do not describe consensual sexual contact. This case shows that when rape is defined by force, many unwanted sexual encounters will not be actionable.

This observation is not a historical footnote. In March 2017, in *People v. Brown*, a California appellate court reversed a conviction involving a gang rape of a 15-year-old girl.<sup>90</sup> In that case, four gang members lured a teenager to their house, “got her falling-down drunk, [and] then had sex with her against her will.”<sup>91</sup> A DNA test identified sperm found in the victim’s vagina to be from the defendant Darnell James Brown.<sup>92</sup> A jury convicted Mr. Brown of rape in concert of a minor, forcible rape, rape of an intoxicated person, and rape of an unconscious person.<sup>93</sup> But on appeal, the conviction for forcible rape was reversed.<sup>94</sup> The issue in the case was that there were two encounters, one in a bedroom in which five men, including

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84. For instance, CAL. PENAL CODE § 273.5(a) (West 2014) defines a domestic violence crime involving the willful infliction of “corporal injury,” which is defined as one “resulting in a traumatic condition.” But “the ‘traumatic condition’ element is not as stringent a requirement as it may seem. A traumatic condition is “a condition of the body, such as a wound, or external or internal injury, . . . whether of a minor or serious nature, caused by a physical force.” *People v. Trudell*, No. E047860, 2009 WL 4931592, at \*6 (Cal. Ct. App. Dec. 21, 2009) (quoting § 273.5(c)).

85. *People v. Anderson*, 314 N.E.2d 651, 652 (Ill. App. Ct. 1974).

86. *Id.*

87. *Id.* at 652–53.

88. *Id.* at 654.

89. *Id.* at 656–58.

90. *People v. Brown*, 217 Cal. Rptr. 3d 589, 596–97 (Ct. App. 2017).

91. *Id.* at 591.

92. *Id.*

93. *Id.*

94. *Id.* at 597.

Mr. Brown, pushed the victim onto her hands and knees and held her in that position while penetrating her, and a second in a vacant apartment in which the victim pushed away Mr. Brown and then fell unconscious.<sup>95</sup> The court agreed that the bedroom encounter involved sufficient force to uphold a rape conviction, but the second one did not on the basis that “[b]ecause [the victim] was unconscious, there was no need to use force or fear to overcome her will.”<sup>96</sup> Because the prosecution had argued both encounters met the definition for force, there was potential that the jury wrongfully considered that second encounter met the definition of a forcible rape. The court accordingly reversed the conviction.<sup>97</sup>

There are three important points arising from the 1974 *Anderson* and 2017 *Brown* cases. First, the level of force needed to support a crime of rape has lessened from the level of violence that it was required in the 1974 *Anderson* case. The 2017 *Brown* case shows that in California, the act of physically restraining a woman was sufficient force to prosecute rape. This is an advance in that Mr. Anderson’s taking a teenager off the streets at gunpoint (even if the victim never sees the gun) and engaging in physical struggle that leaves bruises and abrasions is now enough to meet the level of force needed to prove that the sex was against the will of the victim.

Second, forty-six jurisdictions (forty-five states and Washington, D.C.) define rape as involving an actus reus of force.<sup>98</sup> When rape is defined in this manner,

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95. *Id.* at 594–95 (discussing whether there was sufficient evidence for the jury to find that the events met the legal definition of rape by force).

96. *Id.* at 595.

97. *Id.* at 596–97 (discussing the prosecutor’s failure to elect which facts met the rape definition, the unanimity requirement, and bar on retrial).

98. ALA. CODE § 13A-6-61(a)(1) (2017) (first degree rape, “forcible compulsion”); ALASKA STAT. § 11.41.410(a)(2) (2016) (first degree sexual assault, “causes serious physical injury”); ARK. CODE ANN. § 5-14-103(a)(1) (2017) (rape, “forcible compulsion”); CAL. PENAL CODE § 261(a)(2) (West 2014) (rape, “by means of force, violence, duress, menace, or fear of immediate and unlawful bodily injury”); COLO. REV. STAT. § 18-3-402(1)(a) (2017) (sexual assault, “causes submission of the victim by means of sufficient consequence reasonably calculated to cause submission against the victim’s will”); CONN. GEN. STAT. § 53a-70(a)(1) (2017) (first degree sexual assault, “compels . . . by the use of force”), DEL. CODE ANN. tit. 11, § 773(a)(1) (2017) (first degree rape, “[c]auses physical injury”); D.C. CODE § 22-3002(a)(1) (2013) (first degree sexual abuse, “force”); FLA. STAT. § 794.011(3) (2017) (sexual battery, “uses or threatens to use a deadly weapon or uses actual physical force likely to cause serious personal injury”); GA. CODE ANN. § 16-6-1(a)(1) (2017) (rape, “forcibly and against her will”); HAW. REV. STAT. § 707-730(1)(a) (2017) (first degree sexual assault, “strong compulsion”); IDAHO CODE ANN. § 18-6101(4) (2017) (rape, “the victim resists but the resistance is overcome by force or violence”); *id.* § 18-6101(5) (rape, “the victim is prevented from resistance by the infliction, attempted infliction, or threatened infliction of bodily harm”); *id.* § 18-6101(10) (rape, “the victim submits under the belief, instilled by the actor, that . . . the actor will cause physical harm to some person in the future”); 720 ILL. COMP. STAT. 5/11-1.20(a)(1) (2017) (criminal sexual assault, “uses force or threat of force”); IND. CODE § 35-42-4-1(a)(1) (2015) (rape, level 3 felony, “compelled by force or imminent threat of force”); *id.* § 35-42-4-1(b) (rape, level 1 felony, deadly force, presence of a deadly weapon, or serious bodily injury occurs); IOWA CODE § 709.2 (2017) (first degree sexual abuse, “causes another serious injury”); *id.* § 709.4(1)(a) (third degree sexual abuse, “by force or against the will of the other person”); KAN. STAT. ANN. § 21-5503(a)(1)(A) (2015) (rape, “victim is overcome by force or fear”); KY. REV. STAT. ANN. § 510.040(1)(a) (West 2016) (first degree rape, “forcible compulsion”); LA. STAT. ANN. § 14:42(A)(1)–(2) (2017) (first degree rape, “victim resists the act to the utmost, but whose resistance is overcome

*Brown's* second instance of unwanted sex—intercourse with a woman who was unconscious and had not consented to the sex—will not meet the definition of a rape by force because engaging in unwanted sex alone is not the defining element of the offense. Jurisdictions that define acquaintance rape with the heightened actus reus of force will likely not have many false convictions. But, the downside is that the forty-six jurisdictions that define rape in such a limited manner will not prosecute the disturbing instance of unwanted sex by a criminal gang luring a teenager to their house, “g[etting] her falling-down drunk, [and] then ha[ving] sex

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by force” or “victim is prevented from resisting the act by threats of great and immediate bodily harm”); *id.* § 14:42.1(A)(1) (second degree rape, “victim is prevented from resisting the act by force or threats of physical violence under circumstances where the victim reasonably believes that such resistance would not prevent the rape”); ME. STAT. tit. 17-a, § 253(1)(A) (2017) (gross sexual assault, “result of compulsion”); *id.* § 253(2)(B) (gross sexual assault, by threat); MD. CODE ANN., CRIM. LAW § 3-303(a)(1) (LexisNexis 2017) (first degree rape, “force, or the threat of force”); *id.* § 3-303(a)(2)(i)–(iii) (first degree rape, employ dangerous weapon, inflict serious bodily injury, threaten serious physical injury); MASS. GEN. LAWS ch. 265, § 22(a) (2017) (rape, “submit by force”); MICH. COMP. LAWS § 750.520b(1)(d)(ii) (2017) (first degree criminal sexual conduct, “force or coercion”); MINN. STAT. § 609.342(1)(c) (2017) (first degree criminal sexual conduct, “reasonable fear of imminent great bodily harm”); *id.* § 609.342(1)(e) (2017) (“causes personal injury”); MISS. CODE ANN. § 97-3-65(4) (2017) (statutory rape, “forcible sexual intercourse”); MO. REV. STAT. § 566.030(1) (2017) (first degree rape, “forcible compulsion”); NEV. REV. STAT. § 200.366(1)(a) (2017) (sexual assault, “forces . . . against the will of the victim”); N.H. REV. STAT. ANN. § 632-A:2(I)(a) (2015) (aggravated felonious sexual assault, “overcomes the victim through the actual application of physical force, physical violence or superior physical strength”); N.J. STAT. ANN. § 2C:14-2(a)(6) (West 2017) (sexual assault, first degree “actor uses physical force or coercion and severe personal injury is sustained by the victim”); *id.* § 2C:14-2(c)(1) (sexual assault, second degree, “actor uses physical force or coercion, but the victim does not sustain severe personal injury”); N.M. STAT. ANN. § 30-9-11(D)(2) (2017) (criminal sexual penetration, first degree “use of force or coercion that results in great bodily harm or great mental anguish to the victim”); *id.* § 30-9-11(E)(3) (criminal sexual penetration, second degree, “use of force or coercion that results in personal injury to the victim”); N.Y. PENAL LAW § 130.35(1) (McKinney 2017) (first degree rape, “forcible compulsion”), N.C. GEN. STAT. § 14-27.22(a)(1) (2017) (second degree forcible rape, “force and against the will of the other person”); N.D. CENT. CODE § 12.1-20-03(1)(a) (2017) (gross sexual imposition, “compels the victim to submit by force or by threat of imminent death, serious bodily injury, or kidnapping, to be inflicted on any human being”); OKLA. STAT. tit. 21, § 1114(A)(5) (2017) (first degree rape, “accomplished with any person by means of force, violence, or threats of force or violence accompanied by apparent power of execution regardless of the age of the person committing the crime”); OR. REV. STAT. § 163.375(1)(a) (2016) (first degree rape, “forcible compulsion”); 18 PA. CONS. STAT. § 3121(a)(1) (2017) (rape, “forcible compulsion”); 11 R.I. GEN. LAWS § 11-37-2(2) (2017) (first degree sexual assault, “force or coercion”); S.C. CODE ANN. § 16-3-654(1)(a) (2017) (third degree criminal sexual conduct, “force or coercion to accomplish the sexual battery in the absence of aggravating circumstances”); S.D. CODIFIED LAWS § 22-22-1(2) (2017) (rape, “force, coercion, or threats of immediate and great bodily harm against the victim or other persons within the victim’s presence”); TENN. CODE ANN. § 39-13-503(a)(1) (2017) (rape, “[f]orce or coercion is used to accomplish the act”); TEX. PENAL CODE ANN. § 22.011(b)(1) (West 2017) (sexual assault, “actor compels the other person to submit or participate by the use of physical force, violence, or coercion”); VT. STAT. ANN. tit. 13, § 3252(a)(2) (2017) (sexual assault, “threatening or coercing the other person”); VA. CODE ANN. § 18.2-61(A)(i) (2017) (rape, “against the complaining witness’s will, by force, threat or intimidation of or against the complaining witness or another person”); WASH. REV. CODE § 9A.44.050(1)(a) (2017) (second degree rape, “forcible compulsion”); W. VA. CODE § 61-8B-4(a)(1) (2017) (second degree sexual assault, “forcible compulsion”); WIS. STAT. § 940.225(1)(a) (2017) (first degree sexual assault, “causes pregnancy or great bodily harm to that person”); *id.* § 940.225(2)(a) (2017) (second degree sexual assault, “use or threat of force or violence”); WYO. STAT. ANN. § 6-2-302(a)(i) (2017) (first degree sexual assault, “the actual application, reasonably calculated to cause submission of the victim, of physical force or forcible confinement”).

with her against her will.”<sup>99</sup> These jurisdictions continue to define rape without targeting the social harm of unwanted sex. When a rapist has sex with another person, motivated by entitlement, trickery, confusion, or callousness, those acts of unwanted sex also are not crimes when rape is defined with the heightened element of force. Thus, forty-six jurisdictions that define rape by force do not capture the social harm that occurs in the more than three-fourths of rapes in which the victim knows his or her assailant.

It is important to note that only three of these forty-six jurisdictions exclusively define rape as involving force.<sup>100</sup> But of the thirty-six states that have also a subsection that defines rape as non-consent, as set forth in Section C, *infra*, those definitions do not reach all forms of unwanted sex.<sup>101</sup>

Third, it is important to understand why rape was defined in this limited way. The answer is that, up until 1965, all sex outside of marriage was criminalized. In 1965, the Supreme Court’s *Griswold v. Connecticut*<sup>102</sup> decision first recognized a penumbra of federal privacy rights, which stitched together a shield against the general police powers of the states to criminalize intimacy.<sup>103</sup> Sex outside of marriage continued to be criminalized after 1965, but *Griswold* became the foundation used to challenge those statutes.<sup>104</sup> In this context, rape was understood to be among the spectrum of unlawful acts that occurred outside of marriage. It was a crime that violated a marriage, not a person. As explained by Maine’s Supreme Judicial Court in 1922” “[T]he essence of the crime [of rape] is said to be, not the fact of intercourse, but the *injury and outrage to the modesty* and feelings of the woman . . . .”<sup>105</sup>

All fifty states criminalized sex between adults, not with regard to consent, but based on marital status: adultery was the crime of sex between a married person

99. *People v. Brown*, 217 Cal. Rptr. 3d 589, 591 (Ct. App. 2017).

100. *See* GA. CODE ANN. § 16-6-1(a) (2017); MASS. GEN. LAWS ch. 265 § 22(a) (2017); N.C. GEN. STAT. § 14-27.22(a)(1) (2017). The Massachusetts Supreme Judicial Court has modified the force element in limited contexts, which other states codified expressly. *See* *Commonwealth v. Blache*, 880 N.E.2d 736, 745 (Mass. 2008) (“A case in which the jury find[s] that the complainant lacked the capacity to consent obviously represents one instance where the Commonwealth has no obligation to prove the use of force by the defendant beyond what is required for the act of penetration.”).

101. *See infra* Part I.C.

102. 381 U.S. 479 (1965).

103. *Griswold* was the first case to establish a fundamental right to privacy in the context of a married couple’s access to procreation. Over the next forty years, the Supreme Court struck down other criminal statutes that were determined to trample on conduct involving adult, consensual intimacy. *See, e.g.*, *Loving v. Virginia*, 388 U.S. 1, 2 (1967) (striking down crime of interracial marriage); *Eisenstadt v. Baird*, 405 U.S. 438, 443 (1972) (striking down criminalization of providing contraception to unmarried persons); *Lawrence v. Texas*, 539 U.S. 558, 578–79 (2003) (striking down state sodomy laws that only targeted conduct involving intimacy shared by same-sex couples).

104. Not all states have decriminalized, repealed, or struck down adultery, fornication, and consensual same-sex sodomy crimes. *See* Christina Oehler, *16 States Where You Can Get that Cheating Jerk Thrown in Jail*, WOMAN’S DAY (June 23, 2015), <http://www.womansday.com/relationships/dating-marriage/a50994/adultery-laws/>.

105. *State v. Castner*, 119 A. 112, 112 (Me. 1922) (emphasis added).

and a single person, and fornication was sex between two single people.<sup>106</sup> Sex that did not lead to procreation also was criminalized: sodomy was the crime that also included consensual acts not involving vaginal intercourse because such sex was “unnatural,”<sup>107</sup> and doctors were punished for providing birth control to married couples.<sup>108</sup> And other forms of sex that occurred outside of social norms of racial and religious castes were crimes: anti-miscegenation laws made marriage between individuals of different races a crime;<sup>109</sup> bigamy and polygamy crimes were enacted alongside of campaigns meant to disadvantage those worshipping the religion of the Latter Day Saints (“LDS”), known colloquially (and inaccurately) as Mormonism;<sup>110</sup> and cohabitation was the crime of adults living together outside of marriage, which targeted interracial couples and those who practiced the LDS religion.<sup>111</sup>

In this context, the elements of force and resistance in rape law were necessary to separate rape from the other crimes that violated the norms of marriage. In the 1977 *State v. Saunders* case, the New Jersey Supreme Court struck down its crime of fornication laws as violating privacy.<sup>112</sup> Of note, the trial judge tasked the jury in a rape trial with considering whether the defendant was guilty of the lesser-included offense of fornication—a crime to which the jury found Mr. Saunders guilty after acquitting him of rape.<sup>113</sup> When rape was simply a crime along the spectrum of unlawful acts outside of marriage, the force and resistance elements also prevented a rape victim from being charged with the crimes of adultery or fornication. This observation is not glib. In 2013, a Norwegian tourist who was

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106. See *State v. Saunders*, 381 A.2d 333, 346 (N.J. 1977) (Schreiber, J., concurring) (discussing the origins of fornication law, including its inclusion in the law called “An Act for the Punishment of Crimes (Revision of 1898)” and commenting that “there is no evidence that this statute was intended as anything but an attempt to regulate private morality”).

107. See *Cohen v. Cohen*, 103 N.Y.S.2d 426, 427–28 (Sup. Ct. 1951). *Cohen* was a petition for fault divorce, in which a wife presented evidence that her husband was gay and had been prosecuted under the state’s sodomy law for having consensual sex with another man. The court denied the request for marriage because the crime of adultery—a basis for divorce—was different from the crime of sodomy. *Id.*

108. See *Buxton v. Ullman*, 156 A.2d 508, 514 (Conn. 1959) (upholding a law preventing use of contraception by married couples because “the greater good would be served by leaving the statutes as they are”).

109. See generally RANDALL KENNEDY, *INTERRACIAL INTIMACIES: SEX, MARRIAGE, IDENTITY, AND ADOPTION* 70–92 (2003) (discussing various laws and cases criminalizing interracial relationships from 1876 to the 1950s).

110. See generally *State v. Holm*, 137 P.3d 726, 764, 772–73 (Utah 2006) (Durham, C.J., dissenting) (discussing the history by which the federal government conditioned Utah’s statehood on its criminalization of polygamy within the LDS church).

111. *United States v. Higginson*, 46 F. 750, 751 (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.”); see also *N.D. Fair Hous. Council, Inc. v. Peterson*, 625 N.W.2d 551, 555 (N.D. 2001). In 1882, the Edmunds Act criminalized unlawful cohabitation in the United States. Erin P. B. Zasada, Case Comment, *Civil Rights—Rights Protected and Discrimination Prohibited: Living in Sin in North Dakota? Not Under My Lease*, 78 N.D. L. REV. 539, 541 (2002).

112. *State v. Saunders*, 381 A.2d 333, 339 (N.J. 1977).

113. *Id.* at 334.

raped in Dubai was charged and convicted of adultery when she reported being raped in public.<sup>114</sup>

In sum, the actus reus of rape by force was not concerned about unwanted sex, instead targeting the social harm of sex outside of marriage that beseeched a woman's chastity. The 2017 *Brown* case shows that when rape is defined as rape by force the crime does not capture the social harm of unwanted sex. Forty-six jurisdictions (forty-five states and the District of Columbia) continue to define rape by force.<sup>115</sup> As will be explored in Section II, it then is essential to investigate why states are continuing to define rape in a manner that does not criminalize the social harm of unwanted sex.

### *C. The Contemporary Actus Reus of Rape by Non-Consent Is Underinclusive to the Social Harm of Unwanted Sex*

One of the most important reforms in rape law was the introduction of the actus reus of consent—or more specifically, non-consent, because the crime was finally defined as engaging in sex without the consent of another.<sup>116</sup> This reform was a significant break from the framework that criminalized sex outside of marriage because, for the first time, it contemplated the crime of rape involving the social harm of violating a person's determination over whom she will or will not engage in intimacy with.

The reform probably came too early to be as revolutionary as promised because there were many powerfully situated individuals who feared that men would be victimized if they could be falsely accused of rape by aggrieved wives, girlfriends, and co-workers.<sup>117</sup> As a result, in many states that define rape by the actus reus of non-consent, the crime is limited to very specific power imbalances rather than a

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114. See Nicola Goulding et al., *Dubai Ruler Pardons Norwegian Woman Convicted After She Reported Rape*, CNN (July 22, 2013), <http://www.cnn.com/2013/07/22/world/meast/uae-norway-rape-controversy/index.html> (discussing how after international outcry, a rape victim was pardoned for unlawful sex outside of marriage, and thus her rapist was also released from prison).

115. See *supra* note 98.

116. There are numerous scholars and feminist activists who pioneered and defended rethinking rape as a crime involving non-consent. Catharine A. MacKinnon was one of the most powerful ones. See CATHARINE A. MACKINNON, *TOWARD A FEMINIST THEORY OF THE STATE* 183 (1989). MacKinnon argues:

The deeper problem is the rape law's assumption that a single, objective state of affairs existed, one that merely needs to be determined by evidence, when so many rapes involve honest men and violated women. When the reality is split, is the woman raped but not by a rapist? Under these conditions, the law is designed to conclude that a rape did not occur.

*Id.*; see also SUSAN ESTRICH, *REAL RAPE* 69 (1987); SCHULHOFER, *supra* note 60, at 15. *But see* Jed Rubenfeld, *The Riddle of Rape-by-Deception and the Myth of Sexual Autonomy*, 122 *YALE L.J.* 1372, 1443 (2013) (focusing on the problem of rape by deception to question the scope and limit of importing sexual autonomy into the criminal law of rape).

117. See Patricia J. Falk, "Because Ladies Lie": *Eliminating Vestiges of the Corroboration and Resistance Requirements from Ohio's Sexual Offenses*, 62 *CLEV. ST. L. REV.* 343, 346 (2014) ("Despite rampant rape reform, these old-fashioned requirements [of evidentiary corroboration and resistance] have been remarkably persistent, and vestiges of them remain in twenty-first-century statutory enactments.").



generalized crime that responds to unwanted sex.<sup>118</sup>

As proof of this anxiety of false accusations, one need look no further than the Model Penal Code's current definition of rape and other sexual crimes, which were created in 1962, revised in 1980, and as will be discussed in Section II, are the subject of continuing debate. Others have explained how the Model Penal Code's definition of rape is a glaring aberration in its otherwise influential role in understanding and formulating criminal laws. Over a dozen years ago, Professor Deborah Denno wrote an article criticizing the provisions in detail and calling for "the Model Penal Code's sexual offense provisions . . . be pulled, revised, and replaced."<sup>119</sup>

The Model Penal Code repeats the universally rejected myths that rape involves heterosexual sex, all rapists are men, all victims are women, and husbands cannot rape their wives by starting its definition of rape under Model Penal Code § 213.1 with the limitation that "[a] male who has sexual intercourse with a female not his wife . . . ."<sup>120</sup> This limitation is deliberate. The very next sex crime in the Model Penal Code, "deviate sexual intercourse," does not contain such a limitation, but instead criminalizes the conduct regardless of the victim's gender and relationship to the perpetrator.<sup>121</sup> Maintaining this archaic limitation that rape must occur outside of marriage prevents wives from making false accusations against their husbands.

Even more telling, the Model Penal Code's definition for all of its sexual offenses keeps a heightened evidentiary requirement, preventing a woman's testimony alone from being sufficient evidence to secure a conviction.<sup>122</sup> The Model Penal Code proposes that "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."<sup>123</sup> Since at least 1972, the Model Penal Code has been criticized for the requirement that a rape victim corroborate her accusation because "throughout the country, the word of the victim of a robbery, assault, or any other crime may alone constitute sufficient evidence to sustain a conviction."<sup>124</sup>

The anxiety over false accusations is not rooted in fact. "[F]alse accusations are rare—only between 2% and 10% of all reports [of rape] are estimated to be

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118. See *infra* notes 129–30 and accompanying text.

119. See Denno, *supra* note 42, at 207.

120. MODEL PENAL CODE § 213.1(1) (AM. LAW INST. 1981) (rape).

121. *Id.* § 213.2 (deviate sexual intercourse).

122. See *id.* § 213.6(5).

123. *Id.*

124. Note, *The Rape Corroboration Requirement: Repeal Not Reform*, 81 YALE L.J. 1365, 1365 (1972).

false.”<sup>125</sup> But nonetheless, this anxiety, on explicit display in the Model Penal Code definition, casts a long shadow on how states define the crime of rape.

In a notable break from the sexist iterations of the crime, Montana defines “sexual assault” (its term for rape) as a crime targeting all unwanted sex with its definition of “[a] person who knowingly subjects another person to any sexual contact without consent commits the offense of sexual assault.”<sup>126</sup> But Montana’s definition is rare. Among the states, only eight define rape by non-consent this broadly.<sup>127</sup> With only eight states defining rape to be simply unwanted sex, the majority of states do not define the social harm in rape to be unwanted sex. For instance, of the thirty-six states that used non-consent as an actus reus in defining rape, twenty-eight limit non-consent only when there are specific circumstances unique to the victim or defendant.<sup>128</sup> There are four general categories in which these limiting circumstances fall:

First, states will often limit the context of non-consent to power imbalances between the victim and defendant. For instance, Alaska, Arkansas, Colorado, Hawaii, Kentucky, Maine, Minnesota, New Hampshire, New Jersey, New Mexico, Ohio, Rhode Island, and Washington criminalize unwanted sex if the offender is a health care worker or employee of a state-licensed facility or program, and the

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125. Sandra Newman, *What Kind of Person Makes False Rape Accusations*, QUARTZ (May 11, 2017), <https://qz.com/980766/the-truth-about-false-rape-accusations/>.

126. MONT. CODE ANN. § 45-5-502(1) (2017).

127. In addition to Montana, the other states that define rape as sex without consent are ALASKA STAT. § 11.41.410(a)(1) (2016) (defining first degree sexual assault as occurring when “the offender engages in sexual penetration with another person without consent of that person”); ARIZ. REV. STAT. ANN. § 13-1406(A) (2017) (defining sexual assault as “intentionally or knowingly engaging in sexual intercourse or oral sexual contact with any person without consent of such person”); NEB. REV. STAT. § 28-319(1)(a) (2012) (defining first degree sexual assault as “sexual penetration without the consent of the victim”); TENN. CODE ANN. § 39-13-503(a)(2) (2017) (defining rape as occurring when “[t]he sexual penetration is accomplished without the consent of the victim and the defendant knows or has reason to know at the time of the penetration that the victim did not consent”); TEX. PENAL CODE ANN. § 22.021(a)(1)(A)(i) (West 2017) (defining aggravated sexual assault as “caus[ing] the penetration of the anus or sexual organ of another person by any means, without that person’s consent”); UTAH CODE ANN. § 76-5-402(1) (LexisNexis 2017) (defining rape as occurring “when the actor has sexual intercourse with another person without the victim’s consent”); VT. STAT. ANN. tit. 13, § 3252(a)(1) (2017) (defining sexual assault as “compell[ing] the other person to participate in a sexual act without the consent of the other person”). Other states may criminalize unwanted sex, but it is not in the definition of rape or sexual assault. Rather if it does exist, it falls under a less serious crime such as sexual battery or unwanted contact. *See, e.g.*, DEL. CODE ANN. tit. 11, § 767 (2017) (defining third degree unlawful sexual contact as occurring “when the person has sexual contact with another person or causes the victim to have sexual contact with the person or a third person and the person knows that the contact is either offensive to the victim or occurs without the victim’s consent”); N.Y. PENAL LAW § 130.20(1) (McKinney 2017) (defining the misdemeanor of sexual misconduct as occurring when “[h]e or she engages in sexual intercourse with another person without such person’s consent”).

128. The jurisdictions that limit the circumstances of non-consent are Alaska, Arkansas, California, Colorado, Connecticut, Delaware, District of Columbia, Hawaii, Idaho, Illinois, Indiana, Kansas, Kentucky, Michigan, Minnesota, Missouri, Nebraska, Nevada, New Hampshire, New Jersey, New York, Oklahoma, Oregon, Pennsylvania, South Carolina, Tennessee, Virginia, and Wyoming. *See infra* notes 129–30 and accompanying text (status of victim or offender); *infra* note 158 (when consent secured by fraud is actionable); *infra* note 159 (when intoxication results in incapacity to consent).

victim is receiving medical treatment, under the statutory duty of care, or in custody of the state.<sup>129</sup> Michigan and Ohio criminalize unwanted sex by certain family members.<sup>130</sup>

Second, states also will limit non-consent to the status of the victim. At least twelve states choose to define rape not based on whether the victim consented, but rather based on whether the victim was rendered incapacitated (such as by mental disability, mental disease, unconsciousness, or the influence of substances) and thus unable to provide consent.<sup>131</sup> The problem with limiting rape to these circumstances is that a defendant's culpability will be based on the proof of the existence of those circumstances rather than evidence of whether the sex was unwanted.

In *Commonwealth v. Blache*, the Massachusetts Supreme Judicial Court reversed a police officer's rape conviction for instructional error.<sup>132</sup> In *Blache*, a 5'2", twenty-six-year-old woman weighing 110 pounds spent hours consuming alcohol, smoking marijuana, and ingesting Klonopin.<sup>133</sup> At 2 a.m., she was at her boyfriend's house, very intoxicated and behaving "belligerently."<sup>134</sup> After she drove her truck into his fence and then backed up into his house, her boyfriend and his friend called the police, requesting assistance in removing "an unwanted and

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129. See ALASKA STAT. § 11.41.410(a)(3) (2016) (victim in state facility); *id.* § 11.41.410(a)(4) (offender is health care worker or victim is under professional treatment of offender); ARK. CODE ANN. § 5-14-124(a)(1)(A) (West 2017) (offender is employed by department of corrections or jail); *id.* § 5-14-124(a)(1)(B) (offender supervising minor who is on probation or parole); *id.* § 5-14-124(a)(1)(C)(2) (teacher, principal, coach, counselor); COLO. REV. STAT. § 18-3-402(1)(f) (2017) (victim is in legal custody or detained in a hospital or other institution); HAW. REV. STAT. § 707-731(1)(c) (2017) (offender employed by state facility or private facility that operates as a correctional institution); IOWA CODE § 709.4(1)(b)(3)(c) (2017) (offender "is in a position of authority over the other person and uses that authority to coerce the other person to submit"); KY. REV. STAT. ANN. § 510.060(1)(e) (West 2016) (offender is employee of Department of Corrections or detention facility); ME. STAT. tit. 17-a, § 255-A(1)(I) (2017) (victim is on parole, probation, or detained in a hospital, prison, or other institution and offender has supervisory or disciplinary authority); MINN. STAT. § 609.344(1)(h) (2017) (victim is current or certain former patient of psychotherapist); N.H. REV. STAT. ANN. § 632-A:2(I)(g) (2015) (offender is therapist to victim); N.J. STAT. ANN. § 2C:14-2(c)(2) (West 2017) (victim is on probation or parole or in custody of institution, hospital, or prison); N.M. STAT. ANN. § 30-9-11(E)(2) (2017) (victim is an inmate and offender is in a position of power); OHIO REV. CODE ANN. § 2907.03(A)(10)–(12) (2017) (sexual battery is defined as occurring when the offender is a mental health professional, a correctional officer, or clergy); 11 R.I. GEN. LAWS § 11-37-2(4) (2017) (offender providing medical care for purposes of sexual arousal); WASH. REV. CODE § 9A.44.050(1)(c)(i)–(ii), (d) (2017) (offender is health care provider, victim is resident of treatment facility, or offender was providing transportation to victim with developmental disabilities in the course of offender's employment).

130. See OHIO REV. CODE ANN. § 2907.03(A)(5) (LexisNexis 2017) (criminalizing sexual conduct between certain family members, regardless of consent); MICH. COMP. LAWS § 750.520e(1)(d) (2017) (criminalizing sexual conduct between persons related to one another to the third degree unless married to one another); see also 720 ILL. COMP. STAT. 5/11-1.20(a)(3) (2017) (criminalizing sex with family members who are minors); IOWA CODE § 709.4(1)(b)(3) (2017) (same).

131. See *infra* note 159 and accompanying text (listing states redefining rape based on intoxication that impairs victim's ability to give consent).

132. *Commonwealth v. Blache*, 880 N.E.2d 736, 738 (Mass. 2008).

133. *Id.*

134. *Id.* at 739.

very intoxicated female guest.”<sup>135</sup> David Blache was the responding police officer who witnessed the woman engage in “sexually aggressive behavior” toward him and erratic behavior such as urinating in public and twice turning on the cruiser’s lights and sirens.<sup>136</sup> Officer Blache requested permission to transport the woman home, which was granted.<sup>137</sup>

Officer Blache had sexual intercourse with the woman in her home, which he claimed was consensual.<sup>138</sup> But she described it differently, testifying that she communicated her non-consent and tried to kick him.<sup>139</sup> Although she did not recall the phone calls, later that night, there were two recorded calls to 911 in which she sarcastically said that the officer had given her the “best fuck of [her] life” and later calling back, “I’m going to go for the whole rape thing.” Expert testimony established that the woman’s blood alcohol level at that time of the alleged rape was between 0.176% and 0.24%.<sup>140</sup>

In Massachusetts, the crime of rape is defined only by an element of force, specifically the actus reus of physical force or violence.<sup>141</sup> Taking the woman’s testimony as true, the facts established unwanted sex (saying no and trying to kick the officer), but these facts were insufficient to establish rape by force, defined as unwanted sex accompanied with physical force or violence.<sup>142</sup> The Supreme Judicial Court explained that Massachusetts has an alternative means of defining force. When “the consumption of drugs or alcohol or for some other reason (for example, sleep, unconsciousness, mental retardation, or helplessness)” results in the complainant being incapable of consenting to intercourse, the force element need only be the level of force necessary to accomplish intercourse.<sup>143</sup> As a

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135. *Id.*

136. *Id.*

137. *Id.*

138. *Id.*

139. *Id.* at 739–40.

140. *Id.* at 740.

141. MASS GEN. LAWS ch. 265, § 22(a) (defining rape as occurring when a person “has sexual intercourse or unnatural sexual intercourse with a person, and compels such person to submit by force and against his will, or compels such person to submit by threat of bodily injury”).

142. As noted in *Blache*, even taking the victim’s account as true, the facts did not meet the statute’s force requirement. This is why the conviction was analyzed under an alternative definition of rape that exists in the absence of force but in the presence of facts showing that the victim was incapable of consent. *See Blanche*, 880 N.E.2d at 741.

143. *Id.* at 743. The court added:

While generally for the crime of rape the Commonwealth must prove that the alleged sexual intercourse occurred by force and without the complainant’s consent, where the complainant is “wholly insensible so as to be incapable of consenting,” (a) the element of lack of consent is satisfied; and (b) the only force required for proof of the crime is “such force as was necessary to accomplish” the act of intercourse—that is, only the force necessary to effect penetration.

*Id.* at 741 (quoting *Commonwealth v. Burke*, 105 Mass. 376, 380–81 (1870)). This alternative definition of rape is a judge-created doctrine in Massachusetts. New Jersey has codified this definition of force in its statute and jury instructions. *See State ex rel. M.T.S.*, 609 A.2d 1266, 1277 (N.J. 1992) (discussing statute and jury instructions

corollary, the prosecution must also prove that the defendant knew that the victim was impaired and was thus incapable of consent.<sup>144</sup> When states define rape as a crime lacking consent, the vast majority of states limit the reach to specifically-defined instances of incapacity. The qualified nature of consent—to the characteristics of the victim, status of the offender, or reason for victim’s inability to consent—does not seek nor does it reach all instances of unwanted sex.

Third, the mistake-of-fact defense is another means by which rape defined by non-consent is limited by the crime’s mens rea. The *Blache* decision explained how due process demands that a defendant must be aware of the facts of a victim’s incapacity before finding him guilty of rape.<sup>145</sup> Some states codified this defense by statute,<sup>146</sup> and others, starting with California in 1975, have had their courts write in the defense to save the statute.<sup>147</sup> Defining the crime of rape as requiring that the defendant knew of the facts of incapacity is yet one more layer of proof that removes the crime from targeting unwanted sex.

For instance in *White v. Commonwealth*, a man had sex with a fourteen-and-a-half-year-old girl.<sup>148</sup> In Virginia, rape is defined in three instances: (1) physical

that provide that “physical force in excess of that inherent in the act of sexual penetration is not required for such penetration to be unlawful”).

144. See *Blache*, 880 N.E.2d at 741–72. According to the court:

The second premise is perhaps more implicit than explicit. It is this: Where the Commonwealth uses proof that the complainant has been rendered “incapable of consenting” to establish the necessary element of her lack of consent and to reduce the degree of required force, the Commonwealth should also prove the defendant’s knowledge of the complainant’s incapacitated state. *Id.*

145. See *id.* at 744–45 (limiting that requirement to incapacity cases by stating “Massachusetts has not recognized the ‘defense’ of mistake of fact in rape cases generally”). In February 2018, the Massachusetts Supreme Judicial Court again “[h]eld open the possibility that a mistake of fact instruction may be an appropriate and fair defense” but noted that the facts in that case before it, which involved indecent assault and battery, did not support it. *Commonwealth v. Kennedy*, No. SJC-12345, 2018 WL 794506, at \*5 (Mass. Feb. 9, 2018).

146. See *Commonwealth v. Lopez*, 745 N.E.2d 961, 967 (Mass. 2001) (“States that recognize a mistake of fact as to consent generally have done so by legislation.”). These statutory provisions include: COLO. REV. STAT. § 18–3–402(1) (2017) (“Any actor who knowingly inflicts sexual intrusion . . .”); OR. REV. STAT. § 161.115(2) (2016) (“[I]f a statute defining an offense does not prescribe a culpable mental state, culpability is nonetheless required and is established only if a person acts intentionally, knowingly, recklessly or with criminal negligence.”); TEX. PENAL CODE ANN. § 22.021(a)(1)(A)(i) (West 2017) (“A person commits an offense if the person intentionally or knowingly causes the penetration of the anus or sexual organ of another person by any means, without that person’s consent”).

147. *Lopez*, 745 N.E.2d at 968 (citing *People v. Mayberry*, 542 P.2d 1337 (Cal. 1975) (en banc)); see also *State v. Smith*, 554 A.2d 713, 717 (Conn. 1989). The court stated:

We arrive at that result, however, not on the basis of our penal code provision relating to a mistake of fact . . . but on the ground that whether a complainant should be found to have consented depends upon how her behavior would have been viewed by a reasonable person under the surrounding circumstances.

*Id.* (citation omitted); *State v. Koonce*, 731 S.W.2d 431, 437 n.2 (Mo. Ct. App. 1987) (construing rape statute to require defendant have acted at least recklessly as to consent).

148. *White v. Commonwealth*, 478 S.E.2d 713, 713 (Va. Ct. App. 1996).

force; (2) “through the use of the complaining witness’s mental incapacity or physical helplessness”; and (3) with a child under the age of thirteen years old.<sup>149</sup> The victim was over thirteen years old and no physical force was used, so the prosecution presented evidence that the girl had a mental disability to meet the second category.<sup>150</sup> The court explained that the prosecution then must prove “(1) that the complainant was mentally incapacitated at the time of the offense; (2) that her condition prevented the complainant from understanding the nature and consequences of the sexual act; and (3) that at the time of the offense appellant knew or should have known of complainant’s condition.”<sup>151</sup> The court reversed the conviction because generalized evidence from the school’s school counselor did not meet this standard.<sup>152</sup> Of import to this Article, there was no investigation into whether the sex at issue was wanted or not—the only question was whether the young girl was mentally impaired and did the defendant have cause to know of it.

Fourth, states further limit the crime of rape when consent is secured by fraud. As developed in the larceny cases, theft was initially defined as the taking of an item without permission.<sup>153</sup> Shoplifting a coat from a store was a quintessential example of the crime. But larceny did not reach instances of a wrongful disposition of property when a store clerk gave a coat to a customer because the customer misrepresented either the price (by switching price tags), her identity (falsely claiming to be a person authorized to who was authorized to take possession), or that the presented payment was valid (by bouncing a check). The English Parliament, and later American legislatures, developed “larceny-by-trick,” to then make a taking by consent secured by fraud to be invalid consent, and thus a crime.<sup>154</sup>

Not all rape statutes, however, recognize that consent to sex that was induced by fraud is in fact invalid consent.<sup>155</sup> Michigan limits consent secured by fraud to be actionable only if someone is impersonating a medical professional or misrepresenting that the sexual conduct is a medical procedure.<sup>156</sup> Before a 2013 case

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149. VA. CODE ANN. § 18.2-61(A)(i)–(iii) (2017); *see also id.* § 18.2-67.10(3) (defining mental incapacity).

150. *White*, 478 S.E.2d at 713–14.

151. *Id.*

152. *Id.* at 715. The court stated:

We hold that this record fails to show beyond a reasonable doubt that, at the time of the alleged rape, complainant suffered from a mental incapacity that prevented her “from understanding the nature or consequences of the sexual act involved in such offense and about which [appellant] knew or should have known.”

*Id.* (quoting VA. CODE ANN. § 18.2–67.10(3)).

153. *See Hong*, *supra* note 83, at 193–94 (discussing cases and commentary on the evolution of larceny into larceny by trick).

154. *See id.*

155. *See Rubinfeld*, *supra* note 116, at 1443.

156. *See MICH. COMP. LAWS* § 750.520b(1)(f)(iv) (2017) (first degree criminal sexual conduct includes “[w]hen the actor engages in the medical treatment or examination of the victim in a manner or for purposes that are medically recognized as unethical or unacceptable”).

revealed the sexist origin of this limitation, California was one of the few states that invalidated consent if the person was impersonating a spouse.<sup>157</sup> At least two states define rape as actionable if a person induced the consent of another.<sup>158</sup> Although the factual scenarios that present this issue are admittedly few, it does illustrate that the crime of rape by non-consent does not extend to all who engage in the social harm of unwanted sex.

Fifth, twelve states define intoxication as a form of non-consent.<sup>159</sup> Some jurisdictions, like Vermont, attach liability only if the defendant administers the

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157. See *People v. Morales*, 150 Cal. Rptr. 3d 920, 929 (Ct. App. 2013). 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 . . . ." *Id.* Within nine months, the California legislature enacted a new provision providing: "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) (West 2014).

158. MICH. COMP. LAWS § 750.520b(1)(f)(iv) (2017) (first criminal sexual conduct includes "[w]hen the actor engages in the medical treatment or examination of the victim in a manner or for purposes that are medically recognized as unethical or unacceptable"); *id.* § 750.520b(1)(f)(v) ("When the actor, through concealment or by the element of surprise, is able to overcome the victim"); N.H. REV. STAT. ANN. § 632-A:2(I)(i) (2015) (aggravated felonious sexual assault includes "[w]hen the actor through concealment or by the element of surprise is able to cause sexual penetration with the victim before the victim has an adequate chance to flee or resist").

159. CAL. PENAL CODE § 261(a)(3) (West 2014) (rape includes "[w]here a person is prevented from resisting by any intoxicating or anesthetic substance, or any controlled substance, and this condition was known, or reasonably should have been known by the accused"); D.C. CODE § 22-3002(a)(4) (2013) (first degree sexual abuse includes "administering to that other person by force or threat of force, or without the knowledge or permission of that other person, a drug, intoxicant, or other similar substance that substantially impairs the ability of that other person to appraise or control his or her conduct"); HAW. REV. STAT. § 707-730(1)(e) (2017) (first degree sexual assault includes when "[t]he person knowingly subjects to sexual penetration another person who is mentally incapacitated or physically helpless as a result of the influence of a substance that the actor knowingly caused to be administered to the other person without the other person's consent"); KAN. STAT. ANN. § 21-5503(a)(2) (2015) (rape when one party is "incapable of giving consent because of mental deficiency or disease, or when the victim is incapable of giving consent because of the effect of any alcoholic liquor, narcotic, drug or other substance, which condition was known by the offender or was reasonably apparent to the offender"); LA. STAT. ANN. § 14:42.1(A)(2) (2017) (second degree rape includes "[w]hen the victim is incapable of resisting or of understanding the nature of the act by reason of stupor or abnormal condition of the mind produced by a narcotic or anesthetic agent or other controlled dangerous substance administered by the offender and without the knowledge of the victim"); MISS. CODE ANN. § 97-3-65(4)(a) (2017) (criminalizing "sexual intercourse not constituting forcible sexual intercourse or statutory rape with any person without that person's consent by administering to such person any substance or liquid which shall produce such stupor or such imbecility of mind or weakness of body as to prevent effectual resistance"); N.H. REV. STAT. ANN. § 632-A:2(I)(f) (2015) (aggravated felonious sexual assault includes "[w]hen the actor, without the prior knowledge or consent of the victim, administers or has knowledge of another person administering to the victim any intoxicating substance which mentally incapacitates the victim"); N.D. CENT. CODE § 12.1-20-03(1)(b) (2017) (gross sexual imposition includes when "[the offender] or someone with that person's knowledge has substantially impaired the victim's power to appraise or control the victim's conduct by administering or employing without the victim's knowledge intoxicants, a controlled substance . . . or other means with intent to prevent resistance"); 18 PA. CONS. STAT. § 3121(a)(4) (2017) (rape includes "[w]here the person has substantially impaired the complainant's power to appraise or control his or her conduct by administering or employing, without the knowledge of the complainant, drugs, intoxicants or other means for the purpose of preventing resistance"); S.C. CODE ANN. § 16-3-652(1)(c)

drug or alcohol to the victim.<sup>160</sup> Other jurisdictions write these statutes more broadly to criminalize sex with someone who is “incapable of giving consent because of the effect of any alcoholic liquor, narcotic, drug or other substance, which condition was known by the offender or was reasonably apparent to the offender.”<sup>161</sup> This definition becomes difficult because there often is the mistake-of-fact defense and the reality that “a person who is experiencing [an alcohol induced] blackout may walk, talk, and fully perform ordinary functions without others being able to tell that he is ‘blacked out.’”<sup>162</sup> Further, in the context of voluntary intoxication, as commented by an Ohio court, “there can be a fine, fuzzy, and subjective line between intoxication and impairment.”<sup>163</sup> The end result is that consent defined by intoxication is again underinclusive to unwanted sex, attaching liability instead to evidence of the degree of impairment and defendant’s knowledge of it.

*D. The Contemporary Actus Reus of Rape By Intoxication Is Overinclusive to the Social Harm of Unwanted Sex*

As mentioned above, the crime of rape by intoxication is underinclusive. In fourteen states, an additional or supplemental actus reus was added to criminalize having sex with someone who was intoxicated.<sup>164</sup> For two of those states, administering the drugs that lead to intoxication is equated with force.<sup>165</sup> For three states, the victim’s state of intoxication is a sufficient basis to attach criminal liability.<sup>166</sup> But for nine of these states, the legislatures attached a more narrow liability, arising only if the offender had sex with someone after administering the

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(2017) (first degree criminal sexual conduct includes instances where “[t]he actor causes the victim, without the victim’s consent, to become mentally incapacitated or physically helpless by administering, distributing, dispensing, delivering, or causing to be administered, distributed, dispensed, or delivered a controlled substance, a controlled substance analogue, or any intoxicating substance”); S.D. CODIFIED LAWS § 22-22-1(4) (2017) (rape includes when “the victim is incapable of giving consent because of any intoxicating, narcotic, or anesthetic agent or hypnosis”); VT. STAT. ANN. tit. 13, § 3252(b) (2017) (sexual assault includes when an offender “impair[s] substantially the ability of the other person to appraise or control conduct by administering or employing drugs or intoxicants without the knowledge or against the will of the other person”).

160. VT. STAT. ANN. tit. 13, § 3252(b).

161. KAN. STAT. ANN. § 21-5503(a)(2) (2015).

162. *State v. Doss*, No. 88443, 2008 WL 323168, at \*4 (Ohio Ct. App. Jan. 24, 2008) (quoting Peter Westin, *Egelhoff Again*, 36 AM. CRIM. L. REV. 1203, 1231 (1999)).

163. *Id.*

164. *See supra* note 159 (listing states and statutes).

165. *See* LA. STAT. ANN. § 14:42.1(A)(2) (2017) (defining second degree rape to include “[w]hen the victim is incapable of resisting or of understanding the nature of the act by reason of stupor or abnormal condition of the mind produced by a narcotic or anesthetic agent or other controlled dangerous substance administered by the offender and without the knowledge of the victim”); MO. ANN. STAT. § 566.030(1) (2017) (“Forcible compulsion includes the use of a substance administered without a victim’s knowledge or consent which renders the victim physically or mentally impaired so as to be incapable of making an informed consent to sexual intercourse.”).

166. The statutes that attach liability to the vulnerability of the victim are: CAL. PENAL CODE § 261(a)(3) (West 2014); KAN. STAT. ANN. § 21-5503(a)(2) (2015) (includes express mistake of fact defense); S.D. CODIFIED LAWS § 22-22-1(4) (2017).



drugs, instead of criminalizing the state of the victim's vulnerability.<sup>167</sup>

There is no doubt that defining rape by intoxication as a crime expanded the crime to reach victims of unwanted sex who, under the prior definitions of the crime, would not have had recourse. However, this definition of rape still fails to target the social harm of unwanted sex.

The status of intoxication, in and of itself, lacks the ability to meaningfully distinguish wanted sex from unwanted sex. In a February 2014 *Cosmopolitan* Magazine article, the author listed "16 Problems We All Have During Drunk Sex."<sup>168</sup> This glib article glorified drunken sex, without concern for the risk of rape when one party is intoxicated. In a marked contrast, a 2017 *Teen Vogue* article, "Is Drunk Sex Considered Rape?," dealt with the topic in a much more nuanced manner. *Teen Vogue* recognized that even though some drunk people had consensual sex, it was still valuable to ask whether electing to have sex while drunk heightens the risk of being a victim or perpetrator of a crime.<sup>169</sup> Of note, when discussing examples of criminal activity that may arise when the offender or victim is drinking to excess, the author noted that the defining feature of the crime was not intoxication. Rather, "[t]he reality is that people can use alcohol like a date rape drug. That means someone will either push alcohol on someone or seek out an extremely intoxicated person with the intention of taking advantage of that intoxication to cross boundaries."<sup>170</sup> The crime of rape arises not from intoxication but from predatory conduct targeting an incapacitated victim because she is intoxicated.

The problem then of defining rape by intoxication is that the definition is not targeted to the predatory conduct that renders the conduct criminal. The overinclusive focus on intoxication alone will sweep in some instances of consensual sex; but also, the crime defined in this way is underinclusive in not necessarily reaching predatory conduct when there is insufficient evidence of the nature of incapacity. No doubt that some victims of rape would benefit from this statutory definition of rape. But defining rape solely by whether the alleged victim is intoxicated does not adequately reflect the social harm of unwanted sex and predatory conduct that targets certain victims.

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167. The statutes that attach liability to the offender who administers the drug are: D.C. CODE § 22-3002(a)(4) (2013); HAW. REV. STAT. § 707-730(1)(e) (2017); LA. STAT. ANN. § 14:42.1(A)(2) (2017); MISS. CODE ANN. § 97-3-65(4)(a) (2017); N.H. REV. STAT. ANN. § 632-A:2(I)(f) (2015); N.D. CENT. CODE § 12.1-20-03(1)(b) (2017); 18 PA. CONS. STAT. § 3121(a)(4) (2017); S.C. CODE ANN. § 16-3-652(1)(c) (2017); VT. STAT. ANN. tit. 13, § 3252(b) (2017).

168. Anna Breslaw, *16 Problems We All Have During Drunk Sex*, COSMOPOLITAN (Feb. 27, 2014), <http://www.cosmopolitan.com/sex-love/advice/a5750/drunken-sex-problems/>.

169. Lena Solow, *Is Drunk Sex Considered Rape?*, TEEN VOGUE (Apr. 14, 2017), <http://www.teenvogue.com/story/is-drunken-sex-considered-rape>.

170. *Id.*

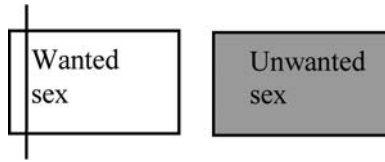


Figure 3. Affirmative Consent Laws (all conduct to the right of the line would be convicted as a crime).

*E. The Proposed Reform of Rape by Affirmative Consent Is Also Overinclusive to the Social Harm of Unwanted Sex*

Much has been written about affirmative consent laws, which are also known as “yes means yes” laws.<sup>171</sup> Although not yet codified in any criminal code, nearly 2,000 colleges and universities have adopted this standard, which requires participants in sexual activity to engage in continuous communication regarding consent.<sup>172</sup>

There is a robust debate over the benefits and drawbacks of this policy.<sup>173</sup> In discussing law as capturing social harm, these laws fail to target unwanted sex.<sup>174</sup> Instead, affirmative consent laws criminalize actors who have sex without the required type, manner, and duration of communication. This crime then sweeps wanted sex into its purview.

Whatever social value these laws provide, defining rape through this means fails to meaningfully sort out wanted sex from unwanted sex. In this respect, rape by affirmative consent shares the same defect that rape by force and rape by non-consent do: they still do not define the social harm of wanted sex as a crime.

171. See, e.g., Kevin de León & Hannah-Beth Jackson, Opinion, *Why We Made ‘Yes Means Yes’ California Law*, WASH. POST (Oct. 13, 2015), [https://www.washingtonpost.com/news/in-theory/wp/2015/10/13/why-we-made-yes-means-yes-california-law/?utm\\_term=.0f780d22026d](https://www.washingtonpost.com/news/in-theory/wp/2015/10/13/why-we-made-yes-means-yes-california-law/?utm_term=.0f780d22026d).

172. Schow, *supra* note 44.

173. See Aya Gruber, *Rape Law Revisited*, 13 OHIO ST. J. CRIM. L. 279, 288–89 (2016) (“The preponderance-of-the-evidence standard . . . 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.”); Deborah Tuerkheimer, *Affirmative Consent*, 13 OHIO ST. J. CRIM. L. 441, 443–44 (2016); Alan Dershowitz, Opinion, *Innocent Until Proven Guilty? Not Under ‘Yes Means Yes.’*, WASH. POST (Oct. 14, 2015), [https://www.washingtonpost.com/news/in-theory/wp/2015/10/14/how-affirmative-consent-rules-put-principles-of-fairness-at-risk/?utm\\_term=.13ad024b772b](https://www.washingtonpost.com/news/in-theory/wp/2015/10/14/how-affirmative-consent-rules-put-principles-of-fairness-at-risk/?utm_term=.13ad024b772b).

174. See, e.g., Gruber, *supra* note 173, at 290 (“Is proceeding with sex without a ‘yes’ retributively wrongful?”).

## II. RAPE BY MALICE CAPTURES THE CONTEMPORARY SOCIAL HARM OF UNWANTED SEX IN ACQUAINTANCE RAPE

There is no doubt that a key function of criminal law is to influence (or control) behavior through expressive norms and punishment.<sup>175</sup> But to maintain its public legitimacy, criminal law must engage in two practical functions: 1) enacting new legislation that addresses emerging social harms, such as those arising from new technologies (e.g., computer crimes) or new norms (e.g., domestic violence prohibitions); and 2) repealing criminal laws proscribing conduct that the public has no longer deems harmful (e.g., adultery, interracial marriages, or marijuana use). State legislatures have already engaged in this very project of reinvention when it comes to homicide, theft, and a body of inchoate and technology-related offenses. Our society's understanding and negotiation of permissible sexual intimacy outside of marriage, the recognition of women's equality and sexual autonomy, and the harm of rape to the actual victim have been radically transformed in the past fifty years. The proposed crime of rape by malice that is set forth in this section is a long overdue update on how the crime of rape may also be redefined and reinvented to reflect contemporary values and norms.

### A. Legislatures Updated Other Offenses to Capture New Social Harms

Criminal law has an important social function in creating new crimes and abandoning outdated ones. For instance, as society evolved when people acquired and used cars, homicide law also evolved and crimes were reinvented.<sup>176</sup> In the early 1900s, there were 8,000 registered cars, and with Henry Ford's affordability and automation model, by 1929 that number had grown to more than 23.1 million.<sup>177</sup> In California during this time period, deaths arising from the operation of a car were prosecuted under the general manslaughter statute.<sup>178</sup> As that statute proved inadequate, in 1935, California first created a separate offense of vehicular

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175. See David L. Bazelon, *The Morality of the Criminal Law*, 49 S. CAL. L. REV. 385, 386–87 (1976); Angela P. Harris, *Rotten Social Background and the Temper of the Times*, 2 ALA. C.R. & C.L.L. REV. 131, 132 (2011) (discussing ideas of Judge David Bazelon).

176. See Carol Sanger, *Girls and the Getaway: Cars, Culture, and the Predicament of Gendered Space*, 144 U. PA. L. REV. 705, 706 (1995) (presenting a fascinating meditation on gender, privacy, and behavior as examples of how “[o]ur legal relations with one another are informed by our social relations to things in that we relate to one another through (in, on, and around) things and not merely to things themselves”).

177. Sarah A. Seo, *Antinomies and the Automobile: A New Approach to Criminal Justice Histories*, 38 LAW & SOC. INQUIRY 1020, 1030 n.3 (2013) (“One indication of the automobile’s affordability as early as the 1920s is the dramatic decrease in its cost after the mass production of the Model T.”).

178. See *People v. Watson*, 637 P.2d 279, 283 (Cal. 1981) (“When the [California] 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 . . . . 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.”).

manslaughter punishing those who killed others while negligently driving cars.<sup>179</sup> In 1941, the legislature briefly narrowed the crime to cover only deaths arising from drivers who had a “willful indifference to, or a reckless disregard for, the safety of others,” but then it “speedily rejected” this heightened mens rea standard by broadening culpability to include drivers who caused death.<sup>180</sup>

Over time, the social harm of deaths arising from drunk driving was met in the 1980s with more serious crimes focused just on drunk driving.<sup>181</sup> More recently, deaths stemming from distracted driving and texting rose, which in turn led to new codified criminal laws against that behavior.<sup>182</sup> And, now, commentators are already thinking about how laws will have to change to account for deaths that arise when the cars of the future—driverless cars—hit the road.<sup>183</sup> In each example, the elements of crimes relating to manslaughter and murder were added, modified, or created anew to respond to and capture the burgeoning social harms.

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179. *Id.*

180. *Id.* at 283–84 (discussing the 1941 amendment that changed the criminal liability from “ordinary negligence” to a “reckless disregard of, or willful indifference to, the safety of others” and before the legislature “speedily rejected” the heightened standard).

181. David Luria, *Death on the Highway: Reckless Driving as Murder*, 67 OR. L. REV. 799, 835 (1988) (“We are witnessing a change in attitude towards reckless and drunk driving. Tolerance of such behavior is diminishing, which will hopefully lead to a decrease in highway fatalities. Although vigorous prosecutions and stringent sentencing will not alone be effective, the law *should* do its part. In response to the changing popular attitude, the law must treat extremely reckless driving in the most rigorous manner and prosecute and sentence outrageous offenders as murderers. Codifying the vehicular murder doctrine would facilitate its use.”); Jennifer L. Pariser, Note, *In Vino Veritas: The Truth About Blood Alcohol Presumptions in State Drunk Driving Law*, 64 N.Y.U. L. REV. 141, 142–44, 181 (1989) (discussing existing laws, prior laws, and potential reforms to law criminalizing drunk driving).

182. See Amy Friedenberger, *Virginia State Police Initiative Tackling Texting and Driving*, ROANOKE TIMES (Nov. 13, 2014), [http://www.roanoke.com/news/crime/virginia-state-police-initiative-tackles-texting-and-driving/article\\_13f918d2-2c05-566c-9520-acd463393809.html](http://www.roanoke.com/news/crime/virginia-state-police-initiative-tackles-texting-and-driving/article_13f918d2-2c05-566c-9520-acd463393809.html) (discussing scope of the law, enforcement obstacles, and enforcement strategies arising from policing those who drive while texting or while distracted); *Cellular Phone Use and Texting While Driving Laws*, NAT’L CONF. ST. LEGISLATURES (June 23, 2017), <http://www.ncsl.org/research/transportation/cellular-phone-use-and-texting-while-driving-laws.aspx> (compiling state laws on driving while texting).

183. See Sean Keach, *Death by Driverless Car: Who’s to Blame When Robot Cars Get It Wrong?*, TRUSTED REVIEWS (Sept. 30, 2016), <http://www.trustedreviews.com/news/driverless-autonomous-car-death-kill-accident-liability-insurance-tesla-google> (discussing potential liability for deaths from driverless cars); see also Joshua F. Cheslow, *The Future of the Law: Four Practice Areas on the Horizon*, N.J. LAW., Aug. 2013, at 35, 37 (“For practitioners, the short term means the inevitable legality of autonomous vehicles and adapting their advice to clients and their arguments in the courtroom. For instance, the New Jersey Cell Phone Law requires the operator of a motor vehicle using a hand-held wireless telephone keep one hand on the steering wheel. The law does not, however, require a person to actually steer the car. It is likely the advent of autonomous cars will change that analysis.”). For an argument that driverless cars may require reconsideration of DUI laws, see Patrick T. Barone, *Navigating the Waters of DUI Vehicular Homicide Law*, in DEFENDING DUI VEHICULAR HOMICIDE CASES 15 (2014 ed.) (“Then there is the possibility of driverless cars—a possibility that cannot be ignored. Renault chief Carlos Ghosn promised that Nissan would bring affordable autonomous cars to the public by 2020. The promise of such technology is zero accidents. If this literally becomes reality, then ought not the laws be changed to allow the occupants of all motor vehicles to be intoxicated? For if the purpose of the law is to avoid the very crimes discussed in this book, namely accidents where alcohol is involved, then do driverless cars not make the law irrelevant?”).

Theft crimes, too, have significantly evolved. In their early days, theft crimes were defined as simple larceny, which was the taking of property without the owner's consent. However, theft crime has evolved to include larceny-by-trick and fraud (wrongful takings arising from the owner's fraudulently secured consent), embezzlement (wrongful conversions), and, most recently, modern theft crimes that involve intangible property and computer technology.<sup>184</sup>

Theft crimes also have evolved to closely demarcate criminal conduct of wrongful takings from desirable transfers of property that remain legal. For instance, a book can legally be purchased from a store, borrowed from a library, read by a reader, or found on the ground. However, a person will usually be charged with a theft offense if she shoplifts the same book from a store (larceny),<sup>185</sup> writes another story substantially based on the original work (criminal copyright infringement),<sup>186</sup> or downloads an electronic copy of the book from another's computer.<sup>187</sup> In all of these examples, a person has the means to read the contents of a book. However, the first three examples legally provide for the transfer of tangible and intellectual property to another, and the latter examples criminalize the same. The difference lies in what conduct—buying, borrowing, and finding—is considered socially desirable, and what conduct—taking without compensation, plagiarism, and downloading without permission—is not. In distinguishing lawful from unlawful conduct, the theft offenses in particular have developed sophisticated forms of *mens rea* and *actus reus* to carefully criminalize social harms. Borrowing a book is different from shoplifting because the borrower has a *mens rea* to only temporarily take the book with the owner's consent. The nuanced definitions of which mental state was coupled with which conduct was necessary to reflect which transfers of property were socially desirable and legal and which ones were social harms met with criminal sanctions.

By contrast, rape law is different in two notable ways. First, whereas theft offenses leave alone the socially-desirable conduct of buying, borrowing, and finding things, current definitions of rape leave alone many instances of unwanted sex, which is not a social good. Second, theft law is as precise as it is in separating morally objectionable behavior from desirable conduct because sophisticated mental states and varied *actus reus* updated the crimes to reflect evolving norms

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184. See Hong, *supra* note 83, at 193–96 (citing to commentary and cases establishing evolution of theft crimes from larceny)

185. See, e.g., *Kimbrough v. Giant Food Inc.*, 339 A.2d 688, 696 (Md. Ct. Spec. App. 1975) (“[I]t is recognized that the owner of premises where personal property is mislaid by an invitee has a right to possession against everyone except the true owner.”).

186. 17 U.S.C. § 301 (2012); see also *Teich v. Gen. Mills, Inc.*, 339 P.2d 627, 635 (Cal. Dist. Ct. App. 1959) (“The primary question is whether these similarities resulted from copying the story; if not, the similarities are without legal significance.”).

187. See, e.g., *State v. Perry*, 697 N.E.2d 624, 628 (Ohio 1998) (“[U]nauthorized uploading and unauthorized downloading are unauthorized uses governed by the copyright laws and prosecution of state charges of unauthorized use for uploading and downloading is preempted.”).

and values.<sup>188</sup> The proposed crime of rape by malice then is an effort to update the crime of rape to reflect the contemporary social harm of the offense. To do so, the new definition must rely on more sophisticated definitions employed by other offenses.<sup>189</sup>

*B. Statutes, Courts, and Jury Instructions Define Malice as Encompassing Multiple Mental States of Knowledge, Reckless, and Contempt For Others*

The mens rea of malice is a critical one to understand because it illustrates how powerful the criminal law can be when it invents a crime that captures the social harm it seeks to regulate. The following section explains what the term malice means, how juries understand and apply it, and examples of a killing by malice instead of a killing by purpose or a killing by recklessness.

A primary criticism that people have against the term is that they do not understand what it means.<sup>190</sup> The term malice is usually described as the mental state that one possesses when he or she acts with a “wicked and malignant heart” toward another in undertaking conduct that kills another.<sup>191</sup> Like all terms of art, the starting point is to divest the term from its colloquial meaning. In 1921, the New Mexico Supreme Court explained that “[m]alice in the law of murder does not mean mere spite, ill will, or dislike as it is ordinarily understood.”<sup>192</sup> Rather, “it means that condition of mind which prompts one person to take the life of another without just cause or provocation, and it signifies a state of disposition which shows a heart regardless of social duty and fatally bent on mischief.”<sup>193</sup>

Statutes and jury instructions from different states make this definition less abstract. Most states define a killing as actionable when an actor has either express

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188. See Robin Charlow, *Bad Acts in Search of a Mens Rea: Anatomy of a Rape*, 71 *FORDHAM L. REV.* 263, 268 (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.”); Kit Kinports, *Rape and Force: The Forgotten Mens Rea*, 4 *BUFF. CRIM. L. REV.* 755, 759 (2001) (“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.”).

189. A preliminary iteration of this Article was titled *Rape As Theft: Rethinking Accidental Rapes and the Tangible Property Interest in Intimacy* as an attempt to import theft crimes into rape law. The mens rea found in theft statutes—larceny (taking by trespass), larceny by trick (taking by fraud), and robbery (taking by force)—were helpful analogies that could be imported into rape. The experiment failed when attempting to create intimacy as a property right. White collar crime uses this legal fiction—intangible property interests such as “honest services”—to target corruption, but I was unable to meaningfully develop a definition of intimacy that improved the nuances found in consent (and arguably lacked a workable definition of consent). For that reason, turning to the mens rea of malice has been a more fruitful way to identify contemporary flaws with the crime of rape and potential solutions.

190. See *infra* note 224 and accompanying text.

191. *State v. Smith*, 194 P. 869, 872 (N.M. 1921).

192. *Id.*

193. *Id.*

or implied malice.<sup>194</sup> Express malice, in California, is defined when someone “unlawfully intended to kill” another.<sup>195</sup> In Massachusetts, express malice is an intent to kill or an intent to inflict “grievous bodily harm” on another.<sup>196</sup> In Washington, express malice is defined as “evil intent, wish, or design to vex, annoy, or injure another person.”<sup>197</sup> Express malice is easy to understand—the mental state one has when there is an intent, desire, or will to kill or injure another.

Implied malice is an alternative means of proving the mental state of malice that includes conduct understood to arise from an actor’s heightened recklessness or disregard of a risk. California defines implied malice as arising when: 1) The killing resulted from an intentional act; 2) The natural probable consequences of the act were dangerous to human life; 3) The defendant knew when he/she acted that the act was dangerous to human life; and 4) The act was deliberately performed with conscious disregard for human life.<sup>198</sup> Massachusetts follows a similar definition, permitting a jury to infer malice if, in the circumstances known to the defendant, a reasonably prudent person would have known “there was a plain and strong likelihood that death would follow the contemplated act.”<sup>199</sup> Washington reaches the same sentiment, with slightly different language, that implied malice is found when the jury draws an inference based on the defendant’s act that was done “in willful disregard of the rights of another.”<sup>200</sup>

As a quick aside, the drafters of the Model Penal Code rejected common law terms such as malice for being too imprecise.<sup>201</sup> Instead, the Model Penal Code erected a four-tiered hierarchy consisting of the mental states—purpose, knowledge, reckless, and negligence—and imported them to all crimes. For those who prefer the Model Penal Code formula, “express malice” tracks so far what would be purposeful or knowing killings (intentionally poisoning the neighbor), and “implied malice” tracks what is understood as reckless killings (shooting at a tree at the edge of your property after being informed that young children play nearby is an example of consciousness disregarding a risk of harm or death).

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194. See, e.g., CAL. PENAL CODE § 187(a) (West 2014) (defining murder as an “unlawful killing . . . with malice aforethought”); *id.* § 188 (“[M]alice may be express or implied. It is express when there is manifested a deliberate intention unlawfully to take away the life of a fellow creature. It is implied, when no considerable provocation appears, or when the circumstances attending the killing show an abandoned and malignant heart.”).

195. JUDICIAL COUNCIL OF CAL., CRIMINAL JURY INSTRUCTIONS 520 (2017).

196. *Commonwealth v. Sneed*, 597 N.E.2d 1346, 1349 (Mass. 1992); see also MASS. GEN. LAWS ch. 265, § 1 (2017) (defining first degree murder as “[m]urder committed with deliberately premeditated malice aforethought”).

197. WASH. REV. CODE § 9A.04.110(12) (2017).

198. JUDICIAL COUNCIL OF CAL., CRIMINAL JURY INSTRUCTIONS 520 (2017).

199. *Commonwealth v. Azar*, 760 N.E.2d 1224, 1230 (Mass. 2002) (quoting *Commonwealth v. Grey*, 505 N.E.2d 171, 173 n.1 (Mass. 1987)).

200. WASH. REV. CODE § 9A.04.110(12).

201. V.F. Nourse, *Hearts and Minds: Understanding the New Culpability*, 6 BUFF. CRIM. L. REV. 361, 371 (2002) (commenting that drafters of the Model Penal Code rejected the term and the notion of malice “because they saw this phrase as a sentimental, ambiguous, holdover of an ancient common law”).

Malice captures these mental states of knowing and reckless killings, but its alternative and additional definitions of malice as “malignant heart” or “wanton disregard” of another also reaches one more type of killing that is not found on the Model Penal Code’s hierarchy. Stated another way, malice is not confined to just one of these three mental states. Rather it is “more accurate to speak of it as a label which is placed upon a group of states of mind, any one of which is sufficient for murder.”<sup>202</sup>

It is true that malice lacks the appearance of tidiness that the Model Penal Code offers for its definitions of purpose, knowledge, reckless, and negligence. But malice offers the benefit of mirroring the messiness that arises in the world around us. People do not always act with purpose, intent, and with specifically defined (and confined) risk. They do act with disregard towards others as well in ways that endanger others, and even while holding contempt towards the lives and well-being of others. As explained by Professor V.F. Nourse, the term malice also captures the mental state that arises when an actor engages in anti-social behavior that holds others in contempt.<sup>203</sup> According to Nourse, “[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>204</sup>

In criminal law textbooks, *United States v. Fleming*<sup>205</sup> serves as an example of implied malice that captures murder by malignant heart.<sup>206</sup> In *Fleming*, a drunk driver had a head-on collision with another car, killing the driver.<sup>207</sup> Normally, this car collision would be prosecuted as vehicular homicide or perhaps negligent homicide, and the defendant would be sentenced accordingly. Unique to this case, though, the prosecutor deemed the actions, judgment, and decision of Mr. Fleming to drive to have been so wanting with respect to the regard of others, that he elected to prosecute the car collision as second-degree murder.<sup>208</sup> Specifically, Mr. Fleming was driving 70 to 100 miles per hour in a 45 mile-per-hour zone, at 3:00 p.m., in congestion that the prosecutor claimed was “rush hour” traffic, at times against traffic, swerving to avoid other cars, all with a 0.315 blood alcohol content.<sup>209</sup> In rejecting Mr. Fleming’s argument that his lack of an intent to kill shields him from a murder prosecution, the court explained:

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202. Rollin M. Perkins, *A Re-Examination of Malice Aforethought*, 43 YALE L.J. 537, 568 (1934).

203. Nourse, *supra* note 201, at 372–73.

204. *Id.* at 376.

205. *United States v. Fleming*, 739 F.2d 945 (4th Cir. 1984).

206. *See, e.g.*, CRUMP ET AL., *supra* note 41, at 69 (introducing case under section entitled “The Blurry Line Between Depraved-Heart Malice and Involuntary Manslaughter”).

207. *Fleming*, 730 F.2d at 946–47.

208. *See* Lena H. Sun, *Drunk Driver Guilty of Murder*, WASH. POST (Jan. 5, 1984), [https://www.washingtonpost.com/archive/politics/1984/01/05/drunk-driver-guilty-of-murder/4f68c07c-b498-4431-b9be-0a95566aacc59/?utm\\_term=.64ace193869a](https://www.washingtonpost.com/archive/politics/1984/01/05/drunk-driver-guilty-of-murder/4f68c07c-b498-4431-b9be-0a95566aacc59/?utm_term=.64ace193869a).

209. *Fleming*, 739 F.2d at 947. According to the prosecutor, Mr. Fleming was “going south in a northbound lane during rush hour, and he was driving at speeds of more than 80 miles per hour . . . He behaved so grossly you can imply the malice that is necessary in second degree murder.” Sun, *supra* note 208.



In the vast majority of vehicular homicides, the accused has not exhibited such wanton and reckless disregard for human life as to indicate the presence of malice on his part. In the present case, however, the facts show a deviation from established standards of regard for life and the safety of others that is markedly different in degree from that found in most vehicular homicides. In the average drunk driving homicide, there is no proof that the driver has acted while intoxicated with the purpose of wantonly and intentionally putting the lives of others in danger.<sup>210</sup>

The *Fleming* case illustrates how “[m]alice is not a conclusion of law, but an inference from the facts.”<sup>211</sup> Moreover, *Fleming* is an example of how malice captures and criminalizes those who have a callousness towards life and others, which is a different social harm than simply a reckless disregard of the risk that one’s conduct may present.

The brutal death of Diane Whipple serves as another important example of how malice, defined as having an abandoned heart, is proven by both a disregard for risk and anti-social behavior. Diane Whipple lived in the same apartment building as Marjorie Knoller and her husband Robert Noel, who owned two Presna Canario dogs—one of which mauled Ms. Whipple to death in their shared hallway.<sup>212</sup> Owning an aggressive dog that kills usually does not result in murder charges; indeed, Mr. Noel, who was not present during the attack, was charged and convicted of the lesser crimes of involuntary manslaughter and ownership of a mischievous animal causing death.<sup>213</sup> But the prosecutor charged Ms. Knoller with murder alleging that the facts before, during, and after the attack proved implied malice.<sup>214</sup> As a legal matter, California law provides that implied malice is proven by 1) a subjective component, which is met when the defendant has the mens rea of awareness that she engages in conduct that endangers the life of another;<sup>215</sup> and 2) an objective component, which is met when the jury finds that a reasonable person would find that “[t]he natural consequences of” the act were “dangerous to life.”<sup>216</sup> The latter prong, which measures what conduct constitutes a “‘high probability of death’[,] is the *objective*, not the *subjective*” part of the crime.<sup>217</sup> Stated another way, malice is met when the defendant is aware that she engages in certain conduct and a reasonable person would find that such conduct has a high probability of resulting in death. That definition is different from recklessness, which requires

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210. *Fleming*, 739 F.2d at 948.

211. *State v. Smith*, 194 P. 869 (N.M. 1921).

212. *People v. Knoller*, No. A123272, 2010 WL 3280200, at \*1 (Cal. Ct. App. Aug. 20, 2010).

213. *Id.* at \*1 n.2.

214. *Id.* at \*1.

215. *People v. Knoller*, 158 P.3d 731, 742 (Cal. 2007) (“The *subjective* component . . . is whether the defendant acted with ‘a base, antisocial motive and with wanton disregard for human life.’” (quoting *People v. Thomas*, 261 P.2d 1, 7 (Cal. 1953) (en banc))).

216. *Id.* at 742.

217. *Id.*

that a person is aware of a risk and chooses to disregard it.<sup>218</sup>

The jury convicted Ms. Knoller of having the mental state of implied malice when her dog killed Diane Whipple.<sup>219</sup> After numerous appeals, the appellate court upheld the conviction based on a damning recitation of facts that the two dogs were an aggressive breed raised without habituation to people. The veterinarian who examined the dogs before Ms. Knoller and Mr. Noel took them home wrote a letter—the first one he had written in his forty-nine years of practice—warning them that the dogs weighed 100 pounds, were not trained, and could maul children or others.<sup>220</sup> Over a period of years, there were thirty times in which the dogs lunged, snapped, and growled at people, and not once did Ms. Knoller apologize to the person targeted.<sup>221</sup> And finally, Ms. Knoller knew the damage her dogs were capable of when she observed the injury to Mr. Noel’s hand caused by a bite from one of her dogs that resulted in a four-day hospital stay.<sup>222</sup>

These facts no doubt meet the subjective and objective prongs describing the requisite risk to meet implied malice. But implied malice is a powerful mental state because it responds to the social harm arising from people who engage in the world without regard for others. When upholding the verdict, the court made a note that after the dog mauled Ms. Whipple in the hallway, there were facts showing that Ms. Knoller had a malignant heart: “Her disregard for Whipple’s life was inferable from the fact that she never called 911 for help, never asked after the attack about Whipple’s condition, and returned to the scene of the attack, not to assist the dying Whipple, but to find her keys.”<sup>223</sup> As discussed below, the advantage that malice has over recklessness is that it takes into account a defendant’s actions after the harm occurred, whereas recklessness looks only at what the defendant knew about the risk, the likelihood of that risk, and what a reasonable person would have done. Implied malice broadens the evidentiary sweep to render relevant after-the-fact conduct that proves the callousness, wantonness, or contempt a person has towards others.

### *C. Responses to Criticisms that the Term Malice Is Vague, Confusing, Recasting Recklessness, or Criminalizing Character*

I wish to start with three likely and reasonable criticisms of malice’s use and its meaning.

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218. See, e.g., *United States v. Rodriguez*, 790 F.3d 951, 953–54 (9th Cir. 2015) (reversing conviction for attempt to interfere with safe operation of an aircraft because there was no proof the defendant knew that shining a laser at an airplane presents a risk of interfering with the pilot’s vision). The court added: “Rodriguez’s conduct cannot accurately be compared to that of someone who shines a bright spotlight through the windshield of passing cars: the effect of bright lights on automobile drivers at night *is* a matter of common knowledge.” *Id.* at 960.

219. *Knoller*, 2010 WL 3280200, at \*1.

220. *Id.* at \*4.

221. *Id.* at \*42.

222. *Id.*

223. *Id.* at \*43.

First, some critics contend that the term malice in the homicide context (let alone introducing it into the rape context) is vague and confusing.<sup>224</sup> As to the former, defining a crime to be broad in its reach is different from defining that crime to be vague. Racketeering statutes, for instance, are exceptionally broad in reaching a wide array of conduct—from drug dealing, pornography, robbery, extortion, and murder—and criminalizing two of these acts if they occur within a ten-year period.<sup>225</sup> Despite their vast reach across time and in numerous types of conduct, these statutes are not vague in that they proscribe conduct that persons of ordinary intelligence understand.<sup>226</sup>

As to the latter criticism, charges that the concept of malice is confusing are dispelled by the term's unusual longevity and practical efficacy in countless contemporary criminal prosecutions. As set forth above, jury instructions are quite precise in defining the term, which has been used in criminal prosecutions since 1389, well before America was even a colony.<sup>227</sup> Of note, the concerns over vagueness are not coming from the judges, jurors, and lawyers who use this term on a daily basis. Rather, it is often leveled by those who prefer the Model Penal Code's proposed streamlined homicide scheme that eschews the common-law degrees of murder for the two general categories of murder and manslaughter.<sup>228</sup>

In 1962, the Model Penal Code initially recommended that states abandon degrees of homicide to punish intentional killings as murder and unintentionally killings as manslaughter.<sup>229</sup> The states did not adopt this recommendation because separating some intentional killings into first degree murder maintained capital

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224. See Suzanne Mounts, *Malice Aforethought in California: A History of Legislative Abdication and Judicial Vacillation*, 33 U.S.F. L. REV. 313, 315, 374 (1999) (offering a damning critique of malice as lacking "intelligibility, coherence and proportionality"). Although Professor Mounts claims that the term is confusing and unworkable, she does not reconcile how the term has persisted in defining murder since California's first use of the term in 1872.

225. See 18 U.S.C. §§ 1961–1962 (2012).

226. See *United States v. Dischner*, 974 F.2d 1502, 1510 (9th Cir. 1992) (rejecting vagueness challenge), *overruled on other grounds by United States v. Morales*, 108 F.3d 1031 (9th Cir. 1997).

227. *State v. Smith*, 194 P. 869, 871 (N.M. 1921).

228. See Robert Weisberg, *Impulsive Intent/Impassioned Design*, 47 TEX. TECH L. REV. 61, 65 (2014) ("[T]he premise of the homicide law in the [Model Penal Code] was that intentional (i.e., unjustified and unexcused) killing should be a singular category of murder, and the key consequence of the traditional degree distinction—eligibility for the death penalty—should turn on the more complex and calibrated aggravating-and-mitigating-circumstance structure of modern capital punishment law."). Professor Weisberg continued to note that "the old premeditation doctrine, [which has malice at its core] with all the moral and literary artistry it generates, has persisted." *Id.* at 66; see also Charles L. Hobson, *Reforming California's Homicide Law*, 23 PEPP. L. REV. 495, 507 (1996) ("The problem with malice is that it is an archaic, artificial label divorced from any notion of common sense. It has allowed California's homicide law to evolve into a needless web of artifice and complexity. Removing malice from homicide law will help untangle this web and bring some needed consistency and common sense to the law of homicide.").

229. Hobson, *supra* note 228, at 526 ("The notion of dispensing with degrees of murder is most forcefully asserted in the Model Penal Code. The Code focused on the Pennsylvania model, which used premeditation and deliberation to distinguish first- from second-degree murders. It found premeditation too difficult to determine and an insufficient indicator of culpability to distinguish between capital punishment and a prison sentence.").

punishment.<sup>230</sup> The Model Penal Code also proposed to eliminate what it called the archaic and sentimental term of malice from definitions of murder.<sup>231</sup> The Model Penal Code did not rely on its hierarchal scheme of mens rea divided into the four states of purpose, knowledge, reckless, and negligence, which it used in defining other crimes. Rather, for homicide, the Model Penal Code recommended using an additional mens rea of “extreme indifference,” which attaches liability for killings “committed recklessly under circumstances manifesting extreme indifference to the value of human life.”<sup>232</sup> The drafters intended mens rea to be easier to prove than knowledge and more serious than recklessness, and they left the jury to determine whether facts fit this term’s meaning.<sup>233</sup> Thirty-six states adopted it into their own codes.<sup>234</sup> This definition sounds remarkably similar, if not identical, to the concept expressed in implied malice.

Because common-law jurisdictions have used malice since before the founding of the country (or the founding of their state)<sup>235</sup> and many Model Penal Code jurisdictions have elected to import the analogous phrase into their scheme for homicide, it is untenable to suggest that the term malice is difficult to understand, apply, or use in an effective manner. Those familiar with its usage—the legislatures, judges, jurors, and attorneys who are immersed in criminal law—are embracing it as an important contribution to our understanding of when people should be liable for the death of another. For instance, a defendant convicted under California’s second-degree murder statute challenged the given jury instructions’ definition of implied malice, arguing that an alternative instruction provided a

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230. *Id.* at 527 (rejecting the Model Penal Code’s recommendation and noting that “since distinguishing between capital and noncapital murder is the original reason for dividing murder into degrees, murder should retain degrees”).

231. John C. Duffy, Note, *Reality Check: How Practical Circumstances Affect the Interpretation of Depraved Indifference Murder*, 57 DUKE L.J. 425, 428–29 (2007); Nourse, *supra* note 201, at 371 (“Modern drafters rejected the idea of a ‘depraved heart’ because they saw this phrase as a sentimental, ambiguous, holdover of an ancient common law.”).

232. Duffy, *supra* note 231, at 429 (citing commentary to Model Penal Code section 210.2(1)(b)).

233. *Id.*

234. *Id.* at 433–44 (discussing debate over the term and providing a thirty-six-state survey of how states vary in their definitions of “depraved indifference” in their jurisdictions). *See generally* STATE BAR OF ARIZ., REVISED ARIZONA JURY INSTRUCTIONS (CRIMINAL) § 11.04 (4th ed. 2017) (second degree murder defined when the defendant purposefully caused the death, knowingly caused the death, or “[u]nder circumstances manifesting extreme indifference to human life, the defendant recklessly engaged in conduct that created a grave risk of death and thereby caused the death”); SUPREME COURT OF COLO., COLORADO CRIMINAL JURY INSTRUCTIONS § 3-1:04 (2016) (extreme indifference with respect to first degree murder arises when the defendant caused the death of another “knowingly” and “under circumstances evidencing an attitude of universal malice manifesting extreme indifference to the value of human life generally”); UTAH JUDICIAL COUNCIL, MODEL UTAH JURY INSTRUCTIONS § CR1403 (2d ed. 2014) (defining aggravated murder as arising when one causes the death of another with “reckless indifference to human life”).

235. *See* Eric A. Johnson, *The Crime that Wasn’t There: Wyoming’s Elusive Second-Degree Murder Statute*, 7 WYO. L. REV. 1, 3–4 (2007) (discussing use of malice in the 1869 statute when Wyoming was a territory and in Ohio’s 1815 statute).

better definition.<sup>236</sup> The appellate court recognized how the different formulations could cause confusion but noted that “the California Supreme Court considers both formulations to be essentially correct articulations of the applicable standard, including the physical component.”<sup>237</sup> The defendant had cited two law review articles criticizing malice as vague and unworkable, which the court dismissed, commenting that the defendant’s “discussion of those articles does not convince us that our analysis in [sic] incorrect or that the court erred in rejecting his proposed instruction.”<sup>238</sup>

Second, another criticism of malice is that it is a more confusing term for what really is either recklessness or negligence. Such criticism misapprehends that malice encompasses multiple mens reas. As noted in 1934 by Professor Perkins, it is “more accurate to speak of [malice] as a label which is placed upon a group of states of mind, any one of which is sufficient for [criminal liability].”<sup>239</sup> Most states then choose to define malice as encompassing one or more mens rea.<sup>240</sup> The term “express malice” attaches liability for mental states that align with knowledge and at times recklessness. But the “implied malice” term that is used in common law jurisdictions or “extreme indifference” used in Model Penal Code states, reaches facts that are outside these two mental states that prove that the defendant acting with an extreme indifference towards the safety and well-being of others. This last mental state does not make it more difficult to secure convictions. To the contrary, it leads to more convictions because liability will attach when any of the three mental states (knowledge, reckless, **or** extreme indifference) are proven by the facts that are present.

As for negligence, there is much debate over whether negligence, as a normative matter, is a proper mental state on which to attach criminal liability.<sup>241</sup> Malice does

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236. *People v. Morales*, No. H030193, 2009 WL 1227954, at \*9 (Cal. Ct. App. May 6, 2009).

237. *Id.* at \*17.

238. *Id.* at \*18 n.12 (first citing *Hobson*, *supra* note 228; then citing *Mounts*, *supra* note 224); *see also Morales v. Noll*, No. C 10-01199 EJD (PR), 2012 WL 1710967, at \*27 n.11 (N.D. Cal. May 15, 2012) (quoting this footnote when affirming the state court’s decision).

239. Perkins, *supra* note 202, at 568.

240. *See generally* COLO. REV. STAT. § 18-3-102 (2017) (defining first degree murder as arising when any of the subsections are met, including an intentional killing under subsection (a) or a murder by malice under subsection (d) defined as “[u]nder circumstances evidencing an attitude of universal malice manifesting extreme indifference to the value of human life generally, [the offender] knowingly engages in conduct which creates a grave risk of death to a person, or persons, other than himself, and thereby causes the death of another”); JUDICIAL COUNCIL OF CAL., CRIMINAL JURY INSTRUCTIONS 520 (2017) (defining express malice as when there is an intent to kill and implied malice as when there is an extreme disregard for life, and instructing the jury to convict if either is found).

241. *See* Jerome Hall, *Negligent Behavior Should Be Excluded from Penal Liability*, 63 COLUM. L. REV. 632, 641 (1963) (“The theory of deterrence rests on the premise of rational utility, *i.e.* that prospective offenders will weigh the evil of the sanction against the gain of the imagined crime. This, however, is not relevant to negligent harm-doers since they have not in the least thought of their duty, their dangerous behavior, or any sanction.”). California, like other states, has codified the principle that civil negligence is not actionable in criminal law. *See* CAL. PENAL CODE § 26 (West 2014) (stating that 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”).

not stretch so far as to reach negligence. There must be a subjective awareness, subjective disregard, or subjective indifference before crimes are prosecuted under this mental state.

Third, a final criticism for using malice as a mental state is that it serves as a stand-in for criminalizing character. This criticism is the most compelling one, but also, engagement with this charge provides an important insight into the term's value. Professor Kenneth Simons has written numerous articles on this subject.<sup>242</sup> One of his most persuasive critiques of the mens rea of culpable indifference—which is one of the mental states captured by the malignant heart standard—is that “[f]ree-floating desires, intentions, beliefs, or attitudes, without more, do not justify criminal liability.”<sup>243</sup> Stated another way, his concern is that taking into account Ms. Knoller's indifference towards Diane Whipple and Mr. Fleming's callous disregard for others on the road, however morally reprehensible that behavior was, is an indictment of their character and actions but not a proper basis to attach criminal liability. In the 1966 case *People v. Phillips*, the California Supreme Court grappled with a similar accusation, that “[t]he 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.’”<sup>244</sup>

A response to this criticism is that malice does not attach liability to bad character any more than a purposeful intent attaches liability to thoughts of harming another. Returning to the neighbor wishing that her neighbor dies, criminal liability would never attach to wishing another person dead, however strong, detailed, and repeated, unless and until those thoughts are accompanied by action. In the same respect, Ms. Knoller was not guilty of murder simply because she had no concern or care over whether Diane Whipple was killed by her dog, and Mr. Fleming was not guilty of murder simply because he had no regard for the well-being of countless persons placed in his path. Rather, Ms. Knoller and Mr. Fleming became guilty of murder when their extreme indifference toward human life was coupled with action—not being able to manage a vicious dog unhabituated to humans and choosing to drive in a state of intoxication that places countless lives at risk—that caused the death of others.

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242. See, e.g., Kenneth W. Simons, *Should the Model Penal Code's Mens Rea Provisions Be Amended?*, 1 OHIO ST. J. CRIM. L. 179 (2003); Kenneth W. Simons, *When Is Negligent Inadvertence Culpable?*, 5 CRIM. L. & PHIL. 97 (2011). Other scholars have written about this as well. See, e.g., Matthew R. Ginther et al., *The Language of Mens Rea*, 67 VAND. L. REV. 1327 (2014) (studying whether jurors understand the four Model Penal Code mental states).

243. Kenneth W. Simons, *Does Punishment for “Culpable Indifference” Simply Punish for “Bad Character”?: Examining the Requisite Connection Between Mens Rea and Actus Reus*, 6 BUFF. CRIM. L. REV. 219, 230 (2002).

244. *People v. Phillips*, 414 P.2d 353, 363 (Cal. 1966) (en banc), *overruled on other grounds by People v. Flood*, 957 P.2d 869, 882 (Cal. 1998).

Assigning criminal liability to the mental state of malice does not convict bad men (and women) based on their morally reprehensible character alone. To the contrary, the mental state of malice recognizes that the people whose character is so bereft of concern over others—once combined with conduct that causes death—present a social harm of a senseless loss of life.

Without the mental state of malice, only the law of averages would protect anyone from the harm arising from people who make countless decisions that are infused with anti-social conduct. Neither Ms. Knoller nor Mr. Fleming formulated a specific desire to kill their victims akin to the abusive husband planning the murder of his wife. Neither Ms. Knoller nor Mr. Fleming knowingly disregarded a specific risk that their dog or car posed to their victims akin to a sharp shooter ignoring his neighbor's warning that children played next to his practice range. But both made numerous decisions to benefit themselves at the expense of the safety and well-being of those around them, and those decisions caused the senseless death of their victims. The genius of the term malice is that it considers the abusive husband and sharp shooter to be just as morally blameworthy as the callous narcissist. In homicide, this capacious mens rea has properly criminalized malignant heart killings as murder. Rape law can also benefit from malice's expanded reach to capture defendants who engage in sex with extreme indifference towards whether their partner is consenting.

#### *D. The Proposed New Offense of Rape by Malice Will Lead to More Convictions*

Weaving together strands of thought from this Article, it is important that rape law evolve to both capture the contemporary social harm of unwanted sex in rape and utilize more sophisticated mens rea that other crimes currently employ. The proposed new offense of rape by malice is defined by the elements of: (1) a person who has sexual contact (2) with another, and (3) has the intent to have sexual contact without consent, is reckless whether the sexual contact is without consent, or is extremely indifferent about whether the sexual contact occurs without consent.

This crime is designed to police the social harm of unwanted sex. Returning to the discussion of the ideal definition of rape, the elements of rape by malice greatly increase the number of instances of unwanted sex that will be criminalized by this term. But as an important corollary, even a substantially improved definition of rape cannot—and should not—criminalize all instances of unwanted sex. Rather the focus will be on criminalizing defendants who have sexual contact with another and know, are reckless to, or have a callous indifference toward whether the other person has consented. The following section discusses four aspects of the proposed new offense that improve upon existing definitions by: selecting an actus reus of consent without force, a broad mens rea that captures knowledge, recklessness, and malice, the resulting increased relevance of evidence that a jury can consider under the malice mens rea, and despite its breadth, the crime does not reach wanted sex.

### 1. *A Broad Actus Reus of Non-Consent Is Without Force*

The actus reus of “rape by malice” would be an unqualified, unconditional element of non-consent, which is currently used in the felonious definitions of rape in only eight states.<sup>245</sup> As explained in Part I, the actus reus of an unqualified non-consent rejects the actus reus of force used in forty-six jurisdictions and the actus reus of non-consent that is used in twenty-eight jurisdictions, which attach liability only when the non-consensual sex occurs within specific power imbalances or victim has certain codified vulnerabilities. An unqualified non-consent actus reus is driven by an aspiration to criminalize the highest number of instances of unwanted sex, without regard to circumstances that derived out of concerns of sexual morality or false accusations.

The element of “sexual contact” is also a rejection of traditional rape that limited rape to vaginal intercourse, reflecting the presumptions that only women could be victims and men could be rapists. The majority of—but not all—jurisdictions have this expanded definition to ensure that the targeted conduct is unwanted sexual contact rather than limited definitions arising from outdated assumptions of gender, morality, or sexual mores.<sup>246</sup>

### 2. *A Broad Mens Rea of Malice Captures Knowledge, Recklessness, and Extreme Indifference*

The mens rea used in the proposed offense “rape by malice” uses the term malice, which is used in the homicide context. As illustrated above, this term captures the mental state of a defendant who knows she does not have the consent of her partner, is reckless towards whether she might have her partner’s consent, or is extremely callous or indifferent towards whether she has the consent of her partner to engage in sexual contact.<sup>247</sup> This expanded mens rea will capture the existing cases where knowledge and recklessness are established. But also, introducing malice will permit convictions to arise from instances of a malignant heart.

When rape is defined only by the heightened mens rea of knowledge or recklessness, many instances of unwanted sex fall outside the reach of criminal law. In his book *Missoula*, Jon Krakauer looks at the campus rape epidemic and profiles half a dozen instances of sexual assault, some of which were prosecuted and convicted, some never prosecuted but adjudicated by the university, and some never prosecuted or adjudicated but described unequivocally by victims as being unwanted sex.<sup>248</sup> As an author, Krakauer had access to victims and abusers and

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245. See *supra* notes 126–27 (listing states and statutes).

246. See *supra* note 81 and accompanying text (citing language from two states that continue to limit rape to vaginal intercourse and heterosexuality); *supra* note 82 (discussing the now abandoned marital rape exemption that was part of traditional original rape statutes).

247. See *supra* Sections II.B, II.C (discussing the meaning of malice in homicide context).

248. KRAKAUER, *supra* note 18, at xiii–xiv.



portrayed a complicated picture of rape and rapists. One of the men who had unwanted sex was a predator, both in terms of attacking a friend while asleep and having a history of attacking other women.<sup>249</sup> This man who was convicted of rape engaged in intercourse with a woman he had known since childhood while she was sleeping on his couch.<sup>250</sup> When she woke up and ran away, he chased after her down the street.<sup>251</sup> Another man, against whom charges were never brought, was a clueless young virgin who lacked basic understandings of intimacy and a woman's anatomy, most likely arising from his sex education apparently coming from pornography.<sup>252</sup> Upon meeting a woman at a bench late at night, he followed her back to her dorm room, and violated her orifices, producing copious blood and bruising. He later defended his conduct, believing that all women "squirted" when pleased and he was simply trying to figure out how to make that happen.<sup>253</sup> Another man profiled by Krakauer was the quarterback of his school's football team. In that case, the young man also demonstrated that he had a malignant heart, seeking out sex with an acquaintance without regard and in complete indifference to whether she consented.<sup>254</sup> His trial received the most attention in the book and a jury acquitted him of rape. Krakauer interviewed a juror who explained that the jurors believed the woman's account that she had unwanted sex.<sup>255</sup> But the jurors did not convict because the prosecution did not present proof that the quarterback had knowledge that he was engaging in unwanted sex.<sup>256</sup>

Unwanted sex arises from multiple motivations. A *mens rea* for rape should be flexible and responsive enough to criminalize as much unwanted sex as possible without criminalizing wanted sex. Krakauer's profiles of sexual assault reveal that someone who sexually assaults another may be a predator, a fool, or somewhere in between. But, the current definitions of rape do not reach all of these unwanted sexual encounters. Other crimes such as homicide have expansive definitions to capture all killings made by predators, fools, and the careless. Under rape by malice, so too would the crime of rape finally be able to reach all who knew, or deliberately did not care to know, if their advances were consented to.

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249. *Id.* at 12–15 (discussing convicted rapist Beau Donaldson's sexual assault of a childhood friend while she was sleeping); *id.* at 153–57 (describing Donaldson's unreported rape of another woman that stopped when friends knocked down a locked door in responses to her screams).

250. *Id.* at 12–13.

251. *See id.* at 14–15.

252. *Id.* at 69–70, 74–83 (discussing Calvin Smith, who had been a virgin, who sexually assaulted a woman by engaging in aggressive, unusual conduct he learned from pornography that he thought was commonplace).

253. *Id.* at 80–81.

254. *See id.* at 133–50, 176–87, 225–289, 299–305 (discussing in depth the alleged rape by Jordan Johnson, the University's findings and appeal process, and criminal trial that resulted in acquittal).

255. *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 . . . .”).

256. *Id.* at 302–03.

3. *Malice Will Render Evidence of Callousness After the Attack Relevant to Whether the Offender Had Extreme Indifference Before the Attack*

Returning to the profile of the quarterback who was acquitted for lack of evidence that he knew he was having sex without his partner's consent, the proposed rape by malice could have led to his conviction. As a preliminary matter, the interviewed juror correctly assessed that there was no evidence that the quarterback knew he was having sex without consent. The woman testified that the sex was unwanted.<sup>257</sup> The quarterback gave a conflicting, more favorable account of the interaction. Significantly, in his version, the woman had no outward signs of resistance or non-consent.<sup>258</sup> When rape is defined as knowingly having sex without consent, as it was here, this evidence is unlikely to lead to a conviction.

Just as *Knoller* and *Fleming* demonstrated malignant hearts with their callous conduct after their victim died, so too would rape by malice expand the universe of relevant evidence. For the quarterback, under his account of what occurred, he testified that he had no prior sexual contact with the woman, he showed up intoxicated to watch a movie in her room, he did not use a condom, and immediately after ejaculating, he cleaned off his hand and put on his clothes.<sup>259</sup> He testified that the woman did not have an orgasm, they did not kiss or cuddle afterwards, and he never attempted to call or text, despite nonstop texts and interactions—infused with flirtations—that preceded their date.<sup>260</sup>

None of these facts were relevant to proving what the quarterback knew while having intercourse. To reformulate the *Fleming* standard, the facts would be highly relevant to the question concerning what he cared, or did not care, to find out about whether his partner was consenting to their interaction. Rape by malice has the evidentiary benefit of directing a jury to consider what actions and omissions the accused undertook after the sexual encounter and to then make inferences from this conduct to assess whether he assumed that the prior sexual encounter had been consensual or not.

Under this inquiry, the quarterback's testimony certainly paints a picture that is at odds with someone who believed his sexual conduct was welcomed in the midst and immediate aftermath of the encounter. The quarterback's lack of interest in his partner's desires or sexual gratification during sex (no condom and no orgasm), his lack of desire for any intimacy in the form of kissing or cuddling afterwards, and his sudden stop of flirtatious and all communication after numerous text exchanges is—as a whole—a callous indifference towards whether she was engaged in consensual activity.<sup>261</sup> Returning to the homicide context, malice is not a legal

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257. *Id.*

258. *Id.* at 279–81.

259. *Id.*

260. *Id.* at 280–82.

261. *See id.* at 278–82 (detailing Johnson's trial testimony describing the sexual encounter).

conclusion but an inference from the facts. In this respect, jerks and bad lovers will not be convicted as rapists unless their flaws are accompanied by indicia of indifference toward and contempt for whether their sexual contact was without consent. Akin to Ms. Knoller's behavior of returning to the crime scene only to search for her lost keys, the quarterback provided no testimony showing any interest or assumption that his partner had engaged in sex that was wanted, enjoyable, or worthy of repetition. Rape by malice considers a wider universe of facts, which will result in more convictions.

#### *4. The Breadth of the Offense Still Has Limits to Prevent an Overinclusive Reach*

Despite the likelihood that more unwanted sex is actionable under rape by malice than under existing definitions of rape, this new offense will not—and should not—criminalize all unwanted sex. Returning to Figure 1, because of the reasonable doubt standard, even the ideal crime of rape should not be able to criminalize all forms of unwanted sex. Unlike rape by intoxication or affirmative consent laws, rape by malice is focused on elements that sort out unwanted sex from wanted sex.

Rape by malice will be akin to murder by malice in that different facts will be newly relevant to judge callousness. The legal standard will present a different inquiry for the jury than just the question of whether a defendant did or did not have certain awareness that the sexual encounter was without his partner's consent. Expanding the evidence and legal inquiry will lead to more convictions for rape. This result will be a normative good in that the crime of rape will finally align with the social harm of stopping unwanted sex. But also, as set forth in Section III, it will present a new problem of what then is the appropriate punishment for the increased number of people convicted for felonious rape.

### III. THE NORMATIVE CASE TO PUNISH ACQUAINTANCE RAPE WITH A MAXIMUM FIVE-YEAR SENTENCE

In April 2015, Justice Anthony Kennedy and Justice Stephen Breyer appeared before a House appropriations subcommittee to discuss issues relating to the American criminal justice system.<sup>262</sup> In addition to serving as a Supreme Court justice, in the 1980s, Justice Breyer had been a member on the commission that helped design the federal sentencing guidelines.<sup>263</sup> It was quite notable for Justice Kennedy to candidly counsel the congressional representatives that, “[i]n many

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262. Editorial, *Justice Kennedy's Plea to Congress*, N.Y. TIMES (Apr. 4, 2015), [https://www.nytimes.com/2015/04/05/opinion/sunday/justice-kennedys-plea-to-congress.html?\\_r=0](https://www.nytimes.com/2015/04/05/opinion/sunday/justice-kennedys-plea-to-congress.html?_r=0).

263. *Id.* (“Justice Breyer . . . before joining the court helped design the modern federal sentencing guidelines in the 1980s . . .”).

respects, I think [the criminal justice system is] broken.”<sup>264</sup> When asked about prison overcrowding, Justice Kennedy was even more pointed in saying “[t]he corrections system is one of the most overlooked, misunderstood institutions we have in our entire government.”<sup>265</sup> He further lamented that the legal profession focuses on guilt and innocence and ignores the consequences: “We have no interest in corrections . . . . Nobody looks at it.”<sup>266</sup>

Part III of this Article takes up Justice Kennedy’s challenge to think comprehensively about punishment when discussing crime. Given that this Article asserts a need for and proposes a solution to increasing rape convictions, it would be remiss to ignore the consequences of such a proposal. Moreover, as a practical matter, the topic of punishment cannot be divorced from statutory reform. As illustrated by the May 2017 American Law Institute conference, the needed reforms to rape law will not occur without addressing what happens to those who will—and should be—convicted for sexual assault.<sup>267</sup> The American Law Institute, states on its website that its own definition of rape is “outdated and no longer a reliable guide for legislatures and courts.”<sup>268</sup> Despite condemnation of its own definition, members of the American Law Institute voted down reforms to change the model definition, rejecting proposals to add the mens rea of purpose or recklessness to the crime.<sup>269</sup> Commentators claimed that a contributing factor that blocked any reform effort arose from those concerned about overcriminalization and adding more prisoners to the carceral system.<sup>270</sup>

To think comprehensively about crime then demands a focus not just on catching the bad guys but on thinking seriously about what impact punishment has on the offender, victim, and society. In 1897, Oliver Wendell Holmes stressed, “[i]t is said . . . that we must consider the criminal rather than the crime.”<sup>271</sup> This Article attempts to do both. Our society is painfully aware of how the Tough-on-Crime era increased our prison population by 400% in only one generation.<sup>272</sup> Starting with U.S. Attorney General Eric Holder, the federal government responded with Smart on Crime measures to reduce the prison population and sentence length for numerous offenders.<sup>273</sup> Holder’s successor, Jeff Sessions,

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264. *Id.*

265. *Id.*

266. *Id.*

267. See Schow, *supra* note 44.

268. *Sexual Assault and Related Offenses*, AM. L. INST., <https://www.ali.org/projects/show/sexual-assault-and-related-offenses/> (last visited Nov. 6, 2017).

269. See *id.*

270. Schow, *supra* note 44.

271. Holmes, *supra* note 26, at 470.

272. See *supra* notes 27–28 (citing statistics about the U.S. incarceration rates before and after the Tough-on-Crime era).

273. See U.S. DEP’T OF JUSTICE, SMART ON CRIME: REFORMING THE CRIMINAL JUSTICE SYSTEM FOR THE 21ST CENTURY (2013) (explaining alternative programs to tough sentencing, providing policy documents and fact sheets, and showcasing local successful reentry programs).

rejected these initiatives and is seeking to revive prosecutorial practices that imprison drug offenders, which is contrary to the contemporary trend to respond to drug addiction with treatment instead of incarceration.<sup>274</sup> Despite the policy change at the federal level, states—which are responsible for nearly 90% of the nation’s prison population—continue to pursue policies defined by Smart on Crime movement, which promote rehabilitation and offender re-entry services over longer prison sentences.<sup>275</sup> States that have invested in offender integration efforts have realized financial and community gains that result from lowering recidivism rates.<sup>276</sup>

As set forth below, this Article proposes a maximum prison term of five years for those who are convicted of rape by malice. Excluded from this proposal are rapes involving aggravating factors such as child victims, weapons, or sadism. States can increase punishment for those factors as need be, but for the 80% of rapes that occur between adults in the absence of these factors, no prison term in excess of five years should be imposed.<sup>277</sup>

The initial problem in discussing this issue is the distressing lack of data. Only six states and the federal government collect and publish data on the number of convictions and length of sentences for rape.<sup>278</sup> Nonetheless, the limited data that exists shows a disturbing reality that approximately 90% of those convicted of rape in state courts serve prison sentences, and 95% of those convicted of rape in federal courts serve prison terms.<sup>279</sup> By contrast, approximately 40% of those

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274. Donna F. Edwards, Opinion, *What Ever Happened to Mass Incarceration Reform?*, HILL (Aug. 9, 2017) (“[W]ith the confirmation of Attorney General Jeff Sessions, who ushered in a 1980’s throw-back Department of Justice directive on low-level drug offenses, it remains unclear whether there might be a return to a bipartisan approach to criminal justice reform in the 115th Congress.”); Nancy Gertner & Chiraag Bains, *Mandatory Minimum Sentences Are Cruel and Ineffective. Sessions Wants Them Back.*, WASH. POST (May 15, 2017), [https://www.washingtonpost.com/posteverything/wp/2017/05/15/mandatory-minimum-sentences-are-cruel-and-ineffective-sessions-wants-them-back/?utm\\_term=.9a3e3d555581](https://www.washingtonpost.com/posteverything/wp/2017/05/15/mandatory-minimum-sentences-are-cruel-and-ineffective-sessions-wants-them-back/?utm_term=.9a3e3d555581).

275. See PETER WAGNER & BERNADETTE RABUY, PRISON POLICY INITIATIVE, MASS INCARCERATION: THE WHOLE PIE 2017 (2017).

276. Samantha Finch, *America’s Recidivism Problem Will Be Fixed Through Prison Education Programs*, PARENT HERALD (June 21, 2016), <http://www.parentherald.com/articles/50251/20160621/america-s-recidivism-problem-will-fixed-through-prison-education-programs.htm> (discussing offender reentry programs that are preventing recidivism in California, Texas, and Idaho); Eric H. Holder, Jr., Opinion, *We Can Have Shorter Sentences and Less Crime*, N.Y. TIMES (Aug. 11, 2016); Maggie Kreins, Opinion, *Is Proposition 47 Working the Way It Was Sold to Voters?*, L.A. DAILY NEWS (Feb. 24, 2016), <http://www.dailynews.com/opinion/20160224/is-proposition-47-working-the-way-it-was-sold-to-voters-guest-commentary> (discussing successes and drawbacks of Proposition 47, which reduced the prison population and promised community resources to prevent crime).

277. See *supra* note 4.

278. See *infra* notes 327–34 and accompanying text.

279. In 2016, 95% of federal sexual abuse convictions received prison terms. 2.9% had a split sentence of prison term, and 1.6% received probation. U.S. Sentencing Comm’n, *Offenders Receiving Sentencing Options in Each Primary Offense Category*, INTERACTIVE SOURCEBOOK FED. SENT’G STAT., [https://isb.ussc.gov/USSC?userid=USSC\\_Guest&password=USSC\\_Guest&toc-section=0](https://isb.ussc.gov/USSC?userid=USSC_Guest&password=USSC_Guest&toc-section=0) (last visited Jan. 19, 2018). In 2009, where data is available from only the seventy-five largest counties, 89% of rape convictions resulted in prison terms. See Danielle Paquette, *What Makes the Stanford Sex Offender’s Six-Month Jail Sentence so Unusual*, WASH. POST (June 6, 2016), <https://www.washingtonpost.com/news/wonk/wp/2016/06/06/what-makes-the-stanford-sex->

convicted of other state felonies are sentenced to prison.<sup>280</sup> And as set forth in detail below, from the states that collect data, the actual sentences range from eight to thirty years. This rate of incarceration is excessive and counterproductive.

“Excessive” is a normative term that must be proven by persuasion rather than quantitative data. In some jurisdictions, an actual sentence for the crime of acquaintance rape is a thirty-year prison term. It is difficult to justify that sentence length, given that it is longer than sentences imposed for many second-degree murders, which are often punished with twenty-year sentences.<sup>281</sup> Moreover, 1/3 of all states punish rape with a maximum term of life, 99 years, or 100 years. Seeking lengthy punishments is counterproductive to many important aspects of criminal justice. Overpunishment leads to fewer convictions, lengthier sentences do not make the community safer because more prison time contributes to recidivism, and the international community punishes rape, on average, with between one- and five-year sentences.

Setting aside facts and figures, many Americans love prisons and measure justice with retribution and the wrongdoer’s suffering. This gut instinct shared by many is misguided. Criminal law is not like contracts. A breach of contract is remedied with equitably devised remedies—specific performance or compensation—that attempt to make a victim whole. There is no symmetry in criminal courts. Victims of violent crimes and rapes do not receive any more solace or healing or safety with any additional time added to a prison term. But crime victims do ask for justice in the form of ensuring their offender does not commit that crime again and inflict the same harm on another.<sup>282</sup>

In this respect, proven methods to reduce recidivism are rehabilitation during prison terms and upon release, and reintegration of the offender into the community. A lighter sentence is the first step in recognizing that society and victims are better off if resources are spent in preventing a repeat offender instead of making the wrongdoer suffer for the sake of suffering.<sup>283</sup> The wrongdoer in rape—

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offenders-six-month-jail-sentence-so-unusual/?utm\_term=.3d292fcb32bd. From data made available in 2013, 85% of the felony rape convictions were punished with prison term. See RAPE, ABUSE & INCEST NAT’L NETWORK (RAINN), *supra* note 1; see also DUROSE & LANGAN, *supra* note 7.

280. In 2006, 41% of convicted felonies were punished in state prison and 28% in local jails. ROSENMERKEL ET AL., *supra* note 7, at 1.

281. See, e.g., CAL. PENAL CODE § 190(a) (West 2014) (fifteen years to life); 730 ILL. COMP. STAT. ANN. 5/5-4.5-30 (2017) (four to twenty years), MONT. CODE ANN. § 45-5-103(4) (2017) (two to forty years); VA. CODE ANN. § 18.2-32 (five to forty years).

282. See DAVID BINDER RESEARCH, *supra* note 57, at 5, 7 (national surveys of crime victims lend support to the policy goals of rehabilitation over lengthier sentences: 82% support “[i]ncreasing education and rehabilitation services for people in the justice system” and only 4% of all surveyed crime victims attribute “too few people in prison” as a cause of crime).

283. Michelle Cotton, *Back with a Vengeance: The Resilience of Retribution as an Articulated Purpose of Criminal Punishment*, 37 AM. CRIM. L. REV. 1313, 1324–37 (2000) (discussing the Model Penal Code’s rejection of retribution as a reason for punishment and the handful of states that followed that recommendation). Professor Cotton argues that the States’ preferences for non-retribution was supplanted “through judicial activism, violation of the doctrine of separation of powers, dismissal of constitutional supremacy, transgression upon the principle of

however despicable and depraved—remains redeemable, and our public safety needs demand that efforts be made toward that goal.

A. *Mass Incarceration: Origins and Contemporary Practices*

The facts of mass incarceration, also appropriately labeled overincarceration, are widely known. In 1973, there were 96 prisoners per every 100,000 people in the United States.<sup>284</sup> At the time, there was a viable movement that advocated for a moratorium on prisons, and even the abolishment of prisons.<sup>285</sup> Arising out of concerns that prisons were not effective in ending crime, political activists, religious groups, and government officials advocated for reforms that promoted rehabilitation over incarceration.<sup>286</sup> Although the anti-incarceration reforms had an arguably lasting impact on how juvenile offenders were treated, there was a quick reversal and return to promoting incarceration for adults.<sup>287</sup>

A number of factors led to a dramatic change in American prison practices. In the 1970s, harsher responses to prisoners were endorsed—and accepted—to punish or prevent prison riots.<sup>288</sup> In 1971, President Richard Nixon launched the war on drugs, which increased the size and presence of federal agencies, mandatory sentences, and no-knock warrants.<sup>289</sup> The states—which ultimately are the site of most prisons and criminal prohibitions—followed suit. In 1973, New York

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federalism, and abandonment of the usual rules of statutory construction.” *Id.* at 1314; see also Matthew D. Moyer, *Free Will’s Enormous Cost: Why Retribution, Grounded in Free Will, Is an Invalid and Impractical Penal Goal*, 92 NOTRE DAME L. REV. 2231, 2234 (2017) (“Unlike the other penological justifications of rehabilitation, deterrence, and incapacitation, retribution is not aimed at any practical social good.”); Thomas E. Robins, *Retribution, the Evolving Standard of Decency, and Methods of Execution: The Inevitable Collision in Eighth Amendment Jurisprudence*, 119 PENN ST. L. REV. 885, 886 (2015) (“The tension between retribution and the evolving standard of decency in method of execution jurisprudence has yet to be fully explored, but will be the future of death penalty litigation.”).

284. JEFFREY REIMAN & PAUL LEIGHTON, *THE RICH GET RICHER AND THE POOR GET PRISON: IDEOLOGY, CLASS, AND CRIMINAL JUSTICE* 150 (11th ed. 2017).

285. DANIEL W. VAN NESS & KAREN HEERTDERKS STRONG, *RESTORING JUSTICE: AN INTRODUCTION TO RESTORATIVE JUSTICE* 14–15 (5th ed. 2014).

286. *Id.*

287. See Jasmine Duel et al., *Restorative Justice: Restoring California Juvenile Justice System and Abolishing Juvenile Life Without Parole*, 3 L.A. PUB. INT. L.J. 68, 86 (2010–2012) (discussing how California policy makers changed juvenile justice from rehabilitation to incarceration in the California Youth Authority and charging juveniles as adults for certain crimes); Julianne Feliz-Kidd, Case Comment, *Diatchenko v. District Attorney for the Suffolk District*, 466 Mass. 655 (2013), 97 MASS. L. REV. 38, 40 (2015) (commenting on how in the 1990s, states also reversed course and eschewed rehabilitation for prison sentences for juveniles).

288. Adam Gopnik, *Learning from the Slaughter in Attica*, NEW YORKER (Aug. 29, 2016) (“The uprising at Attica was, in the not very long run, one of the things that stopped prison reform dead in its tracks. The fear that Attica generated among prison administrators and the American public pointed the way to the supermax and permanent solitary, emboldening the most reactionary forces in the government to begin the program of mass incarceration that remains the moral scandal of our country.”).

289. *A Brief History of the Drug War*, DRUG POL’Y ALLIANCE <http://www.drugpolicy.org/facts/new-solutions-drug-policy/brief-history-drug-war-0> (last visited Oct. 5, 2017) (“In June 1971, President Nixon declared a ‘war on drugs.’ He dramatically increased the size and presence of federal drug control agencies, and pushed through measures such as mandatory sentencing and no-knock warrants.”).

led the way with the highly influential—and controversial—Rockefeller Drug Laws, which epitomized the “tough on crime” philosophy that introduced lengthy and mandatory sentences for the possession of a small amount of drugs.<sup>290</sup> Michigan followed, introducing life sentences for certain drug crimes.<sup>291</sup> Like most parts of United States history, a zig follows a zag.

The 1970s saw an intense but brief movement to decriminalize marijuana, which resulted in thirty-two states reducing penalties for marijuana possession, eleven states decriminalizing possession, 60% of the population supporting decriminalization, and in 1977, President Jimmy Carter endorsing decriminalization.<sup>292</sup>

By the 1980s, public opinion changed and tougher drug laws were enacted by federal and state governments. At the federal level, President Ronald Reagan revived the war of drugs with the “Just Say No” propaganda campaign that was backed up by numerous policy initiatives targeting drug dealers and mostly users. Congress enacted a number of laws that created lengthy mandatory sentences for federal drug crimes.<sup>293</sup> At the state level, the Rockefeller laws—which called for “mandatory prison sentences of 15 years to life for drug dealers and addicts, [including] those caught with small amounts of marijuana, cocaine, and heroin” —were adopted in some form in most states.<sup>294</sup>

Outside of drug offenses, mandatory minimum sentences and three-strikes laws also contributed to lengthy sentences of offenders who had, in previous decades, otherwise received lighter sentences. In 1984, the federal government enacted the Armed Career Criminal Act (“ACCA”), which imposed mandatory and lengthy sentences if the person arrested for a federal firearm offense had prior state

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290. The Rockefeller laws were met with skepticism from the start, as medical experts were unsure of how longer sentences would stop addiction and prosecutors—at the beginning—noticed the racial disparities in who was arrested and prosecuted under the laws. See Brian Mann, *The Drug Laws that Changed How We Punish*, NPR (Feb. 14, 2013), <http://www.npr.org/2013/02/14/171822608/the-drug-laws-that-changed-how-we-punish>.

291. In 1978, Michigan enacted its infamous “650-lifer law,” introducing a life sentence, without the possibility of parole, for the sale, manufacture, or possession of at least 650 grams (1.43 pounds) of cocaine or Schedule I and Schedule II opioids. Michael Gerstein, *New Law Means Less Prison for Repeat Drug Offenders*, DETROIT NEWS (Dec. 28, 2017), <http://www.detroitnews.com/story/news/politics/2017/12/28/michigan-law-drug-offender-parole/108976500/>. In 1998, the mandatory sentence was moderated to a twenty-year mandatory minimum. *Id.* In 1992, the Supreme Court struck it down as unconstitutional. See *Court Overturns a Tough Drug Law*, N.Y. TIMES (June 17, 1992), <http://www.nytimes.com/1992/06/17/us/court-overturns-a-tough-drug-law.html>.

292. KENNETH MEIER, *THE POLITICS OF SIN: DRUGS, ALCOHOL, AND PUBLIC POLICY* 43–45 (1994).

293. Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, 102 Stat. 4181 (1988) (codified as amended in scattered sections of U.S.C. (2012)) (mandatory sentences and immigration consequences); Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, 100 Stat. 3207 (1986) (codified as amended in scattered sections of U.S.C. (2012)) (criminalizing crack cocaine more severely than powder cocaine and imposing mandatory sentences); see also MEIER, *supra* note 292, at 50–52.

294. Mann, *supra* note 290. The laws were met with skepticism from the start as medical experts were unsure of how longer sentences would stop addiction and prosecutors—at the beginning—noticed the racial disparities in who was arrested and prosecuted under the laws.



convictions involving elements of violence or drugs.<sup>295</sup> In 1994, California introduced its own version of a three-strikes law, which lengthened sentences—first doubling and then cumulating with life terms—for recidivists who engaged in specific non-drug offenses.<sup>296</sup>

During this Tough-on-Crime era, juvenile offenders were no longer viewed as redeemable or worthy of rehabilitation. States passed laws to try children as adults, housed them in prisons filled with adults (as opposed to separate juvenile facilities), and opted for carceral institutions.<sup>297</sup> As reported by one article: “[n]early 200,000 youth enter the adult criminal-justice system each year, most for non-violent crimes. On any given day, 10,000 juveniles are housed in adult prisons and jails.”<sup>298</sup> Many criticisms are leveled against these practices, most notably that they make children vulnerable to sexual assault.<sup>299</sup> However, the most significant loss to any child tried or imprisoned as an adult is the loss of the presumption of reformation. Whereas juvenile adjudications are designed to provide educational, vocational, and rehabilitation services, adult prisons are dedicated to punishment, and often, only retribution.<sup>300</sup>

Racial disparities—and racism—have been a driving force of mass incarceration. As other scholars, most notably Michelle Alexander, have argued racism has had an influential force in permitting Tough-on-Crime and the Drug War policies that disproportionately impact communities of color.<sup>301</sup> The sentencing disparities between crack and powder cocaine is the most visible example of how state and federal drug crimes targeted individuals based on race rather than conduct.<sup>302</sup> Although the height of the federal disparity was at a 100:1 differential, contemporary reform only reduced it to 18:1, despite the lack of dangerousness associated

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295. 18 U.S.C. § 924(e)(1) (2012) (attaching sentencing consequences for three prior qualifying offenses).

296. *California’s Three Strikes Sentencing Law*, CAL. CTS., <http://www.courts.ca.gov/20142.htm> (last visited Nov. 2, 2017) (“The essence of the Three Strikes law was to require a defendant convicted of any new felony, having suffered one prior conviction of a serious felony to be sentenced to state prison for twice the term otherwise provided for the crime. If the defendant was convicted of any felony with two or more prior strikes, the law mandated a state prison term of at least 25 years to life.”). In 2012, the voters amended the law to require the third strike to be a serious or violent crime. *Id.*

297. See Badger, *supra* note 29; Jessica Lahey, *The Steep Cost of Keeping Juveniles in Adult Prisons*, ATLANTIC (Jan. 8, 2016), <http://www.theatlantic.com/education/archive/2016/01/the-cost-of-keeping-juveniles-in-adult-prisons/423201/>.

298. Lahey, *supra* note 297.

299. *Id.* (“The National Prison Rape Elimination Commission described their fate in blunt terms in a 2009 report: ‘More than any other group of incarcerated persons, youth incarcerated with adults are probably at the highest risk of sexual abuse.’”).

300. *Id.* (“[Juveniles] are also more likely to benefit from rehabilitation . . . [I]t’s no surprise that juveniles who are released from adult facilities are in worse shape and are more like to reoffend, than their counterparts with similar criminal histories who are released from facilities designed with adolescents in mind.”).

301. See, e.g., ALEXANDER, *supra* note 29, at 97–98.

302. *Kimbrough v. United States*, 552 U.S. 85, 91 (2007) (“Under the statute criminalizing the manufacture and distribution of crack cocaine, 21 U.S.C. § 841, and the relevant Guidelines prescription, § 2D1.1, a drug trafficker dealing in crack cocaine is subject to the same sentence as one dealing in 100 times more powder cocaine.”).

with crack cocaine.<sup>303</sup> In statistics cited by the Supreme Court, of those convicted of federal crack cocaine offenses and subjected to mandatory sentences 100 times longer than convicted of crimes involving powder cocaine, 85% of the offenders were black.<sup>304</sup>

As a further poignant counterpoint to the irrationality of mandatory sentencing for drug crimes, incarceration is not the only societal response to drug crimes. Now that the opioid epidemic is ravaging white communities, the contemporary policy response calls for compassion, needle exchanges, and anti-addiction programs that promote rehabilitation instead of punitive incarceration.<sup>305</sup> In August 2016, the United States Sentencing Commission recommended to Congress that it amend the ACCA to eliminate drug predicates in their entirety.<sup>306</sup> Whether this is a sign of evolved thinking from mistakes from the War on Drugs or empathy granted only to white drug users, it is a marked shift from the prior practices that have incarcerated—and continue to incarcerate—millions of non-white drug users for the same conduct.<sup>307</sup>

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303. *Id.* (noting that even though the chemical composition between crack and powder campaign is similar, “[a]pproximately 85 percent of defendants convicted of crack offenses in federal court are black; thus the severe sentences required by the 100-to-1 ratio are imposed ‘primarily upon black offenders’”). In 2010, the U.S. Congress reduced the sentencing disparity to an 18:1 ratio. *See* Fair Sentencing Act of 2010, Pub. Law No. 111-220, 124 Stat. 2372 (2010). However, any disparity between the two forms of cocaine is still questionable.

304. *Kimbrough*, 552 U.S. at 91.

305. *See* Editorial, *Congress Wakes Up to the Opioid Epidemic*, N.Y. TIMES (May 16, 2016), <https://www.nytimes.com/2016/05/16/opinion/congress-wakes-up-to-the-opioid-epidemic.html> (discussing the eighteen bills Congress has passed and the proposed \$1.1 billion in funding President Obama sought for drug treatment); Tom Howell, Jr., *Senate Overwhelmingly Approves Bill to Fight Deadly Opioid, Heroin Epidemic*, WASH. TIMES (Mar. 10, 2016), <https://www.washingtontimes.com/news/2016/mar/10/senate-passes-bill-fight-opioid-heroin-epidemic/> (reporting on Senate passing a bill by a 94-1 vote to support additional funding for opioid treatment); Robert Pear, *Governors Devise Bipartisan Effort to Reduce Opioid Abuse*, N.Y. TIMES (Feb. 21, 2016), <https://www.nytimes.com/2016/02/22/us/politics/governors-devise-bipartisan-effort-to-reduce-opioid-abuse.html> (“Alarmed at an epidemic of drug overdose deaths, the National Governors Association decided over the weekend to devise treatment protocols to reduce the use of opioid painkillers.”); Katharine Q. Seelye, *Massachusetts Chief’s Tack in Drug War: Steer Addicts to Rehab, Not Jail*, N.Y. TIMES (Jan. 24, 2016), <https://www.nytimes.com/2016/01/25/us/massachusetts-chiefs-tack-in-drug-war-steer-addicts-to-rehab-not-jail.html> (reporting on Gloucester, Massachusetts police department informing addicts that if they come to the station asking for help, the police will not arrest them but will direct them to a program that assists them in securing treatment).

306. U.S. SENTENCING COMM’N, REPORT TO THE CONGRESS: CAREER OFFENDER SENTENCING ENHANCEMENTS 2 (2016).

307. Reports from 2009 to 2011 document that approximately 20% of whites, compared with 10% of Black and Latino Americans, have used controlled substances such as cocaine, marijuana, hallucinogens, and methamphetamine. *See* Saki Knafo, *When It Comes to Illegal Drug Use, White America Does the Crime, Black America Does the Time*, HUFFPOST (Sept. 18, 2013), [http://www.huffingtonpost.com/2013/09/17/racial-disparity-drug-use\\_n\\_3941346.html](http://www.huffingtonpost.com/2013/09/17/racial-disparity-drug-use_n_3941346.html). Despite the disparity in use, Black Americans are arrested for drug possession more than three times as white Americans. *Id.* According to 2011 data from the Bureau of Justice Statistics, of the 225,242 people serving state prison sentences for drug offenses, the racial composition of those prisoners was approximately 30% white, 41% Black, and 21% Hispanic. *See* E. ANN CARSON & DANIELA GOLINELLI, BUREAU OF JUSTICE STATISTICS, NCJ 242467, PRISONERS IN 2012—ADVANCE COUNTS 11 (2013).

The last factor associated with mass incarceration has been the public support for building prisons. Whether it be from lobbying efforts from private prisons<sup>308</sup> and prison guard unions or simply a collateral aspect of the Tough-on-Crime era, the United States spends \$80 billion each year on building or maintaining prisons.<sup>309</sup> This amount is significant. In addition to a substantial increase from prior practices, the growth of this expenditure has vastly outpaced that of expenditures on public education.<sup>310</sup> Seven states increased their corrections budget five times faster than public education expenditures.<sup>311</sup>

These factors in combination resulted in the United States outpacing the world in locking up its own citizenry. Today, there are now 753 prisoners for every 100,000 people—an increase of 400% from 1973.<sup>312</sup> Of those prisoners, 60% are serving sentences for nonviolent crimes.<sup>313</sup> The end result is that the United States has 5% of the world's population and over 20% of its prisoners.<sup>314</sup>

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308. There has been much attention and controversy surrounding private prisons. In August 2016, the federal government announced its intent to phase out private prisons due to pressure from advocates asserting moral and economic reasons. Senator Bernie Sanders and now-Senator Kamala Harris, the former Attorney General of California, argued against private prisons based on moral reasons, 2015 statistics showing higher rates of recidivism of those incarcerated by private prisons, and the documented abusive conditions. See *CA-Sen: Kamala Harris (D) Builds Momentum for DOJ's Call to Stop Using Private Prisons*, DAILY KOS (Aug. 19, 2016), <http://www.dailykos.com/story/2016/8/19/1561968/-CA-Sen-Kamala-Harris-D-Builds-Momentum-For-DOJ-s-C-all-To-Stop-Using-Private-Prisons>; Hanna Kozłowska, *The US Government Says It Will End the Use of Private Federal Prisons*, QUARTZ (Aug. 18, 2016), <http://qz.com/761532/the-us-government-says-it-will-end-the-use-of-private-federal-prisons>. But see Hanna Kozłowska, *The US Government Is Already Quietly Backing out of Its Promise to Phase out Private Prisons*, QUARTZ (Nov. 27, 2016), <http://qz.com/840337/the-us-government-is-already-quietly-backing-out-of-its-promise-to-phase-out-private-prisons/>. Although the industry is a multi-billion dollar one, in 2010 the two largest prison companies received \$3 billion in revenue, the private prisons account for only housing around 5% of state prisoners and 15% of federal prisoners. Michael Cohen, *How For-Profit Prisons Have Become The Biggest Lobby Nobody Is Talking About*, WASH. POST. (Apr. 28, 2015), [https://www.washingtonpost.com/posteverything/wp/2015/04/28/how-for-profit-prisons-have-become-the-biggest-lobby-no-one-is-talking-about/?utm\\_term=.768f74b89cf4](https://www.washingtonpost.com/posteverything/wp/2015/04/28/how-for-profit-prisons-have-become-the-biggest-lobby-no-one-is-talking-about/?utm_term=.768f74b89cf4); *Federal Decision to Phase Out Private Prisons Has Limited Impact, Activists Say*, GUARDIAN (Aug. 19, 2016), <https://www.theguardian.com/us-news/2016/aug/19/private-prisons-closure-limited-impact-justice-department> As such, there is debate over whether private prisons were a contributing factor to or beneficiary of mass incarceration.

309. *Report: Increases in Spending on Corrections Far Outpace Education*, U.S. DEP'T EDUC., (July 7, 2016), <http://www.ed.gov/news/press-releases/report-increases-spending-corrections-far-outpace-education>.

310. U.S. DEP'T OF EDUC., STATE AND LOCAL EXPENDITURES ON CORRECTIONS AND EDUCATION 1 (2016). Since 1980, states have increased spending on K–12 expenditures 107% from \$258 billion to \$534 billion, and forty-eight states increased their spending on corrections from \$17 to \$71 billion. *Id.* Only New Hampshire and Massachusetts elected to increase spending in education rather than correctional spending. *Id.* at 6; see also Stephanie Kelly, *The US Spends a Troubling Amount of Money on Prisons Compared to Schools*, BUS. INSIDER (July 7, 2016), <http://www.businessinsider.com/r-us-spending-on-prisons-grew-at-three-times-rate-of-school-spending-report-2016-7>.

311. Kelly, *supra* note 310.

312. See JOHN SCHMITT ET AL., CTR. FOR ECON. & POLICY RESEARCH, THE HIGH BUDGETARY COST OF INCARCERATION 3 (2010). This current mass incarceration has not been the norm. See *supra* note 27 and accompanying text.

313. Kathleen Miles, *Just How Much the War on Drugs Impacts Our Prisons, in One Chart*, HUFFPOST (Mar. 10, 2014), [https://www.huffingtonpost.com/2014/03/10/war-on-drugs-prisons-infographic\\_n\\_4914884.html](https://www.huffingtonpost.com/2014/03/10/war-on-drugs-prisons-infographic_n_4914884.html).

314. ACLU, *supra* note 28.

The rate of incarceration is a break from past practices and is an anomaly from other countries' policies. In a comparison among thirty-five other countries, the United States' rate of incarcerating 753 prisoners for every 100,000 citizens is shockingly high. Iceland has the lowest rate at 44 prisoners for every 100,000 citizens.<sup>315</sup> Fifteen other countries, including Japan, Norway, Germany, France, South Korea, and Austria, incarcerate at a rate of 100 or fewer prisoners for every 100,000 citizens.<sup>316</sup> The next thirteen lowest rate countries, including Portugal, Canada, Australia, England, Turkey, China, Brazil, and Spain, incarcerate at a rate of 200 or fewer prisoners for every 100,000 citizens.<sup>317</sup> The remaining three countries, incarcerate at rates of 206 (Czech Republic), 209 (Mexico), and 224 (Poland) prisoners for every 100,000 citizens.<sup>318</sup>

*B. From the Little Known Data that Exists, Rape Sentences Are Lengthy*

Given its leadership in rates of incarceration, it is not surprising that the United States has higher sentences for rapes than other Western countries. It is critical to consider the underlying reasons for the current sentence lengths and whether shorter sentence lengths are normatively valuable.

An important caveat must be made in comparing the sentencing practices among states. Each state defines rape (or sexual assault) differently; some include aggravating factors such as rape against a child or rape involving weapons as its own crime, while others include it as a subsection of an offense that includes acquaintance rape. As discussed below, only six states and the federal government even compile and publish the actual sentence imposed for rape convictions.<sup>319</sup> Among such limited data, there is no means to determine which sentences attach to which conduct underlying the conviction.

315. SCHMITT ET AL., *supra* note 312, at 3.

316. *Id.* From data from 2008–2009, the incarceration rate for every 100,000 people, in order of low to high, is: Iceland (44), Japan (63), Denmark (66), Finland (67), Norway (70), Sweden (74), Switzerland (76), Ireland (85), Germany (90), Italy (92), Belgium (94), France (96), South Korea (97), Austria (99), Netherlands (100).

317. *Id.* The incarceration rate for each of these countries, per 100,000 citizens, is: Portugal (104), Greece (109), Canada (116), Australia (134), Slovakia (151), Hungary (152), England and Wales (153), Luxembourg (155), Turkey (161), Spain (162), New Zealand (197). In addition, China incarcerates 118 and Brazil 197 for every 100,000 persons. See *World Prison Populations*, BBC NEWS, <http://news.bbc.co.uk/2/shared/spl/hi/uk/06/prisons/html/nn2page1.stm>, (last visited Sept. 1, 2017).

318. SCHMITT ET AL., *supra* note 312, at 3.

319. See ROBERT R. FRIEDMANN ET AL., NAT'L INST. OF JUSTICE, 237988, IMPROVING CRIME DATA PROJECT 4 (2010) ("Crime data are rarely compiled in standard formats suitable for multi-jurisdiction policy development or program evaluation without time consuming, repetitive, inefficient, and costly data collection and analysis efforts."); Jeff Asher, *Numbers Racket*, SLATE (Mar. 15, 2016), [http://www.slate.com/articles/news\\_and\\_politics/crime/2016/03/calls\\_for\\_service\\_data\\_are\\_the\\_best\\_way\\_to\\_analyze\\_crime\\_why\\_don\\_t\\_cities.html](http://www.slate.com/articles/news_and_politics/crime/2016/03/calls_for_service_data_are_the_best_way_to_analyze_crime_why_don_t_cities.html) ("In an October 2015 address . . . FBI Director James Comey spoke of an urgent 'data shortage' that was making it difficult for him to do his job. Addressing a room of law enforcement executives, Comey said, pointedly, 'How can we address a rise in violent crime without good information? And without information every single conversation in this country about policing and reform and justice is uninformed.'").

Despite these limitations, analyzing what data is available is an essential undertaking. For starters, it highlights the need for more states to record and publish conviction and sentencing data. But also, the commonalities that do exist in the limited data that is available is an important jumpstart into long overdue conversations about proportionality, retribution, and offender reintegration.

Looking to the data available from all fifty states and the District of Columbia, the potential sentences for rape are lengthy and substantial. Forty-three states punish rape with maximum sentences of twenty years to life.<sup>320</sup> Of those states, nineteen provide that a maximum sentence for sexual assault may be up to 99 years, 100 years, or life.<sup>321</sup> In states that reject life sentences, twenty-three impose high maximum sentences that are twenty-, thirty-, and fifty-four-years long.<sup>322</sup>

Minimum sentences are also incredibly harsh: although a small number of states have minimum terms that are under six years in length, twelve states have high minimum terms that begin at ten years and can be as high as twenty-five years.<sup>323</sup>

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320. See *supra* note 52 (listing nineteen states that have maximum terms of 99, 100 years, or life); *infra* note 322 (listing twenty-three states that have high maximum sentences for sexual assault).

321. Comparing the sexual assault statutes between states is difficult because there is no uniform definition distinguishing the most serious forms of rape from other forms. In divining the sentences, I excluded sentencing for any crime against a minor or involving specific aggravating factors, such as use of a weapon, that are not found in most acquaintance rapes.

322. ARIZ. REV. STAT. ANN. § 13-1406(B) (2017) (twenty-eight years); HAW. REV. STAT. § 707-730(2) (2017) (twenty years, per *id.* § 706-659); 720 ILL. COMP. STAT. 5/11-1.20(1) (2017) (thirty years, per 730 ILL. COMP. STAT. 5/5-4.5-30); IND. CODE § 35-42-4-1(b) (2015) (forty years, per *id.* § 35-50-2-4); IOWA CODE § 709.3 (2017) (twenty-five years, per *id.* § 902.9(1)(b)); KAN. STAT. ANN. § 21-5503 (2012) (fifty-four years, per *id.* § 21-6804); KY. REV. STAT. ANN. § 510.040(2) (West 2016) (twenty years, per *id.* § 532.020); ME. STAT. tit. 17A, § 253.6 (2017) (thirty years, per *id.* § 1252); MASS. GEN. LAWS ch. 265 § 22(b) (2017) (twenty years); MICH. COMP. LAWS § 750.520b(2) (2017) (life); NEB. REV. STAT. § 28-319(b) (2012) (fifty years, per *id.* § 28-105); N.H. REV. STAT. ANN. § 632-A:10-a (2015) (twenty years); N.Y. PENAL LAW § 130.35 (McKinney 2017) (twenty-five years, per *id.* § 70.00); N.C. GEN. STAT. § 14-27.21 (2017) (life, per *id.* § 15A-1340.17); N.D. CENT. CODE § 12.1-20-03 (2017) (twenty years); OKLA. STAT. OKLA. STAT. tit. 21, §§ 1114.21, 1115 (2017) (maximum fifteen years for second degree rape); OR. REV. STAT. § 163.375(2) (2016) (twenty years, per *id.* § 161.605); 18 PA. CONS. STAT. § 3121(b) (2017) (twenty and an additional ten years if person administered drugs to the victim, per *id.* § 1103); S.C. CODE ANN. § 16-3-652(2) (2017) (thirty years); S.D. CODIFIED LAWS § 22-22-1 (2017) (maximum sentence for rape by force is fifty years and maximum sentence for rape by intoxication or when the victim is mentally impaired twenty-five years, per *id.* § 22-6-1); TENN. CODE ANN. § 39-13-503(b) (2017) (thirty years, per *id.* § 40-35-111); W. VA. CODE § 61-8B-4(b) (2017) (maximum punishment for sexual assault in the second degree, which is by force or when the victim is physical helpless is twenty-five years); WIS. STAT. § 940.225 (2017) (second degree physical assault is classified as a Class B or C felony depending on whether pregnancy results, punished up to forty or sixty years respectively, per *id.* § 939.50); WYO. STAT. ANN. § 6-2-306(i) (2017) (fifty years).

323. ALA. CODE § 13A-6-61(b) (2017) (ten years, per *id.* § 13A-5-6); ARIZ. REV. STAT. § 13-1406(B) (2017) (5.25 to 28 years); ARK. CODE ANN. § 5-14-103 (2017) (ten years, per *id.* § 5-4-401); CAL. PENAL CODE § 264 (West 2014) (three, six, or eight years); DEL. CODE ANN. tit. 11, § 773 (2017) (fifteen years, per *id.* tit. 11, § 4205); GA. CODE ANN. § 16-6-1(b) (2017) (twenty-five years); 720 ILL. COMP. STAT. 5/11-1.20(1) (2017) (fifteen years, per 730 ILL. COMP. STAT. 5/5-4.5-30); IND. CODE § 35-42-4-1 (2017) (twenty years, per *id.* § 35-50-2-4); KAN. STAT. ANN. § 21-5503 (2012) (12.24 years, per *id.* § 21-6804); KY. REV. STAT. ANN. § 510.040(2) (2016) (ten years, per *id.* § 532.020); MASS. GEN. LAWS ch. 265, § 22(b) (2017) (zero to twenty years); MINN. STAT. § 609.342(2) (2017) (twelve years); NEV. REV. STAT. § 200.366(2) (2017) (a life term with the possibility of parole at ten years); 11 R.I. GEN. LAWS § 11-37-3 (2017) (ten years); W. VA. CODE § 61-8B-4(b) (2017) (minimum punishment for sexual assault in the second degree, which is by force or when the victim is physical helpless is ten years).

Sentencing and conviction data in the States are much more difficult to come by. This is a glaring problem given that the vast majority of rape convictions occur in state courts. The FBI releases statistics reporting estimates on how many rapes likely occur in each state.<sup>324</sup> In 2015, the total number of estimated reported rapes in all fifty states was 124,047.<sup>325</sup> In 2016, the number of federal rape convictions was 604.<sup>326</sup>

This information is helpful in identifying which states have more or fewer reported rapes. But the FBI information does not track state convictions or sentences. Information about state convictions and sentencing, if collected at all, is collected based on the resources and interest of each state. Although efforts were undertaken to gather data from all states, only six had information that could be compared in a meaningful way. Where data was collected, the following information is highly relevant:

- In Alaska, for the 579 reported rapes in 2012, thirteen ended in convictions, and the average sentence imposed was 29.9 years.<sup>327</sup>
- In Illinois, more than 4,000 rapes were reported each year from 2009 to 2016, an unknown number ended in convictions, and the average sentence in 2014 was 9.7 years.<sup>328</sup>
- In Massachusetts, 1,603 rapes were reported in 2012, twenty-one convictions occurred in 2013, and the average sentence in 2013 was 7.95 years.<sup>329</sup>
- In Missouri, in 2012, 1,510 rapes were reported, 166 were convicted, and the average sentence was 25.2 years.<sup>330</sup>
- In North Carolina, in 2014, 1,741 rapes were reported, ninety-two were convicted, and the average term was set at a range of 20.41 years to 27.75 years.<sup>331</sup>
- In Pennsylvania, 4,499 rapes were reported (in 2016), 133 convicted (in 2013), and the average sentence was set at a range of 7.65 to 16.9 years.<sup>332</sup>
- In the federal courts, in 2016, 620 rapes resulted in convictions and the average sentence was approximately ten years.<sup>333</sup> Significantly, for the

324. See *Crime in the United States*, FED. BUREAU INVESTIGATION, <https://ucr.fbi.gov/crime-in-the-u.s/2015/crime-in-the-u.s.-2015/tables/table-4> (last visited Nov. 6, 2017).

325. *Id.*

326. U.S. Sentencing Comm'n, *supra* note 279.

327. ALASKA DEP'T OF PUBLIC SAFETY, LENGTH OF IMPRISONMENT IN EACH PRIMARY OFFENSE CATEGORY FISCAL YEAR: 2016 (2017).

328. ILL. STATE POLICE, CRIME IN ILLINOIS 2014: INDEX CRIME OFFENSE & CRIME RATE DATA 16 (2014).

329. MASS. DEP'T OF PUB. HEALTH, RAPE AND SEXUAL ASSAULT IN MASSACHUSETTS, 2011-2012, at 1 (2013).

330. MO. STATISTICAL ANALYSIS CTR., CRIME IN MISSOURI 2012, at xiii (2012); MO. DEP'T OF CORR., A PROFILE OF THE INSTITUTIONAL AND SUPERVISED OFFENDER POPULATION ON JUNE 30, 2012, at 75-75 (2013).

331. N.C. STATE BUREAU OF INVESTIGATION, CRIME IN NORTH CAROLINA—2015, at 2 (2017).

332. *Focus Report*, PA. UNIFORM CRIME REPORTING SYS., <http://www.paucrs.pa.gov/UCR/Reporting/Monthly/Summary/MonthlySumOffenseUI.asp> ((last visited Nov. 13, 2017).

333. In 2016, there were 620 federal offenders convicted in the "sexual abuse" category, which is the closest category that covers the offenses of rape and sexual assault. The average mean sentence was 144 months and the average median length was 120 months. U.S. Sentencing Comm'n, *Sentence Length in Each Primary Offense*

federal offenders convicted of rape, 95 percent received a prison sentence for the crime and 1.6 percent received probation.<sup>334</sup>

Data from only six states and the federal government are far from ideal when drawing conclusions about practices. However, these seven jurisdictions are consistent with the facts that the conviction rate for reported rapes is very low: by using the data from above, North Carolina convicted 0.048% of reported rapes; Alaska convicted 0.022% of reported rapes. But when the convictions are secured, heavy sentences are imposed: Of the six states with data, half punished rapes with sentences between twenty to thirty years. Illinois and Pennsylvania were roughly consistent with the federal practice of imposing terms of ten years. Massachusetts had the shortest sentences at eight years. The average mean for known sentences is sixteen years.

### *C. Reduced Prison Terms For Rapists Are Consistent With International Norms*

This Article proposes a five-year maximum prison term for the crime of rape that occurs between adults and is without aggravated factors such as child victims, weapons, or sadism.

The first reason for supporting this proposal is that a five-year sentence for rape—which sounds incredibly light to Americans—is in keeping with international practices. Returning to the thirty-five countries previously used in comparing incarceration rates, the majority of those countries sentence rapists to a five-year prison term or less.

The United States stands out from comparable Western democracies in contemplating maximum life sentences and minimum sentences of twenty-five years. The vast majority of Western countries provide for maximum terms for rape to be between one and fifteen years. Only four countries contemplate life sentences: the United Kingdom, France, Turkey, and China (death).<sup>335</sup> And only three other countries have a maximum term over fifteen years: Brazil (thirty years), Norway (twenty-one years), and the Czech Republic (eighteen years).<sup>336</sup> Of note, twelve countries start the potential punishment for rape at terms of zero months, six

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*Category*, INTERACTIVE SOURCEBOOK OF FED. SENT'G STAT. [https://isb.ussc.gov/content/pentaho-cdf/RenderXCD/F?solution=Sourcebook&path=&action=table\\_xx.xcdf&template=mantle&table\\_num=Table13](https://isb.ussc.gov/content/pentaho-cdf/RenderXCD/F?solution=Sourcebook&path=&action=table_xx.xcdf&template=mantle&table_num=Table13) (last visited Jan. 21, 2018).

334. Of the 620 offenders sentenced in 2016, 589 received a term of incarceration and 10 received probation. See U.S. Sentencing Comm'n, *supra* note 279.

335. SENTENCING COUNCIL, SEXUAL OFFENCES DEFINITIVE GUIDELINE (2014) (U.K.) (4 years to life); CROWN PROSECUTION SERV., RAPE AND SEXUAL OFFENSES, [http://www.cps.gov.uk/legal/p\\_to\\_r/rape\\_and\\_sexual\\_offences/sentencing/](http://www.cps.gov.uk/legal/p_to_r/rape_and_sexual_offences/sentencing/) (last visited Nov. 6, 2017) (U.K.); TÜRK CEZA KANUNU [PENAL CODE] pt. 6, art. 102 (Turk.) (two years to life); Zhonghua Renmin Gongheguo Falü Hujibian [CRIMINAL LAW OF THE PEOPLE'S REPUBLIC OF CHINA] ch. IV, art. 236 (China) (three years to death); CODE PENAL [C. PEN] [PENAL CODE] art. 222–223 (Fr.) (four years to life).

336. CÓDIGO PENAL [C.P.] [PENAL CODE] ch. I, art. 213–215 (Braz.) (two to thirty years); ZAKON TRESTNI ZAKONIK [CRIMINAL CODE] ch. III, art. 185 (Czech) (six months to eighteen years); ALMINDELIG BORGERLIG STRAFFELOV [CRIMINAL CODE] ch. 19, § 192 (Nor.) (two to twenty-one years).

months, and two years.<sup>337</sup>

The United States is also exceptional among its peers in imposing actual terms for rape that exceed ten years (ranging from eight to thirty years in any of the given seven jurisdictions). Although data was difficult to locate for all countries on the previously-used list of thirty-one countries, where data is available, the actual imposed sentence is closer to five years.<sup>338</sup> The majority of countries fall well under the ten-year term and many favor a two- to five-year prison term. For purpose of comparison, three countries imposed actual terms between ten and fifteen years (Iceland, Greece, and France),<sup>339</sup> two countries imposed actual terms up to ten years (United Kingdom and Hungary),<sup>340</sup> and nine countries imposed sentences five years or less (Austria, Czech Republic, Denmark, Finland, Germany, Netherlands, Poland, Slovakia, and Sweden).<sup>341</sup> This limited data on international rape sentencing practices is consistent with general comparison in which a defendant in the United States will receive a sentence two to five times longer than the same crime receives in Western Europe.<sup>342</sup>

This international norm begs the question: why is the United States imposing higher sentences for rape than are other countries?

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337. See C.P. ch. I, art. 213-215 (Braz.) (two years); Criminal Code of Canada, R.S.C. 1985, c. C-46, Sec. 271 (no minimum); ZAKON TRESTNI ZAKONIK [CRIMINAL CODE] ch. III, art. 185 (Czech) (six months); STRAFFELOVEN [PENAL CODE] ch. 24, § 216 (Den.) (no minimum); SUOMEN RIKOSLAKI [CRIMINAL CODE] ch. 7 § 1-2 (Fin.) (one year); STRAFGESETZBUCH [STGB] [PENAL CODE], § 177 (Ger.) (six months); BUNTETO TÖRVENYKÖNYV [BTK.] [CRIMINAL CODE] Act C (Hung.) (one year); GENERAL PENAL CODE OF ICELAND ch. XXII, art. 194 (one year); KEIHO [KEIHO] [PEN. C.] art. 176-78 (Japan) (six months); ALMINDELIG BORGERLIG STRAFFELOV [STRAFFELOVEN] [CRIMINAL CODE] ch. 19 § 192 (Nor.) (two years); CÓDIGO PENAL [C.P.] [CRIMINAL CODE] ch. I, art. 178-180 (Spain) (one year); BROTTSBALKEN [BRB] [PENAL CODE] 6:1 (Swed.) (two years); SCHWEIZERISCHES STRAFGESETZBUCH, CODE PENAL SUISSE, CODICE PENALE SVIZZERO [STGB, CP, CP] [CRIMINAL CODE] art. 190, § 1 (Switz.) (one year); TÜRK CEZA KANUNU [TCK] [PENAL CODE] pt. 6, art. 102 (Turk.) (two years). *But see* CODICE PENALE [C.P.] 609-bis (It.) (five years); KODEKS KARNI [K.K.] [CRIMINAL CODE] ch. XXV, art. 197 (Pol.) (three years); CRIMINAL CODE OF SLOVAKIA tit. 2, § 199 (five years); SENTENCING COUNCIL, *supra* note 335, at 9 (U.K.) (four years).

338. See chart of thirty-one countries' sentencing practices (on file with author).

339. Iceland imposes one to sixteen years potential and 14.53 actual years, GENERAL PENAL CODE OF ICELAND ch. XXII, art. 194. Greece imposes an actual sentence of ten plus years. House of Commons Library, *Comparative Prison Sentences in the EU*, U.K. PARLIAMENT, <http://researchbriefings.files.parliament.uk/documents/CBP-7218/CBP-7218.xlsx> (last visited Nov. 6, 2017). France imposes a potential term of four years to life and actual term of ten plus years. C. PEN, art. 222-223 (Fr.).

340. CROWN PROSECUTION SERV., *supra* note 335 (U.K.) (four to life term potential and five to ten year actual). BTK. Act C (Hung.) (one to fifteen years potential, five to ten years actual); House of Commons Library, *supra* note 339 (Poland, three-ten years potential and two-five years actual).

341. House of Commons Library, *supra* note 339. Austria imposes an actual term of one to two years, the Czech Republic two to five years, Denmark less than two years, Finland one to two years, Germany two to five years, Netherlands two to five years, Poland two to five years, Slovakia two to five years, and Sweden two to five years. *Id.*

342. See JUSTICE POLICY INST., *supra* note 31, at 21-23. The shorter sentences are important because housing, feeding, and caring for elderly and ill prisoners comes at a steep financial cost to taxpayers. See DIRK K. GREENEDER, MASSACHUSETTS INCARCERATION: HOW JUSTIFIED AND HOW MUCH PUBLIC SAFETY DOES IT ACTUALLY BUY? 24 (2011).



*D. Reduced Prison Terms for Rapists Are Consistent with Reducing Recidivism*

The second reason for embracing lighter sentences is a more pragmatic one: lengthier prison terms are more likely to lead to recidivism than are lighter terms that are coupled with rehabilitation and reentry programs. Even though the conviction rate for rape is low, state and federal courts impose prison terms in at least 90% of the time when convictions are secured, compared to a rate of 40% prison terms for other felonies.<sup>343</sup> This means that for rapists, no alternative sentencing is being considered or employed. Such an oversight is without rational justification.

Researchers and policymakers agree that we are punishing more offenders for longer than any other country or any other time in our history, that recidivism accounts for prison overcrowding, and that the incarceration-only model imposes enormous fiscal constraints on state and federal budgets.<sup>344</sup> Attorney General Eric Holder summarized the problem by describing that “the rate and length of incarceration in this country is unprecedented and unsustainable.”<sup>345</sup> This is true because in addition to the routine costs of housing inmates for each year, as prisoners get older and sicker, additional costs of medical care are incurred.

Although there is debate on what causes recidivism, states are finding success in using reentry programs to reduce recidivism. Idaho, for instance, invests resources in giving released offenders access to the community—such as short-term housing, food, and continuing relationships with community volunteers and law enforcement members who assist in their reintegration.<sup>346</sup> The Idaho Department of Corrections claims that since these reentry programs were adopted in 2009, they have had an “important role” in reducing recidivism.<sup>347</sup> Reformers argue that the current system utilizing lengthy sentences produces a 75% recidivism rate, a failure by any measure. “If any other institutions in America were as unsuccessful in achieving their ostensible purpose as our prisons are, we would shut them down tomorrow. Two-thirds of prisoners reoffend within three years of leaving prison, often with a more serious and violent offense.”<sup>348</sup>

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343. See *supra* notes 279–80 and accompanying text. In 2009, where data is available from only the seventy-five largest counties, 89% of rape convictions resulted in prison terms. See Paquette, *supra* note 279; see also RAPE ABUSE INCEST NATIONAL NETWORK (RAINN), *supra* note 1 (demonstrating, from data made available in 2013, that 85% of the felony rape convictions were punished with prison term).

344. ROGER K. WARREN, NAT’L INST. OF CORR., EVIDENCE-BASED PRACTICE TO REDUCE RECIDIVISM 8–15 (2007).

345. Holder, *supra* note 276

346. *Reentry Services*, IDAHO DEP’T CORRECTION, [https://www.idoc.idaho.gov/content/probation\\_and\\_parole/reentry\\_services](https://www.idoc.idaho.gov/content/probation_and_parole/reentry_services) (last visited Nov. 24, 2017) (listing support and services that released offenders receive).

347. *Id.*

348. Gilligan, *supra* note 39.

Moreover, those who break the cycle of recidivism do so because they have the means or ability to reintegrate and attach into the community.<sup>349</sup> Some argue that longer prison terms “increase[] the chances that inmates will reoffend later because it breaks their supportive bonds in the community and hardens their associations with other criminals.”<sup>350</sup>

Importantly, despite these cost factors and state success with reentry programs, there is no conclusive evidence that lengthy prison terms cause higher recidivism rates. That said, rehabilitation programs are proven to reduce recidivism. “[F]or appropriate offenders alternatives to imprisonment can be both less expensive and more effective in reducing crime.”<sup>351</sup> A Department of Justice White Paper that was produced under President George W. Bush concluded that “even where alternatives to incarceration do not decrease recidivism, they often do not increase it either, thereby providing a cost-effective alternative to imprisonment without compromising public safety.”<sup>352</sup>

#### *E. Reduced Prison Terms Will Benefit Victims’ Interests in Public Safety*

A reasonable counterargument to reduced punishment for rape—or more precisely for rapists—is that overincarceration is due to nonviolent drug offenders. Rapists are depraved and dangerous individuals either in need of incapacitation or worthy of letting to rot.

To respond to this counterargument, it is important to ask what punishment is appropriate for the crimes of rape and sexual assault. As we witnessed with the public outcry to the Brock Turner case, the initial answer appears to be one of retribution, a desire for punishment to be severe and harsh to serve the purposes of punishment, social condemnation, and outrage. Brock Turner, the former Stanford swimmer, attacked an unconscious woman behind a dumpster. The victim released a lengthy, powerful, and moving, statement capturing the harm of the attack and victimization during the trial and sentencing process.<sup>353</sup> When the judge imposed a sentence that amounted to probation with three months in jail that was actually

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349. NAT’L REENTRY RESOURCE CTR., *REDUCING RECIDIVISM 2* (2014) (discussing factors employed by fifteen state programs that reduced recidivism).

350. *Prison Term Served and Recidivism*, PEW CHARITABLE TR., (Oct. 8, 2013), <http://www.pewtrusts.org/en/research-and-analysis/fact-sheets/2013/10/08/prison-time-served-and-recidivism> (discussing studies that reach opposite conclusions with respect to prison terms and recidivism); see also PAUL GENDREAU ET AL., DEP’T OF THE SOLICITOR GEN. OF CAN., *THE EFFECTS OF PRISON SENTENCES AND INTERMEDIATE SANCTIONS ON RECIDIVISM: GENERAL EFFECTS AND INDIVIDUAL DIFFERENCES 20–21* (2002) (Can.).

351. WARREN, *supra* note 344, at 2.

352. *Id.*

353. See Andrew Buncombe, *Stanford Rape Case: Read the Impact Statement of Brock Turner’s Victim*, INDEPENDENT (U.K.) (Sept. 2, 2016), <http://www.independent.co.uk/news/people/stanford-rape-case-read-the-impact-statement-of-brock-turners-victim-a7222371.html>.

served, public outrage ensued.<sup>354</sup> Some attempted to remove the sentencing judge from office.<sup>355</sup> Others, including state legislators in California, proposed legislation to impose increased and mandatory prison terms for those convicted of sexual assault or rape.<sup>356</sup>

But as relevant to this Article, the national outrage towards what was viewed as a light sentence is what is misguided. Brock Turner received probation when 95% of convicted rapists in federal court and around 90% of convicted rapists in state court face prison.<sup>357</sup> The outrage is that convicted rapists are being disproportionately sentenced to prison. In a notable contrast, prison time is meted out in the sentences for 40% of other convicted felons. If Brock Turner had committed any other violent felony, as a first offender, probation would have been the likely maximum sentence he would face. The football player Ray Rice, whose videotaped attack on his fiancé sparked national outrage, completed a pre-trial diversion program that erased his conviction and his arrest in its entirety.<sup>358</sup> In this respect, this Article's proposed maximum sentence of five-years for rape is consistent with criminal justice goals of rehabilitation, which furthers actual public safety by ending recidivism. But the emotional impulse to make bad guys, especially rapists, pay for their crimes or be locked away because they are presumed dangerous, is real and must be addressed.

The reality is that criminal law is not like contracts. Contract law aspires and provides remedies to breached contracts that are designed to make the parties whole. If four widgets were not made as provided for in a contract, the remedy is for the maker to produce the ordered widgets or pay for the value of the lost bargain. But criminal law does not have such symmetry. Its punishment for those who break laws is not commensurate to the breach of the victim's well-being and violation of public safety. Rather, the punishment imposed on an offender is at best a partial salve, and at worst, entirely collateral to a victim's ability to heal from the wounds of a criminal violation. The harm from surviving rape is horrific and

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354. Grinberg & Shoichet, *supra* note 54 (“The case drew national attention after the victim’s wrenching impact statement went viral. The brevity of Turner’s sentence triggered outrage against the judge and controversy over how the justice system treats sexual assault survivors.”).

355. Lara Bazelon, *Put Away the Pitchforks Against Judge Persky*, POLITICO (Aug. 8, 2016), <https://www.politico.com/magazine/story/2016/08/recall-judge-persky-stanford-rapist-brock-turner-courts-214145> (stating that a million people have signed a petition to recall Judge Persky, sixteen state legislators have requested an oversight board to launch a misconduct investigation, and prosecutors have filed a motion to disqualify him from another sexual assault case).

356. Emanuella Grinberg, *California Lawmakers Pass Bill Inspired by Brock Turner Case*, CNN (Aug. 30, 2016), <http://www.cnn.com/2016/08/29/politics/california-mandatory-prison-unconscious-intoxicated-brock-turner/index.html> (reporting that in response to the light sentence in Brock Turner’s case, the California assembly introduced AB 2888 and passed it by a 66-0 vote). The bill was approved by Governor Jerry Brown on September 30, 2016.

357. *See supra* note 279.

358. James Brady, *Ray Rice Completes Pretrial Intervention, Domestic Violence Charge Dropped*, SB NATION (May 21, 2015), <https://www.sbnation.com/nfl/2015/5/21/8634045/ray-rice-domestic-violence-charge-dismissed-pretrial-intervention>.

lasting. A sense of violation is real; a sense of security is gone. For many, consensual intimacy with others is compromised. The letter from Brock Turner's victim describes the horror of what is lost and lasting from a sexual assault in both small and large ways.<sup>359</sup>

If criminal law worked like contract law, every additional year a defendant served in prison would help the victim heal. But there is no such connection or capacity for the criminal law to do this. As has been illustrated in the capital punishment context, some victims who lose loved ones are not just disappointed, but wounded anew when the execution does not bring the closure that the family members are so desperately need and very much deserve.<sup>360</sup> As some have noted, the remedy the families want is simply the return of the loved one or as explained by the father of a murdered woman, "through a protective and respectful process" an opportunity to exchange remorse and forgiveness.<sup>361</sup> Capital punishment ultimately does not abate the grief and loss the grieving families forever carry with them.

Restorative justice efforts are attempting to rebut these limitations with creative solutions. But at a minimum, the demand for means, programs, and services that permit victims to heal, grieve, and hear remorse show that harsh punishments for their offenders are inadequate to make whole victims of violent crimes. This is why the crime victims who advocated for Proposition 47, California's sentencing reform initiative that reduced incarceration, coupled funding for victim services with treatment for offenders.<sup>362</sup>

When the punishment becomes excessive, no one is served. This Article is not arguing against any punishment for rapists, but it is raising the important point that the criminal justice system cannot presume success comes with lengthy terms—either in terms of needed services to victims or appropriate punishment to the offender. As argued by Professor Catherine Carpenter with respect to sex offender registries, "[i]t may feel good—even righteous—to single out sex offenders for particular treatment in an effort to protect the community. But,

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359. See Buncombe, *supra* note 353 (publishing the victim's letter in its entirety).

360. See Jim Hall, Opinion, *Commute All Death Sentences*, COLUMBIA DAILY TRIB. (Dec. 27, 2016), <http://www.columbiatribune.com/045535e0-f4a0-59d4-90bb-405fc0ceaaaa.html> (father whose daughter was murdered explains how he had "believed the myth" that an "execution would close our emotional wounds," discovered it did not, and calls on the governor to commute all death row sentences).

361. *Id.* In particular, Hall wrote:

Through a protective and respectful process, offenders can be a key element in helping crime victims rebuild their fractured lives. Sadly, one can only imagine. But I'm convinced significant healing would have occurred for us all if our family had engaged in a frank conversation with him at the prison. I wish I had had the chance—consistent with my Christian beliefs—to have told him in person that I forgave him for what he did to our innocent and precious daughter.

*Id.*; see also Sharon Risher, *My Mom Was Killed in the Charleston Shooting. Executing Dylann Roof Won't Bring Her Back*, Vox (June 15, 2016), <https://www.vox.com/2016/6/15/11894036/dylann-roof-death-penalty>.

362. See *infra* note 370 and accompanying text.

history has shown that a collective response to a national problem concerning safety and security does not necessarily make it the right one.”<sup>363</sup>

Returning to the section on mass incarceration, the lessons learned are not that we are now suddenly enlightened about drug use and are seeking to empty the prisons. But rather, the war of drugs used mandatory sentencing without thought of its consequences on offenders and the costs on society. The drive to punish and make drug users suffer arose from passion over reason. Our society believed that youth were “superpredators” and those who committed crimes were damaged and dangerous beyond repair.<sup>364</sup> Those impulses are at work in branding all rapists as worthy of lengthy prison terms and nothing else. Sentencing drug users based on this impulse alone is an accepted failure.<sup>365</sup> Sentencing rapists on this impulse too is without value.

How then could success in sentencing be measured? The most obvious answer is public security defined by an offender never offending again. As poignantly noted by Brock Turner’s victim:

The probation officer’s recommendation of a year or less in county jail is a soft time-out, a mockery of the seriousness of his assaults, and of the consequences of the pain I have been forced to endure. *I also told the probation officer that what I truly wanted was for Brock to get it, to understand and admit to his wrongdoing.*<sup>366</sup>

The call for Brock Turner to understand and admit his wrongdoing lies in the assumption that such recognition will prevent its repetition. In his book *Missoula*, Jon Krakauer interviewed rape victims of assaults that were and were not convicted and punished.<sup>367</sup> When the topic arose, those rape victims, too, spoke of

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363. Catherine L. Carpenter & Amy E. Beverlin, *The Evolution of Unconstitutionality in Sex Offender Registration Laws*, 63 HASTINGS L.J. 1071, 1132 (2012); see also Michael Vitiello, *Punishing Sex Offenders: When Good Intentions Go Bad*, 40 ARIZ. ST. L.J. 651, 654 (2008) (“Thus, the expansion of criminal law governing sex offenders is a cautionary tale about good intentions, legislation enacted in the heat of the moment, and the enactment of piecemeal legislation governing criminal sentences. The lessons are especially important for states like California where some of these laws are enacted through an initiative process, leaving less room for deliberation in their enactment.”).

364. Clyde Haberman, *When Youth Violence Spurred ‘Superpredator’ Fear*, N.Y. TIMES (Apr. 6, 2014), <https://www.nytimes.com/2014/04/07/us/politics/killing-on-bus-recalls-superpredator-threat-of-90s.html>. In relevant part, the author stated:

Social scientists like James A. Fox, a criminologist, warned of “a blood bath of violence” that could soon wash over the land . . . What happened with the superpredator jeremiads is that they proved to be nonsense. They were based on a notion that there would be hordes upon hordes of depraved teenagers resorting to unspeakable brutality, not tethered by conscience.

*Id.*

365. See José Luis Pardo Veiras, Opinion, *A Decade of Failure in the War of Drugs*, N.Y. TIMES (Oct. 9, 2016), <https://www.nytimes.com/2016/10/10/opinion/a-decade-of-failure-in-the-war-on-drugs.html> (arguing for decriminalization over incarceration).

366. Buncombe, *supra* note 353 (emphasis added).

367. See *supra* note 248 and accompanying text.

the simple desire to make sure that their rapist did not rape another. In a dramatic scene at the sentencing hearing for a man who had been convicted for raping his childhood friend, another woman who had been raped by him but had never reported it, summoned the courage to testify at his sentencing hearing.<sup>368</sup> When explaining why she did not report the attack when it happened but felt compelled to speak now, she explained that was testifying to “help prevent [a rape] from happening to someone else.”<sup>369</sup>

There is evidence to back these anecdotes. Proposition 47 is California’s voter initiative that reduced incarceration and increased treatment by reclassifying non-violent crimes from felonies to misdemeanors, authorizing expungement of old felonies, and requiring the State to allocate funds saved from prison costs to services for victims and treatment for offenders.<sup>370</sup> The movement behind this reform came from crime victims seeking criminal justice reform.<sup>371</sup> These individuals did not want longer sentences for offenders, but called for services that would help victims heal and offenders reform.<sup>372</sup>

A first instinct to punish crimes with lengthy prison terms is shared by many Americans. One only need to Google “Brock Turner” or “Judge Aaron Persky” to see the endless outrage condemning both the rapist for his depravity and judge for his inexplicable leniency.<sup>373</sup> Indeed, one author explained, “[t]he idea that the punishment for sexual assault should be only a summer in county jail has made national headlines because it instinctively elicits revulsion from people across the country, right and left, rich and poor. We should heed that revulsion—there is wisdom in it.”<sup>374</sup> But Americans’ bloodlust for lengthy sentences should not be confused for wisdom. The existence of capital punishment in the United States is baffling, given that the other countries that execute its people include Iran, Sudan, Saudi Arabia, and China. Even when the United States ended the practice of executing juveniles, the United States and Somalia were the only countries in the

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368. KRAKAUER, *supra* note 18, at 194–97 (testimony); *id.* at 152–57 (prior unreported rape).

369. *Id.* at 197.

370. CALIFORNIANS FOR SAFETY & JUSTICE, SECOND CHANCES AND SYSTEMS CHANGE 4 (2017); Robin Respaut, *California Prison Reforms Have Reduced Inmate Numbers, Not Costs*, REUTERS (Jan. 6, 2016), <http://www.reuters.com/article/us-california-prison-budget-insight-idUSKBN0UK0J520160106> (discussing how California reduced its prison population by 30,000 within three years).

371. Paige St. John, *Different Kind of Crime-Victim Group Lobbies Against Rolling Back Prop. 47*, L.A. TIMES (Apr. 25, 2015), <http://www.latimes.com/local/politics/la-me-ff-pol-prop-47-20150425-story.html> (explaining how crime victims from communities of color recognized that offenders had often been crime victims themselves and those individuals mobilized the group that advocated for Proposition 47).

372. *Id.*

373. Alex Johnson, *Aaron Persky, Judge in Brock Turner Assault Case, Faces Recall Petition*, NBC NEWS (June 26, 2017), <https://www.nbcnews.com/news/us-news/aaron-persky-judge-brock-turner-rape-case-faces-recall-petition-n776996> (reporting on continued efforts to recall Judge Persky because “residents deserve a judge who will protect victims—not rapists”).

374. Elliot Kaufman, *Brock Turner and the Wisdom of Revulsion*, NAT’L REV. (June 14, 2016), <http://www.nationalreview.com/article/436561/brock-turner-stanford-rape-case-elicits-two-conflicting-responses-left>.

world that permitted this practice.<sup>375</sup> And this practice, which the rest of the world condemned as unconscionable, ended through a 5-4 Supreme Court decision, not legislative or collective action.<sup>376</sup>

The societal impulse to view all criminals with revulsion and call for the longest sentence possible is not innate.<sup>377</sup> It is in part the product of the past forty years that has seen the rise of mass incarceration in our society, an impulse no doubt amplified by social media. The more recent and public advocacy by victims of actual crime offers a salient perspective that counters the reflexive call to incarcerate. Crime victims prefer rehabilitation over punishment, which suggests that a criminal justice system that returns to rehabilitation—if effective—offers a system with more advantages than our status quo.

*F. Reduced Prison Terms Will Lead to Rehabilitation for Sex Offenders and More Convictions by Juries*

To accept the premise of the former Section's contention that lighter sentences also benefit violent offenders such as rapists, rehabilitation must work as an alternative to only-incarceration. Studies and scholars suggest that it does. In Canada, a ten-year study of 168 rapists, 59 pedophiles, 47 mixed offenders (those who harmed adults and children), and 32 child molesters strongly suggests that rehabilitation programs administered during a prison term were effective in reducing recidivism.<sup>378</sup> The study created a control group and concluded that of those not given treatment, 33.2% of the prisoners reoffended with another sexual offense and of those given treatment, 14.5% reoffended with another sexual offense.<sup>379</sup> Even more dramatically, of the first offenders who were given treatment, 8.8% reoffended with another sexual offense and of first offenders without treatment, 27.3% reoffended.<sup>380</sup>

By comparison, the United States has a 77% recidivism rate for all crimes.<sup>381</sup> Canada's program that resulted in an 8.8% recidivism rate for first offenders for sex crimes and 14.5% recidivism rate for repeat offenders<sup>382</sup> is astonishing, but not surprising. Offenders who are given evidence-based treatment to stop underlying criminal conduct have a greater chance of not offending compared with those who

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375. *Roper v. Simmons*, 543 U.S. 551, 576 (2005) ("Article 37 of the United Nations Convention on the Rights of the Child, which every country in the world has ratified save for the United States and Somalia, contains an express prohibition on capital punishment for crimes committed by juveniles under 18.").

376. *See id.*

377. *See* Sara Sun Beale, *What's Law Got to Do with It? The Political, Social, Psychological and Other Non-Legal Factors Influencing the Development of (Federal) Criminal Law*, 1 *BUFF. CRIM. L. REV.* 23, 44–51 (1997) (describing the deeply held public fear of crime).

378. Terry Nicholaichuk et al., *Outcome of an Institutional Sexual Offender Treatment Program: A Comparison Between Treated and Matched Untreated Offenders*, 12 *SEXUAL ABUSE* 139, 141, 145 (2000).

379. *Id.* at 145.

380. *Id.*

381. *See* NAT'L INST. OF JUSTICE, *supra* note 34 (reporting a 77% recidivism rate).

382. *See supra* note 350.

simply whittle away without treatment, skill development, or education, and without any means to return to reintegrate into society. Likewise, if the prison system chooses to simply let punishment be punitive, the most surprising part of the 75% recidivism rate is that 25% of offenders—without any rehabilitation—were able to not repeat the bad choices and bad impulses that led to prison in the first place.

Additionally, overpunishment of rape in the United States likely leads to fewer convictions. Scholars in other contexts—notably drug offenses, capital punishment, white collar crime, and DUIs—have strongly suggested that lengthy sentences may result in the unintended consequence of disincentivizing convictions.<sup>383</sup> Forty years ago, states had an analogous problem in figuring out the best punishment for a driver who killed another while operating a car. The prosecutors could either charge the driver with a misdemeanor offense or the serious crime of involuntary manslaughter, which carried a sentence of twenty years. “[P]rosecutors faced with this choice hesitated to proceed on a manslaughter theory, even when the facts so warranted, because of the reluctance of jurors to convict fellow drivers on such a serious charge.”<sup>384</sup>

It is remarkable that policy makers diagnosed the fears of the jurors, because in the courtroom, jurors often are either not informed of the potential sentence that the accused faces, or if they are, are routinely instructed to disregard the punishment as a factor when deciding guilt.<sup>385</sup> Forty-years ago, policy makers properly divined that jurors relied on common sense when not convicting the guilty to avoid excessive punishment. What turned out to be the appropriate remedy was that state legislatures developed the crime of vehicular manslaughter, which carried approximately a two-year prison term instead of the twenty-year term accompanying involuntary manslaughter.<sup>386</sup> Vehicular manslaughter, a crime with a lighter sentence, resulted in more convictions.

The actual role that jurors’ knowledge of excessive sentences serves to deter convictions by juries and charges by prosecutors appears understudied in the rape

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383. See Frank O. Bowman, III, *Fear of Law: Thoughts on Fear of Judging and the State of the Federal Sentencing Guidelines*, 44 ST. LOUIS U. L.J. 299, 351 (2000) (“[W]e are over-punishing drug offenders, and our excesses are undermining not only the credibility of the drug enforcement effort, but the entire federal sentencing reform project.”); Adam M. Gershowitz, *12 Unnecessary Men: The Case for Eliminating Jury Trials in Drunk Driving Cases*, 2011 U. ILL. L. REV. 961, 984–86 (discussing whether juries may acquit DUI defendants out of concerns of overpunishment); Note, *Go Directly to Jail: White Collar Sentencing After the Sarbanes-Oxley Act*, 122 HARV. L. REV. 1728, 1732–39 (2009) (arguing that the current sentencing model overpunishes small-scale offenders and leads to uneven outcomes); see also *Kennedy v. Louisiana*, 554 U.S. 407, 441–45 (2008) (invalidating death penalty imposed for the crime of raping a child in part because capital punishment created “risks of overpunishment” and might discourage reporting of this crime).

384. *Commonwealth v. Jones*, 416 N.E.2d 502, 505 (Mass. 1981).

385. See Fleischman, *supra* note 49.

386. *Jones*, 416 N.E.2d at 505 & n.6 (“From this history, it seems clear that the purpose of [the vehicular manslaughter statute] was to provide a middle ground between the felony of manslaughter and the misdemeanor of driving so as to endanger.”).



context. But there is every reason to infer that the lessons learned from vehicular manslaughter context apply in equal force to rape adjudications. Indeed, the concerns over lengthy prison terms for convicted rapists casts a long shadow over discussions of visible cases. In Brock Turner's case, his swimming times, Olympic potential, youth, and Stanford pedigree were discussed alongside the horrors of his crime. The sentencing judge relied upon them in justifying his three-month sentence, and critics were quick to mock their relevance to discussing rape. But it is a mistake to discount that what happens to an offender is a real and pressing concern that causes jurors, judges, and prosecutors to pause when given the unsavory choice between a grossly excessive sentence and none at all.

Likewise, in the 2015 St. Paul Prep School case, an eighteen-year-old senior who had unwanted sex with a fifteen-year-old student was convicted not for rape, but for a felony crime of soliciting sex from a minor. He was punished with a one-year prison term, life-time requirement to register as a sex offender, and a rescission of his offer to attend Harvard University.<sup>387</sup> Again, as much as many were quick to dismiss the adverse consequences the offender faced as not relevant or deserving for his depraved acts, Professor Jeannie Suk Gerson observed that the issue is more complicated.<sup>388</sup> People do and should also have concern over the humanity and well-being of the young offender. Many feel "pity" for the shattered future he now faces, and believe that the rape conviction, however deserved, still results in two lives being "destroyed."<sup>389</sup>

Both trials revealed public outrage toward the wrongdoer and the privilege, entitlements, and advantages he possessed. But also present was a voice of pity for the offender, a mourning of a young life cut short by the criminal consequences the wrongdoer will face for life. A juror is not asked, or given the tools, to make the victim whole. If a juror could simply hand out monetary awards to compensate the victims for measured damages like they do in contract and tort cases, they no doubt would.

But a criminal juror is tasked with the determination of guilt of the accused, not with the question of compensation. It is not unreasonable then for a juror to have ambivalence when assigning not just blame—but criminal liability with severe punitive consequences—in the unique context arising from intimate situations. For some jurors, believing that the culpability will be met with a maximum term of life and an actual term of ten-, twenty-, or thirty years gives them pause in the same manner that ambivalence about prosecuting a diver for involuntary manslaughter and the resulting twenty-year prison term did. It is reasonable to infer that the fear of overpunishment for rape weighs against a prosecutor charging and a juror voting for guilt. Given that the criminal justice system requires unanimity, if only

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387. Jeannie Suk Gerson, *St. Paul's School and a New Definition of Rape*, NEW YORKER (Nov. 3, 2015), <https://www.newyorker.com/news/news-desk/st-pauls-school-and-a-new-definition-of-rape>.

388. *Id.*

389. *Id.*

one judge, juror, or prosecutor is swayed by overpunishment, sentences will not be meted in a uniform standard, convictions not rendered, and charges not brought. Stated another way, rehabilitation is not inconsistent with punishment. To the contrary, if our correctional system permitted rapists to reform and reenter society, it is reasonable to expect more convictions for rape will occur, allowing offenders to be punished and reformed.

### CONCLUSION

To most Americans, contemporary understandings over what defines rape is not about how much physical force or violence an offender uses or which power imbalances do or do not exist. Rather, the question presented by rape is whether or not there was consensual sex. As set forth above, the majority of states eschew defining rape as unwanted sex: only eight states define rape as sex without consent. Instead, forty-six jurisdictions opt for rape to be actionable if an additional element of force is present, and twenty-eight define rape as without consent only when certain power imbalances or victim characteristics exist.

But this Article asks why must rape be defined in such limited ways? No doubt the sexist iterations of the crime—first as a crime against family honor, then as a violation of the social norm (and penal code codifications) that sex occur exclusively within marriage, and lastly out of fears that women will relish making false accusations—prevented the crime from responding to the contemporary social harm of unwanted sex.

In the Post-Weinstein era, now that rape victims are believed, we have a unique opportunity to revisit rape law. In criminal law, state legislatures can easily rewrite statutes and create new crimes. Unlike the gridlock of federal government, state legislatures routinely, and quickly, enact new legislation in response to newly-recognized harms. Stalking, computer crimes, and upskirting can—and should—result in immediate evolutions of the criminal code. Why has the crime of rape failed to evolve with the social norms around sex, gender, and unwanted sex?

Rape by malice is a proposal to rewrite a crime that reflects the contemporary understandings of unwanted sex. It employs a more nuanced mens rea that is the hallmark of theft and homicide crimes. Existing rape statutes use elements that reflect anachronistic biases and fears. By contrast, rape by malice is defined by elements that reflect contemporary concerns over how to criminalize unwanted sex.

The new crime of rape by malice would most certainly lead to more convictions. This fact is a cure for the unusually low conviction rates for acquaintance rape. But punishing more rapists, under our current criminal justice system, should not be welcomed. Unlike other felonies where convictions result in prison time around 40% of the time, prison terms are imposed in at least 90% of rape convictions. Although comprehensive national sentencing data is missing, where available, the actual sentences for acquaintance rape then range from eight to thirty years in prison. Any reforms to the legal definition of rape that will punish more rapists

with lengthy prison terms must then be considered in light of our current mass incarceration problem. For the past forty years, our country's Tough-on-Crime policies have locked up more people than any other country in the world—without regard to the billions of dollars spent each year on a system whose greatest accomplishment is producing a 75% recidivism rate.

The proposed new reforms to rape then is accompanied with a maximum five-year sentence. This sentencing proposal does not extend to rape involving deadly weapons or children. Nonetheless, lessening punishment for acquaintance rape does not imply that the offender lacks depravity, that the crime is minor, or that the victim is not deserving of justice. To the contrary, lighter sentences for acquaintance rape—even when the offender is depraved and despicable—are critical to the idea that retribution is not achieved by lengthy sentences. A generation ago, juries hesitated to convict drivers of involuntary manslaughter charges that carried twenty-year prison terms. In response, states adopted vehicular manslaughter offenses that offered two-year prison terms, a reform that led to more convictions. Reducing excessive punishment for rape will also likely lead to more convictions.

Moreover, unlike contract law, where a breach is remedied in full, more time that an offender spends in prison does not correlate with more benefits to the victim. Surveys of crime victims in fact show that they want services to rehabilitate and reform offenders so that, when released, which occurs in 95% of all sentences, the offender will not harm another. Lighter sentences also are a critical piece in successful offender reentry because more time in prison separates an offender from family, friends, employment, and opportunities to reintegrate upon release.

Reforming rape law by increasing convictions and reducing punishment is an opportunity to recognize that rapes must be convicted and the resulting punishment must be rational, fair, and effective. Ending mass incarceration is not simply for non-violent drug offenders. The purpose of the criminal justice system is not to simply inflict suffering on a rapist because he is believed to be dangerous, depraved, or irredeemable. Other countries use proven, evidence-based interventions to rehabilitate rapists while they are in prison so that, when released, they do not commit another crime. There is every reason then for our country to also stop excessive punishment and offer actual services that rehabilitate and reform offenders. Holding the most number of wrongdoers accountable starts with a sensible penal system that has a more accurate definition of a crime and a genuine commitment to measure success by rehabilitation instead of excessive incarceration.