

5-15-1996

Forcing the Issue: An Analysis of the Various Standards of Forcible Compulsion in Rape

Joshua Mark Fried

Follow this and additional works at: <https://digitalcommons.pepperdine.edu/plr>



Part of the [Criminal Law Commons](#), and the [Sexuality and the Law Commons](#)

Recommended Citation

Joshua Mark Fried *Forcing the Issue: An Analysis of the Various Standards of Forcible Compulsion in Rape*, 23 Pepp. L. Rev. Iss. 4 (1996)

Available at: <https://digitalcommons.pepperdine.edu/plr/vol23/iss4/3>

This Comment is brought to you for free and open access by the Caruso School of Law at Pepperdine Digital Commons. It has been accepted for inclusion in Pepperdine Law Review by an authorized editor of Pepperdine Digital Commons. For more information, please contact bailey.berry@pepperdine.edu.

Forcing the Issue: An Analysis of the Various Standards of Forcible Compulsion in Rape¹

Late at night, a woman is walking briskly through her college campus in the North End of Philadelphia. She hears the same ominous noises that one often hears in that particular area of the city at that time of night. She attempts to unlock the door of her apartment, and her worst nightmare materializes when she is surprised by the intrusion of an assailant. He tells her to take her clothes off. She is surprised, afraid, and unsure of what to do. In only a few precious seconds, she has to make a potentially life or death decision. He has made no threat, but she is afraid of what may happen if she does not obey. Reluctantly, she complies, out of fear. She does not verbally or physically resist his penetration, and the two have intercourse.

The woman files a complaint alleging rape. Intuition tells her that her "consent" to intercourse will surely be found to have been vitiated by the coercive circumstances surrounding the event. She also realizes that the slightest penetration is enough to constitute rape.² There's one slight problem, however, as the prosecutor informs her that they must prove that the defendant "forcibly" had unlawful intercourse with her. Further, her fear of bodily injury is admissible to show lack of consent, but not to show force. The prosecutor explains that had she resisted, at least some evidence would exist to prove force. She is confused. Was

1. The author would like to thank his mother, Eleanor R. Fried, Ph.D., for her clinical and professional insight in helping to develop this topic and for her constant and unwavering support throughout law school.

2. See *State v. Mackor*, 527 A.2d 710, 713 (Conn. App. Ct. 1987) (stating that "[p]enetration, however slight" is sufficient to constitute intercourse); *People v. Fryer*, 618 N.E.2d 377 (Ill. 1993) (reasoning that the slightest penetration constitutes criminal sexual assault); *State v. Borthwick*, 880 P.2d 1261, 1271 (Kan. 1994) (noting that the state may establish the element of penetration solely by demonstrating penetration of the vulva or labia—penetration of the vagina is not required); *State v. Wright*, 598 So. 2d 561 (La. Ct. App. 1992) (reasoning that the slightest penetration will suffice—emission is not required); *Commonwealth v. Poindexter*, 646 A.2d 1211, 1214 (Pa. Super. Ct. 1994) (stating that the slightest penetration sufficiently constituted involuntary deviate sexual intercourse); *Nilsson v. State*, 477 S.W.2d 592, 595 (Tex. Crim. App. 1972) (holding that penetration may be proven by circumstantial evidence).

not the prudent procedure in this type of scenario not to resist? Yet without resistance, she cannot prove force.

I. INTRODUCTION

Rape is a difficult subject to address from a scholarly perspective because of the emotional issues that accompany the subject. The majority of articles that have dealt with rape have focused on the issue of consent, specifically whether states should adopt a standard whereby a woman could verbally communicate her desire to engage or not to engage in intercourse.³ The element of force, however, and the role that it has in the context of a rape is less commonly addressed.

Three recent state supreme court cases have addressed the element of force, its function in convicting a defendant of rape, and represent the three general categories of force.⁴ Each case represents both a different approach to the force element and to what degree and through which mechanisms the prosecution must show force in order to obtain a rape conviction. In *People v. Iniguez*,⁵ the California Supreme Court held that the prosecution may use evidence of immediate fear of bodily injury to prove the force element.⁶ One week later, the Pennsylvania Supreme Court held in *Commonwealth v. Berkowitz*⁷ that the victim's verbal protestations were irrelevant to the issue of whether the defendant forcibly raped the victim.⁸ Finally, in *State ex rel. M.T.S.*,⁹ the New Jersey Supreme Court held that the act of penetration contained the requisite amount of force necessary to prove rape, essentially removing the element of force from the rape analysis.¹⁰

3. Rape reform is a rapidly evolving area of law. Many commentators have advocated unique solutions to the problems associated with rape. See generally Donald A. Dripps, *Beyond Rape: An Essay on the Difference Between the Presence of Force and the Absence of Consent*, 92 COLUM. L. REV. 1780 (1992) (analogizing sexual intercourse as a commodity and rape as violation of that commodity such that rape laws should be reformed to reflect a woman's property interest in her own body). But see Robin L. West, *Legitimizing the Illegitimate: A Comment on Beyond Rape*, 93 COLUM. L. REV. 1442 (1993) (responding to and rejecting aspects of Dripps' proposal).

4. See *infra* notes 5-10.

5. 872 P.2d 1183 (Cal. 1994).

6. *Id.* at 1186-88. For a thorough discussion of *Iniguez*, see *infra* notes 181-93 and accompanying text.

7. 641 A.2d 1161 (Pa. 1994).

8. *Id.* at 1164. For a discussion of *Berkowitz*, see *infra* notes 123-50 and accompanying text.

9. 609 A.2d 1266 (N.J. 1992).

10. *Id.* at 1285. For a complete discussion of *M.T.S.*, see *infra* notes 92-103 and accompanying text.

Part II of this Comment will address the standard elements of rape, including the resistance requirement.¹¹ This section will also illustrate that even though most states have statutorily abolished the resistance requirement, many courts still expect a victim to demonstrate passive resistance when confronted with a sexual assault. Part III will discuss the rationale behind the intrinsic force standard and the cases to which it has been applied.¹² Part IV will analyze the *Berkowitz* holding and the jurisdictions that require that the defendant exert some degree of physical force or threat of force in order to constitute rape.¹³ Part V will discuss the *Iniguez* holding and the rationale behind the "fear standard," which still requires that the defendant forcibly penetrate the victim, but allows the prosecution to prove that the defendant forcibly overcame the victim's will with evidence that the victim subjectively feared immediate bodily injury.¹⁴

II. TRADITIONAL ELEMENTS OF RAPE

A. *The Resistance Requirement*

Until relatively recently, it was incumbent upon the prosecution to prove that the victim resisted the defendant as an essential element of rape.¹⁵ Originally, the courts applied the "utmost resistance" standard, which required that the victim¹⁶ resist to the upper limits of her physical ability in order to satisfactorily demonstrate that she was raped.¹⁷ Later cases did not interpret this standard as strictly.¹⁸ While resis-

11. See *infra* notes 15-84 and accompanying text.

12. See *infra* notes 85-120 and accompanying text.

13. See *infra* notes 121-53 and accompanying text; see also Susan Estrich, *Rape*, 95 YALE L.J. 1087 (1986). Professor Estrich has authored several works dealing with rape and is widely recognized as one of the leading authorities on the subject. In her article, Estrich notes the difference between the varying standards of force in rape. "The distinction between the 'force' incidental to the act of intercourse and the 'force' required to convict a man of rape is one commonly drawn by the courts." *Id.* at 1107. It is this distinction that separates jurisdictions applying an extrinsic force standard from those that subscribe to the intrinsic force rationale.

14. See *infra* notes 154-220 and accompanying text.

15. See *infra* notes 16-53 and accompanying text.

16. Women are not the only targets of rape. In fact, a recent study estimates that at least "ten percent of rape victims are men." Lani A. Remick, Comment, *Read Her Lips: An Argument for a Verbal Consent Standard in Rape*, 141 U. PA. L. REV. 1103, 1106 (1993).

17. See *infra* notes 18-19 and accompanying text.

18. By the early 1970s, society's disassociation from resistance began to manifest

tance was still an element of rape, the courts explicitly recognized that not every victim was capable of offering the same degree of resistance.¹⁹ By the late 1970s, most states had replaced the utmost resistance requirement with a "reasonable resistance" standard which required that the victim "offer so much resistance as is reasonable under the circumstances."²⁰ Although this standard was designed to alleviate the harshness of the utmost resistance requirement, it often prejudiced the victim because it effectively removed the subjective component of fear that the victim might wish to present in order to explain her unique reaction to the particular circumstances.²¹ Thus, the reasonableness standard objectified the rape analysis because it did not allow consideration of the victim's own account of the attack.²²

itself in case decisions. For example, in *State v. Harris*, the court, while still acknowledging the validity of the resistance requirement, noted that the victim did not have to resist to the limits of her physical ability in order for the prosecution to prove rape. 174 A.2d 645, 648 (N.J. Super. Ct. App. Div. 1961).

19. See *State v. Waters*, 135 N.W.2d 768, 772 (Wis. 1965) (holding that the "utmost resistance" standard is relaxed in cases where physical resistance would be fruitless). But see *State v. Muhammad*, 162 N.W.2d 567 (Wis. 1968). *Muhammad* is representative of the type of cases in which courts began to reexamine the logic and even the feasibility of the utmost resistance standard. In *Muhammad*, the defendant pinned the victim down on the bed, took off her clothes, and put his hand over her mouth so that she was unable to breath. *Id.* at 568. The defendant attempted to extricate herself from the defendant's grip, but was unsuccessful. *Id.* at 568-69. The court reasoned that the utmost resistance standard was not absolute. *Id.* at 570. "While the law requires the utmost resistance as evidence of the woman's will, the law does not require the useless or the impossible. The strict physical-resistance requirement is relaxed somewhat if it would be useless to resist." *Id.* (citation omitted). The court, however, found that the complainant did not exert the proper degree of resistance. *Id.* In support of its holding, the court thought it important to note the fact that the victim was of "unchaste character," due to the fact she was no longer a virgin and she had "considerable experience" with men. *Id.* at 571.

20. N.Y. PENAL LAW § 130.00(8) (McKinney 1977) (repealed 1981). The statute stated that the victim must offer "earnest" resistance, which was defined as the type of resistance that could reasonably be expected by an individual who refuses to engage in intercourse. *Id.*; see also *People v. Dozier*, 447 N.Y.S.2d 35, 36-37 (N.Y. App. Div. 1981) (Main, J., dissenting) (arguing that resistance need only be reasonable under the circumstances); *State v. McKnight*, 774 P.2d 532, 534-35 (Wash. Ct. App. 1989) (reasoning that resistance was reasonable under the circumstances).

21. In foreshadowing the next phase of the evolution of rape reform, the court in *People v. Dorsey* acknowledged that the abolition of the resistance requirement would be an "enlightened viewpoint which would eliminate this problem altogether." 429 N.Y.S.2d 828, 832 (N.Y. Sup. Ct. 1980). This theory, however, was still several years away from judicial acceptance.

22. The *Dorsey* court emphasized this exact point in its analysis.

The resistance must be such as might be expected from a woman in the victim's circumstances. This, plus the reasonableness required removes the victim's opinion from the case. The concern is not with what she thought was necessary, but what would reasonably appear necessary to a woman in

Eventually, states began to reform their rape statutes to altogether eliminate the resistance requirement.²³ This change manifested itself primarily in the deletion of the requirement that the victim must physically attempt to resist her attacker.²⁴ Correspondingly, courts began to conclude that the prosecution could establish the element of force even in the absence of resistance by the victim.²⁵ The courts also acknowl-

her position.

Id. (quoting Roger B. Dworkin, Note, *Resistance Standard in Rape Legislation*, 18 STAN. L. REV. 680, 685 (1966)). The inherent weakness of this standard is that it defeats the very rationale that brought about its existence, which is the fact that not every victim reacts similarly to rape. It is very difficult, if not impossible, to quantify how a rape victim would react under "same or similar circumstances." See also *State v. Reed*, 276 S.E.2d 313, 317-18 (W. Va. 1981) (holding that earnest resistance is to be measured under the reasonableness of the surrounding circumstances).

23. See, e.g., MICH. COMP. LAWS ANN. § 750.520i (West 1991). Other states have gradually manifested an intent to eliminate the resistance requirement. See *State v. Siering*, 644 A.2d 958, 962 n.6 (Conn. App. Ct.) (stating that the victim need not offer resistance because the use or threat of force sufficiently constitutes forcible compulsion), *petition for certification to appeal denied*, 648 A.2d 158 (Conn. 1994); *State v. Adams*, 880 P.2d 226, 230 (Haw. Ct. App.) (stating that "physical or verbal resistance is not an element that needs to be proven" in rape cases), *cert. denied*, 884 P.2d 1149 (Haw. 1994); *State v. Borthwick*, 880 P.2d 1261, 1269 (Kan. 1994) (stating that the degree of force constituting rape is only that amount necessary to overcome the victim's will because the victim "need not endure a beating . . . in order to satisfy that requirement"); *State v. Oliver*, 627 A.2d 144, 151 (N.J. 1993) (stating that physical force in addition to actual penetration is sufficient to constitute force); *In re Dakota EE*, 618 N.Y.S.2d 133, 134 (N.Y. App. Div. 1994) (holding that an implied or express threat of force is sufficient to prove forcible compulsion); *State v. Jones*, 521 N.W.2d 662, 672 (S.D. 1994) (noting that resistance is no longer an element of the rape statute).

24. See *Estrich*, *supra* note 13, at 1087.

[T]he law, as reflected in the opinions of the courts, the interpretation, if not the words, of the statutes, and decisions of those within the criminal justice system, often tell us that no crime has taken place and that fault, if any is to be recognized, belongs with the woman.

Id. at 1092.

25. *People v. Iniguez*, 872 P.2d 1183, 1186-87 (Cal. 1994); see *infra* notes 154-93 and accompanying text; see also *Curtis v. State*, 223 S.E.2d 721, 723 (Ga. 1976) (noting that the victim's failure to resist due to a reasonable fear of the defendant constituted forcible compulsion); *Johnson v. State*, 456 S.E.2d 251, 254 (Ga. Ct. App. 1995) (holding that defendant's threats of physical retribution toward child-victim constituted force by intimidation); *State v. Hammon*, 781 P.2d 1063, 1068 (Kan. 1989) (reasoning that an "argument of insufficient force is without merit" when the defendant forced himself upon the victim "without her consent."); *State v. Nixon*, 858 S.W.2d 782, 785 (Mo. Ct. App. 1993) (stating that forcible compulsion may be established by proving

edged the inequity of requiring resistance from the victim in order to prove rape when the defendant created the conditions that set up the attack.²⁶ Further, courts recognized that some women, faced with the daunting prospect of an unwanted sexual assault, find themselves paralyzed with a fear that subsequently renders them unable to offer any resistance.²⁷

Other states have been more reluctant to drop the resistance requirement.²⁸ In fact, some courts have embraced the concept of resistance as a quantifiable tool in adjudicating a defendant's guilt or innocence.²⁹ For example, in *Farish v. Commonwealth*,³⁰ the court held

that the defendant caused the victim to entertain a reasonable fear of physical injury); *State v. Jones*, 809 S.W.2d 37, 39 (Mo. Ct. App. 1991) (stating that fear of bodily injury may constitute forcible compulsion); *People v. Rozanski*, 619 N.Y.S.2d 441, 442 (N.Y. App. Div. 1994) (holding that evidence of victim's fear of immediate bodily injury was sufficient to constitute forcible compulsion), *appeal denied*, 647 N.E.2d 466 (N.Y. 1995); *Dakota EE*, 618 N.Y.S.2d at 135 (holding that defendant's subjugation of victim, including placing his hand over victim's mouth, created reasonable fear of bodily injury in victim, thus satisfying forcible compulsion element). *But see Commonwealth v. Feijoo*, 646 N.E.2d 118, 121 (Mass. 1995) (holding that victim's submission to intercourse was not induced by fear of bodily injury, but rather out of an expectation for future benefits, thereby failing to establish forcible compulsion by fear).

26. *See, e.g., Iniguez*, 872 P.2d at 1189-90. "There is no requirement that the victim say, 'I am afraid, please stop,' when it is the defendant who has created circumstances that have so paralyzed the victim in fear and thereby submission." *Id.*

27. *Iniguez*, 872 P.2d at 1186-87; *see supra* note 25 and accompanying text.

28. *See Howell v. State*, 636 So. 2d 1260, 1261 (Ala. 1993) (noting that the relevant rape statute lists "the overcoming of earnest resistance" as an element of rape); *People v. Nelson*, 499 N.E.2d 1055, 1061 (Ill. Ct. App. 1986) (stating that victim who maintained control of faculties and physical abilities must demonstrate some degree of resistance), *appeal denied*, 505 N.E.2d 359 (Ill. 1987); *State v. Martin*, 645 So. 2d 190, 194-95 (La. 1994) (noting that resistance is still an element of rape), *cert. denied*, 115 S. Ct. 2252; *State v. Nixon*, 858 S.W.2d 782, 786 (Mo. Ct. App. 1993) (implying that resistance may be a factor in rape in certain circumstances); *Elliott v. State*, 858 S.W.2d 478, 484 (Tex. Ct. App. 1993) (stating that resistance as an element of rape is measured on a sliding scale depending on the degree of resistance that may be expected under the circumstances); *State v. McKnight*, 774 P.2d 532 (Wash. Ct. App. 1989); *Madison v. State*, 212 N.W.2d 150, 152 (Wis. 1973) (noting that some degree of resistance, although dependent on the specific factual circumstances, may be required of the victim in order to prove rape); *State v. Muhammad*, 162 N.W.2d 567, 570 (Wis. 1968) (holding that victim's resistance is element of rape and is measured by the subjective degree of resistance of which the victim is capable). In *McKnight*, the court acknowledged that in some cases physical resistance was still required to show "forcible compulsion," but it was eager to limit its application. 774 P.2d at 534. "We find no rational basis for requiring resistance to be manifest in all cases by physical means, and in fact, are persuaded that public policy considerations militate against such a requirement." *Id.* The court reasoned that a victim who was weak and alone in her apartment was not required to "subject herself to a physical contest or to provoke a threat" in order for the prosecution to show the forcible compulsion element. *Id.* at 535-36 n.2.

29. For example, until as recently as 1980, the California Penal Code defined rape

that while resistance was no longer a requirement of rape, proof of the victim's lack of resistance would strengthen the defendant's defense of consent to the intercourse.³¹ In *Farish*, the defendant contended that the prosecution bore the burden of establishing that the victim exhibited the maximum amount of resistance under the circumstances.³² *Farish* is representative of the subtle reluctance of many courts to completely abolish the resistance requirement. It demonstrates the school of thought that treats resistance as evidence of nonconsent, rather than perceiving the resistance requirement in terms of lack of force. Although in many jurisdictions the victim is no longer required to resist, she is effectively penalized for not attempting to repel her attacker's advances.³³

as "an act of sexual intercourse under circumstances *where the person resists*, but where 'resistance is overcome by force or violence' or where 'a person is prevented from resisting by threats of great and immediate bodily harm, accompanies by apparent power of execution.'" CAL. PENAL CODE § 261 (West 1980) (emphasis added); see *State v. Matthews*, 643 So. 2d 854, 858 (La. Ct. App. 1994) (reasoning that the defendant exhibited sufficient forcible compulsion due in part to the victim's physical resistance as per the relevant rape statute); *State v. Marlow*, 888 S.W.2d 417, 422 (Mo. Ct. App. 1994) (noting that forcible compulsion "include[s] physical force that overcomes reasonable resistance"); *State v. Kitt*, 879 P.2d 1348, 1349 n.1 (Or. Ct. App. 1994) (noting that the rape statute included resistance in its definition of forcible compulsion).

30. 346 S.E.2d 736 (Va. Ct. App. 1986).

31. *Id.* at 738-39. Section 18.2-67.6 of the Virginia Annotated Code provides:

The Commonwealth need not demonstrate that the complaining witness cried out or physically resisted the accused in order to convict the accused of an offense under this article, but the absence of such resistance may be considered when relevant to show that the act alleged was not against the will of the complaining witness.

VA. CODE ANN. § 18.2-67.6 (Michie 1988).

32. *Farish*, 346 S.E.2d at 738-39.

33. This point is more clearly pronounced in *State v. Lovato*, in which the defendant contended that the victim's failure to verbally resist was dispositive in finding that no sexual abuse occurred. 702 P.2d 101, 108 (Utah 1985). The supreme court balked on the issue of resistance and refused to definitively state that the victim is not compelled to verbally resist. *Id.* "Whether an outcry should have been made, depends upon how practical and effective it might have been." *Id.* (quoting *State v. Studham*, 572 P.2d 700, 702 (Utah 1977)); see also *State v. Parish*, 405 So. 2d 1080, 1087 (La. 1981) (reasoning that the defendant did not attempt to rape the victim because he failed to exert great force and the victim emerged from encounter substantially unscathed).

B. *Passive Resistance*

Perhaps the most important attribute of resistance that still commands a great deal of attention today is the fact that the requirement has only been recently abolished by some states.³⁴ As such, its pervasive effects relative to the force element are still present in the discussions of many modern opinions. Thus, despite the fact that many states have completely eliminated the resistance requirement from their rape laws, its impact is still felt in the form of passive resistance.³⁵ Passive resistance, although difficult to define with any measure of exactitude, basically comprises the victim's verbal and non-physical responses to a rape.³⁶ Courts have struggled, however, to illuminate the practical differences between passive resistance and traditional active resistance. For example, in *People v. Salazar*,³⁷ the court acknowledged the California legislature's intent that a victim no longer needed to resist her attacker in order to show rape.³⁸ The court, however, reasoned that the elimination of resistance placed an emphasis on the element of force.³⁹ Courts have been far more reluctant to dispose of the implied passive resistance that is sometimes expected of the victim. Many opinions do not generally distinguish between physical and verbal resistance explicitly, but it is apparent that courts themselves are often unclear as

34. *State v. Mezrioui*, 602 A.2d 29, 32-33 (Conn. App. Ct.) (reasoning that the victim need not attempt physical or verbal resistance against her attacker), *petition for certification to appeal denied*, 617 A.2d 169 (1992); *People v. Bowen*, 609 N.E.2d 346, 356 (Ill. App. Ct.) (holding that failure of victim to verbally resist is not determinative on whether defendant exerted sufficient amount of force), *appeal denied*, 616 N.E.2d 339 (Ill.), *and cert. denied*, 114 S. Ct. 387 (1993). *But see* *State v. Simmons*, 621 So. 2d 1135, 1138 (La. Ct. App. 1993) (holding that the defendant did not exert sufficient force to constitute rape where the victim verbally told the defendant to "stop" attempting to penetrate her vagina yet "could [not] have reasonably believed that resistance would not prevent intercourse").

35. *See* *Estrich*, *supra* note 13, at 1123-24.

36. *See* *State v. Juhasz*, 865 P.2d 178, 180 (Idaho Ct. App. 1993) (stating that forcible compulsion included "resistance by force or violence or to prevent [resistance] by threats of immediate and great bodily harm"); *Morse v. Commonwealth*, 440 S.E.2d 145, 149 (Va. Ct. App. 1994) (expounding upon the differences between "intimidation" and "threat of force" in the context of forcible compulsion).

37. 193 Cal. Rptr. 1 (Ct. App. 1983).

38. *Id.* at 5.

39. *Id.* From the prosecutor's point of view, this simultaneously solves one problem and creates another. At least with the presence of resistance, the state could more easily show that the defendant forcibly raped the victim. Consequently, with the elimination of resistance, courts generally became more demanding in the requirement that the prosecution show that the defendant forcibly raped the victim. Thus, it seems that in some extrinsic force jurisdictions, the elimination of resistance does little to enhance the victim's chances of establishing that she had been raped. *See* *Estrich*, *supra* note 13, at 1130.

to whether verbal resistance is required.⁴⁰ In other words, some courts, while not explicitly acknowledging it, still expect some type of passive resistance from the victim—the utterance of “no” is an often cited example—to demonstrate to them that intercourse was indeed nonconsensual.⁴¹ This procedure is defended on the ground that proof beyond a reasonable doubt mandates some type of renunciation of the legality of the intercourse by the victim beyond her mere statement, made with the benefit of hindsight, that she did not consent.

Other courts have proceeded along the logic that resistance should not be bifurcated into physical and verbal classifications.⁴² If the broad

40. Compare *People v. Nelson*, 499 N.E.2d 1055, 1061 (Ill. App. Ct. 1986) (stating that physical resistance is no longer required of the victim), *appeal denied*, 505 N.E.2d 359 (Ill. 1987) and *State v. Jackson*, 620 A.2d 168, 172 (Conn. App. Ct.) (reasoning that verbal resistance is not required to establish forcible compulsion), *petition for certification to appeal denied*, 623 A.2d 1026 (Conn. 1993) with *State v. Alston*, 312 S.E.2d 470, 475-76 (N.C. 1984) (noting that despite the abolition of physical resistance requirement, the prosecution nonetheless failed to prove that the defendant exhibited the requisite amount of force).

The reluctance to statutorily abolish the verbal resistance requirement is reflected in the recent statutory revision of the Texas rape provision. The 1974 Penal Code tied the force element to “resistance by a woman of ordinary resolution.” TEX. PENAL CODE ANN. § 21.02(b)(2) (West 1974) (amended 1983). In 1975, the code was changed to allow for the imposition of a “threat . . . that would prevent reasonable resistance . . . because of a reasonable fear of harm.” *Id.* at § 21.02(b)(3) (West 1975) (amended 1983). Finally, the legislature recodified § 21.02 to eliminate physical resistance from the statutory definition of rape. *Id.* at § 22.011(b) (West 1983). It is unclear what effect, if any, this latest revision will have on the level of verbal resistance that is required by the victim in order for the prosecution to effectively prove rape. A recent supreme court case has acknowledged that resistance may still constitute an element of rape in certain circumstances. See *Alexander v. State*, 866 S.W.2d 1, 5 (Tex. Crim. App. 1993) (noting that the current Texas rape statute calls for “such earnest resistance as might be reasonably expected under the circumstances”), *cert. denied*, 114 S. Ct. 1869 (1994); *Elliott v. State*, 858 S.W.2d 478, 484-85 (Tex. Crim. App.) (noting that resistance may be appropriate under circumstances where it may reasonably be expected), *cert. denied*, 114 S. Ct. 563 (1993).

Other jurisdictions have similarly struggled with arriving at a satisfactory answer to the verbal resistance problem. See *State v. Mezrioui*, 602 A.2d 29, 32-33 (Conn. App. Ct.) (finding that it is not incumbent upon rape victim to physically or verbally resist her attacker), *cert. denied*, 617 A.2d 169 (Conn. 1992); *Farish v. Commonwealth*, 346 S.E.2d 736, 738-39 (Va. Ct. App. 1986) (quoting statute which does not require victim to “cry out” or physically resist her attacker). *But see Elliott*, 858 S.W.2d at 484 (interpreting rape statute to require resistance where reasonable under the circumstances).

41. See *supra* note 40.

42. *Mezrioui*, 602 A.2d at 32-33; see also *People v. Barnes*, 721 P.2d 110, 120 (Cal.

category of resistance has statutorily been removed as a requirement to prove rape, then it should make no difference whether the victim declines to resist physically or verbally. The rationale behind this perspective is reflective of the anomaly that resistance has been interpreted somewhat narrowly as encompassing only physical dimensions, while largely ignoring other types of less tangible forms of opposition.⁴³

While this policy seems compatible with the trend toward the abolition of the resistance requirement, it presents a peculiar problem for the prosecution in proving rape. When the victim was required to demonstrate resistance, such resistance not only went to the issue of consent, but also to whether the defendant forcibly overcame the victim's will. Now, in certain circumstances, the absence of resistance may ironically defeat the prosecution's case as a result of its inability to show force due to lack of evidence of forcible compulsion.⁴⁴ This anomalous

1986) (holding that it was inappropriate to instruct the jury that the victim must have resisted in order to return guilty verdict because legislative changes had "brought the law of rape into conformity with other crimes . . . which require force, fear, and nonconsent to convict"); *People v. Bermudez*, 203 Cal. Rptr. 728, 730 (Ct. App. 1984) (stating that the "criminal invasion of sexual privacy does not become a non-rape merely because the victim is too fearful . . . to say 'I guess you know I don't want you to do this'"); *People v. Salazar*, 193 Cal. Rptr. 1, 5 (Ct. App. 1983) (reasoning that the California Legislature clearly manifested an intent to eliminate any requirement of resistance on the part of rape victims); *State v. Adams*, 880 P.2d 226, 233-35 (Haw. Ct. App.) (noting that neither physical *nor verbal* resistance is required to demonstrate forcible compulsion) (emphasis added), *cert. denied*, 884 P.2d 1149 (Haw. 1994); *State v. Oliver*, 627 A.2d 144, 151 (N.J. 1993) (noting that the focus of forcible compulsion is entirely on the conduct of the defendant, not the victim); *People v. Cook*, 588 N.Y.S.2d 919, 921 (N.Y. App. Div. 1992) (holding that "[n]either physical injury, nor screaming or crying out are required to prove forcible compulsion). *But see* *People v. Geneva*, 554 N.E.2d 556, 563 (Ill. App. Ct. 1990) (stating that *physical* resistance was not required of the victim in order to prove force).

43. *See* *Estrich*, *supra* note 13, at 1124-25.

[C]ourts are left either to emphasize the 'light choking' or to look for threats of force That a woman feels genuinely afraid, that a man has created the situation that she finds frightening . . . may not be enough to constitute the necessary force or even implicit threat of force . . . under the law of rape.

Id. at 1115. This is the basis of the rationale behind the imposition of the fear standard implemented by several jurisdictions regarding the amount of force exerted by the defendant. *See infra* notes 154-220 and accompanying text; *see also* *Commonwealth v. Caracciola*, 569 N.E.2d 774, 777 (Mass. 1991) (reasoning that forcible compulsion is not limited only to physical force); *State v. Wilkins*, 415 N.E.2d 303, 307 (Ohio 1980) (analyzing force as coercion that would prevent resistance by an ordinary person).

44. *See* *Estrich*, *supra* note 13, at 1106 (citing *Mills v. United States*, 164 U.S. 644 (1897) (reversing defendant's conviction of rape on grounds that the force, which was incidental to the act of rape, was insufficient when combined with the victim's passive resistance)). Thus, when the display of force is less apparent, either due to the circumstances of the attack or a lack of resistance, the prosecution's burden of pro-

result occurs when a lack of physical resistance induces the court to conclude that the intercourse was lawful because the only evidence present is the victim's word against the defendant's.⁴⁵ As the emphasis shifted away from physical resistance, courts focused greater attention on the amount of force exerted by the defendant.⁴⁶ The degree of physical resistance thus enabled the court to gauge the amount of force used by the defendant.⁴⁷ This was a useful tool in evaluating whether the defendant exercised sufficient force in order to override the victim's will.⁴⁸ Part of the reasoning behind this rationale stems from the fact that resistance is often a reliable indicator of force.⁴⁹ In essence, the victim faced the unattractive choice of either risking physical injury in

duction becomes more difficult. "[W]hen the force is more of the variety considered 'incidental' to sex, or when the situation is threatening but no explicit threat of harm is communicated, 'force' . . . may not be present at all." *Id.*

45. Some states explicitly exempt a husband from raping his wife. *See, e.g., CAL. PENAL CODE § 261(a)* (West 1982). For an in depth discussion of the spousal immunity provision particular to rape, see Jaye Sitton, Comment, *Old Wine in New Bottle: The "Marital" Rape Allowance*, 72 N.C. L. REV. 261 (1993).

46. *See, e.g., Donald A. Dripps, More on Distinguishing Sex, Sexual Expropriation, and Sexual Assault: A Reply to Professor West*, 93 COLUM. L. REV. 1460 (1993). Professor Dripps authored this article in response to Professor West's article in which she criticized, among other things, Dripps' analysis of what constitutes violent sexual intercourse. *Id.* at 1461-62; *see West, supra* note 3, at 1449-55. Much of the debate centering around rape involves not only legal issues regarding consent and force, but the moral issues associated with sexual intercourse.

Legality does not imply legitimacy, any more than consent implies value. Many of our sexual practices may be beyond the reach of any sensible understanding the scope of the criminal law. But it does not follow that they are commendable, or even noninjurious. What does follow is that they are in need of criticism, whether or not in need of punishment.

Id. at 1459. Thus, perhaps to a greater degree with rape than with other crimes, an individual's personal beliefs as to what constitutes moral sexual practices are more often intertwined with the legal analysis or proposition advocating rape reform.

47. *See, e.g., Brown v. State*, 106 N.W. 536 (Wis. 1906) (reversing defendant's rape conviction on the basis that victim did not offer enough resistance). *But see People v. Iniguez*, 872 P.2d 1183 (Cal. 1994) (reasoning that the victim need not exert verbal resistance because the element of resistance is no longer part of the relevant rape statute); *State v. Jackson*, 620 A.2d 168 (Conn. Ct. App.) (reasoning that the defendant was not required to offer even verbal resistance in order to prove forcible compulsion), *petition for certification to appeal denied*, 623 A.2d 1026 (Conn. 1993).

48. *See supra* note 36 and accompanying text.

49. *See State ex rel. M.T.S.*, 609 A.2d 1266, 1272 (N.J. 1992) ("Resistance, often demonstrated by torn clothing and blood, was a sign that the defendant had used significant force to accomplish the sexual intercourse.").

attempting to resist in order to establish at trial that the defendant forcibly overcame her will or submitting to the attack. If the victim elected to submit, however, she risked the possibility that the court might find that the defendant did not commit rape because the prosecution lacked any evidence to prove that the defendant displayed the required amount of force since the victim did not resist the attack. This is primarily because the line between lawful sex and rape is often blurred.⁵⁰

Further, courts and commentators have acknowledged the reality that some victims "freeze up" and become paralyzed with fear when confronted with a rape situation.⁵¹ Thus, the abolition of the resistance requirement is somewhat misleading in that it is not entirely clear what degree of passive resistance is expected from the victim.⁵² Clearly, however, some courts have merely replaced the traditional resistance requirement with a more subtle form of resistance.⁵³

C. *Mens Rea*

With most crimes, the brunt of the court's fact-finding often centers around whether the defendant possessed the requisite mens rea. This approach, however, does not generally extend to rape. Most courts choose to ignore the mens rea element and concentrate their analysis on the issue of consent.⁵⁴ This occurs partly because of the inherent

50. See Lucy R. Harris, Comment, *Towards a Consent Standard in the Law of Rape*, 43 U. CHI. L. REV. 613 (1976) (analyzing various approaches distinguishing consensual intercourse from rape).

51. See *Iniguez*, 872 P.2d at 1187; see also *Jackson*, 620 A.2d at 172 (stating that verbal resistance is not required of the victim in proving forcible compulsion); *Curtis v. State*, 223 S.E.2d 721, 723 (Ga. 1976) (noting that the victim's lack of resistance, provoked by the defendant's creation of fearful circumstances, constitutes force); *State v. Berthwick*, 880 P.2d 1261, 1268 (Kan. 1994) (noting that "violent assaults and life-threatening actions are not necessary to sustain a 'force or fear' rape conviction"); *State v. Wright*, 598 So. 2d 561, 565 (La. Ct. App. 1992) (finding sufficient evidence to support defendant's rape conviction where the victim was unable to resist due to fear of defendant).

52. See *supra* notes 34-51 and accompanying text.

53. This fear was echoed by many women's rights groups following the *Berkowitz* decision. See *Commonwealth v. Berkowitz*, 641 A.2d 1161 (Pa. 1994). "This court decision invalidates the reality that any nonconsensual intercourse is rape The Supreme Court has reaffirmed the societal myth that a victim must resist to her utmost, risking physical harm before a rape charge can be brought." *Rape Ruling: Saying "No" Wasn't Enough Women's Groups Decry Pennsylvania Decision*, CHI. TRIB., June 3, 1994, at 1. Others felt that the ruling would put victims in greater danger by encouraging resistance. "[The] concern is that this kind of ruling will take us back to a time when you have to do something, when the victim has to put herself in some degree of danger." *Id.*

54. For a more detailed analysis of the reluctance of courts to effectively deal with the mens rea element of rape, see *Estrich*, *supra* note 13, at 1095; see also *Peo-*

difficulties in defining the exact parameters of the requisite mens rea for rape.⁵⁵ Of the few courts that have addressed this issue, most have agreed that the defendant need not have a specific intent to engage in unlawful intercourse, reasoning that a general intent to commit the act will suffice.⁵⁶ Understandably, courts have wavered on what constitutes the general intent necessary to convict a rape defendant.⁵⁷ Nevertheless, the actual mens rea standard for rape is beyond the scope of this article.⁵⁸ The underlying point is that the few courts which have

ple v. Brown, 495 N.W.2d 812, 813 (Mich. Ct. App. 1992) (reasoning that the prosecution need not prove that the defendant possessed the specific intent to exert force because rape is a general intent crime); State v. Trackwell, 509 N.W.2d 638, 645 (Neb. 1994) (reasoning that intent is not an element of rape); State v. Aumick, 869 P.2d 421, 423 (Wash. Ct. App. 1994) (holding that intent is not an element of rape, although it is an element of the crime of attempted rape). *But cf. Ex Parte Cofer*, 440 So. 2d 1121, 1124 (Ala. 1983) (reasoning that first-degree sexual abuse requires that the prosecution demonstrate that the defendant acted with the requisite "intent to gratify the sexual desires of himself or the prosecutrix"); People v. Ward, 597 N.Y.S.2d 178, 179 (N.Y. App. Div.) (concluding that defendant maintained requisite intent to commit rape), *appeal denied*, 619 N.E.2d 680 (N.Y. 1993).

55. See Estrich, *supra* note 13, at 1096-98.

56. See *Steve v. State*, 875 P.2d 110, 116 (Alaska Ct. App. 1994) (holding that rape is a general intent crime); State v. Smith, 554 A.2d 713, 715 (Conn. 1989) (rejecting defendant's contention that specific intent is required for a rape conviction), *cert. denied*, Smith v. Liburdi, 580 A.2d 60 (Conn. 1990); State v. Rothenberg, 487 A.2d 545, 549 (Conn. 1984) (holding that sexual assault is a general intent crime); Garnett v. State, 632 A.2d 797, 803 (Md. Ct. App. 1993) (noting that the prosecution does not have to prove the mens rea element of rape); Commonwealth v. Grant, 464 N.E.2d 33, 35 (Mass. 1984) (reasoning that specific intent is not an element of rape); State v. Washington, 869 P.2d 421, 423-24 (Wash. Ct. App. 1994) (holding that rape does not include element of intent); State v. Neumann, 508 N.W.2d 54, 61 (Wis. Ct. App. 1993) (stating that the prosecution is not required to show proof of intent in order to obtain a rape conviction).

57. For example, in *Commonwealth v. Sherry*, the Massachusetts Supreme Court specifically rejected defendant's claim that the applicable rape statute required a specific intent to engage in unlawful intercourse. 437 N.E.2d 224, 226 (Mass. 1982). In the same breath, however, the court hinted that a "reasonable, good faith mistake of fact" could constitute a valid defense toward the issue of consent. *Id.* at 233. Regardless of the soundness of the reasoning, the court correctly differentiated the elements of intent and consent. The watershed California case addressing the intent element of rape, *People v. Mayberry*, correctly distinguished the mens rea element of rape in holding that if the defendant maintained a "reasonable and bona fide belief" that the victim consented to the intercourse, the defendant did not entertain the necessary wrongful intent necessary to commit the crime of rape. 542 P.2d 1337, 1345 (Cal. 1975); see also *State v. Walden*, 841 P.2d 81, 82 (Wash. Ct. App. 1992) (reasoning that the crime of rape does not require proof of intent, yet the crime of assault does require that the prosecution demonstrate the requisite degree of intent).

58. For a more in-depth analysis of mens rea and rape, see Estrich, *supra* note 13,

dealt with the mens rea of a rape defendant and separate the issue of force from consent have correctly noted the difference between the three elements.⁵⁹ The reluctance of the majority of courts to separately analyze the defendant's intent from the issue of the victim's consent effectively shifts the emphasis of the analysis from the conduct of the rapist to the defensive choice of the victim in reacting to the rape situation.⁶⁰

D. Nonconsent

It is important to distinguish the issue of nonconsent from force.⁶¹ Although courts often deal with both elements together, mostly because the existence of force often, if not always, demonstrates nonconsent, the two are separate and distinct elements.⁶² In fact, one court has held that the proof of force is always dispositive in determining lack of consent.⁶³ Although consent is generally viewed as a defense that the

at 1096-1105. Estrich is one of the few commentators who addresses mens rea in the context of rape. Estrich makes the interesting point that the courts' refusal to analyze mens rea in the context of rape is disadvantageous to the victim. *Id.* at 1096. This seemingly paradoxical result occurs because the emphasis shifts from the mental state and potential guilt of the defendant, to the conduct of the victim by focusing on whether she consented. *Id.* at 1098. "[T]he inquiry into the victim's nonconsent puts the woman, not the man, on trial. Her intent, not his, is disputed; and because her state of mind is key, her sexual history may be considered relevant" *Id.* at 1099. This "trial of the victim" is often cited by commentators as one of the most glaring weaknesses in the criminal justice system's traditional approach to rape.

59. See *supra* note 57 and accompanying text.

60. See Estrich, *supra* note 13, at 1099.

61. Some authorities have acknowledged the judicial schism regarding the analysis of force and consent as two separate, although related, elements to rape. See Harris, *supra* note 50. Thus, courts often focus on the defendant's conduct in ascertaining the degree of force exerted. The problem with this traditional analysis is that it minimizes the victim's reaction to the defendant's attack, usually concluding that the victim's inaction necessarily communicated her consent, in analyzing the element of force. See Estrich, *supra* note 13, at 1111-12. The fear standard, as illustrated in *Iniguez*, purports to rectify this defective reasoning by allowing testimony of the victim's fear of imminent physical injury as evidence of force. For a detailed discussion of the fear standard see *infra* notes 154-220 and accompanying text.

62. See, e.g., Estrich, *supra* note 13, at 1087; Donna J. Case, Comment, *Condom or Not, Rape is Rape in the Era of Aids—Does Condom Use Constitute Consent*, 19 U. DAYTON L. REV. 227 (1993) (advocating that the victim's request that attacker use a condom does not constitute consent).

63. *People v. Haywood*, 515 N.E.2d 45, 50 (Ill. 1987). In this case, the court stated that the establishment beyond a reasonable doubt that the defendant exercised force was tantamount to proving the victim did not consent. *Id.* "To prove the element of force is implicitly to show nonconsent. Too, if force is established it would be redundant to require a separate showing of nonconsent as part of the prosecution's case in chief." *Id.* While this is an interesting digression, it is largely academic in

defendant asserts to most crimes, the prosecution must prove a lack of consent as an element.⁶⁴ One of the most fundamental problems associated with rape is the lack of accord over what constitutes nonconsent.⁶⁵ This point is clearly illustrated in *Berkowitz*, where the court affirmed a defendant's acquittal of rape despite the fact that the victim stated "no" during the sexual encounter.⁶⁶ Without purporting to comment on the viability or reliability of a verbal consent standard, courts have clearly thus far been unwilling to adopt such a system because the facts and circumstances of the case may contradict a victim's verbal utterances in the face of a sexual encounter.⁶⁷ Thus, in light of the judicial unwillingness to arrive at a conforming and consistent standard as to what constitutes nonconsent, the focus on the evidence presented at trial becomes even more crucial.⁶⁸

most cases. If the defendant contests the issue of consent, the prosecution still has the burden of proving nonconsent and force beyond a reasonable doubt. *Id.* Thus, this equation only seems to work when the victim's consent is not at issue, yet most rape cases hinge on whether the victim consented.

64. For a more in-depth analysis of the issue of consent, see Remick, *supra* note 16; see also *State v. Hawkins*, 504 So. 2d 1132 (La. Ct. App. 1987) (holding that the victim's fear of defendant and lack of encouragement constituted nonconsent); *State v. Oliver*, 627 A.2d 144, 151 (N.J. 1993) (holding that the ultimate issue in rape depends on the "affirmative and freely-given permission of the victim to the specific act of penetration"); *State v. Jones*, 521 N.W.2d 662, 671 (S.D. 1994) (reasoning that lack of consent may be shown by proving that the victim capitulated to the defendant out of fear of physical violence or bodily injury).

65. Remick, *supra* note 16, at 1105. Although there have been numerous articles articulating the need for some standard by which a court can measure whether a woman has or has not consented, such a standard has thus far eluded the courts. See *State v. Rivera*, 621 A.2d 298, 299 (Conn. App. Ct. 1993) (reasoning that force is the converse of consent and when forcible compulsion is proven, "lack of consent is implicit"); *State v. Cahill*, 845 P.2d 624 (Kan. 1993) (holding that the age of a victim may prevent affirmative consent).

66. See *infra* notes 123-50 and accompanying text.

67. New Jersey may be the exception to this rule. In *State ex rel. M.T.S.*, the court held that "any act of sexual penetration engaged in by the defendant without the affirmative and freely-given permission of the victim to the specific act of penetration constitutes the offense of sexual assault." 609 A.2d 1266, 1277 (N.J. 1992); see also *Oliver*, 627 A.2d 144 (reasoning that the focus of consent never shifts to the victim's state of mind, it always remains on the reasonableness of the defendant's conception that the victim has affirmatively assented to intercourse); *supra* note 65 and accompanying text.

68. See generally John D. Ingram, *Date Rape: It's Time for "No" to Really Mean "No"*, 21 AM. J. CRIM. L. 3 (1993) (analyzing the aspects and problems associated with nonconsensual intercourse).

E. The Force Element

The evolution of the force element has been one of the greatest changes affecting rape statutes during the past decade.⁶⁹ Currently, the rape statutes of most jurisdictions require that the victim demonstrate that the accused display some degree of force or threat of force sufficient to overcome the victim's will.⁷⁰ Nevertheless, the actual degree of force is subject to considerable dispute and variation.⁷¹

One of the earliest cases dealing with force and consequently setting a precedent was *Mills v. United States*.⁷² In *Mills*, the United States Supreme Court reversed the rape conviction of the defendant because the requisite amount of force necessary to constitute rape was lacking.⁷³ The defendant threatened the victim's husband at gunpoint, and ordered him to leave the premises.⁷⁴ The defendant compelled the victim to have intercourse under the threat of physical injury.⁷⁵

The district court instructed the jury that because the victim did not consent, the only force necessary to accomplish rape is the commission of the act itself.⁷⁶ The Supreme Court, however, found the trial court's jury instructions erroneous and remanded the case for a retrial.⁷⁷ The Court reasoned that the defendant did not exhibit a sufficient amount of force necessary to constitute rape.⁷⁸ In support of its holding, the Court stated:

69. The issue of what is sufficient to constitute force has eluded both courts and commentators alike. The problem basically rests in distinguishing whether extrinsic (or some modified version of it such as the fear standard) or intrinsic force will govern whether the defendant exhibited the requisite degree of force.

[W]hen some time elapses between the force and intercourse, when the force is more of the variety considered 'incidental' to sex, or when the situation is threatening but no explicit threat of harm is communicated, "force" as defined and required by the criminal law may not be present at all. In such cases, the law fails to recognize, let alone protect, a woman's interest in bodily integrity.

Estrich, *supra* note 13, at 1106; *Wiggins v. State*, 432 S.E.2d 113 (Ga. Ct. App. 1993) (noting that the degree of force in incest is different than the standard of force in rape).

70. The exception to this general rule is seen in *M.T.S.*, 609 A.2d 1266 (reasoning that force in rape is inherent in the penetration); see *infra* notes 92-110 and accompanying text.

71. See, e.g., note 121 and accompanying text.

72. 164 U.S. 644 (1897).

73. *Id.* at 649.

74. *Id.* at 645-46.

75. *Id.* at 646.

76. *Id.* at 647.

77. *Id.* at 649.

78. *Id.*

The mere nonconsent of a female to intercourse where she is in possession of her natural, mental and physical powers, is not overcome by numbers or terrified by threats, or in such place and position that resistance would be useless, does not constitute the crime of rape on the part of the man who has connection with her under such circumstances. More force is necessary . . . to make out that element of that crime.⁷⁹

The Court seemed to believe that the jury was misled by the trial court's instruction.⁸⁰ The Court's analysis of what constitutes adequate force, however, is somewhat inconsistent. On one hand, the Court stated that the commission of rape itself would provide the requisite amount of force when "the woman's will or her resistance had been overcome by threats or fright, or she had become helpless or unconscious, so that while not consenting she still did not resist."⁸¹ In the same breath, the Court stated that the victim was not in such a situation.⁸² Rather, the Court opined that the victim in this case acted passively, offered no resistance whatsoever, and was not threatened.⁸³ The Court concluded, "[S]uch nonconsent as that is no more than a mere lack of acquiescence, and is not enough to constitute the crime of rape."⁸⁴

Nevertheless, it would seem that given the facts of the case, the victim's will could have been overcome by fright. Perhaps the Court's failure to acknowledge that the circumstances of the encounter may have contributed to the capitulation of the victim's will is reflective of the fact that *Mills* was decided over a hundred years ago when society's view of rape was markedly different than today. The primary import of *Mills* lies in the fact that it set a precedent in requiring that in certain instances, the defendant must demonstrate force beyond the act of raping the victim in order to sustain a conviction. *Mills'* contemporary impact on rape analysis has been its explicit promulgation of the relationship of force and resistance into the minds of early twentieth century jurists. This influence has led to the utmost and reasonable resistance requirements that have only recently been abolished.

79. *Id.* at 648.

80. *Id.* at 647-48.

81. *Id.*

82. *Id.*

83. *Id.*

84. *Id.* at 648.

III. THE INTRINSIC FORCE STANDARD

Intrinsic force is indicative of a modern trend toward the eradication of the element of force. This process is most clearly observed in recent court opinions that narrowly construe sexual assault provisions in favor of the victim. For example, New Jersey defines sexual assault as "sexual penetration" with another person with the use of "physical force or coercion."⁸⁵ While such statutes have traditionally been interpreted as requiring demonstrative force beyond the act of penetration, the New Jersey Supreme Court held that the only force necessary was the actual penetration.⁸⁶ New Jersey, like most states, reformed its rape statute in the 1970s in order to reflect a greater understanding and deference toward rape victims. The older rape laws required that the prosecution demonstrate both that the intercourse was accomplished without the victim's consent, and that the defendant applied the requisite amount of force.⁸⁷ In other words, simply because the prosecution showed that the victim's will was effectively overcome did not correspondingly demonstrate nonconsent. In 1978, the New Jersey Legislature enacted a new rape law that changed the name of the crime to "sexual assault,"⁸⁸ deleted the spousal immunity provision, and replaced the resistance requirement with the force element.⁸⁹ This legislative change obviously begs the question: What is "force?" New Jersey has adopted an intrinsic force standard.⁹⁰ Thus, New Jersey effectively eliminated the need for the prosecution to demonstrate any extra force beyond the actual rape of the victim. The underlying rationale for this interpretation is formulated by comparison to crimes such as assault and battery.⁹¹

85. N.J. STAT. ANN. § 2C:14-2c(1) (West 1992). The relevant portion of the statute provides: "An actor is guilty of sexual assault if he commits an act of sexual penetration with another person [and] . . . [t]he actor uses physical force or coercion, but the victim does not sustain severe personal injury." *Id.* Since the statute does not purport to define what degree of force is necessary to constitute rape, the court had to infer the legislative intent from the statute, something the lower court refused to do. "We hold that the act of penetration itself cannot satisfy the element of 'physical force or coercion' since this would render N.J.S.A. 2C:14-2c(1) meaningless." *In re M.T.S.*, 588 A.2d 1282, 1285 (N.J. Super. Ct. App. Div. 1991), *rev'd*, 609 A.2d 1266 (N.J. 1992).

86. *M.T.S.*, 609 A.2d 1266.

87. *Id.* at 1270-72.

88. *Id.* at 1275. The purpose of renaming the statute is twofold. First, it stresses the assault aspect of the crime and includes all types of sexual contact, not only vaginal intercourse. *Id.* Further, sexual assault may occur against or by either sex, whereas rape distinctively connotes a male attacker and a female victim. *Id.*

89. *Id.* (citing N.J. STAT. ANN. § 2C:14-1).

90. *Id.*

91. *Id.* at 1278.

This analogy is illustrated in *M.T.S.*, where the court held that the only force necessary to constitute rape is the act of penetration.⁹² In *M.T.S.*, the victim testified that she fell asleep on her bed only to awake and find her shorts and underpants removed.⁹³ The victim asserted that the defendant was lying on top of her with his penis inside her vagina.⁹⁴

The court reasoned that the prosecution needed to show beyond a reasonable doubt that a reasonable individual would not have concluded that a person in the victim's position would have consented to intercourse.⁹⁵ The court found the notion that rape was necessarily accompanied by violence to be archaic and outdated.⁹⁶ In analogizing rape to the crimes of assault and battery, the court stated:

Sexual penetration accomplished through the use of force is unauthorized sexual penetration [U]nder [the] assault and battery doctrine, any amount of force that results in either physical injury or offensive touching is sufficient to establish a battery. Hence, as a description of the method of achieving "sexual penetration," the term "physical force" serves to define and explain the acts that are offensive, unauthorized, and unlawful.⁹⁷

Thus, the traditional elements of criminal battery require only an unauthorized touching. As harm or offensiveness are irrelevant to the battery, so should they be similarly immaterial to rape. This interpretation has the effect of placing rape victims on par with victims of other crimes with respect to the burden of proof that the prosecution must satisfy in order to show force.⁹⁸ Criminal battery is not measured by the offen-

92. *Id.* at 1280.

93. *Id.* at 1268.

94. *Id.*

95. *Id.* at 1279.

96. *Id.* at 1278.

Similarly, contrary to common myths, perpetrators generally do not use guns or knives and victims generally do not suffer external bruises or cuts. Although this more realistic and accurate view of rape only recently has achieved widespread public circulation, it was a central concern of the proponents of reform in the 1970s.

Id. (citation omitted).

97. *Id.* at 1277.

98. Much of the reaction to the *M.T.S.* holding criticized the court's reasoning. See *Recent Cases, Rape Law—Lack of Affirmative and Freely-Given Permission—New Jersey Supreme Court Holds that Lack of Consent Constitutes "Physical Force"*—State Ex Rel. *M.T.S.*, 609 A.2d 1266 (N.J. 1992), 106 HARV. L. REV. 969 (1993) (criticizing the reasoning of the *M.T.S.* decision). *But see* State v. Sedia, 614 So. 2d 533 (Fla. Dist. Ct. App. 1993) (reasoning that forcible compulsion is inherent in the penetration according to the state sexual battery statute); State v. Oliver, 627 A.2d

siveness of the contact, but whether the touching is unauthorized or unconsented.⁹⁹ The degree of force is seldom at issue; it is enough that force was exerted, however slight, to accomplish the battery.¹⁰⁰ As the court expounded: "Thus, just as any unauthorized touching is a crime under traditional laws of assault and battery, so is any unauthorized sexual contact a crime under the reformed law of criminal sexual contact, and so is any unauthorized sexual penetration a crime under the reformed law of sexual assault."¹⁰¹

The court's analysis is predicated on the basis that rape is inherently related to assault.¹⁰² Rape and battery are essentially crimes that invade another's privacy. This analogy is underscored by the point that only the slightest degree of force is necessary to constitute battery. The court's analysis has effectively shifted the inquiry to the conduct of the defendant in deciding whether force was exerted. This result occurs because the court's focus is on the assaultive and offensive nature of the defendant's sexual contact with the victim.¹⁰³ Under the intrinsic force standard, there is no examination of the degrees or shades of force executed in order to determine whether the defendant exerted the requisite amount of force. This is due to the fact that under this standard, the force is inherent in the penetration. Once the prosecution establishes penetration, seldom a problem in most rape cases, it simultaneously establishes the force element.

144 (N.J. 1993) (reaffirming the *M.T.S.* interpretation of sexual assault).

99. See, e.g., *Commonwealth v. Gregory*, 1 A.2d 501 (Pa. Super. Ct. 1938).

100. See, e.g., *Bailey v. State*, 219 S.W.2d 424 (Ark. 1949).

101. *M.T.S.*, 609 A.2d at 1276.

102. *Id.* at 1278; see also *Sedia*, 614 So. 2d at 535 (stating that the legislature intended to establish an intrinsic force standard); *Oliver*, 627 A.2d at 151 (reiterating the legislature's intent to emphasize the assaultive nature of rape).

103. The *M.T.S.* court noted that an inherent feature of the intrinsic force standard accomplishes this end because it is the defendant, not the victim, who is placed in the spotlight. *M.T.S.*, 609 A.2d at 1278-79.

In applying that [intrinsic force] standard to the facts in these cases, the focus of attention must be on the nature of the defendant's actions. The role of the factfinder is to decide not whether engaging in an act of penetration without permission of another person is reasonable, but only whether the defendant's belief that the alleged victim had freely given affirmative permission was reasonable.

Id.

Much of the criticism surrounding *M.T.S.*¹⁰⁴ centered around the fear that future defendants will be unfairly convicted of rape as a result of the intrinsic force standard.¹⁰⁵ Indeed, the phrase that "[r]ape is . . . an accusation easily to be made and hard to be proved, and harder to be defended by the party tho never so innocent,"¹⁰⁶ is almost always echoed as a warning at the mere suggestion of any sort of rape reform law. The intrinsic force standard merely puts rape on par with the other types of assaultive crimes where the contact need only be unlawful to constitute force. Few would suggest that the force element of battery should be modified to require a certain level of force or threats above and beyond the contact itself. The intrinsic force element neither affects nor lessens the state's burden of proving nonconsent.

Some commentators argue, however, that the court's emphasis should focus on the defendant's forceful conduct rather than on nonconsent.¹⁰⁷ The practical result of this approach is to shift the burden of proof of nonconsent from the prosecution to the defendant.¹⁰⁸ The intrinsic force standard removes rape from the special category of violent crimes, where most courts have pigeonholed it, and places it in the group of assaultive crimes where contact is measured by its unlawfulness, and not

104. The *M.T.S.* decision dealt with issues that are outside of the scope of this comment, such as consent and misinterpretation of legislative intent. Much of the backlash which proceeded the decision dealt with these types of issues. See, e.g., *Rape Law*, *supra* note 98, at 970-73. This article only purports to address the portion of the decision which pertained to the implementation of the intrinsic force standard. This is not to say, however, that the intrinsic force element has not been openly embraced. One of the goals of the intrinsic force model, to eliminate the compulsion to resist, has been questioned on several fronts. "Resistance is not sufficient to trigger the use of force because an assailant who encounters resistance may resort to threats and emotional coercion but not forceful violence." *Id.* at 972.

Even if this argument is true, it suggests that threats and emotional coercion somehow put the victim in a more enviable position than being physically attacked. Whether the rapist accomplished his goal through physical, moral, or emotional threats or coercion, the act itself is tantamount to forcible compulsion. This assertion purports to subordinate threats of physical force to the actual exertion of physical violence as a means of satisfying the element of force; an assertion that the *Iniguez* court sharply rejected. *People v. Iniguez*, 872 P.2d 1183, 1188 (Cal. 1994).

105. *Rape Law*, *supra* note 98, at 971.

106. MATTHEW HALE, THE HISTORY OF THE PLEAS OF THE CROWN 635 (1778).

107. See Cynthia A. Wickham, Comment, *Focusing on the Offender's Forceful Conduct: A Proposal for the Redefinition of Rape Laws*, 56 GEO. WASH. L. REV. 399 (1988). Wickham argues that judicial emphasis should be on the force the defendant exerts rather than the victim's nonconsent. *Id.* at 400.

108. *Id.* at 429.

by its degree of forcefulness.¹⁰⁹ One of the consequences of this standard is that it primarily renders the issue of force moot. The focus of the analysis shifts to the issue of consent.

The insight into rape as an assaultive crime is consistent with our evolving understanding of the wrong inherent in forced sexual intimacy Any other interpretation of the law, particularly one that defined force in relation to the resistance or protest of the victim, would directly undermine the goals sought to be achieved by its reform.¹¹⁰

In *State v. Sedia*,¹¹¹ decided one year after *M.T.S.*, a Florida Court of Appeal held that according to the relevant state sexual battery statute, when there is no consent, the force element is intrinsic to the penetration.¹¹² Although this sexual battery statute did not explicitly provide that force is inherent to penetration in the absence of consent,¹¹³ the court reasoned the legislature's subsequent enactment of an interpretive criminal statute clarified the implementation of the intrinsic force standard.¹¹⁴ The court further reasoned the trial court's fact-finding should be directed toward the issue of whether the victim consented to the intercourse, not whether the defendant exerted the requisite amount of force.

The state need not prove that the defendant used more physical force than merely the physical force necessary to accomplish sexual penetration in order to convict a defendant under section 794.011(5). Therefore, the question of whether [the defendant's] act occurred as alleged, and without the patient's consent, remains a question of fact.¹¹⁵

Sedia is arguably on more solid ground than *M.T.S.* because the Florida Legislature clearly implemented an intrinsic force standard and expressed this intent by enacting a statute which succinctly defines the parameters of the law.¹¹⁶ The ultimate justification, therefore, of an in-

109. *Id.*

110. *State ex rel. M.T.S.*, 609 A.2d 1266, 1278 (N.J. 1992).

111. 614 So. 2d 533 (Fla. Dist. Ct. App. 1993).

112. *Id.* In *Sedia*, while giving the victim physical therapy treatment, the defendant allegedly inserted his penis into the victim's vagina from behind. *Id.* at 534. No force other than the penetration itself was employed in accomplishing the intercourse. *Id.* The victim recoiled from the defendant upon feeling the intercourse. *Id.*

113. Florida Statute § 794.011(5) states that "[a] person who commits sexual battery upon a person 12 years of age or older, without that person's consent, and in the process thereof does not use physical force and violence likely to cause serious personal injury commits a felony of the second degree." FLA. STAT. ANN. § 794.011(5) (West 1994).

114. Florida Statute § 794.005 provides that "the legislature . . . never intended that the sexual battery offense described in § 794.011(5) require any force or violence beyond the force and violence that is inherent in the accomplishment of 'penetration.'" FLA. STAT. ANN. § 794.005 (West 1994).

115. *Sedia*, 614 So. 2d at 535 (citation omitted).

116. *See id.*

trinsic force standard becomes more defensible when the state legislature clearly manifests an intent to adopt such a standard rather than leaving it to the courts to interpret ambiguous legislative signals.

A potential problem with the intrinsic force standard, however, is that courts may merge the two areas of force and consent, thereby unfairly prejudicing rape defendants. Given the historic difficulty courts have encountered in separating the various elements of rape, the intrinsic force standard could invite even greater judicial error with courts erroneously concluding that unauthorized force necessarily intimates that consent was not given.¹¹⁷ Hopefully, courts following the intrinsic force standard will focus on the element of consent because force is generally rendered a non-issue in the majority of cases.¹¹⁸ Additionally, because most courts refuse to address or even acknowledge the mens rea element of rape,¹¹⁹ consent would be the only major issue remaining in the court analysis.

By implementing the intrinsic force standard, the court deftly avoids the confusing and difficult analysis of what type of force is necessary to constitute rape. Obviously, physical force presents little problem; it is the presence of threats, both implied and express, and circumstances contributing to a threatening environment that pose more difficulty to the trier-of-fact in evaluating the degree of force.¹²⁰ One of the most troubling aspects about force, contributing to judicial inconsistency in interpreting a uniform definition, is the linear criteria that courts employ in establishing the parameters of force. The coercive nuances present in many sexual encounters may contribute toward or even constitute force. Yet these multidimensional types of force that are difficult to quantify and prove will make it difficult for courts to accurately assess whether the defendant exerted the requisite amount of force to constitute rape.

Thus, the intrinsic force standard avoids this imprecise analysis because the focus is primarily on the consent issue, rather than the degree of force. It also recognizes that force is an often elusive concept, difficult to definitively establish absent physical force or overt threats against the victim.

117. See *supra* notes 61-68 and accompanying text.

118. See *supra* notes 85-117 and accompanying text.

119. See *supra* notes 54-60 and accompanying text.

120. See Estrich, *supra* note 13, at 1105. "A second understanding of force, not acknowledged in the law of rape, recognizes that bodily integrity means more than freedom from the force of fists, that power can be exercised without violence, and that coercion is not limited to what boys do in schoolyards." *Id.*

IV. THE EXTRINSIC FORCE STANDARD

Courts that have adopted the extrinsic force standard require that the prosecution prove actual force or the threat of actual force.¹²¹ The degree of force required varies from state to state and is generally a function of the facts and circumstances of each case. It is clear, however, that situations in which a victim's capitulation to her attacker is strictly out of fear of imminent physical injury will not amount to force.¹²²

The most glaring example of the implementation of the extrinsic force standard is *Commonwealth v. Berkowitz*.¹²³ In *Berkowitz*, the Pennsylvania Supreme Court held that a woman's repeated declarations of "no" were insufficient to prove rape absent evidence of "forcible compulsion."¹²⁴ The victim in *Berkowitz* entered the defendant's dormitory room in search of the defendant's roommate.¹²⁵ After locking the door, the defendant sat beside the victim and proceeded to lift up her shirt and

121. See *Stokes v. State*, 648 So. 2d 1179 (Ala. Crim. App. 1994) (acknowledging that the prosecution must show physical force or threat of force in order to demonstrate the forcible compulsion element); *State v. Parish*, 405 So. 2d 1080 (La. 1981) (holding that forcible compulsion was not established for attempted rape because the defendant did not exert sufficient force upon the victim); *Commonwealth v. Gabrielson*, 536 A.2d 401, 407 (Pa. Super. Ct.) (quoting Pennsylvania rape statute in which threats of physical intercourse "where the victim considers it pointless to resist" constitute forcible compulsion), *appeal denied*, 542 A.2d 1365 (Pa. 1988); *State v. Soderquist*, 816 P.2d 1264, 1266 (Wash. Ct. App. 1991) (stating that the force necessary to constitute rape is not simply the force inherent in the penetration, but the force used to overcome resistance); *State v. McKnight*, 774 P.2d 532, 535 (Wash. Ct. App. 1989) (noting that the force exhibited by mere penetration is not itself enough to constitute force).

122. In *State v. Reed*, the court reiterated the requirement that the prosecution must show actual force in order to convict the defendant of rape. "The defendant is correct in his assertion that to convict him . . . the state had to prove compulsion by actual as opposed to constructive force." 479 A.2d 1291, 1293 (Me. 1984); see also, ALA. CODE § 13A-6-60(8) (1994) (defining forcible compulsion as "physical force which overcomes earnest resistance or a threat . . . that places a person in fear of immediate death or serious physical injury"); ILL. REV. STAT. ch. 38, para. 12-12(f) (1993) (requiring the "use of force or violence, including . . . threats to use force or violence on the victim"); LA. REV. STAT. ANN. §§ 14:41, 14:42.1 (West 1993) (noting that the prosecution must demonstrate that the "victim was prevented from resisting by force or the threat of physical violence"). While the Illinois rape statute adopts a force standard that demands some exertion of force by the defendant beyond the actual penetration, it omits the resistance requirement that the Louisiana and Alabama rape statutes include. ILL. REV. STAT. ch. 38, para. 12-12(f). The Missouri rape statute has a scheme similar to that of Illinois: "[a] person commits the crime of forcible rape if he has sexual intercourse . . . without that person's consent by the use of forcible compulsion." MO. REV. STAT. § 566.030.1 (1986).

123. 641 A.2d 1161 (Pa. 1994).

124. *Id.* at 1164.

125. *Id.* at 1163.

fondle her breasts.¹²⁶ The defendant penetrated the victim's vagina with his penis and ejaculated on her stomach.¹²⁷ The victim offered no physical resistance, but testified that she repeatedly stated "no" during the encounter.¹²⁸

The court concluded that the defendant did not commit rape because the victim failed to show that the defendant used any force or threat of force to compel her to have intercourse.¹²⁹ The court focused on whether the forcible compulsion element of the rape statute had been met in order to support a conviction.¹³⁰ The court emphasized that the victim need not resist¹³¹ and must only demonstrate that the force exerted by the defendant was "such as to establish lack of consent and to induce the [victim] to submit without additional resistance."¹³² The court, however, reasoned that the prosecution did not demonstrate the forcible compulsion element to the degree necessary to sustain a rape conviction.¹³³ The court emphasized the victim's wavering testimony, thereby

126. *Id.*

127. *Id.*

128. *Id.* at 1164.

129. *Id.* at 1166.

130. *Id.* at 1163-64. Pennsylvania Statute § 3121 states:

A person commits a felony of the first degree when he engages in sexual intercourse with another person not one's spouse:

- (1) by forcible compulsion;
- (2) by threat of forcible compulsion that would prevent resistance by a person of reasonable resolution;
- (3) who is unconscious; or
- (4) who is so mentally deranged or deficient that such a person is incapable of consent.

18 PA. CONS. STAT. § 3121 (1983).

131. *Berkowitz*, 641 A.2d at 1163.

132. *Id.* (quoting *Commonwealth v. Rhodes*, 510 A.2d 1217, 1226 (Pa. 1986)). The *Rhodes* court expounded that "[t]he degree of force required to constitute rape . . . is relative and depends upon the facts and circumstances of the case." 510 A.2d at 1226 (quoting *Commonwealth v. Williams*, 493 A.2d 765, 768 (Pa. 1982)).

133. *Berkowitz*, 641 A.2d at 1164. The court looked to *Commonwealth v. Mlinarich*, 542 A.2d 1335 (Pa. 1988), to support its holding that the victim failed to establish the forcible compulsion element of rape. *Berkowitz*, 641 A.2d at 1164. In *Mlinarich*, a minor repeatedly objected to sexual intercourse with the defendant, but did not attempt any physical resistance. 542 A.2d at 1337. Ultimately the minor voluntarily engaged in intercourse after the defendant's threat to send her to juvenile detention center. *Id.* The court held that the forcible compulsion element of rape had not been met because no physical or psychological coercion was shown to have been exerted by the defendant. *Id.* at 1342.

intimating an air of indecisiveness on her part.¹³⁴ The court focused primarily on the actual degree of physical force exerted by the defendant, as indicated by the victim's testimony regarding the precise degree of the shove by which the defendant put her on the bed, and whether the untying of her sweatpants was the only physical contact made with the defendant.¹³⁵ The court also looked at the victim's lack of physical resistance when the defendant lifted her shirt and bra.¹³⁶

In addressing the victim's verbal resistance, the court stated that "[a]s to the complainant's testimony that she stated 'no' throughout the encounter with Appellee, we point out that, while such an allegation of fact would be relevant to the issue of consent, it is not relevant to the issue of force."¹³⁷ Thus, under such reasoning, the prosecution could not use the rape victim's verbal protestations to show that the defendant had forcible intercourse. The court correctly acknowledged that the victim's protests were obviously relevant to consent.¹³⁸ The victim's subjective testimony, however, was also relevant to the issue of force. The court, in refusing to address the victim's negative sentiments regarding the sexual encounter,¹³⁹ effectively limited the evidence that it could have considered in determining whether the defendant exhibited the requisite amount of force necessary to constitute rape. Notwithstanding its acknowledgement that the issue of force is "relative and depends on the facts and particular circumstances of the case,"¹⁴⁰ the court only considered evidence of physical resistance on the part of the victim.¹⁴¹

Berkowitz is somewhat unusual in that the court not only required the prosecution to show extrinsic force, but also refused to acknowledge the relevance of the victim's statements of "no" as to the issue of force.¹⁴²

134. *Berkowitz*, 641 A.2d at 1164. The court focused on several of the victim's statements concerning the degree of force used by the defendant in evaluating whether forcible compulsion existed. *Id.* For example, the court found the following statements by the victim to be especially telling: "He put me down on the bed. It was kind of like—He didn't throw me on the bed. It's hard to explain. It was kind of like a push but not—I can't explain what I'm trying to say." *Id.*

135. *Id.*

136. *Id.*

137. *Id.* The *Berkowitz* holding is somewhat of a retreat from the court's past position regarding the scope of evidence that may be considered when determining forcible compulsion. In *Commonwealth v. Rhodes*, the court stated that "the 'force necessary to support convictions for rape and involuntary deviate sexual intercourse need only be such as to establish lack of consent and to induce the woman to submit without additional resistance.'" 510 A.2d 1217, 1226 (Pa. 1986) (emphasis added) (quoting *Commonwealth v. Williams*, 439 A.2d 765, 768 (Pa. Super. Ct. 1982)).

138. *Berkowitz*, 641 A.2d at 1164.

139. *Id.*

140. *Id.* at 1163 (quoting *Rhodes*, 510 A.2d at 1226 (citation omitted)).

141. *Id.*

142. Many critics of the *Berkowitz* decision denounced the fact that the court

Thus, it seems that *Berkowitz* goes even further than most extrinsic force standards because not only does it require some type of actual force or threat of force, but it also hinders the prosecution by limiting the evidence it may use to prove that the defendant exerted such force.

One of the most interesting aspects of *Berkowitz's* application of the force element is that the court never explicitly states what degree of force would be required to prove rape beyond a reasonable doubt. A fair interpretation of the holding leads to the conclusion that extrinsic force is indeed the standard. The court repeatedly focused only on physical force, the threat of physical force, and psychological coercion as acceptable examples of force.¹⁴³ The fact that the defendant penetrated the complainant is uncontroverted, thereby eliminating the possibility of the application of an intrinsic force standard.¹⁴⁴ Further, the court never considered whether the complainant's fear of physical injury caused her to surrender without provoking the defendant to exercise actual force, which weighs heavily against a finding that a fear standard was applied.

Perhaps the best evidence that the court employed an extrinsic force standard is the fact that the majority of the court's analysis concentrated exclusively on the physical manifestations of force that the defendant displayed toward the victim.¹⁴⁵ "She [the complainant] agreed that Appellee's hands were not restraining her in any manner during the actual penetration, and that the weight of his body on top of her was the only force applied. She testified that at no time did Appellee verbally threaten her."¹⁴⁶

Equally damaging to the prosecution's case, however, was the court's refusal to address the victim's subjective reactions to the sexual encounter when considering the issue of force. Such an examination would have

viewed the victim's repeated utterances of "no" as irrelevant to the issue of force. "The 7-0 ruling by the all-male court, women's rights advocates say, is a crime and runs counter to advice often given [to] women about what to do if they are attacked." *Rape Ruling, supra* note 53, at 1. "What is it about the word "no" they don't understand?" *Id.* (quoting Deborah Zubow, program coordinator for the Women's International League for Peace & Freedom). Other commentators questioned the court's emphasis on force, as well as its lack of analysis on the consent issue. *Id.* "Usually, the focus is on lack of consent Focusing on the force issue is an aberration peculiar to Pennsylvania." *Id.*

143. *Berkowitz*, 641 A.2d at 1164.

144. *See id.* at 1163-64.

145. *Id.* In fact, the court's exclusive analysis centered around the physical restraints that the defendant allegedly committed against the complainant. *Id.*

146. *Id.* at 1164.

allowed the court to probe more deeply into the mind of the victim in order to ascertain whether the defendant did or did not exert a sufficient amount of force in order to constitute rape. Instead, the court looked strictly at the conduct of the defendant through his perspective in order to evaluate the degree of force. Such a limited inquiry ignores the other side of the story. It is possible that the defendant conveyed threats or shades of force that the victim could not articulate at the time due to fear. Judicial efficiency may have been better served by evaluating both the victim's and the defendant's account of the attack in order to accurately determine the degree of force manifested by the defendant.¹⁴⁷

In defense of its refusal to allow the victim's subjective testimony regarding the sexual encounter, the *Berkowitz* court cited to its previous holding in *Commonwealth v. Mlinarich*,¹⁴⁸ wherein the court reversed the defendant's rape conviction because there was insufficient evidence to prove the "forcible compulsion" element of the applicable rape statute.¹⁴⁹ The *Berkowitz* court concluded that "*Mlinarich* implicitly dictates that where there is a lack of consent, but no showing of either physical force, a threat of physical force, or psychological coercion, the 'forcible compulsion' requirement . . . is not met."¹⁵⁰

Reaction to *Berkowitz* was swift. One month after the decision, the Colorado Court of Appeals in *People v. Schmidt*¹⁵¹ explicitly rejected the reasoning in *Berkowitz* holding that a victim's statement of "no" is relevant to the issue of force.¹⁵² The court reasoned that the statement provided a sufficient basis for the jury to conclude that the intercourse occurred against the victim's will.¹⁵³

Notwithstanding the fact that some courts require the prosecution to prove that the defendant exerted extrinsic force, such a standard has inherent flaws. The most obvious weakness associated with an extrinsic force standard is that, in many cases, there simply is not enough evidence to show actual force. In such instances, the trial is reduced to which party does the trier-of-fact find to be a more credible witness. Women who are familiar enough with the law so as to be aware of the actual force requirement may be more encouraged to resist in an effort to provide proof at trial that their will was overcome by the defendant's

147. Critics of the *Berkowitz* decision were outraged primarily by the fact that the complainant repeatedly indicated that she did not wish to have sex with the defendant, yet the court refused to find that this constituted nonconsent. See *supra* note 53 and accompanying text.

148. 542 A.2d 1335 (Pa. 1988).

149. *Berkowitz*, 641 A.2d at 1164.

150. *Id.* (footnote omitted).

151. 885 P.2d 312 (Colo. Ct. App. 1994).

152. *Id.* at 316.

153. *Id.*

force. This is where the logical inconsistency between discouraging victims from resisting but still requiring that the prosecution show extrinsic force is most apparent. The paradox rests in the fact that the more the victim resists, the greater the physical danger to her, but the greater the chance of convicting the defendant at the subsequent trial.

V. THE FEAR STANDARD

Somewhere between extrinsic and intrinsic force lies the fear standard. The fear standard allows evidence of the victim's subjective fear of imminent bodily injury to show that the defendant exerted the requisite amount of force.¹⁵⁴ The jurisdictions that adopted the fear standard have wrestled with the contention that rape is a crime of force above and beyond actual penetration. Yet, they are also aware that such a standard is often difficult for the prosecution to prove. Much of this realization comes in the face of the massive onslaught of legislation, commentary, and public opinion advocating rape reform.¹⁵⁵ A major criticism of traditional rape analysis has been its emphasis on trying the victim instead of the defendant. Legislatures have responded by reducing the prosecutor's burden in proving the element of force. To make the element of force easier to prove, courts will admit certain types of evidence that show the victim consented to the rape out of fear of imminent bodi-

154. Most courts and commentators agree that the victim's subjective account and explanation of her conduct relating to the alleged rape is relevant in ascertaining the amount of force exerted during the attack. See *People v. Iniguez*, 872 P.2d 1183, 1188 (Cal. 1994) (noting that the element of fear contains a subjective element and even if victim's fear is unreasonable, force may nonetheless be found if the defendant knowingly exploits this unreasonable, subjective fear); *People v. Barnes*, 721 P.2d 110, 126 (Cal. 1986) (reasoning that the victim's subjective account of fear of physical violence was genuine); *People v. Bowen*, 609 N.E.2d 346, 356 (Ill. App. Ct. 1992) (reasoning that the victim's subjective reaction to sexual assault in failing to cry out are factors to be evaluated in resolving the issue of force), *appeal denied*, 616 N.E.2d 339 (Ill.), *and cert. denied*, *Bowen v. Illinois*, 114 S. Ct. 387 (1993); *People v. Brown*, 495 N.W.2d 812, 814 (Mich. Ct. App. 1992) (noting that the defendant "takes the victim as he finds her," and that subjective testimony of severe emotional trauma caused by defendant was determinative in concluding defendants guilty of first-degree criminal sexual conduct); *People v. Cook*, 588 N.Y.S.2d 919, 921 (N.Y. App. Div.) (analyzing the victim's subjective beliefs when evaluating forcible compulsion), *appeal denied*, 610 N.E.2d 396 (N.Y. 1992); *State v. Etheridge*, 352 S.E.2d 673, 680 (N.C. 1987) (evaluating the totality of circumstances in considering victim's capitulation to sexual acts in order to establish forcible compulsion).

155. See *supra* note 3 and accompanying text.

ly injury.¹⁵⁶ For instance, courts will weigh the victim's subjective testimony of the circumstances of the alleged rape against an objective standard of reasonableness to ensure that the victim's fears were justifiable under the circumstances.¹⁵⁷ The rationale of this standard is most clearly seen in cases where the victim offers neither physical nor verbal resistance, but may nonetheless have been raped.¹⁵⁸

Courts that have adopted this standard recognize that verbal resistance, often, is not offered due to fear of retaliation by the defendant, indecision, or from sheer paralysis of fear.¹⁵⁹ Sometimes the victim is simply intimidated by the size and strength of the attacker, thus warranting an objective standard to evaluate whether the victim's fears are justified so as to provide adequate safeguards for the defendant.¹⁶⁰ The objective part of this standard is generally gauged by the reasonableness of the fear in proportion to the circumstances of the sexual encounter.¹⁶¹ One of the earlier cases applying the fear standard was *People v. Barnes*.¹⁶² The California Supreme Court examined the totality of the circumstances, including the victim's subjective perceptions regarding the encounter, and concluded that the defendant exhibited the requisite force to support a conviction of rape.¹⁶³ In *Barnes*, the victim was waiting for the defendant to unlock the gate to his house so that she could leave.¹⁶⁴ The defendant made several physical gestures toward the victim intimating that he would physically strike her.¹⁶⁵ The victim testified that she felt that the defendant was "psychotic" and pretended to comply with his advances only in order to prevent him from becoming physically vio-

156. See *infra* notes 159-93 and accompanying text.

157. See *People v. Iniguez*, 872 P.2d 1183, 1188 (Cal. 1994).

158. *Id.*

159. This point did not go unnoticed by the *Iniguez* court. *Id.* at 1187. In holding that the victim's subjective fear was reasonable under the circumstances, the court noted that the defendant's intimidating size and state of intoxication would reasonably cause a man or woman confronting this scenario to react with fear of imminent bodily injury. *Id.* at 1188-89.

160. *Id.* at 1188. *Iniguez*, however, is not the first instance in which the California Supreme Court has held that the victim's unreasonable fear of imminent bodily contact may be enough to satisfy the force element if the defendant knowingly takes advantage of this fear in achieving the sexual intercourse. See *People v. Jeff*, 251 Cal. Rptr. 135, 143 (Ct. App. 1988) (stating that a victim's "unreasonable fear may suffice if the accused knowingly takes advantage of this fear in accomplishing sexual intercourse").

161. See *Iniguez*, 872 P.2d at 1188 ("[T]he objective component . . . asks whether the victim's fear was reasonable under the circumstances.").

162. 721 P.2d 110 (Cal. 1986).

163. *Id.* at 111.

164. *Id.* at 112.

165. *Id.* The defendant grabbed the victim by her sweater, and boasted that he could "pick her up with one hand and throw her out." *Id.*

lent.¹⁶⁶ Acquiescing to his threatening physical gestures, the victim engaged in intercourse with the defendant.¹⁶⁷

The court emphasized that the prosecution was not required to show that the victim offered physical resistance in order to prove rape.¹⁶⁸ In fact, the court took great pains to emphasize that eliminating the resistance requirement has placed rape in the same category as other crimes that involve force, fear, and nonconsent.¹⁶⁹ These crimes include assault and robbery, neither of which requires nor even contemplates resistance.¹⁷⁰ One of the *Barnes* court's major concerns in endorsing the elimination of the resistance requirement was the inherent risks that the rape victim assumes in attempting to resist her attacker.¹⁷¹ Earlier opinions, either because they refused to acknowledge the virtual futility and danger of resistance or were simply out of touch with the realities of sexual assault, clearly expected rape victims to display the utmost resistance in repelling their attackers.¹⁷² *Barnes* is representative of the modern trend that recognizes the complexities associated with resistance.¹⁷³

166. *Id.* at 111.

167. *Id.* at 112.

168. *Id.* at 123. Accompanying the rule that the victim need not offer physical resistance, is the increasing willingness to admit other evidence to show that the defendant exerted force in accomplishing the intercourse. *Id.* at 120-23. The court may view "the circumstances of the case, including the presence of verbal and nonverbal threats, or the kind of force that might reasonably induce fear in the mind of the victim." *Id.* at 122.

169. *Id.* at 120-21.

170. *Id.* The law does not require a victim of a robbery to show evidence of resistance for the prosecution to prove guilt beyond a reasonable doubt. *Id.* Although rape contains elements similar to other crimes against the person, it is somewhat of an anomaly because the line between lawful intercourse and rape is often difficult to distinguish. Recent decisions, however, indicate a trend toward recognizing that the absence of physical resistance offered by the victim should not impact in deciding whether she was raped. "[I]t is no longer proper to instruct the jury that it must find the complainant resisted before it may return a verdict of guilt." *Id.* at 121.

171. *Id.*

172. *People v. Dohring*, 59 N.Y. 374 (1874). This case is representative of the earlier line of reasoning that essentially listed resistance as a prerequisite to convicting the defendant of rape. Under this reasoning, the resistance standard would make the issue of whether the intercourse was lawful relatively clear, because the absence of resistance generally led to a finding that the woman consented to the intercourse. "Can the mind conceive of a woman . . . revoltingly unwilling that this deed should be done upon her, who would not resist so hard and so long as she was able?" *Id.* at 384; see also *People v. Bales*, 169 P.2d 262 (Cal. Ct. App. 1946) (holding that absent some showing of resistance by the victim a rape conviction could not be upheld).

173. *Barnes*, 721 P.2d at 119. The traditional line of cases reflected society's view

Having confirmed that resistance is no longer a requirement necessary to prove rape,¹⁷⁴ the *Barnes* court turned its attention to the requisite proof that the prosecution must offer in the absence of any resistance by the victim.¹⁷⁵ The court identified a wide array of evidence¹⁷⁶ that the prosecution may employ to convict a defendant, including the use of verbal and nonverbal threats and force that could instill fear in the victim's mind.¹⁷⁷

The *Barnes* court implicitly acknowledged the relevance of the subjective fear of the victim of physical injury, even in the absence of any overt physical manifestation of a threat by the defendant.¹⁷⁸ This point is somewhat overshadowed by the fact that the defendant clearly demonstrated physical force by threatening the victim with his superior physical power, telling anecdotes about past sexual exploits where he forced other women to submit to intercourse, conveying the message of the futility of resistance, and keeping the door closed when the victim attempted to exit the room.¹⁷⁹ Given the foregoing, there was sufficient evidence to show that the defendant used force and threats in obtaining the victim's acquiescence to intercourse, so her subjective fear of physical injury was hardly crucial to the jury's finding of guilt.¹⁸⁰ By recognizing, the validity of the victim's subjective fear of physical injury as a viable indicator of the force exerted by the defendant, however, *Barnes* set the stage for the formal endorsement of this fear in the absence of any physical or verbal resistance by the victim.

The fear standard was explicitly endorsed by the California Supreme Court in *People v. Iniguez*,¹⁸¹ which reversed a court of appeal's finding there was insufficient evidence of force or fear of imminent bodily injury to sustain the defendant's conviction of rape.¹⁸² In *Iniguez*, the defen-

of rapists and rape victims. "Real" rape victims were traditionally expected to attempt physical resistance. See *Moss v. State*, 45 So. 2d 125, 126 (Miss. 1950) ("A mere tactical surrender is not enough. Where the penalty of the defendant may be supreme, so must resistance be unto the uttermost [sic]."); *People v. Carey*, 119 N.E. 83 (N.Y. 1918) (holding that there can be no rape unless the woman offers complete resistance).

174. It should be noted that California Penal Code § 261 was amended in 1980 when the resistance requirement was deleted, but *Barnes* was one of the first cases to chronicle the demise of the resistance element in detail. *Barnes*, 721 P.2d at 113-21.

175. *Id.* at 121.

176. *Id.* at 122.

177. *Id.*

178. *Id.*

179. *Id.* at 122-23.

180. *Id.*

181. 872 P.2d 1183 (Cal. 1994).

182. *Id.* at 1184.

dant approached the victim while she was sleeping, pulled down her pants, fondled her buttocks, and inserted his penis inside her vagina.¹⁸³ The victim testified that she did not resist or try to escape from the defendant.¹⁸⁴

The court concentrated its analysis in evaluating the nexus between force and fear to the relevant rape statute.¹⁸⁵ The court prefaced its analysis by noting that the current statute allows for a finding of rape by "force, violence, or fear of immediate and unlawful bodily injury on the person or another."¹⁸⁶ The court noted "the element of fear of immediate and unlawful bodily injury has two components, one subjective and one objective."¹⁸⁷ The subjective element focuses on whether the victim allowed the defendant to have intercourse with her because she feared immediate and unlawful bodily injury.¹⁸⁸ The objective component asks whether the subjective fear was reasonable or if the defendant exploited the victim's subjective fear, even if such fear was unreasonable under the circumstances.¹⁸⁹

The court concluded that the victim satisfied both the subjective and objective criteria of fear of immediate bodily injury.¹⁹⁰ First, the victim

183. *Id.* at 1185.

184. *Id.*

185. *Id.* at 1186-90. Section 261 of the California Penal Code states that rape occurs "[w]here it is accomplished against a person's will by means of force, violence, or fear of immediate and unlawful bodily injury on the person of another." CAL. PENAL CODE § 261(a)(2) (West 1988). Before 1980, § 261 defined rape as "an act of sexual intercourse under circumstances where the person resists, but where 'resistance is overcome by force or violence' or where a person is prevented from resisting by threats of great and immediate bodily harm, accompanied by apparent power of execution." *Iniguez*, 872 P.2d at 1186 (quoting *People v. Barnes*, 721 P.2d 110 (Cal. 1986)). Under this statute, the victim had to show resistance, or that resistance was thwarted due to threats by the defendant. *Barnes*, 721 P.2d at 115. This requirement placed an extra burden on the victim because in instances where no resistance was offered, the victim would have to demonstrate exactly why she did not attempt to repel the rapist. *Id.* The old statute was amended in 1980 to reflect the elimination of the resistance requirement. *Iniguez*, 872 P.2d at 1187.

186. *Iniguez*, 872 P.2d at 1187.

187. *Id.* at 1188.

188. *Id.*

189. *Id.*

190. *Id.* at 1188-89. There was substantial disagreement as to the degree of subjectivity involved in the test outlined by the *Iniguez* court. As *Iniguez's* attorney expounded: "It seems to me that any non-consensual act of penetration is now rape . . . even though the Legislature did not say that. By the (California) Supreme Court's decision, as long as it includes elements of fear, it is rape." Maura Dolan,

froze out of fear of the defendant committing an act of violence against her.¹⁹¹ The court specifically rejected the contention that the subjective component was not met because the victim failed to verbalize her fear of the defendant. The court reasoned that “[f]ear may be inferred from the circumstances despite even superficially contrary testimony of the victim.”¹⁹² Second, the objective element of the fear requirement was met when the victim was awakened by the defendant’s movement, fondling, and touching, all of which would reasonably cause an individual to react in fear.¹⁹³

A. *Interplay Between the Extrinsic Force and Fear Standards*

Recently, many courts have expressed a great deal of reluctance toward abandoning the extrinsic force standard. Perhaps the greatest example of the judicial wavering on how much force is required to show rape is seen in a recent line of North Carolina cases that have addressed several degrees of force.

In *State v. Alston*,¹⁹⁴ the defendant and the complainant had maintained a consensual, yet stormy, sexual relationship.¹⁹⁵ The peculiarity of their relationship was underscored by the fact that the woman would remain entirely motionless while the defendant undressed her and engaged in intercourse with her.¹⁹⁶ The incident in question occurred when, after threatening to “fix” the complainant’s face, the defendant led the complainant from school to a friend’s home while discussing the status of their relationship.¹⁹⁷ When they arrived there, the defendant disrobed the complainant and ordered her to lie on the bed.¹⁹⁸ The defendant pushed apart the woman’s legs and engaged in intercourse with

Assault Without Struggle Can Be Rape, Court Says, L.A. TIMES, May 24, 1994, at A2. While this statement must be evaluated in light of the speaker’s bias, it does raise the issue that the objective test of the fear standard may potentially be overshadowed by the subjective testimony of the victim regarding her fear of imminent bodily contact.

191. *Iniguez*, 872 P.2d at 1188.

192. *Id.*

193. *Id.*

194. 312 S.E.2d 470 (N.C. 1984).

195. *Id.* at 471.

196. *Id.*

197. *Id.* at 472. The complainant told the defendant their relationship was over. *Id.* Defendant then replied that he had “a right to make love to her again,” but the complainant did not respond to his remark. *Id.*

198. *Id.*

her.¹⁹⁹ The complainant cried during the sexual encounter, but did not physically resist.²⁰⁰

The court held that no rape had been committed because the defendant did not exhibit the requisite amount of force.²⁰¹ The court reasoned that the complainant's fear emanated from the general circumstances of the defendant's comment to her that he would "fix" her face and from his act of grabbing her arm at the school, but not from the sexual encounter itself.²⁰² Thus, "absent evidence that the defendant used force or threats to overcome the will of the victim to resist the sexual intercourse alleged to have been rape, such general fear was not sufficient to show that the defendant used the force required to support a conviction of rape."²⁰³ The court was influenced by the fact that the complainant and the victim had previously engaged in a consensual sexual relationship prior to the incident in question.²⁰⁴ It seems, therefore, that the existence of a consensual relationship between defendant and complainant presumes that the intercourse was not forcibly accomplished through fear.²⁰⁵ This perplexing leap of logic has not gone unnoticed by other courts.

Three years later, the North Carolina Supreme Court revisited *Alston* in *State v. Ethridge*,²⁰⁶ where the defendant was accused of raping his son. The defendant ordered his son to remove his clothes, and the child initially refused, but submitted after his father repeated the request.²⁰⁷ After intercourse, the defendant threatened to harm the child if he told anybody about the encounter.²⁰⁸

The defendant argued that the *Alston* "general fear" rationale should control because there was no manifestation of threats or force during intercourse.²⁰⁹ The court refused to apply *Alston*, however, because the

199. *Id.*

200. *Id.*

201. *Id.* at 476.

202. *Id.*

203. *Id.* (italics omitted).

204. *Id.* at 475.

205. *Id.*

206. 352 S.E.2d 673 (N.C. 1987).

207. *Id.* at 675.

208. *Id.*

209. *Id.* at 681. The contention that the parent did not exercise the requisite amount of force in alleged intercourse with his child has been argued in many child rape cases. Usually, courts have reached similar conclusions as in *Ethridge*. See *State v. Eskridge*, 526 N.E.2d 304, 306 (Ohio 1988) (holding that father raped his

inherent dominance the defendant had over the victim in light of the father-son relationship created the necessary force required to show rape.²¹⁰ The court similarly limited *Alston* "to its peculiar facts" because the inherent degree of force is different in the case of incestuous intercourse than in consensual sexual activity between adults.²¹¹

Thus, the North Carolina Supreme Court adopted a dual standard regarding the force requirement. *Alston* stands for the proposition that "general fear" from circumstances surrounding, but not directly related to the intercourse in question, is not sufficient to demonstrate force.²¹² This implicitly applies to cases where the parties have maintained a prior consensual relationship.²¹³ The court, however, made clear that the general fear requirement is inapplicable in cases involving intrafamilial sexual intercourse.²¹⁴ In such instances, fear may be adduced from the superimposing presence of the parental figure.²¹⁵ Therefore, the subjective fear of the child is relevant to help prove the force element of rape.

daughter because the coercion implicit in parental authority is almost always enough to show force). *But see* Commonwealth v. Biggs, 467 A.2d 31, 32 (Pa. Super. Ct. 1983) (holding that the parental relationship did not establish the force element necessary to prove rape).

210. *Etheridge*, 352 S.E.2d at 681. "The youth and vulnerability of children, coupled with the power inherent in a parent's position of authority, creates a unique situation of dominance and control in which explicit threats and displays of force are not necessary to effect the abuser's purpose." *Id.*

211. The court explicitly overruled *State v. Lester*, 321 S.E.2d 166 (N.C. Ct. App. 1984), *aff'd*, 330 S.E.2d 205 (N.C. 1985), which was factually similar to *Etheridge*, because the "general fear" rationale is misapplied in cases of adults engaging in intercourse with a child.

212. *State v. Alston*, 312 S.E.2d 470, 476 (N.C. 1984).

213. The *Etheridge* court stated as much by reasoning that "[s]exual activity between a parent and a minor child is not comparable to sexual activity between two adults with a history of consensual intercourse." 352 S.E.2d at 681.

214. *See id.* Courts applying the extrinsic force standard would conclude differently. For example, in *Commonwealth v. Biggs*, the court held that a father's intercourse with his daughter was not rape because there was no proof of adequate force. 467 A.2d 31, 32 (Pa. Super. Ct. 1983). The father instructed his daughter to engage in intercourse with him because, "if the mother could no longer provide as a mother, it was up to the oldest daughter." *Id.* The court held that because the father did not accomplish intercourse by force or threats, there was no rape. *Id.* "The record clearly shows that defendant never used or threatened to use force in inducing his daughter to participate in sexual intercourse. Although this conduct is reprehensible it is not the conduct which [the rape statute] forbids . . ." *Id.* This is clearly against the rationale in *Etheridge*, which emphasized that the very nature of the parent-child relationship was enough to show force. 352 S.E.2d at 681. *Biggs* is representative of the fact that some states do not recognize a dual standard regarding force, but rather require the extrinsic force standard in all rape cases.

215. As the court reasoned, "In such cases the parent wields authority as another assailant might wield a weapon. The authority itself intimidates; the implicit threat to exercise it coerces." *Etheridge*, 352 S.E.2d at 682.

While the court refused to overrule *Alston*, it clearly distanced itself from the reasoning and holding of that case.²¹⁶

Although the extrinsic force standard seems to remain in cases where adults have maintained a consensual relationship, its holding has been cast in doubt. It is difficult to say what the *Etheridge* court meant when it limited the *Alston* holding "to its peculiar facts."²¹⁷ The peculiarity of *Alston* may very well occur in the uncommon scenario where the prosecution cannot establish that the victim's fear of imminent bodily contact stems from the intercourse itself, but from prior events unrelated to the sexual encounter. Later cases addressing *Alston* seem to support this position.²¹⁸ Indeed, such cases have even hinted that actual penetration itself²¹⁹ may well constitute the requisite amount of force necessary to constitute rape.²²⁰

VI. CONCLUSION

M.T.S., *Berkowitz*, and *Iniguez* clearly represent unique interpretations of the force element. Upon close examination, however, each standard

216. *Id.* at 681.

217. *Id.*

218. *State v. Brown*, 420 S.E.2d 147 (N.C. 1992). The *Brown* court rejected the defendant's reliance upon *Alston* by stating that the "general fear" rationale should only apply in cases identical to the peculiar facts of *Alston*. *Id.* at 150. "*Alston* arose upon evidence so peculiar that the decision may well be sui generis." *Id.* The annoyed tone that the supreme court seems to adopt every time a defendant invariably cites *Alston* for the erroneous proposition that "general fear" rationale is universally applicable to all rape cases, is indicative of the court's uneasiness about the case.

219. One justice on the *Brown* court argued that the nature of the defendant's attack lent itself to a finding that force was implied in the act of penetration. *Id.* at 154 (Frye, J., concurring). Justice Frye commented that when the victim is unaware of what is happening, the court should imply that the force and lack of consent elements are satisfied in order to prevent rape defendants from successfully arguing that no force was actually exercised during the intercourse. *Id.* (Frye, J., concurring). Justice Frye argued that this "surprise attack" is analogous to raping a victim while she sleeps or is unconscious. *Id.* (Frye, J., concurring). Obviously, the court's standard of force is extrinsic because the fact that penetration occurred is uncontroverted. *Id.* (Frye, J., concurring). This problem would not arise in states applying an intrinsic standard of force because the penetration was not at issue.

220. *Id.* at 150. The court left open the question of whether intrinsic force would be sufficient. *Id.* The court declined to decide whether the actual physical force would establish the force element in the sexual act at issue. *Id.* The fact that the supreme court would even consider the intrinsic force standard so soon after *Alston* communicates that views are certainly changing.

focuses attention in different areas. Extrinsic force concentrates on the conduct of the defendant by focusing almost exclusively on the amount of force or threat of force used by the defendant to commit rape. This standard makes it more difficult for the prosecution to prove rape because it must prove force in addition to nonconsent. This standard artificially separates rape from other types of assault-related crimes by requiring a more stringent prima facie case for the prosecution to prove. Furthermore, the extrinsic force standard places the victim at greater risk because it encourages resistance to provide evidence of force.²²¹

The fear standard is somewhat of a hybrid between intrinsic and extrinsic force. Courts in this category are reluctant to go so far as to say that force is intrinsic to the act of intercourse, yet are simultaneously uncomfortable with allowing force to play such a big part in rape analysis. Thus, the focus is on both the victim and the defendant in adjudicating the basis of her fears measured against the severity of the defendant's attack. While this represents a departure from the extrinsic force standard, it fails to place the crime of rape on par with other assaultive crimes because it requires that the defendant exert a specified degree of force to be found guilty of rape. As such, this standard suffers from the same inconsistencies as does the extrinsic force standard. It does, however, allow the prosecution a wider array of evidence that it may offer as proof of force.

Intrinsic force is the easiest force standard for the prosecution to prove. The only obligation incumbent on the prosecution regarding force is to show that intercourse actually occurred. Most rape prosecutions rise and fall on the issue of consent; the actual penetration is seldom at issue. Thus, the intrinsic force standard is the most logical point of analysis from which courts may address the issue of force because it focuses on the assaultive act of the defendant. Intrinsic force analogizes the force of rape to the force of assault, battery, and other crimes against the person where the actual degree of force is irrelevant to whether or not the defendant committed the crime. Thus, the brunt of the court's analysis is centered on whether the victim consented to the intercourse. Instead of focusing overwhelmingly on the conduct of the victim, which occurs under the extrinsic force standard, the intrinsic force model looks toward the actions of the defendant to establish the force element while concentrating on the victim to ascertain nonconsent. This dual focus on both the defendant and victim alleviates excessive, as well as exclusive, judicial scrutiny on the victim. Under this standard, rape is analyzed in a

221. See Estrich, *supra* note 13, at 1094. Estrich notes this point in endeavoring to define rape. "We ask: What did the defendant do? What did he know or intend when he did it? [C]ourts, in defining the crime, have focused almost incidentally on the defendant—and almost entirely on the victim." *Id.*

manner analogous to other similar assaultive crimes thereby deferring to the rape victim the same protection as other victims of violent crimes.

JOSHUA MARK FRIED

