1. Introductory Overview


2. Rape and sexual assault can be distinguished but are often treated synonymously. Sexual assault is the term often used to describe offenses of sexual contact not involving penetration, whereas rape is generally viewed as crime involving, historically speaking, penetration of a vagina by a penis. Both terms have been used in rape reforms criminalizing oral and anal penetration and penetration with objects. Unless otherwise indicated, they will be used synonymously in this book.

3. Because females are so overwhelmingly, disproportionately victimized by males in crimes of rape and sexual assault, this book will refer to rape victims as women and accused rapists as men. I do this not only for economy’s sake but also to portray the sex- and gender-based character of these criminal acts. “Women” is used inclusively to refer to adult females and young girls, “men” to refer to adult males and young boys, also for the purposes of linguistic parsimony.

4. Kalven and Zeisel’s classic 1966 study on jurors used the terms “simple” and “aggravated” rape. Estrich follows this tradition but coins the term “real” rape for aggravated rape.
5. As DeKeseredy has pointed out, a feminist realism like that embraced by the model I describe corrects for the problem suffered by a feminist idealism that argues that “the state and the law, the legal mechanism and the police, are a part of a patriarchal structure, under which attempts at legal reform are only tinkeringings within the overall system of control and regulation—so legal change serves only to perpetuate the basic conditions of patriarchy” (DeKeseredy, personal communication, 2007, citing Edwards 1989).

6. The polarization evident in these perspectives may account for part of the dwindling attention to rape reform, in that one sees reform as untenable and the other is unlikely to be accepted because of its excesses.

2. Legal Change Sweeps the Nation

1. The early and extensive Michigan law has been discussed for its influence on many jurisdictions, among them, New Jersey (Field and Bienen 1980), Washington (Estrich 1987), and Illinois (Spohn and Horney 1992).

The Model Penal Code (MPC) approved by the American Law Institute in 1962 was another influential model for state’s rape reform legislation (Field and Bienen 1980: 155). This code, while supposedly improving on carnal knowledge statutes, reflected many of the same problems that those statutes were known to cause. I do not discuss the MPC at length here, because so much of it is at odds with the rape reform movement. For instance, while the MPC is sex neutral and graduates offenses along severity levels, its retention of Justice Hale–type notions about the difficulty of defending against rape charges, and about victim promiscuity, victim consent, victim lies, and victim precipitation are manifest in its requirements of corroboration and prompt complaints (ibid.; Estrich 1987: 46). I discuss these Hale-type cautionary jury instructions, victim promiscuity, and so forth further in this chapter.

“Forcible rape” is the term traditionally or conventionally used in law to describe rape. Yet the term is problematic since it conjures up the sexist, indeed misogynistic, interpretations associated with carnal knowledge statutes, in that “forcible rape” implies that some rape is not forced—and hence may not be rape. In other words, “forcible rape” is a term that is largely redundant. I use “sic” to call attention to this and make clear that “forcible rape” is not a term of my own choosing or crafting.

2. The Michigan CSC Code defines two assault offenses. Assault with intent to commit CSC involving sexual penetration (MCL 750.520g[1]) and assault with intent to commit CSC II involving contact (MCL 750.520g[2]). These are different from attempted CSC offenses that entail someone who “may commit an overt act beyond ‘mere preparation’ but never actually ‘assault’ the victim.” Assault with intent to commit CSC offenses—penetration or contact—are “crimes of sexual violence” that do not “culminate in the actual sexual penetration or touching of a victim. In some cases, the perpetrator may be thwarted from carrying out a sexual penetration or contact despite having the intent to do so” (Michigan Judicial Institute 2002:43).

3. It is noteworthy that Michigan reforms did not originally repeal the exemption for husbands. This change wasn’t enacted until more than a decade after the CSC Code went into place in 1988 (amendment 24, PA 138, in Michigan Judicial Institute 2002).
4. Just as there is a relatively little literature on the nature and outcomes of rape reforms in the United States, the literature on rape reforms in other countries, too, is scant. It is instructive to note that the accessible/published foreign research from nations deemed less developed or advanced frequently underscores different, and horrendous, problems for women. Some problems of note are, for example, bride capture, dowry deaths, and honor killings after rape. Many foreign scholars have pointed out that research from first-world nations is biased when it assumes that the issues surrounding violence against women (when studied in nation/state as opposed to global contexts) are universal. This is clearly a significant and valid criticism and should be drawn on as a corrective to essentializing the plight of women. These problems are not discussed here for the rather obvious reason that rape reform movements and reform legislation are so rare in such countries.

3. Failures and Successes

1. There is, however, one somewhat positive result in this regard: consideration of evidence of past sexual activity did not emerge as a factor influencing charging and plea-bargaining reductions in sexual as opposed to nonsexual assault case prosecutions in Michigan (Caringella-MacDonald 1988). I say “somewhat” because this does not mean that it did not arise in court (where it resulted in sustained objections by the prosecution) or in discussions about pleas. Nevertheless, the factor did not differentiate the types of assaults from one another.

2. Deborah Denno indicates the strength of this convention. She cites that “ninety to ninety-five percent of the media have non-disclosure policies on victims of rape, irrespective of the law of the particular state where they are based” (1993: 1130, citing Jones 1989: A18, which provides an estimate from Deni Elliott, the executive director of the Institute for the Study of Applied and Professional Ethics at Dartmouth College).

3. Misdemeanors are less serious than felonies, carrying only up to one year of jail, as contrasted to a year or more in state or federal prison. Arizona provides an example of a state where marital rape is a misdemeanor offense.

4. It is interesting to note that Temkin claims that “only in New Zealand the discretionary legislation appears to be operating with a certain degree of success” (1995: 308, citing Young 1983: 1:43–46).

5. They note that in Canada “the defense strategy is to elect Supreme Court [i.e., a trial by judge and jury] in those cases where the victim may be open to critical social judgment for her behaviours or lifestyle. This tactic, which maximizes public exposure and holds the victim accountable for the crime, is often successful even in the face of a strong case presented by the crown” (Yurchesyn, Keith, and Renner 1995: 73, cited in Du Mont and Myhr 2000: 1111).

4. Avenues for and Attitudes About Victims

1. Susan Hippensteele and Meda Chesney Lind presented an exceptional case on civil litigation and sexual harassment at the 1994 American Society of Criminology conference in Boston. They discussed how harm is determined to be less severe in instances where victims of sexual harassment are found to have been raped in the past. In civil
litigation, the university can hire a private investigator to dig up this kind of information. If the plaintiff has been raped, the view is that, while the present sexual harassment has caused some harm, harm had already occurred in the past, so the impact of the faculty member's illegal behavior is less damaging.

2. The total cost of the VAWA of 1994 is roughly between $1 and $1.5 to $2 billion. The lower estimate is from Frazee et al. 1995: $1.62 billion over the projected six-year period between 1994 and the twenty-first century. The higher estimates, by the Congressional Budget Office, are $1.896 and $2.056 billion, calculated to cover the years of 1994 through 1998 (U.S. Senate 1993: 68–72). The discrepancy is between “amounts Specified in the Bill” (the lower number) and “Net Additional Authorizations” which is “total Authorizations in S.1” “Less: Authorizations in Current Law Act” (70).

3. In Brzonkala v. Morrison, 935 F. Supp. 779 (WD VA, 1996), District Judge Kiser dismissed VAWA civil rights claims. The plaintiff appealed to the Fourth Circuit Court of Appeals, where a three-judge panel reversed the dismissal, with Circuit Judge Motz writing the majority opinion and Circuit Judge Luttig writing the dissent (at 132 F. 3d 949 [1997]). In a rehearing before an en banc panel of the Fourth Circuit Court of Appeals, with Circuit Judge Luttig now writing the majority opinion (169 F3d 820 [1999]), the court reversed the three-judge appeals panel and affirmed District Judge Kiser. Certiorari was granted by the Supreme Court, which affirmed the en banc panel in United States v. Morrison (529 US 598 [2000]), with Justice Rehnquist writing for the majority (Mullendore, personal communication, 2007).

4. Battelle published an earlier study in 1977. The research inquired about prosecutorial charging decisions in rape. The researchers did not publish pre- to postreform comparisons and so is not featured here. Briefly though, the findings were that most factors deemed important to prosecutors related to legally relevant variables like age and injury; however, the two extralegal variables of circumstances of initial contact and the victim-offender relationship were also mentioned (Spohn and Horney 1992: 111).

5. For reviews of this body of research, see Allison and Wrightsman 1993; Lonsway and Fitzgerald 1994; and Ward 1995. A few of the most familiar and most widely used pieces of research on attitudes about rape are Burt’s research on the Rape Myth Acceptance Scale in 1980, Field’s “Attitudes Toward Rape” (1978), Williams and Holmes’s 1981 research on sex, race, ethnicity, and attitudes toward rape, and Ward’s extensive 1995 review of the research published in book form. Williams and Holmes's summary of the public's beliefs is useful for an overview of the general findings from the attitudinal investigations. They state that “the vast majority of respondents view rape as a behavior problem—primarily that of the rapist (mental illness) and secondarily that of the victim (inappropriate behavior and/or appearance). Few respondents of any group saw societal (macro-level) problems as causally related to rape, and fewer yet saw sex-role problems as causal…. A majority of respondents resorted to law-and-order clichés or admonitions for women to change their behavior as their best suggestion on how to reduce the rape problem” (1981: 123).

6. The research on the media and rape is rarely as specific as that addressing reform objectives relating to corroboration requirements and the like, as has been discussed in this chapter. Although there is no research directly comparing media treatment of rape in the pre- and postreform periods, the evidence of victim-blaming myths is indicative of the failure of reforms to achieve goals.
7. Although the rape charges against the three lacrosse team members were dropped, and District Attorney Mike Nifong was forced to resign (and sentenced to serve one day in jail for contempt charges stemming from making untruthful statements to a judge), the point is that before any of this and before the circus (e.g., the prosecutor was accused of essentially campaigning for reelection by filing charges for a black woman who accused three white, upper-class Duke University students of rape) ensued, the press, the public, and the students all repeated victim-, woman-, and black-blaming stereotypes and dismissed women and minority victimization as an unreal, unserious falsehood.

5. The Legal Landscape

1. Kristine Mullendore (personal communication, 1998), a former assistant prosecuting attorney, associate professor at the School of Criminal Justice at Grand Valley State University, observes that it should be noted that while statutory rape is a common lay example, it is not an accurate legal example of strict liability. This is because statutory rape is a general intent crime, where the act is the intent, and the consequence is irrelevant. Black's Law Dictionary states that general intent “in criminal law [is] the intent to do that which the law prescribes. It is not necessary for the prosecution to prove that the defendant intended the precise harm or the precise result which eventuated” (Black 1991: 560). It is only necessary to establish that the actor intended the act, in this case, sexual penetration (or sexual contact/offensive or invasive touching). This is different from a strict liability crime where one commits the act, and regardless of intent the actor is criminally responsible. With strict liability, intent does not have to be proven because it is irrelevant, whereas with general intent crimes it is the consequence, harm, injury, or result that does not have to be proven because of its irrelevance.

2. See Deborah Denno’s 1997 work on rape and mental incompetence for a critique of the law here.

3. As Mullendore has observed, the problem in Michigan is that the CSC Code is a particularized case of battery/assault crimes, where injury is “particularized” to different categories of victims, for example, the young or the mentally incapacitated (personal communication, 1998). With assault law, the assault is putting the victim in fear; the fear is seen as the fear of battery—which is the actual injury. The violence, force, coercion, or threats put the victim in fear in sexual assault cases in much the same way. The fear would be the fear of battery or the physical harms associated with forced sex, should the victim refuse to submit to the assailant. The assailant here exploits the victim's fear that she cannot do anything about his intentions, his advances, his threats, or his actual use of force or violence and/or her fear/knowledge that she cannot defend herself against these. Because of the particularized injury or battery, the penalties are greater for rape (CSC) than for simple battery/assault offenses. The problem is that because the defense of consent is available to battery/assault crimes, for example, in the context of contact sports and other mutually agreed-upon physical fighting where consent precludes culpability for injuries, the defense of consent also pertains to rape (as a particularized case of battery/assault crime) (ibid.). In other words, the general notions of consent are allowable as a defense to simple battery and hence available as a defense to rape, regardless of degree/severity.
Mullendore elaborates that change in law is construed “narrowly,” or in a limiting sense, whenever criminal responsibility would be created or enhanced by a legal change. Because penalties are greater for CSC offenses, the “narrow” interpretation would be that consent is available as a defense to any degree of rape, as it is available to other crimes of battery.

4. Defenses other than consent and mistake of consent are available in rape cases. Bohmer (1991) lists the following four defenses to rape charges: (1) “It wasn’t me”; (2) “No sex took place”; (3) “I’m not responsible”; and (4) “Sex was consensual” (319). Gardner and Anderson spell out some of the permutations on consent defenses in rape in their criminal law and procedure book. They delineate the following: “I honestly thought she consented, she never did say ‘no’”; “she consented, then changed her mind during the sex”; “the manner in which the woman dressed was sexy and provocative and her conduct (such as placing her hand on the defendant’s upper thigh) … led him on”; “she consented, but later developed guilt feelings and regretted what she did” (1996: 424). Diana Scully’s book on convicted rapists’ “vocabulary of motives” explains in some detail how even convicted and incarcerated rapists rationalize away the assessment that what they did was rape by relying on myths such as victim precipitation, lack of resistance, fantasized desire, “coming around to liking it,” and so on (1990).

5. It is interesting to note how a victim’s postvictimization behavior gets used to infer consent to a prior act that is criminal. The same occurred in the Kobe Bryant case, where the victim’s alleged activities with other men after the alleged rape were used as indicators that she was not raped by Bryant.

6. A final issue in a critical appraisal of Estrich’s model is that she devotes very little space to explaining her analogy of rape and sexual assault to property crimes. What exactly would these offenses be? How would they vary? How would these types of sexual assault correspond to other crimes involving money or property? The statement “were money sought instead” is clear enough, but follow-through would have been most useful in identifying the new crimes she is trying to carve out. Furthermore, she states that such offenses might be lesser crimes but fails to pursue how this might work out in the law. Would they still be sexual assault offenses or some new category of fraud? Would these be lesser in the sense of being misdemeanor offenses or just carry lower sentence possibilities? (See chap. 12 for treatment of these issues.)

The commonality in problems with Estrich’s model is that follow-through with these important conceptualizations and directions would have been most beneficial. It would inform the effort to develop a model to stimulate and guide further reform efforts.

6. Affirmative Consent Reform Models

1. The castigation of Antioch’s code is largely due to the extremity of the staging measure requiring permission for each sexually oriented behavior as these progress. This should not be confused with other affirmative consent reforms that require only that there was an indication of consent on the part of the victim. Additional features of the Antioch policy are that it is gender neutral and explicitly recognizes same sex as well as group sex. It also recognizes that past consent does not portend future consent, so agreement must perpetually be communicated in any sex relationship (Antioch College Community 1995).
2. Affirmative consent reform law should not be confused with affirmative defenses to crimes. Affirmative defenses are rejoinders to criminal charges that attempt to negate criminal culpability. Affirmative defenses require the defense to produce evidence (the defense has the burden of production or going forward here; see chap. 11) to substantiate its defense claim (Kadish and Schulhofer 2001: 45). The consent defense to the criminal accusation of rape provides an example of an affirmative defense.

3. The New Jersey law (like Michigan's, although the CSC model is certainly not an affirmative consent law reform) is strongly influenced by that state's assault and battery law. The battery is the offensive or unauthorized touching, or criminal sexual assault, ranging from criminal sexual penetration to criminal sexual contact (Kadish and Schulhofer 2001: 341–342). Under affirmative consent statutes like that in New Jersey, rape or sexual assault exists when penetration occurs with no voluntary or willing (uncoerced) permission (Reeves Sanday 1996: 281).

4. Schulhofer says the same definition—of a man having intercourse while knowing he doesn't have a woman's consent, in his words “without having clear indication of consent”—is present in the laws in Pennsylvania and Utah as well (1998: 96).

5. The converse is explicitly recognized in, for instance, Antioch's affirmative consent policy, wherein females, too, need to ascertain male consent before acting in sexual ways. Given that the topic here is sexual assault, it makes more sense (and is more efficient) to talk about males ascertaining consent from females.

6. The same has/can be said of resistance, where because of fear victims are afraid or unable to resist just as they may be unable to speak.

7. In point of fact, in the two cases involving silence that Reeves Sanday discusses, aggravating circumstances were apparent (rendering consent or the possibility of a meaningful yes untenable). In the Glen Ridge gang rape case, the young woman who failed to say no was mentally impaired, and in the M.T.S. case, the young woman was asleep until awakened by the defendant's lying on top of her (1996: 278).

8. Although Antioch's affirmative consent policy specifically recognizes same-sex relations in part to avoid this.

9. Chamallas's approach is like Pineau's, only with a “broader range of motives” (Schulhofer 1998: 85).

10. I would go further to argue that willful participation should be examined for its connotation and differentiation from permission. I see mutual participation as yet farther out (from permission and from willful agreement) along some sort of continuum of meaning of accord, where sexual partners interact jointly in sexual encounters. It may be a matter of semantics, but again, semantics matter.

11. Schulhofer cites research indicating that “most women (at least 60 percent in most studies) say ‘no’ only when they mean it” (1998: 267), leaving 40 percent, or some percentage thereof, that either say no when they do not mean it—or when they mean yes—and/or another 40 percent or some percentage thereof saying yes when mean yes.

12. I also take exception to Schulhofer’s view that sexual offenses of penetration committed on incapacitated victims or “physically helpless, mentally defective, or mentally incapacitated” victims (1998: 243, sec. 202[c][1]) should only be second-degree felonies. Rape of unconscious persons (like those unsuspecting victims who are given drugs like roofies, GHB, etc.) should be treated among the most heinous of crimes.
Further, Schulhofer’s model makes no mention of gang rape or aiders and abettors in any degree of sexual offense. Clearly, such an oversight is also a problematic omission in a model statute.

7. Consent and Voluntariness, Agreement

1. This discussion of consent presumes the absence of aggravating, violent, forceful, and so on conditions. This absence is typically the condition that makes any kind/range of consent voluntary, meaningful, or genuine (although there are a few, comparatively rare exceptions; see chap. 11).

2. It should be mentioned that voluntary intoxication or impairment on the part of the defendant is not defense to criminal charges of rape (Criminal Law Revision Committee [CLRC] 2000: 67,72; Michigan Judicial Institute 2002: 244–246).

3. Lewin (1985) discusses how patriarchal norms about sexual initiative, entitlement, and pleasure and the nurturing and passive roles for women contribute to what I am defining as noncriminal acts or acquiescence of the kind just mentioned. Katz goes a little further in the comment that “men are socialized to desire women in such a way that the desired woman’s own desire for the desirer is irrelevant” (1989: 56). These factors can also contribute to the ascendancy of male privilege, male entitlement to take sex—even “against her will”—and the rampant ease with which a man may rationalize that the woman wanted what he wanted, how he wanted it, when he wanted it, and so on in order to legitimate rape. These premises epitomize the perspectives arguing that patriarchy engenders rape, and ultimately they must be addressed for legal change to be fully effective (see chap. 17).

4. Chapter 11 details the exceptional cases—and the processes provided for these atypical cases—where the defense of consent (mutual, voluntary acquiescence or permission) can be used under some of what are normally considered involuntary or forceful conditions.

5. Mullendore (personal communication, 1998) makes an interesting note on a different type of law (not criminal law) that can be juxtaposed here. This is contract/civil law on adhesion contracts. Black’s Law Dictionary defines these as a “standardized contract form offered to consumers of goods and services on essentially a ‘take it or leave it’ basis without affording the consumer realistic opportunity to bargain and under such conditions that consumer cannot obtain desired product or services except by acquiescing in form contract. Distinctive feature of adhesion contract is that weaker party has no realistic choice as to its terms” (1991: 25). The analogy is that the “take it” could be applied to agreeing to engage in sex, with the objective of getting something like a relationship/boyfriend. “Leaving it” would be not agreeing to the sex and not getting the relationship with the boy/man. It should be highlighted, though, that submission that is coerced with threats of harm is not freely yielded and is not consent as it is being discussed here in the sense of a real choice absent anything coercive accompanying demands or sexual requests. What is being suggested here is that the sexual overtures accompanied by merely psychological or emotional pressures not involving implicit or explicit threats, harms, deceptions, and so forth are not crimes.
6. The prosecution would continue to shoulder the burden to show nonconsent in the absence of force or coercion, but consent could not be taken to be implied or presumed under any circumstances (see chap. 8).

7. Or pressures, intimidation, and so on directed at those in proximity to her at the time. I add this consideration because threats to harm loved ones, roommates, and the like who are at hand at the time of the alleged crime can constitute a coercive force, notwithstanding the fact that the model reform in Michigan, for instance, excludes this consideration.

8. To emphasize, I do not include consideration of factors other than physical force or threats here; that is, I do not take into account emotional pleas or psychological tactics as forms of coercion in rape. Later, I will fit false pretenses, fraud, and so on into the model I propose.

9. Tchen notes that this definition is problematic because it uses the words “sex act” in reference to rape and sexual assault. On the flip side, she commends the Minnesota definition as it “clearly precludes the use of implied consent” (1983: 1542).

10. Past sexual history has been a vehicle used to impugn rape victims on the basis of the implied consent predicate, that is, the belief allowed is that consent to sex with one man at some point in time implicitly implies consent to sex with other men in future times. Chapter 10 discusses how this, too, can and must be altered because of consent arguments, implied or otherwise. The de jure specification in rape statutes that consent is not, and cannot, be implicitly assumed might go further than waiting for decisions on an individual case or jurisdictional basis.

11. The much to lose and little to gain for women lies in such phenomena as the horrendous stigma and loss of time, money, reputation, relationships, and career that are so often corollary to the mere reporting of rape. The much to lose and little to gain for women also lies in facing the public, the press, and the person she accuses in open court, while she is scrutinized, and often defiled, by questions about her credibility and character and past sexual friends, dates, and just contacts, often ultimately only to see the assailant acquitted.

12. The small percentage drops even lower for “cases without merit” (Estrich 1987: 16), or unfounded cases, when female as opposed to male officers take rape complaints. What is more, the laws and procedures of the criminal justice system will certainly ferret out the very few false claim cases, as attrition rates of up to 98 percent evince (CONNSACS 2000: 2), without additional discriminatory obstacles mounted for every person who might charge a man of rape. It might be helpful to note in this regard that cases are unfounded because of the belief in false accusation but also because of similar prejudicial factors such as late reporting of the incident, a victim’s intoxication, a victim’s reputation/occupation as prostitute (94: 1), or even a victim’s prior relationship, or just prior acquaintance, with the accused (Hunter, Bentley Cewe, and Mills 1998).

13. MacKinnon puts it eloquently when she lays out a related problem: “The problem is this; man’s perceptions of the woman’s desires often determines whether she is deemed violated… It (rape law) presumes a single underlying reality, not a reality split by divergent meanings, such as those inequality produces… Men’s pervasive belief that women fabricate rape charges after consenting to sex makes sense in this light. To them, the accusations are false because, to them, the facts describe sex” (1983: 652–653; emphasis in the original).
14. Other victim-centered concerns that are to be specified in de jure law and juror instructions as unreasonable and therefore presumptively irrelevant fall along the dimensions of (a) past sexual history/character evidence and voluntary agreement and (b) victim-oriented behavior (and voluntary agreement), such as victim use of alcohol/drugs, victim style of dress, victim demeanor, and victim acquaintanceship with the accused. These facets of victim-related concerns are dealt with in the array in chapter 13 and discussion in chapter 14.

8. Presumptive Nonagreement

1. I have just discussed explicit and implicit force and coercive threats, but enumerating the aggravating circumstances associated with different levels of sexual assault offenses will be useful here. The Michigan model reform statute illustrates the kinds of compounding factors that are considered in establishing the degree or severity of sexual assault crimes. Michigan's law, like many other state reform laws, delineates the following determinative variables: the age of victim (is she a minor?), the victim-offender relationship (is there a blood affiliation or a shared household, or does the defendant hold a position of authority over the victim?), the commission of simultaneous other felony crime(s), the presence of weapons, additional injuries, aiders and abettors, victim incapacitation, and incapacitation and/or coercion (PA 328, 1974).

2. The only other author that directly speaks to how repetitive force and nonconsent definitions are is MacKinnon, who bluntly comments that “lack of consent is redundant and should not be a separate element of crime…. Rape should be defined as sex by compulsion, of which physical force is one form (1989: 245). Estrich recognizes but glosses over the redundancy when she observes that “the force or coercion that negates consent should be extended to extortionist threats and misrepresentation of material fact” (1987: 102–103). She doesn’t go on to address the issue of proof of the force/coercion in relation to proof of nonconsent.

3. Exceptions to requiring proof of aggravation/force/coercion and proof of nonconsent exist in the reform jurisdictions, like Michigan, that tried to do away with the need to prove nonconsent. Tchen comments here that eliminating “the lack of consent as an element of the crime” (1983: 1551) means that the prosecution does not have to prove nonconsent, leaving it to prove the identity of the accused, the penetration or criminal contact, and the existence of aggravating conditions, or force, or coercion. Because proving aggravating crime circumstances and/or force/coercion is tantamount to proving nonagreement, proof of both force/coercion and involuntariness, nonagreement should be legally unnecessary under any type of force/coercion or aggravating conditions, such as multiple offenders or the presence of weapons. But again, even in Michigan, as mentioned earlier, the law on the books and the law in action are quite often two different phenomena.

4. It is instructive to comment on the degrees or severity of sexual assault offenses and presumptive nonagreement. Michigan, for instance, steps or graduates crime severity by specifying objective crime circumstances in order to differentiate the offense (and punishment) level(s). The difference between the circumstances delimited in Michigan reforms and what I’m recommending here is that I would include all the conditions in law as serious enough to make involuntariness the ascendant assumption, whereas
Michigan's reforms do not include the conditions of incapacitation, gangs, or force/coercion alone as sufficiently weighty to make for the higher degrees of CSC in the first and second degrees. (I would argue that gangs or victim incapacitation should alone drive a definition of the higher aggravated levels of rape.) Gang rapes that do not occur in combination with force/coercion or with incapacitated victims and rapes involving additional victim injury without force/coercion or incapacitated victims are all lesser degrees of CSC in Michigan.

The presumption of involuntariness, nonagreement should hold under all severity levels, that is, all crimes accompanied by aggravating, or forceful, or coercive conditions, regardless of degree. This means that under the listed conditions, it should not be necessary for victims to express their involuntariness, nonagreement in order to elevate nonagreement to the reasonable assumption. What I am contending is that under some conditions, like “just” force or coercion, or “just” gangs, or “just” additional injuries, that pertain to the less serious and/or the “simple” rapes, the condition alone is sufficiently clear, and sufficiently serious, to lead to a presumption of involuntariness without the victim having to express nonagreement or the prosecution having to prove nonagreement. This stands despite the fact that such conditions are insufficient to make the crimes the “real” rape of, for example, CSC in the first degree. The presence of “simple” force or coercion or victim incapacitation should, like the other crime circumstances of youthful victims, weapons, and so on, tip the balance in favor of the presumption of involuntary submission on the part of the victim in the criminal acts alleged. This would help make simple rape part of what “really” is rape.

While I am commenting on broadening the Michigan model, let me add another consideration. Estrich addresses coercive threats and Michigan law and the problem of the person to whom these threats are directed. She points out that “the threat to use immediate force must be ‘on the victim’; violence against her escort or her child are not enough” (1987: 86) under Michigan’s model law. This is clearly a problem with this state’s reforms, although, as Estrich notes, it is not true in many other states, including even some nonfeminist reform law jurisdictions. I concur with Estrich’s point that threats to kill, maim, bludgeon, beat, or otherwise do bodily harm to the victim herself, or to her loved ones (like children or parents), or simply to those in proximity to her (like dates or roommates) all should be included under coercion. Submission under any such ominous/sinister conditions is never the same thing as voluntary compliance, not to mention consent. The presumption of involuntariness would apply identically, then, under conditions of threat bodily harm to loved ones or those in proximity. Nonagreement would not have to be proved if such physical coercive threats were established.

5. Just as the victim might be incapacitated by mental impairments or disabilities, she can be incapacitated and unable to indicate her involuntary nonagreement because of ingesting alcohol or drugs. In actuality, for victim intoxication to equate with voluntary nonagreement or count in the prosecution of rape, the intoxication has to be proven to be at such extreme levels that the victim is basically blacked out, completely unconscious, or near death. Moreover, while lesser levels of voluntary drunkenness do not automatically equate with incapacity (Estrich 1987: 97), a drunken woman can still indicate nonagreement, can still say no, and/or can still suffer under circumstances of force/coercion, and so on, all of which make for the crimes of rape and sexual assault.
6. Harris quotes a 1991 court case (Ellison v. Brady 924 F. 2d 872 [9th Cir. 1991]) that recognized this point. She reports that the court adapted the reasonable woman—over the reasonable person—standard because “a sex-blind reasonable person standard tends to be male-biased and tends to systematically ignore the experiences of women” (1996: 60).

7. A strong reform recommendation would be to have presumptive nonagreement stipulated whenever charges are brought forward. Charges brought forward show police and prosecutor concurrence with victims’ reports, which intends a belief in nonconsent. Because consent does frame so much of sexual activity, however, and because the prosecution has the burden of proof with nonconsent as an element of the crime (or force, coercion, or aggravating circumstances), it therefore would not be fair to privilege agreement statutorily.

8. Although if the defense introduces a consent defense, this burden of proof would shift (see chap. 11).

9. To me, this should be viewed as unwanted sex that is not rape or sexual assault, because of the absence of compulsion; should there be any sort of coercive force that begets the less than heartfelt yes, however, it is rape or sexual assault.

10. I might point out that this stands in contradiction to the assertions of some self-declared feminists, most notably Naomi Wolf (1993), who believes that feminists need to teach women how to communicate their boundaries, since we allegedly don’t know how to do this, in spite of the fact that many of us know our boundaries and desires, as well as how to express them out loud.

11. Instead of being debated as consent, the inability to indicate nonagreement physically or verbally (that Reeves Sanday calls “frozen fright”) might be seen as a type of incapacitation. In Michigan law, the aggravating circumstance of incapacitation is defined as being “physically helpless—unable to communicate unwillingness to an act,” (sec. 70.250[i]). Victims who are unconscious or sleeping are examples of victims incapable of expressing unwillingness. This could constitute a criminal circumstance my reform model could employ to dictate that a victim need not say no. Under this condition, then, silence could not rightfully be interpreted as consent. Silence as a type of aggravating condition would then define rape. The law would have to state this explicitly, because of the custom of treating silence as consent. In other words, the law would have to be altered to recognize frozen fright as a type of incapacitation to be demonstrated in order to prove rape. Alternatively, though, what I have been setting up in this (and previous) chapters for the model for reform is that the proof of aggravation/force/coercion that begot the frozen fright would be sufficient to prove crimes of rape and so the silence would not matter or have to be attended to as representing consent or nonconsent (as nonconsent would not have to be proven if force, aggravation, or coercion could be established).

12. A creative route to rectifying the problem of taking silence to mean consent is found in the post-traumatic stress disorder of “rape trauma syndrome” (RTS). RTS evidence could be used to rebut defense claims that silence meant consent. RTS evidence is provided by experts who give testimony about the nature and sequence of reactions to being raped, in order to demonstrate that victims’ responses are consistent with someone who was raped.

It is in this way that RTS might be used to rebut consent defenses. Expert testimony can contribute to establishing that victim responses are of the same pattern that some-
one experiencing nonconsensual sexual attacks would exhibit. The pioneering work of Ann Wolbert Burgess identifies two stages in the “stress reaction to a life-threatening situation” (1995: 239). The syndrome consists of “somatic, cognitive, psychological, and behavioral symptoms” (ibid.), including fear, anxiety, depression, guilt, memory impairment, an inability to concentrate, intrusive imagery, nightmares, other “disturbances in sleep patterns”, an “exaggerated startle response or hyper alertness”, numbing of responsiveness to and decreased involvement with the environment and “avoidance of activities that might arouse recollection” of the rape incident (240–242). The stages are the acute or disruptive phase and the long-term process of adjustment phase (240).

RTS evidence can sensitize judges and jurors to the typical response patterns associated with rape victimization. As Goldberg-Ambrose indicates, prosecutors “have found such evidence invaluable in rebutting assertions that rape victims welcomed or reluctantly submitted to sex” (1989: 953, citing Rowland 1985). This can be invaluable in cases where victims were passive or silent, as such a response would be consistent with being victimized by rape. It is important to underscore that RTS is not used as evidence of rape; it is evidence of a characteristic trauma disorder in reaction to being raped.

13. This stands in contradiction to Catherine Wells’s argument that “decency” ought to be the standard used to judge sexual assault. She criticizes using a women’s experience or point of view because it suffers from the problem of casting women in universal, essentialist terms (cited in Davion 1999: 234). While I am sympathetic with this point, my fear is that unless male privilege is decentered, counterweighed, and corrected, male interests and points of view would define decency—much as they have defined reasonableness.

9. Mens Rea

1. Mistaken consent should be kept conceptually distinct from the defense of consent, which I will call the “liar defense” later (see chap. 11).

2. First he says that “the argument for expanding liability in rape cases from deliberate wrongdoing to carelessness remains controversial” (1998: 258). Next he states that most serious felonies, from murder to ordinary theft, require proof that the defendant knew he was causing injury or was aware of substantial risk. Yet extreme carelessness (criminal negligence) is sometimes accepted as the basis of criminal liability, for example, in homicide prosecutions based on drunk driving or on the use of unreasonable force in self-defense. A similar approach seems appropriate for sexual violations as well (ibid.). Then Schulhofer observes that “since the mid-1970’s, this [negligence] view has largely prevailed with the American courts; the great majority now accept a negligence standard in rape cases” (ibid., citing Kadish and Schulhofer 1995: 326–328, on the resistance requirement vis-à-vis the Hazel case). As Kadish and Schulhofer summarize, “most of the recent American cases permit a mistake defense, but only when the defendant’s error as to consent is honest and reasonable” (2001: 358). Berliner weighs in, noting that “the current standard is less reasonable” in rape than in other crimes (1991: 2704 n. 107).

3. Kristine Mullendore observes that the difference between manslaughter, defined by a mental state of recklessness, and rape, defined by nonconsent to often otherwise acceptable acts, is that, legally speaking, one cannot consent to being killed (or injured
with great bodily harm) but can consent to sex acts that become rape when consent is not present (personal communication, 1998). This is one reason for the historic difference in criminal liability as a result of negligence or recklessness in killing and in rape. But historic logic about the uniqueness of rape has been quieted by critiques showing the discriminatory nature of beliefs like these, the similarities between rapes and other crimes, and the prejudicial lack of protection such beliefs have led to. Because of the similarity and the discrimination in treatment of rape and other crimes, negligence and unreasonable mistakes should be recognized in law as criminal in rape as with other crimes.

4. For instance, the FBI classifies aggravated assault as one of the four serious violent offenses in the country (along with murder and non-negligent homicide, forcible [sic] rape, and robbery), while in the state of Michigan an offense such as aggravated assault is classified as a misdemeanor and defined as "assault; infliction of serious injury" (Michigan Penal Code, sec. 750.81a).

5. I am implicitly relying on the objective versus subjective mens rea standard for intent. Objective mens rea obtains where a reasonable person would have consciousness of guilt. The reasonable person is the yardstick employed to assess intent with the objective standard of rea, rather than an assessment of particular individual's state of mind for intent, as is the case with the subjective mens rea standard. (See also objective versus subjective reasonable woman's point of view, described in the previous chapter.)

6. In fact, even finer distinctions could be made. For example, a distinction between gross versus ordinary versus simple negligence could be made in a fashion akin to the differing kinds of intent levels being discussed here. The CLRC addresses subjective versus objective recklessness and negligence in precisely this context (Law Commission Report to the Home Office Sex Offenses Review, www.lawcom.gov.uk).

7. Recklessness and negligence would be the basis of assessing criminal culpability, as opposed to some "air of reality" test "which may be conferred by all the circumstances in which the alleged assault took place" (Harris and Pineau 1996: 65; also see Temkin 2002 on the "air of reality" criterion and the Canadian Supreme Court cases of Papajohn, Osolin, and Park, esp. 132–133). Simply put, this type of standard ("air of reality") requires some kind of factual basis, or corroboration, or support for the allegation that belief in consent was reasonable under the circumstances.

8. David Archard's (1999) examination of the "the mens rea of rape" discusses how the convenient substitution of "authoritative rule," sexist "convention," male voice, male view, and/or myth emanates from male vested interest, when the case is—or, I should say, when the case should be—determined from what I am referring to as a woman's point of view. Archard states, "in the case of rape,… the injured party is the authoritative source of knowledge about her consent" (223). A man may sincerely believe the victim agreed to the sex acts (or disregard her nonagreement, as Archard also recognizes in this context), but it remains the victim's knowledge—or, in my scheme, a reasonable woman's knowledge—about the existence and expression of involuntary nonagreement that matters.

10. Applying Recklessness and Negligence

1. It is unfortunate that although mistakes are disallowed in the model case of Michigan, the consent defense remains viable. Estrich says, "Michigan courts have consistently
construed these definitions as ‘implicitly’ preserving the consent defense” (1987: 86). As previously noted, the defense of consent has been successful under even serious aggravating conditions, for example, where the victim was kidnapped (People v. Thompson 117 Mich. App. 522, 526, 324 N.W. 2d 22, 23 [1982]) and where a gun was present but an accomplice rather than the assailant was holding it (People v. Bernard 360 N.W. 2d 204, 205 [Mich. App. 1984] 84, 90). See Estrich 1987: 84–85.

2. The flip side of stating that nonagreement is the reasonable legal assumption is that mistaking (non)agreement by believing that consent was given is unreasonable. This is not a preferable way to articulate a provision, as it places the focus on getting away with a mistake (of agreement). Focus should be centered on the nonagreement as stated in law rather than on rebutting the nonagreement.

3. It might be reinforcing to specify both the presumptive nonagreement and the rebuttable presumption of unreasonableness of mistakes of agreement. This seems redundant, however. Moreover, to specify both would be cumbersome and possibly confusing in instructions for the jury.

4. The lesser level of negligent liability could tenably be treated as separate from recklessness in terms of force and coercion and crime definitions. Here the question would revolve around whether the defendant carelessly dismissed versus failed to appreciate the force or coercive power he was wielding over a victim, which a reasonable person would understand to be involved. But as with recklessness and negligence in relation to consent, my model simply incorporates both as culpable states, without making a finer differentiation as to levels or gradations of crime.

11. Defenses

1. Consent defenses would not be arguable in my model in cases where I would advance strict liability; that is, those involving minor-age victims, unconscious victims, the commission of other felonies, and the administration of date rape drugs.

2. An affirmative defense should not be conflated with affirmative consent, as in the Antioch staging policy that requires permission for each sex act.

3. Temkin comments that “arguably, the defense has no evidential burden to discharge in this situation, for, since the defence is seeking to do no more than deny the basic elements of the prosecution’s case, any assertion of consent by the defence should be placed before the jury. This view has not, however, been taken by the courts, which have generally insisted upon some evidence or consent before a jury direction on consent is required” (2002: 172). Temkin’s observation indicates that my recommendation is not seeking that much of an alteration from at least some current practices.

4. Reasonable doubt can be “difficult to define, some courts evade defining it to the jury” (Kadish and Schulhofer 2001: 38); however, “a traditionally accepted definition of reasonable doubt is … not a mere possible doubt; because everything relating to human affairs, and depending on moral evidence is open to some possible or imaginary doubt. It is that state of the case which, after the entire comparison and consideration of all the evidence, leaves the minds of the jurors in that condition that they cannot say they feel an abiding conviction, to a moral certainty, of the truth of the charge” (37).
5. Kristine Mullendore points out, however, that the federal standard is “clear and convincing” evidence for insanity defenses (personal communication, 2007, citing 18 USCA 17 [2007]) as a part of the Federal Crimes and Criminal Procedure Code.

6. It should be noted, however, that there are times when a defense of voluntary agreement might mean the victim was mistaken about, for example, having indicated her nonagreement or the presence of threats, fraud, or the like. This is not to say that she was lying when she charged rape but that in the eyes of judges or jurors she made an unreasonable—from a woman’s point of view—error in judgment about the nature of the situation. This may exonerate a defendant, because, though the victim was not lying, she may yet be assessed to be wrong. The upshot is that with my model of change the woman accusing rape would not be susceptible to charges of perjury or filing a false police report (because she wasn’t fabricating charges). This is noteworthy since some victims have been prosecuted for just such offenses in just such circumstances.

7. It does not matter how victims got into incapacitated states in all other rape circumstances, e.g., whether they were knowingly or volitionally or unknowingly drugged or intoxicated. The point is that such states preclude the rendering of agreement.

8. Burgess-Jackson gives the example that “the Model Penal Code adopts this approach by counting as rape cases in which a male ‘has substantially impaired (a female’s) power to appraise or control her conduct by administering or employing without her knowledge drugs, intoxicants or other means for the purpose of preventing resistance’ ” (1999: 104). In point of fact, in response to this growing problem, Congress passed the Drug-Induced Rape Prevention and Punishment Act in 1996, which criminalized “the use of any drug to commit sexual assault or other violent crimes, and stipulated a 20 year sentence as punishment” (Stap 1997: 2). This act also banned the import and export of flunitrazepam and made simple possession a criminal offense carrying up to a three-year term of imprisonment (ibid.). President Clinton signed a bill similar to the Rohypnol law that criminalized GHB in the year 2000 (National Institute of Justice 2000: 13).

9. In some jurisdictions, past sexual history evidence is limited as to consent; in others, it is limited as to credibility (see Snow 1999: 247–248).

12. Sexual Assault Under Duress and Fraud

1. Crimes of sexual assault under duress should not be confused with the criminal defense of duress.

2. Michigan CSC law includes extortion as a type of force/coercion under the condition of threats to retaliate in the future. The CSC Code states that “to retaliate” includes threats of physical punishment, kidnapping, or extortion (PA 328 1974). As Estrich points out, however, there have been no cases where “‘force’ was based on a threat to extort” in court cases (1987: 141 n. 37).

3. In my thinking, however, sexual assaults under duress would be lesser offenses, as in Estrich.

4. Needless to say, if a victim refuses, that is, says no, in the face of fraud or deceit (see the next section), subsequent sex acts would be coercive and criminal.

5. Black’s defines blackmail as “unlawful demand of money or property under threat to do bodily harm, to injure property, to accuse of crime, or to expose disgraceful de-
fects” (1991: 116–117). The way I am using the term “duress” and hence blackmail is, however, exclusive of violent or physical threats to do bodily harm, in order to distinguish it from rape involving coercion.

6. Yet many of these kinds of positions are not recognized in law as inherently coercive or powerful or influential enough to negate the ability of victims truly to give agreement that is free and willing. Schulhofer’s sexual autonomy approach to rape and sexual assault dictates that when “economic power or professional authority unjustifiably impairs the weaker party’s freedom of sexual choice” (1998: 167), criminal conduct needs to be recognized. I do not go so far. Instead, I am arguing that the (nonphysical) economic/career threat as opposed to the position of power/authority creates the impairment to freedom of choice in this context.

7. MacKinnon is frequently accused of saying that all sex is rape; I point out here that she never went this far.

8. Remaining ambiguities are inevitable, and that is what fact finders like judges and juries are to decide.

13. Reforming Rape Reforms

1. Kadish and Schulhofer (2001: 33–34) offer that jury instructions can be an effective way to eliminate prejudice against a defendant; I would add, against a victim as well.

2. The Model Penal Code also persists in a corroboration requirement. Kadish and Schulhofer report that Texas is the only state to maintain a corroboration requirement. They note that this obtains, however, only when an adult takes over a year to report the incident (2001: 374). Bryden and Lengnick cite that Nebraska is an example as well (1997: 1197). Perhaps they note this additional state because of the way the law is written there. It specifies that corroboration of victim testimony is not required but is “is not rendered inadmissible” either (official Nebraska government Website, sec. 29-2028, “sexual assault; testimony; corroboration not required,” uniweb.legislative.ne.gov/LegalDocs/view.php?page=S2920028000, accessed March 24, 2008).

3. About half of the states still admonished jurors in this fashion in 1988, according to Bryden and Lengnick (1997: 1198). An argument could be made that some sort of instruction opposite to the historical “rape is an accusation easily to be made, hard to be proved, and harder yet to be defended by the party accused, tho’ never so innocent” (1971: 635) is justified, given the pervasiveness and persuasiveness of this instruction. Something like “rape is a crime hard to charge and harder to defend against by the victim, though never so innocent” stands as fact and could be used. I am not contending, however, that rape should enjoy any unique status that an instruction like this would raise; I am only arguing for comparability with other charges and procedures by removal of cautionary jury instructions in rape.

4. Both Michigan’s and Schulhofer’s reforms evince deep concerns about positions of authority and trust. These kinds of positions, where offenders prey on especially unguarded, accessible, naive, dependent, and/or defenseless girls—and women—are rampant and pernicious, as Schulhofer (1998) chronicles. These populations and crimes go neglected in the work of other scholars. Addressing these susceptible populations in laws and practices should figure into rape reform schemes.
5. The model places the last three conditions as aggravating factors on a stand-alone basis, in contrast to Michigan's required combinations of multiple offenders with incapacity or force/coercion or injury with incapacity or force/coercion in order to sustain the higher-level crimes in the first (criminal sexual penetration) and second (criminal sexual contact) degrees (as opposed to the lesser crimes of criminal sexual penetration in the third and criminal sexual contact in the fourth degrees).

6. Under Michigan law, the court must assess whether the victim believed in the ability of the assailant to carry out the threat in order to establish coercion. I advance that this is unnecessary. Like Estrich (1987: 86), I would also extend the law to cover threats against others like loved ones or roommates or friends in proximity at the time of the offense, not just threats to the victim.

7. A few states already specifically recognize rape with nonconsent in the absence of force (Kadish and Schulhofer 2001: 343).

8. Recall that Remick goes further than my provision here, remarking that we should state, “Always take ‘no’ for an answer. Always stop when asked to stop. Never assume ‘no’ means ‘yes.’ If her lips tell you ‘no’ but there’s ‘yes’ in her eyes, keep in mind that her words, not her eyes, will appear in the court transcript” (1993: 1106).

9. Florida's statute provides the example for inclusion in statute and the respective instruction here. It states that consent “does not include coerced submission” (Kadish and Schulhofer 2001: 343).

10. Again, Michigan’s CSC Code has a provision stating that the “victim’s subjective state of mind, not the defendant’s” constitutes the measuring standard for consent (Michigan Judicial Institute 2002: 221). To parallel existing law more, the objective reasonableness of the woman or the subjective state of mind or belief of the individual victim—or offender, for that matter—in a case.

11. Although it is possible that a woman could be prosecuted and convicted on such a charge, this should not be the assumption at the outset.

12. In addition to the repeal of the prompt complaint requirement, the law needs to state the irrelevance of past reports, as I have done here.

13. Colorado law provides an alternative example of legal language to write out the relevance of past sex. The court's response to the constitutional challenge by Kobe Bryant’s attorney was based on Colorado law and stated that “with certain exceptions, evidence of specific instances of an alleged sexual assault victim's sexual conduct 'shall be presumed irrelevant'” (People of the State of Colorado v. Kobe Bean Bryant, citing Colorado Revised Statutes sec. 18-3-407). Another, less strongly stated example is found in a jury instruction quoted in Berger: "There has been testimony about the sexual experience of the complainant in this case. You are to judge this testimony by the same standards of credibility which you apply to all other evidence. Even if you find it credible, you should not infer that, because a woman has consented on prior occasions to sexual intercourse, she necessarily consented with the defendant on the particular occasion at issue in this case." (1977: 96). Berger simultaneously notes, however, that the instruction can be problematic in refocusing attention on victims and their behavior instead of the accused and his conduct. I contend that the de jure specification and jury instruction on its irrelevance is worth the risk because past sex is frequently brought up in rape cases.
14. These considerations are not introduced as evidence in other criminal justice processing. This therefore bolsters the rationale, need, and justification for the recommended changes here. I do not go so far as to say that these factors are completely inadmissible, since some of them may be demonstrated (vs. presumed) to be relevant at times, for example, past sex and the origin of semen, lack of promptness of the report and the rape trauma syndrome, voluntary drinking and victim incapacitation. The point is that because of historical biases these considerations need to be legally declared to be irrelevant unless it is proven that they are material, competent, and relevant and do not introduce “unfair prejudice that would outweigh the probative value of the fact in question” or contribute to unwarranted invasion of privacy and so on.

15. Other state definitions of affirmative consent are similar. Illinois law defines affirmative consent as “words or overt action by a person indicating a freely given agreement to the specific acts of sexual penetration or sexual contact in question” (cited in Tchen 1983: 1549). Minnesota defines affirmative consent as “a voluntary uncoerced manifestation of a present agreement to perform a particular sex act” (cited on 1542). These definitions are of interest for their commonality in precluding implied consent, since indication of present, willful agreement is required.

14. Discussion of the Model Array

1. The evidence that goes to demonstrate the crime alleged can be tangible or testimonial (as is the case with all crimes). Tangible evidence would be physical evidence such as photographs, lab reports, rape kit findings, guns, knives, and so on. Testimonial evidence would be from the victim, who serves as a witness for the prosecution. The victim testifies as to the facts of the case: what happened, when, where, and how, along with details about the aggravating conditions—the force, the coercion, intimidation, fraud, and so on—and about her expression (or lack thereof) through words, gestures, or other conduct of the involuntariness of her submission, in other words, her expressions of nonagreement. The de jure specifications, the rules of evidence, and jury instructions—stating, for example, that corroboration of a victim's testimony is not required, that victim testimony is sufficient for conviction on rape charges, that no means no, that a reasonable woman's point of view is to be used to determine what is reasonable as an indication of involuntariness, and that a woman's point of view is to be used to determine the perception of force or threats/coercion/duress/fraud (in the absence of aggravating factors), or the involuntariness of submission—are all formulated to promote successful rape prosecution. This should help to make nonagreement more weighty, probable, credible, or reasonable than the historic discriminatory belief in implicit consent. Other witnesses who could testify to any of the alleged criminal acts or circumstances would be relevant and helpful, but these are rare in cases of rape. Attackers very often plan and/or carry out their crimes specifically to avoid onlookers, passersby (res gestae witnesses), or witnesses of any other kind, hence typically there is an absence of such corroborative evidence in rape. Because corroboration is explicitly unnecessary, additional witnesses are, legally speaking, unnecessary. It is important to bring in a further possibility regarding witnesses that should be figured into the potential evidence that can facilitate rape prosecutions. This is evidence from expert witnesses who can testify to the rape trauma
syndrome. As noted earlier, the existence of RTS has been used by prosecutors to counter consent claims by the defense by showing that a woman's responses are consistent with those of a person who has been raped. RTS evidence is useful to make sense out of victim reactions that seem inconsistent with rape, like being calm or obsessive or not coming forward right away. Prosecutors could use expert witnesses to show the RTS that would serve as another sort of testimonial evidence, especially useful to prosecutors to rebut voluntariness, agreement (consent) defenses. RTS evidence is useful as a type of (testimonial and) corroborative evidence that enhances conviction probability (Goldberg-Ambrose 1989: 953).

2. Susan Herman, director of the National Center for Victims of Crimes (NCVC) discussed this issue in a radio interview on March 10, 2004 (Herman, 2004).

3. As in the Michigan model, past sexual activity evidence would only be admissible for its relevance to determining “the origin of semen, pregnancy or disease” (sec. 520j[1][b]), not determining victim character/credibility, that is, to show that she is a “dishonest woman” (Harris and Pineau 1996: 121). I would change the Michigan model on the first allowed premise for past sexual evidence, though, and disallow “evidence of the victim's past sexual conduct with the actor” (sec. 520j[1][a]), which it allows, since past consent does not mean consent in the instance being adjudicated even if with the defendant. Like the Michigan model, though, the process and allowance for past sexual history evidence for the origin of semen, pregnancy, or disease would require the filing a written motion and “offer of proof” (sec. 520j[2]); then, if the judge were satisfied, he or she would order an in-camera hearing to be held before trial to determine the relevance/admissibility of such sexual history evidence (Michigan Judicial Institute 2002: 324–325) to be used to show the origin of semen, pregnancy, or disease (and not credibility or character).

4. While Federal Rule of Evidence 404 disallows evidence of a past criminal record to go to the character of the accused, and while “evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, (identity), or absence of mistake or accident” (Kadish and Schulhofer 2001: 26). The defendant's record, of sexual assault or otherwise, can also be considered (in addition to motive, etc.) for enhancement at sentencing, as a part of presumptive, “three strikes,” “habitual” or “career” criminal, or “patterned sex” offender guidelines that have been passed widely across the country.

5. Federal Rule 403 states that “although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence” (Kadish and Schulhofer 2001: 26).

6. The Criminal Law Revision Committee provides another example that could easily be adapted in this context. They recommend that the jury be given “additional directions. Those directions would be … that, if his asserted belief in consent was caused solely by reason of his voluntarily intoxicated state, whether through drink or drugs, then his failure to appreciate that she might not consent is no defence” (2000: 77). The adaptation would be that if his asserted belief in consent was caused solely by reason of her voluntarily intoxicated state, whether through drink or drugs, then his failure to ap-
preciate her involuntariness, nonagreement or her inability to give voluntariness, agreement (consent) is no defense. Similarly, if his asserted belief in consent was caused solely by reason of her dancing, dress, demeanor, acquaintanceship, or history dating him, his failure to appreciate her involuntariness, nonagreement is no defense. But I think it more parsimonious just to stipulate legislatively the irrelevance of such factors as drinking, dancing, and so on to consent or voluntariness, agreement and mistakes herein.

7. A bonus from adapting mens rea from homicide offenses to sexual assault offenses by including reckless and negligent intent is that “a defendant obviously enjoys no constitutional right to present irrelevant evidence; to the extent that the legal issue is framed in terms of his intent, rather than hers, her reputation and her history which was unknown to him is far less relevant and thus far more easily excluded in a balance of probative value and prejudice” (Estrich 1987: 143, referencing Berger 1977). This point is well taken, but what I previously advanced in the model goes further. I contend that even when a defendant has knowledge of a victim’s sexual history, it is irrelevant and would not legitimate mistaken consent as anything resembling reasonable belief.

8. The Kobe Bryant case showcased a new defense. The defense tried to argue that the victim was sick, and her clinical depression affected her ability to identify and perceive reality.

9. This is especially needed to buttress the unreasonableness of assuming voluntariness, agreement with the de jure specification of presumptive nonagreement that—I must emphasize—stands regardless of the victim’s past sexual conduct, despite her drinking, dating, dancing, and so on (because of the presumptive irrelevance to consent of these victim behaviors).

10. It might be noted, too, that requiring the defendant to observe or notice the withdrawal of agreement, once indicated, is different from requiring the exacting of agreement with each sexual move as the Antioch Code further requires. The latter is a more demanding approach; the former is less demanding as it would target withdrawal of voluntariness, agreement rather than demand the securing of permission for each successive act.

15. Advantages of a Paradigm Shift

1. The increased likelihood that real change can come about as a result of the overlapping nature of the alterations set out in the model can be discussed in more specific terms. For instance, applying reckless and negligent liability to offenders’ appreciation of aggravating conditions, force, coercion, duress, fraud, and the expression of nonagreement as these things are determined by what a reasonable woman would understand to be aggravating conditions, force, coercion, duress, fraud, or the expression of nonagreement—that is, an objective woman’s point of view—replaces historic reliance on chauvinistic standards and rape myths to determine the presence of criminal conditions or nonconsent. Applying recklessness and negligence to understanding the presumptive nonagreement that the law stipulates when aggravating, forceful, or coercive conditions, duress, or fraud are present (but not when nonagreement is the sole basis of the crime) moves in this same direction. It does this by stating (and thus reinforcing) clearly and simply in de jure law what the reasonable belief should be (which would be non-
agreement when aggravation, force/coercion, and/or duress/fraud are what a reasonable woman would understand to be in existence). These changes are pivotal to defining that no means no, that women don’t want rape or desire sex that is forced (by male “schoolboy” standards of force; see Estrich 1987), that women who don’t resist “enough” (by male-defined standards, measures, and understandings) really want rape or coerced sex acts, or tricks, or scamming, or the like.

2. It should be recognized that sexual gratification originates, unfortunately, from a hegemonic, male-defined view. Changing this is beyond the scope of the present effort.

3. Schulhofer’s affirmative consent and sexual autonomy model is unlikely to be widely adopted. As he notes, even legislating that a verbal no is sufficient to establish nonconsent has not been accepted in most jurisdictions (1998: 255). The low probability of enacting more radical change is reinforced by the fact that only a “handful” of states—three by his count (New Jersey, Wisconsin, and Washington)—have managed to get affirmative consent provisions through the legislatures (271). Given the relatively low level and narrow range of change along a tenet (affirmative consent reform law) so critical to his work, his claim for “affirmative” and “freely given” “permission” to protect a right yet to be recognized in law (sexual autonomy) seems outlandish. His articulately detailed argumentation is great for theory but bad for political and social change. As he says himself of radicalism (in reference to MacKinnon, Dworkin, and Rich), it is “well intentioned but stultifying” (57). Unfortunately, the same might be said of his own work on this count.

4. This is a first step toward justice. True justice will require more fundamental change than the confines of extant law allows, but such considerations (of alternative models of particularly social justice) are beyond the purview of the present discussion. My model and arguments are designed to move toward the ideals of law and justice but recognize that the reality of law as it is practiced is a far stretch from this ideal.

5. Again, the graduated step structure allowing for degrees of rape and sexual assault is not necessarily a move to be harsher on all those accused of these crimes.

16. Recommendations Complementing the Model Rape Law

1. While some worry that victims will be excessively punitive or even advocate vigilante justice, what really concerns many rape victims is that the defendant be prevented from doing it again, to them or anyone else. Many victims therefore want the assailant to be forced to get counseling through criminal sanctioning, not necessarily castrated or killed, as many tend to think. Not only this, but victims may not be aware of their rights to register their opinions or wishes (as in victim impact statements), or they simply may not exercise these rights even when legislated (Miller and Meloy forthcoming).

2. Arrest warrants should not be confused with search warrants. In the majority of jurisdictions in the United States, the police need to have a prosecutor authorize (and a judge sign/issue) a warrant for the arrest of suspected parties (either before or after an arrest is effected). Prosecutors enjoy nearly total free rein in this realm, where they have the power to authorize, change, or deny any charges the police request.

3. Even so, “the absolute number of jury trials is not so small: there are about 300,000 every year” (Levine 1992: 36), which explains in large part why court dockets are so backlogged. The number of cases potentially affected at trial, not to mention the hand
the changes in the model would deal out for plea negotiations, makes my recommendations all the more far-reaching. Furthermore, as previously mentioned, the enacted law contours the parameters of discretionary decision making that falls within its bounds, and hence enacted law sets the parameters for enforcement whether inside or outside of court/trial contexts.

4. While some might object that low-level charges for sexual assault offenses would be disadvantageous, because they would allow for more deals that excessively minimize the severity of sexual assault charges, the availability of lower-level sexual assault counts could lead to more convictions. Moreover, excessive reductions already occur routinely now, and to nonrape charges.

5. Prosecutors’ decisions to authorize arrest warrants can be reconsidered in light of these plea-bargaining recommendations and potential advantages. To reiterate, because prosecutors can change the number and level of initial charges and counts and outright deny arrest warrants, just as they are empowered to alter offenses and sentence possibilities in plea bargaining (albeit limited by determinate sentencing; see below), accountability is at least as critical with warrant decisions as it is with plea bargaining, and it would likely carry the same benefits of publicity, enhanced leverage, and “truth in criminal labeling” (see Loh 1981).

6. The influential nature of jury instructions was reflected in a news commentator’s recent observation that if the pictures of prisoner torment from Abu Ghraib prison in Iraq were released, the soldiers could maybe get a fair trial, but it would take mounds of jury instructions in order to effect this result (Paula Zahn, CNN News, May 13, 2004).

7. Just as a point of information, the conviction rates between bench and jury trials vary, but not tremendously. Spohn and Horney report conviction rates of 64 and 53 percent, respectively (1992: 72).

8. The discretion to determine aggravating and mitigating circumstances that would alter sentences beyond determinate statute ranges in federal and some state courts may be taken away from judges and conferred instead on juries because of the Supreme Court’s 1994 decision in *Blakely v. Washington* (111 Wash. App. 851, 47P. 3d 149).

9. Additional models could also guide state development of compliance legislation. For example, the Clery Act requires regular reports on rape and sexual assault; a similar requirement might be useful in monitoring implementation practices. And the VAWA requires research on the impact of the legislation; this affords a further model.

10. Although the Tenth Amendment pertaining to the separation of powers between the federal and state governments precludes the feds from requiring states to report directly to them, most states have laws in place that require localities to report to the FBI or to report to the state police, who then forward compilations on to the FBI. Similar laws and procedures could be used to require reporting of the decisions and outcomes associated with rape reform laws in action, in order to monitor compliance so as to assess the effectiveness of reforms and make further improvements as suggested by the successes and failures of implementation. Alternatively, as stated above, federal compliance law could stand as the model guiding the states to develop their own mechanisms for the required data and assessment. I recommend municipalities sending data to the state attorney general and the state attorney general then sending compilations to the feds, rather than the localities being required to send data directly to the BJS, because of
potential separation-of-powers issues and because I am trying to base recommendations on existing models.

11. “The first case where sex was identified as a characteristic requiring more than a rational basis to justify a legislative act was Reed v. Reed, 404 U.S. 71 (1979) when the Supreme Court found that an Idaho statute giving preference to the appointment of fathers over mothers to act as administrators of their children’s estates for administrative convenience was a violation of the 14th Amendment. The US Supreme Court case that most recently reaffirmed the idea that sex based characteristics are not suspect classes under the 14th Amendment is the VNI case, United States v. Virginia, 518 U.S. 515 (1996), where Justice Ginsburg noted that such a characteristic required ‘an exceedingly persuasive justification’” (Kristine Mullendore, personal communication, 2007).

12. One salient factor contributing to the uniquely obstructed access to and protection by the system for rape victims that has to be emphasized is the release of the victim identity and background information. Broadcasting victims names — intentionally or allegedly accidentally (as in the Kobe Bryant case) — and/or allegations about previous sexual activities and sexual reputation, alleged ulterior motives, medical conditions, psychological difficulties, or psychiatric treatment or help-seeking behaviors combine to thwart the reporting and prosecution of offenders by those victimized by the crimes of sexual violence. The penchant for drawing out such details about sexual assault victims makes them prejudicially impugned in the media. Laws need to be enacted or, where enacted, enforced and/or strengthened so as strictly to prohibit violations of victims’ privacy by spotlighting them, raising misgivings about them, and discrediting them in such a singular way. Many laws, customary habits, practices, and/or news etiquettes protect victims’ names and circumstances, such as medical and counseling histories, from publication by the press and from release to the public. But as we recently saw in the Kobe Bryant case, leaks, mistakes, and intentional release of alleged facts are still commonplace. This is why we need reforms that will be monitored and sanctions that punish actors and agencies when violations occur. Not only does release of such information violate victims’ right to privacy, it contaminates jury pools and weakens the district attorney’s hand in plea negotiations. In this instance, victims’ right to unrestricted, nondiscriminatory—equal—use of the criminal justice system outstrips the public’s right to know, not to mention idle public curiosity and interest in gossip.

17. Moving Forward

1. For a discussion of sentencing changes vis-à-vis jurors and other legal actors, see Ball 2007.

2. There are a multitude of additional recommendations for improving the treatment of rape and its victims. While it is beyond the purview of this book to enumerate them all, it might be instructive to convey a sense of the range of measures. Such recommendations would cover a wide span of proposals, policies, and laws. Measures would range from the increased funding and use of standardized rape kits for HIV/AIDS testing and the collection of medical evidence and DNA samples for the identification of assailants to the development of training, education, and reporting policies and manuals, case management systems for criminal justice agencies, the development of task forces,
local councils, and commissions to study and make recommendations on rape, the pro-
hibition of victim polygraphs, the filming of child victim testimony, and the use of rape
and sexual assault offender notification and registration systems.

3. I would agree with critical criminologists that care needs to be taken that the site
of struggle and change extend beyond the state and the law. Foucault states that “the law
produces the subject it claims to protect or emancipate,” while Brown avers that “the
effort to seek legal redress for injuries also ‘legitimizes law and the state as appropriate
protectors against injury while obscuring the masculinist state’s own power to injure’
while creating ‘dependent subjects’ that reproduce inequality” (cited in Mardorossian
2002: 9–10). My recommendations attempt to encompass a bit more than the state to
reach, for example, education, the media, grassroots organizations, and PACs, as well as
pursue the goal of rectifying inequality in its many manifestations.

4. Socialist feminists point out, for example, that capitalist patriarchy relegates wom-
en to being the property of men, banishing them to the private (versus public) realm
where they are unpaid labor in economic production and unpaid reproducers of the next
generation of consumers for capitalist markets, as well as reproducers of the dominant
ideology that perpetuates the patriarchal capitalist system. The avarice and lust of capi-
talist patriarchy contributes to rape when it celebrates men’s ruthless competition to take
money, property, and status from one another, and this includes the taking of sex, which
is to say, the rape of women.

5. Rozee and Koss describe “dangerous men” as those who believe in or act on “sexual
entitlement,” score high on “power and control” and on beliefs and attitudes cor-
responding to “dominance,” and are “overcompetitive” and “rigid” about traditional no-
tions of gender roles (2001: 299, citing Malamuth et al. 1995 and Rozee, Batemen, and
Gilmore 1991). They identify such characteristics as contributors to rape. Miriam Lewin’s
theory of “four societal norms” that cause “unwanted sex,” or sex that is reluctantly given
into, follows along the lines of male dominance and entitlement as contributors to one-
sided sex, which I would contend ultimately contributes to sexual assault and rape. She
advances that “a) current remnants of the ideology of male supremacy, b) the norm of
male initiative, c) the lack of positive sexual experience norms for women, and d) the
’stroking norm’ for women” (1985: 184) cause women to accede to sexual intercourse they
really don’t want.

6. Temkin’s concluding call for a “one-stop shop” type of coordination where medici-
cal, forensic, and counseling services are contained under one roof, as in Manchester and
London (2002: 35) is similar to this last dimension in Weldon’s research.

7. The influence of grassroots and women’s organizations was seen in Michigan’s
first and sweeping rape reform and then in women’s grassroots efforts across the United
States. A network of women worked long and hard to get the model law passed in Michi-
gan. The resultant reforms were exemplary in most ways (the spousal exemption was not
repealed until years later), and other states followed suit. NOW followed up the Michigan
accomplishment by establishing a national-level task force designed to stimulate change
in rape laws across the country (Schulhofer 1998). This example confirms Weldon’s find-
ing concerning the power and effectiveness of grassroots work.

8. Those few who study women’s movements against sexual and domestic violence
and follow them over time have disclosed problems. The first problem to guard against
is placation. Advocate groups get appeased because of all the changes that actually do get put into place. The second problem to watch for and resist is co-optation of the social movements, political institutions, agencies, and front-line workers. Feminist protest and critique get buried by social service bureaucracies and the policies and workings of a therapeutic state. We need to keep a watchful eye out for such potentialities and think about remedial actions to reduce placation and co-optation should they arise with a new round of changes.

9. Weldon continues with recommendations for “maintaining an autonomous women's movement”: (1) government funding for women's movements and (2) a united women's coalition independent of government, separate nongovernmental organization or caucuses for women from marginalized subgroups (2002: 200).