Forcible Rape

An Analysis of Legal Issues

Forcible Rape—An Analysis of Legal Issues

National Institute of Law Enforcement and Criminal Justice
Law Enforcement Assistance Administration
United States Department of Justice

/ LOAI

Forcible Rape

An Analysis of Legal Issues

This project was supported by Grant Number 75-NI-99-0015 awarded to the Battelle Memorial Institute Law and Justice Study Center by the National Institute of Law Enforcement and Criminal Justice, Law Enforcement Assistance Administration, U.S. Department of Justice, under the Omnibus Crime Control and Safe Streets Act of 1968, as amended. Points of view or opinions stated in this document are those of the authors and do not necessarily represent the official position or policies of the U.S. Department of Justice.

March 1978

National Institute of Law Enforcement and Criminal Justice
Law Enforcement Assistance Administration
United States Department of Justice

NATIONAL INSTITUTE OF LAW ENFORCEMENT AND CRIMINAL JUSTICE

Blair G. Ewing, Acting Director

LAW ENFORCEMENT ASSISTANCE ADMINISTRATION

James M. H. Gregg, Acting Administrator

For sale by the Superintendent of Documents, U.S. Government Printing Office
Washington, D.C. 20402
Stock Number 027-000-00627-2

CONTENTS

ABSTRACT

This report summarizes past attitudes towards rape, current laws, movements toward reform, and problems of enforcement of rape law. Special legal problems involved in rape adjudication are discussed and the major alternative statutory approaches to rape are compared. A state-by-state table gives current proposed and passed legislation.

Traditionally, rape has been defined as "carnal knowledge of a woman by force and against her will." The test of force has been crucial to the case and consent has been deduced from the circumstances. Historically, victims were assumed to be consenting parties to the rape unless criminal circumstances could be proved beyond doubt, often requiring active victim resistance or independent corroboration of the victim's report of the crime. In addition, victims were often subject to questions about past sexual behavior and embarrassed by police and court handling of the case. Current reform efforts have attempted to correct these injustices arising from assumption of victim guilt. Legislative changes have also attempted to redefine rape in order to recognize varying degrees or levels of seriousness, with flexible penalty structures depending upon degree of force and other circumstances, and in order to take into account the special issues of child sexual molestation, rape within marriage, and the rape in which a male is the victim. In some states, penalty structures are being reduced in general since reform groups have found juries unwilling to convict for rape except in the most serious cases because penalty structures are currently too severe. Privacy for rape victims, victims advocate programs, victim serice programs, and rape prevention and self-defense programs are discussed. The Michigan and Washington State laws are discussed as patterns of successful change from the traditional model. Appendices include a table summarizing legislation in each State; a narrative summary of State legislation; the Model Penal Code; the Michigan, Minnesota, Washington, and Wisconsin State statutes; a selected bibliography; and several sample definitions of rape.

PROJECT STAFF

*Duncan Chappell, LLB., Ph.D., Center Director
Donna Schram, Ph.D., Project Director
*Camille Legrand, J.D., Visiting Research Scientist
Cy Ulberg, Ph.D., Research Scientist
Frank Albi, B.A., Police Specialist
Linda Forrest, M.A., Victim Specialist
Kathy Nolan, J.D., Research Specialist
*Jay Reich, J.D., Prosecutor Specialist
Faith Fogarty, M.A., Research Assistant
Richard Schenkar, B.A., Research Assistant
Claudine Trafford, B.A., Administrative Assistant

* Principal authors of this report.

Note:

The complete results of this project are included in 11 research products. This volume represents the findings of one part of a comprehensive study of rape and the criminal justice system response. Additional research findings and recommendations are available in the following publications and reports. Copies may be purchased from the Government Printing Office.

Forcible Rape: A National Survey of the Response by Police (Police Volume I)

Forcible Rape: A Manual for Patrol Officers (Police Volume II)

Forcible Rape: A Manual for Sex Crimes Investigators (Police Volume III)

Forcible Rape: Police Administrative and Policy Issues (Police Volume IV)

Forcible Rape: A National Survey of the Response by Prosecutors (Prosecutors' Volume I)

Forcible Rape: A Manual for Filing and Trial Prosecutors (Prosecutors' Volume II)

Forcible Rape: Prosecutor Administrative and Policy Issues (Prosecutors' Volume III)

Forcible Rape: Medical and Legal Information [for Victims]

Forcible Rape: Final Project Report

Forcible Rape: A Literature Review and Annotated Bibliography

ACKNOWLEDGMENTS

We would like to thank the following people for their valuable contributions to this report:

National Advisory Panel

Bruce R. Baker, Chief of Police
Portland Police Department
Portland, Oregon

Edwin C. Brown, Jr.
Brown & Brown Attorneys
Washington, D.C.

D. Lynn Curtis, Research Associate
Bureau of Social Science Research, Inc.
Washington, D.C.

Margaret J. Gates, Co-Director
Center for Women Policy Studies
Washington, D.C.

Patrick Healy, Executive Director
National District Attorneys Association
Chicago, Illinois

Margaret Jordan
Johnson County Prosecuting Attorney
Olathe, Kansas

Lt. Mary Keefe, formerly Sex Crimes Analysis Unit
New York City Police Department;
Presently, Training Specialist,
University Research Corp.
Washington, D.C.

Mary Ann Largen, formerly Chairperson NOW Task Force on Rape;
Presently, Consultant,
National Center for Prevention and Control of Rape
N.I.M.H.
Washington, D.C.

Catherine H. Milton, formerly Assistant Director, The Police Foundation;
Presently, Director,
Female Offender Resource Center
American Bar Association
Washington, D.C.

Project Monitors

Lois Mock
National Institute of Law Enforcement and Criminal Justice
Law Enforcement Assistance Administration
Washington, D.C.

Dr. Fred Heinzelmann
National Institute of Law Enforcement and Criminal Justice
Law Enforcement Assistance Administration
Washington, D.C.

We would also like to thank the more than 150 telephone survey respondents who so kindly provided information on their local rape statutes. Their time and interest in the project is sincerely appreciated.

PREFACE

This project is one of the products of a 2 year research program, funded by the Law Enforcement Assistance Administration, National Institute of Law Enforcement and Criminal Justice, and conducted by the Battelle Law and Justice Study Center in Seattle, Washington. The report analyzes the principle legal issues involved with the crime of rape, as well as providing a summary of the contemporary rape laws in each jurisdiction in the United States.

The need for a document of this type is clear. During the past 3 years there has been a spate of legislative activity regarding rape throughout the United States. The rapidity and volume of legal change in many jurisdictions has been such that those concerned with the law revision process within individual jurisdictions have had only limited knowledge of developments occurring beyond their own geographic boundaries. This lack of knowledge has made it difficult to reach conclusions regarding the direction law revision should take. It is hoped that by examining the major issues at stake when effecting changes in rape laws, and by summarizing the changes already undertaken in each of the states, this report will assist in the revision process.

While the report addresses topics which are of substantial legal complexity, it is believed that the audience for the document will include many persons without legal training who are concerned about the state of the criminal laws relating to rape. Thus, footnotes and citations have been kept to a minimum throughout the text of the report, and technical and obscure legal language has been avoided wherever possible. Readability has also dictated that rapists be characterized as male and victims as female, although other sex-indicative pronouns have been avoided. Sex-indicative pronouns in respect to the rapist and victim seem appropriate since rape has been traditionally defined in terms of male offenders and female victims. Furthermore, despite some recent definition changes which make rape a sex-neutral crime, the fact remains that virtually all reported offenders are male and their victims are female.

CHAPTER 1. INTRODUCTION

The problem of rape is rapidly approaching epidemic proportions. Michigan legislators have a unique opportunity and a pressing responsibility; immediate legal reform [is needed] to prevent the rape epidemic before it happens. Legislators have the power that no single concerned citizen, and no women's organization has the power to say to an entire class of potential criminal offenders that violence in the form of sexual assault is not only anti-social but also will result in certain punishment. . . . Without prompt action on this crisis hundreds of people will be assaulted while the assaulters continue to go virtually free from any threat of conviction. This certainly far outweighs the uncertain benefits of more years of deliberation.[1]

—Michigan's Women's Task Force on Rape

The statement above exemplifies a concern about rape laws expressed in recent years by women's groups in jurisdictions throughout the United States. Responding to this concern the Michigan legislature, along with the legislatures of 36 other states, has enacted laws in the past three years affecting the crime of rape. Michigan's legislation represents the most comprehensive revision of rape laws attempted in the history of the state, and almost certainly in the country at large.[2] Because of its comprehensiveness, the Michigan measure has become the focus of major national attention. Although not adopted in its entirety by any one jurisdiction, the Michigan statute has been, or is being considered, a basic model for the revision of rape laws in at least 12 states.

Whatever the model eventually used by a state affecting changes in its rape laws, certain common issues must be considered by those concerned with the drafting of new legislation. Essentially, these issues fall into two distinct categories: issues of definition and issues of proof. Under the former category arise questions about the nature of rape: the types of rape to be punished by the criminal justice system; the standard for determining whether the crime had taken place; and the severity of punishment to be attached to different forms of rape. Questions affecting matters of proof involve consideration of the kinds of evidence to be used to prove or disprove a rape charge. For example, should a rape charge require corroboration?; to what extent should a victim's prior sexual history be a relevant consideration in determining whether she consented?; and under what circumstances, if any, should a victim undergo a psychiatric examination?

The discussion which follows in immediately succeeding chapters in this report is primarily centered upon matters of definition (Chapter 2) and of proof (Chapter 3). The concluding chapters review special issues affecting victims of rape (Chapter 4) and the process of implementing change in rape laws (Chapter 5). Before turning to the substance of the report, however, some introductory comments regarding the rationale, scope, and initial impact of legislative activity on rape should assist in placing these later chapters in perspective.

1.1 Why Change Rape Laws?

The quotation provided above from the Michigan's Women's Task Force on Rape refers to a number of rationales for desired change in rape laws: the "epidemic proportions" of the crime; the need for a more effective deterrent to rape; and the lack of convictions of offenders under existing rape legislation. There is no doubt that these are among the most important reasons voiced by those seeking revision of rape laws. The startling increase in the incidence of rape can be seen from Table 1. During the past decade rape rates have more than doubled, the pace of increase becoming more rapid since 1967 and in the early 1970's and reaching a speed which has outstripped all other major categories of violent crime.

Table 1
Index of Forcible Rape in the United States (1960–1975)[a]

Year	Number	Rate Per 100,000 Inhabitants
1960	17,190	9.6
1961	17,220	9.4
1962	17,550	9.4
1963	17,650	9.4
1964	21,420	11.2
1965	23,410	12.1
1966	25,820	13.2
1967	27,620	14.0
1968	31,670	15.9
1969	37,170	18.5
1970	37,990	18.7
1971	42,260	20.5
1972	46,850	22.5
1973	51,400	24.5
1974	55,400	26.2
1975	56,090	26.3

[a] Source based on data contained in annual volumes of the F.B.I. *Uniform Crime Reports*, 1960–1975.

Concern about the inadequate deterrent capacity of existing rape laws has been based not only on escalating statistics but also on the poor record of the criminal justice system in apprehending and convicting those who commit this type of crime. While nationally police agencies reported to the FBI a rape clearance rate by arrest of 51 percent in 1975, a Battelle Law and Justice Study Center survey of a sample of 200 police departments around the country revealed wide disparities in both rates of clearance, and in the methods used to calculate these rates.[3] Similarly, disparities were found in filing and conviction rates for rape listed in a survey of prosecutors.[4] According to FBI figures obtained in 1975, 58 percent of all adults arrested for rape were prosecuted for this offense. Forty-six percent of these prosecutions resulted in acquittal or dismissals; 42 percent with the conviction of the substantive offense; and 12 percent in convictions for lesser offenses.

However, as part of this research, rape cases from two major jurisdictions were analyzed. As illustrated in Table 2, these data vividly illustrate the extent of case attrition at each stage of the criminal process. Of the 635 rape complaints reported, 167 suspects were identified, but only 45 were ever charged with rape or attempted rape. Ultimately, only 10 suspects were convicted of rape or attempted rape representing less than 2 percent of the total rapes reported.[5]

For the women's groups who have been the prime lobbyists for changes in rape laws in states throughout the union, soaring rates of rape, coupled with poor rates of apprehension and conviction of rapists, have provided substantial backing for more fundamental criticisms of existing rape legislation. Of particular importance and influence has been the movement to effect change in the status and role of women in our society. In this context, the definition and administration of the laws relating to forcible rape have achieved a special significance among the vanguard of those issues affecting women's rights. Many women regard this part of the criminal law as a means of protecting the inviolability of a male's property rights rather than the integrity of a female's body. In the words of Kate Millet, "traditionally rape has been viewed as an offense one male commits upon another —a matter of abusing 'his woman'."[6] According to this view, a male-dominated system of criminal justice sustains this attitude, refusing to prosecute or convict all but a handful of rapists. Meanwhile, the victim of rape is subjected to a host of indignities at the hands of the police and other system personnel.

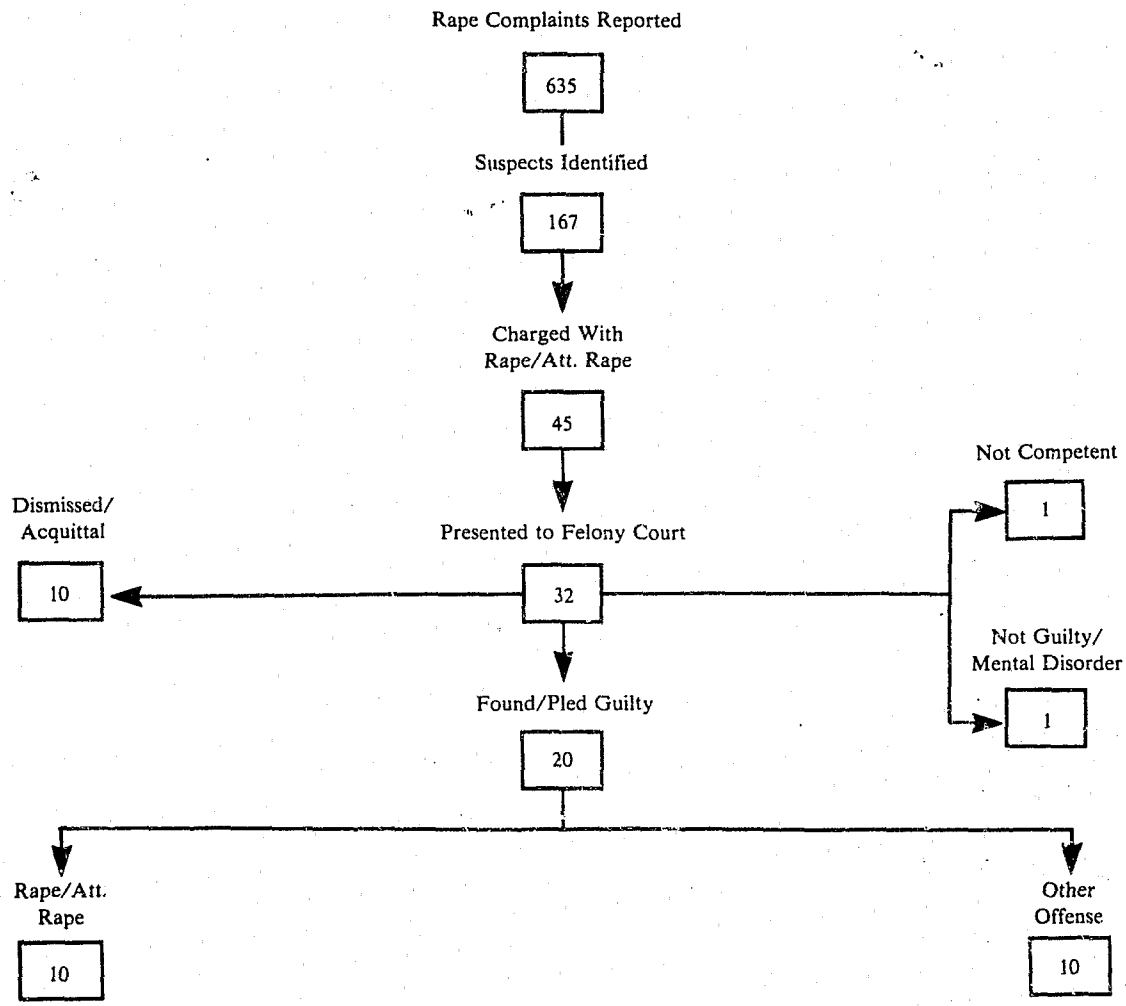
1.2 The Scope of Legislative Change

The rapidity with which the crime of forcible rape has become the focus of national attention and concern has almost certainly caught many people by surprise. The criminal justice system has been struggling to catch up with the momentum for action and change. Many proposed or effected reforms of the substantive criminal law have been matched by numerous attempts to strengthen the capabilities of the agencies of criminal justice to deal with rape and related crimes. Across the nation new and innovative procedures are being developed and implemented to facilitate the apprehension and conviction of rapists and reduce the incidence of rape.

Within the legislative arena the scope of the changes effected has been both broad and varied. Appendix A provides an overview of these changes on a state-by-state basis. In general, the trend has been to adopt new and wider definitions of rape while relaxing proof requirements for the crime. Frequently, rape has been redefined as a broader, sex-neutral assault or battery, with different degrees depending, generally, on the dangerousness of the circumstances of the assault or the kind of assault. Some states, like Michigan, have abandoned entirely the traditional law of rape in favor of new sexual offenses and a new legal terminology to define these crimes.

TABLE 2

FLOW OF RAPE CASES THROUGH THE CRIMINAL JUSTICE SYSTEM



Under the rubric of proof changes, corroboration requirements have been eliminated or minimized in many states. Statutory changes have also tended to restrict the admission of evidence of prior sexual conduct on the part of the victim and to abolish the cautionary instruction, a traditional warning to the jury that the testimony of the complaining witness in a rape case is suspect, and the chastity instruction, which permits the jury to infer that a woman who has once consented to sexual intercourse is more likely to consent again. Further developments have been to mandate special training programs for police and special medical procedures for the examination of rape victims. In addition, some states have begun to provide for high school instruction in self-defense. Although an earlier trend toward protecting the rape victim from public exposure could be noted, that trend has largely disappeared in the wake of several Supreme Court cases which have expanded freedom of the press in respect to criminal proceedings.

1.3 The Impact of Legislative Change

In their statement to the Michigan legislature, the Women's Task Force on Rape expressed the belief that new rape laws would, among other things, prevent a "rape epidemic." The Michigan rape law has now been in force for 2 years and the question may be asked whether the legislative change has prevented the "rape epidemic" feared by many women. Regrettably, a lack of basic statistical data, coupled with the still limited operating experience gained with the Michigan law, and the new laws in other jurisdictions, makes any precise assessment of its impact upon the issue of rape virtually impossible. However, certain trends in the administration of new rape laws around the country at large suggest that legal change, by itself, will not have the anticipated favorable impact upon rates of commission of rape, or rates of apprehension and conviction of rapists.

More will be said about this issue in the concluding chapter of this report. But it is clear that one of the by-products of the spate of legislative activity has been the creation of substantial confusion and uncertainty regarding the scope and value of many new rape laws. This confusion and uncertainty can be partly attributed to the speed with which many new laws have been passed by legislatures. The more typical and traditional process for effecting major changes in the substantive criminal law has been bypassed. Although the traditional process can on occasion be rightly criticized for producing an unreasonable delay in instituting law reform, it does permit adequate discussion and debate before change is enacted. It is beginning to be realized that changes have been made in rape laws which were barely understood by those drafting new legislation, while the effect on other areas of criminal law was ignored or neglected. Further, the potential impact of constitutional law was underestimated. These deficiencies and uncertainties now carry with them the danger of a backlash effect against rape victims, especially if new legislation is found unconstitutional and old rape law is thereby entrenched with new vigor.

With more rape bills in legislative hoppers, and with challenges in the courts to freshly revised rape laws, the time seems opportune to explore in some detail the major issues at stake in this important area of social and legal concern. It is hoped that what follows in this report will assist in clarifying matters of substantial legal complexity which must be confronted by those wishing to effect changes in rape laws.

NOTES

[1] Michigan Task Force on Rape, Background Material for a Proposal for Criminal Code Reform to Respond to Michigan's Rape Crisis, 1973, 1.

[2] See generally Ben Dor, Jan. "Justice After Rape: Legal Reform in Michigan" in Walker, Marcia and Stanley Brodsky (eds.), *Sexual Assault*, Lexington Books: Massachusetts, 1976, 149–161. The Michigan legislation is reproduced in Appendix B.

[3] *Forcible Rape: A National Survey of the Response of Police.* Battelle Law and Justice Study Center: Seattle, Washington, 1975, 45–47.

[4] *Forcible Rape: A National Survey of the Response of Prosecutors.* Battelle Law and Justice Study Center: Seattle, Washington, 1975, 51–54.

[5] These data were obtained from King County (Seattle, Washington, 1974) and Jackson County (Kansas City, Missouri, 1975).

[6] Millet, Kate. *Sexual Politics.* Avon Books: Equinox Ed., New York, 1971, 44.

CHAPTER 2. DEFINITION OF RAPE

2.1 The Common Law and the Model Penal Code

To evaluate recent attempts to redefine the crime of rape, it is important to understand how it has traditionally been defined as a criminal act. Rape law developed through decisions by the courts, as judges made case-by-case determinations of what constituted the crime. This process of lawmaking, known as the common law system, is an aggregate of judicial opinions, each looking to and incorporating prior opinions. In this respect, the common law differs from statutory law: the common law evolves from individual cases while statutory law reflects a generalized case.

Rape, at common law, *is unlawful carnal knowledge of a woman by force and against her will.* Any sexual penetration, however slight, by the male penis of the female vagina is sufficient to complete the crime if the other elements are present. The common law conceptualized rape as "carnal knowledge" and instituted a resistance standard for the victim as a means of distinguishing forcible carnal knowledge (rape) from consensual carnal knowledge (fornication or adultry, depending upon the victim's marital status). All were crimes, but if the carnal knowledge were forcible, then the victim escaped punishment for fornication or adultery.

To the extent that legislatures dealt with rape law at all up until the 1950's, they did so only to codify what they understood to be the common law. Interpretations of the statutes which codified the common law emphasized the "against her will" element of the crime and thus revolved on whether or not the victim consented to the intercourse. "Force" was perceived, not as an independent element of the crime, but as a means of showing that the act was without the victim's consent. Thus, the perpetrator's use of force became criminal only if the victim's state of mind met the statutory requirement. The perpetrator could use all the force imaginable and no crime would be committed if the state could not prove additionally that the victim did not consent.

The courts, who had to apply the consent standard, searched for a way to decide whether a woman in fact consented. They settled eventually upon resistance, the outward manifestation of nonconsent; as the device for determining whether a woman actually gave consent.[1] Not surprisingly, "the use of the outward manifestation of the subjective state of mind of the victim proved an unsure index to the conduct of rapists. How much resistance indicates nonconsent?" [2] Some states required resistance to the utmost on the part of the victim, a standard subjecting a woman to great risk of death or severe physical injury and one which few rape victims could meet, since most would choose rape above death.

Most states repudiated such a stringent resistance standard, but where utmost resistance was not required, great confusion existed. Some cases seemed to impose a reasonableness standard while others stressed the decision of the woman without requiring that her fears be reasonable. Still other cases necessitated only sufficient resistance to make nonconsent reasonably manifest. The amount of resistance required depended upon all the circumstances of the case.

Faced with this confusion an attempt was made in 1962, in the Model Penal Code, to effect a significant change in the common law definition of rape and especially in the resistance standard. The Model Penal Code was an attempt by a distinguished group of lawyers, the American Law Institute (A.L.I.), to bring rationality and coherence to the penal laws of the United States.

The section of the Code dealing with sexual offenses, including rape, was first presented to the A.L.I. in 1955, accompanied by an extensive commentary.[3] It was not significantly changed in the 1962 final version. A copy of Article 213 Sexual Offenses of the Model Penal Code, and related commentary, is contained in Appendix C.

The Model Penal Code was not intended to be typical of the law in effect in most jurisdictions, although it drew for its formulation upon the experi-

ence of the states as well as on the common law. The A.L.I. hoped the Code would be adopted by legislatures in each state. While this hope has not been realized, many states began revisions of their criminal codes as a result of the A.L.I.'s impetus and some enacted portions of the Model Penal Code in restructuring their rape laws.

The Model Penal Code sought to reduce the degree of resistance required of the rape victim by eliminating the element of "against her will." In its place was substituted a requirement specifying that the perpetrator "compels her to submit by force or by threat of imminent death, serious bodily injury, extreme pain or kidnapping, to be inflicted on anyone." [4]

This redefinition shifted the focus from the victim's state of mind, as evidenced by her resistance, to the conduct of the perpetrator. The drafters noted in their comment on this section that they were trying to avoid the requirement that the woman resist to the utmost. However, they stated that "compels to submit" meant that the woman had to offer more than a "token initial resistance."

Although there was less emphasis on resistance in the Model Penal Code formulations of rape than in more traditional carnal knowledge statutes, resistance remained an important factor. The question must be raised why resistance remained central to rape. It is important to recognize that a resistance standard reflects the perpetrator's view of sexual intercourse: unless the victim resists, the perpetrator may assume she is consenting. Resistance thus operates as a communication from the victim to the perpetrator regarding her intentions. But the resistance standard also provides an objective standard by which society, in the form of a jury determination, can evaluate what is inherently subjective—whether the victim consented. Consent is a frame of mind, with all the contradictions, blurred impressions, and vague thoughts that any frame of mind contains. Resistance is a useful outward manifestation which is more easily evaluated by the perpetrator and by the jury. This dual purpose of resistance is of special importance in light of the traditional components of a criminal act.

2.2 The Relationship Between Resistance and Consent: The Unacceptable Act and Criminal Intent

Legal theory has long held that a crime exists only when there is concurrence of an unacceptable act and a criminal intent with respect to that act. The unacceptable act is called the *actus reus*; the criminal intent is called the *mens rea*. In the traditional definition of rape, the *actus reus* is the unconsented-to sexual intercourse and the *mens rea* is the intention or knowledge of having the intercourse without the consent of the victim. Lack of consent of the victim is ultimately the characteristic that distinguishes rape. The concurrence of the act and the intent requires both that the victim in fact not consent and that the perpetrator know at that time that the victim did not consent.

The three following situations illustrate this concept:

(1) If the victim consents in fact, but the perpetrator believes she is not consenting, is this rape? The law says 'no" since there is criminal intent, but no act. The sexual intercourse is consented to and such intercourse is not an unacceptable act within the meaning of rape. Conceptually, this would be regarded as an attempted rape.

(2) If the victim does not consent in fact, but the perpetrator believes she is consenting because her behavior would lead any reasonable person to think she was consenting, is this rape? The law says 'no' since there is an unacceptable act, i.e., unconsented-to sexual intercourse, but no criminal intent. In criminal law terms, this is the mistake-of-fact defense; if the defendant is mistaken in a fact which is an element of a crime and if the fact, as mistaken, would make the conduct lawful, then the defendant has acted with lawful intent and no crime has been committed. In California, a recent court ruling requires an instruction to the jury that the defendant must be acquitted if they find he reasonably believed the victim was consenting. This holds true if they also find the victim did not in fact consent.

(3) If the victim does not consent in fact and makes that lack of consent apparent to any reasonable person, but the perpetrator, being unreasonable, nonetheless believes she is consenting, is this rape? In the strictest sense there is still no *mens rea* since there is still no criminal intent. In England, there would be no crime committed in this situation.[5] In the United States, however, such mistakes generally need to be reasonable and in most jurisdictions there would be a rape in the instance of an unreasonable mistake as to consent.

Thus, the definition of rape depends upon both the perception of the victim, i.e., that the intercourse was in fact not consented to, and the perception of the defendant of that lack of consent. The problem that immediately arises is that, given the assumptions of many people about what is appropriate sexual behavior for men and women, there will be no criminal intent in many instances where there is an unacceptable act. The victim will perceive the intercourse as rape much more frequently than will the perpetrator.

From the victim's perspective, if she is not consenting to sexual intercourse, it is rape. If the perpetrator accomplishes the intercourse by making her feel guilty, by wearing her down with endless coaxing, by ignoring her verbal protestations, by plying her with liquor, or by simply going ahead in the face of her failure to indicate consent, she thinks it is rape. Thus, what to many has been condoned or taught as the art of courtship, is considered rape by the seduced.

The victim may see the perpetrator's determination to have sex with her as too powerful to resist, perhaps accepting the consequences of intercourse as a punishment for being in the situation she is in or because it is the only way to end an onslaught of psychological intimidation. If she is in a situation where rape is possible, she is likely to be where society condemns her for being in the first place: in her apartment alone with a date, in a parked car, in a man's bedroom, in a lonely wood. Accepting the guilt for her situation, she may assume responsibility for the rape as well.

The common belief that there are substantial numbers of false rape complaints might partially be traced to the victim's perception of rape. The law sometimes rejects as a "false" rape complaint what the victim considers to be rape. Sexual intercourse accomplished without the victim's affirmative consent or by means of coercion or intimidation is rape in the eyes of the victim, but it may not be criminal under traditional rape law, or in the eyes of the perpetrator.

The perpetrator tends to define rape in terms of the woman's conduct in response to his advances. He assumes that she is consenting unless she resists physically in a clear, unequivocal, perhaps violent communication of nonconsent.

Even the victim's resistance does not always create a rape in the eyes of the perpetrator. He tends to view resistance as the victim's way of avoiding guilty feelings of her actual consent. He sees resistance more as her response to societal disapproval of consent than as a rejection of him. In the perpetrator's eyes, "no" from the victim means "yes" and anything ambivalent or unclear is construed in favor of consent.

Defining rape in terms of the victim's perspective conflicts with society's view of what is necessary in order to punish someone for a crime: the perpetrator must commit an unacceptable act with criminal intent. Because victims and perpetrators do not agree on what is unacceptable, there is often no criminal intent in situations where there is an act unacceptable to the victim. Thus, the need to redefine rape may require a resolution of this fundamental disparity.

Recent developments in rape redefinition have focused on the need to turn attention from the victim's behavior (resistance) or state of mind (lack of consent) to the rapist's conduct (force). To this end, several states have recently defined rape in terms of criminal circumstances which emphasize perpetrator conduct. Eight states, to date, eliminated the word "rape" and created a terminology, such as criminal sexual assault, connotating a crime defined by what the offender did. In order to broaden further the concept of rape, many states have made the crime sex-neutral. These states have proscribed several types of sexual attacks which do not presume male perpetrators and female victims. In addition, several states have classified "rape" into various degrees which are differentiated by the seriousness of the offender's conduct. Each of these developments is now considered in more detail.

2.3 Criminal Circumstance Definitions of Rape

Traditionally, rape has been defined in terms of sexual intercourse, plus lack of consent, plus criminal intent of the perpetrator. Most states which have redefined rape in recent years have avoided the consent issues altogether. These states have attempted to define rape as sexual intercourse under circumstances which require the conclusion that there was both criminal intent and lack of consent. With this type of definition, there is no need to inquire into the victim's perception. If the sexual intercourse occurred under a dangerous criminal circumstance, then an objective standard has been met and it does not matter whether or not the victim

consented. In fact, the law does not allow her to consent under such a circumstance. A determination has been made by the legislature that consent in such a situation is too dangerous to be sanctioned.

This redefinition of rape requires a careful delineation of criminal circumstances so that there is no overlap into social interactions which society might permit if there were consent. Possibilities for such criminal circumstances include:

(1) sexual intercourse accomplished by means of a weapon or through physical injury or through threat of harm;

(2) sexual intercourse accomplished with a victim under a certain age or in a certain relationship, by blood or authority, with the perpetrator;

(3) sexual intercourse accomplished with a victim who is unconscious or has had drugs administered to her without her consent;

(4) sexual intercourse accomplished in the course of a kidnapping or burglary;

(5) sexual intercourse accomplished under circumstances reasonably calculated to coerce the victim into submission.

Such criminal circumstances can either be itemized as an inclusive list or be used as illustrative of the types of circumstances which render the sexual conduct rape.

There are substantial advantages to a "criminal circumstances" definition of rape. If consent is not an element of the crime, then mistake as to consent is not relevant and the defendant will not be able to escape responsibility for his acts by convincing a jury that he thought the victim was consenting. More critically, if consent is not at issue, then prior sexual conduct of the victim is not relevant and is not admissible on that issue. Generally, the criminal circumstances model permits a much broader standard for rape than the resistance model, which focused narrowly on the victim's conduct. Furthermore, it provides clearer, more objective criteria than the consent standard, which allows differing perceptions by the victim and the perpetrator to negate criminality. Thus, the criminal circumstances model combines advantages of both the resistance standard, in that it is objective, and the consent standard, in that it covers a wide scope of non-consensual sexual conduct.

Despite its wide scope, the criminal circumstances standard still encompasses a narrower range of conduct than what the victim perceives to be rape, since it focuses only on the most dangerous rape conduct. The dangerousness of conduct is certainly a rationale for aggravating an offense in terms of sentencing, but it is not, in terms of rape, germane to the nature of the offense. Conceptually, rape should not be punished only when some dangerous circumstance in addition to the rape exists; otherwise, rape becomes a non-crime, an act punished only when there is some other crime being punished in any case. Thus, the definition of rape must look beyond those situations which are conclusive of lack of consent.

The definition of rape can expand conceptually beyond circumstances which are conclusive of lack of consent to circumstances where consent is possible, although unlikely. Examples might include sexual intercourse accomplished by means of physical restraint (bondage) or by the administration of drugs with the victim's acquiescence. These instances are not so dangerous as to preclude the possibility of consent. Sexual intercourse might be presumed to be rape unless the defendant affirmatively shows that the sexual intercourse was consensual. In practical terms, if the jury finds that there was intercourse, plus criminal circumstance, plus consent, they must acquit. Thus, consent can be concurrent with the criminal circumstance and, if so, then no crime has been committed. Consent is an affirmative defense, but its lack is not an element of the crime.

Even this broadening of the definition does not include all nonconsensual intercourse. To the extent that there are other circumstances too varied to define in advance or too ambiguous to indicate on the face that there is no consent, there remain situations where the victim does not consent and the perpetrator knows or would know that she is not consenting. To include these situations, the objective standard must be abandoned and the law must look solely to the subjective state of mind of the victim, as well as the subjective state of mind of the defendant. Here, lack of consent is restored as an element of the crime, but there is no additional standard: no resistance and no criminal circumstance is here required.

These definitions of rape—from criminal circumstances conclusive of lack of consent to circumstances presumptive of lack of consent and finally to lack of consent—include the range of conduct in which there is both an unacceptable act and criminal intent. However, the problem of varying perceptions be-

tween the victim and the perpetrator remains. Many unconsented-to sexual acts would go unpunished where the prepetrator believes there to be consent. These acts arise largely in situations where the victim feels coerced, intimidated, overpowered, but the perpetrator feels he is engaging in aggressive, but legitimate, "seduction."

The only way to expand the definition of rape to include these situations is to presume all sexual intercourse to be rape, that presumption being overcome only be demonstrating uncoerced consent clearly communicated by the victim. Such a definition may appear shocking on its face and so divergent from current societal views of seduction and courtship as to preclude its legislative enactment. Nonetheless, it is strongly suggested in recent legislation like that of Michigan.

The Michigan Criminal Sexual Conduct Act. The importance and national impact of the Michigan Criminal Sexual Conduct Act has been mentioned earlier.[6] In some senses, the Michigan bill is a prosecutor's nightmare. It is very long and complex, not only because it repeals nine other statutes, but because it creates an entirely new vocabularly, part of which is defined within the statute, and part of which is left to the courts to interpret. Others interested in following the Michigan model have had to examine the language of that bill carefully, since terms used in Michigan may have very different meanings in other states.

Under the new law, four degrees of criminal sexual conduct are distinguished, dependent upon the presence or absence of (a) sexual penetration or contact, and (b) specified aggravated circumstances. The four degrees can be illustrated as follows:

Criminal Sexual Conduct	Penetration Required	Contact Required	Aggravating Circumstances	Maximum Penalty
First Degree	X		X	Life
Second Degree		X	X	15 Years
Third Degree	X			15 Years
Fourth Degree		X		2 Years, $500

The Michigan statute represents a radical departure from common law rape. Both penetration and contact are sex-neutral and broadly defined. The word "rape" has been replaced by "Criminal Sexual Conduct," the resistance requirement has been expressly eliminated, and consent is nowhere mentioned.

The failure of the Michigan statute to mention the elimination of lack of consent as an element of the crime may prove a serious error. Fifteen years ago, for example, California adopted a statute which eliminated all mention of consent and which defined rape in terms of force and a modified resistance standard. Even with a reduced resistance standard, the courts quickly interpreted subjective lack of consent as an element of the crime, reasoning that the very nature of rape demanded lack of consent since, otherwise, the intercourse would be consensual and, thus, not rape. Without a resistance standard, courts are even more likely to bring a consent standard back into a statute unless the statute specifies that lack of consent is not an element of the crime. Even if lack of consent is not re-established as an element of the crime in the Michigan statute, the status of consent as a defense is certain to create problems of statutory interpretation.

Two possible interpretations of the status of consent as a defense under the Michigan law are: (1) consent can be eliminated as a defense or (2) consent can be regarded as an affirmative defense which can excuse the conduct even if all the elements of the crime are present. It is a marked weakness in the Michigan law that it leaves the crucial determination of the differences between these two views to the courts. For example, under 5.5206(1)(e) of the Michigan law, criminal sexual conduct in the first degree is committed if the perpetrator engages in sexual penetration while armed with a weapon or any article used or fashioned in a manner to lead the victim to reasonably believe it to be a weapon. If consent is not a defense, then the victim cannot legally consent and thereby legalize the perpetrator's conduct if he is armed. If consent is a defense, then the perpetrator can claim that, although he was armed with a weapon, the victim in fact consented and the weapon was not responsible for any coercion. In this situation, the use of consent as an affirmative defense has legitimacy in view of the failure of the statute to specify that the victim need be aware of the existence of the weapon. There is also a strong argument for a consent defense where the victim knows the weapon is there, as on a camping trip, but there is reason to believe she was not coerced by its use. Thus, courts might be inclined to assume consent is a defense to the crime.

Under 5.520b(1)(f) of the Michigan law, however, criminal sexual conduct in the first degree also accrues to the accomplishment of sexual penetration

through force or coercion where the victim is injured. At least in situations where force and injury are substantial, the use of consent as an affirmative defense is destructive to the criminal circumstances standard. The jury could be told that, despite the clear indication of force, despite the victim's broken ribs and split lip, they can find that she consented to the intercourse and they must thereby acquit the defendant. The worst travesties of justice in terms of rape law have occurred precisely because the defendant was permitted to show that consent and force and injury could be concurrent. The Michigan statute does not specifically prevent the continuation of consent as a defense in situations where it appears entirely inappropriate.

The failure to deal with consent is aggravated by the definition of criminal sexual conduct in the third degree. The Michigan law establishes this as a felony when sexual penetration is accomplished by force. If force is meant in terms of its common law definition, then it means force sufficient to overcome resistance; thus, indirectly, the resistance standard returns. If force means any application of energy, then all sexual penetration involves use of force and is criminalized by this section. The problem is somewhat minimized by a reference to 5.5206(1)(f)(i) to (v) for suggestions as to what force means, but it also leaves open the possibility of a broader definition by stating that force is not limited to the circumstances outlined there.

Under the Michigan statute, the possibility exists that consent might be permitted as a defense to any of the sections of the law. The difficulty is that it may be desirable to have consent as a defense to some forcible penetration situations, since force theoretically encompasses all types of penetration; on the other hand, it is undesirable as a defense when the force is sufficient to disallow the conclusion that force and consent existed concurently. With no indication in the statute itself as to when consent may be a defense, there is a real likelihood that consent will be permitted as an affirmative defense in all instances, except where consent is factually irrelevant, as with statutory rape based upon age.

The Washington Rape Statute. In 1975, the state of Washington enacted a statute retaining the word "rape" but broadening the definition to include three degrees of the crime.[7] The Washington statute, rather than looking to itemized criminal circumstances, as does Michigan, defines rape in terms of a broad resistance standard. Rape exists when sexual penetration is accomplished by means of "forcible compulsion." Forcible compulsion is defined as "physical force which overcomes resistance, or a threat, expressed or implied, that places a person in fear of death or physical injury to herself or himself or another person or in fear that she or he or another person will be kidnapped." Thus, it represents a broad objective standard, which includes resistance, but replaces traditional lack of consent as an element of the crime.

The treatment of consent as an element and a defense is ultimately left to the construction of the Washington courts. The Washington statute does give some indication of its intention to eliminate consent except in the second degree of the crime. Section 9.79.160(1) of the statute specifies that a mistake-of-fact defense is applicable in the second degree of rape where lack of consent is based solely on the victim's mental incapacity or physical helplessness. Mistake of fact, in this instance, is a defense which the defendant must prove by a preponderance of the evidence. Presumably, by its specific reference in second degree rape and lack of mention elsewhere, mistake of fact as to consent is not a defense to the first or third degree of rape. If mistake of fact is not a defense, the crime is one of strict liability. Where, as in the first degree, the perpetrator accomplishes the sexual penetration through force and kidnapping, he cannot claim that he was mistaken in thinking there was consent, or that she was accompanying him willingly. Traditional *mens rea* is established through an objective determination that there can be neither consent nor a mistake as to lack of consent where sexual intercourse is accomplished through forcible compulsion.

This interpretation of the statute is, however, somewhat conjectural. The statute does not explicitly state that consent is not a defense to the first degree of the crime, where forcible compulsion is the standard. Furthermore, the status of consent is confused by the third degree of the crime which relies upon a lack of consent as the standard for the crime. Section 9.79.190(1) of the Washington law punishes all sexual intercourse accomplished without the consent of the victim if that lack of consent is clearly expressed to the perpetrator. However, consent is defined in terms of affirmative, communicated consent. Presumably, this third degree punishes all sexual intercourse accomplished without affirmative, communicated consent, regardless of the nature of the circumstances. There is no need to show coercion,

resistance or intimidation; the state must prove only that the victim did not communicate consent to the perpetrator and that her lack of such communication was clearly expressed. In the absence of a communication of consent, the perpetrator must presume lack of consent.

There is some ambiguity in the wording of the third degree which renders this interpretation problematic. It seems strange to talk about "expressing" a lack of communication. If the woman does nothing, if she remains totally unresponsive and mute, is she "expressing" her lack of communicated consent? The point is unclear.

Presumably, if the victim in fact does not give her communicated consent, then the defendant cannot claim that he thought, mistakenly, that she did indicate consent. Her failure to give consent establishes the crime without respect to his criminal intent. Although strict liability in the first degree follows from the definition of forcible compulsion, strict liability in the third degree of the crime has questionable rationale. One can reasonably conclude that there is criminal intent where there is the use of physical force overcoming resistance; it is less clear that there is conclusively criminal intent when the victim does not actively communicate consent. In fact, it has been suggested that consent be obtained in writing before engaging in intercourse in Washington.

The Wisconsin Sexual Assault Statute. Wisconsin has adopted a four-tiered "sexual assault" statute which punishes both penetration and contact crimes, eliminates the resistance standard, and incorporates a criminal circumstances standard in addition to the subjective "lack of consent" standard.[8] The explicit retention of lack of consent as a major element of the crime includes a definition of consent to mean words or overt action indicating freely given agreement to sexual intercourse or contact. The first and second degrees punish aggravated sexual penetration and contact as long as there is no consent. Thus, even under the circumstance of rape resulting in severe injury, the victim can theoretically consent and negate the criminal act. This retention of consent means also that the mistake-of-fact defense as to that consent still exists. The third and fourth degrees of sexual assault punish sexual intercourse or contact accomplished without consent. The ambiguity of Washington's terminology "clear expression" is corrected here. It is a crime in Wisconsin to have sexual contact unless the recipient, by words or overt action, indicates freely given consent. Such contact constitutes a crime if the recipient remains mute or unresponsive, even if there is no overt rejection.

Although this definition incorporates the victim's perception of rape, the problem remains that the use of consent, even as redefined, means that juries can find consent in situations where highly dangerous conduct has taken place. It also retains the common-law focus on the victim's behavior rather than the defendant's. In Wisconsin, a jury will be instructed that they must find lack of consent in order to convict under most sections of the new law. In Washington, such an instruction is appropriate only in the third degree rape. Since Washington's third degree is a "lesser-included" offense to first and second degree rapes, however, the instruction on consent will be given even if first or second degree rape is charged. Washington juries will be asked to apply a consent standard only if they do not convict on the first or second degree charge. It is doubtful whether they can suspend the consideration. If they cannot, the Washington and Wisconsin statutes merge on the issue of consent.

Thus, Michigan, with its elimination of lack of consent as an element, Washington with its partial exclusion, and Wisconsin with retention of lack of consent as redefined, offer a spectrum of ways to deal with consent. The more that lack of consent forms the basis of the crime, the broader the conduct which can be punished, since lack of consent looks to the subjective state of mind of each victim. In contrast, the more that lack of consent is eliminated as an element, the less the likelihood that dangerous conduct will be punished, since consent is found to exist concurrent with that conduct. Conceptually, the Washington statute, if clarified as to when consent is a defense, may strike the necessary compromise by eliminating consent as an element and defense in its aggravated rapes where attention can be focused on the rapist's conduct, while retaining it in its lesser degrees of rape where the rapist's conduct may be more ambiguous.

2.4 Rape, Sexual Assault or Criminal Sexual Conduct?

Seven states, including Wisconsin, have recently revised their definitions of rape by eliminating it as a specific crime and creating a new crime which fits generally into assault and battery concepts. Several other states are currently considering such measures.

Assault is defined as an attempt to inflict an unconsented-to touch upon another person, and battery is defined as the touching itself. Conceptually, assault reflects an attempted rape, while battery, where touching is involved, more closely approximates the actual crime of rape.

Traditionally, battery is a misdemeanor punished lightly as one of the least serious of crimes. Even aggravated assault or battery statutes usually carry lower penalties than rape. The emphasis of these statutes is on the potential physical harm which could result from the perpetrator's conduct—a potential usually measured by the actual physical harm inflicted.

The problem with the assault/battery concept in respect to rape is that the seriousness of rape does not necessarily depend upon the degree of force used or on the potential physical harm which results from forced intercourse. Although rape victims are sometimes beaten in addition to the rape, there is usually little physical trauma as a result of the rape itself. The harm of rape rests in the fear of death, as well as in the degradation and humiliation the victim must experience. The injury is always to the psyche, sometimes to the body.

The trend toward treating rape as an assault or battery, rather than as a sexual act, must be evaluated with some care. The rejection of rape as a variety of sexual interaction is appropriate, certainly; yet turning simply to assault and battery as an alternative means of defining the crime may create more problems than it solves. The emphasis in an assault statute is on the physical harm inflicted on the victim. Rape would rarely be punished at all under most aggravated assault statutes. The typical rape, without substantial physical trauma, would instead be punished as a simple assault or battery, and carry a light jail term or fine as its punishment.

One reason given for embracing assault and battery concepts is that many believe consent is not a defense to those crimes and thus the concepts are seen as a way of avoiding the consent problem in rape. However, consent *is* generally a defense to assault and battery unless what is consented to is against public policy or prohibited by law .Translated into the rape context, this means that if the basic activity is illegal, for instance under fornication statutes which forbid sexual intercourse between persons not married to one another, then consent would be impossible. But if, as in some states, sexual activity between unmarried persons is lawful, then consent would be a defense to a rape even if it were classified as a battery.

Recent statutory revisions which consider "rape" as crimes of "sexual assault" usually share little with traditional assault statutes except the connotation of force and violence. This connotation may be sufficient reason to borrow assault language to define the crime only if one ignores the fact that many rapes are perpetrated without force or violence.

Care must be taken, in this event, that common law defenses to assault and battery, including consent and the need for intent to inflict serious bodily harm, do not later narrow the crimes when courts are called upon to interpret the new statutes. Where a legal term with a rich legal history is used, courts have a strong tendency to apply the connotations developed around the word; judges and lawyers assume that such a term would not be used by the legislature for definitional purposes unless its connotations were meant to apply.

Because of these dangers, states considering a change to an assault or battery concept must look carefully at their own case law to determine whether these concepts are, in fact, applicable to rape. If assault and battery concepts do carry meanings inappropriate to rape situations, it would be better to create a new term altogether, like Michigan's "criminal sexual conduct."

Furthermore, the word "assault" may not carry overtones of any great seriousness. No one is horrified at the idea of an assault unless the assault is known to be sexual. The question to be asked may be whether a rape is viewed with more gravity than a severe beating. If society believes these harms to be substantially similar, then assault may be a valuable word to cover rape as well as the beating. However, if society places a different value on rape, for example, than on a man stabbing another man in the arm, then the use of the word "assault" may serve mainly to devalue the seriousness of rape.

Elimination of the word "rape" from the criminal statutes has also been urged by those who believe that its definition has been too constricted: limited to the insertion of a penis into the vagina. Sexual attacks can include many other kinds of conduct which do not differ in their gravity in any way other than the possibility of pregnancy arising from vaginal rape. That risk, in days when an out-of-wedlock child made an outcast of the mother, may well have

legitimized the legal distinction. The consequences of such a pregnancy were probably far greater for the victim than any other kind of injury short of death. Today, however, with the ability to terminate an unwanted pregnancy, there is no longer justification for distinguishing vaginal peneration as a separate crime. Pregnancy resulting from rape, however, may constitute a reason for aggravating the punishment for the crime.

If there is insufficient reason to isolate vaginal penetration by the penis, then the crime of rape might include all kinds of sexual peneration. Section 520 a(h) of the Michigan Criminal Sexual Conduct Act, for instance, defines sexual penetration as:

> sexual intercourse, cunnilingus, fellatio, anal intercourse, or any other intrusion, however slight, or any part of a person's body or of any object into the genital or anal openings of another person's body, but emission of semen is not required.

Without too much distortion of the historical concept, rape could be expanded to include such a definition without changing the word itself, as does Washington. However, the word so strongly connotes sexual penetration that it does not expand readily to include sexual contacts other than penetration. It does not seem odd to think of forcible sodomy as rape, but it does seem peculiar to think of forcible manual touching of the genitals as rape. Therefore, if a state wants to include forcible sexual contact other than penetration, then a term other than rape, such as criminal sexual conduct, seems appropriate. Otherwise, it would be necessary to define two separate offenses, one including an expanded definition of rape, and the other called something like "criminal sexual contact." The latter could then be defined as a separate crime. Michigan defines it within its criminal sexual conduct statute as:

> the intentional touching of the victim's or actor's intimate parts or the intentional touching of the clothing covering the immediate area of the victim's or actor's intimate parts, if that intentional touching can reasonably be construed as being for the purpose of sexual arousal or gratification.[9]

Whether criminal sexual contact is included in a general criminal sexual conduct law or whether separate offenses are created in order to retain the word "rape," the expansion to contact crimes is an important one both pragmatically and conceptually. Sexual contact crimes are not likely to be charged unless they involve some aggravating factor like physical injury. The existence of the crime, however, enables prosecutors who have charged penetration or aggravated contact crimes to negotiate pleas down to those unaggravated contact crimes which carry much lighter sentences. The sexual contact crime gives the prosecutor additional flexibility in disposing of cases with guilty pleas. Many of these are likely to be cases which, under old statutory schemes, would have been dismissed outright or pleaded to simple battery or disturbing the peace. Furthermore, the inclusion of sexual contact crimes recognizes conceptually that very serious harm can arise from a sexual attack even if no penetration is accomplished or attempted. The degree of terror experienced by the victim does not necessarily depend upon the fact of penetration.

2.5 Sex-Neutrality and Marital Status

The expanded definitions of criminal sexual conduct in states like Michigan, Washington, and Wisconsin have another significant side effect. They make rape a sex-neutral crime. Thus, it becomes possible for men to be victims and for women to be perpetrators. Homosexual conduct is treated identically with heterosexual conduct. This necessitates the repeal of any statutes which forbid consensual homosexual conduct, as well as those statutes which punish other kinds of sexual conduct common to both heterosexuality and homosexuality, such as oral and anal intercourse.

The expansion of rape to a sex-neutral crime also eliminates the focus on the crime given to it by feminist analysis, which views rape as a crime by men against women, a crime whose significance lies in its use by men to maintain women in a state of powerlessness. The sex-neutral crime makes quite a different statement: that the sex of the perpetrator and the victim are without significance in evaluating the meaning of the sexual contact.

Despite this sex-neutrality trend, the marital status of the parties involved in criminal sexual conduct continues to be an issue of importance and controversy. The rape of a wife by her husband has never been a crime in this country, although some countries do protect married women from rape by their husbands.[10] Recent proposals for changing the definition of rape in this country have frequently included complete protection for married women, but such

provisions have always been defeated. Most states have retained marriage as a total defense to charges of rape, despite strong opposition by the proponents of new legislation.

The rationale for creating marriage as a defense to rape is understandable in its historical context. The concept of marriage entailed the ownership of the wife by the husband. A husband could not rape his wife for the same reason that he could not burglarize his own house; one cannot steal what one already owns. Furthermore, the wife, by virtue of her marriage vows which required that she "obey" her husband, consented in advance to all sexual intercourse within the marriage. Until recently, divorce law provided that the refusal of the wife to engage in sexual intercourse gave the husband grounds for divorce while rape of the wife by the husband did not give her grounds for divorce.

The greatest advance in protection for married women consists of provisions permitting a rape charge if the spouses are living apart at the time of the rape. Most states, like Michigan, additionally require that one spouse must have filed for separate maintenance or divorce. This type of provision seems to be a standard compromise on the issue, a compromise which some have argued violates equal protection by protecting some married people but not others. Several states, however, have recently enacted legislation which eliminates rape charges between persons living together even if they are not married. A number of arguments are given for retention of the married spouse exclusion, or some variation of it. It is said, for example, that the crime creates legal intrusion into the marriage relationship. It is nonetheless true that any crime other than rape can be committed by one spouse upon another. If a wife forges her husband's name on a check, she can be charged with forgery. If a man beats his wife, he can be charged with assault or battery. To no other crime of violence is marriage a defense.

It is also argued that allowing rape prosecution against one spouse allows the other spouse to use the threat of such a prosecution in order to gain some other advantage, such as a favorable settlement in a divorce. Exactly the same threat, however, can be used in respect to a beating, although in that case the threat may have more vitality; a beating usually carries physical signs of its occurrence, and the proof problems may be fewer. The threat of a rape prosecution, even with substantial evidence, is rarely meaningful given society's current seeming inability to view rape of a wife by a husband as anything deserving punishment.

It is true that there are likely to be substantial evidentiary problems with most interspousal rapes, since a crime is involved which would rarely be capable of proof beyond a reasonable doubt. This argument, it would seem, placates those who fear the wholesale prosecution of husbands rather than defeats the rationale for the existence of the crime. What is usually determinative of whether conduct is criminal is the interest of society in protecting individual safety and well-being.

The difficulties of proving a crime ordinarily mean there will be few prosecutions. Clearly, prosecution under the criminal law is not the solution to the problem of wives beaten by their husbands. Rape is a crime, theoretically, because it is such offensive conduct that society is obligated to express its wrath wherever the conduct is encountered.

2.6 Degrees of Rape and Penalty Structures

Rape, under carnal knowledge statutes, is regarded as a single crime, with a single punishment, frequently death or up to life in prison. This severe punishment for rape is understandable in view of the narrow definition of rape under the carnal knowledge concept: only a few rapes at the most dangerous end of the spectrum of forcible sexual conduct are punished. The actual severity of the punishment for rape is more theoretical than real. Most offenders serve far fewer years than the possible maximum. Nonetheless, it has been feared that the possibility of the imposition of the maximum sentence has deterred juries from convicting, even in cases within the narrow definition of carnal knowledge rape.

Under statutes which broaden the definition to include a greater variety of criminal conduct, there may be distinctions between the kinds of conduct which justify different penalties. A jury may convict for a serious crime where they would acquit if forced to choose between acquittal and conviction on a serious charge. Different penalties require different degrees of the crime, or some method of aggravating factors. In fact, the trend has been toward dividing the crime of rape into degrees in order to provide gradation in penalties.

2.7 The Model Penal Code Approach

Theories on how the crime should be divided vary

greatly, and a number of approaches to such gradation have been taken. The Model Penal Code, for example, establishes three categories based upon the dangerousness of the perpetrator's conduct. The most severe degree is reserved for those crimes where the perpetrator's conduct is "most brutal or shocking, evincing the most dangerous aberration of character and threat to public security. . . ." [11] These crimes are then defined as those in which the perpetrator inflicts serious bodily injury upon someone, or where the victim was not a voluntary social companion of the perpetrator upon the occasion of the crime and had not had previous consensual sexual contact with him. If neither of these two circumstances exists, then the crime is one of the second degree. The least serious degree of the crime, called "gross sexual imposition," includes sexual intercourse accomplished (1) by means of threat, (2) with knowledge of the victim's mental deficiency, (3) without the victim's awareness that the act is being committed, or (4) without her awareness that the perpetrator is not her husband." [12]

Although the infliction of serious bodily injury seems appropriate as an aggravating factor, the Model Penal Code definition of serious bodily injury is very narrow. It is restricted to injury which creates a substantial risk of death or which causes serious, permanent disfigurement, or protracted loss or impairment of a bodily member or organ. Aggravation based on bodily injury is apt to apply to only a few cases; even though some form of injury in the course of rape is quite common, most of the injuries would not meet this standard. Thus, in most cases, aggravation of penalty would depend upon the lack of a prior relationship between the victim and the rapist.

The community's greater sense of outrage at stranger-to-stranger rape probably assumes that the potential for harm to the victim, both physically and emotionally, is greater where there has been no prior relationship between them. There is some indication, however, that there actually tends to be greater physical injury to the victim where there has been a prior acquaintance. It is doubtful, too, that the seriousness of emotional trauma to the victim depends upon the lack of a prior relationship.

Even where an intimate relationship exists, including consensual intercourse, a victim might feel more traumatized if raped by someone she once trusted whose purpose was to humiliate her personally. Further, the rape by the person with whom there has been a prior sexual relationship is possibly more dangerous to the victim since personal animosity itself may lead to the infliction of injury. There is reason, therefore, to believe that a prior sexual relationship might tend to make rape a more dangerous event. At this time, however, the matter is conjectural and there is no justification for using this as a criterion for imposing a more or a less stringent penalty.

Some states have followed the Model Penal Code approach in setting up degrees of rape, with a considerable variety in the details of the gradations. Some limit the infliction of serious bodily injury to the victim; others have eliminated the involuntary companion factor. Other states have added additional other aggravation factors, such as group rape, use of threat of use of a deadly weapon, emotional injury, kidnapping, threat of serious bodily injury, and attempted homicide.

2.8 The Michigan Criminal Sexual Conduct Act Approach

The Michigan Criminal Sexual Conduct Act presents a complicated gradation scheme which focuses first on the nature of the sexual conduct and then on the dangerousness of the conduct. Michigan grades the nature of the sexual conduct by punishing sexual penetration more severely than sexual contact without penetration. Penetration with aggravation (first degree) is punished more severely than contact with aggravation (second degree); penetration without aggravation (third degree) is punished much more severely than contact without aggravation (fourth degree). Aggravated sexual contact (second degree) is punished with the same maximum sentence as unaggravated sexual penetration (third degree). The aggravating factors for penetration and contact are identical.

The distinction between sexual penetration and contact seems to be based on the assumption that crimes involving penetration are more dangerous and more traumatic to the victim than those which do not. Such a generalization is probably true enough to justify the distinction, although it is not difficult to imagine situations where the sexual contact crime might be far worse than a penetration crime: a man who burns a woman's breasts or genitals with a cigarette while masturbating would be punished less severely than the man who slaps a woman and then coerces her into sexual intercourse. Thus, there are cases under this scheme where the penalty is inap-

propriate, since the actual conduct is more dangerous than the category presupposes. In many of these instances, this problem could be mitigated by charging other crimes, such as aggravated assault or attempted homicide in addition to the sexual contact crime. In states where it is possible, consecutive sentences could be imposed to keep the very dangerous perpetrator out of society. Conceptually, nonetheless, some inconsistency is unavoidable under the penetration/contact distinction.

The additional factors in the Michigan statute reflect a desire to punish more dangerous conduct more severely. These factors include:

1. circumstances involving the commission of any other felony;
2. the aiding or abetting of the perpetrator by one or more other persons when (i) the perpetrator knows the victim is mentally defective, mentally incapacitated, or physically helpless, or (ii) the perpetrator uses force or coercion;
3. the perpetrator is armed with a weapon or some item which is used or fashioned in such a manner as to lead the victim to believe, reasonably, that it is a weapon;
4. the perpetrator accomplishes the penetration through force or coercion and causes injury to the victim;
5. the perpetrator causes injury to the victim and knows that the victim is mentally defective, mentally incapacitated, or physically helpless.

The first of these aggravating factors is puzzling since it would seem to include consensual sexual intercourse between two people mutually involved in the commission of a burglary or a marijuana sales transaction. Yet, to limit the category to those situations where the victim of the criminal sexual conduct is also the victim of the felony would be too narrow: it would exclude the situation where the victim's companion is kidnapped or assaulted. The solution seems to be to limit the classification to those situations where the victim is not implicated in the felony.

The second aggravating factor covers gang rape, without respect to physical injury, presumably on the theory that gang rape is generally more terrifying and humiliating to the victim than rape by a sole perpetrator. The terror inherently inflicted by the gang rape, in turn, denotes a high degree of criminal culpability on the part of the perpetrators, a culpability which justifies its inclusion in the highest degree of rape. The dangerousness punished here is the extreme trauma the victim is likely to suffer because the rape is a gang rape.

The third aggravating factor, "armed with a weapon," appears to cover situations where the perpetrator has a concealed weapon about which the victim knows nothing. It could also cover situations where the victim knows the perpetrator has a weapon, but she is not threatened with its use or has no reason to believe the weapon might be used against her if she fails to comply with a demand for sexual intercourse.

Arguably, the very presence of a weapon on a person engaging in sexual intercourse might be regarded as conduct dangerous enough to require its inclusion. The very presence of a weapon, if known to the victim, is apt to be sufficiently coercive to cause her submission without any overt "use" of the weapon. Thus, requiring the perpetrator to "use" the weapon to accomplish the sexual conduct may set too narrow a standard in view of the inherent dangerousness and coerciveness of the possession of a weapon. On the other hand, the existence of the weapon must be known to the victim in order to invoke this rationale. Otherwise, the person who has sexual intercourse while in the possession of a forgotten pocket knife will be liable for the first degree crime even though the existence of the pocket knife was unknown to the victim and even though there were no other aggravating factors.

The fourth aggravating factor, which requires personal injury occurring through "force" or "coercion," limits the injury to the victim. The standard is here narrower than in the Model Penal Code, which covers injuries to others as well. If the perpetrator inflicts personal injury upon a companion of the victim, then the perpetrator would seem to be dangerous enough to warrant charging with the first degree crime.

The standard for "personal injury" under the Michigan statute, unlike the Model Penal Code standard, is very broad. It includes bodily injury, disfigurement, mental anguish, chronic pain, pregnancy, disease, or loss or impairment of a sexual or reproductive organ. Some argument might be made that this standard is so broad as to include all criminal sexual conduct. Arguably, there is always some degree of mental anguish for a victim of rape. The reason rape is punished in the first place is that

rape is emotionally traumatic to the victim. If the standard were to be applied only to cases of extraordinary mental trauma, then the punishment depends upon the particular emotional makeup of the victim, rather than on the dangerousness of the perpetrator's conduct. One victim may react to a less dangerous rape with considerably more mental anguish than another victim subjected to a more dangerous rape.

Much dangerousness of conduct no doubt takes place on too subtle a level, as it is communicated by body language, tone of voice, or facial expression, to be delineated in terms of perpetrator conduct. The only way to capture this dangerousness is to measure it in terms of victim response. And it does seem reasonable to assume that victims of more dangerous rapes will suffer more severe mental anguish than other victims. The problem here is to establish standards to determine whether the mental anguish is severe enough to become a distinguishing factor.

As a practical matter, if the perpetrator's conduct does not sufficiently explain the victim's history of emotional difficulty and makes the jury perceive her extreme mental anguish as the results of events other than the rape, then there is unlikely to be a conviction under the first degree crime. The inclusion of mental anguish does, furthermore, mean that the prosecutor will frequently be able to justify the charge of the first degree crime, thus facilitating the negotiation of a plea to a lower degree.

The inclusion of pregnancy as an aggravating factor presents an odd dilemma. To the extent that its inclusion might affect the perpetrator's conduct, it would seem to encourage oral or anal penetration in place of vaginal penetration in order to avoid the possibility of a pregnancy. The inclusion of pregnancy may also theoretically encourage rapists to take some birth control precautions, either through use of a prophylactic or through withdrawal prior to emission. To this extent, the inclusion of pregnancy serves a valid purpose since the dangerousness to the victim of an unwanted pregnancy, both in physical and emotional terms, is generally serious enough to warrant the charge of the first degree crime. The perpetrator's recklessness in allowing for the possibility of pregnancy, with its attendant dangers for the victim, is thus regarded as a higher degree of the perpetrator's culpability, much as gang rape is so regarded.

The fifth aggravating factor is personal injury which occurs with the knowledge that the victim is mentally defective, mentally incapacitated, or physically helpless. This factor does not appear tied to the dangerousness of the perpetrator's conduct in terms of either physical injury or emotional distress to the victim. The mentally defective victim may be the victim least likely to suffer trauma if the nature of the crime committed upon her is but dimly perceived by her. Likewise, the victim who is mentally incapacitated, perhaps through drugs, is also less likely to suffer severe emotional trauma. The likelihood of serious physical injury also seems to be less in these situations. Only where the victim is physically helpless, yet fully cognizant of what is happening, is there apt to be an aggravation of emotional trauma which justifies its inclusion in the first degree crime. The inclusion of mental defectiveness, incapacity, or physical helplessness of the victim as an aggravating factor can be justified only by a policy intended to protect those people least able to prevent the crime against them.

2.9 The Washington Approach

Like Michigan, Washington divides rape into different degrees with different penalties intended to punish more severely those rapes which reflect brutality or serious threats to public security. Here, however, the word "rape" is retained, although defined to include substantially what is punished as penetration under the Michigan law. The Michigan contact crimes, of the second and fourth degrees, are not included in the Washington law.

The aggravating factors in the Washington statute are quite similar to those of Michigan. The first degree factors include:

(1) use or threat of use of a deadly weapon;

(2) kidnap of the victim;

(3) infliction of serious physical injury upon anyone;

(4) felonious entry into the building or vehicle where the victim is situated.

The second and fourth factors are included within Michigan's "commission of any other felony." The third factor is similar to Michigan's except that it includes injury inflicted to anyone, rather than solely on the victim. While the first aggravating factor is similar to Michigan's, Washington's degree structure does not take into account gang rape.

The second degree of rape in Washington is a catch-all category: it includes penetration accomplished by forcible compulsion or incapacity to consent by reason of being physically helpless or mentally incapacitated. The third degree includes all penetration where the victim did not affirmatively consent, where such lack of consent was clearly expressed by the victim's words or conduct, or where there was a threat of unlawful harm to the property of the victim.

The structure of the second and third degrees, unlike the aggravated first degree, does not depend upon dangerousness in addition to the rape itself. Instead, they depend upon the state of mind of the victim. In the second degree, the victim is placed in fear or is mentally incapacitated. In the third degree, the victim does not give affirmative consent; there is no necessary element of fear.

The use of degrees, whichever factors are seen as aggravating, probably is more important for the flexibility it gives prosecutors in charging crimes and negotiating pleas than in influencing the perpetrator's conduct. In fact, if there is no influence on the perpetrator's conduct, i.e., if the nature of the crimes committed remains unchanged despite the creation of aggravating factors, then the only reason for the use of degrees is to facilitate the negotiation of pleas and to encourage conviction by providing for a lesser-included offense where juries perceive perpetrator conduct as insufficiently culpable to warrant severe punishment. In this light, it does not matter which factors are selected as aggravating, as long as they are generally consistent with notions of culpability.

2.10 Penalty Structures

Debate concerning the question of the appropriate punishment for rape has frequently been associated with the issue of whether to create degrees of the crime. The severity of penalty structures for rape has also been symptomatic of a larger national debate on sentencing which has raised philosophical and pragmatic issues with regard to retribution, rehabilitation, and deterrence. In the specific context of rape, this debate has often centered on the relative effectiveness and equity of treatment programs for sexual psychopaths versus lengthy or mandatory prison sentences.

Apart from this philosophical debate, significant discussions have also occurred with regard to such issues as possible jury nullification in rape cases, and the use of death penalties in such cases. Regardless of how a state legislature has generally determined its sentencing philosophy on its structure of rape, these issues might be usefully addressed under this section of the report.

One reason suggested for low conviction rates in jury trials is the punishment generally associated with the crime of rape. Traditionally, the statutory punishments prescribed for rape have been severe; in most states a defendant convicted of rape faced either a maximum term of life imprisonment or the death penalty. Unless the state's case is very strong and the facts are practicularly heinous, juries seem reluctant to convict and, by so doing, expose the offender to such severe punishment. If there is evidence that the victim had "assumed some of the risk" of the rape by her prior promiscuity or imprudent behavior, the jury might acquit rather than call the defendant's assault a "rape." However, where the jury has a choice of convicting the defendant for rape or another less serious type of assault, they might convict on the lesser charge. Kalvin and Zeisel reached this conclusion after examining jury decision-making in 72 rape trials:

> . . . the jury chooses to redefine the crime of rape in terms of its notions of assumption of risk. Where it perceives an assumption of risk the jury, if given the option of finding the defendant guilty of a lesser crime will frequently do so. It is thus saying not that the defendant has done nothing, but rather that what he has done does not deserve the distinctive opprobrium of rape. If forced to choose in these cases between total acquittal and finding the defendant guilty of rape, the jury will usually choose acquittal as the lesser evil.[13]

This is an example of a concept called "jury nullification" where the jury will acquit a defendant who is technically guilty of the crime because they are unwilling to enforce the law. To facilitate the conviction of defendants who do commit rape, regardless of the naiveté or foolishness of their victims, it may be appropriate to lessen the penalties for rape. If the jury does not assume that conviction means extreme punishment, they may be more willing to reach a verdict based on the facts.

This concept of jury nullification fits logically with the redefinition of rape into various degrees.

Not all rapes are identical. In a continuum of offenses one could clearly distinguish between those cases where a stranger rapes a stranger and commits grievous bodily harm, and cases where a rape evolves from a dating situation and results in no injury. It is only logical that the penalty structure reflect this continuum and, thus, in those states which have different degrees of rape, there are different penalties for each degree. A jury, by choosing between lesser-included degrees of rape, would not only be defining the seriousness of the rape, but indirectly assessing an appropriate punishment for the crime.

How severe the punishment should be for a rape of any degree is a difficult philosophical and political question. Depending on the definition of the crime, it is possible that the lowest degree of rape be a misdemeanor without the possibility of a prison sentence. The highest degree of rape could result in a possible maximum life imprisonment or even the death penalty. Some states have devised legislation which prescribes the possibility of prison for each degree of rape, but mandates a certain commitment to prison for only the most serious degree.[14] This would provide the court or the jury with a range of dispositions which would reflect the range of criminal conduct that can be classified as rape.

The possible provision of a death penalty for rape cases raises serious problems that should be mentioned. Several comprehensive studies have clearly suggested that historically the death penalty has been assessed in a systematically discriminatory fashion.[15] A high correlation has been found between the imposition of the death penalty for rape and the race of the offender and victim, i.e., between black males and white females.[16] Arguably, if the statistics are accurate, the problem may reflect racial issues that transcend the crime of rape. In extending the death penalty to rape cases, legislatures should be aware of the historical pattern of its implementation.

A range of penalties tied to degrees of rape provides significant advantages to the prosecutor. Where rape was traditionally defined in a single degree, the prosecutor lacked flexibility in the filing and plea bargaining of cases. Where he charged cases as rape, he would often reduce the charge to an assault or other crime in return for a plea of guilty. Alternatively, he would file the charge as an assault and gain a conviction for a crime that did not reflect the reality of the case. Since cases were difficult to win and reduction meant calling the crime something other than rape, prosecutors were often reluctant to file a case as rape unless it was extremely strong and the reduction was unlikely. This inflexibility leads to either a very conservative filing policy where few rape convictions were achieved, or to convictions to lesser unrelated crimes which never reflected the seriousness of rape.

With several degrees of rape available to a prosecutor as well as to a jury, there is a possibility of plea bargaining without depreciating the seriousness of the crime. A first degree rape could realistically and pragmatically be reduced to a second degree rape; this might allow a significant range of punishment to the judge and still have the charge reflect the act.

To the extent that rape sanctions can be considered apart from the general debate regarding punishment, deterrence and rehabilitation, it follows logically that penalties be associated with the seriousness of the offense. This will increase the potential for jury convictions and realistic plea bargains; the defendant will be convicted of a crime which approximates the seriousness of his criminal behavior and receive a sentence appropriate to his criminality.

NOTES

[1] See generally Dworkin, Roger. "The Resistance Standard in Rape Legislation," *Stanford Law Review* 18: 680–689, February, 1966.

[2] Ibid., at 682.

[3] Model Penal Code (Tentative Draft No. 4, 1955) Comment to S207.4 which appeared as S213.4 of the final 1962 draft.

[4] Ibid., S213.1.2.

[5] Morgan v. D.P.P. (1975) 61 Cr.App.R. 136. See also Smith, J.C. "The Heilbron Report," *The Criminal Law Review* 97–106, February, 1976.

[6] A copy of the Michigan Criminal Sexual Conduct Act is contained in Appendix C.

[7] For the provisions of the Washington Statute see Appendix C.

[8] For the provisions of the Wisconsin Statute see Appendix C.

[9] Michigan Criminal Sexual Conduct Act, S520a(g).

[10] The State of South Australia recently became the first common law jurisdiction to eliminate the spousal exclusion from its rape statute.

[11] Model Penal Code (Tentative Draft No. 4. 1955). Comment to S207.4. See Appendix B.

[12] See Appendix C.

[13] Kalvin, H. and H. Zeisel, *The American Jury*, University of Chicago: Chicago, 1966, 254.

[14] Washington, for example, R.C.W. S9.79.170(2).

[15] See, for example, the studies noted in Bedau, H. (ed.), *The Death Penalty in America* rev. ed. Doubleday: New York, 1967.

[16] See Wolfgang, Marvin and Marc Riedel, "Race, Judicial Discretion, and the Death Penalty," *The Annals*, 407: 119-133, May, 1973.

CHAPTER 3. PROOF

Proving the crime of rape necessitates the presentation of evidence which establishes beyond a reasonable doubt each and every element of the crime. While rape statutes differ from state to state, there are generally three elements that must be proven: (1) that a sexual assault, through penetration or other contact, did occur; (2) that the sexual assault occurred through force or without the consent of the victim; and (3) that the sexual assault was accomplished by the defendant. The types and amount of evidence required to establish these elements are generally regulated by a standard scheme of evidentiary rules which apply to all criminal cases. In rape cases, however, a special set of rules have also been erected which makes the trial of a rape case somewhat different from that of the normal felony.

The special rules for rape have evolved from a belief that rape complaints are easily proven, often falsely made, and very difficult to defend against. Critics of these rules argue that they prevent the conviction of rapists because they deter victims from reporting and create insurmountable barriers of proof for prosecutors. Defenders of these rules argue that they are necessary to protect innocent defendants. This chapter will explore rules affecting corroboration requirements, cautionary instructions, psychiatric evaluations of victims, the use of the polygraph, and the admissibility of the victim's prior sexual history as evidence. The discussion will address the question of whether the nature of rape provides a special rationale for its unique treatment within the criminal law.

3.1 Evidence of Prior Sexual History

Perhaps the most controversial facet of the rape trial and the issue which has received the most public and legislative attention is the defendant's use at trial of the victim's prior sexual history. There can be little question that this evidence is important to most defense strategies and often devastating to the state's case. The reasons are obvious. The victim who fears that her past sexual activities may be exposed in public is less likely to report her rape and pursue prosecution. Furthermore, if such evidence is exposed at trial, it diverts jury attention from the rape to the character of the victim. Such evidence allows defendants to suggest that the intercourse was consensual or that the victim "asked for it" because of her character.

For evidence to be admissible, it must be relevant or tend to prove some aspect of the case. Prior sexual history evidence, which could cover a wide range of activity from previous marriages and pregnancies to living arrangements and use of contraceptives, is arguably relevant to a number of issues that can be raised at trial. These include a determination of whether the victim consented at the time of the alleged intercourse, whether her testimony is credible and whether the defendant is, in fact, the rapist. Each one of these points requires separate analysis.

a. *Consent.* Where the defendant seeks to demonstrate that the intercourse did not constitute rape, the court must determine whether evidence of the victim's prior sexual history is relevant or helps to prove whether she did or did not consent. The defendant's argument is a simple one: a general propensity to consent to sexual intercourse, established by prior acts, makes it more likely that a woman will consent on any given occasion. Arguably anything which makes it more likely that she consented to intercourse with the defendant is relevant to his assertion and, therefore, her prior sexual history should be admissible.

The defendant might use the following example to press his point. Two women go out on dates. One has sexual intercourse on the first date and subsequently with virtually every person she dates; the other is the same age, dates with the same frequency, but is a virgin. If one were to predict which would be more likely to consent to intercourse with her date on that evening, one would predict that the first would consent and the second would not. Where each date has been charged with rape and the first alleges consent, he would ask that evidence of the

victim's prior sexual history be admissible. The victim in the second case might even argue that her lack of sexual history be admissible to demonstrate that consent was unlikely.

This type of evidence which tends to show a propensity to do certain things has been divided by the law into two parts. The first part concerns evidence of specific prior acts which suggest the probability that other acts will occur. In the context of rape, this evidence would include evidence of specific incidents of prior sexual history with names, dates and places brought forth for jury consideration. Generally, the law has not allowed this type of evidence in any trial, although there are exceptions. This is probably based on a recognition that human behavior is far too complex to allow for any great correlation between past behavior and behavior in respect to a particular event. Despite the logic which suggests that the first woman is more likely to consent, her prior activities do not prove that she did consent on that night. Furthermore, the virginity of the second victim does not establish the fact that this time she did not consent.

A more accurate assessment of the possibility of consent would require a thorough exploration of prior incidents and a comparison with the night in question. So many potential factors would have to be examined to accomplish this assessment that it would divert the real concerns of the court—the incident on the night in question. Since the criminal trial could indulge in only the crudest analysis of human behavior, such specific reference is not normally allowed.

A second category of prior sexual history evidence does not pertain to specific incidents of unchastity, but to a general reputation in the community for promiscuity. Courts which do not allow reference to specific acts have often allowed what is called "general reputation evidence." This evidence is obtained by questioning someone knowledgeable as to the general view of the victim's chastity in the community in which she lives. Arguably this type of evidence might be even less reliable than specific information as a means for concluding whether the victim did consent on a particular night. The circumstances under which she "earned" this reputation are specifically not explored, so the trier of fact cannot begin to judge the probative value of this reputation to the specific events of the alleged rape. Furthermore, this type of evidence has come under recent attack because it is questionable whether Americans stay in their communities long enough to develop reputations which are likely to become known to neighbors.

The reliability of these two types of evidence can be weighed by the trier of fact. However, what standard of relevancy should be applied? How relevant is relevant enough for the evidence to be considered? The Federal Rules of Evidence define relevant evidence as that which has:

> any tendency to make the existence of any fact that is of consequence to the determination of the action more probable than it would be without the evidence.[1]

Taken literally, this standard for relevancy means that even the lowest probative value establishes relevancy. Even if the jury has inadequate information to determine the weight to give prior specific acts or even general reputation evidence, arguably they should consider this information because it may have *some* relevance.

The importance of prior sexual history information has too often been assumed. Until recently, the process of predicting future sexual behavior based on past sexual acts has rarely been carefully scrutinized. Rather, the discussion has been diverted by traditional notions of women and chastity which has placed great weight on female character as a predictor of sexual activity. A classic statement which exemplifies this judgmental perspective is found in a nineteenth century case:

> . . . are we to be told that previous prostitution shall not [be] one among those circumstances which raise a doubt of assent? That triers should be advised to make no distinction in their minds between the virgin and a tenant of the stew, between one who would prefer death to pollution and another who, incited by lust and lucre, daily offers her person to the indiscriminate embraces of the other sex? . . . And will you not readily infer assent to the practiced Messaline in loose attire, than in the reserved and virtuouos Lucretia? . . . It has been repeatedly adjudged that in the same view you may also show a previous voluntary connection betwen the prosecutrix and the prisoner. Why is this? Because there is not so much probability that a common prostitute or the prisoner's concubine would withhold her assent as

> one less depraved, and may I not ask, does not the same probable distinction arise between one who has already submitted herself to the lewd embraces of another, and the coy and modest female severely chaste and instinctfully shuddering at the thought of impurity? Shall I be answered that both are equally under the protection of the law: That I admit, and so are the common prostitute and the concubine. If either have in truth been feloniously ravished the punishment is the same, but the proof is quite different. It requires that the stronger evidence be added to the oath of the prosecutrix in one case than in the other.[2]

Here is the obvious bias of the law in favor of the pure and virtuous, and not a consideration of the probable relevance of prior sexual acts. Quite the opposite perspective is summarized by a more recent Kentucky Court:

> Many courts have expressed the opinion that no inference can be logically drawn that the prosecutrix voluntarily yielded to the defendant upon the particular occasion from the fact that she had previously submitted to the embraces of other men, hence that it is incompetent to prove any of them.[3]

Ultimately, perhaps, relevancy is a matter of opinion. Some, for example, believe strongly that the fact that a woman is a prostitute is obviously relevant to whether she consented; others feel it is just as obvious that there is no connection between the facts of prostitution and consent in rape cases. Fortunately, the law wrestles with the problem in a more complex and sophisticated way.

b. *Policy considerations regarding exclusion.* Even if evidence might be logically relevant it is not automatically admissible. Its probative value must be weighed against various policy interests that may outweigh its relevancy and preclude its admissibility. Relevant evidence, for example, will be excluded if: (1) it presents a substantial likelihood that the jury's prejudice will be aroused, (2) it would unduly confuse or mislead the jury, (3) it would take an undue amount of time to present, or (4) it would unfairly surprise someone who did not have reason to anticipate that the evidence would be presented.

If the probative value of the evidence is outweighed by its prejudicial impact, then the evidence will not be admitted. A common example of this type of evidence in a criminal case occurs when the state has information that the defendant has habitually engaged in bad conduct. Despite the possible relevance of this information, it is normally excluded lest the jury convict the defendant, not on the facts of the case at hand, but on the sense that he is a bad person. With regard to the prior sexual history of the victim, it is quite clear to all parties that such evidence is very prejudicial to the state's case; that is the very reason why the defense wants its admission and the state seeks to keep it out. Kalvin and Zeisel concluded that the jury "closely and often harshly, scrutinizes the female complainant and is moved to be lenient with the defendant whenever there are suggestions of contributory behavior on her part." This study suggested that the jury was so prejudiced that they acquitted the defendant in the same case that the judge would have convicted. The policy judgment which shields juries from prejudicial evidence might thus be applied to evidence of prior sexual history.

Whether or not the evidence is as inflammatory and prejudicial as many believe, the evidence does open the door to lengthy examination of issues which are, at best, peripheral to the case. Trying the victim for her lack of chastity or her marginal reputation in the community diverts the jury from the issue of the actions of the defendant and the victim at the specific time alleged in the criminal complaint. Faced with either specific evidence of past promiscuity or general character evidence of unchastity, the state may be forced to call rebuttal witnesses who can allege that the victim has a good character and is not obscenely promiscuous. Since chastity is a changing concept that does not have the obvious meaning it had in the nineteenth century case quoted above, the jury will be bombarded with evidence that is likely to confuse and mislead rather than help explain the incident in question.

The prior sexual history of the victim is important only because rape has been defined in terms of consent. Since a traditional element of rape is lack of consent, evidence of prior sexual history, arguably relevant on consent, may be admissible in some situations. Where rape is defined in terms of conduct which presumes lack of consent on the part of the victim, consent is thus irrelevant and evidence of prior unchastity is inadmissible.

c. *Prior sexual conduct with the defendant.* The question remains whether prior sexual conduct with

the defendant should be treated differently than general evidence of lack of chastity. Arguably evidence of prior consensual activity with the defendant has more probative value than evidence of a general lack of chastity or specific acts with other men. There would be fewer variables which might differentiate between prior consensual activity and the intercourse in question. On the other hand, such evidence would be likely to have greater prejudicial impact on the jury for they might argue that the woman has not really been harmed since a similar, though not identical, incident occurred consensually in the past.

Prior sexual activity with the defendant may very well be a special case of prior sexual activity in general. The probative value and predictive relevance seems higher and more important for the defendant to establish. Nonetheless, the details of the prior incident may be very different from the incident alleged and the probative value may return to mere statistical relevance.

d. *Credibility.* Even where consent is not an issue, evidence of the victim's prior sexual history may be considered on the question of the victim's general credibility. This may be premised on the dubious assumption that the unchaste woman is more likely to lie. If this were true there would be no reason to isolate the admission of this evidence to rape cases. The Washington Supreme Court has pointed out that if a witness's reputation for chastity somehow does affect here reputation for veracity, then the question of her chastity could logically be raised in all cases where there is a female witness. This argument was rejected by the court.[5]

However, the possibility must not be overlooked that the evidence might be used for a more limited purpose than a general attack on a woman's credibility. The evidence may be relevant in a rape case because the unchaste woman is believed to be more likely to lie about her sexual conduct, even though she may be less likely to lie about other matters such as a robbery or burglary. Here a probability is assumed: the unchaste woman is more likely to claim that she did not consent, when in fact she did, than is the woman who is chaste. Arguably the reverse is true. A sexually active woman might be less likely to deny consent than the inexperienced woman who may regret an indiscretion.

Once again, even assuming that the argument was important at a time when chastity was a significant concept, it is unclear if its logic is applicable today. It is estimated, for example, that more than half of all women have intercourse before the age of 20. It seems incredible to argue that, as a result of this experience, they are presumed to not tell the truth.

e. *Bias or motive to lie.* Other issues of credibility are resolved with more difficulty. In any criminal case, the defendant is permitted to introduce evidence to demonstrate that a witness has a bias or motive to lie with respect to the particular charge. This bias or motive may have a sexual component regardless of the crime for which the defendant is charged. For example, a witness testifying against a bank robber can be impeached by showing that he had sworn revenge against the accused. It may be that the revenge evolved from the impregnation of the witness's wife or unmarried sister by the accused. It may be a coincidence that the motive for lying is sexually based; surely the nature of the motive should not preclude its admission.

Possible bias against the defendant by the victim might have a sexual component that should be brought out. For example, if the victim had a sexual relationship with someone other than the defendant and thereby became pregnant, she might accuse the defendant of rape to protect her lover. The motive to protect the lover and explain the pregnancy would be important for the defendant to explore. If the victim and defendant had had a prior relationship which was terminated by the defendant, the victim might seek revenge by accusing him of rape. Once again, evidence of their prior relationship would be relevant to the issue of motive or bias.

Additionally, if a victim volunteers information about her past sexual history while on the witness stand and the defense can prove that she did not tell the truth, she may be impeached. For example, if the victim claims she is a virgin, but the defendant can prove that she is a liar by proving that she is not a virgin, he can introduce relevant evidence. The purpose of the evidence is not to show that she is promiscuous, but to show that she has lied. The jury should be instructed on the distinction, yet in terms of jury bias, the damage is probably already done.

It is important to note that the use of prior sexual history evidence for purposes of demonstrating bias or motive is consistent with general evidentiary rules. In this respect rape is not singled out; a limitation of such cross-examination would, ironically, create an exception for rape.

f. *Identification of the defendant.* Prior sexual history evidence may be relevant on the issue of the defendant's identity as well as on the issues of consent and credibility. Where, for example, the defendant presents an alibi defense, claiming that he was not the person who raped the victim, he might try to show that the victim was with someone else at the time of the alleged act. Such evidence might include reference to prior sexual conduct. Surely if the victim were pregnant or had contracted venereal disease or had semen present in her vagina, the defendant would have the opportunity to suggest that these indications of intercourse could be attributed to a liaison with someone else. To do this, he might identify opportunities for the victim to have had intercourse with someone else. Once again, this type of evidence could be used in cases other than rape. What is established is who, other than the defendant, may have had sexual relations with the victim, not whether she has a good or bad character. Inevitably, of course, the evidence serves more than one purpose for the defense.

g. *Recent trends.* Many state legislatures have attempted to grapple with the difficult issue of how to control the admissibility of prior sexual history information. Generally, while allowing its admissibility where it is important to the defendant's right to prove his innocence, these legislatures have attempted to eliminate its use as a tool for victim harrassment or as an impossible barrier to jury convictions.

Twenty-two states have recently enacted laws which control to some extent the admissibility of evidence of the rape victim's prior sexual conduct. About one-fifth of these statutes simply codify restrictive laws already devised by state courts. The remainder impose some restriction on the admissibility of such evidence beyond those imposed by their state courts. Some states make procedural changes on how such evidence will be considered by the court. Some states establish a presumption against admissibility, but leave the decision to the trial court. In each of these 22 states, however, the courts maintain discretion to determine the relevancy and admissibility of the evidence.

Other states, such as Michigan, Washington, and California, remove the court's discretion by clearly prohibiting introduction of this evidence in all but very limited circumstances. These statutes have met with substantial criticism by defense attorneys and civil libertarians who assert that the prohibition of such evidence may be unconstitutional. They suggest that cases will arise where such evidence is relevant and the prohibitions will prevent the courts from judging the relevance. These states, however, do not exclude the evidence in all instances. Michigan, for example, allows the use of the evidence to explain the existence of pregnancy, semen, or disease. Washington permits this evidence only on the issue of consent. California prohibits its use on the issue of consent, but permits it in some instances on the issue of victim credibility.

Unfortunately, only a few of these statutes have been tested, and then only in a preliminary way on the issue of their constitutionality. Since this is such an important and controversial topic, the constitutionality of any limitations should be addressed.

h. *Substantive constitutional issues.* The constitutional argument against a limitation of the scope of evidence admissible at trial concerns the Sixth Amendment rights of the defendant. The Sixth Amendment guarantees to all criminal defendants the right to confront his accusers; this essentially guarantees the right to cross-examination. To the extent that legislative change restricts the scope of the defendant's possible cross-examination, i.e., inquiries into the victim's prior sexual conduct, it arguably restricts this fundamental constitutional right.

There is no constitutional right to irrelevant information. Thus, to the extent that the legislature is declaring certain types of evidence irrelevant, the defendant would not have a constitutional argument to have it admitted. If the evidence is relevant, and the legislature says that it is inadmissible because its probative value is outweighed by various policy arguments, it can be argued that the defendant has no right to have all relevant information admissible. Heresay evidence, for example, is routinely excluded from criminal trials despite its potential relevancy; it is argued that its probative value and unreliability make it inadmissible. Furthermore, communications between doctors and patients, and between lawyers and clients, are privileged and inadmissible despite the fact that they may be relevant. Here, there is a strong public policy to facilitate this communication even at the price of excluding potentially relevant evidence.

The strength of the defendant's constitutional attack on the restriction of prior sexual conduct evidence depends on the nature of the evidence and the purpose for which he seeks its admission. As indicated above, evidence which tends to show general

behavioral patterns or character in the community has so little probative value that the policy to restrict its use would probably prevail. On the other hand, prior sexual history evidence used to suggest a victim's bias or motive is universally admitted for purposes of cross-examination despite its potential prejudicial impact.

In assessing the defendant's Sixth Amendment right to expose witness bias or motive through cross-examination, the Supreme Court has held this right superior to strong policy interests. In a recent case, the Court held that the evidence of a witness's prior juvenile record, which was relevant to the issue of bias, was admissible for impeachment despite the strong public interest in maintaining its secrecy.[6] Whether the analogous state interest in protecting rape victims from harrassment and in encouraging them to report to the police should supercede the defendant's constitutional right remains to be seen. Clearly any such restriction on policy grounds would trigger careful constitutional scrutiny.

The manner in which the restrictive statute is constructed may ultimately determine its constitutionality. The drafters must be cognizant of the various ways in which prior sexual history evidence can be used and the varying legitimacy that this evidence can have in different contexts. Some states have excluded the evidence altogether, some have excluded it on the issue of consent, and others have excluded it on the issue of credibility. Still other states have merely restated the common law rule that the judge will determine its relevancy and admissibility without providing significant guidelines. The total exclusion will undoubtedly be subject to constitutional attack; it is most vulnerable if there is evidence which goes to bias or motive which, in other types of trial, would have been admissible. Statutes which regulate the use of this evidence on the issue of consent are probably least vulnerable to constitutional attack because this evidence is the least probative and, thus, more likely to be outweighed by legitimate policy arguments. Of course, those statutes which do not restrict such evidence, but merely leave total discretion to the judge, will not be challenged; only individual judicial decisions may raise constitutional questions.

i. *Procedural issues.* Most states which have recently considered the issue of limiting prior sexual history information have steered a middle ground between taking all discretion away from the judge or leaving the decision entirely within the control of the judge. In various forms, some discretion is left with the judge, but it is governed by procedural safeguards. These safeguards include the use of a notice motion, an offer of proof, and an *in camera* hearing.

Generally, these procedures provide for the orderly determination of the admissibility of particular evidence. The notice motion requirement essentially forces the defendant to tell the prosecutor and the court in advance of trial of his intention to use certain evidence and to ask that it be admitted at trial. Most statutes require that a written motion and affidavit must be served on the prosecutor 10 days prior to trial. In addition, an offer of proof or depiction of what the defendant will attempt to prove must be provided so that all parties know what is at issue. The notice requirement prevents surprise to the prosecutor, the victim, and the court. The prosecutor can weigh the evidence and determine whether or not he will object to its admission, confer with the victim on its truthfulness, and organize legal argument to oppose it if that is the chosen strategy. The notice requirement also signals the court of the importance of the issue since some judges have tended to assume the relevancy of prior sexual conduct. This procedure encourages judges to act less automatically.

Defense attorneys have objected to such procedural requirements on the basis that it may not be practical to know days in advance what evidence will be available for trial. In fact, the actual trial strategy and available evidence may not be known until the trial commences. If evidence does develop after the period for notice, the court can grant a continuance or, perhaps, the statute can be written so the court can waive the notice requirement if there is a showing that the evidence was unknown and could not have reasonably been discovered in time to comply.

The possibility that such evidence may remain unknown to the defendant raises the question of the prosecutor's obligation to share such information. The law on the state and federal level has generally developed so that the state must provide the defendant with all evidence that could potentially exculpate him. Usually this duty presupposes that the information is admissible, although this standard is unclear. The question remains whether the defense can seek information concerning the victim's prior sexual history from the state who may have better access to the information and its source, the victim. Given the openness of the pretrial hearing regarding admissibility of the evidence, there is a question of the appropriateness of a discovery request from the defense

about the victim's past. Only if the defendant knows what evidence is available can he decide whether or not to press for its admission.

Many states have also provided that the actual hearing to determine the admissibility of the evidence is held in the judge's chambers. After the judge has read the defense motion and, perhaps, the state's reply, he can decide if a hearing is necessary. Several states have legislated that the hearing should not be in public. Such a closed hearing is referred to as an *in camera* hearing. The main purpose of the private hearing is to protect the victim from the embarrassment which might occur if the details of her sexual history were revealed and debated in public. Quite possibly the evidence will be ruled inadmissible and the public may never know about these facts.

Public humiliation of the victim in the pre-trial hearing may serve the same purpose as humiliation at trial. If the evidence is ruled to be admissible, then, of course, it would be presented in the public trial.

Not everyone agrees that it is in the victim's best interest to hold such hearings *in camera*. Without the presence and support of family and friends, many victims find such a hearing to be a more intimidating experience than a hearing held in an open courtroom. It is possible that the statute could be written so that the hearing will be held in camera only at the request of the state or the defendant.

The impact of legislation to limit the admissibility of prior sexual history is as yet unclear. Many prosecutors believe that this statutory action was long overdue and has had a substantial influence on jury trials. For the most part, they believe that the legislation only codified the common law, but put the judges on notice and forced them to be more cognizant of the traditional policies of the court to exclude this evidence. However, some prosecutors have voiced the concern that these elaborate procedures may legitimize the admission of such evidence. Inadvertently, the legislation may tell judges that, if the obstacles to admit such evidence are met procedurally, they can then allow the evidence with a clear conscience. Other attorneys and judges have expressed concern with the ambiguous criteria for admission in some statutes and the constitutionality of certain blanket exclusions.

j. *Some conclusions.* To pass constitutional muster, legislation restricting the admissibility of evidence of prior sexual conduct in rape cases should allow for the impeachment of witnesses in the same way that witnesses could be impeached were the charge other than rape. Minimally, this includes impeachment which shows that the witness has a bias or motive to lie or which shows that the witness lied while testifying about her prior sexual conduct. A lie on the stand about whether she consented to the act charged does not give rise to the need for evidence of prior sexual conduct, since prior sexual conduct has nothing to do with general credibility. In this instance, she is impeached by evidence that refutes her version of what happened.

To the extent that discretion is given to the trial court to admit such evidence when impeachment is sought, notice requirements for a hearing on the motion must be flexible enough to allow introduction of the motion during trial. If the defense cannot bring a belated motion in instances where the information was not available prior to trial, then the state may be required to provide the defense with any possible relevant impeachment evidence so the motion can be prepared. In structuring these procedures, it is important to remember that constitutional considerations place a high value on the rights of the defendant who is subject to criminal penalties. In this arena, the victim has no due process rights.

Beyond these procedural restraints, legislatures have the opportunity to redress what some argue has been an imbalance between the victim and the defendant in rape trials. The use of prior sexual history evidence has deterred victims from reporting, forcing them to drop out of the criminal process, and has led juries to acquit defendants on issues not directly relevant to their guilt. Although rules of evidence were traditionally devised by the courts, the modern trend has been to place this power within the legislature. Rules regarding the admission of such evidence may be a very appropriate place for legislatures to begin their reconsideration of the issues involved with rape.

3.2 Corroboration

Rape corroboration rules have been founded on the assertion Sir Matthew Hale made three centuries ago: rape is "an accusation easily to be made, and hard to be proved, and harder to be defended by the party accused, though ever so innocent."[7] This characterization of rape, coupled with the assumption that jurors are unduly prone to sympathize with rape victims, provides the rationale for the nine states which still require that rape charges be corroborated with some evidence other than the victim's testimony.

The corroboration rules have been subject to significant attack. A sarcastic challenge to the New York rules, since amended, which made conviction very difficult was lodged by a *New York Times Magazine* article in its advice to rapists:

> If you're going to rough up a woman, don't stop until you've raped her; then they can't get you on the assault. If you're going to rape a woman, don't rob her; they might get you on the theft. If you're going to rob a woman, you might as well rape her, too; the rape is free.[8]

This attack suggests the rationale being used to modify corroboration requirements in numerous states.

Except for the crime of perjury, the common law has never required corroborative evidence to support a criminal conviction; even rape was not originally made an exception as it was in respect to other rules. Courts have traditionally relied upon juries to weigh the evidence. It has been generally assumed that the occasional false complaint would be uncovered through the adversary process, with the presumption of innocence serving to protect the defendant.

However, some courts departed from the common law tradition and established special corroboration rules for rape. These requirements are based on the fear that conviction of an innocent defendant for rape is somewhat likely despite traditional safeguards. As a result of this fear, a few states have required that a person cannot be convicted of rape on the unsupported testimony of the alleged victim. Some other states apply their corroboration requirements to special circumstances such as when the victim is a minor, where a belated complaint is made or where the victim's story is inherently improbable.

Among the states which have required corroboration there is significant variation with regard to the kind of evidence which fulfills the requirement. Corroborative evidence is defined as that which tends to confirm the victim's testimony. The courts in Iowa, for example, have looked to the entire "combination of circumstances" as possible corroboration. Most courts have listed specific types of evidence which can be used for this purpose. The District of Columbia Court of Appeals has noted a number of possibilities for corroboration:

"(1) Medical evidence and testimony,

(2) evidence of breaking and entering the prosecutrix's apartment,

(3) condition of clothing,

(4) bruises and scratches,

(5) emotional condition of prosecutrix;

(6) opportunity of the accused,

(7) conduct of accused at time of arrest,

(8) presence of semen or blood on clothing of accused or victim,

(9) promptness of complaints to friends and police, and

(10) lack of motive to falsify."[9]

The type of evidence necessary for corroboration depends on what must be corroborated. Generally, under most rape statutes, there are three elements to the crime of rape: (1) force, resistance or lack of consent, (2) penetration, and (3) identity of the rapist. Some jurisdictions, such as New York prior to 1972 and the District of Columbia, required all three elements be corroborated. More states have required that a lack of consent and penetration be corroborated, but not identity of the rapist. Still other states require some corroboration of any portion of the victim's testimony. No state requires eyewitness testimony.

Lack of consent is usually corroborated by evidence of force or resistance which is usually manifested in physical signs such as the victim's hysteria, flight, torn clothing or injury. Penetration is generally corroborated by medical evidence of sperm, irritation of the sexual organs or pregnancy. Identity is corroborated by evidence of the defendant's opportunity to commit the crime or, for example, the victim's recollection of the identifying details of the defendant's possessions if her recollection can be verified. An admission by the defendant, if clear and unequivocal, can corroborate any of the elements.

Where all three elements of the crime have required corroboration, comparatively low conviction rates have resulted. The strict corroboration rules required under New York's pre-1972 rape statute resulted in very few convictions. In New York City in 1969, for example, there were 1,085 arrests for rape and 18 convictions. A minimal corroboration requirement, however, does not guarantee high conviction rates. Even in states where there is no corroboration requirement, few cases are taken to trial without corroborating evidence. Furthermore, some states without corroboration requirements have erected other barriers to conviction, such as cautionary in-

structions or psychiatric examination of the victim. Thus, regardless of the formal corroboration requirements, an informal corroboration requirement and other screening devices may operate to exclude uncorroborated charges from the criminal justice system. It is only where corroboration requirements are extensive and narrowly interpreted that there appears to be a significant negative impact on the conviction rate.

Whether formal or informal corroboration requirements are justified depends on whether their rationale is sound. The perceived prevalence of false rape complaints, coupled with the perception that juries tend to believe rape victims because of their indignation at the crime of rape, represent the underpinnings of the rationale. False rape complaints are believed to be frequent because there are many motives for such complaints. These motives might include shame and anger at having succumbed to consensual intercourse, blackmail, the shielding of a sex partner that caused pregnancy, a desire for notoriety, or mental instability. It is also believed that rape complaints can be easily falsified. Rape can and does occur without witnesses or the creation of any physical evidence. Once the crime has been completed, there are no necessary traces of its criminal nature.

Because there are so many motives for false complaints, an argument that there are many false complaints may be convincing. This fear is clearly expressed by Wigmore:

> Modern psychiatrists have amply studied the behavior of errant young girls and women coming before the court in all sorts of cases. Their psychic complexes are multifarious, distorted partly by inherent defects, partly by bad social environment, partly by temporary psychological or emotional conditions. One form taken by these complexes is that of contriving false charges of sexual offenses by men. The unchaste (let us call it) mentality finds incidental but direct expression in the narration of imaginary sex incidents of which the narrator is the heroine or the victim. On the surface the narration is straightforward and convincing. The real victim, however, too often in such cases is the innocent man; for the respect and sympathy naturally felt by any tribunal for a wronged female helps to give easy credit to such a plausible tale.[10]

Despite this fear of the false complaint, all available evidence suggests quite the opposite: (1) that there is not a disproportionate number of false rape complaints, (2) that those few complaints which are false are readily screened out prior to trial, and (3) that jury attitudes favor the defendant and not the victim.

It is a fact that few rape complaints lead to a criminal conviction, but this does not suggest that the rate of case attrition is a function of false reporting. Although the police, for example, do not decide to proceed with a substantial percentage of rape complaints (the unfounding rate), this appears to be due to prosecutorial disadvantage in the complaints, not to falsity in the charges. These prosecutorial disadvantages include factors such as intoxication of the victim, a delay in the reporting of the offense, prior acquaintanceship between the victim and the rapist, or refusal by the victim to submit to a polygraph or physical examination. Police have no difficulty in screening out the occasional false charge; if anything, they screen out far more than fabricated complaints.

Even in the event that the police are unable to screen out false charges immediately, it is doubtful that a woman would proceed very far with such complaints in the face of the unpleasantness she must endure to pursue it. A woman wishing to satisfy spite, vengeance, or any other base motive is not likely to accomplish her ends by bringing a false rape charge. By crying rape, she faces personal harrassment and embarrassment and yet is less likely to succeed in securing a conviction than if, for example, she brought any other charge. Without substantial corroboration of her charge, she has virtually no chance of achieving a conviction.

In addition to indications that false rape complaints are screened out of the system, Kalvin and Zeisel, as mentioned earlier, demonstrated that there is actually little jury sympathy for the rape victim. In their study, the jury would have convicted in 3 of 42 cases of "non-aggravated" rape that were examined. In contrast, judges would have convicted in 22 of the cases. Thus, the danger of the oversympathetic jury seems greatly exaggerated.

The corroboration in rape cases ultimately rests on the uniqueness of rape in jury deliberation. This argument assumes that rape charges are sufficiently different from other charges to require a different rule. Given jury attitudes against rape victims, this conclusion does not seem justified. If the jury in a par-

ticular case does have undue sympathy for the victim leading to an unwarranted conviction, the judge has the power to set aside the verdict due to insufficient evidence. Finally, the point must be made that society may be unable to justify a rule which precludes conviction in situations where a crime has been committed, but the very nature of the offense prevents corroborating evidence.

3.3 The Cautionary Instruction

Where corroboration is not required in rape cases, some states have introduced an instruction to the jury which cautions them to exercise special care in evaluating the victim's testimony. The most common form of this instruction reads as follows:

> A charge such as that made against the defendant in this case, is one which is easily made and, once made, difficult to defend against, even if the person accused is innocent. Therefore, the law requires that you examine the testimony of the female person named in the information with caution.[11]

The instruction arose from the writings of Sir Mathew Hale who served as Lord Chief Justice of the Court of King's Bench from 1671 to 1676 and whose writing was published posthumously in 1735. He recounted two cases in which he felt that false charges of rape had been brought by very young girls, although the defendants in both cases had been acquitted without any special instruction to the jury regarding the credibility of rape victims. Hale concluded that juries were more prone to convict in rape cases than in other trials and that they needed to be cautioned against their own biases. As a result of Hale's observations, some of which were cited earlier, the instruction cautioning the jury became common in rape cases. It was first given only where the victim was a minor, but the rule was later applied to all cases of sexual assault.

The cautionary instruction has now been abolished in most states through statute or case law. The instruction was attacked because it seemed to exemplify the contemptuous treatment that rape victims receive from the criminal justice system. Feminists argue that the instruction originated as a statement of general mistrust of women; some cautionary instructions even emphasize that the *female* person in the case be regarded with caution. Prosecutors believe that the instruction has a significant impact on the outcome of rape cases by virtue of implanting doubt within the minds of the jurors.

While many states have banned the use of the cautionary instruction, 13 states still allow its use at the discretion of the trial judge. The judge's decision will not necessarily be reversed for failing to give it. The appellate courts in these states examine the quantity of credible evidence presented at trial and what other instructions are given. They then determine whether it was reversible error for the judge not to give the instruction.

The question of whether the judge was correct in refusing to give the instruction has arisen on appeal very few times. It may be that the instruction is generally given in those states where it is discretionary. If a defendant is acquitted, the state cannot appeal the conviction due to the constitutional protection against double jeopardy. If the judge gives the instruction and the defendant is acquitted, the state cannot appeal on the basis that the instruction was wrongfully given. If the judge refuses the instruction and the defendant is convicted, the defendant would certainly appeal on the basis that the instruction was wrongfully withheld. These consequences may lead judges to give the instruction as a means of protecting the conviction if one is obtained; there is no risk of reversal if the instruction is given, while there is some risk of reversal if they refuse to give it.

Arguments against the use of the instruction can be organized into four categories: historical, factual, judicial, and constitutional. The first three arguments have been successful in state supreme courts, while the constitutional argument remains untested.

a. *Historical argument.* It is commonly believed that the cautionary instruction arose at a time when the defendant could not testify on his own behalf and when, therefore, extra protection of his rights was needed. Although this interpretation is technically correct in that defendants could not testify under oath, as a practical matter, they could and did testify freely without taking the oath. There were other significant differences, however, in the ability of a defendant to defend himself in the seventeenth century. He had no presumption of innocence, no right to an attorney, and no right to compel witnesses to testify. Under these circumstances it might be difficult to disprove a rape charge. Since these disabilities have been removed and defendants now have elaborate protections, the rule is no longer appropriate.

b. *Factual argument.* The factual attack argues that the underlying basis of the instruction is false, objecting to the implied assertion that rape cases which go to trial are rarely corroborated. The Kalvin and Zeisel study suggests that rape charges tend to be better corroborated than other types of crimes. Lack of corroboration occurs just as frequently in trials for non-sexual assault as for sexual assault, despite, one would assume, the more public nature of non-sexual assaults. The rape defendant is more likely to have corroboration of the defense than is the defendant in a narcotics case. In addition, there is more likely to be corroborative expert evidence (e.g., testimony of physicians) in rape cases than in burglary, drunk driving, or assault cases. If the screening process already assures that rape cases must be stronger than other cases to get to trial, there is no apparent need for a universal cautionary instruction in rape cases.

In summary, factual attack on the cautionary instruction asserts that a charge of rape is made with difficulty and easily defended against; few rapes are reported, fewer still are prosecuted, and jury attitudes favor the accused rather than the victim.

c. *Judicial arguments.* The judicial argument against the Hale instruction asserts that the instruction is not the kind of direction which a judge is allowed to give to the jury. Judges traditionally instruct juries on principles of law that the jury is expected to apply to the facts that they find. Judges are not usually allowed to argue a particular side of an issue or suggest a bias. However, the cautionary instruction represents a factual conclusion and not a principle of law and, therefore, it may be inappropriate. The cautionary instruction essentially represents a judicial intrusion into the jury's traditional role of judge of witness credibility. By suggesting that there is something suspicious in the victim's testimony, it directs and biases jury decision-making.

d. *Constitutional arguments.* The constitutional argument against cautionary instructions is based on a denial of equal protection on the basis of sex. Under traditional constitutional arguments, classifications are struck down if they disadvantage a group and there is no legitimate purpose to the classification. The cautionary instruction might be constitutionally deficient because it deprives women quite literally of equal protection of the criminal law. Such deprivation occurs when doubt is cast on the testimony of women as victims of crime merely because of their sex or because of the nature of the crime committed against them. If the discrediting of their testimony leads to a higher acquittal rate for rape than for other felonies, then it can be argued that rape goes relatively unpunished, rapists are relatively free to rape, and women are victims of a crime in higher proportions than they would be had instruction not been given. This argument may be less persuasive in jurisdictions where the instruction is given regardless of the sex of the witness. For example, prior to the rejection of the instruction in California, the instruction was required in every case involving a sex offense even if, as in one case, the victim was a male police officer.[12]

If there is no factual basis for the instruction, there would appear to be no basis at all for the instruction; it would serve merely to encourage acquittals irrespective of the defendant's guilt. Such an argument is somewhat novel, since the victims of crime have never been given standing to bring such an attack under the Constitution. However, recent interest in victims' rights and the Equal Rights Amendment may make the constitutional argument more viable in the future.

Thus, despite the various arguments against the use of the cautionary instruction, the fact remains that some rape charges, like some charges in other crimes, are uncorroborated. To the extent that this increases the risk of false conviction, there may be a need for some type of cautionary instruction. However, the instruction need not be crime-specific to ameliorate the risk; an instruction which could be used in any case in which there is no corroboration would suffice to alert the jury to injustice without suggesting that a particular class of victim or crime is inherently suspect. Eight states have passed specific legislation banning the cautionary instruction specific to rape cases, while many others, like California, have rejected its use through case law. It remains an important issue because it reflects deeply held attitudes throughout the criminal justice system that have undoubtedly prevented the conviction of defendants for the crime of rape.

e. *Psychiatric examinations.* Another alternative to the corroboration rule is the provision for psychiatric examination of complaining witnesses in some states. A number of writers, including Wigmore, have expressed the opinion that all complaining witnesses should be psychiatrically examined as an alternate means of eliminating false rape complaints.[13] This suggestion is premised on a number of assumptions: that there are many false complaints,

that substantial numbers of those complaints arise from mental disorders, and that psychiatry can determine truth from falsehood in this context. While there is no reason to believe that there are more false complaints of rape than of any other type of crime, there is virtually no evidence to indicate what percentage of those false complaints of rape which are made are the result of mental disorder. The belief, however, that such complaints are common had led some courts to permit the ordering of such examinations in rape cases. Although the practice grows out of judge-made law, legislators may be asked to evaluate the practice in view of growing concern with the treatment of rape victims, on the one hand, and the elimination or modification of corroboration requirements on the other.

In those states where such an examination is possible, the order is made at the discretion of the trial judge. No conviction has been reversed for failure to order such examinations, but it should be noted that where the judge orders the examination, the issue will not arise on appeal since neither the state nor the complaining witness could appeal the order if granted. A survey of states made as part of this study suggests that the while the examination is requested with some frequency, it is generally denied.

What the defendant needs to show in order to justify such an order varies greatly with the particular circumstances of each case. Generally, courts require some reason for the examination; for example, the complaining witness had fabricated numerous sexual incidents in the past. The legal standard varies from a "compelling need" to a "substantial showing of need and justification" to "some showing of need." The great breadth of trial court discretion tends to make each of these formulations virtually the same in practice.

In arguing for these examinations, courts have emphasized the defendant's right to confront the witness and the trial court's need for information. Defendants have stressed that the examination can avoid manifest possibilities for injustice raised when the trial judge does not take advantage of the knowledge and expertise that psychiatry and psychology can offer. For these reasons, California considers that the examination may constitute a minimum protection for a defendant charged with a sex offense, particularly if the charge involves child molestation.

Victims and prosecutors have strongly objected to these examinations. For the victim, the examination, as well as the motion to order the examination, may constitute a personal affront as substantial as the assault itself. The examination represents still another indication that the criminal justice system does not believe her and that she is somehow suspect merely because of her sex and the crime that was committed upon her. She may witdraw her complaint rather than be subjected to this gross insult. The District of Columbia Court, in forbidding such examinations, gave these reasons as rationales and additionally pointed out that the availability of such an order opened the door to victim harrassment by the defense. The overall effect, the court believed, was to deter complaints.[14]

Even these arguments presume that such an examination might have some validity. The Oregon Court, for example, rejected a request by a defendant on the basis that: "[i]t has not been demonstrated that the art of psychiatry has yet developed into a science so exact as to warrant such a basic intrusion into the jury process."[15] Doubts surrounding the reliability of psychiatric testimony create the possibility of a battle of experts with psychiatrist pitted against psychiarist. This, in turn, could be expensive for the criminal justice system. Finally, it suggests that sexual assault cases will become a special class of criminal cases decided not by the jury, but by an abdication to doctors.

f. *Polygraphs.* Those who favor psychiatric examinations of rape victims also tend to favor the use of the polygraph (lie detector) as screening devices for false rape complaints. Some even urge that such tests be mandatory and admissible at the defendant's trial. Given the current status of polygraphs as inadmissible without a stipulation by both parties to the criminal trial, as well as the general mistrust of the machine's reliability, it is unlikely that there will be serious consideration of this requirement.

Police, and sometimes prosecutors, do find the polygraph a satisfactory and even effective means to screen untruthful or uncooperative complainants as well as encourage guilty pleas by defendants. The victim who agrees to submit to the test is perceived as more truthful and cooperative than the victim who refuses to submit. A test which suggests truthfulness on the part of the victim can be a bargaining lever against the defendant in plea negotiations.

Despite the potential usefulness of the test, many regard the polygraph as one more device for victim harrassment by both the defendant and the criminal

justice system. Once again, the test may represent the system's suspicion of the complainant because she is a woman and subject to this particular type of offense. Her refusal to take the test may reflect her contempt for this attitude more than her unwillingness to prosecute or lack of credibility.

3.4 Conclusion

Corroboration requirements, cautionary instructions, psychiatric examinations of victims, and polygraph tests all have served to erect special barriers for rape prosecution. While based on assumptions regarding the protection of innocent defendants, they have carved out a special exception to the norms of criminal justice and have essentially assumed falsehood among victims. It is the victim whose word is immediately subject to scrutiny and skepticism. Such a philosophy can only discourage victims from reporting. The risk of false conviction is arguably no greater than in any other felony. Furthermore, the attitudes which have helped erect these barriers have so permeated the criminal justice system that even without statutory or common law safeguards, prosecuion of rape cases too often remains a limited and tentative effort. It is hoped that the present legislative drive to remove these barriers may not only make the proof of rape analagous to the proof for other felonies, but it may change attitudes to facilitate the successful prosecution of the crime.

NOTES

[1] Fed. R. Evid. 401.

[2] People v. Abbott, 19 Wend. 192 (1838).

[3] Crigsby v. Commonwealth, 299 Ky. 721, 725 (1945).

[4] Kalvin and Zeisel, Ibid., 249.

[5] State v. Dorrough, 2 Wn.App. 820 (1970).

[6] Davis v. Alaska, 415 U.S. 308 (1974).

[7] Hale, M. *Pleas of the Crown,* 1736, 635.

[8] Lear, Martha. "Q. If You Rape a Woman and Steal Her T.V., What Can They Get You For in New York? A. Stealing Her T.V." *New York Times Magazine,* 11, at 55, January 30, 1972. See also, Pitler, Robert. "Existentialism and Corroboration of Sex Crimes in New York: A New Attempt to Limit If Someone Didn't See It, It Didn't Happen." *Syracuse Law Review,* 24, 1–37, 1973.

[9] Allison v. United States, 409 F.2d 455 (D.C. Cir. 1969).

[10] Wigmore, J. *Evidence* (Chadbourne rev. ed.) 3A, 924a, 3., 1970. It should be noted that the literature upon which this sweeping statement was based consisted of five case studies from a 1915 textbook and of letters and monographs from four psychiatrists, all dated before 1933, the original year of publication of Wigmore's treatise. Babcock, Barbara, Ann Freedman, Eleanor Holmes Norton, and Susan Ross. *Sex Discrimination and the Law: Causes and Remedies,* Boston: Little Brown, 856, n.45, 1975.

[11] CALJIC No. 10.22 (Cal. Jury Instrs., Crim. 3rd ed. 1970).

[12] The cautionary instruction in California was struck down in People v. Rincon—Pineda 14 Cal. 3d 864 (1975).

[13] Wigmore asserted that "no judge should ever let a sex offense charge go to the jury unless the female complainant's social history and mental makeup have been examined and testified to by a qualified physician." Wigmore, Ibid. (3rd ed., 1940).

[14] United States v. Benn, 476 F.2d 1127 (D.C.C.A., 1973).

[15] State v. Walgraeve, 243 Or. 328 (1966).

CHAPTER 4. SPECIAL ISSUES

Much of the impetus for legal change with regard to rape has emerged from the reports of victims. For many victims, involvement with the criminal justice system has been almost as bad as the sexual assault itself. Rape is a traumatic event in the victim's life, and the demands of the criminal justice system often accentuate and magnify the disruption. The criminal justice system, with its concerns for bureaucratic efficiency, public scrutiny, and the adversary process, has traditionally paid little attention to the needs of victims.

More recently, victims of rape have received significant publicity, and their needs have begun to be addressed or at least discussed by the criminal justice system. First, there is a growing concern for the integrity and needs of the victim. Second, only if the victim is treated humanely can the criminal justice system expect the victim to report the crime and become involved wih the rapist's prosecution.

Possible legislative initiatives with regard to rape victims represent a wide range of protections and services. These include everything from provisions to assure the victim's privacy to the establishment of educational programs for potential victims on how to avoid rape. Legislatures have considered the payment of victim compensation to rape victims, the provision of counseling services, and special training for police officers to improve their sensitivity to victim needs. While legislatures have indirectly attempted to assist rape victims by enacting substantive changes in the rape law, there remain extensive opportunities to more directly assist victims through legislative action.

4.1 Privacy

Public exposure of the intimate details of her rape is often an embarrassing or humiliating experience for the victim. However, the extent of the privacy problem is difficult to assess because local practice varies significantly. In some jurisdictions, for example, probable cause or preliminary hearings are held in small quiet courtrooms. The entire calendar of cases for a particular morning will be of a similar sensitive nature. In other places, especially in urban courts, these hearings occur in crowded and noisy courtrooms overflowing with victims, defendants, and witnesses associated with a wide range of criminal conduct. The victim's experience in testifying in these two environments will differ significantly.

Some prosecutors have a choice in how they will proceed with a rape case that allows some consideration of victim needs. In some jurisdictions, for example, probable cause hearings can be avoided altogether by having the case heard before a grand jury or filed directly into the trial court. These latter options allow the case to be pursued into the felony trial court without the victim exposure to what is often brutal cross-examination at the probable cause hearing. Unfortunately, neither the grand jury or direct filing option is available in all jurisdictions.

In addition, the privacy problems of a jurisdiction may depend upon voluntary mechanisms employed by the local media. Many newspapers and radio and television stations refrain voluntarily from publishing information about the victims of sexual assault, even though by law the information may be a matter of public record.

The volume of legislative activity concerning victim privacy suggests that local practice has not sufficed to provide victims with the privacy they desire when pursuing sexual assault cases. Legislatures have attempted to make pretrial hearings, and trials, private and have attempted to limit media coverage of rape cases. The problem with such legislative attempts is that the victim's right of privacy often conflicts with the public's right to information and the defendant's right to a public trial. Balancing these fundamental interests is a legislative task of utmost delicacy.

The right to a public trial, the right to privacy, and freedom of the press. The Sixth Amendment to the United States Constitution, as well as the constitutions of the various states, guarantees to the defendant the right to a public trial. Interpreting the scope and limits of this right is difficult enough in

view of the multiplicity of conflciting interests in this area, but this difficulty is compounded in the context of a rape trial. Four typical cases based on actual circumstances may serve to illustrate the range of problems which arise:

- The defendant desires a public trial, including the presence of family and friends, but the rape victim wants the courtroom cleared since she feels emotionally unable to testify in front of spectators.

- The 17-year old victim has a number of supporters in the courtroom, many of whom are friends her age. The judge excludes these young women because it is against public morality for them to be exposed to the testimony in a rape case.

- The rape victim has friends, family, and supporters from a rape crisis group in the courtroom. The defendant wants the courtroom cleared because he believes the presence of these people will influence the victim's testimony. His counsel believes that the impact of his cross-examination on the victim will be enhanced if the victim's supporters are excluded from the courtroom.

- Both the defendant and the victim want the courtroom cleared because they do not want public exposure of their intimate lives—the defendant because he finds it highly embarrassing to be on trial for rape and the victim because she may be forced to reveal details of her past sexual conduct. Members of a rape crisis group want to attend to monitor the justice system's conduct of the trial, and a reporter wants to attend to write an article for his paper.

From these four cases it is apparent that the defendant, the victim, the public, and the press all have an interest in whether or not a rape trial is open to the public. The particular interest of these various parties may vary, however, from case to case and may not be apparent simply by virtue of the party's role in the case. Only the press, in its persistent search for public information, has a fixed interest in the public trial. Because of the complexity of these interests, the question as to whose rights prevail in the presence of conflict requires substantial inquiry.

Courts have recognized these various interests and have attempted to balance them, but they have uniformly started from the position that a trial must be public unless there is sufficient reason to limit public access. The underpinnings of the right to public trial are substantial: the defendant's right to a fair trial, the public interest in curbing the power of the courts, and the freedom of the press. The United States Supreme Court has pointed out that the right to a public trial emanates from a distrust of secret trials; such trials historically were used to suppress political and religious dissent. The public scrutiny of trials was seen as a means of controlling the potential abuses of judicial power. By watching their judicial system in action, the public would acquire confidence in their governmental processes and the democratic system would presumably be stabilized. This strong tradition is what courts and legislatures must struggle with to modify the public nature of the criminal trial.

Despite this tradition, courts have generally permitted three limitations on the right to public trial. First, spectators can be excluded if their presence interferes with the orderly conduct of the trial. If there is inadequate space available in the courtroom for all who may want to attend, the right to a public trial does not require that the trial be moved to a space large enough to accommodate all. Furthermore, if the conduct of the spectators is disruptive of the judicial process, they can be removed from the courtroom. Since the orderly conduct of the trial is necessary to preserve the defendant's right to a fair trial, the exclusion of spectators for this reason simply balances his right to a fair and orderly trial against his right to a fair and public trial.

Second, courts permit the exclusion of spectators when it is necessary to protect the public morality. When a case involves a sex offense, for example, young spectators can be excluded if the evidence is likely to involve the recital of scandalous or indecent matters which would have a demoralizing effect upon their immature minds. No matter how this type of language would be interpreted by the courts, it is clear that what is at issue is not the public nature of the trial, but merely the exclusion of a particular segment of the public.

Third, a judge can generally exclude the public to avoid a miscarriage of justice. Such exclusion can occur when a witness is emotionally unable to testify before spectators, especially if the witness is so young that she may be embarrassed if she testifies before

those not concerned with the trial. Some states have taken the further position that, in sex offense cases, the judge can exclude all members of the public, including the press, who have no special connection with the trial. Other states have permitted the press to remain, while excluding the rest of the public on the theory that the presence of the press satisfies the need for the trial's public exposure.

Constitutionally, the defendant's right to public trial is likely to be found superior to the victim's right of privacy. It is likely that due process rights are superior to privacy rights; the possibility of the defendant's incarceration is probably more serious than the possibility, for example, of the victim's embarrassment or emotional breakdown. This issue, however, has never been specifically addressed by the courts. To protect a victim/witness likely to suffer serious harm, the state can dismiss the charges against the defendant; the defendant, however, cannot choose to have his charges dismissed.

The interest of the public in avoiding a miscarriage of justice might be found superior to the defendant's right to a public trial where a particularly distraught witness is unable to testify in public. An appropriate case might be that in which the victim is a minor. The interests of the defendant, the public, and the press might be satisfied by such devices as closed-circuit television, which could monitor the proceedings without interfering with the witnesses' concern that the hearing might become a public show. Care should be taken that the exclusion of the public would be temporary and would not affect the fairness of the defendant's trial.

An alternative solution to this constitutional conflict might be the provision that the victim's testimony be taken by means of a deposition. A deposition allows a witness to testify outside of court and be subject to cross-examination by the defendant. This satisfies the defendant's Sixth Amendment right to confront witnesses against him while allowing the trial to proceed without the presence of the witnesses. Federal law provides that the testimony of the witness may be admitted by way of deposition if the witness is unavailable due to "sickness or infirmity." The deposition is also acceptable if the witnesses refuse to testify at a hearing or trial. Presumably, then, if the victim in a rape case in federal court refuses to testify after being deposed, her testimony can be presented through the deposition.

There are several problems with the use of a deposition as a substitute for live testimony. As a practical matter, the procedure may be usable only for the probable cause hearing in a rape case. A prosecuting attorney is unlikely to proceed to trial if the victim is not personally present; it is unlikely that a jury will convict if they are unable to see the victim and evaluate her credibility. While videotaped depositions might alleviate this problem, its practical use has not been sufficiently tested. Another difficulty applicable to videotapes as well as additional depositions is that the defendant may allege that the deposition was inadequate and, therefore, does not accurately and fully capture the victim's testimony. Arguably, the information available at the time of the deposition was inadequate and further confrontation of the victim would be necessary to fulfill the defendant's Sixth Amendment rights. Thus the defendant may succeed in having the victim called to testify for the preliminary hearing or the trial even if a deposition had been taken. This would be of significant advantage to the attorney and potentially ruinous to the state's case; there would be another record from which to cross-examine the victim and the victim would be forced to recall once again the details of her sexual assault.

Sometimes a victim might seek a public proceeding, perhaps because she expects and would welcome support from friends. In this event, the defendant may want the public excluded. It is well settled that the defendant can waive his right to a public trial, but these waivers have never been legally tested in the face of opposition from witnesses, the public or the press. Some courts evidently do forbid these waivers because of the interest of the public in being present.

In yet another scenario, the victim and the defendant both want a private judicial proceeding, while the press insists upon its right to exercise First Amendment freedoms. In *Nebraska Press Association v. Stuart*.[1] the Supreme Court recently decided that restraints on the press to prohibit publication of information about a criminal case are almost always unconstitutional. The court did not decide whether judicial proceedings could be closed to the press with the consent of the defendant. Since the court underscored the importance of public scrutiny of the judicial process, however, it is doubtful that exclusions of the press from trials will be upheld.

An interesting rationale for upholding the privacy of rape trials can be devised by analogizing the rape

trial to the juvenile court proceeding. The United States Supreme Court has held that, consistent with due process, a state can keep confidential police and court records related to juveniles.[2] There has been virtually unanimous judicial support for protecting the child brought under the jurisdiction of the juvenile court from publicity, even where the juvenile wanted a public hearing. The state's interest in the protection of the young person from the stigma of youthful misconduct is regarded as more important than informing the community how its courts are operating. Whether this state interest in protecting minors is still intact in light of the Nebraska Press Association ruling is questionable. The state interest has also been challenged by the Supreme Court in *Davis v. Alaska*[3] where the confidentiality of juvenile records was characterized as a rather minor interest weighed against a defendant's due process right to confront a witness.

If the ability of the state to protect juvenile proceedings from public exposure remains intact, an argument can be made that a similar ability should exist to protect the victim/witness in a rape trial since she, like the juvenile, is apt to suffer substantial stigma from public exposure of her rape. This argument is particularly strong when the victim/witness is a juvenile.

Conclusion. Statutes which require or allow the judge to clear the courtroom in proceedings involving a charge of sexual assault will undoubtedly be subject to constitutional challenge. To avoid such challenge, California has passed a statute which instructs the judge to clear the courtroom at preliminary hearings in any case at the defendant's request.[4] Under this law, the rape defendant has an absolute right to a private preliminary hearing which prevails over any contrary interests of the victim, the public, or the press. A significant recent use of the statute, until amended, was to preclude attendance of rape crisis advocates who sought to monitor the criminal justice system and lend support to the victim. However, a prosecuting witness may now have a person of her/his choice present while testifying at the preliminary hearing.

The public interest in access to criminal trials is particularly important with regard to rape cases. The changes that are occurring in rape legislation have evolved from the exposure of the treatment of rape victims by the criminal justice system. The monitoring of rape trials and courtroom support of victims will undoubtedly be continued and encouraged by rape crisis groups. It is paradoxical that the movement which seeks to ease the trauma of trial for the victim is itself interested in maintaining the public nature of the trial.

The policy of encouraging public scrutiny may mean that the courtroom could not be cleared even where both the defendant and the victim agree that this is their preference. There is no reason, however, why the legislature could not begin to define the limits of public exposure in a way consistent with the defendant's right to trial and the victim's possible need for privacy.

Privacy of the victim's name and address. Limiting public access to the names and addresses of rape victims has been a topic of significant legislative attention. The debate has recently been dominated by a Supreme Court decision which overturned a Georgia statute prohibiting the publication of rape victims' names.[5] The court held that the press can freely publish information disclosed in public judicial proceedings. If the victim's name and address are contained within the court record, then the press cannot be prohibited from publishing them. The press is seen as the guarantor of the fairness of trials through its scrutiny of the administration of justice.

The Supreme Court suggested, however, that if privacy interests must be served, states might devise a system to keep certain information out of the public record. Prosecutors, for example, could substitute a fictional name, "Jane Doe," for the victim's name in criminal complaints, as could police in their records. This fictitious name, without an address, would appear in all public documents. The true name and address of the victim could be made available to the defense upon a showing of their need for the information. The legislature might further authorize the court, in appropriate circumstances, to instruct the defense attorney to withhold this information from the defendant himself.

Legislation authorizing judges to withhold the address of a rape victim from the defendant upon a motion by the District Attorney was recently defeated in California. Even though the bill directed the court to admit the address into evidence upon a showing that the value of the address to the defendant outweighed the potential danger to the victim, opponents of the bill believed that the address was essential to the right of confrontation. Proponents argued that the defendant's constitutional rights were protected by the provision which enables the defense to show some need for the address.

If the information were not public, but were somewhere published in the newspapers, it is unclear if the victim could sue. The Supreme Court in the *Cox* case prohibited a suit because the information was public and never addressed the issue if the information were not in the public record. Here the victim's right of privacy would be pitted against the freedom of the press; the result may depend on whether the case had been filed or on the public nature of the crime. A legislature might attempt to address this issue by prohibiting the printing of such information or by allowing statutory damages to the victim irrespective of actual injury. Fear of such liability could deter newspapers from the printing of such information; of course, it is this very chilling effect on speech that would force the constitutional challenge.

The legislature could erect different degrees of privacy for the victim and defendant in a rape case. Arguably, the victim is subject to more public stigmatization than the defendant, and thus could be afforded greater protection by controlling access to information or by allowing civil remedies. Once again, however, any attempt to control information will be subject to the closest constitutional scrutiny.

4.2 Victim Advocates

While the criminal justice system and the victim of sexual assault may share the common goal of the prosecution of rapists, they often have separate interests and concerns. The criminal justice system is a beleagured bureaucracy that must be concerned with screening cases based on their strength; with limited resources and a quasi-judicial role, the criminal justice system cannot pursue every case. The prosecutor, for example, does not simply represent the interests of the victim. The prosecutor must be concerned with the available evidence in a case, the possibility of winning at trial, and justice, in the larger sense, which reflects a consideration of the victim, the defendant, and the public generally. The victim, on the other hand, may seek vigorous prosecution regardless of the limited criminal justice resources and a low probability of success. In addition, she may need emotional support and encouragement which the prosecutor is neither trained nor experienced to provide. She may have rights to be protected which the prosecutor compromises in his consideration of his larger role. In order to assure the victim that her interests are being protected, three victim advocate devices have been considered: (1) the private prosecutor, (2) the private attorney assigned to the victim, and (3) the non-attorney advocate.

Private prosecutors. To the extent that prosecutors have been insensitive to the complexity of rape or have inadequate resources to prioritize rapes within their offices, private prosecutors have been considered to assume the role of the public prosecutor. Private prosecution of crimes has been common throughout much of the country, although its major use is at the request of and under the supervision of the district attorney. Under this system, private counsel is paid by the state to "assist" in the prosecution, either because the district attorney is too busy or because there is a conflict of interest. Since rape cases are difficult to win and rape victims require time and energy to prepare for trial, prosecutors may be willing to bring in private counsel to bolster limited resources and prosecute cases which they believe deserve prosecution. Some states even have statutes which permit parties, including the victims of crime, to hire assistant prosecutors at their own expense to aid in prosecution of the crime.

Private prosecution is also possible in some states when the district attorney refuses to file charges or act upon charges filed, or proceeds with incompetency. In these situations, the victim must convince a judge that the district attorney has abused discretion in the handling of the case. The court can then appoint private counsel to prosecute the particular case. In some jurisdictions, this procedure emanates from constitutional authority. In other states, courts have held that this power resides in their inherent power to administer justice.

While district attorneys may welcome assistance in the prosecution of difficult and demanding rape cases, it is unlikely that they would welcome systems that render them vulnerable to charges of incompetency on a case-by-case basis. Prosecutors have traditionally exercised significant discretion; usurption of this power would not only be threatening to the prosecutor, but it might also serve to undermine the organization of criminal justice. From the district attorney's perspective, cases which are prosecuted in the face of district attorney opposition are cases which should not be prosecuted. It is unlikely that the judiciary will want regularly to supplant the discretionary decision-making of the prosecutor with their judgment that a case should be prosecuted. Any judicial standard for appointing private counsel to exercise the duties of the prosecutor would be very

strict. The court would probably have to find a manifest abuse of justice, a finding unlikely in the prosecutor's refusal to file any particular rape case.

The victim's interest in private prosecution stems from her interest in vindication and her sense that the traditional means of prosecution will not, perhaps cannot, give her the attention that she desires. If only a small percentage of all rape reports lead to charges filed by the prosecutor, how can the victim have faith that her case will be vigorously pursued? She probably will not understand the basis of prosecutor decision-making, even assuming its legitimacy, since it is often not explained to her. To the extent that the prosecutor made a correct choice in not filing her case, then private prosecution would only serve her ends rather than the ends of "justice": the defendant might be accused and arrested without any possibility of conviction. On the other hand, to the extent that the prosecutor failed to file the case because inadequate resources were available or because of a bias against the filing of rape cases, private prosecution might provide an outlet for aggrieved victims. The frustration felt by many victims is compounded by the reality that few defendants can be sued for damages in a civil action.

Defense objections have arisen to the use of private prosecutors when private counsel uses information obtained in the criminal process to commence a civil suit. Such an eventuality could be controlled through statutes. It should be noted that although the district attorney is usually immune from charges of malicious prosecution, the private attorney would be hesitant to prosecute unless this protection were clearly extended to him. If such a program is to be encouraged, the private prosecutor should have access to all information and be protected by the law; in essence he should be placed in a position identical to the prosecutor.

Another major problem with private prosecution is its cost. Who should pay the private attorney, and at what rate, are questions that would have to be explored. In general, private prosecution could only be viewed as an occasional remedy for rape victims. It would probably occur in jurisdictions where the prosecutor's office is small, perhaps inexperienced, and surely overworked. Where the hiring of outside counsel would suggest a condemnation of the prosecutor and represent a usurption of his discretionary powers, it is unlikely to be a popular method.

Private representation. Legislative attempts have been made to provide rape victims with private counsel in addition to the prosecuting attorney. In Ohio, for example, private representation of victims is permitted in hearings to determine the admissibility of the victim's prior sexual history. Indigent victims can have counsel appointed for them. Such provisions are novel, since the victims of crime are seldom represented by private counsel unless they are invoking their Fifth Amendment privilege against self-incrimination.

The victim may believe that her interests, particularly with regard to privacy, may not be fully protected by the prosecutor. She may want private representation to argue against the revelation of the court of her name and address, to prevent her from testifying at all on the grounds that it could endanger her emotionally, or to prevent questioning by either the state or the defense regarding her prior sexual history. If she and the prosecuting attorney do not agree on these issues, she may need private counsel.

A recent California case suggests the importance of such representation. In this case there were two trials, the first trial resulted in a "hung" jury, while the second resulted in a conviction. At the first trial, the defense was permitted to inquire into the victim's sexual history in detail; in addition, a cautionary instruction was read to the jury. At the second trial, the victim was represented by an American Civil Liberties Union attorney. Upon the advice of counsel, she refused to answer questions about her prior sexual conduct; in addition, the court refused to give the mandatory cautionary instruction. On appeal, the State Supreme Court overturned the custom of giving the cautionary instruction. Although the result of the trial could not be directly attributed to the activities of the additional attorney, it is clear that the victim's interests were more forcefully represented by private counsel than they could have been by a prosecutor whose role and perspective in the case would be very different.

Since the criminal justice system does not anticipate private representation of witnesses, there are few guidelines as to what attorneys can and cannot do. Much of the effectiveness of private counsel depends upon the cooperation of the prosecuting attorney and court. Such cooperation, however, may be difficult to achieve if the prosecutor regards private counsel as an interloper and the court believes

counsel's presence unnecessarily complicates the proceeding.

The problems of the private counsel arise in two areas: (1) access to information, and (2) standing in the court process. Without informal cooperation or a legislative mandate, the private attorney may have difficulty obtaining information from the police or the prosecuting attorney. Information in the state's records with regard to the victim would appear to be critical for appropriate representation of the victim. Arguably, the entire contents of the police and prosecutor file would be relevant if the attorney were to argue the necessity for his client's testimony about specific matters. In a civil suit, the attorney could arguably subpoena many of these records, but it is unclear how this mechanism could be used in a pending criminal case. Legislation authorizing the presence of such counsel would have to consider the problems of access to information.

With regard to attorney standing, there are several issues that require analysis. To what proceedings is the presence of private counsel appropriate? If parts of the trial were closed to the public, there is question whether private counsel could attend if his client were not involved. If negotiations with regard to evidence, plea bargaining, and jury instructions occurred in chambers, is it appropriate for private counsel to attend? If the trial were public and the private attorney were present, what is the role of the private attorney? The law provides no guidelines with regard to where the counsel could sit or if he could make objections and raise motions. In essence, the criminal trial is a lawsuit between the people of the jurisdiction and the defendant; since the victim is not a party, the role of the private counsel is unclear.

Ideally, the use of private counsel would improve victim representation by the prosecutor. However, the presence of the private counsel may also threaten the relationship between the prosecutor and his chief witness. To the extent that the presence of the private counsel represents a failure of this relationship, then obviously this is a moot point. The required presence of counsel for the victim may create an extra adversarial relationship between the victim and the prosecutor in the criminal trial. The dilemma may be a significant one even if the early experience of such three-party criminal suits were insufficient to draw any conclusions.

The non-attorney advocate. A number of criminal justice agencies across the country have formulated victim assistance programs with non-attorney advocates to assist rape victims in the criminal process. Additionally, hundreds of rape crisis centers outside the criminal justice system fulfill similar functions through both paid and volunteer advocates. The role of such advocates is non-legal, generally they provide emotional support, information, and counseling so that the victim can better understand and cope with her sexual assault and the criminal justice system. These programs raise several significant problems that a legislature might seek to address.

First, just as the private counsel has difficulty obtaining information relevant to his client, so do rape advocates. While the advocates located within police departments or prosecutor offices presumably have access to case files, advocates outside the system have no clearly defined role vis-à-vis the criminal justice system. They may not have access to information that would be helpful in assisting the victim. While the exchange of information is often done informally, there are no guidelines for dissemination of sensitive but relevant information for the victim advocate.

A second and related problem involves the role of the victim advocate. Often the adocate is privy to information about the victim by virtue of the counseling relationship. Recently, there have been attempts by defense counsel to subpoena these advocates or to request copies of their reports. To the extent that the advocates work in police departments or prosecutor offices as adjuncts to official processes, this information may be available to the defendant in much the same way that investigator notes might be discoverable. On the other hand, to the extent that these advocates work as counselors, there is an interest in keeping this information confidential. The law protects the communication between attorneys and clients, clergyman and confessioners, and doctors and patients. Where advocates are psychotherapists, the communication with patients may be protected, but this is obviously not the normal case. The interest in preserving confidentiality is to facilitate trust and communication; if the victim has to be told that what she says may later be brought out at a trial, she will be hesitant to engage in the type of frankness that the counseling requires. Furthermore, any variances between what she tells the counselor and what she tells the police or testifies on the witness stand can be exploited by the defense counsel. A legislature could resolve the issue by care-

fully defining the advocate/victim relationship and granting a confidential status to this communication.

Legislatures have also addressed the non-legal problems of training and funding of advocacy services. To the extent that these programs have demonstrated value to both the victims and the criminal justice system, they could be encouraged by the legislature. Training standards could be devised and advocate programs funded. State funding could act to legitimize their role and provide criminal justice agencies with professional referral services.

Legislative efforts in several states, including Massachusetts and Minnesota, have sought to provide services for victims through traditional criminal justice means.[7] In these states, criminal justice personnel are trained in limited forms of crisis intervention so that they can be more sensitive to victim needs. If prosecutors and police were better equipped to understand and assist rape victims, the need for private prosecution and private advocacy might lessen. However, the role of the non-attorney advocate as a counselor is not likely to be replaced entirely by either traditional police or prosecutor personnel.

4.3 Comprehensive Victim Service Programs

To the extent that special services are available to victims, they have largely been provided by local groups who have recruited volunteers, raised funds and administered limited programs. These programs face obvious problems of cost and interaction with the traditional bureaucracies of the police, the prosecutor, and public service agencies. A few states, such as Minnesota, Massachusetts, California, Alaska, and Ohio, have attempted to address the problems of rape victims in a more comprehensive fashion. By legislative enactment, these states have attempted to provide direct services to victims, public education, and training for criminal justice professionals. There are potential advantages and disadvantages to private versus public control of victim service programs; nonetheless, it is an area that a state legislature might usefully explore apart from the traditional concerns of re-defining the crime of rape.

The scope of possible legislative activity in the provision of victim services is vast and can be divided into several distinct components. First, the state can attempt to upgrade the training of law enforcement personnel across the jurisdiction so that victims will be treated with more sensitivity and rapes will be investigated more effectively. Various states have developed programs to educate police and prosecutors on the myths of rape, the trauma of rape for victims, and the techniques of crisis intervention. The underlying assumption of such training is that these criminal justice personnel can provide support services to victims which will ensure victim cooperation and encourage victim reports.

Second, the state can engage in a comprehensive program of public education. Some states have published brochures for women who have been raped which instruct them about the criminal justice system. This helps to inform and, thereby, assist them in the difficult process of reporting and prosecuting a rape case. In addition, women can be instructed about the nature of rape and what to do in situations where a rape is threatened. This has been done in the form of lectures, printed materials, and films.

Third, the state can mandate the provision of various services for rape victims. These can include police-sponsored phone "hot-lines," counseling services, legal representation, and victim compensation. It should be noted, however, that there seems to be a growing concern that such services not be restricted to victims of rape. Instead, they might become part of expanded services available to victims of all sex offenses, victims of violent crimes, or victims in general.

Finally, some states have promulgated statewide standards for victim services even though their provision may be locally initiated. Hospital protocols have been devised through legislative actions which would be standardized throughout the state. Some states have required that victim specialists be available on a 24-hour basis in hospitals and police departments to attend to the special needs of victims. Other legislatures have considered whether police departments should have women available to work with victims who have been sexually assaulted. Here the thrust of legislative action is not to provide services directly, but to ensure that services which are provided meet minimum standards across the state.

There are a number of problems associated with such statewide measures which must be considered by a legislature when enacting legislation in this area. These include: (1) the legality of state-mandated sex requirements for particular employment positions, i.e., women police officers; (2) the appli-

cability of statewide standards, given the diverse needs of rural and urban municipalities; (3) the bureaucratization of services which may undercut the motivation and success of local programs; and (4) the imposition of a service responsibility on agencies, such as the police and prosecutor, who are not always well-equipped for such a role. These issues go well beyond the scope of this discussion, but may be important in the legislative context of such proposals.

States have enacted programs in various ways and on different scales. Alaska, for example, has not legislated specific programs, but has passed resolutions which recommend courses of action. This shifts the cost of programs to the agencies to whom the resolution is directed. These resolutions have included recommendations that policewomen be assigned so that they can respond to rape calls; that thorough medical examinations for both physical and emotional trauma be given to rape victims; that self-defense be taught in the schools; and that the Alaska Police Standards Council, in conjunction with local women's organizations and local medical professionals, develop training courses for police in rape investigation. Ohio has passed legislation requiring a physician be on-call at all times to gather evidence of rape, and that all victims be informed of services that are available to them. In addition, Ohio provides that a minor can be examined without the consent of parents. Minnesota has created a comprehensive program for victims of sexual assault which provides extensive counseling and referral services, training programs for criminal justice and health care professionals, informational workshops, and a data bank on the incidence of sexual assault.

Depending on the nature and scope of the rape problem in a particular jurisdiction, there is a wide variety of programs that a legislature might consider. The immediate impact of such legislation might be more significant than any technical legal change in the law which defines and punishes rape. The provision of criminal justice training and victim service programs can provide an impetus for the traditional legal system to grapple with rape in a more comprehensive manner.

4.4 Rape Prevention and Self-Defense

A series of well-publicized incidents in which women have used force against men who assaulted them have triggered controversy and questions about the limits of self-defense remedies for rape victims and the extent to which a woman should prepare herself for the possibility of being raped. Three examples will serve to suggest the complexity and importance of these issues:

(1) Inez Garcia, a Latina in a small California town, was convicted of second-degree murder after shooting and killing the man she claimed had helped another man rape her. The shooting occurred a short time after the rape and after she had been released by her assailants. Her claim to self-defense was based not on preventing the rape, but on threats to kill her which were made by the men after the rape. At the trial for murder, the judge indicated to the jury that the rape was not relevant to the murder charge for which she was being tried. Many observers saw her case as an instance of the failure of the criminal justice system to take the rape seriously.

(2) Joan Little, a woman incarcerated in a small North Carolina jail, was forced to perform fellatio upon her jailer. Like Inez Garcia, Joan Little killed her attacker after the assault was completed, but she did so immediately while she was still captive. She was acquitted of murder.

(3) A Chicago woman was arrested after she shot at a man who broke into her apartment, raped her friend and then threw the friend from a window on the 15th floor apartment. The assailant escaped, but the 22-year old woman who was raped was reported in "serious but improving condition . . ." Her friend was arrested on charges of failing to have the proper city and state registration for a gun, and with discharging a firearm within city limits.

These cases may not suggest a trend toward violence on the part of rape victims, but they do raise important questions that some legislatures have begun to address. These include whether self-defense instruction should be provided to women, whether they should be educated on what to do if placed in a rape-threatening situation, and what the law of self-defense and the carrying of weapons entails with regard to the victims of rape.

Self-defense. At common law, deadly force is justified in self-defense against a felonious assault where there is imminent and impending danger of death or serious bodily injury. A woman could presumably justify killing her assailant to prevent rape if she satisfied the common law elements of self-defense: she must be without fault in bringing on the attack and she must reasonably believe at the time that she is in immediate danger of losing her

life or receiving serious bodily harm. In the majority of jurisdictions, where she has satisfied these requirements and the assault is violent and felonious, she has no duty to escape or retreat. In a few jurisdictions, even in these circumstances, she must escape or retreat if she has a reasonable means of doing so.

The serious bodily harm requirement. With regard to rape, the question must be raised whether this type of assault necessarily justifies deadly force. The Model Penal Code and a number of states with new criminal codes specifically allow use of deadly force to prevent rape. The trend is in favor of allowing self-defense in attempted rape situations as well. In other states, the issue has been debated as to whether rape necessarily carries with it the danger of serious bodily injury or death.

There is a strong argument to suggest that rape does necessarily threaten such harm that deadly force is justified. Women report that the acute terror they experience in the rape is a fear of being murdered, not a fear of the consequences of the rape itself. Within the violence of the sexual assault is the threat of death, a threat which is in no way diminished by any prior relationship between the rapist and the victim. It is the total helplessness of the victim, not the sexual intrusion, that characterizes the trauma of the rape experience.

The inherent danger of rape can be analogized to the law regarding self-defense in a burglary situation. The law generally asserts that the fact that a person has broken into a house gives the inhabitant sufficient grounds to believe, as long as the burglar is not retreating, that the inhabitant's life is in danger. This is true whether or not the burglar in fact has any capability to harm the inhabitant, although it does not hold true if it is reasonably apparent to the inhabitant that the burglar is harmless. Thus, the resident can use deadly force in self-defense by virtue of the circumstances of a burglar entering his home. Arguably, if this presumption of inherent dangerousness applies to burglary, it should be applicable to the sexual intrusion of the victim.

The legal presumption of dangerousness is important because of general societal attitudes toward rape. This was dramatically captured by a juror in the Inez Garcia case. When asked whether a woman could ever argue self-defense if she killed her rapist during the attack the juror responded:

> "No, because the guy's not trying to kill her. He's just trying to screw her and give her a good time. To get off the guy will have to do her bodily harm and giving a girl a screw isn't giving her bodily harm."[8]

If this attitude is seen as a problem which distorts the processes of justice, then legal change through legislative enactment may be appropriate.

The no-fault requirement. A second requirement for invoking the self-defense argument is that the person who kills in self-defense must not have created the incident which required the deadly force. The law imagines one man taunting another, i.e., deliberate provocation. When the taunted man responds, the first man kills him. He has no self-defense argument because he provoked the attack and necessitated his own use of deadly force.

If the victim of a sexual assault who kills her assailant invokes self-defense, she must demonstrate that she did not provoke the assault that required her use of deadly force. In her trial for murder, for example, the prosecution may want to show that the woman voluntarily engaged in limited sexual contact or assumed the risk of the sexual attack upon her. Ironically, the prosecutor in the murder case would attempt to amplify the evidence that he would seek to suppress if he were charging the deceased with rape. Under this theory, the state would attempt to show that the alleged rape was victim-precipitated and, therefore, the rape victim would be precluded from suggesting that she acted in self-defense when she killed the rapist.

The no-fault requirement has harsh consequences for the woman who has entered into a rape-threatening situation without realizing her danger. The rule which will determine her right to defend herself has evolved through non-sexual assault cases which have largely involved disputes between men. If the traditional notions of provocation are applied to rape situations and if the woman's conduct is viewed as provocative, then, in order to establish her right to self-defense, she will have to notify her assailant verbally that she does not want sexual intercourse and she must attempt to withdraw physically. Such an application of the traditional rule seems impractical and, perhaps, even dangerous. A woman who must give advance notice of her intent to resist when attacked is unlikely to succeed in efforts at self-defense.

Possession, carrying, and use of weapons. The police receive frequent inquiries from women as to what weapons they can lawfully carry and under what circumstances they can lawfully use a weapon

to prevent attack upon them. People who carry proscribed weapons are not usually charged with a crime even if they use them to prevent a crime. Furthermore, unless a weapon is used, the police are unlikely to discover that it is being carried. Nonetheless, such charges and discoveries are made on occasions and most women want to protect themselves by means which are within the law.

The possession and carrying of weapons is regulated through various state statutes and local ordinances. The carrying of a concealed firearm without a permit, for example, is universally disapproved, but there are interesting exceptions: a gun in an open holster is not considered a concealed weapon in some states and may be carried legally. Other states prohibit the carrying of a firearm on the person whether or not it is concealed. Most modern statutes specify the types of dangerous weapons which may not be concealed on the person. These include guns, some types of knives, blackjacks, metallic knuckles, and a variety of exotic weapons. It is generally permissible to carry a knife if it is not a switchblade, although some states forbid the carrying of double-edged blades as well. Special statutory provisions or local ordinances frequently control the possession and use of tear gas and mace. Some states forbid their possession, while others prohibit possession only in the commission of a crime. Women are free in most states to carry many items which might serve as weapons, including most knives, nail files, insect spray, and hat pins, without fear of prosecution.

The extent to which women should be encouraged to carry weapons for their own protection is subject to considerable debate. The carrying of most weapons requires some training as to their potential use. It is quite possible that the use of weapons, as well as weaponless self-defense, may escalate the violence of the attack and increase the danger to the victim. If, on the other hand, women believe themselves to be particularly vulnerable to sexual attack, should they not be allowed to protect themselves in a reasonable manner? The difficult role of the legislature is to balance the rights of the potential victims to self-protection and the rights of society to prevent a proliferation of weapons and the possibility of increased violence.

Peace bonds. Occasionally a woman will find herself in a situation where she is threatened by a person she can identify. This is not an infrequent occurrence between estranged spouses or lovers. If the woman reports the threats to the police, she may find that the police cannot act until a crime is actually committed. Is there any protection that the law can provide a woman in this situation?

The peace bond is a civil remedy that may have some potential for legislative revamping. This is a common law procedure, codified in a number of states, by which a person who threatens a crime against another can be required to post a bond or be incarcerated. This remedy is little used and of doubtful constitutionality because it forces the person to be restrained and to face penalties without having committed a crime or having due process applied to his case.

The value of the peace bond is not the bond or the incarceration, but the exposure of the threat. Upon the victim's formal complaints, the "defendant" is brought before the judge and confronted with the threat. This confrontation may act to deter future criminal activity. In this respect, the peace bond acts as a restraining order which alerts the "defendant" to the possibility of contempt proceedings if he violates the court order.

The fear that a victim of rape experiences when the defendant is released from jail is analogous to that of the potential victim who has been threatened. The legislature could address the conditions of release under these circumstances so as to minimize the fear of the victim and the potential for retaliation. This concern is again related to the release of the victim's name and address to the defendant discussed earlier.

Conclusion. The experience of rape is an experience of violence and terror. While the fine points of legal definition are debated, women are raped and suffer serious and sometimes irreparable harm. The process of changing antiquated laws regarding the crime of rape must be supplemented by programs and legislation which deal more directly with the brutal reality of the crime for victims. Whether this means providing services to victims, sensitizing criminal justice personnel to the impact of rape, or enabling potential victims to avoid or fend off attacks are questions that need to be addressed by legislatures.

NOTES

[1] Nebraska Press Association v. Stuart, 96 S.Ct. 237 (1975).

[2] In re Gault, 387 U.S. 1 (1967).

[3] 415 U.S. 308 (1974).

[4] California Penal Code, See 868, as amended 1976, Chapter 1178.

[5] Cox Broadcasting Corporation v. Cohn, 95 S.Ct. 1029 (1975).

[6] People v. Rincon—Pineda, ibid., n. 12, Chapter 3.

[7] The Minnesota Statutory Provisions on this subject are contained in Appendix A.

[8] Quoted in appellant's supplemental opening brief, *People v. Garcia*, No. 1 Crim. 14104, in the Court of Appeals of the State of California, First Appellate Division (1976), p. 55.

CHAPTER 5. CHANGES

While a firm understanding of the conceptual and legal issues of rape represents a prerequisite to the drafting of legislation, it is also important that proponents of legal reform understand the process of legislative change itself. As part of the research required to prepare the material contained in Appendix A, a state-by-state telephone survey was undertaken which provided valuable subjective data regarding this process from prosecutors, defense attorneys, and others who were involved in or familiar with local changes in rape law. All interviewees were questioned on how bills were introduced, by whom they were supported, which issues were most controversial and how the new laws had been implemented. The responses to these questions suggested trends which may guide those who seek change in the rape law of their state.

5.1 Motivations for Change

The general pattern involved in rape law reform have been fairly consistent from state to state. It appears that there are three primary groups that have sought such reform, each with overlapping but distinctive goals.

The first, and most significant of these groups, has been made up of women. It is they who have provided the most important force behind recent changes in rape laws. In some respects, their attack on traditional rape laws is symbolic, for these laws have reflected some of the most blatantly sexist attitudes of society. The value that the law has placed on the chastity of women and the lack of dignity with which women have been treated as rape victims can be exposed as a reflection of more general attitudes prevalent within a male-dominated society.

Women's groups themselves have exhibited a variety of perspectives and approaches. The National Organization for Women, in particular, has been very active in legislative reform. The League of Women Voters, women's business groups, church auxiliaries, and rape crisis centers have also been responsible for drafting and lobbying for new legislation. The crisis center representatives, with their first-hand experience with rape victims, often provide practical credibility to the more ideological proponents of change.

In addition to the symbolic importance of legal change, women, as victims of rape, have sought reform to ensure better protection. The poor treatment of rape victims by agents of criminal justice and the low conviction rates for accused rapists have been attributed, in part, to the law of rape. Thus, women's groups have sought legal change on behalf of those women who have been raped or are potential victims of rape.

This goal has been shared by a second group of proponents for legal change; namely, police and prosecutors who do not necessarily view rape reform in terms of feminist ideology, but see it as a law-and-order issue. These criminal justice professionals seek legislative change as a means to improve their enforcement effectiveness. Prosecutors who were surveyed, for example, suggested that restrictions on the cross-examination of victims has had a significant impact on their ability to earn convictions.

The knowledge of an experienced prosecutor can be a particularly valuable resource in the formulation of legislation that will work within the parameters of the existing criminal justice system. It is important to note, however, that the influence of prosecutors has generally been reactive. Accustomed to traditional rape law, prosecutors have tended to involve themselves with legislative activity only after it has become apparent that change was likely. While there have been some notable exceptions, the primary contribution of prosecutors has been to ensure that inevitable change would be as workable as possible.

The third group which has provided motivation for change consists of legislators and law reformers interested in broad legal change. There have been efforts in several states, for example, to revise criminal codes generally. To this end, new rape laws have been considered and drafted. Such changes, however, have generally reflected the Model Penal

Code revisions of two decades ago, rather than the more dramatic changes exemplified in a state such as Michigan. Recently, a few legislators have drafted and introduced substantive rape law reform bills in response to a state mandate to make all laws sex-neutral in compliance with their Equal Rights Amendment.

These various motivations have created non-traditional alliances between groups, e.g., radical feminists and conservative prosecutors, and have caused dissension within groups such as the American Civil Liberties Union. While some reformers within the ACLU have sought change to enhance the rights of victims, others have concerned themselves with the commensurate loss of rights by defendants.[1] Many local ACLU organizations have split on the issue of rape reform or have split with the national ACLU because of its traditional opposition to any limitation on the defendant's right to cross-examination.

Generally, however, the appeal of the rape issue, both as a symbol of feminist ideology and as a symptom of rampant street crime, has forged powerful coalitions that have with extraordinary speed and political acumen pushed reform bills through state legislatures.

5.2 Patterns of Success and Failure

The scope of legislative change has varied substantially among jurisdictions, as the material in Appendix A illustrates. Some states have made comprehensive reforms in their rape laws by altering both the definition of the crime and the various evidentiary issues discussed above. Other states have enacted more limited modifications of specific evidentiary issues, such as the admissibility of the victim's prior sexual history or the corroboration requirement. In addition to changes in rape law, some states have provided special social services for rape victims and training programs for criminal justice personnel.

While successful legislative changes have occurred in many states, almost a dozen others have considered and rejected new rape legislation in the past several years. This legislation was sometimes defeated simply because of poor drafting rather than on the merits of the bill. However, defeat more commonly occurred, not because of any substantive defect in the proposed legislation, but because of certain configurations in the political process. Thus, a review of the failures may provide as much guidance as a survey of the successes.

Use of models. Most states which have considered reform of their rape laws looked to models in the form of legislation passed in other states. The laws of Michigan, Wisconsin, Florida and Colorado have provided the major models for redefinition statutes. California law has served as the major model for limitation on prior sexual history evidence. Where proponents of a bill have attempted to introduce one of these models intact, the bill is usually defeated. Successful legislative attempts have occurred where models have been used as a starting place, but where substantial independent drafting has taken place.

There are many reasons for this failure. Legal language varies significantly from state to state. Where language is taken intact from one state and introduced in another, the bill may seem alien. If the legal words do not trigger the necessary connotations, they may act to inhibit serious consideration.

The use of another state's legal language may additionally lead to conflict with existing law. The terms "resistance," "consent," and "credibility" have different meanings in different states since each court system has evolved its own definitions and interpretations. Thus, a vocabulary may not only be foreign, but may contradict established law.

More importantly, the use of an intact model circumvents the legislative drafting process which serves as an invaluable educative experience for the proponents. They not only learn to understand the issues, but also develop an emotional commitment to the bill as a product of their own efforts. Finally, the law passed in another state represents the result of considerable negotiation and compromise. To begin at this point, additional and unwanted compromises may be required prior to the passage of any legal change.

Complexity. The complexity of many proposed bills endangers their passage. The more complex the bill, the more room there seems to be for disagreement. Although proponents may begin with a common goal, their unity may be threatened by the numerous decisions which must be made in drafting and negotiating. If the backers of legislation are divided, the legislators may be unwilling to act.

Legislators may also be unwilling to support complex legislation because it is too difficult to understand or predict its impact. The Michigan bill, for example, has been criticized for its complexity; it is even difficult for prosecutors to understand and,

therefore, to implement the statute. The complex legal issues involved may not require complex legislation.

Finally, the constitutional issues inherent in some aspects of rape legislation may act to deter passage of new legislation. The issue of restricting a defendant's right to cross-examination, for example, is likely to be fought on many grounds, not the least of which is its constitutionality. Until this issue is clarified by court opinions in several states and even the United States Supreme Court, some legislatures can be expected to argue its unconstitutionality.

Priorities. Defeat of legislation has also occurred because rape is not perceived as a high legislative priority for a variety of reasons. In some jurisdictions, the visibility of rape is low and the symbolic importance of the crime is not seen as significant enough to force legal change. Where rape law is relatively satisfactory to prosecutors, there may be little incentive to risk change. Even among the feminist supporters of legislative reform there may be a division of priorities. Passage of state Equal Rights Amendments has been a popular feminist issue. Lobbying efforts on behalf of the ERA has reduced the potential pressure that could be exerted for rape law change. Finally, the effort to revise the entire criminal code in some states has superceded the specific urgency for rape reform, and proponents of change have been unable to speed consideration of only one segment of the criminal law.

Anti-feminism. The association of rape law reform with militant feminists has damaged the chance of reform in some jurisdictions. Most of the successful lobbying efforts have been particularly low-keyed and well planned, attempting to characterize the reform as consistent with broader law-and-order interests and moderate feminist positions. Feminist groups have rallied teachers and nurses unions and even the personal secretaries of state legislators in an effort to neutralize their often militant imagery.

Nonetheless, rape legislation which makes rape easier to prove, or expands the notion of criminal sexual conduct, can be threatening to legislators. In some jurisdictions, only massive lobbbying efforts which have applied significant public pressure to legislators has succeeded in getting bills out of committee and onto the legislative floor.

Social science v. legal approach. A recurring problem in the debate over rape legislation has emerged from the differing perspectives of reform opponents and proponents. The proponents, borrowing from social science language and evidence, tend to argue from general trends of victimization, reporting, low conviction rates, and so on. The opponents, who often object to change on legal grounds, tend to generalize from the very specific and individual cases, imagining exceptions to the trends that the proponents assert.

An example of the recurring clash between these positions concerns the issue of prior sexual history. The proponents of change assert that such evidence is not relevant, cannot be used to predict behavior, and tends to deter reporting. The oponents, on the other hand, raise the hypothetical situation where such evidence might be relevant and its exclusion would be unfair.[2] The difficulties in communication which arise from these different perspectives can be significant. Although they may be no more severe than in any other type of criminal law legislation, they have occurred with sufficient frequency to necessitate compromises that apply to the general circumstances, but allow loopholes for the extreme situations.

Patterns in compromise. All legislative processes involve negotiation and compromise; rape reform is no exception. Certain patterns of compromise, however, seem to have emerged in those states which have dealt seriously with the legal issues of rape.

To the feminists who have initiated most of the legislative change, the highest priority reforms have consistently involved the redefinition of the crime to one which is broad and sex-neutral, the limitation on admission of the victim's prior sexual history, and the limitation of corroboration requirements. In order to effect these changes, the proponents have frequently been willing to trade other proposed changes which have been opposed by prosecutors and legislators. These proposed changes have generally included the elimination of marriage as a defense to rape, the lowering of the age of consent and the repeal of traditional sodomy laws.

The issue of marriage as a defense is often traded, not because feminists are indifferent to the issue, but because prosecutors are usually vehemently opposed to such a change. Prosecutors contend that rape cases which arise in marriage relationships are not crimes that can be prosecuted. The victim will often not pursue prosecution, evidence of force and intercourse are often lacking, there is often evidence of

victim motive, and juries will simply not convict. In view of the expectation that husbands would not be prosecuted in any case, feminists tend to compromise on this issue.

Draft legislation often contains amendments to statutory rape laws which traditionally make intercourse with a woman under a certain age illegal regardless of consent. The draft legislation has generally proposed reduction of the age of consent to 12 or 14 years of age. This essentially increases the number of cases in which consent can become an issue. Prosecutors have opposed this lowering of the consent age because such a step increases the difficulty of conviction and plea bargaining. The more cases that they do not have to prove lack of consent, force, or criminal circumstances, the better are the chances of inducing a guilty plea or a conviction. Proponents of legislative change are often ambivalent about lowering the age of consent. While they believe that a young woman should be given the right to consent, they are cognizant of the fact that some young women may be more vulnerable to certain kinds of coercion. Therefore, the issue is often compromised, though the tendency is to reduce to some extent the traditional age of consent.

The third common compromise is to leave old sodomy laws on the books. Some legislators oppose legalization of consensual oral and anal intercourse. Some prosecutors want the old laws retained since, like the statutory age of consent, they do not have to prove lack of consent to attain a conviction.

A constitutional problem often arises, however, when forcible sodomy can be punished under both the new and the old statute. The defendant might argue a denial of equal protection if he is charged with the crime associated with the higher penalty. He could argue that similarly situated offenders might be punished less harshly for the same act. Unless the prosecutor consistently charges only the lesser penalty offense, this scheme may be subject to constitutional challenge.

In the area of prior sexual history exclusions, compromises have taken various forms. In a number of bills, such evidence has been generally excluded; it is admissible only on a particular issue such as credibility, consent, or to explain the presence of semen, pregnancy or disease. Only more data on how these statutes are being used will reveal whether the exceptions have swallowed the rules. For example, it is unclear whether evidence which actually goes to the issue of consent will be admitted under the rubric of credibility. Does evidence of prior sexual history go to the victim's credibility when it tends to show that, based on her prior unchastity, she lied when she said she did not consent? Generally, the statutes have created a presumption against the admissibility of such evidence while allowing trial judges to make exceptions in individual cases. Elaborate procedural mechanisms were written into most statutes to control this determination and to ensure that careful consideration was given to the issue of exclusion. In those states where there are no built-in exceptions to the exclusions, the laws may be constitutionally defective.

Impressions of impact. One of the most important issues to be addressed in a review of the reform of rape laws is how the legislative changes have worked. Unfortunately, it is still too early to make an accurate assessment of the impact of new laws. In most states, the provisions have been used infrequently and have never been tested on appeal. There is little pre- and post-comparative data available on arrests, case filings, and prosecutions. In any case, it would be difficult to ascribe changes simply to legislative reform. Some impressionistic evidence has been gathered, however, that may be useful in an assessment of early impacts.

Most of the proponents of legislative reform have been satisfied with the legislation that was passed. Significant conceptual changes were accomplished and, although compromises were effected, enough was won to make the effort worthwhile. These proponents anticipate that reporting and convictions will increase as a result of the legislative change.

Those actually involved in the criminal justice system are more conservative in their estimate of the law's impact. Policemen who were surveyed suggest that most women were not aware of the changes in the rape law and that such changes will be unlikely to influence their behavior. It may be that the process of legislative change, with its attendant publicity, will have more to do with increased reporting than the legal change itself.

Many law enforcement personnel have viewed the legal changes as too complex. While this might be ascribed in part to the necessity to relearn the law, there are genuine problems of ambiguity in many of the statutes. For example, the Michigan statute, which delineates degrees of criminal sexual conduct, has posed problems because, in some instances, it

does not provide enough guidance on the distinctions between degrees. Some states, which have passed new statutes, still use the old statutes. There have been complaints that there has been inadequate training on the new statutes to allow comfortable implementation.

Restrictions on the use of prior sexual history have been warmly received by criminal justice personnel. In about one fifth of the states which passed new laws in this area, however, the case law was already favorable to the proponents of change. While some fears have been expressed that the exclusionary rules are not strict enough, there have been few specific complaints that judges allow evidence that should be excluded. Most of the complaints in this area have come from defense attorneys who believe that such restrictions might be unconstitutional. Several cases are pending appeal on this issue.

While it is unclear that convictions have increased, prosecutors have reported that statutes with degrees of crime have facilitated plea bargaining and thus, convictions. Juries will no longer have to choose between acquittal and exposure of a defendant to life imprisonment. Under these new statutes, juries have the option to agree on a compromise position which convicts the defendant of a crime less serious than traditionally associated with rape. Similarly, prosecutors can reduce charges from the highest of rape in return for a guilty plea without jeopardizing public safety or depreciating the seriousness of the crime.

Some prosecutors who were surveyed believed that many more cases are now presented by the police and filed than would have been prosecuted before. Some saw this as a hopeful sign; others complained bitterly about increased case loads. However, this increased activity may result from factors other than, or in addition to, legislative change. Victims may be more willing to report as a result of recent rape publicity or, perhaps more importantly, there may be some attitudinal change within the criminal justice system itself. Police and prosecutors who have had to deal with the issues of rape reform may be more willing to support victim complaints and risk loss at trial. While there is still significant reluctance among police and prosecutors to vigorously pursue rape complaints, there is some indication that this is changing.

Ultimately, the attitudes and commitments of police and prosecutors may determine the impact of legislation. Unless these enforcement personnel believe victims and aggressively pursue cases, the more refined legal issues will never be raised. The job of legislative reform is a first step toward effective enforcement of rape laws. The implementation of these reforms, however, requires that the criminal justice system embrace their assumptions. To the extent that the criminal justice system only reflects the values of the general society, the job of implementation has only begun.

NOTES

[1] See Herman, Laurence. "What's Wrong with the Rape Reform Laws," *Civil Liberties Review*, 3, 60–73, 1976–77.

[2] Ibid.

APPENDIX A

SUMMARIES OF STATE LEGISLATION AND TABLE OF RAPE ISSUES BY STATE

This Appendix contains state-by-state summaries in tabular and written 'ormats of the status of rape legislation current until November, 1976. It is intended to provide a broad overview of developments in the various jurisdictions around the country for those interested in a comparative perspective of rape laws. However, since change in this area is occurring with such rapidity, it is suggested that anyone requiring a specific status report on the law in a particular jurisdiction obtain an update from the attorney general or legislative counsel in that state.

Material for use in this Appendix was obtained, in part, from a phone interview survey in which informed persons in each jurisdiction, representing criminal justice, victim and defendant perspectives were questioned in regard to recent legislative activity in their states. The survey was designed to elicit the most current information as to the status of rape laws, as well as to gain insight into the dynamics of the local rape law revision process

ALABAMA

A. Definition

Alabama statute does not define rape. It incorporated the common law definition into its statute: unlawful carnal knowledge of a woman, forcibly and without her consent.

A copy of the Michigan criminal sexual conduct statute was introduced in the Alabama legislature but was never referred out of committee.

A second bill, a proposed criminal code revision, would have kept separate the crimes of sodomy and rape. If the bill had passed, rape would have been defined as sexual intercourse with a female by forcible compulsion or when the woman is incapable of consent by reason of being physically helpless or mentally incapacitated.

B. Proof

Corroboration is not required.

A bill, much like the California Evidence Bill, was also introduced in 1975 to limit the instances in which a victim's past sexual history would be admissible.

Admissible evidence of past sexual conduct is limited to evidence of the victim's conduct with the defendant and evidence of specific instances of sexual activity showing origin of semen, pregnancy or disease.

If the defendant wishes to offer evidence of that nature, a written motion and offer of proof would be required. If the court, after an in-camera hearing, determined that the evidence was material to a fact at issue and its probative value is not outweighed by its inflammatory or prejudicial nature, it will be admitted.

C. Special Victim Issues

The proposed bill based on the Michigan statute would have allowed either the victim or the accused to request that the names of persons involved and the details of the incident be suppressed until indictment, dismissal of the charge, or other conclusion of the case.

ALASKA

A. Definition

Alaska recently redefined rape as carnal knowledge of another person forcibly and against the will of the other person. Carnal knowledge, under the 1976 changes, includes sexual, oral, and anal intercourse.

A sexual assault section proscribing nonconsensual sexual contact was also added.

The entire Alaska Criminal Code is presently under review and further changes in the provisions relating to rape may occur.

B. Proof

Corroboration is not required.

A section of the 1976 bill establishes a procedure for defendants who wish to offer evidence of the victim's past sexual history in a rape or sexual assault prosecution.

The defendant may apply for an order of the court at any time before or during the trial or preliminary hearing. If, at the in-camera hearing, the judge finds the evidence offered by the defendant is relevant, that its probative value is not outweighed by the probability that it will create undue prejudice, confusion of the issues or an unwarranted invasion of the victim's privacy, he/she may order the evidence admitted.

C. Special Victim Issues

Five resolutions providing assistance and support to victims of rape were passed in 1975. The first resolution authorized creation and implementation of non-aggressive self-defense classes for high school students. The second resolution established policies which hospital personnel are expected to implement and follow. Hospital staff must receive special training in how to deal with victims of sexual assault, how to medically examine and treat them for emotional and physical injuries. Hospital staff must also inform the victim of the possibility of venereal disease and pregnancy, and that a state crime compensation statute is in effect. A third resolution requires all state troopers to attend training sessions to learn how to treat rape victims and how to investigate rape cases.

A state police special investigative unit which processes only sexual assault cases was also established by resolution. All municipalities are required to place female police officers on night duty to handle rape complaints.

A bill which would make 24-hour emergency medical services available to rape victims has not yet been passed.

ARIZONA

A. Definition

Rape is an act of sexual intercourse accomplished with a female, not the wife of the perpetrator where the female is incapable through unsoundness of mind of giving legal consent, where the female's resistance is overcome by force or violence or she is prevented from resisting by threats of force. Despite concerted efforts by lobbyists, no recent changes have been made in the rape laws. A sexual assault bill which would have provided protection to both sexes from nonconsensual intercourse, oral, anal, and vaginal, was defeated in 1975.

B. Proof

No corroboration of the victim's testimony is needed.

The proposed sexual assault bill would have made all evidence of the victim's past sexual conduct inadmissible unless it was with the defendant or explained the source or origin of pregnancy, semen, or disease. Presently, there are no statutory restrictions on the admissibility of the victim's past sexual conduct.

C. Special Victim Issues

None.

ARKANSAS

A. Definition

Arkansas revised its criminal code in 1975. Although the word rape was detained, the term was redefined to include vaginal, oral, and anal sexual intercourse and penetration by an object accomplished by forcible compulsion or when the person is physically helpless.

B. Proof

No corroboration is required in Arkansas and no cautionary instruction is given to the jury.

There are two lines of case law concerning past sexual history in Arkansas. One line strictly limits inquiry and the other allows defense attorneys great leeway to explore the victim's past sexual history. Plans are being made to introduce a bill drafted by an Arkansas prosecutor which would exclude all opinion and reputation evidence and any cross-examination of the victim concerning past sexual history unless the judge finds it is relevant to a fact at issue at an in-camera hearing. The defendant would be required to make a written motion and an offer of proof, at least 15 days prior to trial, to have past sexual history evidence considered.

Either party would have the right to an interlocutory appeal of the judge's decision after the in-camera hearing is held. Under the proposed law, any attorney who attempts to allude to or mention matters at trial ruled inadmissible by the judge would be subject to a fine or a jail sentence for contempt of court.

C. Special Victim Issues

Carrying teargas is a misdemeanor, punishable by up to 30 days in jail.

A victim compensation statute has been proposed in Arkansas, but it has not been passed.

CALIFORNIA

A. Definition

Rape is an act of sexual intercourse accomplished with a female, not the wife of the perpetrator, where the female's resistance is overcome by force, she is prevented from resisting by threats, drugs or unconsciousness, she is deceived into believing that the perpetrator is her husband, or she is legally incapable of giving consent due to her mental condition. The courts have interpreted the statute to include lack of consent as an additional element and have established as a defense the defendant's reasonable belief in the victim's consent.

B. Proof

Corroboration is not required. The cautionary instruction, formerly mandatory, was eliminated by the court in 1975. Psychiatric examination of the victim can be required by court order.

The California Robbins Rape Evidence Law, effective January, 1975, severely restricts evidence of the victim's prior sexual conduct. Such evidence is eliminated on the issue of consent, unless such conduct was with the defendant or unless the victim herself volunteers such evidence in court and the defendant wants to rebut it. On the issue of credibility, the evidence is generally not admissible, unless it would be admissible under the law governing use of character evidence in all cases. Even here, the

evidence cannot be admitted unless the court finds it relevant after a hearing upon a written motion and offer of proof. The evidence is also excluded if, according to another general evidence rule, its inflammatory effect exceeds its probative value. The hearing on the motion is not *in camera*. Evidence showing origin of semen, pregnancy or disease is not affected by the statute.

C. Special Victim Issues

A bill allowing individuals to carry tear gas weapons for self-defense was signed into law, effective January 1, 1977. The bill excludes minors and felons and requires that persons carrying tear gas complete a course in the use of such weapons and then obtain a permit from local police.

Also effective January 1, 1977, is another Robbins Rape Bill which:

(1) Requires venereal disease and pregnancy testing to be available at all county hospitals, without cost, for rape victims;

(2) Requires medical professionals trained in the examination of rape victims be available or on call 24 hours at each county hospital in counties of over 500,000 population;

(3) Requires a specific medical protocol to be used in connection with the examination and treatment of rape victims. The protocol is to be developed by the Department of Health and women's organizations;

(4) Requires each country hospital to provide rape victims with information and application forms for reimbursement under the victim crime compensation law;

(5) Requires police to receive training in the investigation and handling of rape and sexual assault cases, and requires the Commission on Peace Officer Standards and Training to establish standard procedures to be followed by all law enforcement officers for the investigation of rape and sexual assault cases;

(6) Requires Department of Justice to develop forms to record medical examination data about the rape victim for use in criminal proceedings against the rapist.

There is a victim compensation law which reimburses crime victims for their medical expenses and loss of wages. However, stringent standards of financial hardship are applied so as to reimburse only impoverished victims.

A law in California requires that the court, upon request of the defense, clear the courtroom at a preliminary examination of a rape defendant as long as one woman remains in the courtroom along with the victim. A bill to modify this law so as to permit the victim more support in the courtroom met with defeat in 1976, but will probably be reintroduced in 1977.

COLORADO

A. Definition

Colorado replaced its rape statute in 1975 with a sexual assault bill. There are four degrees of assault including sexual penetration, intrusion and contact. Sexual penetration means vaginal, oral or anal intercourse. Sexual intrusion is any intrusion by any object on any part of a person's body except the mouth, tongue or parts into genital or anal openings of another person's body.

B. Proof

Corroboration is not required.

The Lord Hale cautionary instruction was abolished by the 1975 changes. Evidence of past or subsequent sexual history of the victim is presumed to be irrelevant in two instances: (1) if the victim's conduct was with the defendant; and (2) if the evidence shows the source or origin of semen, pregnancy or disease. If the accused wishes to offer other evidence of the victim's past sexual history, the defense must submit a written motion and offer of proof 30 days before trial. If the offer of proof is sufficient, an in-camera hearing is held at which the judge may order the evidence admitted if found to be relevant to a material issue.

C. Special Victim Issues

A bill is presently pending in Colorado which would provide compensation to victims of all crimes.

CONNECTICUT

A. Definition

In 1975, Connecticut replaced its rape statute with a sexual assault bill which considerably expanded the scope of forbidden conduct. A person is guilty of sexual assault when he/she compels another person to engage in sexual intercourse by

force or threat of force. Sexual intercourse is defined as vaginal intercourse, anal intercourse, fellatio or cunnilingus. The statute also proscribes nonconsensual sexual contact and genital or anal penetration by any object.

B. Proof

Connecticut instituted a corroboration requirement in 1971, but it was repealed in 1975.

A bill restricting past sexual history was introduced in 1976 but did not pass.

C. Special Victim Issues

None.

DELAWARE

A. Definition

A man commits rape when he intentionally engages in sexual intercourse without the consent of a female (not his wife), or of a male. Without consent includes forcible compulsion, threats of harm to the victim or others, physical helplessness and mental and physical incapacity to consent.

B. Proof

The Delaware statute requires corroboration, but it may be circumstantial.

A law which passed in 1975 requires the defendant to make a written motion and an offer of proof to the court if he wishes to introduce evidence of the victim's past sexual conduct for the purpose of attacking her credibility. The judge hears the evidence out of the presence of the jury and if he/she finds it "relevant and not inadmissible" it may be admitted. No evidence of general reputation or evidence of specific sexual history is admissible to prove consent.

A bill was defeated in 1975 which would have required a higher standard of proof to convict a defendant of first degree rape. The new standard would have required the state to prove the defendant's guilt "beyond any shadow of a doubt."

C. Special Victim Issues

A 1975 bill was proposed, but not passed, which would have provided that a woman who gave false testimony leading to an arrest and/or trial of a male on a charge of rape should, upon a finding of contempt, be sentenced to no less than one year in jail.

Delaware does not have a statute providing compensation to victims of rape. However, the State Crime Compensation Board does have the power to award money to crime victims, including victims of rape.

DISTRICT OF COLUMBIA

A. Definition

Carnal knowledge of a female forcibly and against her will or carnal knowledge of a female child under 16 against her will. The District of Columbia rape laws were reviewed by a task force in 1973, and are to be further studied as part of a general review of the criminal code.

B. Proof

Corroboration not necessary in cases involving adult victims but may be required in cases involving juveniles. Prior sexual history of the victim is admissible but is subject to the discretion of the trial judge. Presently this issue is under consideration at the appeal court level.

C. Special Victim Issues

None.

FLORIDA

A. Definition

Florida became one of the first states to pass a redefinition bill in 1974. Involuntary sexual battery includes oral, anal, or vaginal penetration by the sexual organ of another or by any other object.

B. Proof

The statute specifies that the testimony of the victim need not be corroborated but the jury may be instructed with respect to the weight and quality of the evidence.

Specific instances of the victim's past sexual conduct are not admissible except when consent is an issue and the defense, outside the presence of the jury, establishes that such activity "shows such a relation to the conduct involved in the case that it tends to establish a pattern of conduct or behavior on the part of the victim which is relevant to the issue of consent."

C. Special Victim Issues

The 1974 change also made it a misdemeanor for any person to print, publish, broadcast or cause or allow to be printed, published or broadcast in an instrument of mass communication the name, address or other identifying information of a victim of sexual offense.

The carrying of a tear gas gun or chemical weapon is prohibited unless the chemical device is designed to be carried in a woman's purse or a man's pocket and contains no more than one half ounce of chemical.

If the victim is 14 years old or younger, the court may order a psychiatric examination of the victim at the defendant's request.

GEORGIA

A. Definition

Georgia, another common law state, defines rape as carnal knowledge of a female, forcibly and against her will.

Several proposed bills, all of which were defeated, would have redefined rape as 'sexual assault' and extended the definition to include oral, anal, and genital intercourse.

B. Proof

Corroboration is statutorily required in Georgia. An unsuccessful attempt was made to abolish the corroboration requirement in 1976.

A bill limiting admissibility of the victim's past sexual history was passed in 1976. The judge determines the admissibility of such evidence at an in-camera hearing at trial. The past sexual behavior of the victim is admissible only if it directly involved the participation of the accused or it supports an inference that the accused could have reasonably believed that the victim consented to intercourse with the defendant.

C. Special Victim Issues

In 1974, the Supreme Court struck down as unconstitutional a Georgia statute which made it a misdemeanor to print, publish, televise or disseminate the name, address or identity of a victim of rape.

HAWAII

A. Definition

Although Hawaii's criminal code was revised effective 1973, the legislature chose to continue to distinguish between rape and sodomy but divided both crimes into degrees. The law also prohibits sexual contact by forcible compulsion under a new section entitled sexual abuse.

A male commits rape if he intentionally engages in sexual intercourse by force or when the female is mentally defective, incapacitated or physically helpless.

B. Proof

Corroboration is not required. However, unless the offense is reported to a public authority within one month of the occurrence, no prosecution may be maintained.

If the defendant wishes to offer evidence of the sexual conduct of the victim to attack his/her credibility, the accused shall make a written motion to the court accompanied by an offer of proof. If, at an in-camera hearing, the court finds the evidence is relevant and not inadmissible it may be ordered admitted.

C. Special Victim Issues

The legislature has appropriated funds to provide comprehensive social and medical services to victims of sexual assaults.

IDAHO

A. Definition

Idaho's law, which dates back to 1896, defines rape as an act of sexual intercourse accomplished with a female, not the wife of the perpetrator where the female is under age, incapable of consenting on account of unsoundness of mind, and where female's resistance is overcome or her resistance is prevented by threats of harm.

Several sexual assault bills which would have consolidated non-consensual sex acts under one section were introduced in the last year or two but failed to pass.

B. Proof

Corroboration of the victim's testimony is required

when her testimony is contradictory, her credibility is impeached or her unchastity is shown.

The proposed bills mentioned in section A would also have required an in-camera proceeding if the defendant wished to introduce evidence of the victim's past sexual conduct. The evidence could not be admitted unless it concerned conduct with the defendant or had occurred in the year prior to the offense.

C. Special Victim Issues

None addressed in proposed bills.

ILLINOIS

A. Definition

Under Illinois law, a male, 14 years or older, commits rape when he has sexual intercourse with a female, not his wife, by force and against her will.

B. Proof

Corroboration is not required in Illinois as long as the prosecutrix's testimony is clear and convincing.

A 1975 bill was defeated which would make inadmissible all evidence of the victim's past sexual history except that with the defendant.

C. Special Victim Issues

The use of or carrying of mace or teargas is a misdemeanor punishable by a maximum of one year in the county jail or a $1,000 fine.

A 1975 proposal requiring all police to undergo rape sensitivity training failed to pass.

A Rape Victim's Emergency Treatment Act, effective 1976, requires that a wide variety of medical services be made available to victims of rape. Every hospital licensed by the Public Department of Health must provide emergency hospital service to all alleged rape victims. The minimum requirements of that service are: (1) medical examinations and laboratory tests necessary to ensure health, safety, and welfare of the victim, and which may be needed for evidence at trial; (2) oral and written information regarding the possibility of venereal disease and pregnancy, and medication or treatment needed for possible disease or infection; (3) provision of necessary medication; (4) blood tests for venereal disease; and (5) any counseling needed.

If a hospital provides services to an indigent rape victim who does not qualify for public aid or does not have insurance, the State Public Health Department must reimburse the hospital.

INDIANA

A. Definition

The new Indiana criminal code, which takes effect in 1977, defines rape as sexual intercourse with a member of the opposite sex, not his spouse, by means of force or threat of force, or where the victim is unaware that intercourse is occurring or if the victim is mentally incapable of giving consent.

B. Proof

Corroboration is not required in Indiana.

Evidence of the victim's past sexual history is admissible under the following conditions: (1) the conduct was with the defendant; (2) it would show that someone other than the defendant committed the act; and (3) the judge finds that the evidence is material and its inflammatory or prejudicial nature does not outweigh its probative value. If the defense wishes to have such evidence admitted, a written motion must be made at least 10 days prior to trial and the hearing is held outside the presence of the jury.

C. Special Victim Issues

None.

IOWA

A. Definition

In 1978, Iowa will begin prosecuting rapes under the new sexual abuse section of the revised criminal code. The new code section, which replaces the old common law carnal knowledge statute, defines sexual abuse as any sex act between persons when the act is done by force, threats, or against the will of the other or when the other person suffers from a mental defect or incapacity which precludes giving consent. The definition of sex act includes oral, anal, or vaginal intercourse.

B. Proof

A separate bill passed in 1974 eliminated the corroboration requirement.

Any instruction cautioning the jury to use a different standard relating to a victim's testimony than that of other witnesses in a sexual abuse case is expressly forbidden by the 1978 criminal code revision. The code revision does not require *proof of physical* resistance to obtain a conviction. Evidence of the victim's past sexual history is presumptuously inadmissible. If the defense wishes to present such evidence, a motion must be made and the judge determines if the evidence is relevant and material in an in-camera hearing.

C. Special Victim Issues

As a result of the criminal code revision, the cost of a medical exam to gather evidence and the cost of any treatment for venereal disease will be paid by the State Department of Health.

KANSAS

A. Definition

Rape is penetration of female sex organ by a male sex organ committed by a man with a woman not his wife and without her consent. Without consent can include overcoming resistance by force or fear or the physical or mental incapacity of a woman to consent. A recently proposed bill was defeated which would have made the crime sex-neutral.

B. Proof

No corroboration is required in Kansas. The legislature passed a bill in 1975 which allows evidence of past sexual conduct with the defendant or other people to be admitted at trial if after an in-camera hearing the judge finds that it is "relevant and not otherwise inadmissible." A written motion by the defendant seven days before trial is required. If the prosecution introduces evidence of the victim's conduct on direct examination the defense may cross-examine the victim or introduce independent evidence in the defense case to rebut the victim's testimony.

C. Special Victim Issues

A recent bill did not pass which would have required standard evidence-gathering kits to be used by personnel in every hospital and free medical treatment to rape victims.

Kansas statutory law prohibits the carrying or use of teargas, or similar weapons using smoke, noxious liquids or gas. The penalty for violation of the statute is a maximum 6 months in jail or a maximum fine of $1,000.

KENTUCKY

A. Definition

Although Kentucky revised its sex offense statutes extensively in 1974, the terms rape and sodomy and their ordinary meanings were retained. Lack of consent is an element of each offense and can result from forcible compulsion, incapacity to consent, or when the victim is under 16, mentally defective or incapacitated or physically helpless.

B. Proof

No corroboration is required.

Early in 1976, the legislature passed what is popularly known as the "Kentucky Rape Shield Law" which specified that reputation evidence or specific instances of the victim's past sexual conduct with others is not admissible at trial. However, the complaining witness's past sexual conduct or habits with the *defendant*, as well as the details of the specific act in question, may be admitted if the evidence offered is relevant and material to a fact at issue and its probative value outweighs its inflammatory or prejudicial nature. Relevancy is determined at an in-camera hearing on the written motion concerning the evidence which the defense must file at least two weeks prior to trial.

C. Special Victim Issues

A general compensation statute authorizes payments to victims of crimes, including rape.

LOUISIANA

A. Definition

Louisiana amended its rape law in 1975, establishing a statutory scheme of degrees, but continues to distinguish between the traditional notion of rape and other sex offenses.

Heterosexual rape is sexual intercourse with a female without her consent. Homosexual rape is an act of anal intercourse with a male person without his consent.

B. Proof

Corroboration is not required in Louisiana.

A 1976 amendment restricts admissibility of the victim's past sexual history to conduct with the defendant but does not establish any procedure to determine admissibility.

C. Special Victim Issues

None.

MAINE

A. Definition

The common law definition of rape was repealed in 1976 and rape is now defined as compelling a person, other than the actor's spouse to submit to sexual intercourse by force and against the person's will, or by threats of immediate death, serious bodily injury or kidnapping to either the victim or a third person. The criminal code revision defines sexual intercourse as penetration of female organ by the male sex organ. Gross sexual misconduct covers sexual acts other than vaginal intercourse under same circumstances as rape.

B. Proof

Testimony of the victim must be clear and convincing or else it must be corroborated.

C. Special Victim Issues

None.

MARYLAND

A. Definition

Although Maryland made extensive changes in its rape legislation in 1976, the dichotomy between rape and other sexual offenses remains a part of the law. Under the new law, rape is defined as vaginal intercourse with another person by force or threat of force against the will and without the consent of that person. All other nonconsensual sexual acts, including sexual contact are included in the catch-all category of sexual offenders.

B. Proof

Victim's testimony need not be corroborated.

Although the law now limits severely the introduction of evidence of past sexual conduct, those limitations apply only to rape. Victims of any sexual offense other than rape are not protected and any evidence of prior sexual conduct may be admitted.

When the charge is rape and the defendant wishes to offer evidence of the victim's past sexual conduct, an in-camera hearing must be held.

Only evidence of the victim's past sexual conduct with the defendant, evidence showing the source or origin of pregnancy, semen or disease, evidence which supports a claim that the victim has an ulterior motive in accusing the defendant or evidence offered for impeachment purposes after the prosecutor has put the victim's conduct in issue may be admitted and it must be shown to be relevant, material to a fact at issue and its prejudicial nature must not outweigh its probative value.

C. Special Victim Issues

A general crime compensation statute provides for awards to victims of rapes as well as victims of other crimes.

MASSACHUSETTS

A. Definition

A redefinition bill was passed in 1974 which repealed the old common law definition of rape and substituted sexual intercourse or unnatural sexual intercourse (oral, anal, and vaginal), by a person with another person under the age of 16 or who is compelled to submit against his will, by threat of bodily injury.

B. Proof

Corroboration of the victim's testimony is not required to sustain a conviction for rape.

Lobbyists are planning to introduce a bill which would require the defendant to make application to the court before or during trial for an in-camera hearing to determine admissibility of evidence concerning the victim's past sexual history. Evidence of conduct occurring more than one year prior to the date of the offense would not be admitted unless it were conduct with the defendant.

A bill which would have prohibited admissibility of all evidence of the victim's sexual conduct except

that with the defendant or which shows the source or origin of pregnancy, disease, or semen has failed to pass both times that it was introduced.

C. Special Victim Issues

In 1974, the Massachusetts legislature approved a bill which withholds state approval of municipal police training schools unless the curriculum provides for training of personnel in rape prevention and prosecution, requires a rape reporting and prosecution unit consisting of specially trained police officers, and a special telephone hotline to be used for rape reporting in each municipal police department. The bill also requires that the police reports be confidential and unavailable to the public.

As of autumn, 1976, a bill was pending before the legislature which would allow the judge to exclude the general public from the courtroom at the victim's request. Those persons who have "a direct interest" in the case would be allowed to remain.

Carrying or using mace or teargas is a felony under Massachusetts state law and carries a maximum 5 year jail sentence.

MICHIGAN

A. Definition

In 1974, Michigan discarded the entire concept of rape, replacing it with criminal sexual conduct, which includes both sexual contact and sexual penetration. Sexual penetration means sexual intercourse, cunnilingus, fellatio, anal intercourse, or any intrusion of an object into the genital or anal openings of another's body. Four separate degrees of criminal sexual conduct were created with each requiring certain circumstances to complete the offense.

B. Proof

Corroboration of the victim's testimony is not required.

The only evidence of the victim's past sexual history which may be admitted is evidence of the victim's conduct with the defendant or evidence of specific instances of sexual activity showing the source or origin of semen, pregnancy, or disease.

If the defendant wishes to offer such evidence, he must file a written motion and offer of proof within 10 days after the arraignment. If the court determines, in an in-camera hearing, that the evidence is material to a fact at issue and its inflammatory or prejudicial nature does not outweigh its probative value, the evidence may be admitted.

C. Special Victim Issues

The names of the victim and the accused and details of the offense may be suppressed by the magistrate until arraignment, dismissal of charges or until the case is otherwise concluded if either victim, defendant or counsel so request.

MINNESOTA

A. Definition

Minnesota passed a very comprehensive rape reform bill in 1975 which defines the term criminal sexual conduct to include sexual intercourse, cunnilingus, fellatio, anal intercourse, peneration of genital and anal openings by an object, or sexual contact when committed by one person upon another without the other's consent. Degrees of criminal sexual conduct were established according to the age of the victim, the amount of force used, and harm threatened or inflicted.

B. Proof

Under the 1975 revisions, the testimony of the complaining witness does not require corroboration or the need to show resistance.

In general, evidence of the victim's past sexual history may not be admitted in a prosecution for criminal sexual conduct. However, when consent or fabrication is a defense, evidence of conduct of the victim tending to establish a common scheme or plan of similar sexual conduct under similar circumstances may be admitted if it occurred within the last year and the judge finds that it is material and its probative value is not outweighed by its prejudicial value. Evidence of past sexual conduct may also be admitted if it was with the defendant or would show the source of semen, pregnancy, or disease or if offered to impeach the victim's testimony.

In order to admit any such evidence, a motion by the defense must be made prior to trial and proposed evidence presented at a hearing held out of the presence of the jury.

C. Special Victim Issues

Costs incurred by hospitals or physicians for an evidence-gathering examination of the victim must be paid by the county in which the alleged offense was committed.

An act passed in 1974 authorized the Commissioner of Corrections to develop a statewide program to aid victims of sexual attacks. The statewide program included voluntary counseling to be made available to victims throughout the proceedings following the rape, including hospital examination, police investigation, and questioning of witnesses and trial. The Commissioner of Corrections was also directed to assist in establishing sensitivity training for prosecuting attorneys, local police and peace officers, and hospital personnel.

The court may no longer give jury instructions to the effect that it may be inferred that a complainant who has previously consented to sexual intercourse with others would be more likely to consent to intercourse with the defendant; that the complainant's previous or subsequent sexual behavior may be considered in determining the credibility of the complainant; that criminal sexual conduct is a charge easily made but difficult to disprove; or that the complainant's testimony should be scrutinized more closely than the testimony of other witnesses.

Use or carrying of mace and teargas are forbidden by state law.

MISSISSIPPI

A. Definition

Rape is carnal knowledge of or ravishing of a female by force.

B. Proof

Corroboration is not required.

A proposed bill which did not pass would have placed a total ban on admissibility of the victim's past sexual history.

C. Special Victim Issues

None.

MISSOURI

A. Definition

Rape is unlawful carnal knowledge of a woman by force.

B. Proof

The victim's testimony need not be corroborated unless it is contradictory in nature or unbelievable.

C. Special Victim Issues

None.

MONTANA

A. Definition

A 1973 revision of Montana rape laws substituted the term "sexual intercourse without consent'" for rape. A conviction of sexual intercourse without consent requires that the person knowingly had sexual intercourse without consent with a person not his spouse.

A section entitled sexual assault proscribes knowing subjection of another person to sexual contact of another person to sexual contact without consent.

A separate section, deviate sexual conduct, makes homosexual conduct illegal.

B. Proof

Corroboration is not required in Montana.

In 1975, admissibility of the victim's past sexual conduct was limited to evidence of past conduct with the defendant, or evidence of specific instances of intercourse to show the origin of semen, pregnancy or disease. A hearing must be held out of the presence of the jury to determine whether such evidence will be admitted.

Before 1975 changes, a jury instruction could be given that allowed the jury to infer from a complainant's failure to report a rape immediately that she was not telling the truth. The bill passed in 1975 allows the defense to show that complaint was not timely but the jury is to be instructed that that fact standing alone may not bar conviction.

C. Special Victim Issues

No statute provides victim compensation nor is carrying of mace or teargas prohibited.

NEBRASKA

A. Definition

Nebraska rape laws underwent an extensive revision in 1975. Two degrees of sexual assault were created which consist of sexual contact and sexual penetration. Sexual penetration includes oral, anal, and vaginal intercourse and penetrations by means of an object. Rape is a crime between husband and wife even when they are living together.

B. Proof

Before specific instances of past sexual history of the victim with people other than the defendant may be admitted, an in-camera hearing must be held. If the judge determines that the activity which the defense seeks to admit shows such a relation to the conduct involved in the case and tends to establish a pattern of conduct or behavior on the part of the victim as to be relevant to the issue of consent, it shall be admitted. The new law also provides that the past sexual conduct of the defendant may be admitted if it is found by the judge to be relevant.

C. Special Victim Issues

A bill which would provide compensation to victims of crime will be considered by the legislature during the next session.

NEVADA

A. Definition

Despite efforts in 1975 to pass a redefinition bill modeled after the Michigan statute, Nevada remains one of a number of states which defines rape as carnal knowledge of a female against her will.

B. Proof

No corroboration is required in Nevada.

In order to have admitted any evidence of the victim's past sexual conduct, the defense must submit a written offer of proof to the court including the specific facts he expects to prove. If the offer of proof is sufficient, the court will order a hearing out of the presence of the jury. If the evidence is relevant to the issue of consent, and is not required to be excluded, it may be admitted. The defendant may not present evidence of previous sexual conduct to challenge the victim's credibility as a witness unless the prosecutor has presented evidence concerning the past sexual conduct of the victim.

C. Special Victim Issues

Each county must pay the costs incurred by hospitals for initial emergency treatment of rape victims and any examination performed for evidence-gathering purposes. By ordinance, each Board of County Commissioners is also authorized to provide up to $1,000 to rape victims who require counseling and medical treatment. However, in order to obtain benefits of the program the victim must file a criminal complaint within 3 days of the occurrence of the offense.

NEW HAMPSHIRE

A. Definition

All nonconsensual sex offenses were consolidated into a sexual assault law in 1975. Sexual penetration (oral, anal, vaginal intercourse and intrusion by an object into genital or anal openings) and sexual contact accomplished by application of physical force or violence, by threat of force or retaliation, by coercion or when the victim is mentally incapacitated are within the definition of sexual assault.

B. Proof

The testimony of the victim need not be corroborated to sustain a conviction. *No* evidence of any prior consensual sexual activity between the victim and anyone other than the defendant may be admitted.

No prosecution for sexual assault may be had unless the offense was reported to law enforcement authorities within 6 months of its occurrence.

C. Special Victim Issues

None.

NEW JERSEY

A. Definition

New Jersey follows the common law which defines rape as carnal knowledge of a woman, forcibly and against her will.

B. Proof

If the defense wishes to introduce any evidence regarding the past sexual history of the victim, it may make application to the court for an order at any time before or during trial. If, at an in-camera hearing, the court finds the evidence relevant, and its probative value is not outweighed by the undue prejudicial value, or likelihood of confusing the issue, or that it would not be an unwarranted invasion of privacy, the evidence will be ordered admitted. Evidence of the victim's conduct which occurred more than one year prior to the date of the offense will be presumed inadmissible unless clear and convincing proof to the contrary is presented.

Corroboration is not required in New Jersey. An attempt to codify that case law rule was defeated in 1975.

C. Special Victim Issues

In 1975, other proposed bills were defeated which would have provided compensation to rape victims, established a sex crimes analysis unit, required training of police in handling rape investigations and allowed the victim's name to be withheld.

NEW MEXICO

A. Definition

The recent changes in New Mexico's rape law widened considerably the scope of forbidden conduct. The crime of sexual assault is divided into degrees based on whether or not there was penetration or contact, the age of the victim, the amount of force used, and harm resulting to the victim. Sexual penetration includes oral, anal and vaginal intercourse and penetration of genital and anal openings with an object.

B. Proof

Under the 1975 statutory revisions, corroboration is not required and the victim's testimony is entitled to the same weight as any other witness.

Opinion or reputation evidence or specific instances of the victim's past sexual history will not be admitted unless a written motion is made by the defendant and the court finds, at an in-camera hearing, that the evidence is material to the case and its inflammatory or prejudicial nature does not outweigh its probative value.

C. Special Victim Issues

None.

NEW YORK

A. Definition

Rape is defined as sexual intercourse by a male with a female by forcible compulsion when she is physically helpless to resist, or legally incapable of consent by reason of a mental defect. Oral and anal intercourse without the other person's consent are classified as sexual misconduct.

B. Proof

New York's requirement of corroboration for all three elements of rape (force used, penetration, and the defendant's identity) was abolished in 1974. Currently, the statute requires corroboration for any sexual offense in which lack of consent is an element but the incapacity to consent results from the victim's age, a mental defect, mental incapacity, or when the defendant is charged only with an *attempt*.

Evidence of the victim's past sexual conduct is not admissible under 1975 amendments unless the evidence: (1) proves or tends to prove specific instances of conduct with the accused; (2) proves or tends to prove the victim has been convicted of prostitution or soliciting; (3) rebuts evidence presented by the prosecutor regarding the victim's failure to engage in sexual acts during a given period of time; (4) explains origin or source of semen, pregnancy or disease; or (5) is found by the court after "such hearing as the court may require" to be relevant and admissible in the interest of justice.

C. Special Victim Issues

New York has a program providing compensation to the innocent victims of violent crime, including victims of rape. The program covers medical expenses, with no maximum limit, and other losses up to a limited maximum. Eligibility for compensation is subject to a means test.

NORTH CAROLINA

A. Definition

Rape is carnal knowledge of a female 12 years or older by force and against her will.

New legislation, just drafted, but not introduced, would establish the crime of sexual assault which would include oral, anal, and genital intercourse.

B. Proof

The victim's testimony need not be corroborated.

Efforts are now underway to draft legislation which would restrict admissibility of the victim's past sexual history to only that conduct which was with the defendant.

C. Special Victim Issues

Proposed bills which are now being drafted by various groups may include authorization and funding for special training of law enforcement and hospital personnel.

Present statute forbids use and carrying of mace or tear gas.

The judge is authorized to exclude, by statute, during the victim's testimony at trial or during the preliminary hearing, all people except officers of the court, the defendant, and those engaged in the trial.

NORTH DAKOTA

A. Definition

A criminal code revision, effective 1975, eliminated the term of rape and substituted for it "gross sexual imposition." The scope of the definition was widened from sexual intercourse with a female not the wife of the perpetrator, to "a sexual act with another where the victim submits by force, threat of force or where victim's capacity to appraise or control conduct has been substantially impaired."

B. Proof

The 1975 legislative changes prohibit introduction of opinion evidence, reputation evidence, or specific instances of sexual conduct with others to prove consent, although the defendant is allowed to rebut testimony relating to victim's past sexual history offered by the prosecution.

Evidence of victim's sexual conduct is admissible to attack her credibility. If the defendant wishes to offer such evidence, he must make a written motion accompanied by an offer of proof. A hearing on the motion is held out of the presence of the jury. If the judge finds the evidence relevant and not legally inadmissible, it will be ordered admitted.

C. Special Victim Issues

By statute, compensation is available to victims of all crimes, including rape. Compensation to victims is limited to expenses under $100.

OHIO

A. Definition

Rape is defined as sexual conduct with another, not the spouse of the offender, by force, threat of force or when the victim's judgment or control is substantially impaired. Sexual contact without consent is also prohibited.

B. Proof

Corroboration is required to convict a person of sexual imposition, which is sexual contact without consent.

The victim's past sexual history is admissible only in two instances: (1) to show the origin of sperm, disease, or pregnancy; or (2) if the conduct was with the defendant and it is material to a fact at issue and its inflammatory or prejudicial nature does not outweigh its probative value. The defendant must make the motion to order the evidence admissible at the preliminary hearing or three days prior to trial. The hearing to determine relevancy is held in the judge's chambers.

The statute specifically states that the victim need not prove physical resistance.

C. Special Victim Issues

A 1975 statutory change allows the names of the victim and the defendant and the details of the evidence to be withheld until a preliminary hearing is held.

The victim may also have private counsel present at the in-camera hearing to determine admissibility of prior sexual history. If the victim is indigent, then the court may, upon victim's motion, appoint counsel.

The 1975 statutory changes also allow minors to obtain medical treatment after a rape without their parents' consent, requires the state to pay for the

medical examination if used as evidence at trial, and requires the public health department to establish standard evidence-gathering procedures to be followed by all hospital personnel. The victim also has the right to be informed of all medical and psychiatric services available.

OKLAHOMA

A. Definition

Rape is an act of sexual intercourse accomplished with a female not the wife of the perpetrator where she is incapable of giving legal consent through lunacy or unsoundness of mind, where she resists but her resistance is overcome by force or violence or threats of force, where she is unconscious, or when she is prevented from resisting by a narcotic or anesthetic agent.

B. Proof

No corroboration of the victim's testimony is needed unless it is inherently inprobable.

A bill which passed in 1975 prohibits admission of any evidence of the victim's past sexual conduct except where that conduct was with or in the presence of the defendant. The defendant may also rebut any testimony relating to the sexual conduct of the victim if the prosecutor first introduces such evidence.

C. Special Victim Issues

None.

OREGON

A. Definition

A person commits the crime of rape if he has sexual intercourse with a female by forcible compulsion.

B. Proof

The testimony of the victim need not be corroborated.

Only evidence of sexual conduct between the victim and the defendant may be admitted in a prosecution for rape since 1975. If the defendant wishes to introduce such evidence during the trial to negate the existence of forcible compulsion, he must request a hearing to be held out of the presence of the jury. If the court finds the evidence is relevant and not otherwise inadmissible, the evidence may be introduced.

C. Special Victim Issues

None.

PENNSYLVANIA

A. Definition

A person commits rape if he engages in sexual intercourse with another, not his spouse, by forcible compulsion, threats of forcible compulsion, or when the other is unconscious or so mentally deficient as to be incapable of consent.

B. Proof

The testimony of a victim need not be corroborated as provided by statute. The credibility of a victim is to be judged by the same standard as a victim of any other crime and no instruction may be given cautioning the jury to view the testimony in any way other than that in which the testimony of all victims is viewed.

No evidence concerning the victim's past sexual conduct is admissible unless it was with the defendant. If the defendant wishes to offer such evidence, a written motion must be filed and the evidence heard at an in-camera hearing.

A 1976 statutory revision abolished the requirement of prompt complaint (within 3 months of the offense), although the defendant may introduce evidence of the victim's failure to report promptly.

C. Special Victim Issues

A bill to establish and fund a special sensitivity training program for criminal justice personnel is currently being considered.

RHODE ISLAND

A. Definition

The Rhode Island statute retains the common law definition of rape. An attempt to expand the definition of rape to include other nonconsensual sexual conduct, including contact, was defeated in 1975.

B. Proof

Corroboration is not required in Rhode Island.

Restrictions on admissibility of the victim's past sexual history are in effect as a result of a criminal procedure rule approved by the bench and bar of Rhode Island and promulgated by the Supreme Court in 1975. When the defendant wishes to introduce evidence of the complaining witness's past sexual conduct with others, he must give oral notice and make an offer of proof out of the hearing of the jury and any spectators. The court then rules upon the admissibility of the evidence.

C. Special Victim Issues

A proposed bill (1975) would have required physicians, health care workers, social workers and counselors to have the consent of the victim before reporting a rape to the police. Its purpose was to encourage rape victims to seek prompt medical treatment.

SOUTH CAROLINA

A. Definition

No changes have been made in South Carolina's definition of rape in at least 100 years. The statute reads: "Whosoever shall ravish a woman, married, maid, or other, when she did not consent, either before or after, or ravisheth a woman with force, although she consent after, shall be deemed guilty of rape."

In 1975, a bill modeled after Florida's sexual battery law, definition of which included anal, oral, and genital intercourse failed in committee.

Proponents of rape reform legislation are planning to introduce a Michigan-style bill in late 1976.

B. Proof

Corroboration of the victim's testimony is not required.

The proposed bills have attempted to restrict admissibility of the victim's past sexual history to conduct occurring with the defendant or specific instances of sexual acts with others which explains the source or origin of semen, pregnancy or disease. The defendant would be required to make a written motion before trial and make an offer of proof at an in-camera hearing.

C. Special Victim Issues

South Carolina, like Virginia, allows the victim in a rape case to submit her testimony by deposition. No one other than the prosecuting attorney, the accused and his counsel may attend the deposition unless the judge expressly allows it. The accused has the right to object to admissibility of testimony either at the time the deposition is taken or at trial when the deposition is offered into evidence.

The deposition is to be destroyed after trial if no appeal is taken from the trial court decision.

The proposed statute would require that the state bear the cost of the medical examination of the victim.

SOUTH DAKOTA

A. Definition

Rape is an act of oral, anal, or genital penetration accomplished with any person by force, coercion, threats of harm, or when the victim is incapable of consenting because of mental or physical incapacity.

B. Proof

Corroboration is not required.

Evidence of the victim's sexual conduct with others is not admissible unless it is relevant to a fact at issue. If the defendant wishes to offer such evidence, the court must hold a hearing, out of the presence of the jury and the public, to determine its admissibility.

C. Special Victim Issues

Any person convicted of rape must be given an initial psychiatric evaluation to determine if counseling is necessary. If so, then counseling must be made available in prison and counseling may also be made a condition of parole.

The names of the victim and the accused and the details of the incident may be suppressed at the request of either person until arraignment, dismissal of charges or the case is otherwise concluded.

TENNESSEE

A. Definition

In Tennessee, rape is the unlawful carnal knowledge of a woman forcibly and against her will. A criminal sexual conduct statute modeled after the

Michigan bill, which would have grouped all nonconsensual sex acts, was defeated in 1975.

B. Proof

Corroboration is not required in Tennessee.

In 1975, a bill passed prohibiting admission of evidence of any sexual activity between the victim and persons other than the defendant except when consent of the victim is at issue, the evidence may be admitted if it is established to the court outside the presence of the jury and spectators that the activity shows such a relation to the conduct of the victim involved in the case that it is relevant to consent.

C. Special Victim Issues

Carrying and use of teargas or mace is legal if the canister is designed to be carried in a purse or pocket.

TEXAS

A. Definition

Although Texas rewrote its rape laws in 1975, like Maryland, it chose to continue the distinction between rape and other sexual offenses. The new statute defines rape as sexual intercourse with a female not the wife of the offender without her consent. Without consent is defined by listing circumstances in which the female will be presumed not to have consented, e.g., where the offender compels the victim to submit by force that overcomes her earnest resistance. Deviant sexual intercourse, defined as oral or anal intercourse, is a separate offense entitled sexual abuse.

B. Proof

Victim's testimony in a rape case need not be corroborated *if* the victim informed any person other than the defendant of the alleged offense within 6 months of its occurrence.

In order to admit evidence of the victim's past sexual history (whether it is opinion, reputation or specific instances) the defendant must request an in-camera hearing on the matter. The judge may admit the evidence if, and only if, it is material to a fact at issue and its probative value is not outweighed by its inflammatory or prejudicial nature. The court shall seal the record of the hearing after admissibility has been determined.

C. Special Victim Issues

A victim's compensation bill passed in 1974 which requires the state to pay only the cost of the evidentiary medical exam.

UTAH

A. Definition

In Utah, a male person commits rape when he has sexual intercourse with a female, not his wife, without her consent. A report has been submitted to the state legislature which has recommended eliminating sexual discrimination from Utah's laws regarding rape and sexual assault.

B. Proof

Corroboration is not required.

Presently, there are no restrictions on the admissibility of the victim's past sexual history; however, a bill scheduled to be introduced in the 1977 session would allow such evidence to be admitted when the conduct was with the defendant or to rebut evidence presented by the prosecutor concerning the victim's past sexual conduct. A motion by the defendant would be required and admissibility would be determined at an in-camera hearing.

C. Special Victim Issues

Plans are being made to introduce a bill in 1977 which would reimburse victims for the cost of medical care, examinations and counseling.

VERMONT

A. Definition

Vermont continues to follow the common law definition of rape: carnal knowledge of a female person by force and against her will.

A proposed criminal code revision would continue the use of the term rape but would redefine it so that it would include any sexual act (anal, oral, vaginal intercourse) with another person, not the offender's spouse, when the victim is compelled to participate by force and against his/her will, by threats or coercion, or when the victim's ability to control or appraise his/her own behavior has been substantially impaired. Nonconsensual sexual contact would also be a crime.

B. Proof

Corroboration is required by case law but prompt complaint or other circumstantial evidence will suffice. The proposed criminal code revision would abolish the requirement of corroboration.

Proposed restrictions on admissibility of the victim's past sexual history would require the defendant to file a written motion within 30 days after arraignment or 10 days prior to trial. At the in-camera hearing, if the judge determines it is relevant, evidence of the victim's past sexual conduct with the defendant or evidence which shows the source or origin of semen, pregnancy or disease may be admitted. Opinion or reputation evidence is never admissible.

C. Special Victim Issues

The proposed bill would also have required the judge to suppress the name of the victim and the details of the incident upon request of the prosecutor, or victim or upon the court's own motion.

VIRGINIA

A. Definition

Rape is carnal knowledge of a female against her will, by force.

B. Proof

No corroboration of the victim's testimony is required in a rape prosecution.

A bill proposed in early 1976 would have prohibited any evidence of the victim's past sexual conduct unless the defendant could show a prior association with the victim by corroborated evidence. The prior association would be established outside the presence of the jury.

C. Special Victim Issues

By statute, Virginia alows the victim and other witnesses in a rape case to give testimony by deposition rather than oral testimony in open court. The defendant, his counsel, and the prosecutor are present at the deposition and the judge rules upon all evidentiary questions as if in open court. No other people may be present without express permission of the judge.

The Virginia Legislature passed a resolution in 1976 directing the Virginia State Crime Commission to conduct a study on criminal sexual assault, including changes needed in legislation, law enforcement, punishment and rehabilitation, public education and court process.

WASHINGTON

A. Definition

Although Washington retained the term rape in revising the rape laws in 1975, the definition of sexual intercourse was rewritten so that it included vaginal and anal penetration by an object, oral and anal intercourse as well as vaginal sexual intercourse. Rape is defined as sexual intercourse with another person by forcible compulsion or, when a person is incapable of legally consenting by reason of physical or mental incapacity.

B. Proof

The victim's testimony need not be corroborated in Washington as provided by statute.

A written pretrial motion accompanied by an offer of proof must be made by the defendant. The hearing is held out of the presence of the jury.

All evidence of the victim's past sexual history is inadmissible on issues of credibility and consent except in instances where the defendant and the victim have engaged in sexual intercourse before and that past intercourse is material to the issue of consent. The evidence may be admitted if the conduct between the victim and the accused is determined to be relevant and its probative value is substantially outweighed by the probability that its admission will create a substantial danger of undue prejudice and that its exclusion would result in denial of substantial justice.

C. Special Victim Issues

The judge may exclude all persons except necessary witnesses, the defendant, counsel and those who have a direct interest in the case or the work of the court from the hearing concerning admissibility of the victim's past sexual history.

Washington's Victims of Crime Compensation Act authorizes state payment of crime victim's medical bills but no compensation is paid unless the victim reports the crime to local authorities within 72 hours.

WEST VIRGINIA

A. Definition

Sexual assault is defined as sexual intercourse (anal, oral or vaginal intercourse) with another person by forcible compulsion or sexual intercourse when the other person is incapable of consent because he/she is mentally defective or incapacitated or under 16.

B. Proof

Corroboration is not required.

Evidence of specific instances of the victim's past sexual conduct is not admissible on the issue of consent unless such conduct was with the accused. All such evidence which the defendant wishes to offer must first be heard out of the presence of the jury.

Evidence of the victim's conduct with others, opinion evidence, and reputation evidence are admissible *only* for the purpose of impeaching the victim's credibility if the prosecution puts such credibility in issue.

C. Special Victim Issues

None.

WISCONSIN

A. Definition

In 1976, Wisconsin repealed its rape law, replacing it with a comprehensive redefinition section entitled sexual assault covering all nonconsensual sexual acts. Both sexual intercourse (includes fellatio, cunnilingus, anal intercourse or any other intrusion of any object into the genital or anal opening of another) and sexual contact are included in the definition of sexual assault which is divided into degrees according to amount of force used and harm to the victim.

B. Proof

Corroboration of victim's testimony is not required.

Any hearing involving the admissibility of evidence of prior sexual conduct or reputation of a complaining witness must be conducted out of the hearing of the jury.

Evidence of prior sexual conduct of the victim may not be admitted into evidence except evidence of the victim's past sexual conduct with the defendant, evidence showing the source or origin of semen, pregnancy or disease or evidence of prior untruthful allegations of sexual assault made by the victim. Sexual conduct is defined by the statute to mean any conduct or behavior relating to sexual activities of the complaining witness including but not limited to use of contraceptives, prior sexual intercourse or contact, living arrangement and lifestyle.

C. Special Victim Issues

The 1976 sexual assault bill requires the judge at the request of the complaining witness to exclude all people from the evidence hearing who are not officers of the court, members of witness's or defendant's families or "others deemed by the court to be supportive of them" or otherwise are required to attend the hearing. The judge may also exclude all persons from the hearing if he wishes.

Carrying and use of mace or teargas is prohibited by state statute.

WYOMING

A. Definition

Wyoming has kept the traditional common law definition of rape—carnal knowledge of a woman forcibly and against her will.

A 1976 bill which completely rewrote the rape laws did not pass. The bill was similar to the Michigan statute, defining sexual assault to include oral, anal, and genital intercourse and prohibiting nonconsensual sexual contact.

B. Proof

Corroboration is not required and the 1976 proposal explicitly stated that.

There are no statutory restrictions on the admissibility of the victim's past sexual history. The proposed bill would have required a written motion and offer of proof by the defense if it wished to offer evidence of sexual conduct with others for the purpose of challenging the victim's credibility or to show that the victim "was acting in conformity with a trait of character." Under the proposed statute, reputation and opinion evidence would not be admissible to show consent.

The *proposed* bill also forbade the following jury instructions: (1) that rape victims' testimony be viewed differently than the testimony of victims of other crimes; (2) that the testimony of the victim be examined with caution solely because of the nature of the charge; (3) that charge of rape is easy to make but difficult to defend; (4) that it may be inferred that anyone who has previously consented to sexual intercourse with persons other than defendant would be more likely to consent to sexual intercourse again; and (5) that prior sexual conduct in and of itself may be considered in determining credibility of witnesses.

C. Special Victim Issues

The proposed law would also have: (1) required a doctor in each city to be on call 24-hours a day to provide treatment for rape victims; (2) required the county to pay the costs of the victim's medical exam; and (3) allowed the names of the victim and the defendant to be withheld from the public until the court took jurisdiction of the case.

APPENDIX B

MODEL PENAL CODE

(Tentative Draft No. 4, 1955)

[Comment to §207.4, which appears as §213.4 of the approved 1962 draft, supra:]

Background and General Scheme of Proposed Section.

It is everywhere regarded as a serious offense for a male to have intercourse with a female other than his wife by means of force, threats, or certain forms of fundamental deception. The chief problems are (i) to decide and express what shall be the minimum amount of coercion or deception to be included here, i.e., drawing the line between rape-seduction, on the one hand, and illicit intercourse on the other; and (ii) to devise a grading system that distributes the entire group of offenses rationally over the range of available punishments. The latter problem is especially important because: (1) the upper ranges of punishment include life imprisonment and even death; (2) the offense is typically committed in privacy, so that conviction often rests on little more than the testimony of the complainant; (3) the central issue is likely to be the question of consent on the part of the female, a subtle psychological problem in view of social and religious pressures upon the woman to conceive of herself as victim rather than collaborator; and (4) the offender's threat to society is difficult to evaluate.

We know very little about "rapists" as a class, if indeed they constitute a single group. The intelligence of sex offenders is reported to be average, but the I.Q. of rapists falls below that level. Rape is most often committed by males between the ages of sixteen and thirty; and forcible rape especially is the crime of younger men. Among possible motivations for forcible rape Karpman has suggested: (a) male need for female resistance to achieve potency, (b) sadism, masochism or narcissism, (c) male hostility to the female and compensatory force to overcome feelings of sexual inadequacy, (d) overdevelopment of normal male aggressiveness, (e) aggressive criminality based upon a desire to pillage and plunder with rape as merely another act of plunder. Recidivism

in statutory and forcible rape is said to be negligible in comparison with other offenses. The grouping of statutory and forcible rapists together in attempts to characterize "the rapist" makes available statistics of little use in identifying the offender who merits the ultimate sanction.

The classification proposed in the text is based on the following rationale: the extreme punishment of first degree felony is reserved for situations which are the most brutal or shocking; evincing the most dangerous aberration of character and threat to public security, and which also provide some objective support for the complainant's testimony of non-consent. The remaining offenses embraced in common law rape or the usual statutory first degree are classified as second degree felonies. Subsections (2) and (3) delineate certain categories in which it appears desirable and safe to set even lower limits on punishment....

[Comment to §207.6, which appears as §213.4 of the approved 1962 draft, supra:]

Sexual Assault

Introduction. Section 207.6 deals with acts of sexual aggression which, with some exceptions, do not involve the peculiarly resented element of "penetration". The range of activity covered extends from unauthorized fondling of a woman's breast to homosexual manipulation of a young boy's genitals, digital penetration of a girl by an older man, and sadist or masochistic flagellation. The common law made no special provision for indecent assault, treating these as varieties of common assault and battery. At least as early as 1861, English legislation distinguished indecent assault from common assault by providing higher penalties for the former. American legislation has not generally differentiated sexual from other assaults, except that assaults with intent to rape or commit sodomy have been classified as aggravated. A few states have statutes on "gross lewdness" which, unlike most such statutes, cover private as well as public indecency. However, in recent years especially, there has been enacted in most states special legislation on taking sexual liberties with children....

MODEL PENAL CODE

(Proposed Official Draft, 1962)

ARTICLE 213. SEXUAL OFFENSES

Section 213.1. Rape and Related Offenses.

(1) *Rape.* A male who has sexual intercourse with a female not his wife is guilty of rape if:

(a) he compels her to submit by force or by threat of imminent death, serious bodily injury, extreme pain or kidnapping, to be inflicted on anyone; or

(b) he has substantially impaired her 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; or

(c) the female is unconscious; or

(d) the female is less than 10 years old.

Rape is a felony of the second degree unless (i) in the course thereof the actor inflicts serious bodily injury upon anyone, or (ii) the victim was not a voluntary social companion of the actor upon the occasion of the crime and had not previously permitted him sexual liberties, in which cases the offense is a felony of the first degree. Sexual intercourse includes intercourse per os or per anum, with some penetration however slight; emission is not required. [Felonies of the first degree are punishable by a possible maximum of life imprisonment, with a minimum of not less than a year nor more than ten years. Felonies of the second degree are punishable by a maximum of ten and a minimum of one year.]

(2) *Gross Sexual Imposition.* A male who has sexual intercourse with a female not his wife commits a felony of the third degree [punishable by a maximum of five and a minimum of one year] if:

(a) he compels her to submit by any threat that would prevent resistance by a woman of ordinary resolution; or

(b) he knows that she suffers from a mental disease or defect which renders her incapable of appraising the nature of her conduct; or

(c) he knows that she is unaware that a sexual act is being committed upon her or that she submits because she falsely supposes that he is her husband.

Section 213.3 Corruption of Minors and Seduction.

(1) *Offense Defined.* A male who has sexual intercourse with a female not his wife, or any person who engages in deviate sexual intercourse or causes another to engage in deviate sexual intercourse, is guilty of an offense if:

(a) the other person is less than [16] years old and the actor is at least [4] years older than the other person; or

(b) the other person is less than 21 years old and the actor is his guardian or otherwise responsible for general supervision of his welfare; or

(c) the other person is in custody of law or detained in a hospital or other institution and the actor has supervisory or disciplinary authority over him; or

(d) the other person is a female who is induced to participate by a promise of marriage which the actor does not mean to perform.

(2) *Grading.* An offense under paragraph (a) of Subsection (1) is a felony of the third degree. Otherwise an offense under this section is a misdemeanor.

Section 213.4 Sexual Assault.

A person who subjects another not his spouse to any sexual contact is guilty of sexual assault, a misdemeanor, if:

(1) he knows that the contact is offensive to the other person; or

(2) he knows that the other person suffers from a mental disease or defect which renders him or her incapable of appraising the nature of his or her conduct; or

(3) he knows that the other person is unaware that a sexual act is being committed; or

(4) the other person is less than 10 years old; or

(5) he has substantially impaired the other person's power to appraise or control his or her conduct, by administering or employing without the other's knowledge drugs, intoxicants or other means for the purpose of preventing resistance; or

(6) the other person is less than [16] years old and the actor is at least [four] years older than the other person; or

(7) the other person is less than 21 years old and the actor is his guardian or otherwise responsible for general supervision of his welfare; or

(8) the other person is in custody of law or detained in a hospital or other institution and the actor has supervisory or disciplinary authority over him.

Sexual contact is any touching of the sexual or other intimate parts of the person of another for the purpose of arousing or gratifying sexual desire of either party.

APPENDIX C

STATE STATUTES

Michigan, Minnesota, Washington, Wisconsin

A. MICHIGAN SEXUAL ASSAULT STATUTE

The People of the State of Michigan enact:

Section 1. Act No. 328 of the Public Acts of 1931, as amended, being sections 750.1 to 750.568 of the Compiled Laws of 1970, is amended by adding sections 520a, 520b, 520c, 520d, 520e, 520f, 520g, 520h, 520i, 520j, 520k, and 520l to read as follows:

Sec. 520a. As used in sections 520a to 520l:

(a) "Actor" means a person accused of criminal sexual conduct.

(b) "Intimate parts" includes the primary genital area, groin, inner thigh, buttock, or breast of a human being.

(c) "Mentally defective" means that a person suffers from a mental disease or defect which renders that person temporarily or permanently incapable of appraising the nature of his or her conduct.

(d) "Mentally incapacitated" means that a person is rendered temporarily incapable of appraising or controlling his or her conduct due to the influence of a narcotic, anesthetic, or other substance administered to that person without his or her consent, or due to any other act committed upon that person without his or her consent.

(e) "Physically helpless" means that a person is unconscious, asleep, or for any other reason is physically unable to communicate unwillingness to an act.

(f) "Personal injury" means bodily injury, disfigurement, mental anguish, chronic pain, pregnancy, disease, or loss or impairment of a sexual or reproductive organ.

(g) "Sexual contact" includes the intentional touching of the victim's or actor's intimate parts or the intentional touching of the clothing covering the immediate area of the victim's or actor's intimate parts, if that intentional touching can reasonably be construed as being for the purpose of sexual arousal or gratification.

(h) "Sexual penetration" means sexual intercourse, cunnilingus, fellatio, anal intercourse, or any other intrusion, however slight, of any part of a person's body or of any object into the genital or anal openings of another person's body, but emission of semen is not required.

(i) "Victim" means the person alleging to have been subjected to criminal sexual conduct.

Sec. 520b. (1) A person is guilty of criminal sexual conduct in the first degree if he or she engages in sexual penetration with another person and if any of the following circumstances exists:

(a) That other person is under 13 years of age.

(b) The other person is at least 13 but less than 16 years of age and the actor is a member of the same household as the victim, the actor is related to the victim by blood or affinity to the fourth degree to the victim, or the actor is in a position of authority over the victim and used this authority to coerce the victim to submit.

(c) Sexual penetration occurs under circumstances involving the commission of any other felony.

(d) The actor is aided or abetted by 1 or more other persons and either of the following circumstances exists:

(i) The actor knows or has reason to know that the victim is mentally defective, mentally incapacitated, or physically helpless.

(ii) The actor uses force or coercion to accomplish the sexual penetration. Force or coercion includes but is not limited to any of the circumstances listed in subdivision (f)(i) to (v).

(e) The actor is armed with a weapon or any other article used or fashioned in a manner to lead the victim to reasonably believe it to be a weapon.

(f) The actor causes personal injury to the victim and force or coercion is used to accomplish sexual penetration. Force or coercion includes but is not limited to any of the following circumstances:

(i) When the actor overcomes the victim through the actual application of physical force or physical violence.

(ii) When the actor coerces the victim to submit by threatening to use force or violence on the victim, and the victim believes that the actor has the present ability to execute these threats.

(iii) When the actor coerces the victim to submit by threatening to retaliate in the future against the victim, or any other person, and the victim believes that the actor has the ability to execute this threat. As used in this subdivision, "to retaliate" includes threats of physical punishment, kidnapping, or extortion.

(iv) When the actor engages in the medical treatment or examination of the victim in a manner or for purposes which are medically recognized as unethical or unacceptable.

(v) When the actor, through concealment or by the element of surprise, is able to overcome the victim.

(g) The actor causes personal injury to the victim, and the actor knows or has reason to know that the victim is mentally defective, mentally incapacitated, or physically helpless.

(2) Criminal sexual conduct in the first degree is a felony punishable by imprisonment in the state prison for life or for any term of years.

Sec. 520c. (1) A person is guilty of criminal sexual conduct in the second degree if the person engages in sexual contact with another person and if any of the following circumstances exists:

(a) That other person is under 13 years of age.

(b) The other person is at least 13 but less than 16 years of age and the actor is a member of the same household as the victim, the actor is related to the victim by blood or affinity to the fourth degree to the victim, or the actor is in a position of authority over the victim and used this authority to coerce the victim to submit.

(c) Sexual contact occurs under circumstances involving the commission of any other felony.

(d) The actor is aided or abetted by 1 or more other persons and either of the following circumstances exists:

(i) The actor knows or has reason to know that the victim is mentally defective, mentally incapacitated, or physically helpless.

(ii) The actor uses force or coercion to accomplish the sexual contact. Force or coercion includes but is not limited to any of the circumstances listed in sections 520b(1)(f)(i) to (v).

(e) The actor is armed with a weapon or any other article used or fashioned in a manner to lead a person to reasonably believe it to be a weapon.

(f) The actor causes personal injury to the victim and force or coercion is used to accomplish the sexual contact. Force or coercion includes but is not limited to any of the circumstances listed in section 520b(1)(f)(i) to (v).

(g) The actor causes personal injury to the victim and the actor knows or has reason to know that the victim is mentally defective, mentally incapacitated, or physically helpless.

(2) Criminal sexual conduct in the second degree is a felony punishable by imprisonment for not more than 15 years.

Sec. 520d. (1) A person is guilty of criminal sexual conduct in the third degree if the person engages in sexual penetration with another person and if any of the following circumstances exists:

(a) That other person is at least 13 years of age and under 16 years of age.

(b) Force or coercion is used to accomplish the sexual penetration. Force or coercion includes but is not limited to any of the circumstances listed in section 520b(1)(f)(i) to (v).

(c) The actor knows or has reason to know that the victim is mentally defective, mentally incapacitated, or physically helpless.

(2) Criminal sexual conduct in the third degree is a felony punishable by imprisonment for not more than 15 years.

Sec. 520e. (1) A person is guilty of criminal sexual conduct in the fourth degree if he or she engages in sexual contact with another person and if either of the following circumstances exists:

(a) Force or coercion is used to accomplish the sexual contact. Force or coercion includes but is not limited to any of the circumstances listed in section 520b(1)(g)(i) to (iv).

(b) The actor knows or has reason to know that the victim is mentally incapacitated, or physically helpless.

(2) Criminal sexual conduct in the fourth degree is a misdemeanor punishable by imprisonment for not more than 2 years, or by a fine of not more than $500.00, or both.

Sec. 520f. (1) If a person is convicted or a second or subsequent offense under section 520b, 520c, or 520d, the sentence imposed under those sections for the second or subsequent offense shall provide for a mandatory minimum sentence of at least 5 years.

(2) For purposes of this section, an offense is considered a second or subsequent offense if, prior to conviction of the second or subsequent offense, the actor has at any time been convicted under section 520b, 520c, or 520d or under any similar statute of the United States or any state for a criminal sexual offense including rape, carnal knowledge, indecent liberties, gross indecency, or an attempt to commit such an offense.

Sec. 520g. (1) Assault with intent to commit criminal sexual conduct involving sexual penetration shall be a felony punishable by imprisonment for not more than 10 years.

(2) Assault with intent to commit criminal sexual conduct in the second degree is a felony punishable by imprisonment for not more than 5 years.

Sec. 520h. The testimony of a victim need not be corroborated in prosecutions under sections 520b to 520g.

Sec. 520i. A victim need not resist the actor in prosecution under sections 520b to 520g.

Sec. 520j. (1) Evidence of specific instances of the victim's sexual conduct, opinion evidence of the victim's sexual conduct, and reputation evidence of the victim's sexual conduct shall not be admitted under sections 520b to 520g unless and only to the extent that the judge finds that the following proposed evidence is material to a fact at issue in the case and that its inflammatory or prejudicial nature does not outweigh its probative value:

(a) Evidence of the victim's past sexual conduct with the actor.

(b) Evidence of specific instances of sexual activity showing the source or origin of semen, pregnancy, or disease.

(2) If the defendant proposes to offer evidence described in subsection (1)(a) or (b), the defendant within 10 days after the arraignment

on the information shall file a written motion and offer of proof. The court may order an in camera hearing to determine whether the proposed evidence is admissible under subsection (1). If new information is discovered during the course of the trial that may make the evidence described in subsection (1)(a) or (b) admissible, the judge may order an in camera hearing to determine whether the proposed evidence is admissible under subsection (1).

Sec. 520k. Upon the request of the counsel or the victim or actor in a prosecution under sections 520b to 520g the magistrate before whom any person is brought on a charge of having committed an offense under sections 520b to 520g shall order that the names of the victim and actor and details of the alleged offense be suppressed until such time as the actor is arraigned on the information, the charge is dismissed, or the case is otherwise concluded, whichever occurs first.

Sec. 520l. A person does not commit sexual assault under this act if the victim is his or her legal spouse, unless the couple are living apart and one of them has filed for separate maintenance or divorce.

Section 2. All proceedings pending and all rights and liabilities existing, acquired, or incurred at the time this amendatory act takes effect are saved and may be consummated according to the law in force when they are commenced. This amendatory act shall not be construed to affect any prosecution pending or begun before the effective date of this amendatory act.

Section 3. Sections 85, 333, 336, 339, 340, 341, 342, and 520 of Act No. 328 of the Public Acts of 1931, being sections 750.85, 750.333, 750.336, 750.339, 750.340, 750.341, 750.342, and 750.520 of the Compiled Laws of 1970, and section 82 of chapter 7 of Act No. 175 of the Public Acts of 1927, being section 767.82 of the Compiled Laws of 1970, are repealed.

Section 4. This amendatory act shall take effect November 1, 1974.

B. MINNESOTA VICTIM ASSISTANCE STATUTE

CHAPTER 578--S.F. No. 3301
[Coded]

An act relating to crime and criminals; requiring the commissioner of corrections to develop a program to aid victims of sexual attacks.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MINNESOTA:

Section 1. [241.51] CRIME AND CRIMINALS; SEXUAL ATTACK VICTIM; PROGRAM TO AID. Subdivision 1. The commissioner of corrections shall develop a community based, statewide program to aid victims of reported sexual attacks.

Subd. 2. As used in this act, a "sexual attack" means any non-consensual act of rape, sodomy, or indecent liberties.

Subd. 3. The program developed by the commissioner of corrections may include, but not be limited to, provision of the following services:

(a) Voluntary counseling by trained personnel to begin as soon as possible after a sexual attack is reported. The counselor shall be of the same sex as the victim and shall, if requested, accompany the victim to the hospital and to other proceedings concerning the alleged attack, including police questioning, police investigation, and court proceedings. The counselor shall also inform the victim of hospital procedures, police and court procedures, the possibility of contracting venereal disease, the possibility of pregnancy, expected emotional reactions and any other relevant information; and shall make appropriate referrals for any assistance desired by the victim.

(b) Payment of all costs of any medical examinations and medical treatment which the victim may require as a result of the sexual attack if the victim is not otherwise reimbursed for these expenses or is ineligible to receive compensation under any other law of this state or of the United States.

Sec. 2. [241.52] POWERS OF COMMISSIONER. In addition to developing the statewide program, the commissioner of corrections may:

(a) Assist and encourage county attorneys to assign prosecuting attorneys trained in sensitivity and understanding of victims of sexual attacks;

(b) Assist the peace officers training board and municipal police forces to develop programs to provide peace officers training in sensitivity and understanding of victims of sexual attacks; and encourage the assignment of trained peace officers of the same sex as the victim to conduct all necessary questioning of the victim;

(c) Encourage hospital administrators to place a high priority on the expeditious treatment of victims of sexual attacks; and to retain personnel trained in sensitivity and understanding of victims of sexual attacks.

Sec. 3. [241.53] FUNDING; PILOT PROGRAMS. The commissioner of corrections shall seek funding from the governor's commission on crime prevention and control at the earliest possible date for purposes of this act. In addition, the commissioner of corrections shall seek and utilize all other available funding resources to establish pilot community programs to aid victims of sexual attacks before December 1, 1974.

Approved April 11, 1974.

9.79.140 Definitions. As used in this chapter:

(1) "Sexual intercourse" (a) has its ordinary meaning and occurs upon any penetration, however slight, and

(b) Also means any penetration of the vagina or anus however slight, by an object, when committed on one person by another, whether such persons are of the same or opposite sex, except when such penetration is accomplished for medically recognized treatment or diagnostic purposes, and

(c) Also means any act of sexual contact between persons involving the sex organs of one person and the mouth or anus of another whether such persons are of the same or opposite sex.

(2) "Married" means one who is legally married to another.

(3) "Mental incapacity" is that condition existing at the time of the offense which prevents a person from understanding the nature or consequences of the act of sexual intercourse whether that condition is produced by illness, defect, the influence of a substance or from some other cause;

(4) "Physically helpless" means a person who is unconscious or for any other reason is physically unable to communicate unwillingness to an act;

(5) "Forcible compulsion" means physical force which overcomes resistance, or a threat, express or implied, that places a person in fear of death or physical injury to herself or himself or another person, or in fear that she or he or another person will be kidnaped;

(6) "Consent" means that at the time of the act of sexual intercourse there are actual words or conduct indicating freely given agreement to have sexual intercourse. [1975 1st ex.s. c 14 § 1.]

9.79.150 Testimony--Evidence--Written motion--Admissibility. (1) In order to convict a person of any crime defined in this chapter it shall not be neccessary that the testimony of the alleged victim be corroborated.

(2) Evidence of the victim's past sexual behavior including but not limited to the victim's marital history, divorce history, or general reputation for promiscuity, nonchastity, or sexual mores contrary to community standards is inadmissible on the issue of credibility and is inadmissible to prove the victim's consent except as provided in subsection (3) of this section, but when the perpetrator and the victim have engaged in sexual intercourse with each other in the past, and when the past behavior is material to the issue of consent, evidence concerning the past behavior between the perpetrator and the victim may be admissible on the issue of consent to the offense.

(3) In any prosecution for the crime of rape or for an attempt to commit, or an assault with an intent to commit any such crime evidence of

the victim's past sexual behavior including but not limited to the victim's marital behavior, divorce history, or general reputation for promiscuity, nonchastity, or sexual mores contrary to community standards is not admissible if offered to attack the credibility of the victim and is admissible on the issue of consent only pursuant to the following procedure:

(a) A written pretrial motion shall be made by the defendant to the court and prosecutor stating that the defense has an offer of proof of the relevancy of evidence of the past sexual behavior of the victim proposed to be presented and its relevancy on the issue of the consent of the victim.

(b) The written motion shall be accompanied by an affidavit or affidavits in which the offer of proof shall be stated.

(c) If the court finds that the offer of proof is sufficient, the court shall order a hearing out of the presence of the jury, if any, and the hearing shall be closed except to the necessary witnesses, the defendant, counsel, and those who have a direct interest in the case or in the work of the court.

(d) At the conclusion of the hearing, if the court finds that the evidence proposed to be offered by the defendant regarding the past sexual behavior of the victim is relevant to the issue of the victim's consent; is not inadmissible because its probative value is substantially outweighed by the probability that its admission will create a substantial danger of undue prejudice; and that its exclusion would result in denial of substantial justice to the defendant; the court shall make an order stating what evidence may be introduced by the defendant, which order may include the nature of the questions to be permitted. The defendant may then offer evidence pursuant to the order of the court.

(4) Nothing in this section shall be construed to prohibit cross-examination of the victim on the issue of past sexual behavior when the prosecution presents evidence in its case in chief tending to prove the nature of the victim's past sexual behavior, but the court may require a hearing pursuant to subsection (3) of this section concerning such evidence. [1975 1st ex.s. c 14 § 2.]

9.79.160 Defenses to prosecution under this chapter.

(1) In any prosecution under this chapter in which lack of consent is based solely upon the victim's mental incapacity or upon the victim's being physically helpless, it is a defense which the defendant must prove by a preponderance of the evidence that at the time of the offense the defendant reasonably believed that the victim was not mentally incapacitated and/or physically helpless.

(2) In any prosecution under this chapter in which the offense or degree of the offense depends on the victim's age, it is no defense that the perpetrator did not know the victim's age, or that the perpetrator believed the victim to be older, as the case may be: *Provided,* That it is a defense

CONTINUED

1 OF 2