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RAPE REFORM LEGISLATION: IS IT THE SOLUTION?*

FORCIBLE RAPE IS ONE OF THE MOST rapidly increasing crimes of violence in the United States.¹ Figures released by the Federal Bureau of Investigation indicate that there was an eleven percent increase in violent crime in this country in 1974,² and within this group, a nine percent increase in forcible rape.³ Yet with the incidence of rape reaching dramatic proportions,⁴ less than fourteen percent of the reported rapes are successfully prosecuted.⁵

Part of the blame for the failure to successfully prosecute rape cases can be attributed to the failure of our criminal justice system — a failure admitted by Attorney General Edward H. Levi in a memorandum accompanying the *1974 Preliminary Annual Release of the Uniform Crime Report*:

These figures represent a dismal and tragic failure on the part of our present system of criminal justice

We must understand that an effective criminal justice system has to emphasize deterrence. There are many causes of crime, but among them is the failure of our system to move quickly and effectively to detect and punish offenders.⁶

Others, however, point specifically to the antiquated rape statutes that presently exist in most states as being a major part of the problem and argue that the statutes provide little protection for the victim while in effect, acting as a deterrent to effective prosecution. This is the result

* Editor's note: Special acknowledgment is extended to the Women's Caucus of the Cleveland State University College of Law for the use of its facilities and for the funds which permitted the undertaking of this study. Unless otherwise indicated, miscellaneous materials cited herein are on file at the Cleveland State University Law Library.

¹ Forcible rape as used in this study refers to vaginal intercourse between a male and female, and anal intercourse, fellatio and cunnilingus, between persons regardless of sex, with another not the spouse of the offender when either of the following applies: (1) the offender purposely compels the other person to submit by force or threat of force, or (2) for the purpose of preventing resistance, the offender substantially impairs the other's judgment or control by administering any drug or intoxicant to the other person, surreptitiously or by force, threat of force or deception. Statutory rape will not be treated.

² FBI, *UNIFORM CRIME REPORTS FOR THE UNITED STATES* (1974 Preliminary Annual Release, March 31, 1975). Violent crimes include: murder, forcible rape, robbery, and aggravated assault.

³ *Id.* The FBI has defined forcible rape as "carnal knowledge of a female through the use of force or the threat of force." FBI, *UNIFORM CRIME REPORTS FOR THE UNITED STATES* 13 (1973). These statistics include attempts to commit forcible rape but exclude statutory rape without force and male rape.

⁴ *Id.* Forcible rape offenses in 1973 increased 10% over 1972 and 62% over 1968.

⁵ *Id.* at 15.

⁶ FBI Press Release (March 31, 1975).

of statutes so inadequately drafted by the legislatures⁷ that judicial decisions must be based on case law and a tradition which looks upon the testimony of rape victims with suspicion.⁸ Proponents of this argument conclude that the solution to the problem lies with the legislatures and requires the enactment of sweeping rape reform legislation.⁹ A few states, including Ohio,¹⁰ have already adopted some reform legislation.¹¹

In order to evaluate rape reform legislation we will compare the new statutes with the old, critically analyze reform legislation, present arguments both in support of and against various aspects of rape reform legislation, and estimate the effect on the rape problem that such legislation is likely to have.

I. OHIO LAW PRIOR TO REFORM

In enacting its new criminal code which became effective January 1, 1974, the Ohio legislature dramatically changed its approach to sexual offenses.¹² It recognized that any type of sexual activity between consenting adults in private is not a crime and focused its attention on sexual activity carrying a significant risk of harming or affronting others.¹³ It further demonstrated legislative sophistication by discarding distinctions of sex between offender and victim.¹⁴ These changes were all utilized in drafting Ohio's new rape statute.¹⁵

⁷ See, e.g., GA. CODE ANN. § 26-2001 (1972); ME. REV. STAT. ANN. tit. 17, § 3151 (1964).

⁸ 3A J. WIGMORE, EVIDENCE § 924a (Chadbourn rev. 1970).

⁹ Among the proponents of rape reform legislation are the Michigan Women's Task Force on Rape, the National Organization of Women, and the American Bar Association.

¹⁰ Ohio Am. Sub. S.B. 144 was signed into law by Governor James A. Rhodes on August 27, 1975, effective immediately [hereinafter referred to as "Ohio Bill"].

¹¹ See CAL. EVID. CODE ANN. § 782, 1103 (West Supp. 1975); CAL. GOV'T CODE ANN. § 13961.5 (West Supp. 1975); CAL. PENAL CODE ANN. §§ 1127d, 1127e (West Supp. 1975); Colo. H.B. 1042 (enacted July 1, 1975); FLA. STAT. ANN. § 794.011 (Supp. 1975); Hawaii H.B. 106 (enacted May 14, 1975); Ill. H.B. 271 (enacted August 26, 1975); Ill. H.B. 278 (enacted August 26, 1975); IOWA CODE ANN. §§ 782.3, 4 (Supp. 1975); MICH. COMP. LAWS ANN. §§ 750.520a-5201 (Supp. 1975); ch. 374, [1975] Minn. Laws 1084; Nev. A.B. 664 (enacted May 21, 1975); Nev. S.B. 52 (enacted May 20, 1975); Nev. S.B. 222 (enacted May 20, 1975); N.M. STAT. ANN. §§ 40A-9-20 to -26 (interim Supp. 1975); Ohio Am. Sub. S.B. 144 (enacted August 27, 1975); Ore. H.B. 2241 (enacted July 1, 1975); Ore. H.B. 2242 (enacted July 3, 1975); ch. 203, [1975] Tex. Laws 476; ch. 14 [1975] Wash. Laws 1st Ex. Sess. 171.

¹² OHIO REV. CODE ANN. §§ 2907 *et seq.* (Page 1975).

¹³ OHIO REV. CODE ANN. §§ 2907 *et seq.*, Committee Comment (Page 1975).

¹⁴ See, e.g., OHIO REV. CODE ANN. § 2907.01 (A), (B), (D) (Page 1975).

¹⁵ OHIO REV. CODE ANN. § 2907.02 (Page 1975) provides:

(A) No person shall engage in sexual conduct with another, not the spouse of the offender, when any of the following apply:

(1) The offender purposely compels the other person to submit by force or threat of force.

(2) For the purpose of preventing resistance, the offender substantially impairs the other person's judgment or control by administering any drug or intoxicant to the other person, surreptitiously or by force, threat of force, or deception.

(3) The other person is less than thirteen years of age, whether or not the offender knows the age of such person.

Rape as it is now defined in Ohio incorporates the common law definition¹⁶ but expands the traditional concept of rape to include oral and anal sex as well as homosexual and lesbian assaults.¹⁷ In addition, the purposeful drugging of the victim or rendering the victim intoxicated in order to perpetrate rape has been proscribed as criminal activity by the statute.¹⁸

This redefinition of rape reflects the intent of the legislature not only to clarify the criminal law but also to establish reasonable guidelines for the courts in their exercise of judicial discretion. For example, although under former law rape was a non-probationary offense,¹⁹ rape offenders are now eligible for probation subject to the application by the courts of detailed criteria in determining such eligibility.²⁰ An exception is made in the case of repeat offenders who are still not eligible for probation.²¹

Despite the well-intentioned efforts of the legislature to clarify the law concerning rape, these efforts failed to deal with several critical aspects of the rape problem. These include: the necessity of proving resistance; the admissibility of evidence of the victim's prior sexual conduct with persons other than the accused; and the requirement of corroborative testimony. Ohio statutes have never addressed themselves to these issues; consequently, judicial determinations have frequently been constrained within the bounds of the statutory framework. Other Ohio courts have overcome the statutory limitations by utilizing the "expansiveness of the common law," but for the most part the courts have had to define the law without the benefit of legislative guidance aided only by prior case law. As far back as 1861, the Ohio Supreme Court, in a case involving an attempt to rape a nine-year-old child, expressed its dismay at the statutory constraint:

No act or omission, however hurtful or immoral in its tendencies, is punishable as a *crime* in Ohio, unless such act or omission is specially enjoined or prohibited by the statute laws of the state. It is, therefore, idle to speculate upon the injurious consequences of permitting such conduct to go unpunished, or to regret that our criminal code has not the expansiveness of the common law.²²

(B) Whoever violates this section is guilty of rape, a felony of the first degree. If the offender under division (A) (3) of this section purposely compels the victim to submit by force or threat of force, whoever violates division (A) (3) of this section shall be imprisoned for life.

¹⁶ At common law rape was defined as the unlawful carnal knowledge of a woman by a man forcibly and against her will.

¹⁷ OHIO REV. CODE ANN. § 2907.01 (A) (Page 1975). See also note 15, *supra*.

¹⁸ See note 15, *supra*.

¹⁹ OHIO REV. CODE ANN. § 2951.04 (Page 1954).

²⁰ OHIO REV. CODE ANN. § 2951.02 (Page 1975).

²¹ OHIO REV. CODE ANN. §§ 2951.02 (F) (2), 2929.01 (Page 1975).

²² *Smith v. State*, 12 Ohio St. 466, 469 (1861).

Resistance, though not an element of the crime of rape, has almost always been used by the courts as a factor determinative of lack of consent. The question has been how much resistance must be exerted to negative consent with various courts applying various standards. One of the earliest standards defined by an Ohio court is found in *State v. Labus*:²³

The force and violence necessary in rape is naturally a relative term, depending upon the age, size and strength of the parties and their relation to each other; . . . the same degree of force and violence would not be required upon a person of such tender years, as would be required were the parties more nearly equal in age, size and strength.²⁴

Though following the "relative" standard of *State v. Labus*, the court in *State v. Colucci*²⁵ expanded the standard to include submission through fear of personal violence. It was also recognized in *State v. Martin*²⁶ that resistance can be overcome by terror or by fear of great bodily injury or harm. In this case, the court held that the guilt of the accused was established beyond a reasonable doubt despite the fact that "the victim might have used greater physical resistance or cried out . . ." ²⁷ The Supreme Court of Ohio in *State v. Schwab* has gone even farther in recognizing that resistance need not be proved where "consent has been induced or the opposition prevented, by fears of personal violence . . ." ²⁸

There is in general a notable paucity of case law in Ohio dealing with rape, particularly on the issue of the admissibility of evidence of the victim's prior sexual conduct. The law in Ohio on this subject was first articulated in 1858 in *McCombs v. State*²⁹ and was reiterated four years later in *McDermott v. State*.³⁰ The *McCombs* decision stated the rule to be:

²³ 102 Ohio St. 26, 130 N.E. 161 (1921).

²⁴ *Id.* at 38-39, 130 N.E. at 164.

²⁵ 27 Ohio L. Abs. 509, 514 (Ohio App. 1938). The following charge was made to the jury:

You are instructed that the allegation of force is proved by evidence which shows beyond a reasonable doubt that the person of the complaining witness was violated and her resistance overcome by physical force, or that her will was overcome by fear or duress. In either case the crime would be complete though she ceased all resistance before the act was actually consummated. Where a female submits to sexual intercourse through fear of personal violence, such intercourse is not with her consent, and the crime is complete. The woman is bound to resist if manual resistance is possible, or unless such resistance is overcome by fear or by threats. If she remains passive, her passiveness is to be taken as consent. *Id.* at 514.

²⁶ 77 Ohio App. 553, 68 N.E.2d 807 (1946).

²⁷ *Id.* at 554, 68 N.E.2d at 808. See also *State v. Wolfenberger*, 106 Ohio App. 322, 154 N.E.2d 774 (1958).

²⁸ 109 Ohio St. 532, 539, 143 N.E. 29, 31 (1924).

²⁹ 8 Ohio St. 643 (1858).

³⁰ 13 Ohio St. 332 (1862).

The character for chastity of the prosecutrix . . . can not be impeached by evidence of particular acts of unchastity, but only by evidence of her reputation in that respect. Nor can she be interrogated as to previous criminal intercourse with persons other than the accused himself; nor is such evidence of other instances admissable.³¹

After citing its previous decision in *McCombs*, the Supreme Court of Ohio in *McDermott v. State* explained the rationale for excluding such evidence:

It by no means follows, that a desire to have sexual intercourse with one person, tends, legitimately, to prove a willingness to have like intercourse with another and different person. Indeed, the reverse is much the most probable; but, however this may be, the introduction of such proof is opposed to the well-settled rules of evidence.³²

Although these decisions were reached over a hundred years ago, they have yet to be reaffirmed, questioned or rejected.

Under the common law, the corroboration requirement for a charge of rape did not exist³³ and as with the previously discussed aspects of rape, Ohio follows the common law. The Ohio Supreme Court in *State v. Tuttle*³⁴ held that it was error to instruct the jury in a case of statutory rape that it is unsafe to convict upon the testimony of the victim alone without other reliable corroborative evidence.³⁵ This position has been adhered to so consistently by the Ohio courts that the statutory confirmation of the common law rule has been viewed as unnecessary.

As shown above, the Ohio courts have approached three critical aspects of the rape problem in a manner reflective of an unsophisticated understanding of the more complex ramifications of this crime. But the courts alone cannot be held accountable for failing to address other critical areas. Such issues as the definition of spouse, the availability of medical care for rape victims, the withholding of victims' names from the media and the establishing of sentencing provisions require legislative action. Only within the past year has the Ohio legislature been willing to recognize the breadth of the rape problem and to initiate statutory reform.

II. OHIO REFORM LEGISLATION

Interested groups concerned with the present rape crisis and advocating legislative reform as the answer to this crisis were confronted by two major problems. The first was that several aspects of rape had not been

³¹ 8 Ohio St. at 646-47 (1858).

³² 13 Ohio St. at 334 (1862).

³³ 7 J. WIGMORE, EVIDENCE § 2061 (3d ed. 1940).

³⁴ 67 Ohio St. 440, 66 N.E. 524 (1902).

³⁵ *Id.* at 442, 66 N.E. at 525. The court also held that finding the victim of a rape to be an accomplice would "incur" the purpose of the law.

specifically dealt with statutorily but had only been treated by the courts relying on the common law. The solution to this problem, however, required only codification of existing case law. The second problem was more acute. Proponents of reform were concerned with concepts of rape that had never before been considered by either the Ohio legislature or the courts. It was incumbent upon the proponents to incorporate these concepts within a workable legal framework. Their task was somewhat simplified by the sophisticated approach used in drafting the sex offenses chapter³⁶ of the 1974 revision of the Ohio Criminal Code. Nonetheless, initiating reform in any aspect of the law is never easy.

These efforts resulted in the enactment of Senate Bill 144 by the 111th Ohio General Assembly.³⁷ The amendments to existing rape law³⁸ included in this bill are the following:

1. The term spouse is defined to mean one presently married to an offender at the time of the alleged offense with the following exceptions: (1) when the parties have entered into a written separation pursuant to the Ohio Revised Code; (2) when an action for annulment, divorce, dissolution or alimony is pending; (3) when the action is for alimony, after the effective date of the judgment.³⁹

2. The victim need not prove resistance.⁴⁰

3. In prosecutions for rape, evidence of specific instances of the victim's "sexual conduct,"⁴¹ and opinion and reputation evidence of the victim's prior sexual conduct is inadmissible with two exceptions: evidence of the origin of semen and evidence of the victim's prior sexual conduct with the offender.⁴² These two evidential exceptions are admissible, if the court at a hearing in chambers⁴³ finds such evidence to be "material to a fact at issue in the case and that its inflammatory or prejudicial nature does not outweigh its probative value."⁴⁴ The hearing in chambers to determine the admissibility of such evidence shall be held at or prior to the preliminary hearing but not less than three days before trial or during trial for good cause.⁴⁵ At any hearing or proceeding at which the admissibility of evidence is to be determined the victim may be represented by counsel.⁴⁶ In the event of indigency

³⁶ OHIO REV. CODE ANN. §§ 2907 *et seq.* (Page 1975).

³⁷ See note 10, *supra*.

³⁸ OHIO REV. CODE ANN. §§ 2907.02 *et seq.* (Page 1975).

³⁹ Ohio Bill § 2907.01(L).

⁴⁰ Ohio Bill § 2907.02(C).

⁴¹ OHIO REV. CODE ANN. § 2907.01(A) (Page 1975) defines "sexual conduct" as vaginal intercourse between a male and female, and anal intercourse, fellatio, and cunnilingus between persons regardless of sex. Penetration, however slight, is sufficient to complete complete vaginal or anal intercourse.

⁴² Ohio Bill § 2907.02(D).

⁴³ Ohio Bill § 2907.02(E).

⁴⁴ Ohio Bill § 2907.02(D).

⁴⁵ Ohio Bill § 2907.02(E).

⁴⁶ Ohio Bill § 2907.02(F).

or inability to obtain counsel, the court upon request shall appoint counsel without cost to the victim.⁴⁷

Evidence of specific instances of the defendant's sexual activity and opinion and reputation evidence of the defendant's sexual activity is inadmissible subject to the same exceptions applicable to the victim's sexual conduct with an additional exception, proof of motive or intent pursuant to section 2945.59 of the Ohio Revised Code.⁴⁸ Such evidence may be admissible if a determination of materiality is made at an in chambers hearing as described above.⁴⁹ The right of the state or the defense to impeach the victim's credibility is not limited by this section.⁵⁰

4. Persons convicted of rape as a second or subsequent offense are mandatorily sentenced to actual incarceration for a minimum period of five years.⁵¹ A second or subsequent offense as used in the Bill means that prior to the present conviction, the offender has been convicted for violating the Ohio rape statute or a substantially similar statute of any other state or the United States.⁵² Actual incarceration is defined as requiring imprisonment for a stated period, notwithstanding any provisions to the contrary in existing law concerning suspension of sentence, probation, shock probation, parole, and shock parole.⁵³ The exceptions to the "actual incarceration" requirement are reduction of sentence for good behavior and suspension of sentence during indefinite commitment to a mental institution.⁵⁴

5. Upon the request of either the victim or offender, the court shall order the suppression of the names of both the victim and offender and the details of the alleged crime until the preliminary hearing, the accused is arraigned, the charge is dismissed, or the case is otherwise concluded, whichever occurs first.⁵⁵ This section does not deny to either party the name and address of the other party or the details of the alleged offense.⁵⁶

6. Any costs incurred by a hospital or other emergency medical facility for conducting a medical examination of a rape victim for the purpose of gathering physical evidence for possible prosecution shall be paid by the county if a county facility, by the municipality if a municipal facility, or by the municipality in which the offense was committed if a private facility.⁵⁷ All hospitals within the state of

⁴⁷ *Id.*

⁴⁸ Ohio Bill § 2907.02(D).

⁴⁹ Ohio Bill § 2907.02(E).

⁵⁰ Ohio Bill § 2907.02(D).

⁵¹ Ohio Bill § 2907.10(A).

⁵² *Id.*

⁵³ Ohio Bill § 2908.10(B).

⁵⁴ *Id.*

⁵⁵ Ohio Bill § 2907.11.

⁵⁶ *Id.*

⁵⁷ Ohio Bill § 2907.28.

Ohio with emergency room facilities shall provide on-call physician service twenty-four hours a day for the examination of rape victims.⁵⁸ Such examinations shall be made upon the request of any peace officer or prosecutor with the victim's consent or upon the request of the victim.⁵⁹ The attending hospital shall provide the victim with information of all available venereal disease, pregnancy and psychiatric services.⁶⁰ A minor may consent to a physical examination for rape, such consent not being subject to disaffirmance because of minority.⁶¹ Consent of the parent or guardian of a minor rape victim is not required for such an examination nor is the parent or guardian liable for payment for any services provided without their consent.⁶²

7. Any unauthorized insertion of an instrument, apparatus or other object into the vaginal or anal cavity of a person not the spouse of the offender when the offender compels submission by force or threat of force or when the offender prevents resistance by administering a drug or intoxicant by force, threat of force or deception shall constitute felonious sexual penetration, a felony of the first degree.⁶³

These newly enacted provisions of the Ohio rape law represent the major areas of concern to proponents of rape reform legislation throughout the United States. Accordingly, this note will focus on these issues and the issue of requiring corroboration of the rape victim's testimony, a subject of great controversy which was deleted from the originally proposed Ohio legislation. The following comparative analysis will examine, with the aid of the views of interested individuals and groups, not only newly enacted reform legislation, but also rape law as it still exists in the majority of states.

III. DEFINITION OF SPOUSE

Historically a husband has been presumed to be incapable of raping his wife. The classical statement of this presumption is found in Lord Hale's treatise of 1847:

But the husband cannot be guilty of a rape committed by himself upon his lawful wife, for by their mutual matrimonial consent and contract the wife hath given up herself in this kind unto her husband, which she cannot retract.⁶⁴

Although Hale cited no other authority for his proposition, it was readily adopted as the law on the subject. The first indication of disagreement

⁵⁸ Ohio Bill § 2907.29.

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² *Id.*

⁶³ Ohio Bill § 2907.12. This section adds a new crime to the Sex Offenses Chapter of the Ohio Criminal Code.

⁶⁴ 1 M. HALE, *THE HISTORY OF THE PLEAS OF THE CROWN* § 629 (1847).

with Hale's rule appeared by way of dicta in *Regina v. Clarence*,⁶⁵ where judges expressed the view that the consent given by the wife at marriage could, in some circumstances, be revoked. It was not until 1949 in *Rex v. Clarke*⁶⁶ that one such circumstance was recognized, namely that consent to marital intercourse was revoked by a decree of judicial separation. This decision was soon qualified in *Regina v. Miller*⁶⁷ which held that a mere filing for divorce did not revoke marital consent nor erase the husband's immunity from a charge of raping his wife.

Marriage as a defense against charges of rape was first articulated in the United States by the Supreme Court of Massachusetts in dicta in *Commonwealth v. Fogerty*.⁶⁸ The court stated that the defense was valid even when the husband and wife were no longer cohabitating and found that physical separation did not revoke consent.⁶⁹ Although a subsequent case held that divorce revoked the marital contract and destroyed the wife's implied consent to marital intercourse,⁷⁰ the decision does not represent the recognition of a circumstance in which a husband can be found guilty of the rape of his wife, but rather, acknowledges that a divorce nullifies the marriage.

Although American courts have persisted in following the rule that a husband is legally incapable of raping his wife, they have found that he may be convicted for the rape of his wife. A husband who aids or abets, assists or forces another to have sexual intercourse with his wife, or forces her to submit to sexual intercourse with another can be held guilty of rape.⁷¹ Even in circumstances where the husband has intercourse with his wife concomitant with aiding and abetting her rape by another party, courts will find him guilty only by reason of his aiding and abetting and not by reason of his having had intercourse with her.⁷² Thus it appears

⁶⁵ 22 Q.B.D. 23 (1889). Implied consent of marriage does not extend to infection with syphilis or gonorrhoea. American decisions have held qualified consent to apply only to healthful intercourse, and husbands have been found guilty of (sexual) criminal battery. See *State v. Lankford*, 29 Del. 594, 102 A. 63 (1917); 18 COLUM. L. REV. 81 (1918). See also *Trammell v. Vaughan*, 158 Mo. 214, 59 S.W. 79 (1900); *State v. Marcks*, 140 Mo. 656, 43 S.W. 1095 (1897) (dissenting opinion).

⁶⁶ 2 All E.R. 448 (1949).

⁶⁷ 2 Q.B. 282 (1954).

⁶⁸ 74 Mass. 489 (1857).

⁶⁹ *Id.* See *Frazier v. State*, 48 Tex. Crim. 142, 86 S.W. 754 (1905). See also Comment, *Rape and Battery Between Husband and Wife*, 6 STAN. L. REV. 719 (1954).

⁷⁰ *State v. Parsons*, 285 S.W. 412 (Mo. 1926).

⁷¹ See *Elliott v. State*, 190 Ga. 803, 10 S.E.2d 843 (1940); *People v. Damen*, 28 Ill. 2d 464, 193 N.E.2d 25 (1963); *State v. Martin*, 17 N.C. App. 317, 194 S.E.2d 60 (1973); *Cody v. State*, 376 P.2d 625 (Okla. Crim. 1962); *State v. Blackwell*, 241 Ore. 528, 407 P.2d 617 (1965).

⁷² See *Bohanon v. State*, 289 P.2d 400 (Okla. Crim. App. 1955), wherein the husband threatened to kill the wife and their three children unless she submitted to the third person, tore off her clothes, threw her on the bed, watched his friend have intercourse with her despite her protests and then had intercourse with her himself; *State v. Drope*, 462 S.W.2d 677 (Mo. 1971), wherein the husband cooperating with four other men tied his wife to a bed, held a gun to her head while each of the others had intercourse with her, and then had forcible intercourse with her himself.

that courts will adhere to the consent theory even where the facts indicate that the wife's consent was unlikely.⁷³

Discontent with this state of the law has resulted in the statutory redefinition of spouse. Since 1973, ten states have enacted statutes that revoke the immunity of the husband from charges of rape when the spouses are living apart under a decree of judicial separation⁷⁴ or are living apart and either have filed for judicial separation or divorce.⁷⁵ During the past year, New Mexico adopted an even more restrictive definition of spouse and now defines spouse as "a legal husband or wife, unless the couple is living apart or either husband or wife has filed for separate maintenance or divorce."⁷⁶ (Emphasis added.) Therefore, merely living apart is sufficient to revoke the spousal immunity.

To the same effect is the Colorado definition which excludes spouses living apart with the intent to do so, whether or not pursuant to a decree of judicial separation.⁷⁷ Whereas Washington in enacting rape reform legislation defined "married" persons as those legally married,⁷⁸ Minnesota included in its definition of spouse "adults cohabiting in an ongoing voluntary sexual relationship at the time of the alleged offense."⁷⁹ Ohio's unique definition excludes parties who have entered into a written separation agreement pursuant to Ohio law and also parties who are involved in an action for annulment, divorce, dissolution of marriage or alimony.⁸⁰ Yet despite the movement toward liberalization of this feature of the rape laws, Indiana is presently considering the enactment of a statute which would incorporate the common law theory of implied consent upon marriage.⁸¹

The common law definition of spouse applied in most states rests on the theory that the husband has a property interest in his wife. This theory views the wife as subject to her husband. Such a concept does not reflect the present day approach to marriage as a contract between equal partners. Sexual intercourse between equal partners implies a voluntary consent to each act and negates an absolute contractual obligation.

Proponents of the redefinition of spouse argue that the criminal law

⁷³ See *State v. Drope*, 462 S.W.2d 677 (Mo. 1971); *Bohanon v. State*, 289 P.2d 400 (Okla. Crim. App. 1955).

⁷⁴ KY. REV. STAT. ANN. § 510.010 (Supp. 1975); LA. REV. STAT. ANN. § 14:41 (1974); MONT. REV. CODES ANN. §§ 94-5-503, -506(2) (1973); ch. 241, § 2 [1973] N.M. Laws, as amended N.M. STAT. ANN. § 40A-9-20(E) (interim Supp. 1975); ORE. REV. STAT. § 163.305 (2) (1973); PA. STAT. ANN. tit. 18, § 3103 (1973); UTAH CODE ANN. § 76-5-407 (1973).

⁷⁵ MICH. COMP. LAWS ANN. § 750.520 (1) (Supp. 1975); ch. 374, § 10, [1975] Minn. Laws 1089; Nev. S.B. 52 § 2 (enacted May 20, 1975).

⁷⁶ N.M. STAT. ANN. § 40A 9-20(E) (interim Supp. 1975).

⁷⁷ Colo. H.B. 1042 § 18-3-409(2) (enacted July 1, 1975).

⁷⁸ Ch. 14, § 1, [1975] Wash. Laws 1st Ex. Sess. 171.

⁷⁹ Ch. 374, § 10, [1975] Minn. Laws 1089.

⁸⁰ Ohio Bill § 2907.01 (L).

⁸¹ Proposed Ind. Penal Code Final Draft § 35-12.1-4-1 (October 1974). The comment following the proposed statute states at 88: "The implied consent of the marriage has been incorporated into this section so that a spouse cannot physically rape his partner."

should not discriminate against married women as a class.⁸² They claim that the law's refusal to recognize the possibility of a husband raping his wife violates the equal protection clause of the United States Constitution:

The same facts of criminal behavior could occur in two separate instances, but while rape would exist in the instance where there was no marital bond, it would not exist in the other solely due to the fact of a legal bond of marriage.⁸³

It is further argued that the state has an inherent interest in protecting not only the general welfare of society but also the integrity of the individual. Although there is a societal interest in protecting the marital relationship, there is an equal interest in safeguarding the individual from acts of violence. Both interests must be considered in the determination of legislative policy. Under present law the integrity of the individual is subjugated to the societal interest in protecting marital privacy.

Opponents agree that wives should be protected by the criminal law from forcible sexual intercourse, but contend that "rape is a category ill-suited to marriage."⁸⁴ The usual problems of proof are magnified when a wife accuses her husband of rape for it is difficult to determine whether consent once given, in a specific instance has been revoked. Accordingly, it is claimed that courts and legislatures are justified in their reluctance to include within the definition of rape sexual intercourse between spouses.

There is, it is alleged, a compelling societal interest in protecting the institution of marriage. Such an interest requires that legislative policy encourage reconciliation even in those instances where the parties have separated or have filed for separation or divorce. A redefinition of spouse to allow for rape between married persons in such circumstances could discourage reconciliation and prevent the restoration of vitality to the marriage. Even where it is apparent that reconciliation will not occur opponents fear the use of rape charges as a means of blackmail.⁸⁵

Although opponents fear that the redefinition of spouse represents a threat to the institution of marriage, it must be kept in mind that the redefinition of spouse has no effect on a viable, ongoing marriage. The focus of reform legislation on this topic is the protection of spouses who although no longer a part of an ongoing marriage are nonetheless still

⁸² See Michigan Women's Task Force on Rape, Background Material for a Proposal for Criminal Code Reform to Respond to Michigan's Rape Crisis 12 [hereinafter cited as Michigan Women's Task Force].

⁸³ *Id.* at 11-12.

⁸⁴ Comment, *Rape and Battery Between Husband and Wife*, 6 STAN. L. REV. 719, 725 (1954).

⁸⁵ Where there has once been love, there is reason to suspect that it will be replaced by hatred rather than indifference. A wife who is willing to prod the state into beginning a felony prosecution against her husband is unlikely to recollect objectively. There also is the possibility that she may use the threat of prosecution to force her husband to agree to an unfavorable property settlement. *Id.*

legally bound by the implied consent of the marriage contract. There is no reason why a spouse who has not only indicated an intention to terminate the marriage but also has taken formal steps to do so should be required to submit to unwanted sexual intercourse because of the archaic concept of implied consent.

IV. RESISTANCE

As rape is defined in most states the act must be forcible and against the will of the victim. Although resistance has never been an element of the crime, many courts have seized upon it as the outward manifestation of nonconsent.⁸⁶ Resistance has been used to establish two essential elements of the crime: force and nonconsent.⁸⁷ These elements must be demonstrated except in cases where the victim is *non compos* or is otherwise mentally or physically incapacitated.⁸⁸

The basic question facing the courts with regard to resistance is how much resistance negatives consent. This quantitative question has been a major source of disagreement and has resulted in the formulation of numerous resistance standards. It has been generally held that resistance by mere words is not enough; it must be accompanied by acts.⁸⁹ The most rigid standard is that which requires "utmost resistance." The Wisconsin Supreme Court has interpreted this phrase as requiring

the most vehement exercise of every physical means or faculty within the woman's power to resist the penetration of her person, and this must be shown to persist until the offense is consummated.⁹⁰

Other authorities, however, refuse to require this degree of opposition:

While it may be expected in such cases from the nature of the crime that the utmost resistance would be manifested, and the utmost resistance made which the circumstances of a particular case would allow, still, to hold as a matter of law that such manifestation and resistance are essential to the existence of the crime, so that the crime could not be committed if they were wanting, would be going farther than any well-considered case in criminal law has hitherto gone.⁹¹

It is now generally recognized that resistance to rape is relative and that a court must consider all the attending facts and circumstances: the age

⁸⁶ Comment, *The Resistance Standard in Rape Legislation*, 18 STAN. L. REV. 680 (1966).

⁸⁷ 2 F. BAILEY AND H. ROTHBLATT, *CRIMES OF VIOLENCE* § 432 (1973).

⁸⁸ This incapacity includes the use of drugs or other intoxicants and instances in which resistance is prevented through fear or threats of physical injury.

⁸⁹ *See Mills v. United States*, 164 U.S. 644 (1897); *State v. Risen*, 192 Ore. 557, 235 P.2d 764 (1951).

⁹⁰ *Brown v. State*, 127 Wis. 193, 199, 106 N.W. 536, 538 (1906).

⁹¹ *State v. Shields*, 45 Conn. 256, 264 (1877).

of the victim,⁹² the relative strength of the parties,⁹³ the amount of force exerted by the accused,⁹⁴ and the futility of resistance.⁹⁵ The court must determine in light of the facts and circumstances of a particular case whether the degree of resistance exerted was reasonable and adequate to negate consent,⁹⁶ but it is well-established that the victim of rape need not resist where such resistance would be futile and would endanger her life.⁹⁷

In developing the resistance standard, courts have generally accepted the view that yielding because of fear does not constitute voluntary consent.⁹⁸ It has been held that actual resistance is not required when because of fear resulting from threats of great bodily harm or death a woman yields to her attacker.⁹⁹ Again, however, there is disagreement among the courts as to what constitutes sufficient fear to overcome or prevent resistance. Some jurisdictions have adopted an objective standard as stated in *Farrar v. United States*:¹⁰⁰

Fear to be sufficient . . . must be based upon something of substance; and furthermore the fear must be of death or severe bodily harm. A girl cannot simply say, "I was scared," and thus transform an apparent consent into a legal non-consent which makes the man's act a capital offense [H]er fear must be not fanciful but substantial.¹⁰¹

This objective standard of fear, however, is not generally accepted.

A variation of the objective standard enunciated in a number of jurisdictions is a "paralyzing fear" standard. One of the most rigid interpretations of the standard was that of the Wisconsin Supreme Court which

⁹² See *Bulls v. State*, 33 Okla. Crim. 64, 241 P. 605 (1926); *State v. Wamsley*, 109 W.Va. 570, 156 S.E. 75 (1930).

⁹³ See *People v. Simental*, 11 Ill. App. 3d 537, 297 N.E.2d 356 (1973) (victim was four feet eleven inches tall and weighed ninety-five pounds while her two assailants were about five feet eleven inches tall and weighed one hundred eighty pounds each).

⁹⁴ See *King v. State*, 210 Tenn. 150, 357 S.W.2d 42 (1962), wherein the court quotes from 1 A. WHARTON, CRIMINAL LAW AND PROCEDURE 639:

The degree of force required to constitute rape is relative depending upon the particular circumstances but in any case it must be sufficient to subject and put the dissenting woman within the power of the man and thus enable him to have carnal knowledge of her notwithstanding good faith resistance on her part.

⁹⁵ See *People v. Browder*, 21 Ill. App. 3d 223, 315 N.E.2d 168 (1974); *In re Price*, 20 Ill. App. 3d 357, 314 N.E.2d 235 (1974).

⁹⁶ See *Holmes v. State*, 505 P.2d 189 (Okla. Crim. App. 1972).

⁹⁷ See *People v. Browder*, 21 Ill. App. 3d 223, 315 N.E.2d 168 (1974) (two women were abducted at gunpoint by four men and assaulted sexually in a dark, vacant apartment by fifteen or sixteen men); *People v. Smith*, 32 Ill. 2d 88, 203 N.E.2d 879 (1965); *People v. Faulisi*, 25 Ill. 2d 457, 185 N.E.2d 211 (1962).

⁹⁸ See *Whittaker v. State*, 50 Wis. 518, 524, 7 N.W. 431, 433 (1880), wherein the court quotes from *Regina v. Day*, 9 Carr and P. 722: "There is a difference between consent and submission. Every consent involves a submission, but it by no means follows that submission involves consent."

⁹⁹ See *State v. Campbell*, 190 Neb. 22, 206 N.W.2d 53 (1973).

¹⁰⁰ 275 F.2d 868 (D.C. Cir. 1960).

¹⁰¹ *Id.* at 876.

required "a fear . . . so great as to terrify her and render her practically incapable of resistance."¹⁰² As applied, this standard excluded as a victim of rape any person who was "fully cognizant of everything that was going on, fully able to relate every detail thereof"¹⁰³ This harsh standard, first articulated in 1938 and reaffirmed as recently as 1968,¹⁰⁴ was rejected by the Wisconsin Supreme Court in 1971 when it recognized that the test of a woman's will to resist is subjective and need not be expressed in terms of incapacitating fear.¹⁰⁵ Specifically, the court recognized that not every woman would respond to the threat of rape at gunpoint with the same degree of fear; though one might be overcome by incapacitating fear, another might not.¹⁰⁶ Thus, a person overcome by incapacitating fear would not have to prove resistance, whereas another, not easily frightened, would be required to do so. The law should apply the same standard in either situation and should not require resistance in any situation where a person is faced with an attack at the point of a deadly weapon — the use of a gun is reason enough not to resist.¹⁰⁷

The Wisconsin subjective standard was further liberalized in *Brown v. State*,¹⁰⁸ a case in which the victim was confronted with a weapon that later turned out to be a water pistol. The court held:

[t]he . . . fear which renders the utmost resistance unnecessary . . . need not necessarily be . . . "so extreme as to preclude resistance," but may, in the exercise of "[c]ommon sense and the experience of mankind," be prompted by the "strong motivation or belief" that survival demands submission.¹⁰⁹ (Footnotes omitted.)

The trend in other jurisdictions has likewise been toward a liberalization of the resistance standard. In general, recent cases have held that the utmost resistance theory is "obsolete and outdated" and that the victim need only show "that her resistance was genuine, active, and in good faith."¹¹⁰

In an effort to clarify the confusion created by the application of numerous resistance standards, three states have enacted reform legislation.¹¹¹ The essence of the legislation in all three states is that the prosecution need not prove resistance in order to establish that a rape has

¹⁰² *State v. Hoffman*, 228 Wis. 235, 240, 280 N.W. 357, 359 (1938).

¹⁰³ *Id.* at 244, 280 N.W. at 361.

¹⁰⁴ *State v. Muhammad*, 41 Wis. 2d 12, 162 N.W.2d 567 (1968).

¹⁰⁵ *State v. Herfel*, 49 Wis. 2d 513, 182 N.W.2d 232 (1971).

¹⁰⁶ *Id.*

¹⁰⁷ *Id.* at 519, 182 N.W.2d at 235. As the court noted: "The law does not require a woman to become a martyr to test by resistance the sincerity of a threat to rape at gunpoint."
Id.

¹⁰⁸ 59 Wis. 2d 200, 207 N.W.2d 602 (1973).

¹⁰⁹ *Id.* at 212, 207 N.W.2d at 608.

¹¹⁰ See generally 2 F. BAILEY AND H. ROTHBLATT, *supra* note 87, at 278.

¹¹¹ MICH. COMP. LAWS ANN. § 750.520(i) (Supp. 1975); ch. 374, § 8, [1975] Minn. Laws 1088; Ohio Bill § 2907.02(C).

occurred. Several arguments have been advanced in support of this legislation. The first of these deals with the subjectivity of the interpretation of statutory language as applied by the courts to individual fact situations. It is contended that because such statutory terms as "utmost resistance" and "against the will" are not self-defining, courts in defining them have injected their own subjective biases.¹¹² Another argument advanced is that in all crimes of violence resistance on the part of the victim alarms and angers the attacker. It follows that a person who attempts to resist a rape attack is far more likely to be injured or killed than a person who unwillingly submits. The elimination of the resistance requirement would at the very minimum decrease the possibility that violence will be used to accomplish the intercourse.¹¹³ It should not be necessary for the victim to have to withstand further injury for the sole purpose of *proving* a charge of rape. Finally, advocates say that the legislatures must stop concentrating their attention on the victim's conduct but rather should focus on the offender's criminal behavior.¹¹⁴ The primary concern should be "whether the offender's behavior was coercive and violent; [and] whether the offender's power of execution of threats was reasonably apparent to the victim."¹¹⁵

While those protective of the victim's rights press for elimination of the resistance requirement, those concerned with safeguarding the rights of the accused urge reformulation of an objective resistance standard which would eliminate conjecture and uncertainty.¹¹⁶ It is argued that the statutory language should make clear that the victim need not incur serious risk of death or serious bodily injury and with equal consistency ensure fair treatment of the defendant:

The standard must be high enough to assure that the resistance is unfeigned and to indicate with some degree of certainty that the woman's attitude was not one of ambivalence or unconscious compliance and that her complaints do not result from moralistic afterthoughts. It must be low enough to make death or serious injury an unlikely outcome of the event. To demand that a woman sacrifice her life to protect her virtue not only would represent a misplaced sense of values but would also unjustly

¹¹² Landau, *Rape: The Victim as Defendant*, 10 TRIAL, July/August 1974, at 19, 21.

They have tended to assess the conduct presented in individual cases by measuring it against their view of what an adult woman who did not want sexual intercourse would have done under the given set of circumstances. Unfortunately, this judicial view of the average woman frequently does not correspond to the way in which real women actually respond to perceived dangers. As a result, our appellate courts have frequently dealt in an unrealistic manner with the actual events as experienced by a woman subjected to forcible intercourse. *Id.* at 21.

¹¹³ *Id.* at 22.

¹¹⁴ Michigan Women's Task Force, *supra* note 82, at 6.

¹¹⁵ *Id.*

¹¹⁶ Comment, *The Resistance Standard in Rape Legislation*, 18 STAN. L. REV. 680 (1966).

raise an inference and an eyebrow whenever a raped woman lived to tell the tale.¹¹⁷

Obviously this proposed resistance standard does not eliminate conjecture and uncertainty. A statutorily defined standard offers no greater protection to both the victim and accused than the standards presently articulated by the courts. The complete elimination of the need on the part of the victim to prove resistance would appear to be the best solution.

V. PRIOR SEXUAL CONDUCT OF THE VICTIM

The chastity of the rape victim has historically been a proper subject of inquiry by the courts. Evidence of the victim's unchastity has been admissible to show the probability of her consent and to impeach her credibility. The introduction of such evidence into rape trials was founded upon the nineteenth century view that an unchaste woman could not be raped.¹¹⁸ Despite a dramatic change in sexual mores, these outmoded attitudes are still reflected in current judicial decisions.

When the defense to a charge of rape is consent, the general rule is that evidence of the victim's reputation for unchastity is admissible.¹¹⁹ The reasoning behind this rule is that it is more probable that an unchaste woman would assent to such an act than a virtuous woman.¹²⁰ As bearing on the question of consent, however, some jurisdictions admit not only general reputation evidence but also evidence of specific acts tending to show want of chastity on the part of the prosecutrix.¹²¹ Though this is the minority view, it is supported by Wigmore who, while pointing out the conflict among the courts, concludes that the better rule admits evidence of specific acts.¹²² The response to Wigmore's position has been that such testimony involves collateral issues that have no direct bearing on the guilt or innocence of the defendant.¹²³ Other reasoning

¹¹⁷ *Id.* at 685. The resistance standard which was proposed by the author was that "resistance [be] at least as great as the maximum resistance a female could reasonably offer to prevent penetration while avoiding serious risk of death or serious bodily injury."

¹¹⁸ Comment, *Rape and Rape Laws: Sexism in Society and Law*, 61 CALIF. L. REV. 919, 939 (1973).

¹¹⁹ Annot., 140 A.L.R. 364, 380 (1942).

¹²⁰ See *People v. Cox*, 383 Ill. 617, 622, 50 N.E.2d 758, 760 (1943).

¹²¹ See *State v. Wood*, 59 Ariz. 48, 122 P.2d 416, 417 (1942); *People v. Walker*, 150 Cal. App. 2d 594, 310 P.2d 110, 115 (1957); *State v. Wulff*, 194 Minn. 271, 260 N.W. 515, 516 (1935); *Frank v. State*, 150 Neb. 745, 35 N.W.2d 816, 822 (1949); *Redmon v. State*, 150 Neb. 62, 33 N.W.2d 349, 351 (1948).

¹²² I J. WIGMORE, EVIDENCE § 200 (3d ed. 1940). A recent case comment supports the minority view espoused by Wigmore but advocates that evidence of specific acts of the victim's prior sexual conduct be admissible subject to the exercise of judicial discretion out of the presence of the jury. This comment also advocates a total exclusion of evidence of specific sexual acts when offered solely to impeach the victim's credibility. 8 GA. L. REV. 973 (1974).

¹²³ See *Rice v. State*, 35 Fla. 236, 17 So. 286 (1895).

is not only concerned with the introduction of collateral issues but also with the surprise element inherent in such evidence.¹²⁴ The prosecutrix, though prepared to answer questions regarding her general reputation for chastity and her specific sexual relationship with the accused, cannot reasonably anticipate accusations and questions regarding specific sexual acts with other men. In some jurisdictions, even general reputation evidence is excluded when consent is not an issue.¹²⁵

In most states, under the rules of evidence, the veracity of the witness is the only proper subject of inquiry for purposes of impeachment. In general, these rules exclude evidence of other specific character traits. An exception is made in cases of rape, however, where a few courts admit evidence of character for unchastity.¹²⁶

Most courts agree that in prosecutions for rape, evidence of the victim's prior sexual conduct with the accused is admissible.¹²⁷ Generally, such evidence is admitted to raise an implication of consent and to reduce the probability that the act was forcible.¹²⁸ The principle upon which evidence of the victim's acts of intercourse with the defendant is admitted was stated in *Bedgood v. State*:¹²⁹

¹²⁴ [W]hile a prosecutrix, as a witness in an action of rape alleged to have been committed upon her, is expected to defend her general reputation for chastity she cannot anticipate the charges of specific acts of illicit intercourse which may be made by men who perhaps have been suborned to testify that they have had such connection with her, so as to secure the acquittal of the accused. . . .
State v. Ogden, 39 Ore. 195, 210, 65 P. 449, 454 (1901).

¹²⁵ See *Esquivel v. State*, 506 S.W.2d 613 (Tex. Crim. App. 1974); *Roper v. State*, 375 S.W.2d 454 (Tex. Crim. App. 1964); *State v. Sims*, 30 Utah 2d 357, 517 P.2d 1315 (1974).

¹²⁶ See, e.g., *Jones v. Commonwealth*, 154 Ky. 640, 157 S.W. 1079 (1913); *Redmon v. State*, 150 Neb. 62, 33 N.W.2d 349 (1948). In admitting such evidence in rape cases the question has arisen as to whether the evidence is relevant as to both the victim's and accused's credibility.

It is a matter of common knowledge that the bad character of a man for chastity does not even in the remotest degree affect his character for truth, when based upon that alone, while it does that of a woman. It is no compliment to a woman to measure her character for truth by the same standard that you do that of a man's, predicated upon character for chastity. What destroys the standing of the one in all the walks of life has no effect whatever on the standing for truth of the other.

State v. Sibley, 131 Mo. 519, 531-32, 33 S.W. 167, 171 (1895).

The concurring opinion rejected the bias of the majority apparent in the above statement and argued that the same rule of evidence for impeaching the credibility of testimony should apply whether the witness be male or female. *Id.* at 532-33, 33 S.W. at 171-72 (concurring opinion). The bias of the majority view, however, finds support in *Wigmore who believed that the one situation in which chastity may have a direct connection with veracity is when a woman charges a man with rape.* 3A J. WIGMORE, EVIDENCE § 924a (Chadbourn rev. 1970).

¹²⁷ See, e.g., *Rice v. State*, 35 Fla. 236, 17 So. 286 (1895); *Esquivel v. State*, 506 S.W.2d 613 (Tex. Crim. App. 1974).

¹²⁸ See *Lee v. State*, 132 Tenn. 655, 179 S.W. 145 (1915); *Graham v. State*, 125 Tex. Crim. 210, 67 S.W.2d 296 (1933).

¹²⁹ 115 Ind. 275, 17 N.E. 621 (1888).

[E]vidence of previous illicit commerce renders it probable that force was not used. This principle has a two-fold effect, inasmuch as it affects the credit of the woman who charges that her person was forcibly violated, and also supplies the accused with a circumstance making it probable that he did not obtain by violence what he might have secured by persuasion or for money. It is, the rule assumes, not probable that a man who has procured without committing a felony what he desired would commit a felony to obtain it. A man accused of crime has a right to all relevant testimony that tends to make it appear improbable that he is guilty of the crime with which he is charged.¹³⁰

Although this principle was first articulated in 1888, it remains essentially unchanged today.

Application of the above rules of evidence regarding the victim's prior sexual conduct has, it is argued, often had the effect of placing the victim on trial rather than the accused. This treatment of the rape victim has had the following cyclical effect: rape victims are reluctant to report the crime; without reporting there are no prosecutions and convictions; without prosecutions and convictions, there is no deterrent to the crime; without a deterrent, the incidents of rape continually increase; and finally, though the number of rapes increases, victims remain unwilling to report the crime. To break down this continuous cycle legislation to change the rules of evidence with regard to the victim's prior sexual activity has been enacted in thirteen states.¹³¹

The first state to enact a statute dealing with the admissibility of past sexual conduct of the rape victim was Iowa.¹³² The statute excludes all evidence of such conduct with persons other than the defendant committed more than one year prior to the date of the alleged crime.¹³³ It leaves to the court's discretion, however, upon a determination of relevancy, the admissibility of all other evidence of prior sexual conduct —

¹³⁰ *Id.* at 279, 17 N.E. at 623. In *Bedgood*, a case involving a rape by several men, the court admitted evidence of prior sexual intercourse with one of the accused. In *People v. Degnen*, 70 Cal. App. 567, 234 P. 129 (1925), however, a case involving a rape by two men, both of whom had had prior intercourse individually with the victim, the court refused to admit evidence of prior intercourse arguing that consent to intercourse with each individually did not imply consent to an attack by both at the same time.

¹³¹ CAL. EVID. CODE § 782, 1103 (West Supp. 1975); Colo. H.B. 1042 § 18-3-407 (enacted July 1, 1975); FLA. STAT. ANN. § 794.022(2) (Supp. 1975); Hawaii H.B. 106 § 1 (enacted May 14, 1975); IOWA CODE ANN. § 782.4 (Supp. 1975); MICH. COMP. LAWS ANN. § 750.520(j) (Supp. 1975); ch. 374, § 8, [1975] Minn. Laws 1088; Nev. S.B. 222 §§ 2, 4 (enacted May 20, 1975); N.M. STAT. ANN. § 40A-9-26 (interim Supp. 1975); Ohio Bill §§ 2907.02(D), (E), (F); Ore. H.B. 2241 § 2 (enacted July 1, 1975); ch. 203, § 3, [1975] Tex. Laws 477; ch. 14, § 2, [1975] Wash. Laws 1st Ex. Sess. 171.

¹³² IOWA CODE ANN. § 782 (Supp. 1975).

¹³³ *Id.*

such admissibility to be decided at an *in camera* hearing upon application to the court by the defendant before or during trial.¹³⁴

Florida, in enacting its involuntary sexual battery statute, also admits evidence of specific instances of prior sexual activity between the victim and the offender,¹³⁵ but specific instances of prior sexual activity between the victim and persons other than the accused are not admissible except when consent is in issue.¹³⁶ In those circumstances, such evidence may be admitted if the court at an *in camera* hearing determines that it tends to establish a pattern of behavior on the part of the victim relevant to consent.¹³⁷ Unlike the Iowa statute, Florida's statute restricts the discretion of the court in determining admissibility to the issue of consent.

California in enacting the Robbins Rape Evidence Law,¹³⁸ contemporaneously with Michigan, adopted a less restrictive evidentiary standard. Opinion and reputation evidence and evidence of specific instances of the victim's sexual conduct are inadmissible on the issue of consent unless such conduct was with the defendant.¹³⁹ Evidence of the prior sexual conduct of the complaining witness, however, may be admissible on the issue of credibility if determined relevant to the issue by the court at an *in camera* hearing.¹⁴⁰ The court shall order such a hearing upon a written motion made by the defendant and a sufficient offer of proof.¹⁴¹ Evidence of the character or a trait of character of the victim is admissible if offered by the accused to prove conduct in conformity with such character or trait of character, or offered by the prosecution to rebut such evidence of the defendant.¹⁴²

While not addressing the issue of consent, Hawaii followed California in allowing evidence of sexual conduct of the complaining witness to be admitted to attack the credibility of such witness subject to an *in camera* hearing.¹⁴³

Nevada's evidentiary standard, on the other hand, admits evidence of any previous sexual conduct of the victim for purposes of proving consent, subject to an *in camera* hearing, but excludes such evidence for purposes of impeaching credibility.¹⁴⁴ If, however, the prosecution has introduced evidence of the victim's previous sexual conduct or the victim has testified concerning such conduct or its absence, the defense may use this evidence to impeach the victim's credibility in cross-exami-

¹³⁴ *Id.*

¹³⁵ FLA. STAT. ANN. § 794.022(2) (Supp. 1975).

¹³⁶ *Id.*

¹³⁷ *Id.*

¹³⁸ CAL. EVID. CODE §§ 782, 1103 (West Supp. 1975).

¹³⁹ *Id.* § 1103(2).

¹⁴⁰ *Id.* § 782(a).

¹⁴¹ *Id.*

¹⁴² *Id.* § 1103(1).

¹⁴³ Hawaii H.B. 106 § 1 (enacted May 14, 1975).

¹⁴⁴ Nev. S.B. 222 §§ 2, 4 (enacted May 20, 1975).

nation or rebuttal, but only to the extent utilized by the prosecution or victim.¹⁴⁵

Opinion and reputation evidence of the victim's sexual conduct and evidence of specific instances of the victim's prior or subsequent sexual conduct are presumed to be irrelevant under the new Colorado rape law.¹⁴⁶ The two exceptions to this presumption are evidence of the victim's prior or subsequent sexual conduct with the accused and evidence of specific instances of sexual activity to show source of semen, pregnancy, disease or any other similar evidence of sexual intercourse.¹⁴⁷ Evidence not included within the two exceptions and evidence that the victim has a history of false reporting of rape may be admitted at trial if found relevant to an issue material to the case at an *in camera* hearing.¹⁴⁸

Relying on judicial discretion to assure the defendant's right to present all relevant evidence while protecting the victim from evidence of an inflammatory or prejudicial nature, New Mexico and Texas have adopted legislation which conditions the admission of *all* evidence of the victim's sexual conduct upon a determination at an *in camera* hearing of its materiality.¹⁴⁹ This evidentiary standard is the one supported by groups traditionally concerned with the protection of defendants' rights since there is no absolute exclusion of any evidence which may have probative value. Similarly, Minnesota requires an *in camera* hearing to determine the admissibility of any evidence of the complainant's previous sexual conduct.¹⁵⁰ Unlike New Mexico and Texas, Minnesota qualifies the circumstances under which such evidence can be used: (1) when consent or fabrication by the victim is the defense if such evidence shows a pattern of sexual conduct under similar circumstances occurring within one year of the alleged offense; (2) evidence of specific instances of sexual activity to show source of semen, pregnancy or disease; (3) evidence of the victim's past sexual conduct with the accused; and (4) for purposes of impeachment when such evidence is offered to rebut the victim's testimony.¹⁵¹

The evidentiary standard enacted as part of Washington's rape reform legislation admits evidence of the victim's past sexual behavior only on the issue of consent and only when the perpetrator and the victim have engaged in sexual intercourse with each other in the past.¹⁵² Under these circumstances, evidence including but not limited to the victim's marital behavior, divorce history, reputation for promiscuity or sexual

¹⁴⁵ *Id.* § 4.

¹⁴⁶ Colo. H.B. 1042 § 18-3-407 (enacted July 1, 1975).

¹⁴⁷ *Id.*

¹⁴⁸ *Id.*

¹⁴⁹ N.M. STAT. ANN. § 40A-9-26 (interim Supp. 1975); ch. 203, § 3, [1975] Tex. Laws 477. See 27 BAYLOR L. REV. 362 (1975) for an analysis of the Texas statute.

¹⁵⁰ Ch. 374, § 8, [1975] Minn. Laws 1088.

¹⁵¹ *Id.*

¹⁵² Ch. 14, § 2, [1975] Wash. Laws 1st Ex. Sess. 171.

mores contrary to community standards may be admissible pursuant to an *in camera* hearing.¹⁵³ Taking the same approach as its neighboring state, Oregon admits evidence only for the purposes of negating forcible compulsion, subject to an *in camera* hearing.¹⁵⁴ Unlike Washington, Oregon limits the evidence on that issue to evidence or testimony of previous sexual conduct between the victim and accused.¹⁵⁵

With the enactment of its new criminal sexual conduct law, Michigan adopted the most stringent evidentiary standard for rape prosecution to date.¹⁵⁶ This law excludes opinion and reputation evidence of the victim's sexual conduct and evidence of specific instances of the victim's sexual conduct with two exceptions: evidence of the victim's past sexual conduct with the accused; and evidence of specific instances of sexual intercourse for purposes of showing origin of semen, pregnancy or disease.¹⁵⁷ Evidence included in these two exceptions is admissible only if within ten days after arraignment the defendant files a written motion and offer of proof.¹⁵⁸ The court at an *in camera* hearing may find the evidence admissible only to the extent that it is "material to a fact at issue in the case and that its inflammatory or prejudicial nature does not outweigh its probative value."¹⁵⁹

The rape reform legislation originally introduced in the Ohio legislature incorporated an evidentiary standard identical to that enacted by Michigan. As amended and as finally enacted, the Ohio statute retains the Michigan standard except that it expressly stipulates that nothing therein is to be interpreted as limiting or restricting the right of either the state or the defense to impeach credibility.¹⁶⁰ It appears that the evidentiary restriction enacted in Ohio does not fully protect the victim from the defense's introduction of irrelevant, inflammatory and prejudicial evidence. Although such evidence is not admissible to prove the substantive element of consent, it is admissible to attack credibility. Thus, the protection accorded the victim in one provision is taken away in another. If the Ohio legislature was unwilling to enact the rigid standard originally proposed, the more reasoned and equitable approach would have been to adopt a standard similar to those of New Mexico and Texas. Nevertheless, the Ohio legislature should be commended for the enactment of two unique features in its evidentiary provision. These features are the extension of the evidentiary standard to the defendant's sexual conduct and the allowance for counsel representing the victim to be present at any evidentiary hearings.¹⁶¹

¹⁵³ *Id.*

¹⁵⁴ Ore. H.B. 2241 § 2 (enacted July 1, 1975).

¹⁵⁵ *Id.*

¹⁵⁶ MICH. COMP. LAWS ANN. § 750.520(j) (Supp. 1975).

¹⁵⁷ *Id.* § 750.520(j) (1).

¹⁵⁸ *Id.* § 750.520(j) (2).

¹⁵⁹ *Id.* § 750.520(j) (1).

¹⁶⁰ Ohio Bill § 2907.02(D).

¹⁶¹ *Id.* §§ 2907.02(D), (E).

With regard to the victim's prior sexual activity, proponents of the new evidentiary standard begin their argument with the premise that as a matter of substantive law, every person has a right to decline sexual activity and to be protected by the law from unwanted intercourse. They contend that the present body of judge-made laws fails miserably to guarantee these substantive rights and that it is time for state legislatures to overcome the historical bias of these judicial decisions by enacting statutes which focus on the protection of rape victims. Until very recently, rape laws defined the crime as essentially involving a female victim and a male defendant. As such, the evidentiary standards that developed were founded on a basic suspicion of the female complainant's testimony. Thus, courts admitted evidence of the victim's prior sexual conduct not only to show that consent was likely but also to impeach the victim's credibility. Supporters of legislative reform allege that the admissibility of evidence of the victim's past sexual life is totally irrelevant and immaterial to the issue of her consent to an act of forcible rape and to her credibility as a witness in prosecuting the rape. The connection between her chastity or lack of chastity and her consent and credibility is too attenuated to be given serious consideration.

As to the issue of consent, is it logical and reasonable to draw the conclusion that a victim's consent to one act of sexual intercourse implies consent to all other acts of a similar nature? If so, should not the same logic and reasoning be applied to the defendant? Yet, though evidence of the victim's prior sexual life is admissible to show that on the basis of her unchastity she probably consented to the intercourse, evidence of the defendant's prior sexual promiscuity cannot be used as a basis for inferring his guilt. The implication of the above reasoning is that virgins and faithful wives are deserving of the protection of the law while women who may have had previous sexual encounters are unworthy of such protection. Because of the modern attitude toward sexual activity, the chastity requirement today places significant numbers of women beyond the law's protection.¹⁶² It has been suggested that courts take judicial notice of this attitude and consequently reject any attempt to introduce evidence of unchastity into rape trials.¹⁶³

Similarly, of what relevance is the victim's reputation for chastity to her reputation for truth and veracity? If the rape laws regard the extramarital sexual activity of the rapist as irrelevant to his veracity, why should the same activity of the victim be used to condemn her? Furthermore, is it logical to exclude evidence of the accused's criminal history, *i.e.*, evidence of past arrests and misdemeanor convictions, while admitting evidence of the victim's entire sexual history?

It is not to be denied that the accused has the right to confront his accuser, and that the credibility of the prosecuting witness and her reputation for truthfulness are important. Nevertheless, any value to be

¹⁶² Comment, *Rape and Rape Laws: Sexism in Society and Law*, 61 CALIF. L. REV. 919, 939 (1973).

¹⁶³ *Id.*

gleaned from cross-examination of the witness as to her prior sexual activity must surely be outweighed by the prejudicial nature of the evidence. Although courts presently have the discretion to exclude evidence found to be overly inflammatory and prejudicial, such a critical issue should not be a matter of judicial discretion but should be precisely delineated by statute granting to all citizens, as a matter of public policy, protection against such attacks on their personal integrity.

Proponents of rape reform legislation point out that the evidentiary restrictions in no way interfere with the right of the accused to have the benefit of the traditional safeguards against false charges — the burden of proving guilt beyond a reasonable doubt and the evaluation of credibility by the jury. Rape defendants will still have all the opportunities now accorded persons charged with other crimes, since reform legislation will simply take away a right improperly given to rape defendants alone — a right to make the victim's prior sexual conduct the key to his defense and the deciding issue in the case.¹⁶⁴

Supporters of defendants' rights view the evidentiary restrictions as impingements upon the accused's sixth amendment right to confront his accuser. This right, granted to criminal defendants, has been recognized by the United States Supreme Court as being fundamental to a fair trial and as including the right to cross-examine.¹⁶⁵ Accordingly, it is argued that the defendant should not be precluded from fully cross-examining the prosecutrix as to her prior sexual conduct — conduct relevant to her consent and credibility. Since rape has traditionally been viewed as an accusation easily made and difficult to refute,¹⁶⁶ and in light of the fact that corroboration of the victim's testimony is in most jurisdictions not required,¹⁶⁷ the defendant should be accorded every opportunity to present evidence relevant to his innocence.

The logical conclusion of the confrontation argument is that if the criminal defendant has the right to confront and cross-examine his accuser, no state can enact a statute that infringes upon that right. In support of this conclusion, advocates of defendants' rights cite *Davis v. Alaska*,¹⁶⁸ a case in which a state statute prohibiting a criminal defendant from cross-examining a juvenile witness about the juvenile's criminal record was found to violate due process. The United States Supreme Court held that the constitutional right to cross-examine to the extent required to reveal bias on the part of an adverse witness is so vital a right that it cannot yield to a state policy interest in protecting the confidentiality of a juvenile offender's record.¹⁶⁹ It is unreasonable, however, to analogize the relevance of prior criminal conduct to the relevance of prior

¹⁶⁴ V. Nordby, *Legal Effects of Proposed Rape Reform Bills* 15, April, 1974.

¹⁶⁵ See *Pointer v. Texas*, 380 U.S. 400 (1965).

¹⁶⁶ M. HALE, *THE HISTORY OF THE PLEAS OF THE CROWN* § 635 (1847).

¹⁶⁷ For a detailed discussion of the corroboration requirement see section VI.

¹⁶⁸ 415 U.S. 308 (1974).

¹⁶⁹ *Id.* For further discussion see *Criminal Procedure, Review of Selected 1974 California Legislation*, 6 *Calif. Crim. L.J.* 261, 261-66 (1975).

sexual conduct in determining the credibility of the prosecutrix. Evidence of prior criminal conduct is surely a more valid reason for rejecting the credibility of a witness than is evidence of prior sexual conduct.¹⁷⁰ *Davis* fails to provide a strong constitutional argument against restricting the admissibility of evidence of the victim's prior sexual conduct in a rape trial.

VI. CORROBORATION

Corroboration of the victim's testimony is a requirement unique to the crime of rape. At common law, in crimes against the chastity of a woman, the testimony of the prosecutrix was sufficient by itself to support a conviction,¹⁷¹ with perjury being the only crime requiring corroboration.¹⁷² The majority of jurisdictions by judicial decision adhere to this principle,¹⁷³ but a few states by statute¹⁷⁴ or judicial decision¹⁷⁵ have rejected the common law principle and require corroboration to sustain a conviction for rape.

Although the majority of states follow the common law principle and flatly reject the need for any corroboration, some states apply a qualified corroboration requirement,¹⁷⁶ where the testimony of the prosecutrix is not clear and convincing,¹⁷⁷ is contradictory,¹⁷⁸ is improbable or incredible,¹⁷⁹ or where the prosecutrix does not make a prompt complaint.¹⁸⁰

In view of the fact that corroboration of the victim's testimony is required only in rape trials and thus seems to reflect a societal bias against rape victims,¹⁸¹ (a bias which is in conflict with the present belief in the principle of full equality of women in society) several states have enacted statutes completely eliminating the corroboration requirement. Seven states have enacted laws stating that the testimony of a rape victim need not be corroborated;¹⁸² Florida, however, allows the court to instruct

¹⁷⁰ See *Criminal Procedure, Review of Selected 1974 California Legislation*, 6 PACIFIC L.J. 261,264 (1975).

¹⁷¹ 7 J. WIGMORE, EVIDENCE § 2061 at 342 (3d ed. 1940).

¹⁷² *Id.* § 2040(a) at 273.

¹⁷³ Note, *The Rape Corroboration Requirement: Repeal Not Reform*, 81 YALE L.J. 1365, 1367 (1972).

¹⁷⁴ See, e.g., GA. CODE ANN. § 26-2001 (1971).

¹⁷⁵ See, e.g., *United States v. Jones*, 477 F.2d 1213 (D.C. Cir. 1973); *State v. Fisher*, 190 Neb. 742, 212 N.W.2d 568 (1973).

¹⁷⁶ See Note, *The Rape Corroboration Requirement: Repeal Not Reform*, *supra* note 173.

¹⁷⁷ See, e.g., *Truluck v. State*, 108 So. 2d 748, 750 (Fla. 1959); *People v. Simental*, 11 Ill. App. 3d 537, 541, 297 N.E.2d 356, 358 (1973).

¹⁷⁸ See, e.g., *State v. Neal*, 484 S.W.2d 270 (Sup. Ct. Mo. 1972).

¹⁷⁹ See, e.g., *State v. Dipietrantonio*, 152 Me. 41, 122 A.2d 414 (1956); *May v. State*, 89 Nev. 277, 510 P.2d 1368 (1973); *Foster v. State*, 308 P.2d 661 (Okla. Crim. Ct. App. 1957).

¹⁸⁰ See, e.g., *People v. Reese*, 14 Ill. App. 3d 1049, 303 N.E.2d 814 (1973); *Wright v. State*, 364 S.W.2d 384 (Tex. Crim. App. 1963).

¹⁸¹ According to the traditional definition a rape victim must be female.

¹⁸² FLA. STAT. ANN. § 794.011(5) (Supp. 1975); MICH. COMP. LAWS ANN. § 750.520(h) (Supp. 1975); ch. 374, § 8, (1975) Minn. Laws 1088; N.M. STAT. ANN. § 40A-9-25

the jury with respect to the weight and quality of the evidence.¹⁸³ New York's statute provides that a defendant charged with forcible rape can be convicted solely on the testimony of the complainant except when the alleged victim is deemed by law to be incapable of consent.¹⁸⁴ The New York statute repealed a corroboration requirement which essentially served to nullify rape prosecutions.¹⁸⁵ Similarly, two other states have repealed statutes requiring corroboration but without simultaneously enacting statutes stipulating that corroboration would not be required.¹⁸⁶

The major justifications advanced in favor of an exceptional corroboration requirement in rape trials include: the likelihood of false charges of rape; the emotional impact of such a charge on a jury; and the difficulty in disproving a charge of rape. Proponents of reform legislation argue that none of these justifications has any validity in that adequate documentation in support thereof has never been presented. They argue further that rape laws, judicial decisions, and legal literature have all been dominated by the fear that innocent men will be convicted of false charges of rape, an inordinate fear stemming from a long-standing sexual bias:

The false complaint is feared more in rape cases [than in other crimes] because of the basic assumptions that many women are either amoral or hostile to men and that women can induce rape convictions solely by virtue of fabricated reports.¹⁸⁷

The result of this bias is that extraordinary protection has been provided for persons accused of sex offenses, as exemplified by the corroboration requirement.

The basis for the corroboration requirement can be found in the statement of Wigmore in his treatise on evidence. Relying essentially on a meager sampling of psychiatric case studies, Wigmore concluded that there is a female propensity for falsifying charges of sexual offenses by men.¹⁸⁸ Because of his fear of falsified rape charges and his belief that

(interim Supp. 1975); N.Y. PENAL LAW § 130.16 (McKinney 1975); ch. 203, § 6, [1975] Tex. LAWS 479; ch. 14, § 2, [1975] Wash. LAWS 1st Ex. Sess. 171.

¹⁸³ FLA. STAT. ANN. § 794.022(1) (Supp. 1975).

¹⁸⁴ N.Y. PENAL LAW § 130.16 (McKinney 1975) (the victim is under seventeen years of age or is mentally defective or mentally incapacitated).

¹⁸⁵ See Ludwig, *The Case for Repeal of the Sex Corroboration Requirement in New York*, 36 BROOKLYN L. REV. 378 (1970); Hechtman, Practice Commentary, N.Y. PENAL LAW § 130.16 (McKinney 1975).

¹⁸⁶ 1969 Conn. Public Act 828, § 69 (effective 1971, repealed 1974); Acts of 25th Iowa General Assembly (1894), ch. 100, § 782.4 (repealed 1974).

¹⁸⁷ Comment, *Rape and Rape Laws: Sexism in Society and Law*, 61 CALIF. L. REV. 919, 931 (1973).

¹⁸⁸ 3A J. WIGMORE, EVIDENCE § 924a at 736 (Chadbourne rev. 1970). Wigmore states:

Modern psychiatrists have amply studied the behavior of errant young girls and women coming before the courts in all sorts of cases. Their psychic complexes are multifarious, distorted partly by inherent defects, partly by diseased derangements or abnormal instincts, partly by bad social environment, partly by temporary physiological or emotional conditions. One form taken by these complexes is that of contriving false charges of sexual offenses by men. The

juries would be more sympathetic to the victim, Wigmore advocated that a conviction for rape never be based solely on the testimony of the complaining witness, and that no court allow a rape case to be presented to a jury until the complainant's social history and mental makeup had been examined and testified to by a qualified physician.¹⁸⁹

Although the scientific evidence on which Wigmore based his proposition is now outdated and the statements of both Wigmore and the authorities he cites are blatantly biased,¹⁹⁰ Wigmore's treatise is the one most often cited for the argument that the prosecutrix's accusations, without more, are insufficient to sustain a rape conviction. Wigmore's advocacy of the requirement of psychiatric examinations of all complainants in rape cases also finds some support today,¹⁹¹ but others contend that since such a requirement finds no basis in the documentation of the frequency of false rape charges, rape complainants should be subjected to psychiatric examination only when the need is indicated.¹⁹²

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. *Id.*

¹⁸⁹ *Id.* § 924a at 737. It is to be noted that while Wigmore is the most frequently cited authority in support of the corroboration requirement, Wigmore was, in fact, opposed to this requirement:

The fact is that, in the light of modern psychology, this technical rule of corroboration seems but a crude and childish measure, if it be relied upon as an adequate means for determining the credibility of the complaining witness in such charges.

7 J. WIGMORE, *EVIDENCE* § 2061 at 354 (3d ed. 1940). Wigmore's position was that every complaining witness in a rape case should be subjected to a psychiatric examination to determine her mental makeup.

¹⁹⁰ Dr. Otto Mönkemöller's observations concerning the problems encountered with the female witness in sex offense cases are as follows:

The most dangerous witnesses in prosecutions for morality offenses are the youthful ones (often mere children) in whom the sex instinct holds the foremost place in their thoughts and feelings. This intensely erotic propensity often can be detected in the wanton facial expression, the sensuous motions, and the manner of speech. But on the other hand one must not be deceived by the madonna-like countenance that such a girl can readily assume; nor by the convincing upturn of the eyes, with which she seeks to strengthen her credibility. To be sure, the coarse sensuousness of her demeanor, coupled with a pert and forward manner, usually leaves no doubt about her type of thought. Even in her early years can be seen in countenance and demeanor the symptoms of the hussy-type, which in later years enable one at first glance to recognize the hardened prostitute. With profuse falsities they shamelessly speak of the coarsest sex-matters. . . . When the sex-urge is strongly developed, then if some man comes within their vicinity, they may dally with a secret wish to have some sex-relation with him, and then his most harmless conduct is transformed by these sex-imaginative witnesses into acts which charge him as a criminal. . . . In male youths this particular sex disposition plays a far smaller part.

DR. OTTO MÖNKEMÖLLER, *Psychology and Psychopathology of Testimony*, 333 (1930), cited in 3A WIGMORE, *EVIDENCE* § 924a, at 743-44 (Chadbourne rev. 1970). The work has apparently never been translated into English.

¹⁹¹ See, e.g., 43 IOWA L. REV. 650 (1958).

¹⁹² B. BABCOCK, A. FREEDMAN, E. NORTON, & S. ROSS, *SEX DISCRIMINATION AND THE LAW* 860 (1975) [hereinafter cited as *BABCOCK*].

The implication of the corroboration requirement is that there are no pre-trial procedures for eliminating false charges of rape. Although there may be instances of fabricated or exaggerated charges, the whole criminal process is designed to screen out such charges long before trial.¹⁹³ In fact, the likelihood of false rape charges is probably no higher, and may actually be lower, than in the case of other crimes, since the "disincentives" are so overwhelming and the incentives, if any, are minimal.¹⁹⁴ Thus, to require corroboration only in these cases and not in all cases of violent crime on the basis of the false charge argument is totally unjustified.

The argument that juries tend to sympathize with the victim of an alleged rape is based on a belief that a charge of rape raises such intense emotions that the jury cannot be relied on to be fair and impartial. One commentator has suggested that in the case of rape, "[t]he presumption of innocence to which a defendant is entitled may give way to . . . the unreasoning rage which many feel toward one accused of both violence and indecency."¹⁹⁵ No documented evidence, however, supports this theory and, as in the case of the false charge argument, the only authority cited is Wigmore.¹⁹⁶

The facts negate this argument. A well-documented study of the functioning of the American jury system points unequivocally to the opposite conclusion.¹⁹⁷ Kalven and Zeisel found, in analyzing jury reaction to crimes other than rape, that judges would have reached the same conclusion as the jury in seventy-five percent of the cases.¹⁹⁸ In cases of simple rape,¹⁹⁹ however, there was agreement between the judge and jury only forty percent of the time with the judge convicting and the jury

¹⁹³ [T]he elaborate screening through which charges of rape pass starting with often disbelieving or cynical police, through grand juries and prosecutors, makes it somewhat unlikely that many false charges would even get to the trial stage, much less survive cross-examination at trial to lead to conviction. *Id.* at 859.

¹⁹⁴ Note, *The Rape Corroboration Requirement: Repeat Not Reform*, 81 YALE L.J. 1365 (1972). Some of the disincentives to making a charge of rape are the stigma that attach to the victim of an incident culturally defined as sordid, and the humiliation caused by some forms of publicity associated with such charges. Also to be considered are the necessity of confronting the assailant and the reluctance to face the barbs and insinuations of the defense attorney. There is, in addition, the fear of retaliation from the accused rapist or his friends. Finally, there is the deterrent effect of the existence of the corroboration requirement itself, at least to the extent that a potential complainant may be aware of it. *Id.* at 1374.

¹⁹⁵ Note, *Corroborating Charges of Rape*, 67 COLUM. L. REV. 1137, 1139 (1967).

¹⁹⁶ 3A J. WIGMORE, EVIDENCE § 924a (Chadbourne rev. 1970).

¹⁹⁷ H. KALVEN & H. ZEISEL, *THE AMERICAN JURY* (1966). Kalven and Zeisel conducted a study of the operation of the American jury by analyzing judge and jury reaction in 3,576 criminal jury trials. The method used in their jury study was to ask trial judges, by mail questionnaire, to report how the jury decided the case and how they would have decided it, and to give some descriptive and evaluative material about the case, the parties, and the attorneys.

¹⁹⁸ *Id.* at 56.

¹⁹⁹ *Id.* at 252. Kalven and Zeisel define simple rape as those cases in which there is no evidence of extrinsic violence, or in which there is only one assailant or in which the defendant and victim are not complete strangers.

acquitting in sixty percent of the cases.²⁰⁰ Kalven and Zeisel concluded that in cases in which there were no aggravating circumstances, juries tended to be more critical of the victim and would infer an assumption of risk.²⁰¹ In such cases, juries appeared to be reluctant to attach the distinctive stigma of a rape charge to the defendant, and when there was no option to finding the defendant guilty of a lesser crime, the jury would usually choose acquittal rather than find the defendant guilty of rape.²⁰² The study lends support to the view that no bias to convict exists, but even if such bias does exist, it has been suggested that there are more effective ways of dealing with the problem: the protection afforded by the fourteenth amendment; a change of venue if local prejudice is found; and the duty of the courts to set aside the verdict of an obviously biased jury.²⁰³

The third justification offered in support of the corroboration requirement is that a charge of rape is difficult to disprove. In fact, a charge of rape is no more difficult to defend against than a charge of any other crime. There still is the presumption that the accused is innocent and the burden of proof is still on the prosecution to establish guilt beyond a reasonable doubt. Since in rape cases there are usually no eyewitnesses and testimony is thus limited to that of the prosecutrix, it is essentially the word of the victim against that of the accused. It has even been argued that it is much easier to defend against a rape charge than to prosecute one, since, if a victim can manage to overcome the obstacles presented by the criminal justice system to get her case to trial, she will still have to face a notoriously unsympathetic jury. To additionally require corroboration only in cases of rape is unjustified.²⁰⁴

A final argument that should be presented in opposition to the corroboration requirement is one that favors neither the prosecutrix nor the accused. This argument represents a valid concern that the corroboration requirement is a potential deterrent to the effective functioning of the trial process. As a mere "rule of thumb" it is no substitute for a thorough examination into the credibility of the complaining witness.²⁰⁵ Such a requirement if mechanically applied may in fact distract the jury from its primary responsibility of determining the credibility of the witness.²⁰⁶ Thus, instead of providing an additional safeguard for the defendant and an additional obstacle for the complainant, the corrobora-

²⁰⁰ *Id.* at 253.

²⁰¹ *Id.* at 254.

²⁰² *Id.*

²⁰³ Michigan Women's Task Force, *supra* note 82, at 10.

²⁰⁴ *Id.* at 11.

²⁰⁵ Ludwig, *The Case for Repeal of the Sex Corroboration Requirement in New York*, 36 BROOKLYN L. REV. 378 (1970).

²⁰⁶ If the complaining witness in a sex offense lacks sufficient credibility in any respect, no amount of other evidence can compensate for that deficiency. If the complaining witness is completely credible, any other evidence is superfluous and should be unnecessary. *Id.* at 383.

tion requirement may produce the opposite result and should be eliminated.

VII. SENTENCING

The purpose of enforcing the criminal law is to deter aberrant behavior, and sentencing is the primary means of achieving this desired effect. As applied to the crime of rape, sentencing reflects a peculiar societal ambivalence. Because rape is viewed as a particularly repugnant crime, the sentences imposed on those found guilty are especially harsh, but ironically it appears that the very harshness of the sentences has made juries reluctant to convict and courts reluctant to sentence.

At the present time, there are at least thirty states which provide a possible life sentence for rape while many other jurisdictions impose maximum sentences of thirty, forty or fifty years.²⁰⁷ At least two states provide a minimum sentence of five years²⁰⁸ whereas others provide for both imprisonment and the payment of substantial fines.²⁰⁹ Prior to the decisions by the United States Supreme Court establishing that a discretionary death penalty is in violation of the eighth amendment as cruel and unusual punishment,²¹⁰ sixteen states provided a death penalty for rape.²¹¹ Since these decisions, at least one state has enacted a statute providing for a mandatory death sentence for rape.²¹² A decision on the constitutionality of a mandatory death sentence is presently pending.²¹³

Rape reform legislation appears not to address itself to the question of whether the severity of the penalties imposed is a factor significantly contributing to the lack of convictions for rape. Rather, legislation seems to be concerned primarily with judicial discretion in sentencing by providing for minimum mandatory sentences for either first or subsequent offenses. Michigan and Ohio have recently enacted legislation providing for a minimum mandatory sentence of not less than five years for a second or subsequent offense.²¹⁴

Minnesota has enacted similar legislation which provides for a minimum mandatory sentence of at least three years or successful completion of a treatment program for antisocial sexual behavior for a second or subsequent offense occurring within fifteen years of the prior conviction.²¹⁵

²⁰⁷ BABCOCK, *supra* note 192, at 863 n.56.

²⁰⁸ VA. CODE ANN. § 18.1-44 (Supp. 1975); WASH. REV. CODE ANN. § 9.79.010 (Supp. 1974).

²⁰⁹ *See, e.g.*, N.J. STAT. ANN. § 2A:138-1 (1969); N.M. STAT. ANN. § 40A-29-3(B) (1953).

²¹⁰ *Furman v. Georgia*, 408 U.S. 238 (1972). The Court, however, did not address itself to the issue of whether the death penalty for rape was a punishment disproportionate to the crime.

²¹¹ BABCOCK, *supra* note 192, at 863 n.57.

²¹² N.C. GEN. STAT. § 14-21 (Supp. 1974).

²¹³ *Fowler v. North Carolina*, 285 N.C. 90, 203 S.E.2d 803, *cert. granted*, 419 U.S. 963 (1974), wherein the defendant was convicted of first-degree murder and sentenced to death. *Restored to calendar for reargument*, ___ U.S. ___, 95 S. Ct. 2652 (1975).

²¹⁴ MICH. COMP. LAWS ANN. § 750.520(f) (Supp. 1975); Ohio Bill § 2907.10.

²¹⁵ Ch. 374, § 7, [1975] Minn. Laws 1087.

Washington is the only state which has recently enacted reform legislation with a *minimum mandatory sentence for first offenders*.²¹⁶

If the purpose of enforcing the criminal law is to deter aberrant behavior and if sentencing is the means by which the deterrent effect is applied, then a sentence meted out for any crime should satisfy two standards: it should be proportionate to the crime committed; and it should be sufficiently harsh to achieve the deterrent effect and yet not so harsh that juries are reluctant to convict. If the severity of the sentence is such that it negates the possibility of conviction, it is obvious that the deterrent effect will not be upon the criminal but rather upon the jury. The counter argument raised is that this deterrent effect upon juries does not exist since juries are not reluctant to convict when there are aggravating circumstances or when the victim and accused are of different races.²¹⁷ Since the majority of rapes do not involve aggravating circumstances or persons of different races,²¹⁸ it can still be argued that it is in fact the existence and possible imposition of harsh penalties that is the basis of the disinclination of juries to convict.

Thus, it appears that the focus of rape reform legislation is somewhat misplaced. Perhaps reformers should be concerned not with curbing judicial discretion but with removing the obstacle to juries justly convicting those guilty of rape. Rather than focusing on the establishment of minimum mandatory sentences for first or subsequent offenses, legislation should reduce the maximum sentences now provided to a level proportionate to the gravity of the offense.²¹⁹

VIII. IDENTIFICATION OF RAPE VICTIMS

In an effort to protect the reputation of the victim of a rape, four states sought by statute to proscribe any publication of the name or identity of the victim.²²⁰ These broadly drawn statutes prohibiting dissemination of such information provided that any person found guilty of violating the statutes shall be punished as for a misdemeanor. In its decision of

²¹⁶ Ch. 14, § 4, [1975] Wash. Laws 1st Ex. Sess. 172. Washington has established a minimum mandatory sentence of three years for first offenders.

²¹⁷ BABCOCK, *supra* note 192, at 868.

²¹⁸ A number of studies have shown that most rapes are intraracial. The President's Commission on Crime in the District of Columbia, for instance, found in its 1966 survey of serious crimes that eighty-eight percent of rapes involved persons who were of the same race. THE PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, *THE CHALLENGE OF CRIME IN A FREE SOCIETY* 40 (1967).

²¹⁹ BABCOCK, *supra* note 192, at 869.

Realistically and fairly, efforts . . . to abolish the special rules concerning the trial of rape cases should be accompanied by a reassessment of the penalty for the crime. If the penalty were brought into line with that for aggravated assaults in most jurisdictions, there would be less need felt for special evidentiary rules and instructions to protect the accused against the risk of too high a penalty in comparison to the crime. Lowering the penalties should in itself increase the conviction rate because juries will no longer be overly concerned with the possible drastic consequences of conviction. *Id.*

²²⁰ FLA. STAT. ANN. § 794.03 (Supp. 1975); GA. CODE ANN. § 26-9901 (1972); S.C. CODE ANN. § 16-81 (1962); WIS. STAT. ANN. § 942.02 (1953).

March 3, 1975, in *Cox Broadcasting Corp. v. Cohn*,²²¹ the United States Supreme Court found such statutes to be in violation of the first and fourteenth amendments. In that case, the father of a rape victim, who did not survive the incident, brought an action for damages relying on Georgia law²²² alleging that his right to privacy had been invaded. The action was based on the identification of the victim during television coverage of the trial of the alleged rapists. The reporter covering the trial for the defendant broadcasting company obtained the name of the victim from the indictments which were made available for public inspection in the courtroom. In finding the Georgia statute unconstitutional the Supreme Court held that a state may not impose sanctions on the publication of the name of a rape victim when it is obtained from public records.²²³ The Court reasoned that there is no invasion of the right to privacy when the information involved already appears on a public record, a conclusion compelled not only by the first and fourteenth amendments but also by the public interest in maintaining a vigorous press.

As a result of the *Cox* decision those statutes absolutely prohibiting publication of the identity of rape victims are no longer constitutional. Statutes recently enacted in Michigan²²⁴ and Ohio,²²⁵ qualify the proscription on publication. The Michigan statute provides that the counsel, the victim or the accused may request the court to suppress the details of the alleged crime and the names of the victim and the accused; this suppression will continue until arraignment, dismissal of the charge, or conclusion of the case, whichever occurs first.²²⁶ Ohio's statute is substantially the same as Michigan's except that it contains two additional provisions: the preliminary hearing is added to the events prior to which suppression is required and neither party is to be denied the name and address of the other party or the details of the offense charged.²²⁷ Since the Supreme Court in *Cox* addressed itself specifically to the issue of the publication of information already in a public record, it would appear that the Michigan and Ohio statutes are not in violation of the first and fourteenth amendments since the information suppressed is not yet part of the public record. These two statutes can be further distinguished

²²¹ — U.S. —, 95 S. Ct. 1029 (1975).

²²² GA. CODE ANN. § 26-9901 (1972) provides:

It shall be unlawful for any news media or any other person to print and publish, broadcast, televise, or disseminate through any other medium of public dissemination or cause to be printed and published, broadcast, televised, or disseminated in any newspaper, magazine, periodical or other publication published in this state or through any radio or television broadcast originating in the state the name or identity of any female who may have been raped or upon whom any assault with intent to commit rape may have been made. Any person or corporation violating the provisions of this section shall, upon conviction, be punished as for a misdemeanor.

²²³ — U.S. —, —, 95 S. Ct. 1029, 1044 (1975).

²²⁴ MICH. COMP. LAWS ANN. § 750.520(k) (Supp. 1975).

²²⁵ Ohio Bill § 2907.11.

²²⁶ MICH. COMP. LAWS ANN. § 750.520(k) (Supp. 1975).

²²⁷ Ohio Bill § 2907.11.

from those held unconstitutional in two respects: first, no specific sanction is provided; and second, the reputations of the victim and the accused are sought to be protected as a matter of public policy.

The argument supporting the suppression of the identities of the victim and the accused is reasonable in light of the opprobrium attached to rape. Premature identification of either party could not only subject the victim to unnecessary humiliating publicity and to the threat of possible physical harm but also cause irreparable damage to the reputation of the accused. Suppression of such information prior to arraignment should be not only within the bounds of the first and fourteenth amendments but also within the power of the state to legislate for the protection of its citizens.

IX. MEDICAL CARE

A unique feature of the crime of rape is that the most convincing evidence can often be obtained only by a physical examination of the victim. Although the evidence obtained from such an examination is subsequently used by the prosecution, the cost of gathering such evidence in most states is incurred by the victim. Advocates of reform in this area of rape law argue that since the prosecution is conducted by the state which assumes all the other expenses involved therein, the cost of the physical examination of the victim should also be borne by the state.

The interest in this aspect of reform appears to be quite limited at the present time. California, Minnesota, Nevada, and Ohio enacted statutes which specifically provide that no costs incurred for the examination of the victim of a sexual assault, when such examination is performed for purposes of gathering evidence for possible prosecution, shall be charged to the victim of such assault.²²⁸ These statutes assign the cost of such treatment to the appropriate local governmental agency, *i.e.*, to the county or municipality in whose jurisdiction the alleged offense was committed.²²⁹ Nevada, in addition, provides that any cost incurred by a hospital for the initial emergency medical care of a rape victim shall be charged to the county in which the rape occurred.²³⁰ Among these four states Ohio is unique in that it provides for medical examination of minor rape victims without parental consent.²³¹

Illinois is the only state to date which has enacted a statute providing that hospitals furnishing emergency medical service to rape victims are to be reimbursed by the Department of Public Health.²³² This "Rape Victims Emergency Treatment Act" requires the participation of every hospital licensed by the state but provides that such participation may be

²²⁸ CAL. GOV'T CODE § 13961.5 (West Supp. 1975); ch. 374, § 11, [1975] Minn. Laws 1089; Nev. S.B. 222 § 8 (enacted May 20, 1975); Ohio Bill § 2907.28.

²²⁹ CAL. GOV'T CODE § 13961.5 (West Supp. 1975).

²³⁰ Nev. S.B. 222 § 8 (enacted May 20, 1975).

²³¹ Ohio Bill § 2907.29.

²³² Ill. H.B. 271 § 2 (enacted August 26, 1975).

in conjunction with one or more other hospitals in an areawide or community plan approved by the Illinois Department of Public Health.²³³ The Act further provides the minimum requirements for the treatment and services offered rape victims.²³⁴ Illinois has also enacted statutory provisions prohibiting the exclusion of coverage for the treatment of injuries of rape victims in accident and health insurance policies and in hospital service plans.²³⁵

An enabling act recently adopted by the state of Nevada allows counties to adopt ordinances providing for medical treatment and counseling not only for rape victims but also for their spouses.²³⁶ Treatment in the form of psychological, psychiatric and marital counseling shall be made available to victims and spouses with costs not exceeding \$1,000 to be paid by the county.²³⁷

The legislation recently enacted in Minnesota was introduced subsequent to the enactment of a statute requiring the Commissioner of Corrections to develop a statewide program to aid victims of sexual attack.²³⁸ This enabling statute represents the broadest public policy statement to date in support of the rape victim. The statute gives the Commissioner authority to develop a community based program which may assume all costs of any medical examination and treatment the victim may require, whether or not the information obtained from such examination will be used in a prosecution, provided that the victim is not otherwise reimbursed for these expenses.²³⁹ Such a program may also include voluntary counseling by trained personnel who are able to inform the victim of the possibility of contracting venereal disease, the possibility of pregnancy, the expected emotional reactions and any other relevant information.²⁴⁰ Moreover, the focus of the legislation goes beyond merely providing adequate medical care. It is clear that the legislative intent is to insure sensitive and understanding assistance to the victim at every phase of the rape prosecution. Thus, in addition to developing the program, the Commissioner is to encourage the implementation of the public policy in support of rape victims by: urging the assignment of prosecuting attorneys sensitive to rape victims; urging the assignment of trained peace officers of the same sex as the victim to conduct all necessary questioning of the victim; and urging hospital administrators to place rape victims in a position of high priority.²⁴¹

Whether the program will ever develop and if developed whether it can be successfully administered is unknown at the present time. Since

²³³ *Id.* §§ 2, 3, 4.

²³⁴ *Id.* § 5.

²³⁵ Ill. H.B. 278 (enacted August 26, 1975).

²³⁶ Nev. A.B. 664 § 4 (enacted May 21, 1975).

²³⁷ *Id.* § 5.

²³⁸ MINN. STAT. ANN. §§ 241.51-53 (Cum. Supp. 1975).

²³⁹ *Id.* § 241.51(3)(b).

²⁴⁰ *Id.* § 241.51(3)(a).

²⁴¹ *Id.* § 241.52.

a major factor contributing to the failure of the effective administration of the rape laws is the lack of a strong public policy supporting the rape victim, it is not unreasonable to conclude that the development and implementation of a program similar to the one recommended by the Minnesota legislature will dramatically increase both the number of rapes reported and the number of rapes successfully prosecuted.

X. INTEREST GROUPS

The major impetus for rape reform legislation has come from various interest groups across the country. Although the groups whose positions are discussed below are in essential agreement with the need for reform legislation, *i.e.*, that the inadequacy of present rape laws is directly responsible for the failure of the effective administration of the criminal law as it applies to rape, they differ in their approach to the problem. While some feel that certain aspects of the enacted and proposed legislation have inherent constitutional infirmities, others contend that even more stringent measures must be taken if reform legislation is to fully encompass the problem.

Michigan was the first state to enact comprehensive rape legislation largely through the efforts of the Michigan Women's Task Force on Rape. In the belief that "the threat of rape now constitutes a major infringement on the civil liberties of all citizens"²⁴² and that existing laws provide little protection or deterrent against rape, the Women's Task Force drafted a proposal, many aspects of which have been incorporated into the new Michigan law. Their argument for prompt legislative action recognizes that in the final analysis only state legislatures can establish a public policy in support of the rape victim. Although the controversial nature of the rape problem lends itself to endless discussion, deliberation and delay, the certainty that hundreds of people will be assaulted while the assaulter continues to go virtually free from any threat of conviction far outweighs the uncertain benefits of more years of deliberation.²⁴³

The American Civil Liberties Union of Ohio on the other hand urges that the most effective rape reform legislation can only be obtained by care and deliberation at the drafting stage. They argue that in the long run carefully drafted statutes that will withstand constitutional tests justify temporary delay in enactment since such statutes will protect the rights of both the victim and accused.

In its traditional role as a defender of the rights of the accused, the Ohio ACLU objects to the enactment of rape laws which totally exclude evidence of the victim's prior sexual conduct. They argue that such laws exclude evidence which may be relevant and necessary for an adequate confrontation by the defendant of his accuser. Such an exclusion precludes a number of circumstances in which evidence of prior sexual con-

²⁴² Michigan Women's Task Force, *supra* note 82, at 1.

²⁴³ *Id.*

duct is absolutely material, for example, where a pattern and practice of extortionary conduct by the victim is alleged.²⁴⁴

In support of its position, the Ohio ACLU cites *Chambers v. Mississippi*,²⁴⁵ *Davis v. Alaska*,²⁴⁶ and *State v. Cox*,²⁴⁷ all indicative of the proposition that the exclusion of relevant and material evidence violates the due process clause of the fourteenth amendment. In *Chambers*, the United States Supreme Court held that the exclusion as hearsay of testimony as to the confession of a third party to the crime for which the defendant was being tried deprived the defendant of a fair trial.²⁴⁸ In *Davis*, the Supreme Court struck down a state statute protecting the confidentiality of a juvenile offender's record declaring that no state statute can interfere with the defendant's constitutional right to effectively cross-examine an adverse witness for bias.²⁴⁹ Citing the decision in *Davis*, the Ohio Supreme Court in *Cox* recently struck down a similar state statute holding that such enactments may not impinge upon a criminal defendant's right to present all available, relevant and probative evidence which is pertinent to a specific and material aspect of the defense.²⁵⁰ Withholding evidence of a prior admission of guilt or evidence of a juvenile record is, however, most assuredly not analogous to withholding evidence of a victim's prior sexual conduct. To apply the rationale of the above decisions to evidence of a victim's prior sexual conduct in rape trials is to ignore the basic differences between the two types of evidence. The relevancy and materiality of a prior confession or of a prior juvenile record for purposes of showing bias or lack of credibility is not equivalent to that of a rape victim's sexual history. The conclusion that the law cannot exclude evidence of the victim's prior sexual conduct, except with the defendant, is unsupported.

The Ohio ACLU, relying on unbiased judicial discretion, proposes that all such evidence of the victim's prior sexual conduct be admissible subject to an *in camera* hearing and to the limitation that the evidence be sufficiently connected with a material fact in the case to make it relevant

²⁴⁴ Memorandum from Benson A. Wolman, Executive Director of American Civil Liberties Union of Ohio to Members of the Ohio Senate Judiciary Committee concerning Substitute S.B. 144, June 24, 1975 [hereinafter cited as Memorandum]. Another circumstance in which evidence of sexual conduct is viewed as absolutely essential is when a defense of consent is raised. One commentator has argued that statutes restricting the admissibility of evidence of the victim's sexual conduct impede the defendant's sixth amendment right to confront the witnesses against him, and that in order to satisfy this constitutional requirement proponents of such statutes must establish proof that there is no rational connection between the complainant's sexual history and the likelihood of her consent to intercourse on any occasion. This commentator actually believes that such proof can be obtained by the commissioning of a panel of "reliable, impartial social scientists" to determine whether or not a woman's sexual history has any bearing on the probability of her consent.

²⁴⁵ 410 U.S. 284 (1973).

²⁴⁶ 415 U.S. 308 (1974).

²⁴⁷ 42 Ohio St. 2d 200, 327 N.E.2d 639 (1975).

²⁴⁸ 410 U.S. 284 (1973).

²⁴⁹ 415 U.S. 308 (1974).

²⁵⁰ 42 Ohio St. 2d 200, 327 N.E.2d 639 (1975).

and material.²⁵¹ Furthermore, the defendant is to have the same opportunity to resort to an *in camera* hearing on the admissibility of his prior sexual activity in order to satisfy the requirement of the fourteenth amendment's equal protection clause and the spirit of the Equal Rights Amendment ratified by the Ohio General Assembly.²⁵² Proponents of a total exclusion of evidence of the victim's prior sexual conduct argue that judicial discretion has traditionally been biased against the rape victim, and that in most cases highly prejudicial and inflammatory evidence which is neither relevant nor material is admitted. It is to correct such abuse of discretion that stringent evidentiary restrictions should be enacted. A compromise position, suggested by one commentator, would allow all evidence of sexual conduct to be admissible subject to an *in camera* hearing where the scope of judicial discretion has been established by statutory guidelines.²⁵³ Such an approach would insure the protection of the defendant's constitutional right to an effective cross-examination while protecting the victim from the introduction of embarrassing and immaterial evidence.

Another area of rape reform legislation in which the Ohio ACLU finds an inherent constitutional infirmity is the suppression of the names of the victim and the accused and the details of the alleged rape at the request of either party at least until after the preliminary hearing or arraignment.²⁵⁴ The ACLU contends that such a provision is within the holding of *Cox Broadcasting Corp. v. Cohn*²⁵⁵ and violates the first amendment right to publish information which is part of the public record.²⁵⁶ To correct such a constitutional defect the Ohio ACLU proposes that only the address of the victim be suppressed and that the name of the victim be released to the media.²⁵⁷ Such a modification unfortunately dilutes the purpose of the identification provision which is to protect both the victim and accused from adverse publicity. Furthermore, as noted previously, it would appear that the decision in *Cox* does not render this provision unconstitutional on its face since the information temporarily withheld is not yet part of the public record. In addition, the ACLU argues that a statute which denies the defendant the right to know the name and address of the victim and the details of the alleged offense violates the constitutional right of the defendant to know the identity of his accuser and the details of the charges against him until it may be too late to prepare an adequate defense.²⁵⁸ Thus, according to the ACLU argument the identification provision of Michigan's new rape

²⁵¹ Memorandum, *supra* note 244.

²⁵² *Id.*

²⁵³ Note, *California Rape Evidence Reform: An Analysis of Senate Bill 1678*, 26 HASTINGS L. J. 1551 (1975).

²⁵⁴ MICH. COMP. LAWS ANN. § 750.520(k) (Supp. 1975); Ohio Bill § 2907.11.

²⁵⁵ — U.S. —, 95 S. Ct. 1029 (1975).

²⁵⁶ Memorandum, *supra* note 244.

²⁵⁷ *Id.*

²⁵⁸ *Id.*

law is unconstitutional. Yet until the accused has been formally charged at an arraignment, the preparation of a defense is premature. The main objective of a statutory suppression of the victim's name and address until arraignment is to protect the victim from the threat of possible physical harm from the accused, a provision like Ohio's which accords either party the name and address of the other party prior to that time nullifies the effectiveness of such a statute.

The Ohio ACLU endorses the provisions of the new Ohio rape law which make it unnecessary to prove resistance and which provide that the victim should not pay the costs of a medical examination for the purpose of gathering evidence.²⁵⁹ In addition, it was instrumental in the enactment by the Ohio legislature of those provisions which apply the evidentiary restriction to both the victim and the defendant, which allow for the medical examination of minor rape victims without parental consent, and which establish the crime of felonious sexual penetration, an offense which proscribes the vaginal or anal penetration by instrument or object. The Ohio ACLU finds the recently enacted Ohio rape law incomplete since it does not encompass every possible aspect of the rape problem. The ACLU recommends that any state considering the enactment of rape reform legislation should also address itself to the following proposals: the elimination of the corroboration requirement; the establishment of uniform and humane evidence-gathering procedures; the possibility that one spouse may bring a charge of rape against the other spouse; the preservation of judicial discretion in sentencing; and the representation of the rape victim by her own attorney if so desired throughout the entire proceeding.²⁶⁰

As one of the major advocates of social and legal equality of women, the National Organization for Women looks upon the revision of rape laws as a necessary step in challenging the secondary position of women in our society. A resolution submitted to the NOW National Board Meeting of August 1974, set forth as its goal:

To revise the present laws which overwhelmingly favor the defendant, impede convictions, allow victims, as witnesses, to be treated in a manner which is both humiliating and damaging to their emotional health, and which further discourages victims from reporting the crime to the officials.²⁶¹

²⁵⁹ *Id.*

²⁶⁰ *Id.* In a press release of January 15, 1974, the New York Civil Liberties Union endorsed the repeal of the statutory corroboration requirement in that state. In support of its position, the NYCLU made the following statement:

If women were generally required to produce corroborating evidence in crimes of which they complained, while men were not, that would be no less a violation of the guarantee of equal protection of the laws. The corroboration requirement for rape has the same effect because it disproportionately places a higher legal burden upon women than upon men.

²⁶¹ Resolution No. 20 on Rape, National Organization for Women National Board Meeting, August 3-4, 1974.

Added to its endorsement of a redefinition of spouse, the general revision of the present rules of evidence, and the inclusion within the definition of rape of the penetration by instrument or device, the distinctive features of the NOW resolution are its provisions with regard to sentencing, penalties, rehabilitation and parole. The general approach of the sentencing provision is to achieve a lowering of penalties except in gang rapes so that the penalty fits the crime, thus making more likely the possibility of conviction. In addition, to ensure that convictions will result in the serving of at least a minimum sentence, NOW proposes the requirement that parole be granted only after the serving of one year for the first offense and five years for the second offense, with intensive rehabilitative counseling.²⁶² Contending that the absence of meaningful rehabilitation contributes to the high rate of recidivism among sex offenders, NOW recommends an intensive psychiatric study of the convicted rapist along with participation in an individualized rehabilitation program by the rapist during incarceration and after parole.²⁶³ The NOW resolution further advocates that the victim of a rape have the right to be represented in court by counsel of her own choosing in order to fully protect her rights in possible subsequent civil proceedings.²⁶⁴

Finally, additional support for rape reform legislation can be found in a resolution adopted by the House of Delegates of the American Bar Association in February 1975. Through the efforts of the Law Student Division,²⁶⁵ the ABA authorized its president to urge a redefinition of

²⁶² *Id.*

²⁶³ *Id.* For a discussion of New Jersey's experience in implementing a comprehensive rehabilitation program for sex offenders see Prendergast, *Problems Encountered in the Implementation of the Sex Offender Act by the Rahway Treatment Unit*, 3 *CRIM. JUSTICE Q.* 58 (1975).

²⁶⁴ *Id.*

²⁶⁵ In testifying before the House of Delegates urging approval of a resolution calling for a redefinition of rape, Connie K. Borkenhagen of Albuquerque, New Mexico, presented an imaginary cross-examination of a robbery victim subjected to the kind of cross-examination that the rape victim usually must undergo:

"Mr. Smith, you were held up at gunpoint on the corner of First and Main?"

"Yes."

"Did you struggle with the robber?"

"No."

"Why not?"

"He was armed."

"Then you made a conscious decision to comply with his demands rather than resist?"

"Yes."

"Did you scream? Cry out?"

"No. I was afraid."

"I see. Have you ever been held up before?"

"No."

"Have you ever given money away?"

"Yes, of course."

"And you did so willingly?"

"What are you getting at?"

"Well let's put it like this, Mr. Smith. You've given money away in the past. In fact, you have quite a reputation for philanthropy. How can we be sure that you weren't contributing to have your money taken from you by force?"

rape in terms of "persons" instead of "women" and a revision of the rules of evidence by: elimination of corroboration requirements exceeding those applied to other crimes; revision of evidentiary rules as to cross-examination of the prosecutrix; re-evaluation of penalties for rape; development of new police and prosecutorial procedures in rape cases; and establishment of rape treatment and study centers for purposes of aiding both victim and offender.²⁶⁶

Despite the strong endorsement for the enactment of rape reform legislation from the ABA, both the Model Penal Code and the Proposed New Federal Criminal Code still retain some of the objectionable features of the old rape laws. Both codes include a corroboration requirement for felonious sex offenses coupled with a special jury instruction that the testimony of a rape victim should be evaluated with special care in view of the emotional involvement of the witness and the difficulty of determining credibility with respect to alleged private sexual activities.²⁶⁷ In the commentary following the proposed code the argument presented to support these requirements is that there is an inherent danger of mistaken conviction in rape — such danger occasioned perhaps by

the hysterical accusations of a spurned lover, and even the "special psychological involvement, conscious or unconscious, of judges and jurors in sex offenses charged against others."²⁶⁸

The organizations whose views are discussed above represent only a sampling of those interested in and working for the enactment of rape reform legislation. It is not to be implied that they have been the most influential in effecting rape reform. Rather, their positions are represen-

"Listen, if I wanted"

"Never mind. What time did this holdup take place, Mr. Smith?"

"About 11:00 p.m."

"You were out on the street at 11:00 p.m.? Doing what?"

"Just walking."

"Just walking? You know that it's dangerous being out on the street that late at night. Weren't you aware that you could have been held up?"

"I hadn't thought about it."

"What were you wearing at the time, Mr. Smith?"

"Let's see . . . a suit. Yes, a suit."

"An *expensive* suit?"

"Well — yes. I'm a successful lawyer, you know."

"In other words, Mr. Smith, you were walking around the streets late at night in a suit that practically advertised the fact that you might be a good target for some easy money, isn't that so? I mean, if we didn't know better, Mr. Smith, we might even think that you were *asking* for this to happen mightn't we?"

Quoted in 61 A.B.A.J. 464 (1975).

²⁶⁶ ABA Law Student Division Report No. 112, February 1975, in *House of Delegates Redefines Death, Urges Redefinition of Rape, and Undoes the Houston Amendments*, 61 A.B.A.J. 463, 465 (1975).

²⁶⁷ UNITED STATES NATIONAL COMMISSION ON REFORM OF FEDERAL CRIMINAL LAWS, FINAL REPORT, A PROPOSED NEW FEDERAL CRIMINAL CODE § 1648(5) (1971); MODEL PENAL CODE § 213.6(6) (Proposed Official Draft 1962).

²⁶⁸ UNITED STATES NATIONAL COMMISSION ON REFORM OF FEDERAL CRIMINAL LAWS, WORKING PAPERS Vol. II, at 875 (1970).

tative of the views of many concerned individuals and organizations throughout the country.

XI. CONCLUSION

The crime of rape is unique in that an excessively high standard of proof is required to establish the commission of the crime and the guilt of the accused. This standard places an undue burden on the rape victim and hinders effective rape prosecution. Rape reform legislation attempts to equalize the standard of proof by granting rape victims the same protection accorded victims of all other violent crimes. The most compelling objection to the statutory reform of the rape laws is that in extending equal protection to the rape victim the rights of the defendant will be diminished. After analyzing all the arguments supporting and challenging the enactment of rape reform legislation, it appears that the overriding fear that the defendant's constitutional rights will be violated is unfounded. And such an unfounded fear should not be the basis for denying equal protection to the rape victim.

A more valid objection to the enactment of new rape laws is that such legislation in and of itself cannot provide a total solution to the rape problem. The validity of this objection lies in the fact that rape reform legislation does not address itself to the total problem and that rape is partly a societal problem which cannot be legislated away.

Furthermore, the enactment of such legislation may lull those most concerned with the problem into a false sense of security which will result in the failure to seek additional solutions, and additional solutions must be found. Many problems not dealt with by the present legislation may be more detrimental to the effective prosecution of a rape case than those sought to be cured by such legislation. Victims will still be subjected to the same harassment, intimidation, and embarrassment during pre-trial questioning as a result of police and prosecutorial bias, and cases will continue to be dismissed because of police failure to conduct the identification procedure in accordance with the requirements of the rules of criminal procedure.

Moreover, present rape reform legislation fails to suggest practical preventive measures for curbing the incidence of rape. Increased police surveillance in high rape areas and housing codes delineating minimum safety requirements in apartment buildings and public facilities exemplify the types of safety measures that can be taken to reduce potential rapes. Also, in recognition of the societal aspects of the rape problem evidenced by its high rate of recidivism, rehabilitative programs providing individualized treatment for sex offenders must be developed.

Despite the fact that rape reform legislation does not provide a total solution to the problem, it should be enacted since it will, at the very least, establish a strong public policy in support of the rape victim. Such a public policy should counteract the historical bias against rape victims by giving notice that the rights of the rape victim will no longer be

subordinated to those of the accused. This legislative mandate should encourage not only the reporting of rapes but also the successful prosecution of those guilty.

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