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THE IMPACT OF COMMON LAW AND REFORM RAPE STATUTES ON PROSECUTION: AN EMPIRICAL STUDY

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In the past six or seven years, the subject of forcible rape[1] has captured national attention. Since the enactment of the Criminal Sexual Conduct Act of Michigan in 1974,[2] the first comprehensive reform of rape legislation in the nation, some forty states have modified existing or passed new statutes on rape.[3] Substantive law changes have been matched by efforts to strengthen the capabilities of law enforcement[4] in order to increase the apprehension, conviction, and sentencing of offenders, and to brake the rising incidence of the crime.[5] Service organizations to aid victims such as rape crisis centers,[6] victim advocates[7] and specialized hospital units[8] have spread across the country. Indeed, the swiftness and momentum of these changes have outpaced social attitudes of the citizenry and of some criminal justice officials.[9]

1. In this article, "forcible rape" refers to nonconsensual sexual intercourse by force or threat of force, and "statutory rape" refers to sexual intercourse with an underage person conclusively presumed incapable of consent. In some instances, "rape" will be used to encompass both types of offenses, but this broader usage can be readily ascertained from the context. The rare cases of nonforcible sexual intercourse that are legally presumed to be nonconsensual due to mental defectiveness or unconsciousness of the victim, or because of the fraudulent or deceptive conduct of the perpetrator, are not dealt with here. *See generally* Puttkamer, *Consent in Rape*, 19 ILL. L. REV. 410 (1925).

2. MICH. COMP. LAWS §§ 750.520(a)-(1)(Supp. 1977–78).

3. *See* Report by BATTELLE MEMORIAL INSTITUTE LAW AND JUSTICE STUDY CENTER FOR THE NATIONAL INSTITUTE FOR LAW ENFORCEMENT AND CRIMINAL JUSTICE, LAW ENFORCEMENT ASSISTANCE ADMINISTRATION, FORCIBLE RAPE: AN ANALYSIS OF LEGAL ISSUES 1 (1978)[hereinafter cited as BATTELLE-LEAA FORCIBLE RAPE]; Note, *Recent Statutory Developments in the Definition of Forcible Rape*, 61 VA. L. REV. 1500, 1502 n.16 (1975) [hereinafter cited at VA. Note].

4. *See generally* reports by BATTELLE MEMORIAL INSTITUTE LAW AND JUSTICE STUDY CENTER FOR THE NATIONAL INSTITUTE FOR LAW ENFORCEMENT AND CRIMINAL JUSTICE, LAW ENFORCEMENT ASSISTANCE ADMINISTRATION: FORCIBLE RAPE: A NATIONAL SURVEY OF THE RESPONSE BY POLICE (POLICE VOLUME I) (1975)[hereinafter cited as BATTELLE-LEAA POLICE SURVEY]; FORCIBLE RAPE: A MANUAL FOR PATROL OFFICERS (POLICE VOLUME II)(1978); FORCIBLE RAPE: A NATIONAL SURVEY OF THE RESPONSE BY PROSECUTORS (PROSECUTORS' VOLUME I) (1975) [hereinafter cited as BATTELLE-LEAA PROSECUTOR SURVEY]; FORCIBLE RAPE: PROSECUTOR ADMINISTRATIVE AND POLICY ISSUES (PROSECUTOR'S VOLUME III) (1978) [hereinafter cited as BATTELLE-LEAA PROSECUTOR PROSECUTOR'S VOLUME III]; FORCIBLE RAPE: FINAL PROJECT REPORT (1978) [hereinafter cited as BATTELLE-LEAA FINAL REPORT.]

5. *See* text accompanying notes 169–78 *infra*.

6. *See, e.g.*, Hardgrove, *An Interagency Service Network to Meet Needs of Rape Victims*, 57 SOCIAL CASEWORK 245 (1976); Rape Crisis Center in Washington, D.C., How to Start a Rape Crisis Center (August 1972, mimeographed); NEW YORK RADICAL FEMINISTS, RAPE: THE FIRST SOURCEBOOK FOR WOMEN 177–80 (1974).

7. *See, e.g.*, BATTELLE-LEAA FORCIBLE RAPE, *supra* note 3, at 38–41; Berger, *Man's Trial, Woman's Tribulation: Rape Cases in the Courtroom*, 77 COLUM. L. REV. 1, 84–87 (1977).

8. *See, e.g.*, Bassuk, Savitz, McCombie, & Pell, *Organizing a Rape Crisis Program in a General Hospital*, 30 J. AM. WOMEN'S A. 486; M. GATES, S. SINGER, M. TUCKER & R. WHITE, RAPE AND ITS VICTIMS: A REPORT FOR CITIZENS, HEALTH FOUNDATIONS, AND CRIMINAL JUSTICE AGENCIES 55–92 (1975).

9. *See* J. Reich & D. Chappell, The Prosecutorial Response to Michigan's Criminal Sexual Conduct Law: Business as Usual 22–23 (1976) (unpublished paper on file at the University of Washington Law School Library).

The legal commentary on the reform of rape legislation developed during this period is extensive.[10] Commentators have attended primarily to doctrinal analyses of statutory and decisional developments in rape law.[11] The significance of criminal law rules, however, lies not only in their formulation but also, in Justice Jackson's terms, in their "delivered value"[12]—that is, in their day-to-day implementation and administration.

10. The lion's share of the literature pertains to unique evidentiary rules in rape prosecutions. For a list of commentaries on the admissibility of the victim's prior sexual history, *see* Berger, *supra* note 7, at 12 n.83. On the corroboration rule, *see* Note, *The Rape Corroboration Requirement: Repeal, Not Reform*, 81 YALE L.J. 1365 (1972) and articles cited therein.

On the definitional elements of rape, *see* R. PERKINS, CRIMINAL LAW 152–171 (2d ed. 1969); Comment, *Towards a Consent Standard in the Law of Rape*, 43 U. CHI. L. REV. 613 (1976) [hereinafter cited as CHICAGO Comment]; Note, *The Resistance Standard in Rape Legislation*, 18 STAN. L. REV. 680 (1966) [hereinafter cited as STANFORD Note].

For statutory analyses of new reform laws, *see, e.g.*, Ireland, *Reform Rape Legislation: A New Standard of Sexual Responsibility*, 49 U. COLO. L. REV. 185 (1978); Comment, *Rape Reform Legislation: Is it the Solution?* 24 CLEV. ST. L. REV. 463 (1975) [hereinafter cited as CLEVELAND STATE Note]; Comment, *Washinton's Attempt to View Sexual Assault as More than a "Violation" of the Moral Woman—The Revision of the Rape Laws*, 11 GONZ. L. REV. 145 (1975) [hereinafter cited as GONZAGA Comment]; Legislative Note, *Michigan's Criminal Sexual Assault Law*, 8 U. MICH. J. L. REF. 217 (1974) [hereinafter cited as MICH. Note]; VA. Note, *supra* note 3.

Historical and general overviews of rape legislation are contained for example, in B. BABCOCK, A. FREEDMAN, E. NORTON & S. ROSS, SEX DISCRIMINATION AND THE LAW 820 *et seq. (1975) [hereinafter cited as BABCOCK]; Gold & Wyatt, The Rape System: Old Roles and New Times*, 27 CATH. U. L. REV. 695 (1978); Comment, *Rape and Rape Laws: Sexism in Society and Law*, 61 CALIF. L. REV. 919 (1973) [hereinafter cited as CALIF. Comment]; Smith, *History of Rape Laws*, 60 WOMEN L. J. 188 (1974).

On trial strategies, *see* Hibey, *The Trial of a Rape Case: An Advocate's Analysis of Corroboration, Consent, and Character*, 11 AM. CRIM. L. REV. 309 (1973).

A bibliography of non-legal literature on rape is found in Fogarty, *A Selective Bibliography*, in FORCIBLE RAPE: THE CRIME, THE VICTIM, AND THE OFFENDER, 356–382 (D. Chappel, R. Geis, & G. Geis, eds. 1977) [the book of readings is hereinafter cited as Chappell].

11. Only two systematic, empirical studies have been done on the exercise of discretion in rape cases. One deals with the prosecutor and the other with the police, and both are based on case files. *See* Weninger, *Factors Affecting the Prosecution of Rape: A Case Study of Travis County, Texas*. 64 VA. L. REV. 357 (1978), and Comment, *Police Discretion and the Judgment that a Crime Has Been Committed—Rape in Philadelphia*, 117 U. PA. L. REV. 277 (1968) [hereinafter cited as PENN. Comment]. Neither study, however, compares the effect of the old and the reform rape statutes on discretionary decisionmaking or on the disposition of rape cases.

In addition, there have been two national surveys of prosecutor and police opinions about rape law enforcement. BATTELLE-LEAA PROSECUTOR SURVEY and BATTELLE-LEAA POLICE SURVEY, *supra* note 4. Respondents were asked what factors they take into account in charging or investigating rape, respectively. As might be expected, the responses given on an attitude questionnaire are not always consistent with actual practices based on the information in case files. *See* note 329 and accompanying text *infra*. Nonetheless, the studies are useful for the complementary perspective they provide to the statistical data from the case records. These two studies also do not compare the impact of the old and new rape statutes or their opinions.

12. Jackson, *Criminal Justice: The Vital Poblem of the Future*, 39 A.B.A.J. 743 (1953). A drafter of reform criminal codes has also proposed that it would be "wise to provide that no change in the penal law be enacted unless it is accompanied by some provision for determining, over some appropriate period of time what the effect of the law turns out to be." Fox, *Reflections on the Law Reforming Process*, 4 U. MICH. J. L. REF. 443, 460 (1971).

The actual impact of the reform legislation on prosecution, an issue which to date has not been systematically studied, is the focus of this article.

In July 1975, riding the crest of the national reform movement, the Washington State legislature enacted a new rape law[13] that repealed a centenarian, common law-based statute.[14] This article presents the results of an empirical study of the effects of the common law and reform rape statutes on prosecution in King County (Seattle), Washington, and assesses the implications of the findings for the law of rape and for prosecutorial discretion in the charging of rape. To the extent that definitional elements of the new Washington law have parallels in reform statutes of other states, and the statistical profile of the incidence and circumstances of the crime in King County is similar to that found in other jurisdictions, the findings and conclusions of this study have broader significance.

I. THE LEGAL FRAMEWORK

The purpose of this Part is to lay the statutory foundation for the empirical analysis presented later in the Article. It begins with an overview of the main substantive elements and social policies of forcible rape legislation, and then briefly considers statutory rape legislation.

A. Forcible Rape

There are three major issues in any system of forcible rape[15] law: (a) definition of the crime—the legal standard of criminalization and gradations, if any, of culpability; (b) penalty structure; and (c) proof of occurrence of the crime—evidentiary rules with respect to corroboration of the complaining witness' allegation of rape, and admissibility on cross-examination of the complaining witness' prior sexual history.

13. WASH. REV. CODE ch. 9.79 (renumbered by 1979 1st Ex. Sess. to WASH. REV. CODE ch. 9A.44.)

14. 1973 Wash. Laws ch. 154, 1st Ex. Sess. (repealed 1975). *See* note 21 *infra*.

15. The use of "forcible" in modifying rape should be clarified. It does not mean that use or threat of force is necessarily present in every case. In fact, most forcible rapes involve no, or only a minimal amount of extrinsic violence beyond the act itself, and usually result in no physical injury. *See* text accompanying notes 252–257 *infra*. But in addition to actual force or a threat thereof, "forcible" refers to the psychological degradation of the victim, and connotes violence to her personhood. Feminist writers thus define rape as a crime of assault and violence. *See, e.g.*, Griffin, *Rape: The All-American Crime*, RAMPARTS Sept. 1971 at 33. Some courts, too, view rape as "forcible" because it is an act of personal outrage: "The essence of the crime is not the fact of intercourse but the injury and outrage to the feelings of the woman by the forceful penetration of her person." Commonwealth v. Goldenberg, 338 Mass. 377, 381, 155 N.E.2d 187, 191–92 (1959). Modern rape law recognizes the violence inherent in every instance of nonconsensual or forcible sexual intercourse, irrespective of actual use of physical force, by proscribing it and attaching strong penalties upon conviction.

The basic substantive element of rape is nonconsent of the victim. This is what renders criminal otherwise ordinary conduct. Statutes, judicial opinions,[16] legal commentators,[17] and trial attorneys[18] have long recognized the role of nonconsent in rape law. Despite the centrality of the concept, the legal community "has yet to develop a principled standard of nonconsent that reflects the interests protected by criminalization of rape."[19] Instead of articulating the nature and scope of nonconsent, it has concentrated on fashioning subsidiary rules of evidence unique to rape law. This places the proverbial cart before the horse. The legal standard of rape—more precisely, the standard adopted by law as the objective indicator of nonconsensual intercourse—determines the type and quantum of evidence needed to prove the crime. If the actor's conduct (physical force or threat of force) is the legal criterion, then evidence pertaining to the victim's prior unchastity becomes mostly irrelevant for proving that element. But if victim's conduct (resistance) is determinative, past sexual conduct can be material. Consequently, the definitional standard is the most important conceptual issue in rape law and is the primary focus of this Article.[20]

Four approaches to forcible rape legislation are summarized next. They span the continuum of victim-actor orientation, with the Washington common law statute and the Michigan reform statute at the respective ends, and the Washington reform law and the Model Penal Code both in the middle.

1. Definition and Penalty Aspects

a. The Washington common law-based legislation.

Under the prior Washington law, "Rape is an act of sexual intercourse with a person not the wife or husband of the perpetrator committed against the person's will and without the person's consent."[21] Derived

16. *See, e.g.*, Williams v. United States, 327 U.S. 711, 715 (1946).

17. *See, e.g.*, CHICAGO Comment, *supra* note 10.

18. "No matter how rape is defined, my job is the same: to persuade the jury that there was no consent." Interview with Greg Canova, chief of the Sexual Assault Unit, King County Prosecuting Attorney office (May 16, 1979) [hereinafter cited as Canova Interview].

19. CHICAGO Comment, *supra* note 10, at 645.

20. Only the principal definitional elements of the old and new Washington law, the Michigan reform law, and the Model Penal Code are presented here. Issues of evidentiary proof and penalties are mentioned in passing insofar as they are relevant to the definitional aspect of the statutes. A number of important but specialized topics in rape law such as interspousal rape, defense of mistake, and rape by fraud or economic coercion are beyond the scope of this article.

21. 1973 Wash. Laws (1st Ex. Sess.) ch. 154, § 122, at 1198 (repealed 1975). It provides further:

from the common law, the definition is representative of those in pre-reform rape statutes in other jurisdictions.[22] "Sexual intercourse" consists of penetration of the female sexual organ, however slightly, by the male sexual organ.[23] "Against the person's will" and "without the person's consent" are synonymous in common law,[24] and are defined in terms of the victim's action, namely, "resistance . . . forcibly overcome" or "resistance . . . prevented by fear of immediate and great bodily harm."[25] Despite the use of physical force by the actor, unless the victim resists or is overcome by such fear as to excuse resistance, there is no rape. The actor's force thus is gauged and deemed criminal according to the victim's conduct.[26] Washington courts have required only "reasonable" resistance,[27] but early decisions elsewhere expected an "utmost" or "terrific" exertion.[28] The penalty for rape under the Washington stat-

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Every perpetrator of such an act of sexual intercourse with a person of the age of ten years or upwards not his wife or husband:

(1) When, through idiocy, imbecility or any unsoundness of mind, either temporal or permanent, the person is incapable of giving consent; or

(2) When the person's resistance is forcibly overcome: or

(3) When the person's resistance is prevented by fear of immediate and great bodily harm which the person has reasonable cause to believe will be inflicted upon her or him; or

(4) When the person's resistance is prevented by stupor or weakness of mind produced by intoxicating narcotic or anaesthetic agent administered by or with the privity of the defendant; or

(5) When the person is at the time unconscious of the nature of the act and this is known to the defendent;

Shall be punished by imprisonment in the state penitentiary for not less than five years.

This rape statute, which is typical of others, contains no mens rea language because once forcible conduct is shown, mental culpability is presumed.

22. *See, e.g.*, 1895 Wis. Laws ch. 370, §2, at 753: "Any person who shall ravish and carnally know any female of the age of fourteen years or more, by force and against her will, shall be punished by imprisonment in the state prison not more than thirty years nor less than ten years . . . ."

23. "Any sexual penetration, however slight, is sufficient to complete sexual intercourse or carnal knowledge." 1973 Wash. Laws (1st Ex. Sess.) ch. 154, § 124, at 1199 (repealed 1975). "Penetration means that the sexual organ of the male entered and penetrated the sexual organ of the female. . .." State v. Snyder, 199 Wash. 298, 301, 91 P.2d 570, 571 (1939).

24. R. PERKINS, *supra* note 10, at 160–61.

25. 1973 Wash. Laws (1st Ex. Sess.) ch. 154, § 122, at 1198.

26. A commentator has proposed a statute defining forcible rape solely in terms of resistance. It requires an actor to use force or guile, and then evaluates the sufficiency of the force or guile in terms of a standard of victim's resistance that must be overcome. STANFORD Note, *supra* note 10, at 688–89. At least one reform statute continues to define rape in terms of the victim's conduct: "[T]he amount of force necessary to negate consent is a relative matter to be judged under all the circumstances, the most important of which is the resistance of the female." TEX. PENAL CODE ANN. tit. 5, § 21.02, Practice Commentary at 308.

27. *See, e.g.*, State v. Pilegge, 61 Wn. 264, 112 P. 263 (1910).

28. R. PERKINS, *supra* note 10, at 161. Starr v. State, 205 Wis. 310, 311, 237 N.W. 96, 97 (1931) ("utmost resistance"); Mills v. United States, 164 U.S. 644, 648–49 (1897) ("to the extent of her ability").

ute was harsh: "not less than five years" imprisonment.[29] Many states imposed the death penalty or life imprisonment.[30]

b. The Washington reform legislation

The new Washington rape law, like other reform legislation, changes the definitional and penalty aspects of the prior law in several respects. First, it focuses more on the actor's use or threat of force rather than the victim's conduct as the external criterion of nonconsent. The criminalization of rape is thereby made consistent with that of other violent offenses such as assault. Second, it recognizes the crime ranging from brutal attacks by strangers to "half won arguments of couples in parked cars,"[31] and these different factual situations cannot be subsumed under a single legal standard. And third, it renders more equitable the penalty structure by matching the types of conduct reflecting different degrees of culpability over a range of available punishments.

Rape is divided into three degrees according to the extent of force or threat.[32] The basic elements of a first degree offense are sexual inter-

29. 1973 Wash. Laws (1st Ex. Sess.) ch. 154, § 122, at 1198 (repealed 1975).

30. *See* MODEL PENAL CODE § 207.4, Comment at 241 (Tent. Draft No. 4, 1955). Prior to Furman v. Georgia, 408 U.S. 238 (1972), sixteen states permitted the death penalty for rape. Since then, several have enacted ostensibly less discretionary schemes. *See* CLEVELAND STATE Note, *supra* note 10, at 491. Some 30 states imposed life imprisonment. BABCOCK, *supra* note 10, at 863 n.56.

31. Comment, *Forcible and Statutory Rape: An Exploration of the Operation and Objectives of the Consent Standard*, 62 YALE L. J. 55, 56 (1952) [hereinafter cited as YALE Comment].

32. The sections on rape are as follows:

WASH. REV. CODE § 9A.44.040(1979):

(1) A person is guilty of rape in the first degree when such person engages in sexual intercourse with another person not married to the perpetrator by forcible compulsion where the perpetrator or an accessary:

(a) Uses or threatens to use a deadly weapon; or

(b) Kidnaps the victim; or

(c) Inflicts serious physical injury; or

(d) Feloniously enters into the building or vehicle where the victim is situated.

WASH. REV. CODE § 9A.44.050(1979):

(1) A person is guilty of rape in the second degree when, under circumstances not constituting rape in the first degree, the person engages in sexual intercourse with another person, not married to the perpetrator:

(a) By forcible compulsion; or

(b) When the victim is incapable of consent by reason of being physically helpless or mentally incapacitated.

WASH. REV. CODE § 9A.44.060(1979):

(1) A person is guilty of rape in the third degree when, under circumstances not constituting rape in the first or second degree, such person engages in sexual intercourse with another person, not married to the perpetrator:

(a) Where the victim did not consent as defined in RCW 9A.44.010(6), to sexual intercourse with the perpetrator and such lack of consent was clearly expressed by the victim's words or conduct, or

course (with a non-spouse)[33] by forcible compulsion under aggravated circumstances. It is punishable by a minimum sentence of 20 years and a minimum confinement period of 3 years, with no deferred or suspended sentence permissible except for inpatient treatments.[34] Second degree rape requires only sexual intercourse by forcible compulsion. The penalty upon conviction is a maximum of 10 years.[35] Third degree rape is defined as sexual intercourse without consent or with threat of substantial harm to property rights, with a sentence of "not more than 5 years."[36]

The new, sex-neutral definition of "sexual intercourse" broadens the range of conduct constituting forcible rape. It expands prior law to include penetration, however slight, of the vagina or anus "by an object" as well as by a sexual organ, and "sexual contact" (without penetration) between a person's sexual organ and the anus or mouth of another.[37] This formulation makes the law applicable to homosexual rape, previously prosecutable only under a sodomy statute.[38] However, mere "contact" between two sexual organs and "touching" of the intimate parts of a person for sexual gratification is not rape. It is proscribed as "indecent liberties," a felony punishable by a sentence approximating that imposed for second degree rape.[39]

The new concept of "forcible compulsion"[40] is substantively similar to the prior Washington statute's definition of physical force as resistance forcibly overcome.[41] The first two degrees of rape make no mention of consent in order to deflect attention away from the victim, thereby

(b) Where there is threat of substantial unlawful harm to property rights of the victim.

33. The new statute continues the common law notion that marriage justifies continuing assent to all marital sexual relations. For critical views, *see* Comment, *Rape and Battery Between Husband and Wife*, 6 STAN. L. REV. 719 (1954); CHICAGO Comment, *supra* note 10, at 641; GONZAGA Comment, *supra* note 10, at 149–51.

34. WASH. REV. CODE § 9A.44.040(2)(1979).

35. WASH. REV. CODE § 9A.44.050(1979) and §9A.20.020(b)(1975).

36. WASH. REV. CODE § 9A.44.060(1979) and § 9A.20.020 (c)(1975).

37. *Id.* § 9.79.140(1)(a)-(c)(1977).

38. Ch. 249, 1909 Wash. Laws § 204, at 950, *as amended* ch. 74, 1937 Wash. Laws § 3, at 322 (former WASH. REV. CODE § 9.79.100) (repealed 1975). One of the reasons for bringing sodomy under rape law is that "the majority of our victims report that these sexual acts [vaginal and anal penetration, including by physical objects] are occurring together. They find that sodomy and anal intercourse are much more degrading and much more devastating. . . ." Testimony of Carol Klingbill, Director of the Sexual Assault Program, Harborview Hospital, Seattle, in Jud. Comm. Hearings, *infra* note 78. The assertion about the frequency of these acts, however, is not born out by the available data in case files. *See* text following note 254 *infra*.

39. WASH. REV. CODE ANN. §9A.88.100(1977). *See also* WASH. REV. CODE ANN. § 9A.20.202(b)(1977).

40. " 'Forcible compulsion' means physical force which overcomes resistance, or a threat, express or implied, that places a person in fear of death or physical injury to herself or himself or another person, or in fear that she or he or another person will be kidnapped. . . ." WASH. REV. CODE ANN. § 9.79.140(5)(1977).

41. The definition in the Washington statute is virtually identical to that in the New York Penal

prompting one commentator to say that nonconsent has been removed as an element of the crime.[42] On the other hand, by defining forcible compulsion in terms of the victim's resistance and using the same language that under the prior statute defined "against the person's will," arguably the element of nonconsent has been slipped in through the backdoor.[43] Conceptually, then, the new law represents a compromise approach, one that emphasizes the actor's conduct but does not exclude the victim's resistance as an objective indicator.

The "common denominator" to the three degrees of rape is lack of consent.[44] When in addition to forcible compulsion there is present at least one of the four itemized aggravating criminal circumstances, nonconsent can be said to be conclusive in a rape 1 offense.[45] The law does not allow freedom of choice in a situation potentially dangerous to a person's physical safety and to society's sense of collective security. Under circumstances of physical force or threat of force constituting rape 2, lack of consent is only presumptive. To this extent, the second degree offense "[embodies] the essence of the prior rape statute."[46] Only in rape 3 is nonconsent expressly stated as an element of the crime, but absent aggravating factors and forcible compulsion, it is unclear what other objective evidence based upon "the victim's words or conduct"[47] the state can present as proof. The definitions of the first two degrees preempt the content of rape 3 and render its prosecution difficult.

c. The Michigan reform legislation.

Unlike legislation patterned after the common law, reform statutes differ significantly in the legal standard employed to define the crime. The most sweeping revision of prior law is the Michigan reform law.[48] It has served as a model for twelve states[49] and was at least "seriously exam-

Law, except that New York requires that the resistance be "earnest." N.Y. PENAL LAW § 130.00(8), (McKinney 1975) (adopted 1965).

42. GONZAGA Comment, *supra* note 10, at 155.

43. A recent article argues that force and nonconsent are "separate and distinct" elements, and "one does not necessarily constitute evidence of the other." Consequently a rape victim is a "co-defendant charged with the crime of consent." Gold & Wyatt, *supra* note 10, at 695. It may well be that complaining witnesses who undergo skeptical questioning by law enforcement officials and harsh cross-examination by defense counsel come to feel that they are the ones on trial. But what may be experientially true is not necessarily conceptually correct. Modern statutory and decisional law do not treat force and nonconsent as separate formal elements. Indeed, if force (or resistance) is not an objective indicator of nonconsent, it is unclear how else the subjective state would be determined.

44. CRIMINAL CODE MANUAL, *infra* note 79, at 9.79.140–44.

45. WASH. REV. CODE ANN. § 9.79.170(1)(a)-(d).

46. CRIMINAL CODE MANUAL, *infra* note 79, at 9.79.170–74.

47. WASH. REV. CODE ANN. § 9.79.190(1)(a)(1977).

48. MICH. COMP. LAWS §§ 750.520(a)–(1)(Supp. 1977–78).

49. BATTELLE-LEAA FORCIBLE RAPE, *supra* note 3, at 1.

ined'' by Washington legislators.[50] Using sexually neutral terminology, the statute even eschews the word rape, probably because of its outmoded social and sexual connotations.[51] Any reference to the victim's conduct is expressly eliminated.[52] Instead, it goes further than any other statute in detailing the kinds of conduct that constitute criminal sexual behavior.[53]

Four types of sexual assaults are proscribed as four degrees of ''criminal sexual conduct.'' The first degree offense,[54] which carries a maxi-

50. Interviews with Rep. Ed Seeberger, a sponsor of House Bill 208 (the Seattle Women's Commission's proposed rape law) and Sen. Pete Francis, chairman of the Senate Judiciary Committee, by James Nelson, on February 8–9, 1979 [hereinafter cited as Seeberger Interview and Francis Interview.]

51. In Washington, many women opposed removing the word rape from the statute. The testimony of one rape center counselor summed up the prevailing sentiment:

> I think rape is a particular crime. I think that it's different than assault. People who commit rape commit it for different reasons than people who commit assaults. Changing the name of the crime isn't going to do any good. It's going to be throwing the issue under the rug, so to speak. I think this would be very detrimental to our work with rape victims, because rape is not simply a form of assault.

Jud. Comm. Hearings, *infra* note 78.

52. MICH. COMP. LAWS § 750.520i (Supp. 1977–78).

53. A definitional scheme as comprehensive as Michigan's is not initially without statutory interpretation problems. Key definitions, for example, are vague due to the complexity of the statutory scheme, drafting weaknesses, and the imprecision of language to capture subtle behavioral nuances. ''Penetration'' is defined so broadly as to be almost indistinguishable from ''contact'' (*see* note 56 *infra*). Thus, does intrusion (''however slight'') of the actor's finger into another person's sexual organ constitute ''penetration'' or ''contact''? The distinction is important because the respective penalties upon conviction are not equally severe.

Another ambiguous definition is that of ''personal injury'' to the victim, which encompasses both bodily injury and mental anguish. MICH. COMP. LAWS § 750.520a(f) (Supp. 1977–78). On circumstance of a first degree offense (penetration with force or coercion causing personal injury, *id.* § 750.520(b)(1)(f)), is the same as a circumstance of the third degree offense (penetration with force or coercion under ''any of the circumstances listed in section 520(b)(1)(f),'' that is, personal injury; *id.* § 750.520d). Since any unwanted penetration may cause anguish and the statute does not define degrees of anguish, the two offenses are indistinguishable except in penalties. Other states adopting the Michigan model consequently require ''great'' mental anguish for the first degree offense. *See, e.g.*, N.M. STAT. ANN. § 30–9.11.A(2)(1978).

To define the actor's conduct in terms of the degree of the victim's emotional state introduces problems of psychological measurement and proof. Given the modern shift away from the victim's conduct (degree of resistance) as an indication of nonconsent, the reliance now on the victim's subjective response (ungraded anguish) seems to dilute the new statutory focus on the actor's conduct. The reason for including mental anguish in the definition is understandable, since rape is perceived as a crime of psychological violence. *See* note 15 *supra*. But the law already recognizes the emotional trauma inherent in all instances of forcible rape by proscribing the act in the first instance, even if unaccompanied by actual extrinsic force, and by prescribing severe penalties upon conviction. Hence it does not need to insist upon further proof of the degree of anguish at trial. Attempts at proof could open up examination of the victim's past experiences, including sexual history, which reform statutes (including Michigan's) takes pains to exclude. *See* notes 85–95 and accompanying text *infra*. For this reason, the Washington reform law and most other reform legislation do not incorporate mental anguish into their definitional framework.

54. MICH. COMP. LAWS § 750.520b (Supp. 1977–78).

mum sentence of life imprisonment, is an aggravated[55] act of sexual penetration.[56] Second degree criminal sexual conduct,[57] punishable by a 15-year maximum sentence, is an aggravated act of sexual conduct.[58] The third and fourth degree offenses, carrying 15- and 2-year maximum sentences, respectively, repeat the pattern of penetration (3rd degree) and contact (4th degree) under less aggravated circumstances.

d. The Model Penal Code.

The 1955 draft on sexual offenses of the Model Penal Code was the first major restatement of the common law. Its innovative standard of rape[59] had widespread effect in the early and mid-1970's on state and proposed federal criminal codifications.[60] The culpable conduct occurs when a male[61] compels a female not his wife to submit to sexual intercourse by force or threat of death or serious bodily injury. For the first time, a rape law deliberately avoided nonconsent language in the text. Nonetheless, the drafters acknowledged in the Comments that "the central issue is likely to be the . . . consent . . . of the female . . ."[62]

55. Among the aggravated circumstances varying from the four offenses are the youth of the victim, a familial or authority relationship between actor and a young victim, commission of another felony, participation of more than one actor, the actor's possession of a weapon, personal injury to the victim, mental defects or physical helplessness of the victim, and the actor's use of force or coercion. *Id.* § 750.520a-e. Force of coercion is objectively indicated by any of five non-exclusive criteria ranging from use or threat of physical force to deception. *Id.* § 750.520b(1)(f)(i)-(v).

56. " 'Sexual penetration' means sexual intercourse . . . or any other intrusion, however slight, of any part of a person's body or of any object into the genital or anal opening of another person's body. . . ." *Id.* § 750.520a(h).

57. *Id.* § 750.520c.

58. *Id.*

59. MODEL PENAL CODE § 213.1 (10 UNIFORM LAWS ANNOTATED 1974). Rape and related offenses.

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

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

. . .

Rape is a felony of the second degree unless (i) in the course thereof the actor inflicts serious bodily injury upon anyone, or (ii) the victim was not a voluntary social companion of the actor upon the occasion of the crime and had not previously permitted him sexual liberties, in which cases the offense is a felony of the first degree.

(2) Gross Sexual Imposition. A male who has sexual intercourse with a female not his wife commits a felony of the third degree if:

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

60. *See* VA. Note, *supra* note 3, at 1512.

61. The substantive offense was not defined in terms of a female actor because, according to the drafters, "[i]t seems more realistic . . . of morals, rather than sexual aggression." The commentary did not discuss homosexual rape. MODEL PENAL CODE § 207.4, Comment (2)(Tent. Draft No. 4, 1955).

62. *Id.* Comment (1).

and consequently defined "compels to submit" as requiring more than "a token initial resistance, but less than the "utmost resistance" of common law.[63] The fact that some resistance was still thought necessary to prove the crime points to the difficulty of framing a legal test exclusively in terms of one party's conduct.

The Code provides for two degrees of culpability.[64] The basic substantive offense is a second degree felony, and the added presence of either one of the aggravating conditions—serious bodily injury or involuntary social companion—elevates the felony to the first degree.[65] Rape 1, then, represents the stereotyped, public image of the crime: a brutal assault by a stranger leaping out from behind the bushes.[66] Most rapes, however, do not fit that mold; they do not result in physical injury and do not involve strangers.[67] The relative importance of the involuntary companion factor consequently increases. When the victim and actor have engaged in social interaction prior to the offense, juries tend to bootleg informal notions of contributory negligence or assumption of risk by the victim in determining the culpability of the actor.[68] The formal inclusion of the antecedent social relationship in the definitional scheme indicates a recognition on the part of the drafters that assumptions of "victim precipitation"[69] color prosecutor and jury determinations of nonconsent. In light of the record of jury leniency in these circumstances, the Code emphasizes that forcible sexual intercourse by a social companion is still a crime, albeit only in the

63. *Id.* Comment (6).

64. Grading the actor's conduct was one of the two major issues faced by the drafters. The other was drawing the line between illicit intercourse and rape-seduction. *Id.* Comment (1).

65. In addition, the Code provides for two sexual offenses which it does not categorize as rape. One is "gross sexual imposition," or sexual intercourse compelled by threat that prevents resistance (the common law definition of nonconsent). MODEL PENAL CODE § 213.1(2)(10 UNIFORM LAWS ANNOTATED 1974). *See* note 59 *supra*. This is equivalent to Washington's and Michigan's third degree rape. WASH. REV. CODE ANN. § 9.79.190(1977); MICH. COMP. LAWS § 750.520d (Supp. 1977–78). The Code drafters, however, did not believe it warranted the stigmatizing label of rape and provided for lower penalties upon conviction for that offense. MODEL PENAL CODE § 207.4, Comment 1 (Tent. Draft No. 4, 1955). The other non-"rape" offense is unwanted "sexual contact" which is categorized as sexual assault. MODEL PENAL CODE § 213.4 (10 UNIFORM LAWS ANNOTATED 1974). Under Washington law, these acts are defined as indecent liberties or assault, respectively. WASH. REV. CODE ANN. § 9A.88.100; *Id.* ch. 9A.36 (1977). Michigan law defines them as rape 2 and 4, respectively. MICH. COMP. LAWS §§ 750.520 c,e (Supp. 1977–78).

66. According to the drafters, "[t]he community's sense of insecurity (and consequently the demand for retributive justice) is especially sharp in relation to [unknown assailants]." MODEL PENAL CODE § 207.4, Comment 5 (Tent. Draft No. 4, 1955). In other words, when a stranger randomly selects a victim, general security is threatened—everyone is a potential victim. The probability and fear of victimization in the population at large is less, however, when crimes occur between acquainted couples.

67. *See* text accompanying note 252 *infra*.

68. KALVEN & ZEISEL, *infra* note 82, at 249–51.

69. *See* note 381 *infra*.

second degree of gravity. The Washington and Michigan reform statutes, in contrast, ignore this social dimension of rape and define the offense solely in terms of physical conduct.

2. *Definitional Standards and Prosecution Effectiveness*

Rape law was reformed in large measure to enhance the effectiveness of prosecution. Changing the definitional component of the law—reformulating the standard of criminalization and creating gradations of culpability—was thought to be instrumental in this regard. Determining whether these changes actually facilitate prosecution is one of the main purposes of this study.

The gravamen of criminal sexual intercourse in nonconsent. Under the common law legislation, nonconsent was determined by examining the victim's conduct. This standard was prejudicial to and weakened prosecution. Women generally have not been socialized to be aggressive and many are afraid to and do not resist an assailant. Indeed, resistance to rape or other violent crimes often results in greater injury to the victim.[70] Under the common law statutes, a jury could acquit when it determined that the victim did not resist sufficiently; that is, the victim was deemed to have consented. A court could dismiss prosecution or reverse a conviction upon finding that resistance did not rise to the required level.[71] For this reason, the consent standard has been criticized as "inflammatory and mistaken" and its removal from reform legislation welcomed.[72] The adoption, instead, of actor's force as the new standard of criminalization led to the comment that "under the new [Michigan] law it is clearly no longer necessary for the prosecution to prove nonconsent."[73]

It is doubtful that this feature of reform will have an appreciable impact on prosecution. The difficulty in securing rape convictions under common law statutes was not created by the consent standard as such. Highly publicized cases that are seen as travesties of justice usually involved the application of an utmost resistance or high fear standard.[74] Such acquit-

70. Data on victim resistance and the relationship between resistance and injury are presented in notes 253–257 and accompanying text *infra*.

71. Brown v. State, 127 Wis. 193, 201, 106 N.W. 536, 539 (1906) (conviction reversed because complaining witness failed to prove utmost resistance).

72. VA. Note, *supra* note 3, at 1514.

73. MICH. Note, *supra* note 10, at 226.

74. In one case, for example, the physician who examined the complainant testified that "she was absolutely terrified; she was shaking like a leaf and so incoherent it almost took half an hour to make out anything she said. She was *very* hysterical. . . . finally she told me she had been out, been raped." The jury convicted. The Wisconsin supreme court reversed because of its perception that her fear was not so great as to excuse utmost resistance. State v. Hoffman, 228 Wis. 225, 240, 280 N.W. 357, 361 (1938).

tals were less frequent when the law set a lower threshold of resistance. The problem lies in the practical unattainability of the required level of resistance or fear, and not in nonconsent itself.

In addition, consideration of victim resistance as a legal standard coincides with attitudes in the criminal justice system. Unless there is evidence of resistance, it is less likely that police will investigate, prosecutors will charge, and juries will convict.[75] Nonconsent is one of the main evidentiary issues around which the trial revolves.[76] As a practical matter, a prosecutor still must demonstrate nonconsensual intercourse whether this was because of actor's force, victim's resistance, or both. The same kinds of evidence are used to establish the crime regardless of the statutory formulation and language. As a legal matter, though, a prosecutor under the new legislation no longer has the burden of proving victim resistance or nonconsent. He is relieved of the risk of nonpersuasion as to that element.

Thus, although nonconsent is the basic substantive element of the crime and its evidentiary proof at trial remains unchanged, the standard chosen as its operational indicator has important legal implications. The new law channels the jury's focus, via instructions, on the culpability of the actor rather than the response of the victim. It may render the jury's exercise of its nullification power less likely because of stereotypes about rape and rape complainants. In addition, with victim's conduct no longer a separate formal element of the crime, there is less legal justification for evidentiary rules unique to rape law based on the victim's past sexual actions. The symbolic value of the shift should not be minimized. The reform statutes announce society's interest in accurately identifying perpetrators of rape, not in reinforcing traditional assumptions regarding appropriate behavior of (virturous) women.

The single-degree definition of the crime and the accompanying severe penalties for offenders that characterized common law statutes arguably hampered prosecution. Harsh sanctions operated to discourage convictions when there is a perceived sense of disproportion between culpability and

75. A New York City detective noted, "A lot of officers, especially the old-timers, believe that unless a woman comes in bruised, there's no rape." Quoted in Cohn, *Succumbing to Rape*, in RAPE VICTIMOLOGY 11 (L. Schultz ed. 1975). In one case, the jury acquitted a defendant for raping two women despite the medical evidence of their bruised condition. One juror later revealed that the jury did not believe the women had resisted sufficiently. Note, *The Victim in a Forcible Rape Case: A Feminist View*. 11 AM. CRIM. L. REV. 335, 346 (1973).

76. The two most common defenses are mistaken identification and consent. The former is more likely when the circumstances of the crime indicate extreme force or that the victim's opportunity to observe the defendant was limited. When identification is positive and the force used was limited, a consent defense is probable. Less frequently, psychiatric defenses are raised when the facts of the rape are heinous and identification evidence is irrefutable.

the prescribed sentence.[77] Without gradations of rape, juries exercised their nullification power by acquitting of the rape charge, or by convicting of a lower offense if the option was available, in instances of "simple" rather than "aggravated" rape.[78] Prosecutors who anticipated such jury responses were more inclined to charge or accept a plea to a lesser offense[79] in order to maximize their conviction records.

The legislative purpose in calibrating degrees of rape and punishment was to facilitate prosecution and thereby enhance the general deterrent effect of the law.[80] Proponents of the Washington reform statute expected it would allow greater flexibility in charging (e.g., filing rape 3 in a weak case rather than simple assault) and in negotiating (e.g., reducing a rape 2 charge to rape 3 instead of assault in exchange for a guilty plea).[81] More rape convictions after trial were anticipated. Since a lower degree of rape is a lesser included offense in a higher degree, this standard coincides with the jury's intuitive notion of a continuum of culpability.[82] Proper identification of offenders as rapists would also provide a more accurate record of the incidence of the crime and enable them to qualify for sexual offender treatment programs.[83] The new definitional scheme was ex-

77. Experience seems to show that excessively severe penalties may actually reduce the risk of conviction, thereby leading to results contrary to their purpose. When the penalties are not reasonably attuned to the gravity of the violation, the public is less inclined to inform the police, the prosecuting authorities are less disposed to prosecute and juries are less apt to convict.

Andenaes, *The General Preventive Effects of Punishment*, 114 U. PA. L. REV. 949, 970 (1966).

78. The Seattle Women's Commission drafted a proposed rape law, Senate Bill 2196 and House Bill 208, that was enacted in 1975 as the new Washington rape statute. A Commission member (Jackie Griswold) criticized the old law's one degree definition of rape as follows:

> We believe that one significant reason for jurors' reluctance to convict for rape is that current law requires that we consider under one category rapes of the most hideous variety as well as those in which far less obvious harm has occurred. This results in a situation in which rapists who commit grievous, shocking crimes are seen as rapists and convicted, and other rapists go free because they do not compare in brutality.

From tape recording of hearings on the proposed law on January 21, 1975, before the Washington Senate Judiciary Committee [hereinafter cited as Jud. Comm. Hearings].

79. "[T]he prior law, containing only one degree of rape, encouraged plea bargaining, resulting in assault convictions in cases where a rape prosecution under a lower degree of rape would have been pursued if available." WASHINGTON STATE CRIMINAL JUSTICE TRAINING COMMISSION REVISED CRIMINAL CODE TRAINING AND SEMINAR MANUAL 9A.79.190-93 (January 1, 1976)[hereinafter cited as CRIMINAL CODE MANUAL].

80. There is no formal record of the legislative history and purposes of the new Washington law. The formulation presented here is derived from extensive interviews conducted by my research assistant, James Nelson, with various state legislators, attorneys, and representatives of women's groups involved in the legislative reform process (described more fully in section II.B of the text *infra*) and from tape recordings of the legislative hearings on the proposed law (*see* Jud. Comm. Hearings, *supra* note 78). *See generally* Part II.B & C. *infra*.

81. Interview with Pat Aiken, assistant chief deputy prosecutor, criminal division, King County, by James Nelson, on January 11, 1979 [hereinafter cited as Aiken Interview].

82. H. KALVEN & H. ZEISEL, THE AMERICAN JURY 250 (1966).

83. Testimony of Carol Klingball, in Jud. Comm. Hearings, *supra* note 78.

pected to produce, according to a defense attorney, "a better mousetrap" for the prosecution.[84]

3. *Evidentiary Rules*

Rules pertaining to the admissibility in evidence of the victim's chastity[85] and the requirement of corroboration of her testimony[86] evoke again the issue whether rape law should focus on the conduct of victim or actor. They are among the most controverted and commented upon aspects of rape law.[87]

Under the common law, general reputation for chastity and specific instances of prior sexual activity were deemed probative of consent[88] and,

84. Testimony of Murray Guterson, a prominent defense attorney and chairman of a State Bar Association task force that drafted a proposed rape statute (which was eventually rejected by the legislature; *see* note 144 and accompanying text *infra*), in Jud. Comm. Hearings, *supra* note 78. His exchange with Pete Francis, chairman of the Senate Judiciary Committee, reflects the opposing viewpoints on the calibration of culpability in rape:

> Guterson: "Is it your feeling . . . that what you are going to ultimately come up with will include some kind of third degree rape or is that still open for debate? If there is going to be a third degree, how will it be defined?
>
> Francis: "It's certainly something we probably need to discuss more. It could be of some significance and I don't think we are at all aware of the potential differences between having just two degrees or three degrees.
>
> Guterson: "As a defense attorney, I always feel that it's harmful to the defendant to be accused of a crime that has a number of lesser included offenses. If the prosecutor can give the jury different ways of convicting, then it makes it a lot easier for a jury to compromise. That's basically why I oppose the third degree of rape.
>
> Francis: "On the other side of the coin, you have definitely given [the Seattle Women's Commission's] argument for three degrees because what we're trying to do is convict more rapists.
>
> Guterson: "I'm not trying to convict more anythings than I possibly can. And I don't like the notion that people who are very considerate of the constitutional rights of the accused and who are very liberal in quotes . . . when it comes to sex offenses become overwhelmingly prosecution minded."

Third degree rape in the original Seattle Women's Commission proposal included only sexual intercourse without consent (now WASH. REV. CODE ANN. § 9.79.190(1)(a)(1977)). Another group, the State Women's Council, then proposed extending the offense to encompass intercourse compelled by a person in authority, such as a landlord or employer (now WASH. REV. CODE ANN. § 9.79.190(1)(b)(1977). Interview with Jackie Griswold, chair of the drafting committee, Seattle Women's Commssion, by James Nelson, January 15, 1979 [hereinafter cited as Griswold Interview].

85. Chastity is abstention from premarital or extramarital sexual intercourse. *See* State v. Bird, 302 So. 2d 589, 592 (La. 1974).

86. For an enumeration of types of corroborative evidence (*e.g.*, medical evidence, breaking and entering, torn clothing, prompt complaint, emotional state, etc.), *see* Allison v. United States, 409 F.2d 445, n.8 (D.C. Cir. 1969).

87. Most of the legal literature on rape pertains to evidentiary rules. *See* note 10 *supra*. This aspect of rape law is mentioned here in passing only as background for the discussion of the role of corroboration in prosecutorial decision making. *See* discussion at III *E infra*.

88. "Fortunately, the character of the woman as to chastity or unchastity is admissible in evidence because of its probative value in judging whether she did or did not consent to the act in question." R. PERKINS, *supra* note 10, at 158 (footnotes omitted). One court put it more colorfully:

in some jurisdictions, of credibility.[89] Harsh cross-examination of complaining witnesses often produced "character assassination in open court"[90] and discouraged victims from prosecuting for fear of being "twice traumatized."[91] In revising rape laws, over one half of the states enacted "shield laws" for victims.[92] The new Washington law steers a middle course between exclusion[93] and discretionary admission[94] of such evidence. The statute excludes it for impeaching credibility and admits it for showing consent, pursuant only to a pretrial motion, offer of proof by affidavit, and an *in camera* hearing.[95]

Since there are rarely witnesses to rape and physical evidence is not always available, corroboration often was required[96] to safeguard against false accusations[97] under common law statutes.[98] The requirement, strad-

"And will you not more readily infer assent in the practised Messalina, in loose attire, than in the reserved and virtuous Lucretia?" People v. Abbot, 19 Wend. 192, 195 (N.Y. 1838).

89. Promiscuity imports dishonesty. Brown v. State, 50 Ala. App. 471, 474, 280 So. 2d 177, 179 (1973). Many courts, however, do not allow nonchastity to impeach victim's credibility. 3A J. WIGMORE, EVIDENCE §§ 923–24 (Chadbourn rev. 1970).

90. Commonwealth v. Manning, 367 Mass. 605, 610, 328 N.E.2d 496, 501 (1975)(Brauchner, J., dissenting).

91. Bohmer & Blumbwerg, *Twice Traumatized: The Rape Victim and the Courts*, 58 JUD. 391 (1975).

92. *See* Berger, *supra* note 7, at 32 nn.196 & 197.

93. *See, e.g.*, MICH. COMP. LAWS § 750.520j (Supp. 1977–78). It excludes evidence of victim's chastity, sexual reputation, and sexual conduct, except for evidence of prior sexual activity with the defendant, and evidence of specific instances of sexual activity to show the origin of pregnancy, disease, or semen. Even the excepted evidence is admitted only after a hearing. For a discussion of the constitutionality of this provision of the Michigan statute on sixth amendment grounds, see Note, *Limitations on the Right to Introduce Evidence Pertaining to the Prior Sexual History of the Complaining Witness in Cases of Forcible Rape: Reflection of Reality or Denial of Due Process?* 3 HOFSTRA L. REV. 403, 417–25 (1975). *See generally* Berger, *supra* note 7, at 52–83.

94. At common law, admission was at the court's discretion upon a finding that probative value outweighed prejudice. Some modern codes continue this permissive approach to admissibility. *See, e.g.*, N.M. STAT. ANN. § 30–9–26A (1978).

95. WASH. REV. CODE § 9A.44.020(1)–(39 (1979). *See generally*, Note, *Evidence—Admissibility of the Victim's Past Sexual Behavior Under Washington's Rape Evidence Law—Wash. Rev. Code § 9.79.150* (1976). 52 WASH. L. REV. 1011 (1977). In 1975 the Washington Court of Appeals held that specific acts of sexual misconduct were inadmissible as to consent. State v. Greer, 13 Wn. App. 71, 73, 533 P.2d 389, 391 (1975). On its face, the new statutory procedure could let in more sexual history evidence than is possible under existing case law. In fact, in the four years since the enactment of the shield law, there have been only two or three instances in which defense counsel has even requested a pretrial hearing. They seem to recognize that such evidence is inapposite and, in any event, the Washington courts are unlikely to admit in light of the *Greer* decision. Canova Interview, *supra* note 18.

96. Note, *The Rape Corroboration Requirement: Repeal not Reform*, *supra* note 10, and BABCOCK, *supra* note 10, at 853–55.

97. Fears of false accusations expressed by courts and commentators typically rest on Wigmore's authority. Relying on "modern psychiatry" (five case studies from a 1915 textbook), he stated the following about "women coming before the courts":

Their psychic complexes are multifavious, distorted partly by inherent defects, partly by disease derangements or abnormal instincts, partly by bad social environment, partly by temporary

dling the line between substantive law and evidence, was believed to impair prosecution and deter victims' reporting.[99] Washington courts, however, have not required corroborated testimony[100] and the new statute codifies existing case law for both forcible and statutory rape.[101] Reform statutes elsewhere have largely abrogated the requirement,[102] recognizing that ordinary safeguards of the adversarial process suffice to protect against false witness.[103]

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physiological or emotional conditions. One form taken by these complexes, is that of contriving false charges of sexual offenses by men. . . .

. . . Judging merely from the reports of cases in the appellate courts, one must infer that many innocent men have gone to prison because of tales whose falsity could not be exposed.

3A J. WIGMORE, EVIDENCE § 924(a), at 736 (Chadbourn rev. 1970). Nonetheless, Wigmore opposed a corroboration rule in rape because it was inadequate to determine credibility, and a court can always set aside a conviction for insufficient evidence. 7 J. WIGMORE, EVIDENCE § 2061, at 464 (Chadbourn rev. 1978). He proposed instead that "[n]o judge should ever let a sex offense charge go to the jury unless the female complainant's social history and mental makeup have been examined and testified to by a qualified physician." 3A J. WIGMORE, EVIDENCE § 924(a), at 737 (Chadbourn rev. 1970)(footnotes omitted). Nevertheless, Wigmore's quaint ideas on women's psychology have been relied upon to support the corroboration rule.

98. Under early common law, rape was not treated differently from other crimes with respect to corroboration: the testimony of a rape victim, like that of an assault victim, needed no formal corroboration. 7 J. WIGMORE, EVDENCE § 2061, at 451 (Chadbourn rev. 1978). There were, however, alternative testimonial safeguards. One was the cautionary jury instruction derived from Lord Hale's oft-quoted remark that rape "is an accusation easily to be made and hard to be proved, and harder to be defended by the party accused, tho never so innocent." 1 M. HALE, THE HISTORY OF THE PLEASE OF THE CROWN 635 (London 1800)(n.p. 1680). This instruction was struck down in California in People v. Rincon-Pineda, 14 Cal. 3d 864, 538 P.2d 247, 123 Cal. Rptr. 119 (1975). Another common law safeguard was the requirement of prompt reporting by the victim, sometimes also considered as an indicator of credibility. *See* Greenfield, *The Prompt Complaint: A Developing Rule of Evidence*, 9 CRIM. L. Q. 286 (1967).

99. Partly as a result of the corroboration requirement, there were only 18 rape convictions out of thousands of complaints in New York City in a "recent typical" year. N.Y. PENAL LAW note § 130.16 (McKinney 1975). This, in turn, was further said to discourage reporting. *See*, Lear, *Q. If you Rape a Woman and Steal Her T.V., What Can They Get You For in New York? A. Stealing her T.V.*, N. Y. Times, Jan. 30, 1972, § 6 (Magazine), at 55 (quoting Governor's Approval Memoradum No. 16, May 22, 1972).

100. Since the turn of the century the uncorroborated testimony of the complaining witness has been sufficient for rape conviction. State v. Roller, 30 Wash. 692, 695, 71 P. 718, 719 (1903).

101. The new statute states: "In order to convict a person of any crime defined in this chapter it shall not be necessary that the testimony of the alleged victim be corroborated." WASH. REV. CODE § 9A.44.020(1)(1979).

102. *E.g.*, MICH. COMP. LAWS § 750.520h (Supp. 1977–78). *But see* MODEL PENAL CODE § 213.6(5), requiring corroborated testimony for rape conviction and a cautionary charge to the jury to evaluate the victim's testimony "in view of the emotional involvement of the witness and the difficulty of determining the truth with respect to alleged sexual activities carried out in private." Curiously, the drafters did not elucidate why they included these requirements. MODEL PENAL CODE § 207.4, Comment (22)(Tent. Draft No. 4, 1955). The Code's focus on actor's conduct in the definition of the crime is inconsistent with its focus on victim's conduct with respect to evidentiary rules.

103. The presumption of innocence, the government's burden of proof, the standard of proof beyond a reasonable doubt, and the right to confront and cross-examine witnesses have been considered sufficient safeguards against testimonial falsehood in all other crimes (except perjury). A corroboration requirement is perhaps understandable if rape is a one degree offense as in common law-

The absence of a legal requirement does not mean that corroboration as a factual matter at trial is of less significance.[104] A study of rape prosecutions in Texas found medical corroboration to be the most determinative factor in securing indictments, despite the abrogation of the corroboration requirement.[105] The author concluded that prosecutorial reliance on corroboration was "misguided" since their decisions were made on a basis "only partly acceptable in light of legislative policy."[106] This statement fails to distinguish between the formal requirement of corroboration (to sustain a conviction) and its practical necessity at trial (as evidence of victim's credibility).[107] With the requirement, a trial court must sustain a motion to dismiss at the end of the state's case unless corroborative evidence has been adduced. An appellate court can overturn a conviction rendered in an uncorroborated case. Prosecutors will not file charges if they anticipate the case cannot get to the jury because of a lack of corroboration. Without the requirement, a jury would probably still not convict unless there is corroboration, but at least the prosecution would not be dismissed outright. As with the concept of nonconsent, corroboration need not be elevated to a legal standard because of its potency in point of fact at trial.

4. Social Reform of Rape Legislation

Rape laws mirror values regarding the social position of women and the nature of the crime. In the view of radical feminists, rape is "an offense one male commits upon another—a matter of 'abusing his woman,' "[108] and rape laws are designed accordingly to safeguard male

based statutes. The severe penalties associated with rape impelled courts to guard against wrongful convictions. With gradations of the crime, however, the requirement is less compelling since the fact-finder can convict of a less included offense which carries a lower penalty.

104. After the abrogation of the California corroboration requirement, a Los Angeles deputy prosecutor stated: "Legal theory is not legal reality . . . and in California, just like anywhere else in the country, a woman who hopes to win a rape case better have plenty of corroboration." Chappel & Singer, *Rape in New York City: A Study of Material in the Police Files and its Meaning*, Chappell, *supra* note 10, at 266.

105. Weninger, *supra* note 11, at 390.

106. *Id.* at 391–92.

107. Prosecutors in most small counties require rape victims to undergo polygraph examinations at least "sometimes" before deciding whether to file charges against the alleged perpetrator. BATTELLE-LEAA PROSECUTOR SURVEY, *supra* note 4, at 65 (Table 39). Because polygraph results are not usually admissible at trial without stipulation by both parties, the purpose of the test is not principally to obtain corroboration, but rather assess the victim's cooperativeness and determination to prosecute. Interview with Jay Reich, Chief of the Juvenile Division, King County Prosecuting Attorney (June 19, 1979)[hereinafter cited as Reich Interview].

108. K. MILLETT, SEXUAL POLITICS 44 (1970).

property rights in women.[109] One need not subscribe to some of their polemical excesses [110] to agree that common law statutes on rape embodied and reinforced Victorian morals of the times. The social status of women was defined in terms of premarital virginity and marital fidelity. Chastity was a legally protected property value because it helped channel sexuality into marriage.[111] By protecting chastity, the law buttressed the institution of monogamy; by criminalizing rape, the law deterred threats to family and social organization.

In this value system, moralistic and absolute, the law recognized only one gradation of rape. A woman was either defiled or not; violations of chastity did not come in degrees. Harsh penalty was prescribed for "despoiling" a chaste woman because rape diminished her marketability and threatened the institutions of marriage and family. A woman was expected therefore to protect her social status by utmost resistance.

Reform legislation reflects the judgment that individual self-determination in sexual choice is a protected interest in and of itself. A corollary policy is protection of bodily security. When sexual intercourse is accompanied by extrinsic violence, reform statutes in effect presume nonconsent. The dangerousness of the actor's conduct requires a "strict liability" approach. By discarding assumptions of chastity, the law can recognize degrees of culpability (and of victim nonconsent) and abrogate the special evidentiary rules premised thereupon.

The reform of rape laws, then, reflects a shift in both social policy and legal methodology—from a policy of protecting a tangible, property interest to one of safeguarding an intangible, personal right; from an absolute approach based on fixed legal categories (one crime, one penalty) to a relativistic one that calibrates culpability and social harm along a continuum.

B. Statutory Rape

Criminal proscription of sexual intercourse with underage persons who are conclusively presumed incapable of consent does not seem to stir as much public clamor or official diligence as does nonconsensual intercourse. Most doctrinal and empirical analyses of rape laws exclude statutory rape from the scope of their coverage.[112] One reason is that the cir-

109. S. BROWNSMILLER, AGAINST OUR WILL 377, 379 (1975). *See* CALIF. Comment, *supra* note 10, at 924–25.

110. Brownsmiller, for example, states: "[Rape] is nothing more or less than a conscious process of intimidation by which *all* men keep *all* women in a state of fear." S. BROWNSMILLER, *supra* note 109, at 15.

111. YALE Comment, *supra* note 31, at 70.

112. *See, e.g.*, Berger, *supra* note 7, at 3 n.8; CALIF. Comment *supra* note 10, at 919; CHICAGO

cumstances of statutory and forcible rape are dissimilar. The former offense typically involves a continuing relationship, without physical force, between a willing underage girl and an older male acquaintance or relative.[113] Neither the public[114] nor the criminal justice system[115] tends to regard this conduct as "rape."

Washington's common law statute on carnal knowledge,[116] like similar statutes elsewhere,[117] set a single age of nonconsent (under 18 years) and provided penalties inversely proportional to the victim's age. The new statutory rape law[118] lowers the ceiling to under 16 years and defines three gradations of the offense based upon the age differential between the parties.[119] The penalties for the degrees of statutory rape are equivalent to the

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Comment, *supra* note 10, at 613 n.1; VA. Note, *supra* note 3, at 1500 n.1; CLEVELAND STATE Note, *supra* note 31; Libai, *The Protection of the Child Victim of a Sexual Offense in the Criminal Justice System*, 15 WAYNE L. REV. 979 (1969). There has been no systematic, empirical study of statutory rape prosecution.

113. Studies based on court records estimate that this particular fact pattern accounts for 40 to 95 percent of child victims. Schultz, *The Child as a Sex Victim: Socio-Legal Perspectives*, RAPE VICTIMOLOGY 257, 259 (L. Schultz ed. 1975). Many of the participant victims are products of broken homes or have a background of family conflict. T. GIVVENS & J. PRINCE, CHILD VICTIMS OF SEX OFFENSES 7 (1963).

114. YALE Comment, *supra* note 31, at 75 n.134.

115. In a recent nationwide survey, sex offenses against women aged 12 to 17 years were found most likely to be declined for prosecution or dismissed by the court. *Prosecutors Find Victim's Role Makes or Breaks Case*, 8 LEAA Newsletter No. 5, at 6 (May 1979).

116. 1973 Wash. Laws (1st Ex. Sess.) ch. 154, § 123 (repealed 1975) provided:

> Every male person who shall carnally know and abuse any female child under the age of eighteen years, not his wife, and every female person who shall carnally know and abuse any male child under the age of eighteen years, not her husband, shall be punished as follows:
>
> (1) When such an act is committed upon a child under the age of ten years, by imprisonment in the state penitentiary for life;
>
> (2) When such an act is committed upon a child of ten years and under fifteen years of age, by imprisonment in the state penitentiary for not more than twenty years;
>
> (3) When such act is committed upon a child of fifteen years of age and under eighteen years of age, by imprisonment in the state penitentiary for not more than fifteen years.

117. MODEL PENAL CODE § 207.4, Comments at 250–51 (Tent. Draft No. 4, 1955).

118. In the process of legislative reform, statutory rape got relatively little attention from the main women's lobby. In fact, their proposed reform statute initially dealt exclusively with forcible rape. At the instigation of legislators, a new statutory rape law was eventually drafted. Griswold Interview, *supra* note 84; Francis Interview, *supra* note 50.

119. WASH. REV. CODE § 9A.44.070(1)(1979):

A person over thirteen years of age is guilty of statutory rape in the first degree when the person engages in sexual intercourse with another person who is less than eleven years old.

WASH. REV. CODE § 9A.44.080(1)(1979):

A person over sixteen years of age is guilty of statutory rape in the second degree when such person engages in sexual intercourse with another person, not married to the perpetrator, who is eleven years of age or older but less than fourteen years old.

WASH. REV. CODE § 9A.44.090(1)(1979):

A person over eighteen years of age is guilty of statutory rape in the third degree when such person engages in sexual intercourse with another person, not married to the perpetrator, who is fourteen years of age or older but less than sixteen years old.

respective penalties for forcible rape. The Model Penal Code[120] and the new Michigan law[121] differ from Washington's law both in the labelling of the offense and in the number of steps in the grading system.

The lowering of the age of nonconsent is significant. It symbolizes the modern policy of safeguarding self-determination in sexual choice, subject to the individual's capacity to comprehend that choice. The drawing of actual age lines itself is somewhat arbitrary, a product of legislative compromise. Practically, the result is to increase the pool of cases in which the prosecution must now prove the fact of nonconsent in order to secure a conviction. The impact of this statutory age change on the rate of overall convictions and decline of prosecutions in forcible rape cases will be assessed in this study.

The purpose common to all legislative formulations making consent legally inoperative is to protect the immature from sexual exploitation.[122] Immaturity is identified objectively and in advance by age. The new Washington statute[123] recognizes three distinct age groups; pre-puberty (under 11 years), early adolescence (11–13 years), and middle adolescence (14–15 years). Retribution is harshest when a pre-pubescent child is used as a sexual object because such acts manifest in the adult male actor a "mental aberration, called pedophilia."[124] At puberty the child arrives at physical capacity to engage in intercourse. However, the act is proscribed because an early or middle adolescent may not comprehend the meaning of sexuality and, therefore, is likely to be exploited. In addition, the conduct is regarded as a "contravention of the moral standards of the community."[125]

Age of victim is treated in tandem with age of actor. Unlike reform statutes on forcible rape, such as Michigan's that focus only on the actor, the law of statutory rape recognizes that both parties must be taken into account in defining the crime. As a result of the strict liability approach, the object of focus is age rather than conduct. The new Washington law criminalizes sexual intercourse only when the age differential exceeds

120. The Model Penal Code labels the offense "corruption of minors and seduction," a third degree felony, and sets a single age of consent (tentatively, under 16 years). The label and grading indicate that the drafters do not consider this offense as serious as a "rape" offense. MODEL PENAL CODE § 213.3 (1962).

121. In the Michigan scheme, age is one of the aggravating circumstances that define a first, second, or third degree offense. The critical age is drawn at below 13 years, and exploitation is conclusive if the victim is between 13 and 15 years of age. MICH. COMP. LAWS §§ 750.520(b)(1)(a)-(b); 750.520(c)(1)(a)-(b); 750.520(d)(1)(a)-(b) (Supp. 1977–78).

122. MODEL PENAL CODE § 207.4, Comments at 251 (Tent. Draft No. 4, 1955).

123. WASH. REV. CODE §§ 9.79.200(1); 9.70.219(1); 9.79.220(1)(1977).

124. MODEL PENAL CODE § 207.4, Comments at 252 (Tent. Draft No. 4, 1955).

125. *Id.*

two to four years.[126] Sexual experimentation between members of roughly the same age cohort is not considered an exploitative relationship.

Implicit in the victimization protection policy is the assumption of long-lasting psychological harm to children, especially in the first two age categories. Clinical interviews of children[127] and retrospective studies of adults (victimized at childhood)[128] indicate that in the absence of physical violence, this concern is exaggerated. In fact, "it is not the sexual act per se that creates trauma, but the parents' behavior toward the child victim on discovery of the offense, and how this parental behavior affects the child."[129] Parental punishment and expressions of revulsion by adults and peers are greater causes of stress.[130] It forces the child to adjust her perception of the act as play or affection-seeking behavior to the adult view as criminal activity. Proscribing the conduct, then, serves not only to protect the child but to prevent the affront to parental and community feelings.

Also more potent than the act itself as a source of ill effects is the process of prosecution.[131] The victim is subjected to questioning by police

126. WASH. REV. CODE § 9.79.220(1)(1977).

127. Schultz, *supra* note 113, at 260.

128. *See, e.g.*, Landis, *Experiences of 500 Children with Adult Sexual Deviation*, 30 PSYCHIATRIC Q. 91–99 (Supp. 1956). In a college sample, 35% of the women and 30% of the men reported being sexually victimized during childhood by adults. Of the women, 4% reported that they suffered long-term damage from the experience. Another study of college women found 5% were seriously harmed by pre-puberty sexual exploitation. Gagnon, *Female Child Victims of Sex Offenses*, 13 SOC. PROB. 176, 189 (1965).

129. Schultz, *supra* note 113, at 264. One study found that child victims involved in criminal proceedings suffered more behavioral disturbances and recovered less quickly than a random group of child victims. GIBBENS & PRINCE, *supra* note 113, at 13–14.

The conclusions of these studies need to be accepted with caution for several reasons. First, there are inherent biases in self-selected samples. Second, reported cases are likely to be different from the larger pool of unreported cases. Third, the measure of psychological harm is not the same in every study. Some studies use the criterion of responsiveness to treatment; others consider the victim's adjustment to society many years later as an adult. *See* Bender, *Offended and Offender Children*, SEXUAL BEHAVIOR AND THE LAW 687–89 (R. Slovenko ed. 1965). However defined, the harm may be the product of a combination of sources. The sexual incident, for example, could aggravate a pre-existing emotional disturbance in the child, so that the particular source of the trauma is difficult to trace. Gagnon, *supra* note 128, at 188. Despite these methodological limitations, there is a general consensus among psychiatrists that the psychological damage is due at least as much (if not more) to societal reactions after discovery of the offense, as to the offense itself. *See* M. GUTTMACHER, SEX OFFENSES: THE PROBLEM, CAUSES, AND PREVENTION 118–119 (1951).

130. GIBBENS & PRINCE, *supra* note 113, at 5–6. Studies also indicate that sexual conduct disclosed by the children to parents result in more trauma than those not reported to anyone. This led one social worker to suggest that "[N]on-reporting of the offense may be the best choice in terms of the child's welfare." Schultz, *supra* note 113, at 263.

131. "Legal proceedings are not geared to protect the victim's emotions and may be exceptionally traumatic." GUTTMACHER, *supra* note 129, at 118. *See also* DE FRANCIS, PROTECTING THE CHILD VICTIM OF SEX CRIMES 12–13 (1965).

and prosecutors usually untrained in interviewing child witnesses.[132] If the case goes to trial, the child is treated as an adult prosecutrix in the adversarial process. Current statutory schemes contain no provisions for "shielding" child victims from such impact. In actuality, however, most children are already shielded by the fact that statutory rape cases seldom go to trial unless there is physical violence.

The important and unexamined issues in statutory rape thus pertain more to implementation rather than formulation of the law. Here, more than in forcible rape, prosecutorial discretion is the central issue. The broad legislative proscriptions based on age require sensitive judgment, tuned to prevailing community values and realities, in order to translate them into pragmatically satisfactory policy. The present study attempts to determine the factors, in addition to age, relied upon in prosecution of statutory rape, and compares them with the discretionary factors in prosecution of forcible rape. The results can elucidate the role of consent in the administration of rape law.

II. PROCESS AND CONTEXT OF REFORM

The proponents of rape law reform were drawn from three movements that gained national prominence in the mid-sixties to mid-seventies: the movement to codify state criminal laws, the women's rights movement, and the crime control movement. The three movements had distinct but overlapping interests. Together, they forged a powerful, non-traditional alliance that pushed reform bills through state legislatures with uncommon swiftness and political acumen. To understand the reasons behind some of the provisions of the new statutes and to assess the impact of these rapidly instituted changes, it is useful to examine the process and social-political context of legislative reform. There are some consistent patterns of reform from state to state, and the particular circumstances of the Washington experience will be used to highlight them.

A. Codification of State Criminal Law

The Model Penal Code official draft published in 1962 served as a catalyst in most states for the consolidation of criminal statutes into one integrated whole. The Code was a massive effort to bring a sense of order to the antiquated, prolix body of criminal legislation by establishing general principles of liability, a systematic structure for offenses, and penalties

132. In some jurisdictions, social workers conduct questioning of child victims on behalf of the police or prosecutors, but this is the exception. DE FRANCIS, *supra* note 131, at 11.

proportional to the crimes.[133] By the late 1960's, over 30 jurisdictions had started or completed revisions modeled after the Code.[134]

The reform of rape laws in some instances began as a part of the larger overhaul of the entire state criminal code. In 1967, the Washington State legislature resolved to revise the criminal code and delegated the undertaking to the Washington Legislative Council's Judiciary Committee.[135] The project consultant and reporter were left largely free to express their own "libertarian principles" while also relying on the Model Penal Code and reform legislation of other states.[136] The final product, known as the Orange Code after the color of its cover, was published in December 1970.[137] The chapter on sex offenses used the "approach" of the Model Penal Code in devising a grading scheme for culpable conduct, but the "definition and organization of offenses"[138] were modeled after Michigan and New York statutes in setting forth three degrees each of rape[139] and of sexual contact.[140] In addition, like the Model Penal Code[141] and unlike Michigan's law,[142] it required corroboration, which would have reversed existing Washington case law, and did not include a shield law for victims. By adopting wholesale the legislation from other jurisdictions without tailoring it to the local context, and by neglecting to involve interest groups and legislators in the political and educative aspects of the drafting process, the two drafters practically ensured that the published proposal would be met with nearly unanimous rejection. Prosecutors objected to the mens rea approach of the entire proposed code,[143] and

133. *See generally* Wechsler, *The Challenge of a Model Penal Code*, 65 HARV. L. REV. 1097 (1952).

134. Baldwin, *Criminal Law Revision in Delaware and Hawaii*, 4 J. L. REF. 476, 481 (1971). For an analysis on the process of revising criminal codes in other states, *see, e.g.*, Fox, *supra* note 12.

135. S. Res. 1967 Ex-38. Senate Journal, State of Wash. 1639 (1967).

136. The consultant was Professor John Junker of the University of Washington Law School, and the reporter was a former student of his, Richard Holmquist. Interviews with Professor Junker by James Nelson, January 20, 1979 [hereinafter cited as Junker Interview].

137. REVISED WASHINGTON CRIMINAL CODE (December 3, 1970) published by the Judiciary Committee of the Washington Legislative Council [hereinafter cited as Orange Code]. Strictly speaking, it was not a "proposed code" at the time of publication because it had not been approved by the Judiciary Committee of the Washington Legislative Council. It was published by the Committee "for the sole purpose of inviting comments from members of the public." *Id.* at ii.

138. *Id.* at 173.

139. *Id.* §§ 9A.44.040–060.

140. *Id.* §§ 9A.55.070–090.

141. MODEL PENAL CODE § 213.6(6)(1962).

142. MICH. COMP. LAWS § 750.520h (Supp. 1977–78).

143. *See* Washington Criminal Code (1973), Prosecuting Attorney's Draft, Washington State Prosecuting Attorneys' Association. A major innovation of the Model Penal Code was the definition of four levels of criminal intention, and the allocation of a specific mens rea requirement to each crime (and sometimes to different elements within a crime). Prosecutors felt this scheme was unnecessarily complex.

women's groups were incensed at the evidentiary provisions of the rape section. The state bar association assembled a blue-ribbon committee, representing a balance of prosecution and defense interests, to mediate the conflicting viewpoints.[144] All three groups proceeded to draft counter-proposals to the Orange Code. In the end, it was the proposal of a women's group—a broadly-based, well-organized, single-issue lobby that focused on only one segment of the criminal law rather than the reform of an entire code—that prevailed. The legislature enacted it fully one year before passage of the remainder of the new criminal code.

B. Women's Rights Movement

The main force behind the awakening of public consciousness to rape and the reform of rape laws was the feminist movement. It re-emerged as an influence in American politics in the latter half of 1960.[145] Incident to its drive for social and economic equality, feminists sought equal enforcement of anti-prostitution laws. They insisted that soliciting men, not just prostitutes, be subject to prosecution. This issue, however, turned out to be ideologically divisive and failed to rally a broad cross-section of women.[146] Feminists had to search for a different cause in the area of criminal justice. They found it in rape law reform.

In consciousness-raising group sessions across the country, women began to discover in rape a common concern that cut across class and race.[147] They saw rape not only as isolated instances of criminal conduct, but as a societal problem rooted in sex role stereotypes and cultural perspectives discriminatory to women. The immediate objective was to aid

144. *See* Report of the Task Force to the Washington State Bar: Washington Proposed Criminal Code (1974), Washington State Bar Association, Criminal Code Task Force. The task force consisted of two prosecutors, two defense attorneys, and two attorneys in private, civil practice.

145. After the ratification of the nineteenth amendment guaranteeing universal suffrage, the women's rights movement declined as a significant political force. "Social feminists," such as the League of Women Voters, felt their goal of equality was achieved. "Hardcore feminists," who believed that suffrage was only a first step towards equality, represented the minority viewpoint. W. O'NEILL, EVERYONE WAS BRAVE: THE RISE AND FALL OF FEMINISM IN AMERICA 5 (1969). In 1966, the National Organization of Women was established. Its early leadership was drawn from participants of the 1963 President's Conference on the Status of Women and from civil rights activists. *See generally* J. FREEMAN, THE POLITICS OF WOMEN'S LIBERATION (1975).

146. On the one hand, feminists condemned prostitution. They saw it as degrading to women, and they criticized the harassment of prostitutes by the criminalization of the activity. On the other hand, they also opposed the legalization of prostitution because the required medical examinations and licensing procedures would formalize the degradation. The prostitutes themselves did not welcome the attention of the feminists. *See generally* K. MILLETT, THE PROSTITUTION PAPERS: A CANDID DIALOGUE (1971). "The women's rights movement today is ambivalent about prostitution." BABCOCK, *supra* note 10, at 897.

147. *See generally* Largen, *History of the Women's Movement in Changing Attitudes, Law, and Treatment toward Rape Victims*, SEXUAL ASSAULT 69–70 (M. Walker & S. Brodsky eds. 1976).

rape victims. The ostensibly unsympathetic and sometimes harsh treatment of women victims by police, prosecutors, and hospital personnel led to the establishment of rape crisis centers. By the early 1970's, such centers were in operation in almost every major urban area, providing counseling and adversary services. During this period, rape task forces were created at local and state levels; rape research and prevention received federal attention;[148] and network television programs[149] and feminist publications[150] on rape nurtured public awareness of the problem.

In the wake of congressional passage of the Equal Rights Amendment in 1972 and the adoption of equivalent "little ERAs" in several states, groups began to concentrate on legislative reform in addition to social service. Existing rape laws were perceived to reflect male-oriented interests and to be unresponsive to women's concerns for physical integrity and sexual self-determination. The supposedly inadequate deterrent affect of these laws—indicated by low rates of reporting, arrest, prosecution, and conviction—further galvanized these groups into action. In 1974, women sucessfully lobbied through the Michigan legislature the nation's first comprehensive rape reform statute. One year later, Washington women followed suit.

The Seattle Women's Commission (SWC), appointed by the mayor to advise on women's issues, was the most instrumental group in law reform in Washington.[151] It held in early 1973 a number of public forums on forcible rape. The discussions, ranging from the needs of local rape victims to the "alarmingly low" conviction rate, lacked a central focus.[152] Then the SWC discovered the rape law that had been proposed in the Orange Code some two years earlier. The SWC members considered the corroboration requirement an affront to women and felt the absence of a shield rule made the proposed statute fatally defective. This marked the turning point of the SWC; law reform became its dominant concern. After one year of drafting[153] and intensive lobbying, its proposal prevailed over three others and was enacted into law.

148. A National Center for Prevention and Control of Rape was created within the National Institute of Mental Health. 42 U.S.C. § 2689q (Supp. V, 1975).

149. *E.g.*, ABC-TV's program "Cry Rape" aired in 1971.

150. *E.g.*, N. GAGER & C. SCHURR, SEXUAL ASSAULT: CONFRONTING RAPE IN AMERICA (1976); D. RUSSELL, THE POLITICS OF RAPE: THE VICTIM'S PERSPECTIVE (1976); Griffin, *supra* note 15.

151. The SWC did most of the drafting but other women's groups were also prominent in the lobbying process. They included the Washington State Women's Council and representatives from rape crisis centers.

152. This section is based on the Griswold Interview, *supra* note 84.

153. The drafting committee consisted of an activist (J. Griswold, chair), a prosecutor (P. Aiken), and an assistant state attorney General who had helped draft the state's ERA (G. Berry)

C. Crime Control

The third major impetus for rape law reform was the national preoccupation with "law and order." From the mid-sixties to the mid-seventies, crime and crime control were salient political issues. During this period, there were more Presidential commissions[154] studying and making recommendations about the rising incidence of crime in the streets[155] than in all the preceding years of the Republic. The reports of these commissions alluded to the upsurge in reported forcible rape, but none suggested changes in the rape laws.

Proponents of rape reform hitched their wagon to the crime control movement. Police and prosecutors who supported the reform did not necessarily subscribe to feminist values. They saw it as a means to improve their enforcement effectiveness. In Washington, the women's lobby marketed its proposal to the conservative bloc in the legislature as a law and order bill. It was enacted in part by riding on the coat tails of new death penalty legislation.

Reform advocates have portrayed almost unanimously a doomsday scenario of the incidence and prosecution of forcible rape. The women's lobby in Michigan darkly warned: "The problem of rape is rapidly approaching epidemic proportions. . . . [I]mmediate legal reform [is needed] to prevent the rape epidemic before it happens. . . . Without prompt action on this crisis, hundreds of people will be assaulted while assaulters continue to go virtually free from any threat of conviction."[157] A "legislative fact sheet" circulated by the women's lobby to Washing-

154. THE PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, THE CHALLENGE OF CRIME IN A FREE SOCIETY (1967) [hereinafter cited as PRESIDENT'S CRIME COMM'N]; REPORT OF THE NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS (1968)(better known as the KERNER REPORT, after its chairman, Otto Kerner); NATIONAL COMMISSION ON THE CAUSES AND PREVENTION OF VIOLENCE, TO ESTABLISH JUSTICE, TO INSURE DOMESTIC TRANQUILITY (1969) [hereinafter cited as NAT'L VIOLENCE COMM'N] NATIONAL AVISORY COMMISSION ON CRIMINAL JUSTICE STANDARDS AND GOALS, A NATIONAL STRATEGY TO REDUCE CRIME (1973) [hereinafter cited as CRIMINAL JUSTICE COMM'N].

155. NAT'L VIOLENCE COMM'N, *supra* note 154, at 18.

156 According to Ms. Griswold, "the biggest support [the women's lobby] got was from Ted Bundy." Bundy was suspected of murdering several young women in the Seattle area in 1974, charged with murdering a young woman in Colorado in 1978, and eventually convicted of first degree murder of three college women in Florida in 1979. Larsen, *Judge Sentences Bundy to Die,* Seattle Times, July 31, 1979, at 1, Col. 1. At the time of the hearings on the SWC's rape bill, the legislature was debating a new death penalty statute, spurred partly by the alleged Bundy killings. "I sat up in the gallery. There were parents all around, you know, of the women who presumably had been murdered by Bundy. All of the legislators were really scared of these parents coming at them. I sat listening to the death penalty debate and I thought, 'It's all those ghosts of the murdered women who are going to pass our rape bill.' You could just feel the law and order atmosphere of that legislature." Griswold Interview, *supra* note 84.

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

ton legislators in 1975 stated that "rape is the most rapidly increasing crime of violence in the United States today;" that "rapes have increased more than 400% in Seattle in the last decade;" and that "the conviction rate for rape is lower than for any other violent crime."[158] Legal commentators[159] too have sounded the alarm.[160]

The public's fear of the rise in reported violent crime needs to be recognized and respected. The economic and social costs of that fear are real. As the President's Crime Commission warned, however, it is necessary to avoid inducing "distorted perceptions of the risk of crime and exaggerated fears of victimization."[161] Dramatic statistics on rape which are not seen in context can "needlessly increase [people's] fears"[162] and color their judgments as to the appropriate crime control repsonse.

The distinction between better reporting and more crime is often glossed over in rape literature. It is generally agreed that rape is the most underreported of violent crimes.[163] The President's Crime Commission estimate that forcible rape occurs at 3-½ times the reported rate is a com-

158. Seattle N.O.W., Revising the Laws on Rape: A Legislative Fact Sheet on SB 2196 and HB 208 as Proposed by the Seattle Women's Commission and the Washington State Prosecutors' Association, Feb. 1975.

159. BATTELLE-LEAA PROSECUTORS' VOL. III, *supra* note 4, at 3, estimated one out of every 500 women in the country was raped in 1975. VA. Note, *supra* note 3, at 1500 and n.3 described "the dramatic increase in the incidence of the crime," indexed by the 62% rise in reported rapes between 1968–72. CLEVELAND STATE Note, *supra* note 10, at 463, stated the "incidence of rape [is] reaching dramatic proportions" and that "less than 14% of the reported rapes are successfully prosecuted."

160. This section of the text will discuss only the incidence of rape. The statistics on rape convictions are discussed in section III.D.1 of the text, *infra*.

161. THE PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, CRIME AND ITS IMPACT—AN ASSESSMENT 89 (1967).

162. *Id.*

163. FBI, UNIFORM CRIME REPORTS: CRIME IN THE UNITED STATES, 1977 14 [hereinafter cited as UCR]; PRESIDENT'S CRIME COMM'N. *supra* note 154, at 21. Reporting is critical to crime detection; some 87% of all crimes become known to police only after victims report them. Hawkins, *Who Called the Cops?: Decisions to Report Criminal Victimization*, 7 L. & SOC'Y REV. 427, 441 (1973).

Reasons for non-reporting are unclear. UCR speculates that underreporting of rape is "due primarily to the victims' fear of their assailants and their sense of embarrassment over the incident." UCR 1977 at 14. But interviews with 27 rape victims suggest that fear of treatment by police and prosecutors ranks at the top. Less frequently given reasons include fear of trial and desire to conceal the incident from family and friends. BATTELLE-LEAA FINAL REPORT, *supra* note 4, at 15.

The data are also inconsistent with respect to racial differences in underreporting. In a probability sample survey of 10,000 households in each of 13 cities conducted by LEAA and the U.S. Census Bureau on behalf of the Criminal Justice Commission, 84% of black victims reported the rape to police compared to only 65% of white victims. The most frequent reason for non-reporting among blacks was "fear of reprisal," whereas among whites it was that rape is a "private matter." Hindelang & Davis, *Forcible Rape in the United States: A Statistical Profile* in Chappell, *supra* note 10, at 98–99. *But see* FIELD SURVEYS II: CRIMINAL VICTIMIZATION IN THE UNITED STATES: A REPORT OF A NATIONAL SURVEY SUBMITTED TO THE PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND THE ADMINISTRATION OF JUSTICE 47 (1967). This survey by the National Opinion Research Center found that income levels, not racial differences account for variances in rates of or in reasons for non-reporting of crime to police.

monly cited statistic.[164] Assuming the reliability of this figure, it does not follow, as is often implied,[165] that the increase in reported rapes means an increase in the true rate. One commentator, for example, cited the FBI's Uniform Crime Reports (UCR) statistics showing a rise of 49% in reported rapes between 1964 and 1974. Because of "gross underreporting," the reported number was multiplied by a factor of ten to reach a "considerably more alarming figure" of actual rapes.[166] But the same logic can lead to the opposite conclusion. If forcible rape is so underreported, then the reported increases could be the result of digging deeper into the well of unreported crime. In view of the public spotlight on rape and the more supportive climate towards victims, it is possible that more women are now coming forth to report the crime than before.[167] According to the National Violence Commission, "While the reported incidence of forcible rape has increased, reporting difficulties associated with this crime are too great to permit any firm conclusion on the true rate of increase."[168]

164. PRESIDENT'S CRIME COMM'N, *supra* note 154, at 21. Estimates of underreporting are made by comparing UCR rates of reported crime with estimated rates of actual crime based on victimization surveys. The President's Crime Commission surveyed a national probability sample of 10,000 households. Interviewers asked if any members of the household had been raped. The survey estimated the occurrence of forcible rape in 1965 at 42.5 per 100,000 population. The UCR rate for that year was 11.6. FIELD SURVEYS II: CRIMINAL VICTIMIZATION IN THE UNITED STATES, *supra* note 163, at 8. In general, victimization surveys "give a more precise estimate of the volume of crime . . . than the UCR." CRIMINAL JUSTICE COMM'N, *supra* note 154, at 21. However, this is not necessarily true of rape. In the first place, the precision of the estimate depends upon the size of the survey sample. If a crime is a statistically rare event (and only homicide is less frequent than rape), an inordinately large sample is needed to detect reliably its volume. A sample of 10,000 households will not reliably measure the occurrence of rape. "In fact, few people realize that all data on rape in [Field Surveys II] are based on only fifteen rapes reported to interviewers in the national survey." Hindelang & Davis, *supra* note 163, at 89. In the secod place, the Field Surveys II estimate is likely to be inflated because no "unfounding procedure" was used by the interviewer. Unfounding is a police procedure to remove cases in which the legal elements of the crime are not met, the police do not believe the victim, or successful prosecution would be a borderline proposition for some other reason. *See* Section III.A.1 *infra*. While the Field Surveys II interviewer accepted all claims of rape, the UCR data excluded unfounded cases.

165. *See, e.g.*, BATTELLE-LEAA FINAL REPORT, *supra* note 4, at 15; CALIF. Comment *supra* note 10, at 941; CLEVELAND STATE Note, *supra* note 10, at 463.

166. Berger, *supra* note 7, at 5.

167. Such is the conclusion of a study of the impact of a reform in Norway in 1927. Five years after revising upwards the penalties for sex offenses, the reported rate increased by 68% compared to the same period before the change. The increase was attributed to more reporting as a result of the public discussion and agitation that accompanied the penal code revision. This inference was buttressed by data showing that the increased reports involved "borderline" cases such as illicit relations with 16 year old girls, that previously went unreported. Andenaes, *General Prevention—Illusion or Reality*, 43 J. CRIM. L.C.&P.S. 176, 191 (1952).

168. NAT'L VIOLENCE COMM'N, *supra* note 154, at 18. The reporting difficulties unique to rape are not present with other violent crimes and therefore do not preclude inferences regarding their true rates of occurrence. "The true forcible rape rate has not necessarily risen significantly over the various time spans considered. However, at least since 1958, there has probably been a significant rise in

More importantly, whatever the true rate is, the reported rate itself needs to be placed in perspective.[169] Most of the legal commentary on rape was published in the early and mid-1970's. It typically cites UCR[170] trends showing sharp increases in reported rapes (per 100,000 population) during a preceding block of five or ten years. In statements about rate increases attention must be given to the time span involved. Different time periods give dissimilar rates of change. Trends based on a brief period can give rise to divergent inferences unless presented in the context of other changes over longer periods. The so-called crime wave got underway, according to the Criminal Justice Commission, around the mid-1960's.[171] The UCR has been criticized for only publishing and illustrating trends during the decade of the '60's and '70's when crime increases have been most substantial.[172]

Figure 1 presents change rates of reported forcible rape and aggravated assault for 1949 to 1977 in four-year intervals.[173] The curves for both offenses rise steeply and closely together around 1965. At the peak in 1969, the increase in reported rape is substantially higher than the increase in reported assault. Thereafter, both curves drop sharply, and converge by the mid-1970's.[174] Except for the momentary extreme in 1965–73, the increase in the rate of reported rape is not consistently higher than the increase in the rate of reported assault.

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the true rates of criminal homicide, robbery and aggravated assault." D. MULVIHILL & M. TUMIN, 11 CRIMES OF VIOLENCE: A STAFF REPORT SUBMITTED TO THE NATIONAL COMMISSION ON THE CAUSES AND PREVENTION OF VIOLENCE 49 (1969).

169. Despite the increase in the incidence of reported rapes, and the more substantial increase in the rate of change of the incidence during 1965–73, it must be borne in mind that the overall volume of reported rapes remains relatively low. Even during the time when the increases were most dramatic, this offense accounted for less than 1% of the UCR Crime Index total and only 5% of violent crimes. UCR 1967 at 11. In prior and subsequent years, it has remained a statistically rare occurrence. UCR 1977 at 14. By comparison, the volume of aggravated assault is eightfold more than rape. *See* rates for 1977 in Figure 1 of text *infra*.

170. The reliability and validity of the UCR Index as a measure of criminality has been questioned. Aside from inadequacies in police data collection and reporting to the central registry, the UCR statistical procedures themselves are said to be deficient. For instance, UCR index rates reflect the simple count of crime per 100,000. Indices that weight the seriousness of each crime computed from the facts of each case, as is done in European criminal statistics, result in quite dissimilar trends. These methodological issues do not bear directly on the purposes of this article so long as the main concern here is with rates of change in reported rate, rather than with estimation of the volume of reported rape.

171. CRIMINAL JUSTICE COMM'N, *supra* note 154, at 13.

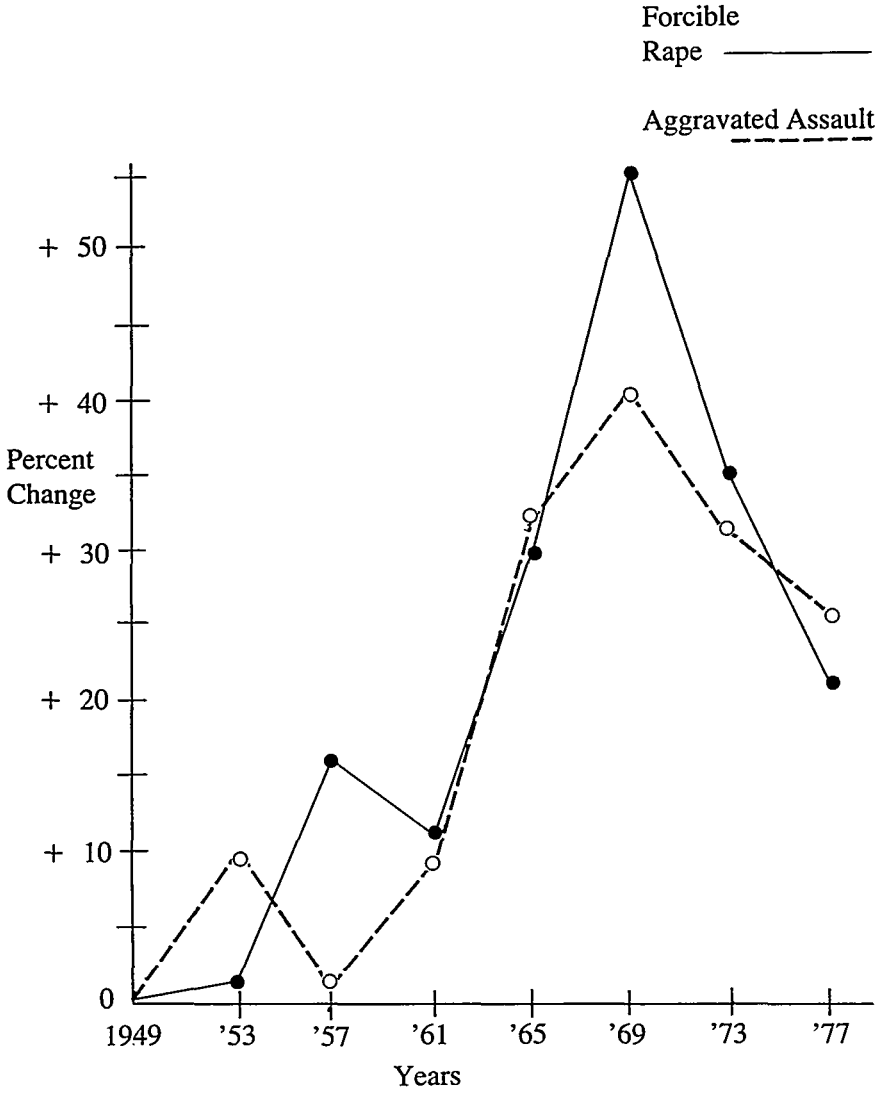
172. MULVIHILL & TUMIN, *supra* note 168, at 131 n.25.

173. The selection of 1949 as the starting point was somewhat arbitrary. The UCR was first published in 1933. From then until 1949, the incidence of reported forcible rape showed no major oscillations. *See* MULVIHILL & TUMIN, *supra* note 168, at 47 figure 2. Also, the statistics for the first two decades of the UCR, according to the FBI itself, are not as reliable as later ones. *Id.* at 131 n.25.

174. The same inverted-U pattern in change of reported rape for 1969 is found in Seattle. The number of reported rapes for 1961, '65, '69, '73 and '77 is, respectively, 60, 78, 248, 276, and 370.

Figure 1

Percent Change in Rate* of Reported Forcible Rape and Aggravated Assault on National Basis from 1949 to 1977.



*Rate per 100,000 popualtion, based on data from annual Uniform Crime Reports from 1949 to 1977. Percent change tabulated by the author. The rates for forcible rape for each of the eight years indicated above are, respectively: 7.2, 7.3, 8.4, 9.2, 11.9, 18.3, 24.3, and 29.1. The respective rates for aggravated assault are: 70.7, 77.9, 78.1, 84.4, 109.5, 152.5, 198.4, and 241.5.

The fall of the change rate from the high point in 1969 cannot be attributed to the introduction of reform rape legislation. The pioneering statute of Michigan was not implemented until 1974, after the change rate had declined. The reform is thus more apt to be an effect rather than, or in addition to being, a cause. This is an instance of statistical regression[175] in an unstable time series. A crime change rate that has increased to an atypically high level before a reform is introduced will in and of itself regress to a more normal level regardless of the legislative intervention.[176]

The alarm over the "epidemic" of reported rape during the relatively brief interruption was not unfounded, and helped support passage of rape reform legislation. However, it should not be magnified out of proportion. Virtually every generation has felt itself threatened by the spectre of one type of rising violence or another.[177] As the President's Crime Commission reminded, "It may be that there has always been a crime crisis, insofar as public perception is concerned."[178]

III. PROSECUTION OF RAPE

This portion of the article describes and presents the results of an empirical study of the prosecution of rape. It begins with a description of the rape law enforcement process, with specific attention to King County. After presenting the methodology of the study, statistical patterns of rape in King County are introduced and compared to data obtained in other jurisdictions. Finally, the impact of rape legislation on case disposition and charging in King County is analyzed.

SEATTLE POLICE DEPARTMENT, STASTICAL REPORT (for the indicated years). The figures do not exclude unfounded cases as the UCR does. The Seattle population for these years was obtained from STATE OF WASHINGTON, 1970 CENSUS DATA BOOK and 1978 POCKET DATA BOOK. The increase (in four year intervals, except for 1960–65 which is five years) in rape based on reported rate per 100,000 population, starting in 1960, is: 32% (in '65), 226% (in '69), 34% (in '73), and 17% (in '77).

175. Regression artifacts are perhaps the most common form of self-deception in planned social changes. *See generally* D. CAMPBELL & J. STANLEY, EXPERIMENTAL AND QUASI-EXPERIMENTAL DESIGNS FOR RESEARCH 10–11 (1963). For another example of regression effects in a legal reform, *see, e.g.*, Campbell & Ross, *The Connecticut Crackdown on Speeding: Time-Series Data in Quasi-Experimental Analysis*, 3 L. & SOC'Y. REV. 33 (1968).

176. Public clamor for criminal justice reforms usually arises when there is an upsurge of crime, an acute crisis. To ensure that proposed crime control measures appear to produce the desired effect, election-minded legislators can capitalize on the regression phenomenon by introducing the reform at the point where the crime is "at its worst so far." If the time series has inherent variability, as crime trends do, the next point on the average will be lower, or nearer the normal level. The decrease in crime could result from the effectiveness of the reform, but it could also be due simply to the momentary extremity, or to both.

177. *See generally* CRIMINAL JUSTICE COMM'N, *supra* note 154, at 12; MULVIHILL & TUMIN, *supra* note 168, at 52; PRESIDENT'S CRIME COMM'N, *supra* note 154, at 85.

178. PRESIDENT'S CRIME COMM'N, *supra* note 154, at 85.

A. Enforcement Process

1. Police

The police function, though not of central concern here, is considered briefly because it defines the outer boundaries of rape law enforcement. The police process in Seattle[179] typically begins with a telephone complaint of rape. A patrol officer is dispatched to interview the victim and, if necessary, to transport her to a hospital equipped with a sexual assault program.[180] The patrol officer's report is then routed to the head of the Sexual Crimes Unit who, in turn, assigns the case to one of the five detectives. The time and manner of detective follow-up inquiry bear a significant relationship to the availability of the victim as a complaining witness.[181]

The detective's findings include a decision as to whether a complaint is "founded," *i.e.*, whether an offense has been committed, and gathering information to make that decision. These functions are discretionary, of low visibility, and subject to little control.[182] Indeed, police discretion is perhaps greatest in rape cases. Rape complaints received by police represent an extremely broad range of conduct,[183] and their judgments inevitably reflect their own social perceptions and assumptions. Detectives spend substantial resources simply establishing the occurrence of the crime[184] before turning to the identification and apprehension of the suspect..

179. Seattle is the largest city in King County and most offenses prosecuted by the county attorney are committed within the city. Therefore, procedures and statistics of the Seattle Police Dep't are described in this section. This information was obtained from an interview with Detective Wally Johnson of the Sex Crimes Unit, on June 5, 1979 [hereinafter cited as Johnson Interview].

180. Hospitals are a vital link in the preparation of rape cases for prosecution. A hospital is often the first agency to come in contact with the rape victim, sets the tone for subsequent interactions between the victim and the criminal justice system, and affects the victim's willingness to prosecute. It also generates forensic evidence. In Seattle, since 1974, a specialized sexual assault unit has been established at a local hospital to which police usually refer rape victims.

181. A questionnaire survey of sex crime detectives in five cities in 1976 showed that the Seattle Police Dep't was the slowest in assigning cases to detectives for follow-up investigation, with cases being assigned as late as 3 or 4 days after the initial complaint. Only 49% of the victims were contacted in person by a detective, compared to 89% to 97% in the other four cities. The result is that victims are more often "lost" in Seattle. BATTELLE-LEAA FINAL REPORT, *supra* note 4, at 33–35. At present, victims are interviewed by detective "if possible" and "sometime shortly" after the complaint. Aggravated cases, however, receive "immediate" attention. Johnson Interview, *supra* note 179.

182. *See generally* Goldstein, *Police Discretion Not to Invoke the Criminal Process: Low-Visibility Decisions in the Administration of Justice*, 69 YALE L.J. 543 (1960).

183. *See, e.g.*, PENN. Comment, *supra* note 11, at 278.

184. This is not necessarily because they disbelieve the victim's account. Without evidence of penetration and nonconsent, there is simply no prosecutable case. BATTELLE-LEAA FINAL REPORT, *supra* note 4, at 46. Penetration evidence usually consists of results of the medical examination (semen,

The national and Seattle average of all forcible rape complaints determined by police to be baseless is 15%.[185] Articulated standards for the founding decision do not exist in most police departments.[186] A study of Philadelphia police records revealed, however, that detectives generally relied on legally appropriate criteria in founding rape cases.[187] Where the information was inconclusive, the police presumed the complaint's veracity and filed the case with the prosecutor. Interestingly, when prosecutors aided Philadelphia police in their decisions by offering advisory opinions, the unfounding rate remained unchanged.[188] A national survey of police reported a high degree of agreement among police departments on the factors used in founding decisions, although the weight attached to each factor may differ from department to department.[189] The factors used by police were those they believed were important to successful prosecution.[190] Of the founded cases, not all are sucessfully "cleared" by arrest or other means. Rape cases, it should be noted, pose a unique dilemma. Most violent crimes that are solved are those in which the victim knows the perpetrator. For example, because most homicide suspects are either related to or acquanted with their victims, police consistently "clear by arrest" a greater proportion of homicides than any other personal or property offense.[191] The number of rape suspects known to the victims is also high, but the prior social relationship makes nonconsent more difficult to prove. Therefore, rapes perpetrated by strangers (hence

vaginal abrasions) and crime scene evidence to corroborate likelihood of penetration (stains on clothing, furniture, etc.). *Id.* at 37. Despite the importance of nonconsent, usually evidenced by victim's testimony, police in one-half of the cases do not record a formal statement by the victim of the crime. Patrol officers or detectives summarized the victim's account in 4 or 5 short sentences, which is "hardly adequate to describe the full circumstances of the assault." *Id.* at 40.

185. UCR 1975 at 24. SEATTLE POLICE DEP'T, STATISTICAL REPORT 1971 at 29. (The more recent of these annual Seattle police reports do not include unfounding rates.) Other local studies show unfounding rates of about 20%. PENN. Comment, *supra* note 11, at 308; Galton, *Police Processing of Rape Complaints: A Case Study*, 4 AM. J. OF CRIM. L. 15, 19 (1975); Schiff, *Statistical Features of Rape*, 14 J. FOR. SCI. 102, 109 (1969).

186. In a 1975 national survey of police departments, only 20% reported the existence of written guidelines for unfounding rape complaints. BATTELLE-LEAA POLICE SURVEY, *supra* note 4, at 43–44.

187. These criteria included promptness of complaint, victim injuries, prior social contact between victim and suspect, victim resistance, and suspect's use of force. PENN. Comment, *supra* note 11, at 282, 287, 291, 295, 298. Although police were using the criteria established by law, they did not apply the same weight as would be required at trial; *e.g.*, they did not require the proof to rise to the level of beyond a reasonable doubt. In addition, a non-legally relevant factor that was also determinative of founding was race of victim and actor. Intraracial black incidents were unfounded more frequently. *Id.* at 302. This study did not, however, assess the relative impact of each of these factors on the founding decision.

188. *Id.* at 308.

189. BATTELLE-LEAA POLICE SURVEY, *supra* note 4, at 82–84.

190. *Id.*

191. Only 13% of homicides are by strangers. The arrest clearance rate in 1977 for homicide was 7%, compared to 51% for forcible rape. UCR 1977 at 10, 14.

seldom identified)[192] or aquaintances who do not use physical force (hence difficult to prosecute), often "simply die a bureacratic death and are 'exceptionally cleared' or filed as inactive."[193]

In 1961, shortly before the start of the "crime wave," the national clearance rate for rape was 73%. In comparison, the clearance rate for aggravated assault was only somewhat higher (79%). With the rise in reported crime, not matched by similar increase in police resources, the clearance rate for both offenses steadily declined, leveling off in the mid-1970's. In 1977, the clearance rates for forcible rape and aggravated assault were 51% and 62% respectively.[194] A similar trend occurred in Seattle.[195]

Some women activists, as well as proponents of rape law reform drawn from the crime control movement, have decried the low arrest rate, which they usually express in relation to the total volume of initial complaints rather than to founded complaints.[196] They have also criticized police diffidence and insensitivity towards women victims.[197] These claims contain a measure of validity, and rally support for legal reform. Seen in context, however, the police process—while needful of improvement[198]—is not inherently biased agaist rape victims. While the clearance rate of founded rape cases has been consistently lower, by an average of about 9%, than that of aggravated assault, the nature and circumstances of rape cases render their successful investigation difficult. A survey of reporting victims in three cities (including Seattle) found that 61% said

192. The usual police identification techniques—previous offender files, modus operandi files, police artist sketches, fingerprints—are seldom successful. In five cities, it was found that unless the rape victim could supply identification information, typically because of prior acquaintance with the actor and sometimes because the victim remembers the actor's car license number, identification and hence arrest of the actor was unlikely. BATTELLE-LEAA FINAL REPORT, *supra* note 4, at 30–39.

193. *Id.* at 46. "Exceptionally cleared" is an umbrella category that includes cases in which the victim or prosecutor refuses to prosecute, the perpetrator has died or left the jurisdiction, or other situations where he has been identified but is not prosecuted.

194. The forcible rape clearance rates for 1961, '65, '69, '73, and '77 were: 73%, 64%, 56%, 51%, and 51%. The aggravated assault clearance rates for the same years were 79%, 73%, 65%, 63%, and 62%. These figures are from UCR for the indicated years.

195. The forcible rape clearance rate in Seattle for 1960, '65, '69, '73, and '77, were: 68%, 62%, 46%, 42%, and 45%. SEATTLE POLICE DEP'T, STATISTICAL REPORT (for indicated years).

196. *See, e.g.*, Berger, *supra* note 7, at 6; BATTELLE-LEAA FORCIBLE RAPE, *supra* note 3, at 2.

197. According to victims, "Although the rape was really bad, the police interrogation was six times as horrible." Wood, *The Victim in a Forcible Rape Case: A Feminist View*, in RAPE VICTIMOLOGY 194, 210 (L. Schultz ed. 1975)(footnote omitted). "The rape was probably the least traumatic incident of the whole evening. If I'm ever raped again . . . I wouldn't report it to the police because of all the degradation." Griffin, *supra* note 15, at 30. *See also* BROWNSMILLER, *supra* note 109, 364–65.

198. For reform proposals regarding police rape procedures, see generally the REPORTS BY BATTELLE LAW AND JUSTICE CENTER FOR THE NATIONAL INSTITUTE OF LAW ENFORCEMENT AND CRIMINAL JUSTICE, LAW ENFORCEMENT ASSISTANCE ADMINISTRATION: FORCIBLE RAPE: A MANUAL FOR PATROL OFFICERS (POLICE VOLUME II) (1978); FORCIBLE RAPE: A MANUAL FOR SEX CRIME INVESTIGATORS (POLICE VOLUME III) (1978).

they were treated with considerable understanding by police, 23% with indifference, and 15% with disrespect.[199] The evidence belies popular conceptions of harsh police treatment of rape and victims as the norm.[200]

2. *Prosecutor*

Founded cases are further screened by the prosecutor, who has almost unfettered discretion in charging.[201] By discretion is meant not the judg-

199. The survey included 117 victims in Seattle, Detroit, and Kansas City. BATTELLE-LEAA FINAL REPORT, *supra* note 4, at 45.

200. A reason frequently given for non-reporting is fear of police treatment. *See* notes 163 and 197 *supra*. Most non-reporting victims did not acquire this view of the police from personal experience. Public attitudes about the criminal justice system are generally learned vicariously, through the media or personal reports of the experiences of others. The finding that, in reality, most rape victims are treated by police with solicitude underscores the damaging consequences of even occasional instances of police officiousness or bias. These instances tend to be widely circulated, creating the impression that they are common rather than exceptional practices, and thereby tend to inhibit reporting.

201. Judicial recognition of prosecutorial discretion can be traced to English common law. The Attorney General of England had power to decide whether to prosecute subject only to the control of the High Court of Parliament when there was abuse of discretion. Regina v. Allen, 121 Eng. Rep. 929 (Q.B. 1862). In federal courts, the prosecutor "is clothed with the power and charged with the duties of the Attorney General of England under the common law." United States v. Brokaw, 60 F. Supp. 100, 101 (S.D. Ill. 1945). State prosecutors also possess the common law powers of the Attorney General of England in the absence of limiting statutes. *See, e.g.*, People *ex rel.* Elliott v. Covelli, 415 Ill. 79, 112 N.E.2d 156, 160–61 (1953). In addition the discretionary authority is said to rest on the nature of the prosecutor's office and the doctrine of separation of powers. *See* F. MILLER, PROSECUTION: THE DECISION TO CHARGE A SUSPECT WITH A CRIME 165 (1969). In principle, private citizens can through formal means (*e.g.*, an action of mandamus) influence filing decisions. In practice, they have been effective in extraordinary circumstances only. *See generally* Ferguson, *Formulation of Enforcement Policy: An Anatomy of the Prosecutor's Discretion Prior to Accusation*, 11 RUTGERS L. REV 507, 517–521 (1957).

"[L]egislative supervision of exercise of the prosecuting power is seldom, if ever, meaningful." K. DAVIS, DISCRETIONARY JUSTICE 209 (1969). Statutes reveal at most a legislative desire that prosecutors exercise discretion actively and not be lax in enforcement. They prescribe remedies for instances of corruption, gross incompetence, or unusual indolence, though the administration is left to trial judges or attorneys general. But legislation does not attempt to codify what factors should be considered or not considered in the charging decision. *See generally* F. MILLER, *supra* at 293–346 (control of prosecutor discretion).

The policy reasons for prosecutorial discretion in filing have been recognized, but not always articulated, by the courts. *See* United States v. Cox, 342 F.2d 167, 171 (5th Cir.), *cert. denied*, 381 U.S. 929 (1965). Some of the reasons include the preservation of limited prosecutorial resources, maintenance of a high conviction record, and various social concerns unrelated to guilt or evidence (*e.g.*, avoidance of undue harm or stigmatization to first time offenders). Prosecution Standard 3.9(b) of the ABA PROJECT ON STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO THE PROSECUTION FUNCTION AND THE DEFENSE FUNCTION 92 (1971) enumerates several "good cause" reasons for non-prosecution despite evidentiary sufficiency: (ii) extent of harm caused by the offense, (iii) disproportion of authorized punishment to particular offender, (iv) improper motives of complainant, (vi) reluctance of victim to testify, and (vii) cooperation of accused in apprehension of another. However, Standard 3.9(c) rejects the desire to enhance a record of convictions as a legitimate factor in charging. *Id.* at 92. Prosecutors themselves use insufficiency of evidence as a shorthand notation to mask policy reasons for not charging or charging less than fully.

ment of evidence sufficiency, but the judgment whether to charge fully, less than fully, or not at all those who meet the probable guilt standard. Its exercise leads normally to under rather than overenforcement.[202] When prosecutors refer to discretion, they have in mind the influence of "practical factors" (*e.g.*, likelihood of conviction, victim credibility, office caseload, personal values) on day-to-day charging decisions rather than "statutory factors" (elements of the crime).[203] In the prosecution as in the police investigation of rape, the role of these practical factors looms large by reason of unique problems inherent in rape law enforcement: cases usually have weak fact patterns (no corroborative evidence of force or injury; pre-existing relationship between suspect and victim); victims are often reluctant to report or testify even though they normally are the sole witnesses; local community attitudes may insist on aggressive rape prosecution and, at the same time, their representatives on the jury might not convict except in the most compelling of circumstances, placing an added burden on the prosecutor to charge and plea bargain selectively; and not least, discretionary decisions are more susceptible in rape than in any other types of crime to the interjection of personal attitudes toward women, sexuality, race, and class.

There are four principal steps in prosecution: pre-filing screening of the case, filing procedure to determine probable cause, plea bargaining, and trial. Rape cases pose special prosecutorial issues of an administrative and organizational nature primarily at the first two stages. These issues include the specialization and training of personnel and the standardization of the filing process.

In King County, the prosecution process typically begins with the filing by police of a rape case with the Sexual Assault Unit of the King County Prosecuting Attorney's (KCPA's) office. The chief of the Unit assigns the case to a deputy prosecutor for screening and possible filing. The Sexual Assault Unit is the only specialized branch within the criminal division of the KCPA.[204] Established in 1970 with four deputies (two women), it was

202. The commentary to Prosecution Standard 1.1(a) states that the prosecutor's "obligation is to protect the innocent as well as to convict the guilty. . . ." *Id.* at 44. In reality, the risk of false positives (prosecuting the innocent) is remote; the likelihood of false negatives (not prosecuting the probably guilty) is high. This is due to personal convictions and institutional pressures. Prosecutors believe it is "morally wrong to prosecute a man unless one is personally convinced of his guilt." Kaplan, *The Prosecutorial Discretion—A Comment*, 60 N.W.U.L. REV. 174, 178 (1965). Limited resources preclude charging every case in which there is reasonable basis for believing that a crime has been committed. Efforts expended in weak cases are considered wasted. *Id.* at 180.

203. Abrams, *Internal Policy: Guiding the Exercise of Prosecutorial Discretion*, 19 U.C.L.A. L. REV. 1, 11 (1971).

204. Specialization at the filing level is uncommon. F. MILLER, *supra* note 201, at 19. Most prosecutor offices are organized by function, such as filing, plea bargaining, or trying cases, rather than by type of crime. The Sexual Assault Unit of the KCPA represents a compromise structure in

expanded in 1974—the height of the rape law reform movement in Washington. It currently has 14 deputies; half of them are women.[205] Specialization facilitates the accummulation of experience, enables continuous case responsibility by a single deputy, and enhances consistency in filing decisions. On the other hand, rape prosecutions are the most emotionally demanding of felony cases and can quicky "burn-out" trial attorneys. Hence, while Unit deputies handle all of the pretrail functions they do not try rape cases exclusively. The only special training[206] given to deputies is in interviewing skills to increase sensitivity to victim trauma. No special training in trial skills is provided since they are considered generic to all prosecutions.

Rape cases are the only cases in which a pre-filing interview of the victim is conducted.[204] This interview is considered "critical because the state's case stands or falls on the victim."[208] The interview enables the prosecutor to gather information about the crime and support the victim by allaying her apprehensions and by explaining the workings of the judicial process. At the same time, it also permits the prosecutor to evaluate the victim's credibility[209] as a jury might do, and probe her determination

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that it specializes only in screening and filing, but not in trying rape cases. Its structure indicates where the unique problems of rape prosecution lie. Nationwide, 16% of prosecutor offices have a special unit for rape cases, principally for pretrial functions. BATTELLE-LEAA PROSECUTOR SURVEY, *supra* note 4, at 55–56. Given a choice, most prosecutors (68% of those surveyed) shun specialization of rape cases. The reasons include: rape cases are "too emotional," "a pain in the ass," and "not good for one's career." BATTELLE-LEAA FINAL REPORT, *supra* note 4, at 56.

205. Over three-fourths of a national sample of prosecutors felt that sex of prosecutors made no difference in the evaluation and trial of a rape case. BATTELLE-LEAA FINAL REPORT, *supra* note 4, at 55. This question merits further inquiry because there is evidence that there are clear sex differences in the perception of the crime. Feldman-Summers & Lindner, *Perceptions of Victims and Defendants in Criminal Assault Cases*, 3 CRIM. JUST. & BEHAVIOR 135, 136–37, 144–47 (1976).

206. In-service training of prosecutors is mostly "accidental and haphazard." BATTELLE-LEAA PROSECUTORS' VOL. III, *supra* note 4, at 30. In a national survey, only 19% of prosecutor offices were found to have special training in rape cases, and this training consisted primarily in victim interviewing techniques. Learning was by intensive case assignment, resulting in the accumulation of case experience in a few select individuals. BATTELLE-LEAA PROSECUTOR SURVEY, *supra* note 4, at 92. This practice aggravates the perennial problem of prosecutor "burn-out." The average turnover rate in the Sexual Assault Unit is less than three years, about the same as the national average for specialist rape prosecutors. Reich Interview, *supra* note 107.

207. Less than one-half of the prosecutors (41%) nationally interview victims routinely prior to filing. BATTELLE-LEAA FINAL REPORT, *supra* note 4, at 51. Constraints of time and resources are more determinative of the procedure than the merits of the interview itself. *Id.* at 50–51. Among those who interview, over one-half (53%) require three or more interview sessions in addition to any police interviews. BATTELLE-LEAA PROSECUTOR SURVEY, *supra* note 4, at 7. This practice tests the victim's will to persevere in prosecution of the case. *Id.* at 7–8.

208. Canova Interview, *supra* note 18.

209. Nationally, 69% of prosecutors occasionally ask victims to undergo polygraph examinations, especially when the factual circumstances of the case are weak. BATTELLE-LEAA FINAL REPORT, *supra* note 4, at 51.

to persist in a prosecution that might take months to come to trial. Even with the most sympathetic of prosecutors, a certain antagonism colors the interview that can be misinterpreted by the victim. For this reason, victim advocates are sometimes present at the interview.[210]

Following the interview and factual investigation by detectives, a decision on charging is made. In the absence of effective external controls over filing discretion in routine cases,[211] some prosecutors, including the KCPA, have established and published administrative standards for charge selection and reduction.[212] In the KCPA's office, a deputy recommends a rape charge "if sufficient admissible evidence exists which when considered with the most plausible, reasonably foreseeable defense that could be raised under the evidence, would support conviction by a reasonable and objective fact-finder."[213] The Unit chief reviews the recommendation and makes the final decision. It is important to note that only one person is ultimately responsible for selecting rape charges. This centralization of decisionmaking, office specialization, and promulgation of guidelines are attempts to limit and standardize the influence of personal factors so as to achieve "tolerable consistency"[214] in the exercise of discretion. The KCPA standards contribute only partially to this purpose. The guidelines for charge selction of forcible or statutory rape merely reiterate the statutory elements for the respective degrees of each

210. Despite the growth of rape crisis centers throughout the country, only 1% of prosecutors in a national survey reported that crisis counselors or victim advocates were normally present at the interviews. Victims were more commonly accompanied by a family member or friend. BATTELLE-LEAA PROSECUTOR SURVEY, *supra* note 4, at 63–64. The relationship between prosecutors and victim counselors may be adversarial. Counselors perceive their main task as victim advocacy, since crisis centers were initially established partly in reaction to the supposedly harsh treatment of the victim by police and prosecutors. Prosecutors see themselves as representatives of the criminal justice system, not necessarily of individual victims. On the other hand, counselors may be co-opted to prosecutorial interests, especially if they are "in-house counselors" sponsored by and located in prosecutor offices.

211. *See* F. MILLER, *supra* note 201, at 297–344.

212. Most prosecutor offices do not have guidelines. In fact, prosecutorial policy was the lowest priority among possible areas for improvement in handling of rape cases, according to the prosecutors themselves. BATTELLE-LEAA PROSECUTOR SURVEY, *supra* note 4, at 93. Better police investigation and public education were ranked highest in priority. *Id.*

213. King County Prosecuting Attorney Filing and Dispositions Policy, § 1061(I)(A) (1977) [hereinafter cited as KCPA Policy]. Permissible reasons for declining prosecution other than insufficiency of the evidence, include: a request by the victim, a grant of immunity to the accused, the accused's confinement or pending prosecution on another charge, the highly disproportional cost of prosecution, or the complainant's improper motives. *Id.* at § 1051(II)(B). The last two reasons, however, are not supposed to be considered in rape cases. *Id.* at § 1051(II)(B)(8) and (9)("high impact crimes").

214. Abrams, *supra* note 203, at 6–7.

offense.[215] They do not describe the emphasis, if any, deputies are to give to those practical factors that constitute the essence of discretionary judgment.

The formal criterion for charging is probable cause. The aforequoted KCPA standard, however, specifies a higher test, that of beyond a reasonable doubt as applied by a jury.[216] This is common practice among prosecutors. Because of limited resources, the political need for a high conviction record, concern about wrongful convictions, and other reasons, prosecutors insist that in charging "there must not only be a very strong probability of guilt, there must also be a strong probability of conviction."[217] The application of a convictability standard at filing, compared to the probable cause standard at the police founding stage, explains the additional attrition rate as cases progress through the criminal justice process.

The procedure by which probable cause is determined—preliminary hearing, grand jury proceeding, or direct filing—can affect the development and outcome of prosecution. The victim is often a vulnerable though key witness, and the impact of a probable cause hearing may affect not only the quality of her testimony, but also her willingness to pursue prosecution to its conslusion.[218] In King County, virtually all rape cases are filed directly in Superior Court, thereby avoiding such hearings.[219]

Rape prosecutions do not give rise to unique issues with respect to plea bargaining. Legal and policy considerations[220] reflected in rape charge

215. The guidelines add the following gloss to the statutory definitions of aggravating elements of first degree rape: "threatens to use" deadly weapon means it must actually be visible to the victim: and "serious physical injury" means injury requiring medical treatment of more than a first aid nature. KCPA Policy, *supra* note 213, at § 1061(I)(B)(1)(a).

216. *Id.* at § 1061(I)(A).

217. F. MILLER, *supra* note 201, at 42. *See also* Kaplan, *supra* note 202, at 180.

218. The hearing can serve a useful function by enabling the state to test and evaluate its case. On the other hand, an adversarial preliminary hearing can be traumatic for the victim if a harried prosecutor, as frequently happens, has been unable to prepare her for cross-examination. It also poses risks of exposing the case to the defense, and creating a record for impeachment. The grand jury proceeding allows the prosecution to achieve the screening advantages of the preliminary examination while the nonadversarial nature of the proceeding shields the victim. However, many jurisdictions have dispensed with the grand jury for all but exceptional cases. Direct filing provides the least exposure of the case and of the victim. It places a greater burden on prosecutors to engage in careful pre-filing screening and application of the convictability standard. *See generally* BATTELLE-LEAA FINAL REPORT, *supra* note 4, at 51–52.

219. State court rules require the filing in all criminal proceedings of an information or indictment in Superior Court or of a complaint in Justice Court to determine probable cause at a preliminary hearing. WASH. SUP. CT. CRR 2.1; WASH. JCRR 2.03(d). Local prosecutorial policy is to file all "high impact crimes" directly in superior court "unless there are specific evidentiary reasons for a preliminary hearing." KCPA Policy, *supra* note 213, at § 1051(I)(A)(1). About 98% of all rape charges are directly filed.

220. *See generally* Alschuler, *The Prosecutor's Role in Plea Bargaining*, 36 U. CHI. L. REV. 50 (1968).

negotiations are not dissimilar from those in other felony cases.[221] For purposes of a study of prosecutorial discretion, the initial charge (by complaint or directly filed information) is "the heart of the charging process,"[222] not the final charge after preliminary hearing[223] or reduced charge after plea bargaining. The initial charge is an ex parte decision that reflects solely the influence of statutory and discretionary factors on prosecutorial decisionmaking.

When a case is set for trial, a single deputy undertakes all the responsibilities of preparation, pretrail hearings, trial, and sentencing recommendations. No issues unique to rape prosecutions arise at this stage.

B. Research Methodology

A before-after study was conducted of the impact of Washington common law and reform rape statutes on the charging and disposition of 445 rape complaints filed by police with the KCPA for prosecution during a six year period, from 1972 to 1977. The sample included 208 cases filed from the beginning of 1972 to June 30, 1975 when the common law statute was in effect, and 237 cases filed from July 1, 1975 to the end of 1977 under the reform law. It included almost every adult suspect (over 18 years) presented for prosecution. Cases involving juvenile suspects (estimated at about 100 during the six years)[224] are prosecuted by the youth division, not the Sexual Assault Unit, of the KCPA and adjudicated separately in Juvenile Court. Because of the incompleteness or unavailability of these files, juvenile suspects are not included in the present study except for the handful who were prosecuted as adults in Superior Court. The

221. Plea bargaining has drawn particular criticism, however, in prosecutions under common law rape statutes. Rape charges were believed to have been reduced to assaults or other lesser offenses too routinely. The impact of reform rape legislation, with its gradations of culpability, on plea rates remains to be determined. KCPA guidelines recognize difficulty in proving the basic allegation or the aggravating factor as the only reason that may normally be considered in charge reduction. Caseload pressure and prosecution costs are expressly excluded from consideration. KCPA Policy, *supra* note 213, § 1061(II)(A)(1). There is also centralization of plea bargaining decisions. Every plea must be approved personally by the head of the criminal division. Interview with David Boerner, Chief, Criminal Division, KCPA, April 12, 1979.

222. F. MILLER, *supra* note 201, at 14.

223. A final charge after a preliminary hearing reflects judicial involvement in the charging process and not just the prosecutor's own discretion. Although formally there is a sharing of power in filing, in practice the magistrates' scrutiny of the evidence is perfunctory and their bind-over decisions usually rubber stamp the prosecutor's initial decision. *Id.* at 45–46.

224. Estimates and data provided by the research office of the Juvenile Division, KCPA. Between 1973 and 1977, there were 96 complaints of rape and 64 of indecent liberties. No figures are available on complaints of statutory rape or cases declined for prosecution. Data for 1972 were unavailable. In 1978, there were 18 complaints filed as rape, 24 as indecent liberties, and 16 as statutory rape; again, no figures on declined cases were kept.

adult sample plus the estimated juvenile sample, totalling 545 cases, comprise about one–third of all the rape complaints (about 1844)[225] lodged with the Seattle Police Department during the period of this study. In addition, there were 25 homosexual male rape complaints in the after period (as a result of the sex neutral definitions of the reform law), but the small number precludes detailed analysis.

These cases were obtained from KCPA and Seattle Police Deparment files.[226] Trained coders recorded about 100 items of information on each case on a questionnaire.[227] As a reliability check, all of the coders recorded 12 randomly drawn case files. The intercoder agreement averaged 93%, indicating high reliability of the data.

C. Statistical Patterns of Rape

This section sketches statistical profiles of the victim,[228] the suspect,[229] and the circumstances of the crime.[230] These are not profiles, however, of all alleged rapes that occur, or even of all rapes reported to police. The data represent only the minority of cases that reach the prosecutorial stage. A complaint that is reported, founded, cleared by arrest, and presented for prosecution is probably quite dissimilar (*e.g.*, stronger factual circumstances from a prosecutorial viewpoint) than one that suffers early attrition in the criminal justice process. Only the after data patterns will

225. Figures were derived from the annual SEATTLE POLICE DEP'T STATISTICAL REPORT for 1972 to 1977.

226. Cases involving forcible and/or statutory rape charges were readily identifiable in the KCPA's files. Cases of attempted offenses were few and, therefore, were combined in the sample with completed offenses. However, the process of identifying rape complaints that were declined or resulted in other charges (*e.g.*, assault, other sex crime, etc.) was more complex and subject to the coder's discretion. Every other violent and sex offense filed during the six year period was screened to see if there had been an initial rape allegation by the victim. If the coder determined the complaint included a rape claim, regardless of whether the facts satisfied the statutory definition of rape, the case was tracked down. Cases of other charges were located in KCPA files. Declined cases had to be found in police files.

Only cases closed at the time of data collection were recorded. Some rape case files were unavailable and hence not recorded, but the number in the sample still includes nearly all (about 95%) of the total cases charged. The sample of declined and other charge cases underrepresents to a somewhat greater extent the total population of such cases. Due to resource limitations, only declined cases in the Seattle Police Department, and not in other departments within the county, were located. The majority of offenses, however, occur in Seattle, so the underrepresentation is probably not substantial.

227. *See* Appendix A.

228. *See* Appendix B.

229. *Id.*

230. *See* Appendix C.

be described in the text, since they essentially replicate the before data.[231] The statistical profiles combine forcible and statutory rape cases except in instances when there are substantial differences between them, and then they are separately presented.[232] To illustrate the basic uniformity in rape patterns across jurisdictions and time, these results will be compared to those of a 1960 Philadelphia study[233] and a 1967 national study,[234] both of which were based on police records.[235]

Victims' ages ranged from 4 to 61 years, with a median age of 17.5.[236] As a result of lowering the age of consent from less than18 to less than 16 years, the proportion of forcible rape (adult victim) cases has increased from one-half in the before data to two-thirds in the after data, with a corresponding reduction in statutory rape (juvenile victim) cases. Most victims (80%) are white. Since the population is composed predominantly of teenagers,[237] most (82%) are single and over one-half are students. In the nonstudent group, more victims hold blue collar rather than white collar jobs. A succession of studies have shown higher victimization rates among lower income persons for rape as well as other violent crimes.[238] The arguement that rape is as much a middle class as a working class phenomenon—but middle class women report more often to private physicians than to police and therefore are underrepresented in criminal

231. The match between the two sets of data, collected by different coders at different times, reinforces confidence in the reliability of the figures.

232. *See* Appendix D.

233. M. AMIR, PATTERNS IN FORCIBLE RAPE (1971) [hereinafter cited as AMIR]. This was the first major statistical study undertaken of forcible rape. The sample consisted of 646 cases in police files in 1958 and 1960. *Id.* at 11–12. The author does not say whether they were founded or unfounded cases. But since the sample is described as consisting of "all complaints" one may assume that unfounded cases are included. *Id.* at 334.

234. MULVIHILL & TUMIN, *supra* note 168, at 207–258. The survey consisted of a 10% random sample of all police case files in 17 large cities, including Seattle. *Id.* at 207–08. The basic unit of analysis was victim-offender interaction, and there were 465 such units in the sample. *Id.* at 208.

235. These are the two principal local and national empirical studies, respectively, using case files. The present study based mainly on prosecutor files is more comparable to them (even though they rely on police files and include unfounded cases) than to victimization surveys (Hindelang & Davis, *supra* note 163; FIELD SURVEYS II: CRIMINAL VICTIMIZATION IN THE UNITED STATES, *supra* note 163). Statistical profiles constructed from victim interviews (which include nonreported cases) are likely to differ from those based on reported cases due to the sampling differences.

236. The most frequent age bracket of victims according to Amir is 15 to 19 years. AMIR, *supra* note 233, at 51.

237. Reports on rape based on victim interviews usually involve adult women, not adolescents. *See, e.g.*, D. RUSSELL, *supra* note 150 (victim interviews). There is a positive correlation between the victim's age and the extent of physical force used by the suspect (contingency coefficient or C = .37); *see* note 312 *infra*. As a result impressionistic profiles of rape possibly portray a more aggravated crime than statistical studies with broadly based samples.

238. M. WOLFGANG, PATTERNS IN CRIMINAL HOMICIDE 37 (1958); NAT'L VIOLENCE COMM'N, *supra* note 154, at 22–23.

statistics,[239]—is not supported by existing victimization surveys.[240] All victims do not have unblemished, law-abiding records; nearly one-fifth have a history of adult arrests, usually for sex offenses.[241] These arrests pose credibility obstacles to successful prosecution.

Suspects' ages ranged from 15 to 73 years, with a median age of 25.[242] About one–half (53%) are white, 38% are black, and 9% are other minorites. The majority (83%) are in lower occupational ranks or are unemployed.[243] Most are unmarried (71%) and have adult arrest records (66%),[244] but only one-fourth of prior arrests were for sex offenses. In addition, nearly 20% have prior incarceration records. The profile of the rape suspect, then, is that of a lower income, young white or black male, who has a background of criminal activity.

The circumstances of the offense are important to a determination of the practical (if not legal) element of nonconsent. These will be described in three phases: before, during, and after the criminal conduct.

There is often a sequence of events involving interaction between victim and suspect that sets the stage for the crime. The modal statistical pattern is not one of "hardcore" rape—an unexpected assault by a stranger. It is more commonly a "softcore" crime.[245] In the majority of instances (61%) the victim and suspect are acquainted with each other or

239. Weis & Borges, *Victimology and Rape: The Case of the Legitimate Victim*, in RAPE VICTIMOLOGY 91, 130 (L. Schultz ed. 1975). The authors base this proposition on conjecture, not data.

240. "The risks of victimization from forcible rape, robbery, and burglary, are clearly concentrated in the lowest income groups and decrease steadily at higher income levels." PRESIDENT'S CRIME COMM'N, *supra* note 154, at 38.

241. Amir also found 19% of victims in his sample had arrest records. AMIR, *supra* note 233, at 112.

242. The most common age bracket for suspects in Amir's sample was 15–19 years. AMIR, *supra* note 233, at 51–52. Nationally, the modal age range is 18–22 years. UCR 1977 at 13. The age in the present study is a little higher because of the exclusion of juveniles.

243. About 90% of suspects of both races were in the lower part of the occupational scale according to Amir. AMIR, *supra* note 233, at 70. This finding reflects social class norms and socialization practices. Aggression is not absent in the middle class but its expression and approval are more common in the working class. Frequent rehearsals of toughness and exploitation of women serve to prove masculinity. NAT'L VIOLENCE COMM'N, *supra* note 154, at 36–37. "Like physical aggression, sexual relationships and motivation are far more direct and uninhibited in lower-class adolescents." Davis, *Socialization and Adolescent Personality*, in READINGS IN SOCIAL PSYCHOLOGY 148 (T. Newcomb & E. Hartley eds. 1947). *See generally* M. WOLFGANG & F. FERRACUTI, THE SUBCULTURE OF VIOLENCE (1967).

244. One-half of Amir's sample had arrest records. AMIR, *supra* note 233, at 112.

245. According to police, for example, complaints often involve "couples who met initially in a bar or in a similar social setting, and who subsequently misinterpreted one another's sexual intentions." Chappell & Singer, *Rape in New York City: A Study of Material in the Police Files and Its Meaning*, in Chappel, *supra* note 10, 245, 257–58. The point is only that these situations are more frequent than those involving violent assaults, not that the actors should necessarily be prosecuted any less vigorously.

belong to the same family; 39% involve strangers.[246] The pre-existing social or blood relation between victim and suspect is not unique to rape. The proportion of suspects who are known to aggravated assault victims is almost identical to that of rape victims.[247]

A related finding is that in 68% of the cases, the victim agreed to have prior social contact with the suspect (*e.g.*, meeting at a tavern, at work, etc.). One-fourth had no social contact at all, and 7% of the victims were hitchhiking. Only a small number of victims (10%) had consensual sexual relations with the suspect prior to the alleged offense. The significance of prior relationship or contact[248] is that it constitutes one of the objective circumstances weighed by the fact finder in inferring consent. The less forceful or aggravated the conduct of the suspect, the more determinative the social interaction factor is likely to become. In 25% of the cases, both victim and suspect had ingested alcohol and/or drugs prior to or at the time of the act.[249] This fact may affect the victim's credibility as a complaining witness.

Rape is committed primarily at night and slightly more frequently during the warm months of the years. It is principally an intraracial crime.[250] About one-half of the cases involved only whites, 17% involve only minorities (mostly black), and 31% involve white victims and black suspects. Typically, rape occurs indoors: 44% take place in the suspect's residence or car, 27% in the victim's residence or car, 9% outdoors, and 20% elsewhere. When the rape occurs in the victim's residence, in 38% of the cases the suspect was invited, in 33% entry was uninvited but nonforcible, and in 20% entry was forcible or by deception. Because it is unlikely that a suspect would risk identification by taking the victim to his

246. According to Mulvihill & Tumin, 53% of the cases involve strangers, MULVIHILL & TUMIN, *supra* note 168, at 249 n.62. In Amir's sample, 42% were strangers. AMIR, *supra* note 233, at 234.

A survey in the District of Columbia found, however, that only 36% of the interviewed victims reported their assailant was unknown. PRESIDENT'S CRIME COMM'N, *supra* note 154, at 40. Victimization surveys purportedly represent crime patterns more accurately than criminal statistics because there is no underreporting bias in the former. The likely explanation for the discrepancy between the survey and case file figures, then, is that rapes by strangers are more likely to be reported.

247. Assailants are known in 43% of rape cases and 45% of aggravated assault cases. MULVIHILL & TUMIN, *supra* note 168, at 217, Table 6.

248. Prior social contact also has implications for crime control policy. If rape is primarily a "street crime," committed by strangers, then increased police patrols would be an appropriate response. If it is primarily a "social crime," however, other preventive measures, such as public education, would be called for.

249. In Amir's study, alcohol had been used by both the victim and the suspect in 20% of the cases. AMIR, *supra* note 233, at 101.

250. The national survey found 90% of rapes to be intraracial. There were twice as many black victim/black suspect rapes (60%) as white victim/white suspect rapes (30%). MULVIHILL & TUMIN, *supra* note 168, at 209. *See also* AMIR, *supra* note 233, at 336.

own residence, place of the offense is another circumstance from which a fact finder might infer consent.[251]

The typical sexual assault itself is not of an aggravated kind. One-fourth of the assaults involve no physical force (other than the act of penetration).[252] When extrinsic force is used, it is moderate (restraining; 42%) rather than high (choking, hitting; 32%). Weapons are employed in 18% of the cases. Verbal or physical resistance by the victim occurs half of the time;[253] one out of five victims attempts to flee. The only noticeable difference between the before data and the after data is the increase (18%) in the number of women who are physically resisting the sexual assault. This may be a product of the increase in women's self-defense training in recent years. Physical injury rates have remained the same. The majority of victims (63%) suffer no injury;[254] 28% need only minor or first aid attention; and 8% require medical treatment. Additional acts of sexual humiliation are not prevalent. The incidence of repeated intercourse was 22%, sodomy 7%, and oral intercourse 33%.

There is a direct correlation between pre-existing social relationship and use of force.[255] A high degree of force (including the use of a weapon) occurs in 28% of rapes by strangers, 17% by casual acquaintances, 14% by close acquaintances, and 3% by relatives. There is also a direct relationship between these two factors and the verbal resistance of victims. In assaults by strangers, one-half of victims resist, but in assaults by close acquaintances or relatives, less than one-third resist.[256] Similarly, in rapes by strangers the physical injury rate (40%) is higher than in rapes by close acquaintances or relatives (23%).[257] Greater social distance thus is associated with greater force, greater resistance, and greater physical injury.

After the crime, victims tend to report it first to friends or relatives (64%) other than to police (20%), a medical facility (2%), or a rape crisis center (6%). Three-quarters of the victims who report the crime to the

251. One-third of rapes in Amir's sample occurred in the victim's residence, and 7% in the suspect's residence. AMIR, *supra* note 233, at 139.

252. In 87% of the cases in Amir's study, only verbal coercion was initially used to subdue the victim. There was no physical or verbal force in 15% of the cases. When physical force was used, one-half of the victims were "manhandled." AMIR, *supra* note 233, at 336.

253. One-half of the victims in the Amir study did not resist in any way. AMIR, *supra* note 233, at 337.

254. In the national sample, 76% had no injury at all. MULVIHILL & TUMIN, *supra* note 168, at 235, Table 10.

255. $C = .37$, $p < .001$ ("p" refers to the probability level of significance; here, the likelihood of the contingency coefficient of .37 occurring solely by chance is 1 in 1000). *See* note 312 *infra*.

256. $C = .19$, $p < .04$.

257. $C = .17$, $p < .05$.

police do so within 24 hours of the offense. Prompt reporting is considered by juries as an indicator of victim credibility.

The statistical pattern of statutory rape[258] is similar to that of forcible rape, except that the circumstances of the former point much more strongly to the possibility of consent. One-quarter of the juvenile victims, but none of the adult victims, are involved in long term, continuing relations with the suspect. One-half of the statutory rape suspects are close friends or relatives of their victims, compared to 17% of forcible rape suspects. Statutory rape offenses occur more frequently in the suspect's residence. The extent of physical force, resistance, and physical injury are substantially higher in forcible rape cases. The few cases of homosexual (exclusively male) rape also show strong likelihood of consent; the pattern is more like that of statutory than forcible rape. [259]

D. Impact of Rape Statutes on Disposition

1. Prosecutorial Success

Table 1[260] presents the success rate (conviction after trial or by guilty plea) in prosecuting the initial charge under common law and reform rape statutes. The results for forcible rape (top row of table) will be discussed first. Under the old law, of the 106 cases initially charged with forcible rape, 37% resulted in convictions of rape or carnal knowledge, 23% ended with dismissals or acquittals of rape or carnal knowledge, and 35% resulted in convictions of other charges (*e.g.*, assault, indecent liberties, etc.). Under the new law, of the 122 cases initially charged with one of the three degrees of forcible rape, 56% resulted in convictions of some degree of forcible or statutory rape, 28% were unsuccessfully prosecuted, and 15% resulted in other convictions.

With reform legislation, the conviction rate for rape has increased 19% (from 37% to 56%).[261] This is brought about primarily by the decline in

258. *See* Appendix D.

259. Of the 25 homosexual rapes, for example, 52% involved no force at all, compared to 52% of heterosexual statutory rapes and 13% of forcible rapes. 75% of the victims suffered no injury, compared to 80% of female juvenile victims and 55% of adult victims. 88% of the victims had prior social contact with suspect, compared to 68% of the victims in all heterosexual rape cases.

260. The numbers and the notation "N" enclosed in parentheses in this and all subsequent tables represent the number of cases.

261. This increase cannot be unequivocally attributed to the operation of the new law. In any field study that does not consist of a true experimental design (*i.e.*, random assignment of cases to independently established treatment and control groups), there are alternative plausible explanations for observed results. Here, changes in public attitudes toward rape, in prosecutorial aggressiveness, in police investigation, etc., can all be related to changes in conviction rates. Moreover, it is not

TABLE 1

SUCCESS IN PROSECUTING THE INITIAL CHARGE

UNDER OLD LAW				*UNDER NEW LAW*			
	PROSECUTION OF:						
	RAPE OR CARNAL KN., RESPECTIVELY		OTHER CHARGE		ALL DEGREES OF RAPE OR STAT. R., RESPECTIVELY		OTHER CHARGE
INITIAL CHARGE	SUCCESS	NO SUCCESS	SUCCESS*	INITIAL CHARGE.	SUCCESS	NO SUCCESS	SUCCESS*
RAPE (N=106)	37% (39)	23% (24)	35% (37)	RAPE 1, 2, 3 (N=122)	56% (68)	28% (35)	15% (19)
				R1 (N=41)	66%	17%	17%
				R2 (N=79)	51%	35%	14%
				R3 (N=2)	50%	–	50%
CARNAL KN. (N=33)	42% (14)	15% (5)	36% (12)	STAT. R 1,2,3 (N=46)	57% (27)	17% (8)	24% (11)
				SR1 (N=13)	31%	23%	46%
				SR2 (N=17)	77%	6%	17%
				SR3 (N=16)	63%	19%	12%
OTHER (N=27)	N/A	N/A	77% (21)	OTHER (N=24)	N/A	N/A	71% (17)

*The difference between 100% and the sum of the percentages in each row indicates the no success of prosecuting "other charge." Thus, the no success rate in prosecuting "other charge," when the initial charge was "rape" (under old law) is 5% = (100%)–(37% + 23% + 35%).

convictions of other offenses. Formerly, 35% of initially filed rape cases were convicted of other offenses.[262] Now, only 15% of rape filings result in convictions of other crimes. In other words, the increase in the rape win rate simply reflects a change in labelling of the conviction. Rape cases that under the old law (when there was only one degree of culpability) resulted in convictions of, for example, assault, are under the reform law being convicted of rape 2 or 3. However, the overall conviction rate (*i.e.*, rape plus other offenses) is constant: 72% before (37% + 35%), and 71% after (56% + 15%).

Increasing rape convictions was one of the principal motivations of law reform advocates. This objective has been achieved. However, this does not mean that the total pool of offenders has expanded, only that within it there is more precise labelling.[263] The new statute, then, is not a bigger mousetrap, only a better mousetrap. The symbolic significance of calling a convicted defendant a "rapist" rather than "assaulter" should not be underestimated.[264]

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strictly correct to speak of "impact" or "effect" on conviction to the extent that such terms imply causation. At most, one can only conclude that legal reform correlates—not necessarily causes—changes in convictions (or in charging). It is in this sense that "impact" is used in the text.

The cases initially charged with other offenses (27 before, 24 after) can serve as a "control" group to test the correlational effect. The reform law pertains only to rape, and cases so charged show an increase in rape convictions. The reform law does not, however, deal with other offenses (*e.g.*, assaults), and the conviction rate for such cases (the "controls") show virtually no change from before to after (77% v. 71%). They provide a comparison baseline for assessing the effect of the law on rape convictions.

The particular statutory provision that correlates with conviction cannot be empirically determined. It would seem, though, that the enhanced prosecution success is not related to the evidentiary rules. Even before the new statute was enacted, Washington courts had abolished the corroboration requirement and excluded evidence of victims' prior sexual history. It is probably more likely related to the gradations of the crime, the new distribution of penalties, or both.

262. In support of the establishment of degrees of rape, it is often said that juries under the old law had to acquit rather than convict in instances of lesser culpability. This undoubtedly occurred in some cases. The more common result, as these data show, was to convict of another lesser offense when that option was available. The jury, in effect, created its own lower degree of "rape."

263. This relabelling has occurred primarily in the less aggravated cases. Under the new law, the most successful prosecutions are those filed under rape 1. Their conviction rate for rape is 66%. Of the 39 cases in which forcible rape was charged under the old law, 21 (or 53%) were of an aggravated nature. These cases could have been filed as rape 1 had the new law been in effect; under the old law 61% of them resulted in rape convictions, approximately the same conviction rule as for rape 1 cases. Thus, prosecutors have been highly successful in securing rape convictions in "hardcore" cases regardless of the substantive law. The more aggravated the circumstances, the less probable the inference of victim consent, and the more likely a conviction.

264. Nonconsensual intercourse is considered criminal because of the outrage committed on the victim's personhood, and the infringement of the individual's freedom of choice. If the reason for punishment was mainly the physical violence involved, the crime would be simply a species of assault. To highlight the outrage involved, many women victims prefer to see their assailants convicted of third degree rape rather than first or second degree assault, even though the penalty for the rape offense is much lower. Johnson Interview, *supra* note 179. The rape label carries far more social

Reform proponents assert that rape convictions are unusually low and, therefore, indicative of "a law gone awry."[265] A criminal statistic cannot be adjudged high or low by itself but only in relation to other figures used as baselines.[266] The "very low"[267] rape conviction rate must be measured over time and against conviction rates for equivalent[268] violent offenses. The bottom half of Figure 2 presents the overall conviction rates for forcible rape and aggravated assault on a national basis from 1961 to 1977.[269] It is obvious that each offense trend is best fit by a straight line. This means that the conviction rate for both offenses, even during the 1965–75 "crime wave" period, remains relatively stable[270] when seen in longitudinal perspective. Moreover, the conviction trend for assault is only slightly higher than for rape, with a temporary deviation in 1969 (the apogee of the reported crime upsurge)[271] when the difference reached 9%. Otherwise, during this entire period, the average conviction rate for assault is 59%, and for rape 57%. Since the evidentiary difficulties in prosecuting rape are typically greater than in assault, it is notable that their respective conviction rates are not more discrepant.[272]

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stigma than assault. Indeed, to brand someone as a rapist is a kind of "status degradation," whereby he is "transformed into something looked on as lower in the local scheme of social types. . . ." Garfinkel, *Conditions of Successful Degradation Ceremonies*, 61 AM. J. SOCIOLOGY 420 (1956). More accurate identification of rapists *qua* rapists teaches others that society deems this form of conduct to be criminal.

265. VA. Note, *supra* note 3, at 1500.

266. Conviction rates must be considered in relation to the figures used as baselines. Some commentators report conviction rates based on total rape complaints or arrests. BATTELLE-LEAA FORCIBLE RAPE, *supra* note 3, at 2–4 (rape convictions in Seattle and Kansas City are less than 2 percent of the total rapes reported); Chappell & Singer, *supra* note 245, at 246 (in New York City, "In no recent year have more than 8 percent of rape arrests resulted in rape convictions."). Although there is no inherently correct baseline for comparison, the use of complaint and arrest rates can be misleading, since a high proportion of cases are screened out before they are presented for charging.

267. Berger, *supra* note 7, at 6.

268. The convictions rate for all Index Crimes (including property offenses) has been used as a standard of comparison. Berger, *supra* note 7, at 6. But prosecuting rape is not the same as prosecuting burglary or auto thefts. Even so, over time, the two rates converge: in 1977, they are the same. UCR 1977 at 216.

269. The national conviction rate for forcible rape in 1977 was 60%. The rate in King County was 72% for the period of this study, but this figure includes statutory rape convictions. Excluding these cases, the local conviction rate is 63%. Hence, disposition of charges as well as factual circumstances of the crime are representative of national patterns, enhancing generalizability of the conclusions of this study.

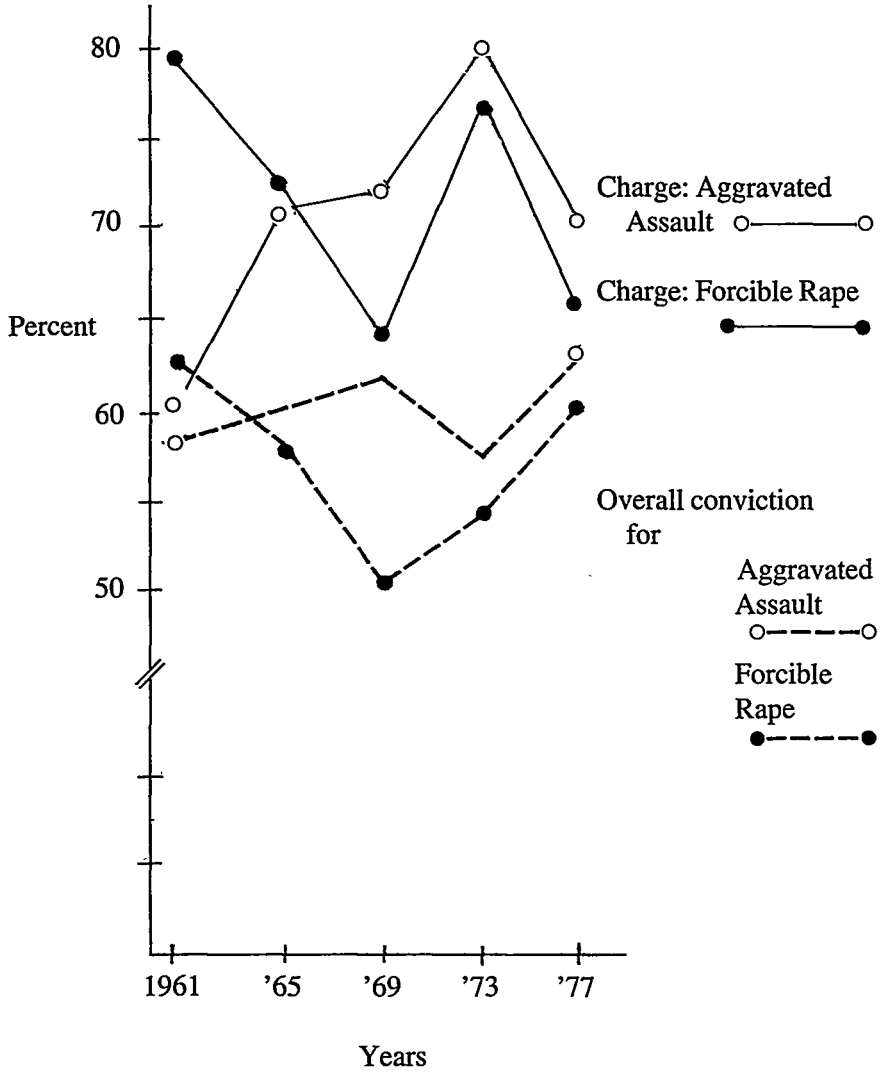
270. The constancy in convictions during the crime wave decade provides indirect support for the possibility that the increase in rape represents primarily an increase in reporting, not an increase in the actual incidence of the crime. *See* note 168 and accompanying text *supra*.

271. *See* Figure 1 *supra*.

272. During this 16-year time span rape convictions have consistently averaged only 10% below convictions for homicide, which is the most successfully prosecuted violent offense. In view of the unique problems of rape prosecution, and the not substantially higher conviction rates for other, more easily prosecuted violent offenses, it cannot be said that rape convictions are disproportionately low.

Figure 2

Percent of Charges (of those arrested) and Overall Convictions (of those charged) for Forcible Rape and Aggravated Assault on National Basis from 1961 to 1977.



Note: These figures are taken from Uniform Crime Reports for the indicated years. "Overall convictions" include convictions (by plea or after trial) for the initially charged offense and for lesser offenses.

The results for statutory rape prosecutions are presented in the second row of Table 1. The pattern is identical to that of forcible rape. Under the reform legislation, there is an increase of 15% (42% to 57%) in statutory rape conviction, but the non-conviction rate remains the same (15% before, 17% after). There is also a decrease of 12% (36% to 24%) in other convictions. This again suggests that the reform law has resulted in a relabelling of assault and other offenses as statutory rape convictions. The overall conviction rate remains relatively stable[273] (78% before, 81% after). It is somewhat higher than that of forcible rape (72%), as would be expected when nonconsent is conclusively presumed and the offense is consequently easier to prove.

Most felony charges are disposed by plea.[274] Rape is no exception, although pleas to it are much less frequent than for other crimes. Table 2 presents the plea dispositions of the various initial charges. The overall proportion of pleas in forcible rape cases (top row) is only slightly lower from before to after: 62% (28% + 34%) to 55% (39% + 16%). This variation is probably within the range of chance and no substantive significance can be attached to it.[275] The content of the plea, however, shows a

273. The fact that conviction rates (not only for rape, but for other offenses such as assault and homicide as well) are basically stable, suggests the possibility of a natural ceiling. The source of this idea is Durkheim's proposition of a stable, optimal level of crime in every society. Society requires some normative code of conduct in order to maintain social order. Labelling certain conduct as deviant or criminal is necessary to define and reinforce the normative code, but can undermine social stability if it is done excessively. There is thus an optimal level for the amount of conduct society labels as deviant. E. DURKHEIM, THE RULES OF SOCIOLOGICAL METHOD 66–68 (1964).

Because criminal conduct is formally identified by conviction, Durkheim's idea can be extended to explain a stable level of convictions. Changes in conviction rates are not consciously regulated but reflect the interaction of different social processes. In Durkheim's view, sharp increases in reported rape would lead to a temporary increase in convictions, but the balance would be restored by less vigorous prosecution of nonaggravated cases. Decreases in reported rape, on the other hand, would produce an interim drop in convictions, but more aggressive prosecution would return convictions to its optimal level. If too many persons are labelled as rapists, the basic stability of society is undermined. Likewise, if too few persons are so labelled, the rule proscribing such conduct is weakened and social order is threatened. Hence, societal processes operate to maintain a constant level of conduct labelled deviant, evidenced by a constant level of convictions. The same reasoning applies *a fortiori* to charging.

The present data indicate that the proportion of convictions (whether for rape or other lesser offenses) of those initially charged with rape is at or near the built-in upper limit. The 72% rate is constant. However, within this stable pool, the labelling of "rapists" has not yet reached the optimal ceiling. The 19% increase indicates there is (or was) room for additional labelling.

For applications of Durkheim's theory in other contexts, *see* K. ERIKSON, WAYWARD PURITANS 3–29 (1966); Blumstein & Cohen, *A Theory of the Stability of Punishment*, 64 J. CRIM. L. & CRIMINOLOGY 198 (1973).

274. Plea rates vary by offense, with homicide and forcible rape at the low end. Y. KAMISAR, W. LAFAVE, & J. ISRAEL, MODERN CRIMINAL PROCEDURE 11 (4th ed. 1974).

275. The "control" group of cases charged with other offenses also shows a decline, from 59% to 54%. Assuming that this 5% drop represents the error margin, the "true" decrease in rape pleas is 2% (=7% − 5%).

TABLE 2
DISPOSITION BY PLEA OF INITIAL CHARGE

UNDER OLD LAW

PLEA TO:

INITIAL CHARGE:	RAPE &/OR CARNAL KN.	OTHER CHARGE
RAPE (N=106)	28% (30)	34% (36)
CARNAL KN. (N=36)	33% (11)	35% (12)
OTHER (N=29)	N/A	59% (16)

UNDER NEW LAW

PLEA TO:

INITIAL CHARGE:	RAPE 1, 2, 3 &/OR STAT.R. 1, 2, 3	OTHER CHARGE
RAPE 1, 2, 3 (N=122)	39% (48)	16% (19)
STAT.R. 1, 2, 3 (N=46)	45% (21)	24% (11)
OTHER (N=24)	N/A	54% (13)

	PLEA TO:		
	R1/SR1	*R2/SR2*	*R3/SR3*
R1 (N=41)	25%	17%	7%
R2 (N=79)	–	18%	13%
R3 (N= 2)	–	–	–

	PLEA TO:		
	SR1	*SR2*	*SR3*
SR1 (N=13)	15%	–	–
SR2 (N=17)	–	65%	–
SR3 (N=16)	–	–	50%

distinct shift. Defendants are more likely now to plea to rape or statutory rape than to another charge, just as they are more likely to be convicted of the charged offense rather than of assault. Pleas to rape or statutory rape are up by 11% (28% to 39%), whereas pleas to other charges are down by 18% (34% to 16%). Almost one-half of rape 1 charges are disposed by plea (25% + 17% + 7% = 49%), compared to about one-third of rape 2 charges (18% + 13% = 31%). The more serious the degree of the offense and the more severe the penalty, the more likely a defendant is going to plea than risk a trial. As law reform proponents had hoped, calibrating degrees of rape has enhanced substantially the negotiating flexibility of the prosecutor.

The pattern of pleas to statutory rape is the same as for forcible rape. Total pleas remain unchanged: 68% before, 69% after. There is a 12% increase in pleas to statutory rape[276] (33% to 45%) and an 11% decrease in pleas to other offenses (35% to 24%).

The slight decline in total pleas has been accompanied by a small increment in the number of forcible rape cases that go to trial. Before, 22% went to trial; now it is 30%. The proportion of statutory rape charges that go to trial is much smaller.[277] The conviction rate for rape or statutory rape after trial has risen 17% (37% to 54%).

2. *Sentencing*

The sentencing innovation wrought by the reform law was to match punishment to culpability. The sanctions prescribed for the degrees of rape are generally more lenient than under the prior one-degree rape law.[278] The women's lobby wanted more to enhance apprehension and conviction of suspects than to visit harsh retribution on convicted offenders.[279] This approach was sound from the perspective of general deterrence.[280] "Severity acting alone is not associated with lower rates of

276. The small number of cases precludes reliable statements regarding the rates of plea by degree of statutory rape.

277. Before enactment of the reform law, 3 out of 33 cases, or 9%, went to trial: thereafter, 9 out of 46 cases, or 19% did so. Because of the small numbers, these figures may not be reliable. The number of other charges that went to trial is also too small for reliability, and is not presented.

278. The possible exception is punishment for first degree rape, which excludes any deferred or suspended sentences unless for commitment to inpatient treatment. WASH. REV. CODE § 9.79.170(2)(1979). Such sentences were permissible under the old law. Ch. 154, § 122, 1973 Wash. Laws 1198 (repealed 1975).

279. Griswold Interview, *supra* note 84.

280. General deterrence refers to the capacity of the criminal law, via the threat of sanctions, to make citizens law-abiding. Andenaes, *supra* note 77, at 179. Special deterrence, in contrast, refers to "the threat of further punishment of one who has already been convicted and punished" in order to render him less likely to recidivate. Morris, *Impediments to Penal Reform*, 33 U. CHI. L. REV. 627,

crime."[281] There is "anecdotal but persuasive" evidence[282] that an increase in the certainty of detection, prosecution, and punishment has greater general preventive effect than an increase in the severity of punishment.[283] Moreover, severe penalties not attuned to degree of culpability are thought to reduce the likelihood of conviction, thereby defeating the statutory purpose.[284]

Sentences under the new law reveal striking changes. Deferred and suspended jail sentences have decreased threefold compared to under the common law statute (42% before, 17% after).[285] Punishment is clearly more certain now—fewer offenders are being released. Mindful of the crime control climate that produced the rape law reform movement, judges are stricter in sentencing. This strictness does not necessarily mean sending more rapists to prison. In fact, the incarceration rate has declined slightly (35% before, 27% after). The emphasis instead is on rehabilitation. The commitment to inpatient sexual offender treatment facilities has more than doubled (22% to 55%). Courts are reflecting the public mood that rapists should be certain of conviction and confinement (including treatment), but not necessarily of harsh imprisonment terms (at least in nonaggravated cases).[286] It is this kind of pattern, according to general deterrence theory, that should eventually result in a lower incidence of crime.

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632 (1966). In both, the essence of deterrence or prevention is threat. *See generally* F. ZIMRING & G. HAWKINS, DETERRENCE 91–248 (1973).

281. Antunes & Hunt, *The Deterrent Impact of Criminal Sanctions: Some Implications for Criminal Justice Policy*, 51 J. URB. L. 145, 158 (1973). Because of the limited empirical evidence, others are more cautious in their assertions, saying only that the deterrent effect is "doubtful" or "equivocal" at best. S. KADISH & M. PAULSEN, CRIMINAL LAW AND ITS PROCESSES *BB 16:2* 31 (3d ed. 1975)(hereinafter KADISH & PAULSEN). Substantial increases in punishment for rape have been shown to have no effect on the frequency or aggravated circumstances of the crime. Schwarz, *The Effect in Philadelphia of Pennsylvania's Increased Penalties for Rape and Attempted Rape*, 59 J. CRIM. L. C. & P.S. 509 (1968).

282. KADISH & PAULSEN, *supra* note 281, at 30.

283. "[I]ncreasing severity in a condition of low certainty will have little effect on crime rates." Antunes & Hung, *supra* note 281, at 158. Since the effectiveness of the deterrence or threat must be judged from the viewpont of potential offenders, the certainty of these practices is important only as it contributes to the appearance of certainty—that is, how they are perceived by the public. Andenaes, *supra* note 77, at 970. The combination of certainty and severity may produce the maximum general deterrence.

284. *See* note 77 *supra*.

285. The percentages in this section of the text are based on 124 cases in the before data and 143 in the after data.

286. Actually, judges usually issue sentences recommended by the prosecutors. There is an average overlap of 90% between the two in the present study. In the few instances in which judges differ from prosecutors, it is in the direction of greater leniency. Since the new law, the KCPA has followed a policy of recommending deferred sentences of at least 5 years conditioned upon successful inpatient treatment. Canova Interview, *supra* note 18; KCPA Policy, *supra* note 213, at § 1061(II)(B)(3).

The draconian sanctions of common law rape statutes were counterproductive in that they discouraged juries from convicting in other than the most "hardcore" cases. The severity of the sentence in practice was more formal than real.[287] If severity is measured by the number of convicted persons sentenced to incarceration,[288] this study suggests that sentences under the old law were no more severe than are sentences under the new law.[289] Nonetheless, the prescribed penalty is important from the deterrence viewpoint because it is the threat, rather than the imposition, of sanctions that is correlated with jury dispositions to convict. Juries may know of the penalty in the books, but normally they are unaware of actual sentencing practices. Now that life imprisonment is no longer possible, and penalties are scaled to the gravity of the crime, rape convictions are more frequent than before.

E. Impact of Rape Statutes on Charging

This section examines two related issues in the charging process. The first is the effect of the old and new statutes on the proportion of rape charges filed out of the total number of rape cases presented to the prosecutor. Without an increase in the number of cases charged, an overall increase in convictions—a prime objective of the reform legislation—is not likely to occur. The second issue is how prosecutors decide whether to charge and what to charge in a particular case. By identifying and weighing the factors used by prosecutors, it will be possible to reconstruct empirically the decision making process. The resulting model provides an empirical basis for formulating guidelines for the exercise of charging discretion and for evaluating afresh the substantive law of rape.

287. Most offenders under the common law statutes were sentenced to far fewer years than the allowable maximum. BATTELLE-LEAA FORCIBLE RAPE, *supra* note 3, at 14.

288. Data on the years of incarceration were not available in the KCPA files. Prosecutors estimated that the average imprisonment sentence has not varied significantly. Canova Interview, *supra* note 18; Reich Interview, *supra* note 107, at 20.

289. There is little difference in terms of incarceration between those convicted of carnal knowledge under the old law and those convicted of statutory rape (all three degrees combined) under the new law. Before, 32% of the convicted offenders were imprisoned; now, 26% are imprisoned. Assuming that many of the rape cases under the old law would, if prosecuted under the new law, be charged as rape 1, *see* note 23 *supra*, there is again little difference in incarceration rates: 60% v. 63%. Most offenders who commit aggravated rapes (which are usually easier to prove) are going to be convicted and imprisoned no matter what the content of the statute. Finally, 29% of those convicted of other offenses under the old law were incarcerated; today the proportion incarcerated for rape 2, 3, and other convictions (many of whom, in the past, would have been convicted of assault) is 22%.

1. Initial Charge

Table 3 presents the distribution of initial[290] charges[291] under both statutes, and reveals that the reform law has had no impact on the proportion of cases charged. Before enactment of the new law, 51% of all complaints were filed as rape and 16% as carnal knowledge. Today, despite the substantial increase in the number of complaints presented by the police for prosecution and the refinement in the definition of rape designed to enhance prosecutorial flexibility,[292] the experience under the reform law is the same: 51% are filed as rape[293] and 19% as statutory rape[294] (combining the three degrees in both offenses). Other charges also remain essentially unchanged (13% before, 10% after).[295] The proportion of rape complaints declined for prosecution is nearly identical: one out of five.[296]

290. The initial (rather than final or reduced) charge is the primary focus in the study of the exercise of charging discretion. *See* text accompanying note 222 *supra*. As a result of pleas, there are fewer final rape charges than initial rape charges, and more final other charges and declines or dismissals than initially. Under the old law (N = 201), the distribution of final charges was as follows: 25% rape, 8% carnal knowledge, 35% other charge, 31% decline/dismiss. Under the new law (N = 213): 32% rape, 13% statutory rape, 22% other charge, 33% decline/dismiss.

291. Most cases (134 of 208 before; 93 of 237 after) were charged with one or more offenses in addition to rape. They were normally prosecuted as rape cases. In this study, a case filed as rape 2 and robbery, for example, would be coded as initially charged with rape 2. "Other charge" includes those cases in which only a charge other than forcible or statutory rape was filed, despite the founded complaint of rape.

292. Prior to the reform, 208 such complaints were made during a three and one-half year period. In a two and one-half year period thereafter, there were 237 such complaints.

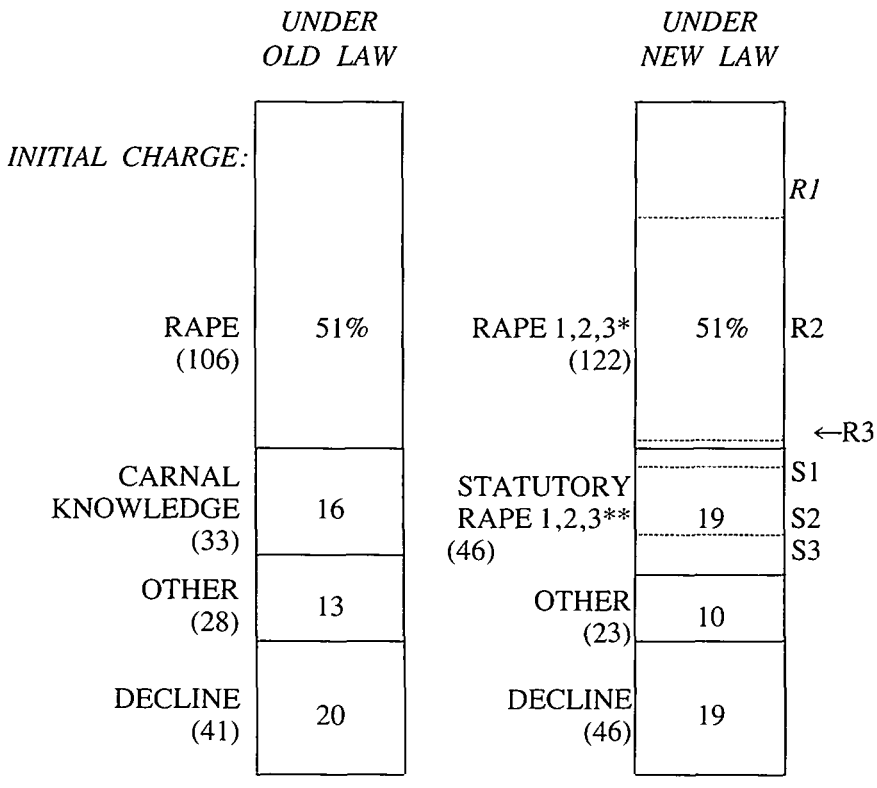
293. Of the three degrees of forcible rape, rape 2 is charged twice as often as rape 1. Rape 3 is virtually never filed. It is primarily a residual category for plea bargaining (Table 3). In effect, then, for initial filing purposes there are only two degrees of forcible rape.

294. Unlike forcible rape, all three degrees of statutory rape are filed. The second and third degrees are charged more frequently than the first. *See* figures at the bottom of Table 3.

295. Although the overall proportion of other charges before and after the reform is about the same, the types of other charges vary. Under the old law, there were a total of 134 cases (out of 208) that contained some other charge(s), distributed as follows: 40% were for other sex crimes (sodomy, indecent liberties, etc.), 34% were crimes against a person (assault, kidnapping), 29% were crimes against property (robbery, burglary, trespass), and 4% were miscellaneous offenses. Under the new law, the 93 cases with other charge(s) (out of 237) consisted of: 29% other sex crimes, 29% crimes against a person, 32% crimes against property, and 10% miscellaneous. There are fewer sex crimes as a result of the sex-neutral definitions and gradations of culpability. A case formerly filed as sodomy would now be filed as rape. Charges of crimes against a person have also decreased; assaults, for example, would now be filed as rape 2. However, property crimes and miscellaneous charges increased correspondingly, so that the overall proportion of other charges relative to rape charges is unchanged. The pattern of other charges in relation to the age of the victim differs in that other sex offense filings are more common in statutory rape cases, while personal and property crime filings are more common in forcible rape cases.

296. To refine this analysis of charging, Appendix E presents the distribution of charges under both statutes according to the victims' age. With adult victims, the proportion of charges and declines is basically constant. The lowering of the age of nonconsent increased the number of adult victims, from one-half to two-thirds of the population. Nonetheless, the proportion of forcible rape charges is about the same (65% before, 68% after). We already know that total convictions did not change

TABLE 3
PERCENTAGE AND (NUMBER OF CASES) OF INITIAL CHARGES FILED



* RAPE 1 (40) 17%
RAPE 2 (80) 33
RAPE 3 (2) 1
TOTAL: (122) 51%

** STAT. RAPE 1 (10) 4%
STAT. RAPE 2 (18) 7
STAT. RAPE 3 (18) 7
TOTAL: (46) 19%

As shown earlier, the factual circumstances of rape cases in the two time periods of this study match rather closely. There are practically no noteworthy distinctions in the setting, circumstances, and evidentiary background,[297] or in the personal characteristics of victims and suspects,[298] between the cases presented for prosecution before and after the law reform. The stability in charging rates suggests that prosecutors (who normally would not file unless they believed a conviction could be secured) are applying the same "convictability" standard now as before the law was changed.[299]

Given the consistency in charging and similarity in fact patterns, it is not surprising to find that the total conviction rate also remains the same.[300] The reform law, then, has not affected the proportion of cases charged or declined, nor has it affected the proportion of cases convicted. The percentage of persons out of the total pool of rape complaints who are deemed "offenders" (by charge or conviction) has remained relatively constant.

(Table 1). Thus, contrary to initial concerns of prosecutors, converting a substantial number of statutory rape cases into forcible rape cases has not adversely affected prosecution (charging or conviction) despite the additional burden of proving nonconsent. In fact, prosecutors should have been able to predict that outcome. Under the old law, they were already charging over one-third of the suspects in juvenile victim cases with forcible rape when they could have charged them with carnal knowledge (Appendix E). With the new law lowering the statutory age, prosecutors were simply obliged to charge what they had always charged in the past at their own discretion.

With respect to juvenile victim cases, the distribution of rape charges differs. Before, 33% were charged with carnal knowledge; afterwards, statutory rape charges increased to 54%. Under the new law, fewer cases are filed as forcible rape (36% before, 20% after) and as other charges (18% before, 12% after). This change may simply reflect the age of nonconsent, since forcible rape was more likely to be charged in cases involving older (16–18) victims. *See* note 237 and notes 23–64 and accompanying text *supra*. The proportion of juvenile victim cases perceived to be nonconvictable remains the same: 13% were declined before, and 14% after.

297. *See* Appendix C.

298. *See* Appendix B.

299. Deputies in the KCPA believe, and claim, however, that since the implementation of the new law, the office has adopted a more aggressive prosecutorial posture. It has bolstered its prosecution capability by establishing a specialized Sexual Assault Unit, recruited more women deputies, sensitized its staff to the unique problems posed by rape, and pursued a tougher enforcement policy. According to the Unit chief, cases that in the past might have been declined or charged with a lesser offense because of their marginal evidentiary basis, might now be filed as a lower degree forcible or statutory rape. Canova Interview, *supra* note 18. If prosecutors are in fact more aggressive in filing, that is, if they are applying a lower convictability standard, then an increase in rape charges ought to ensue given the unchanged evidentiary strength of the cases.

The results of this study suggest that "convictability," unlike probable cause, is a standard that does not leave much room for the exercise of discretion. So long as the fact patterns of the complaints are essentially the same, and prosecutors rely on these facts to the same extent before and after the reform, the filing outcome can be expected to stay the same. Prosecutors today might be more solicitous of and sensitive to the needs of victims than their predecessors, but this attitudinal change does not necessarily translate into a filing change if the record is bereft of the evidence needed to prevail.

300. *See* Table 1 and text following note 262 *supra*.

Rape law reform advocates have asserted that charges, like convictions, of rape are disproportionately low.[301] The top half of Figure 2 plots national trends of forcible rape and aggravated assault charges as percentages of those arrested for each offense from 1961 to 1977.[302] In 1969, filings of assault were indeed 10% higher, but in 1961, rape filings were even higher. Averaging over the highs and lows of the entire time period, the charging rates of rape and assault are identical: 71%. Except for temporary oscillations (± 10%), the proportion of persons in society identified as probable offenders stays relatively unchanged over time, thereby ensuring social stability.[303]

2. *A Decisionmaking Model of the Charging Process in Forcible Rape*

In order to formulate a decisionmaking model of charging in rape cases, a three-step statistical analysis was undertaken.[304] The results of each step will be described sequentially.

a. Identifying the factors.

The first step was to condense the 50 or so items of information (variables) available for each case,[305] which were assumed to be related to charging, to a more limited number of homogenous clusters of variables (called factors). Using the technique of factor analysis,[306] all of the vari-

301. *See* note 265 *supra*.

302. In 1977, the national charging rate for forcible rape was 65%. Under the new law (1975–77) the KCPA charging rate is nearly the same, 68% (Appendix E, forcible rape cases only).

303. *See* note 273 *supra*.

304. Despite entreaties for systematic study of these factors (*see* Kaplan, *supra* note 202, at 193), only two investigations have been conducted with respect to rape filings. Weninger, *supra* note 11 (based on case files); BATTELLE-LEAA PROSECUTOR SURVEY, *supra* note 4 (based on opinion interviews). One commentator doubts that these factors "lend themselves to much meaningful systematization." Abrams, *supra* note 203, at 11. Prosecutors, too, say that each case is unique and generalizations about charging factors cannot be made. Yet, there is no reason to suppose that charging, as a cognitive process, is any different from other types of decisionmaking that have been shown to reflect certain constant factors (*e.g.*, sentencing, parole release). *See, e.g.*, J. HOGARTH, SENTENCING AS A HUMAN PROCESS (1971); *Project, Parole Release Decisionmaking and the Sentencing Process*, 84 YALE L.J. 810 (1975). One needs to look at large numbers of cases and enlist the aid of multivariate statistical techniques that weigh the independent and combined effects of multiple variables in order to uncover the common patterns of human behavior hidden beneath the welter of individual case details.

305. These variables are found in the questionnarie, Appendix A: for Card I, variables 33 to 80 (excluding the following: 35–36, 41–46, 47–52, 53–54, 56–59, 76 to 78); for Card II, variables 5 to 28.

306. *See generally* P. HORST, FACTOR ANALYSIS OF DATA MATRICES (1965). There are several variations in the method of condensing variables into factors. The one used here is the most common type: principal axes analysis with Varimax rotation. It is the procedure that extracts the most variance for any set number of factors. J. NUNNALY, PSYCHOMETRIC THEORY 316 (1967).

ables are intercorrelated, and a small number of independent clusters that "hold together" are identified. Each cluster or factor reflects a distinct conceptual dimension.

The results under the old law and under the reform law were similar, so only the latter are presented.[307] In the prosecution of forcible rape, five factors were identified (in descending order of importance):[308] physical force (both aggravated and nonaggravated),[309] social interaction between suspect and victim prior to alleged rape, corroborative evidence, victim credibility, and race. In prosecution of statutory rape, the following five factors emerged (in descending order of importance):[310] corroborative evidence, social interaction, nonaggravated physical force, suspect and victim credibility, and race. The similarity in before and after data factors indicates that prosecutors use the same set of factors regardless of the governing substantive law. Thus, in forcible rape prosecutions, under both statutes, force is the primary factor and social interaction is secondary. It should be noted, however, that the five factors explain most of the statutory rape prosecutions (92% of the variance), but only somewhat more than one-half of the forcible rape cases (58% of the variance). Pro-

307. *See* Appendix F. Under each extracted factor are the percentage of variance explained by that factor, and the variables with the highest factor loadings used to define the factor. For example, in the factor analysis of adult victim cases, the fifth factor of race accounts for 11% of the variance. The two principal variables that compose this factor are race of suspect (with a loading of .91) and race pairing (with a loading of .87). These loadings are correlations between the individual variable and the composite factor. High loading variables (only these are listed in Appendix F) are the principal determinants of the given factor. One looks at these variables to interpret and label the factor. For a complete description of each of these listed variables, see Appendix G. For example, "race pairing," presented in Appendix G (item 7–C), refers to race (white/minority) of suspect of victim, and consists of four possible pairing combinations.

308. The study of rape prosecutions in Texas examined the effect of several similar variables: force/resistance, prior social contact, prior social relationship (the preceding two variables combined to form the social interaction factor in the present study), and medical corroboration. They were not empirically generated, but were chosen *a priori*. Weninger, *supra* note 11, at 371–73.

309. Statistically, aggravated and simple physical force are highly correlated and form a single factor. Conceptually, however, they should be kept separate because aggravation is the statutory element that distinguishes rape 1 from rape 2. It is defined by the presence of a deadly weapon, kidnapping, serious physical injury, or felonious entry. WASH. REV. CODE § 9A.44.040 (1979). Hereinafter, the force factor will be separated into aggravated and nonaggravated components.

Force and resistance have been treated separately in rape law. Empirically, however, they are highly interrlated. The greater the physical force, the more the resistance (product-moment correlation = .58). *See* text accompanying notes 255–56 *supra*. In defining "forcible compulsion" as "physical force which overcomes resistance," Washington reform law reflects the practical reality that one does not occur without the other in most cases. WASH. REV. CODE § 9A.44.010(5) (1979). Thus, regardless of the legal standard, proof at trial will be the same. Evidence of force almost always entails evidence of resistance, and vice versa. In this study, the factor of physical force will be understood to include victim resistance.

310. *See* bottom half of Appendix F.

secutions of forcible rape are more complex, and not all of the determining factors can be statistically identified.

b. Correlating aggregated factors with charging.

Grouping of similar variables into factors does not say anything about their correlation with an external criterion such as charging. The second step, then, was to ascertain that these factors as a whole are indeed associated with charging.

This was accomplished by summing the various factors to create a "convictability scale."[311] If there is an association between the factors and charging, one would expect the degree of convictability according to this scale to be correlated with charging. When a prosecutor screens a case and evaluates the array of available information (mostly condensable into five factors), the assumption is that he adds the information together to determine whether and what to charge. The more pertinent evidence available, the more convictable the case at trial, and therefore the more likely a rape charge. Table 4[312] confirms the positive linear relationship between convictability and charging under both the old and reform statutes.

Three results should be noted. First, this simple scale is a fairly accurate predictor of charging. Given any case in the after data a charge of statutory rape, other offense, rape 2 or 3,[313] or decline of charge can be predicted on the average with better than even chance. The accuracy rises to 78% for rape 1 charge. This means that prosecutorial decisionmaking

311. The scale was composed of 23 variables that appeared under one or another of the five factors (Appendix F), regardless of the size of their factor loadings. A basic principle of measurement theory is that the longer a test, the more reliable it is (*i.e.*, the greater the number of variables, including variables with low loadings, the more reliable the scale). J. NUNNALLY, *supra* note 306, at 223–25. These variables are listed in Appendix G. The scale scores could range from 0 to 38. For example, the variable "verbal resistance" was scored 1 if yes, 0 if no; "attempted flight" was 1 if yes, 0 if no; and so on. For each case, the values of each variable were summed to produce the convictability score. The higher the score, the more convictable the case. These scores were categorized into four levels of convictability: low (0–11), moderate (12–14), high (15–22), and very high (23–38). *See* Table 4. The same procedure was applied to the before-and-after data.

312. The notations at the bottom of the table signify the following: the chi-square (x^2), with a value of 142.1, tests the statistical significance of the association between the two measures, convictability and charge. With 12 degrees of freedom (df), the probability (p) of this relationship occurring solely by chance is negligible (1 in 10,000). The contigency coefficient (C) is another way of expressing the relation between two measures. It ranges from zero (no association) to an upper limit near unity (about .80), depending on the number of cells per table. A coefficient of .61 would be considered very high. *See generally* S. SIEGEL, NONPARAMETRIC STATISTICS FOR THE BEHAVIORAL SCIENCES, 104–111, 196–202 (1956). hereinafter, these same notations will be used in presenting statistical analyses.

313. Rape 2 and 3 charges in this analysis and subsequent ones will be combined since there were only two initial filings of rape 3.

TABLE 4

Relationship Between "Convictability" and Charge

UNDER OLD LAW

Charge

Convictability	Carnal knowledge	Decline	Other	Rape	
very high	(2)	(3)	(5)	46% (49)	
high	(3)	(16)	46% (13)	42% (44)	
moderate	(6)	44% (18)	(2)	(7)	
low	67% (22)	(4)	(8)	(6)	
N =	33	41	28	106	208

$x^2 = 80.4$, 9df, $p = .00001$, $C = .53$

UNDER NEW LAW

Charge

Convictability	Statutory Rape	Decline	Other	Rape 2,3	Rape 1	
very high	(1)	(4)	(6)	(18)	78% (32)	
high	(8)	(10)	48% (11)	58% (47)	(8)	
moderate	(10)	54% (25)	(4)	(10)	(1)	
low	59% (27)	(7)	(2)	(6)	(0)	
N =	46	46	23	81	41	237

$x^2 = 142.1$, 12df, $p = .00001$, $C = .61$

can be simulated by an additive scale.[314] This scale makes intuitive sense because degrees of rape imply a continuum of culpability, and the more incriminating factors present, the higher the charge.

Second, the same linear trend occurs in the before data.[315] This suggests, as did the data on proportion of charges and the factor analysis, that prosecutors employ the same convictability standard in screening cases irrespective of the law of rape. As a practical matter, certain factors must be present in order to win at trial, and these remain unchanged despite reforms in the legal elements of the crime.

Third, the "convictability" of carnal knowledge and statutory rape cases is low. Even declined forcible rape cases, were they to be prosecuted, would be more likely to succeed. The possibility of abolishing statutory rape or lowering further the age of nonconsent was considered by the Washington legislature.[316] The enactment of either notion would have resulted in a drop in convictions. The fact that convictions are presently obtained at all despite the judgment that juvenile victim cases are much weaker than forcible rape cases, indicates the importance of the conclusive presumption of nonconsent.[317]

c. Correlating individual factors with charging.

The final step in constructing a decisionmaking model of the charging process was to correlate individual factors with charging. This involved a two-pronged analysis. First, the association between the variable representing each factor and the charging outcome was examined by crosstabulation and its statistical significance was assessed by the chi-square test. This procedure identified those variables that have a significant impact

314. This simple scale serves the purpose of showing the relationship with charging. However, more complex scales could be constructed (*e.g.*, by differential weighting of the factors) that would enhance substantially predictive accuracy. A practical application of this scale would be its adaptation for use in prioritizing rape cases for filing. A similar scale that assesses the gravity of offenses, based not on legal definitions of the crime but on practical factors such as extent of injury, intimidation, criminal history of the suspect, etc., was used in devising a computer-based management information system for prosecutors to prioritize pending criminal cases. *See* Hamilton & Work, *The Prosecutor's Role in the Urban Court System: The Case for Management Consciousness*, 64 J. CRIM. L. & CRIMINOLOGY 183, 185 (1973).

315. The lower accuracy of predictions in the pre-reform data can be attributed to the absence of gradations of the crime.

316. *See* Table 1 *supra*.

317. There is a positive correlation between age of juvenile victims and convictability (C = .40). The older the juvenile, the more convictable the case. This is why lowering the age on nonconsent to 16 has not adversely affected prosecution. *See* note 27 *supra*. The presumption is most needed for successful prosecution with child and younger adolescent victims.

upon charging.[318] For example, two significant variables were the "aggravating conditions" of the rape and the corroborative "circumstantial evidence." Crosstabulation shows that when aggravation is present the filing of a rape charge is more likely than when it is not.[319] The high statistical significance means that this relationship is unlikely to be a product of chance. The association between the presence of corroborative evidence and charging[320] is interpreted in a like manner.

These significant variables were entered into a stepwise multiple regression analysis to determine their respective relative impacts on charging decisions. This enabled the ordering of the variables, and the factors that they represent, in terms of their impact upon the different types of charges.[321] Whereas the chi-square test only indicates whether there is a significant correlation between any given variable and charging, the regression analysis reveals the differential effect of any variable compared to any other. For example, this analysis shows that "aggravating conditions" has a greater effect than "circumstantial evidence" in the prosecutor's decision to charge the suspect with first degree rape.[322]

A sequence of binary choices provides an ideal model of the charging process for forcible rape. Upon screening a case, the prosecutor initially

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318. *See* Appendix G. The chi-square values exclude the carnal knowledge and statutory rape cases (presented in separately marked columns) because they are sufficiently different from the other types of cases (*e.g.*, low convictability; *see* Table 4) that they need to be analyzed and discussed separately. The notation $p = n.s.$ in some of the tables means that the probability level is not statistically significant.

319. Appendix G, Table 1.

320. Appendix G, Table 4.

321. *See* Appendix H (after data) and Appendix I (before data). Multiple regression is a technique for predicting a dependent variable (the charge) from any number of independent variables (the 23 variables of Appendix G). It is based on the equation $Y = A + B_1X_2 + \ldots B_NX_N$, where Y is the dependent outcome, X is an independent variable, A is a constant, and B is the regression or beta coefficient. Beta represents the change in Y associated with a given change in one of the X's, while holding the remaining independent variables constant. The larger the beta of a given X, the more influential it is in predicting the Y. In the stepwise variation of multiple regression, the variable that is most predictive of the outcome is selected first, then the second most predictive variable is selected, and so on. The dependent variable consisted of paired comparisons of charges. The first charge of the pair is the charge of interest, and is compared against the other member of the pair. For example, the dependent variable "decline v. rape + other" means that the regression is examining the factors that influence non-prosecution, as compared to any rape charges and other charges. *See generally* H. BLALOCK, JR., SOCIAL STATISTICS 429–33, 450–53, 498–502 (2d ed. 1972). Separate regression analyses were performed for adult and juvenile cases in order to formulate separate charging models of forcible and statutory rape.

In describing the results in the text, the two sets of data were analyzed as follows: First, I looked at the regression analysis to identify the principal variables that influence the charge. The size of the beta coefficients indicates the relative weight of each variable. Next, I turned to the crosstabulations. The distribution of percentages shows the relationship between each of these variables and the charge.

322. Appendix H, Regression Analysis A.

decides whether to file or not to file. If he opts to file, then he decides whether to charge the suspect with rape or some other offense. If the charge is rape, he must choose between rape 1 or rape 2. The determinative factors of each of these choices are identified by regression analysis and summarized in Table 5.

Three main fact patterns are involved in an initial decision to decline prosecution. In descending order of importance, they are: (1) the absence of aggravation and the use of only moderate physical force (*e.g.*, few of the declined cases involved choking of the victim when compared to the charged cases);[323] (2) the lack of corroborative evidence (*e.g.*, there is a relative absence of circumstantial evidence[324] and identification witnesses[325] in the declined cases); and (3), the presence of a white victim and a minority suspect.[326] The first two elements are understandable. Absent convincing proof of the legal element of forcible compulsion and the practical requirement of corroboration, filing would be futile.[327] Selective enforcement based on judgments of convictability arguably represent good faith exercises of discretion.

More troublesome, however, is the influence of race in the decision not to charge. Under the old statute, it was primarily the minority victim/minority suspect cases that were declined.[328] Although prosecutors nationwide deny that race enters into their decision making,[329] studies have shown that in black intraracial assaults as well as in rapes, suspects

323. Appendix H, Regression Analysis C, shows that the principal predictor of non-prosecution is the (lack of) aggravation factor. It has the largest beta coefficient, .21. Next, Appendix G, Table 2b, shows the crosstabulation of the "degree of physical force" (one of the variables that constitutes the forcible compulsion factor) with the charges. 19% of declined cases involved high force (choking), compared to 43% of all charged cases.

Unless otherwise indicated, all the percentage differences from the crosstabulations reported in this and subsequent notes, and in the text, are statistically significant.

324. Appendix G, Table 4b. 61% of the declined cases lacked circumstantial evidence, compared with 15% of the filed cases.

325. Appendix G, Table 4e. 60% of the declined cases lacked identification witnesses, as opposed to 38% of the filed cases (averaging 35% + 44% + 22%).

326. 77% of the declined cases involved minority, mostly black, suspects, compared to only 41% of all prosecuted cases. Appendix G, Table 7a. 55% of the declined cases involved interracial couples, while only 29% of the filed cases did. Appendix G, Table 7c. This relationship between race and non-prosecution holds even after controlling for the effect of the following variables: aggravation, social interaction, and corroboration.

327. Declined cases also involved high social interaction and low victim credibility. *See* Appendix G, Tables 3a, 3c, 6a, & 6b. According to the Regression Analysis, however, these two factors are less important than aggravation, corroboration, and race.

328. Appendix G, Table 7c. 41% of the declined cases under the old statute involved a minority victim and a minority suspect, as opposed to 14% of the filed cases. Again, the relationship persisted after controlling for the possible influence of third variables: aggravation, social interaction, and corroboration.

329. Less than 1% of the surveyed prosecutors acknowledged that race was a factor in their charging decisions. BATTELLE-LEAA PROSECUTOR SURVEY, *supra* note 4, at 52.

Table 5
A Decisionmaking Model of Prosecutorial Charging
Under the New and Old Forcible Rape Law

INITIAL CHARGE UNDER *NEW LAW*:	STATUTORY FACTOR	DISCRETIONARY FACTORS				INITIAL CHARGE UNDER *OLD LAW*:
	FORCE	SOCIAL INTERACTION	CORROBORATION	VICTIM CREDIBILITY	RACE	
RAPE 1	AGGRAVATION	LOW	HIGH	MEDUIM/HIGH	*	RAPE
RAPE 2	LOW/MEDIUM	MEDIUM/HIGH	MEDIUM	MEDIUM/HIGH	*	
"OTHER"	LOW/MEDIUM	MEDIUM/HIGH	MEDIUM	MEDIUM/HIGH	*	OTHER
RAPE 3	LOW	(Residual plea bargaining category)				
DECLINE	LOW	HIGH	LOW	LOW	MINORITY RACE	DECLINE

*not relevant

are often released without charge.[330] Prosecutors claim black victims are unwilling to prosecute because such offenses are not deemed serious by black cultural norms.[331] Currently in King County, this kind of racial bias has disappeared in rape prosecution. Cases involving minority couples are not declined or charged more often than others.[332] At present, however, there is no adequate explanation for the increase in the failure to file charges in black suspect/white victim cases.[333]

If a decision to file is made, then the next choice is between rape or some other charge. The profiles of defendants charged with other offenses and with rape 2 are almost indistinguishable. Both involve low to medium forcible compulsion,[334] medium to high social interaction,[335] and victims who are at least moderately credible.[336] Race is not a factor.[337] These results explain the near identity in appraisals of convictability of rape 2 and other charge cases. In other words, prosecutors just as well could be filing rape 2 charges as assaults or some other sex crime. The fact that prosecutors do not file these other charges means either that their filing choice is not made on a generally consistent basis, or the statistical techniques employed do not discern the relevant factors.[339]

Once the prosecutor decides to file a rape charge, the choice of degree is determined easily. Rape 3 is filed rarely. The single most important

330. F. MILLER, *supra* note 201, at 174. *See also* Comment, *Prosecutorial Discretion in the Initiation of Criminal Complaints*, 42 S. CAL. L. REV. 519, 527 (1969). ("[I]t is the policy of some offices to be lenient in charging assault and sex offenses occurring within minority groups.")

331. According to one Detroit prosecutor, the "moral code among the Negro subgroup was so low that if all such offenses were prosecuted, the courts would be overloaded." F. MILLER, *supra* note 201, at 175 n.5.

332. Appendix G, Table 7c.

333. One prosecutor has suggested that the increase is the result of a temporary police attempt, begun in 1975–76, for a crackdown on prostitution by arresting pimps and presenting them for rape prosecution. The Sexual Assault Unit of the KCPA refused to prosecute these cases, in which the pimps were often black and the prostitutes were white. Canova Interview, *supra* note 18. It should be noted, however, that this explanation is not reflecting a change in the racial composition of suspects and victims in complaints from before and after the law was changed. *See* Appendix B.

334. Appendix G. Tables 2a & 2d.

335. Appendix G, Tables 3a & 3b.

336. Appendix G, Tables 6a & 6c.

337. Appendix G, Tables 7a, 7b, & 7c.

338. Appendix G, Table 4.

339. In interviews, prosecutors said that they filed other charges when there was no penetration, a central definitional element of rape. The data showed a higher frequency of lack of penetration evidence in other charges, but it was not statistically significant. Appendix G, Table 4a. The non-significance could be due to the small number of cases involving other charges. The only variable that distinguished these cases was the suspects' credibility. Whereas most rape suspects claim consent or mistaken identity, suspects charged with other offenses often raise the defense of prostitution or intoxication. Appendix G, Table 5b. It is not clear why these exculpatory claims result in other charges.

factor in charging rape 1 is aggravation.[340] This is not unexpected since it is, after all, one of the definitional elements of the crime. When there are aggravating circumstances there usually also is forcible compulsion,[341] the parties normally are unknown to each other,[342] corroborative evidence is substantial,[343] and the victim has considerable credibility.[344] Thus, the presence of aggravating circumstances renders the discretionary factors relatively unimportant. For the prosecutor, it is practically tantamount to a presumption of nonconsent by the victim.

In sum, because of the aggravated force, a rape 1 charge is readily predictable and filed in highly convictable cases. Two-thirds of rape 1 filings in fact result in rape convictions.[345] Declined cases are also easily predicted. The minimal levels of force and the minimal corroboration present in those cases render them the least convictable. Cases filed with rape 2 or other charges are of intermediate convictability. They have mid-range values on statutory and discretionary factors. As a result, only one-half of rape 2 filings lead to convictions for the substantive charges.[346]

The impact of Washington's reform legislation on the charging process has been negligible. The same five factors that currently are influential were relied upon and given approximately the same weight in the charging process under the previous statute. There are some differences,[347] but the similarities overshadow them. Before, as now, cases were declined when there was little force and little corroboration.[348] The factors that determined a rape charge were the same as the ones that now influence the filings of rape 1 and rape 2 charges. For example, 51% of former rape charges were against suspects unknown to victims; now, 48% of rape 1 and rape 2 charges are against strangers.[349] Before, there was circumstan-

340. Appendix H, Regression Analysis A (beta = .51). Appendix G, Table 1: 80% of rape 1 cases involve aggravation, compared to 18% of rape 2 and 3 cases.

341. Appendix G, Table 2b: 53% of rape 1 cases involve high force, compared to 36% of rape 2 and 3 cases.

342. Appendix H, Regression Analysis A (beta = .23). Appendix G, Table 3a: 61% of rape 1 cases involve strangers, compared to 42% of rape 2 and 3 cases.

343. Appendix H, Regression Analysis A (beta = .21). Appendix G, Table 4a: 55% of rape 1 cases have evidence of penetration, compared to 38% of rape 2 and 3 cases.

344. Appendix G, Table 6a, 6b.

345. *See* Table 1.

346. *Id.*

347. One difference, already discussed, is race. *See* notes 328–33 and accompanying text *supra*. Another is victim's chastity as an aspect of her credibility in determining a rape charge. Appendix I, regression analysis A (beta = .46). Now that prior sexual history is for the most part inadmissible, this variable is no longer taken into account in the filing process. *See* notes 88–95 and accompanying text *supra*.

348. Appendix I, Regression Analysis D. Appendix G, Tables 2b-e & 4b-e.

349. Appendix G, Table 3a.

tial evidence in 92% of rape filings; under the new law, circumstantial evidence is present in 84% of the rape 1 and rape 2 filings.[350] On the whole, the statistical evidence cannot be more persuasive that prosecutorial decisions to charge rape or not to charge at all have not been affected by the definitional overhaul of the common law rape statute. The consistency of the factors used by prosecutors and the weight attached to them before and after enactment of reform legislation further indicates that the factual proof required at trial has not been affected by the change in the statutory definition of the crime. Except for expressly excluded evidence such as prior sexual history, the same kinds of evidence are used to show nonconsent, regardless of whether the legal standard is framed in terms of the victim's resistance, the actor's force, or both.

3. A Decisionmaking Model of the Charging Process in Statutory Rape

Table 6 presents the effects of the two statutory and three discretionary factors on statutory rape prosecutions under the new law.[351] The presumption of nonconsent makes prosecution easier, so the charging process in juvenile victim cases shows a much clearer configuration than in forcible rape. Again, a possible analogue of the filing process consists of a sequence of choices: first, to decline prosecution or to file; second, if a charge is to be filed, then to charge statutory rape, forcible rape, or some other offense; and third, if statutory rape is charged to select the appropriate degree.

Like forcible rape complaints, statutory rape complaints are declined principally for want of corroboration and lack of physical force. In most declined cases, the suspect (modal age 20 years) is approximately the same generation as the putative victim (modal age 14–15 years). Prosecutors also perceive the complainant as in an uncooperative witness.[352] The prototypical case involves a consenting adolescent who is pressured by disgruntled parents to file a complaint against an older boyfriend. In these situations, prosecutors are taking consent into account in deciding not to file.

The next decision is to charge statutory rape, forcible rape, or some other offense. The use of physical force, although uncommon in juvenile

350. Appendix G, Table 4b.

351. The five factors are derived by factor analysis (Appendix F). *See* note 306 and accompanying text *supra*. The factor of race is not included in Table 6, because it only indicates that statutory rape is principally a white crime. Black suspects or interracial couples in juvenile victim cases are rare.

352. The respective beta coefficients for non-corroboration, the suspect's age, and the victim's credibility, are .24, .19, and .10. Appendix H, Regression Analysis F.

Table 6
A Decisionmaking Model of Prosecutorial Charging
Under the New Statutory Rape Law

INITIAL CHARGE	STATUTORY FACTORS			DISCRETIONARY FACTORS		
	FORCE	AGE OF VICTIM	AGE OF ACCUSED	SOCIAL INTERACTION	CORROBORATION	VICTIM CREDIBILITY
RAPE 1, 2, 3	HIGH	*	*	LOW	HIGH	MEDIUM/HIGH
OTHER	MED/HIGH	*	*	LOW-MEDIUM	HIGH	MEDIUM/HIGH
S.R. 1	NONE/LOW	≤ 10 yrs.	older (≥ 31 yrs.) adult	HIGH	MED/HIGH	MEDIUM
S.R. 2	NONE/LOW	11-13 yrs.	older (≥ 31 yrs.) adult	HIGH	MED/HIGH	MEDIUM
S.R. 3	NONE/LOW	14-15 yrs.	older (≥ 31 yrs.) adult	HIGH	MED/HIGH	MEDIUM
DECLINE	NONE/LOW	*	younger adult (≤ 30 yrs.)	MED/HIGH	LOW/MED	LOW

*not relevant

cases, is an important factor.[353] When forcible compulsion is present, mostly in cases involving 14–15 year old victims, the charge is either forcible rape or some other charge, but rarely statutory rape.[354] The distinguishable factor between forcible rape and other charges appears to be the extent of social interaction. Forcible rape is filed when the victim is credible and there is little or no prior social contact. The typical pattern involves a chaste mid-puberty juvenile (14–15 years) forcefully raped by an unknown, relatively young man (under 30 years).[355] Another charge is filed when, despite the suspect's use of some force and the victim's credibility, the parties are acquainted with each other. The suspect in this situation is usually a relatively older man (31 years and over).[356] The decision to charge or not to charge a given offense does not, in practice, reflect a strict liability approach based on the age differential of the parties as prescribed by the statute. Inferences about the juvenile victim's consent affect the filing decision. As in forcible rape cases, the factor of social interaction weighs heavily in determining what charge, if any, to file.

The most common filing is of statutory rape.[357] Compared to forcible rape,[358] it is charged when there is virtually no forcible compulsion, and there is high social interaction: two-thirds of the suspects are close acquaintances or relatives of the victim.[359] The victim is perceived as less credible because of the long-term nature of the proscribed conduct.[360]

The specific degree charged is solely a function of the victim's age. Victims are mostly in the 11–13 and 14–15 age brackets and thus within the statutory definitions of second and third degree statutory rape, respectively.[361] The suspects are generally over 30 years old, although the statute requires only that they be over 16 for statutory rape 2, and over 18 for statutory rape 3.[362] The policy behind defining these age categories was to protect the immature from exploitation by older persons. By their charging practices, prosecutors have in effect redefined these age categories:

353. In the cases studied, there were no instances of aggravation, and only 6% involved a high degree of force. Appendix G, Tables 1 & 2b.

354. Of all juvenile victim cases studied, 20% were charged with forcible rape and 12% with another charge. Appendix E.

355. Appendix H, Regression Analysis D. Over three-fourths of all forcible rapes, both of juvenile and of adult victims, were perpetrated by men under 30 years old.

356. Appendix H, Regression Analysis E.

357. The distribution of charges for statutory rape 1, 2, and 3, is, respectively: 12%, 21%, and 21%, totaling 54% of all juvenile cases. Appendix E.

358. Appendix H, Regression Analysis D.

359. Appendix G, Table 3a.

360. Appendix G, Table 6d. 63% of statutory rape cases involved long-term offenses, compared to 16% of forcible rape cases.

361. WASH. REV. CODE §§ 9.79.210, .220 (1979).

362. *Id.*

exploitation is deemed to exist only when the age gap is substantially wider than that provided for in the statute. In otherwise similar circumstances, younger men (30 years or less) are not prosecuted, while older men (31 years or more) are charged with statutory rape.[363]

Juvenile victim cases, then, are of three basic types, each associated with a different filing practice: consensual intercourse with an older boyfriend ("dirty young man" type), which is not prosecuted; consensual intercourse with an older relative or friend ("dirty old man" type), which is filed as statutory rape and occasionally as another charge if some force is used; and forcible rape by a young man, which is filed as such.

Under the common law statute, the fact patterns and prosecutorial practices of juvenile victim cases were essentially the same as they are now. The reform law changed the distribution of the charges (fewer forcible rape and more statutory rape filings) by lowering the age of nonconsent. The factors that determine whether and what to charge, however, and the relative weights accorded those factors, remain unaltered.[364] The way prosecutors perceive and evaluate rape complaints for filing purposes, whether of juvenile or adult victims, has not been affected by the law reform.

IV. IMPLICATIONS OF THE STUDY

The movement to change rape laws is nearing completion of the traditional reform cycle. Beginning in the early 1970's, there was lively public discussion on the problem of rape and how the law should be modified. Then, popular and parliamentary majorities were swiftly marshalled in support of the legislative reform proposals. Now, at the end of the decade, there is review of the performance, and the results, in turn, re-open discussion on the law and its implementation. This article will conclude with an analysis of the implications of the findings of the present study for the definitional standards of rape law and for administrative policy in rape prosecution.

363. Younger men account for 75% of the declined cases and older men account for 65% of the statutory rape cases.

364. Before, as now, low force, high social interaction, and low to medium victim credibility distinguished carnal knowledge from rape charges. Charges other than carnal knowledge are filed when more force is used. Appendix I, Regression Analyses B & C. Most forcible rape charges (79%) involved men under 30 years; 48% of the carnal knowledge charges involved men 31 years and older; and 55% of the declined cases involved younger men. Because of the similarity, a separate model of charging in juvenile victim cases under the old statute (equivalent to Table 6) is not presented.

A. Rape Law

1. Probable Impact of the Michigan Reform Statute

Compared to the common law statute, the findings clearly indicate that the Washington reform legislation has not changed how prosecutors screen and file cases, with the consequence that the total proportion of convictions remains the same. However, within this offender pool, there is more accurate identification of rapists. The next question, then, is whether these results would be any different under another reform approach, such as the Michigan statute. Until impact studies are conducted in other jurisdictions, one can only conjecture, relying upon the presently available data.

A principal definitional feature of the Michigan statute is the rather elaborate and finely detailed calibration of four degrees of culpability based exclusively on the nature of the sexual assault.[365] Commentators have lauded it as "a much needed consolidation and simplification."[366]

However, there is impressionistic evidence, based on interviews with judges and prosecutors, that Michigan's new law is probably not having a different impact on filing. One year after the law went into effect, Detroit prosecutors complained it was "a law professor's dream" (in recognition of its draftsman), formulated "at the highest level of abstraction," but "a prosecutor's nightmare."[367] Despite training seminars, the general sentiment was that it was too complex and ambiguous with respect to the degrees of the crime.[368] The interviews led to the conclusion that "the new [Michigan law] had little influence on the daily filing decisions of these prosecutors. . . . If anything, they perceived that the new statute encouraged weaker complaints which they felt bound to discourage."[369] It is an institutional characteristic of prosecution everywhere that charges are filed only if there is a high likelihood of conviction. Consequently, there is little reason to expect that the charging process will be changed. The same evidence is used at trial whether the crime is called rape or criminal sexual assault. If charging is the same before and after the Michigan reform, the overall number of convictions relative to charges is likely to remain the same too.

A related question is whether the Michigan reform results in more offenders labelled as "rapists" than does the new Washington law. On its

365. *See* MICH. COMP. LAWS § 750.520 (b)–(e) (Supp. 1977–78).

366. MICH. Note, *supra* note 10, at 219.

367. J. Reich & D. Chappell, *supra* note 9, at 5.

368. In contrast, "The old law was simple. . . . The only requirements for conviction were vaginal penetration and force, and cases were won or lost on the facts, not the law." *Id.*

369. *Id.* at 16.

face, it should, because involuntary sexual contact is criminalized as a fourth degree sexual assault, whereas in Washington the same offense is termed indecent liberties. Michigan elevates to "rape" an act that the average person probably does not perceive to merit that severe a stigma. If the crime has been defined with too broad a brush, the more likely alternative is that prosecutors will not charge and juries will not convict. Indeed, for a period of time, prosecutors in Detroit did not authorize a single warrant for this fourth degree offense.[370] The likely outcome, then, is that the proportion of convictions denominated "rape" will be increased by the Michigan reform statute, but not necessarily more than that brought about by the Washington reform legislation.

The gradations of the crime in the Michigan statute have an appealing conceptual symmetry. In practice, though, it encumbers the filing process because it is difficult to establish culpability with that degree of refinement. The three-degree Washington law—two degrees for charging and one for plea bargaining—is simpler and more flexible from an enforcement viewpoint.

2. *A Standard of Nonconsent*

Neither the Michigan nor the Washington reform legislation defines the crime in a manner which reflects fully the evidentiary factors which are important at trial. The critical issue in rape trials is nonconsent, but neither statute incorporates all of the factors used by prosecutors, and presumably juries, in determining nonconsent. A principled standard of nonconsent, which reflects the realities of rape prosecution, should offer the greatest potential for increasing rape convictions.

The determination of voluntariness of confessions in police interrogations under the fourteenth amendment,[371] and of assent to warrantless searches under the fourth amendment,[372] can contribute to the analysis of consent in rape law. The constitutional test of freedom of choice in both types of police intrusions is the totality of circumstances. Voluntariness does not turn on the presence or absence of any single controlling criterion. Instead, it is an issue of fact inferred from the balancing of police behavior, the individual's capacity and will to resist, and the surrounding circumstances of the incident.[373]

370. *Id.* at 8.

371. The most extensive judicial exposition on voluntariness is found in pre-*Miranda* (Miranda v. Arizona, 384 U.S. 486 (1966)) confession cases under the Fourteenth Amendment Due Process Clause, beginning with Brown v. Mississippi, 297 U.S. 278 (1936). All of these cases used the balancing test.

372. Schneckloth v. Bustamonte, 412 U.S. 218, 223–27 (1973).

373. *Id.* at 224–29. *See also* Spano v. New York, 360 U.S. 315 (1959).

The development of a legal standard of consent for rape cases is further aided by a consideration of consent as a social psychological concept. Consent can be conceptualized as an attitudinal disposition or intention.[374] A person may be cognizant of his own disposition to act in a certain manner and later be able to recall and report that mental state accurately. Others, however, can only infer it from observable, external cues. The observer not only sees but perceives another's conduct—that is, he seeks to comprehend the observed person's actions by inventing or attributing reasons for it based upon inferences from behavioral and situational cues.

The three elements of the totality test represent three means of operationalizing consent. It is not meaningful in an empirical sense to speak of consent independently of its observed basis, and this consists of the actor's conduct, the victim's conduct, and the social context in which the act occurs. The fact finder in a rape trial is cast in the role of a third party observer, and has to take into account the actions of both sides prior to and upon the occasion of the crime in reaching a judgment as to consent. To focus solely on one or the other party is to make attributions in a social vacuum.[375]

Whether one consents to a search, to confess, or to have intercourse, there is no other practical way of determining the subjective state than by examining all the relevant objective indicia. The common law rape statute considers only the victim's resistance. Michigan's reform law looks only at the actor's force. Each, then, takes into account only half of the situation. Washington's reform law recognized the reciprocal influences inherent in human conduct and perception and defines forcible compulsion partly in terms of victim's resistance.[376] What all three statutes have in common is an exclusive focus on conduct at the time and scene of the crime. None expressly considers the surrounding circumstances, such as prior social interaction. Yet, "events leading up to allegations of rape are important in the final determination whether consent was given. . . ."[377]

Only the Model Penal Code incorporates this factor, by making "vol-

374. An attitudinal disposition, sometimes called a behavioral intention, is a specifically-targeted attitude, inferred from conduct that can "serve as raw material for further inference about values." E. JONES & H. GERARD, FOUNDATIONS OF SOCIAL PSYCHOLOGY 264 (1967).

375. Most of the research in this area has concentrated on the types of factors used in the interpretation of conduct. One key factor is the perceived degree of choice of an individual. Applied to the rape context, the greater the choice of a victim in engaging in antecedent social contact with the actor, the more likely the attribution of voluntariness. *Id.* at 306.

376. WASH. REV. CODE § 9A.44.010(5) (1979).

377. Commonwealth v. Goodman, 182 Pa. Super. Ct. 205, 211, 126 A.2d 763, 766 (1956).

untary social companion[ship]" an element of second degree rape.[378] Although one commentator has summarily dismissed this element as "irrelevant,"[379] the data of this study show that it is consistently the second most important factor, after physical force, in determining charging under the old and new Washington statutes. In assault, robbery, and homicide cases too, a recent study has found that "[t]he social relationship between the victim and defendant frequently appeared to make a difference in deciding whether to prosecute."[380] The Code directs attention to the chain of causative events leading to the incident. These events may be reflected in the antecedent social relationship or contact between the actor and victim. In other words, the prior *social* interaction is an indicator of consent in addition to actor's and victim's *behavioral* interaction during the commission of the offense. It is an umbrella category or a shorthand label for any of a number of specific circumstances, including victim precipitation,[381] that are normally associated with voluntary companionship and from which one could possibly infer consent.

378. MODEL PENAL CODE § 213.1(1)(Proposed Official Draft 1962).

379. STANFORD Note, *supra* note 10, at 688–89 n.42.

380. *Prosecutors Find Victim's Role Makes or Breaks Case*, 8 LEAA NEWSLETTER 6 (May 1979). In assault, robbery, and homicide, as well as rape, cases a recent study has found that the social relationship between victim and defendant frequently appeared to make a difference in deciding whether to prosecute. The reason is that a prosecutor "anticipates that a victim who has a close relationship with the defendant will become an uncooperative witness as the case progresses. Thus, even though the victims may be willing to file charges initially, the prosecutor may decline prosecution in anticipation of reconciliation or restitution being achieved outside the court setting." *Id. See* Table H and I.

See also C. SILBERMAN, CRIMINAL VIOLENCE, CRIMINAL JUSTICE 265–66 (1978). ("No single factor has so large an impact on what happens to felons after they have been arrested [as the prior relationship between victim and suspect]." *Id.* at 266.) One court has recognized that "events leading up to the allegation of rape are important in the final determination whether consent was given." Commonwealth v. Goodman, 182 Pa. Super. Ct. 205, 211, 126 A.2d 763, 766 (1956).

381. The term refers to those circumstances in which the victim agrees or appears to agree to sexual relations but retracts that agreement before intercourse. The incidence of victim precipitated rape is variously estimated at 4% and 19%. NAT'L VIOLENCE COMM'N, *supra* note 154, at 228; and, AMIR, *supra* note 233, at 266, respectively. Some commentators criticize the concept as having sexist overtones: "It is the personificiation and embodiment of the rape mythology cleverly stated in academic scientific terms." Weis & Burges, *supra* note 239, at 112. Ideology aside, the evidence shows that victim precipitation is not unique to rape. In fact, the concept originated in the context of homicide. One-fourth of homicides in Philadelphia are incited by the victim. M. WOLFGANG, *supra* note 238, at 254. Victims who first used force or insinuating gestures and language, thereby triggering an attack, make up 14% of aggravated assault cases. NAT'L VIOLENCE COMM'N, *supra* note 154, at 227–28. The issue in the rape context, then, is not whether victim precipitation exists, but the extent of its occurrence and the legal effect that should be given to it. Some women acknowledge the role of victim precipitation and do not define the incident as rape. Schultz & DeSavage, *Rape and Rape Attitudes on a College Campus*, in RAPE VICTIMOLOGY 77, 81 (L. Schultz ed. 1975).

Although the law does not formally recognize the victim's role in the occurrence of the crime, the notion of victim precipitation has seeped into legal thinking under different names. It is an element in the definitions of certain crimes, and basis for reduced charges and affirmative defenses. *See* Gobert, *Victim Precipitation*, 77 COLUM. L. REV. 512, 517–36 (1977). In addition, it has always been infor-

A model law of rape, then, that includes a principled standard of nonconsent and reflects the policies served by the criminalization of the conduct, would combine the definitional elements of the Washington reform statute and the Code. It would embody the totality test by recognizing the element of social interaction in the lesser gradations of culpability defined by forcible compulsion.[382] This proposed reformulation of the Washington reform law makes the legal treatment of nonconsent in rape consistent with principles of nonconsent in other areas of the law, and with the social psychological principles of interpersonal attributions. It also reflects more accurately the evidentiary realities of the crime. Whether it will actually lead to an increase in rape convictions remains to be ascertained, but based on the results of this study, a possible ramification for prosecution can be hypothesized.

The disposition of cases at the ends of the convictability continuum is not much affected by definitional standards. Most cases, however, lie in the mid-range. They involve low to moderate force, so practical factors—especially social interaction—are determinative. The public does not find rape in these circumstances[383] and prosecutors are reluctant to file. Chances for a conviction of rape are about even. It is here, not at the extremes, that room for augmenting rape convictions may exist. The stability of conviction and charging rates in Washington is not inconsistent with this suggestion, since the reform legislation does not define these mid-range cases any differently than the common law statute.[384] The Code, however, considers it inappropriate not to give formal, legal effect to the social circumstances in this type of rape. Its statutory recognition does not exonerate the actor, but only reduces the degree of the offense. It puts juries on notice that they should not automatically infer consent, as they are now wont to do, whenever social interaction is present.[385]

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mally recognized in arrest, charging, jury decisions, and sentencing. *Id.* at 536–40. Because victim precipitation, as such, does not exist in the law, courts have had to struggle with it on an individualized basis. The Code's inclusion of voluntary social companionship as an element that mitigates defendant culpability is an attempt to incorporate the notion of victim precipitation in the law of rape.

382. The reform statute (WASH. REV. CODE § 9A.44.050) could be reformulated as follows: "A person is guilty of rape in the second degree when, under circumstances not constituting rape in the first degree, the person engages in sexual intercourse with another person, not married to the perpetrator: (a) by forcible compulsion, notwithstanding the fact that the victim was a voluntary social companion of the perpetrator upon the occasion of the crime."

383. Schultz & DeSavage, *supra* note 381, at 81.

384. The definition of rape 2 in the Washington reform law overlaps with the prior statute's definition of rape. *Compare* WASH. REV. CODE § 9A.44.050 (1979) *with* 1973 Wash. Laws (1st Ex. Sess.), ch. 154, § 122, at 1198 (repealed 1975).

385. The factor of social interaction could be included in jury instructions instead of in the statutory definition of the crime. The jury might be charged as follows: "There has been testimony about the prior social interactions between the complainant and the defendant. Even if you find it credible, you should not infer that, because a woman was the voluntary social companion of the accused upon

B. Rape Prosecution

Legislative reform is necessary but not sufficient for effective enforcement of the criminal law. As important as the formulation of legal rules is their day-to-day discretionary implementation by criminal justice officials. It is in case-by-case decisions—in little solutions for each little bite of the big problem—that the purposes of reform are realized.

At the prosecution stage, implementation of reform requires a coherent and aggressive policy of enforcement formulated at the top administrative echelons. Although the specific design of the office policy will depend on local practice and resources, a key issue is the use of administrative guidelines in filing. This internal control is "the most significant means of assuring responsible exercise of charging discretion."[386] As noted before, office standards are the exception, not the rule.[387] They are particularly necessary in rape prosecution because the nature of the crime makes charging susceptible to personal biases. The guidelines need to state not only when rape is to be charged or declined, but also when other charges are to be filed in lieu of rape. They must articulate the weight to be attached to different practical factors in charging, especially to the social interaction element. The filing standard of convictability also has to be defined. Depending on the risk of loss an office is willing to tolerate for the purpose of increasing rape convictions, the standard could be set lower for rape than for other violent felony offenses. Finally, the administrative policy must provide for regular review of the guidelines in light of accumulated experience, so that a "common law" of filing can be established for the office.

Other administrative actions would also enhance the effectiveness of rape law enforcement. These include the creation of specialized rape prosecution units,[388] the coordination of functions with police and hospitals,[389] and the establishment of liaisons with rape crisis centers and other

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the occasion of the alleged crime, she necessarily consented to sexual intercourse with the defendant in this instance." Similar compensatory instructions have been proposed with respect to testimony about prior sexual history of the victim. BABCOCK, *supra* note 10, at 842. It may be true that "[t]he naive assumption that prejudicial effects can be overcome by instructions to the jury . . . all practicing lawyers know to be unmitigated fiction." Krulewitch v. United States, 336 U.S. 440, 453 (1949)(Jackson, J. concurring). Such an instruction can nonetheless be justified on symbolic if not instrumental grounds. *See* text accompanying note 393 *infra*.

386. Miller, *supra* note 201, at 344.

387. *See* note 212 *supra*.

388. *See* text accompanying note 204 *supra*.

389. The success of prosecution obviously depends in large measure on the evidence obtained by police and the preservation for trial of the results of medical examinations. For a discussion of the need and means to improve prosecutor relations with police and medical personnel, see BATTELLE-LEAA PROSECUTORS' VOL. III, *supra* note 4, at 33–35.

victim advocate groups.[390] The rationale for such measures is that the prosecution of rape is not just like the prosecution of any other violent felony—rape cases need special processing. Unless there is a commitment to vigorous prosecution from the highest levels, backed by the necessary resources and administrative actions, the best-drafted reform legislation is unlikely to alter the pattern of charging and convictions. What the reform has done is to create a climate for change in prosecutor offices that legitimates and encourages the enforcement of rape laws as a top administrative priority. Thus, the assessment of the impact of reform legislation will always be intertwined with the effect of administrative changes in prosecution.

C. Conclusion

The effectiveness of rape law enforcement will depend, ultimately, on official and lay attitudes toward the crime. Those attitudes influence the will of victims to prosecute, of prosecutors to file, and of juries to convict. As a catalyst for change in such attitudes, the impact of the reform of rape law may be greater than its immediate impact on the criminal justice system. The criminal law serves more than a deterrent function. It also has a "*moral* or *sociopedagogic*"[391] purpose to reflect and shape our values and beliefs. The new rape law symbolizes and reinforces newly emerging conceptions about the status of women and the right of self-determination in sexual conduct. The success of the reform law in aiding accurate labeling of offenders has an educative effect. Conviction of rape, rather than of some surrogate offense, is a dramatic lesson of society's disapprobation of the act. In this way, the criminal law complements and enhances the moral learning initially acquired through non-legal processes.

One Detroit judge expressed the view that the values of reform legislation are, at this time, philosophically ahead of law enforcement officials

390. Less publicized than substantive changes in the rape law is legislation that mandates the establishment of assistance programs for rape victims, including counseling and compensation for medical expenses. *See, e.g.*, MINN. STAT. ANN. §§ 241.51–58 (West Supp. 1979). It may well be that these social service programs, in the long run, have a greater effect on victim reporting of the crime than any definitional or evidentiary changes (*e.g.*, exclusion of prior sexual history) in the law itself.

391. Andenaes, *supra* note 77, at 950 (emphasis in original).

and the general citizenry.[392] "Perhaps in a few years," she mused, "Michigan could return to a simpler statute that called a rape, a rape. By then . . . the word would capture not only the reality of the crime but a newer understanding among the people."[393]

392. Prosecutors say that the single, most important means for improving law enforcement is increased public education about rape. BATTELLE-LEAA PROSECUTOR SURVEY, *supra* note 4, at 93–94. If so, they and other criminal justice officials should spearhead the educational effort. They are the middlemen who can retail the values of the criminal law to the citizenry at large. Attitude change is most effective when the public identifies with and absorbs the values of opinion leaders in the community. R. LANE & D. SEARS, PUBLIC OPINION 38–39 (1964). Of course, the officials themselves must first embrace the value assumptions of the reform legislation.

393. *Quoted in* J. Reich & D. Chappell, *supra* note 9, at 22–23.

APPENDIX A

RAPE STUDY QUESTIONNAIRE

Card #1

(1-3) _____CODE NUMBER [Code]

(4) __1__CARD NUMBER [Card]

(5) _____Researcher [Coder]

1 = Dan	5 = Val
2 = Shelley	6 = James
3 = Lynda	7 = Collette
4 = Karen	8 = Rand

(6) _____Year Charge Filed [Yr]

1 = 1972	5 = Aug.—Dec. 1975
2 = 1973	6 = 1976
3 = 1974	7 = 1977
4 = Jan.—July, 1975	8 = 1978

CHARGES FILED

0 = Not filed	1 = Filed

(7) _____No charge filed [NC]
(8) _____Rape [Rape]
(9) _____Carnal knowledge [CK]
(10) _____Sodomy [SOD]
(11) _____Indecent liberties [IL]
(12) _____Other sex crime [OSC]
(13) _____Assault, 1st degree [AI]
(14) _____Assault, 2nd degree [AII]
(15) _____Assault, 3rd degree [AIII]
(16) _____Murder [MUR]
(17) _____Kidnapping [KID]
(18) _____Contributing to the delinquency of a minor [CDOM]
(19) _____Burglary [BUR]
(20) _____Robbery [ROB]
(21) _____Trespass [TRES]
(22) _____Other [OTH]
(23) _____Rape, 1st degree [Rape 1]
(24) _____Rape, 2nd degree [Rape 2]
(25) _____Rape, 3rd degree [Rape 3]
(26) _____Statutory rape, 1st degree [SRAPE 1]
(27) _____Statutory rape, 2nd degree [SRAPE 2]
(28) _____Statutory rape, 3rd degree [SRAPE 3]

(29-30) _____FINAL DISPOSITION [FIN DIS]

00 = decline
01 = conviction of rape or carnal knowledge
02 = conviction of other charge
03 = plea bargain to rape or carnal knowledge
04 = plea bargain to other charge
05 = acquittal on all charges
06 = dismissal of all charges
07 = case still open
08 = dismissal due to conviction or plea in other case
10 = conviction of Rape 1st deg. or Stat. Rape 1st deg.
11 = conviction of Rape 2nd deg. or Stat. Rape 2nd deg.
12 = conviction of Rape 3rd deg. or Stat. Rape 3rd deg.
13 = plea bargain to Rape 1st deg. or Stat. Rape 1st deg.
14 = plea bargain to Rape 2nd deg. or Stat. Rape 2nd deg.
15 = plea bargain to Rape 3rd deg. or Stat. Rape 3rd deg.

(31-32) _____SENTENCE [SENT]

00 = N/A
01 = deferred, no jail
02 = deferred, with jail
03 = deferred, to Western state
04 = deferred, conditions unknown
05 = suspended, no jail
06 = suspended, with jail
07 = suspended, to Western State
08 = suspended, conditions unknown
10 = incarcerated

(33) _____Defendant released prior to trial [DREL]

0 = N/A
1 = yes
2 = no
9 = unknown

(34) _____If yes, defendant released on: [RELON]
0 = N/A
1 = personal recognizance
2 = Bail
9 = unknown

(35-36) _____Age of the victim [AGEV]

(37-38) _____Age of the defendant [AGED]

(39) _____Race of the victim [RACEV]
1 = white
2 = black
3 = Chicano
4 = Native American
5 = Asian
6 = other
9 = unknown

(40) _____Race of the defendant [RACED]
1 = white
2 = black
3 = Chicano
4 = Native American
5 = Asian
6 = other
9 = unknown

(41-46) _____Date first charge filed
List month/day/year
[MOCHG] [Day CHG] [YRCHG]

(47-52) _____Date of final disposition
List month/day/year [MOFD] [DAYFD] [YRFD]

(53-54) _____Prosecutor's sentence Recommendation [PROSREC]
00 = N/A
01 = deferred, no jail
02 = deferred, with jail
03 = deferred, to Western State
04 = conditions unknown
05 = suspended, no jail
06 = suspended, with jail
07 = suspended, to Western State
08 = suspended, condition unknown
10 = incarceration

(55) _____Types of physical force [PHYSF]
0 = no force
1 = restraining
2 = choking
3 = hitting
4 = all three
5 = 1 & 2
6 = 1 & 3
7 = 2 & 3
9 = unknown

(56) _____Polygraph of victim [POLYV]
1 = yes
2 = no

(57) _____Results of victim polygraph [VRES]
0 = N/A
1 = results supportive of victim's allegations
2 = results not supportive
3 = results inconclusive

(58) _____Polygraph of defendant [POLYD]
1 = yes 2 = no

(59) _____Results of defendant polygraph [DRES]
0 = N/A
1 = results supportive of victim's allegations
2 = results not supportive
3 = results inconclusive

(60) _____Photo ID of defendant attempted [PHOTO]
1 = yes 2 = no

(61) _____If yes, defendant identified [PHOTO ID]
0 = N/A 1 = yes 2 = no

(62) _____Defendant participated in line-up [LINEUP]
1 = yes 2 = no

(63) _____If yes, defendant identified [LINEUPID]
0 = N/A 1 = yes 2 = no

(64) _____Confession by defendant to rape [CONFESS]
1 = yes 2 = no

(65) _____If yes, confession was: [HOW]
0 = N/A 1 = written 2 = oral

(66) _____Initial denial, at police stage, was: [DENIAL]
0 = N/A 4 = intoxication
1 = other 5 = other
2 = victim consent 6 = prostitution
3 = no penetration 9 = unknown

(67) _____Occupation of the victim [OCCV]
1 = unemployed 5 = 1 & 2
2 = blue collar 6 = 1 & 3
3 = white collar 9 = unknown
4 = student

(68) _____Occupation of the defendant [OCCD]
1 = unemployed 5 = 1 & 2
2 = blue collar 6 = 1 & 3
3 = white collar 9 = unknown
4 = student

(69) _____Marital status of victim [MARV]
1 = single 4 = divorced
2 = married 5 = widowed
3 = separated 9 = unknown

(70) _____Marital status of defendant [MARD]
1 = single 4 = divorced
2 = married 5 = widowed
3 = separated 9 = unknown

(71) _____Victim-defendant relationship [RELVD]
1 = stranger 3 = close acquaintance
2 = casual acquaintance 4 = relative

(72) _____Prior Consensual Sexual History Between Victim and Defendant [PREVSX]
1 = yes 2 = no 9 = unknown

(73) _____Non-marital sexual activity of victim [NONMSX]
1 = yes 2 = no 3 = probable 9 = unknown

(74) _____Adult arrest of victim [ARRESTV]
0 = N/A 1 = yes 2 = no 9 = unknown

(75) _____Adult arrests of defendant [ARRESTD]
0 = N/A 1 = yes 2 = no 9 = unknown

(76) _____Type of defendant arrests [DEFARR]
0 = N/A 1 = sex crime(s) 2 = other

(77) _____Previous incarceration of defendant [INCARD]
1 = yes 2 = no 9 = unknown

(78) _____Time of rape [TIME]
1 = daylight 2 = dark
3 = both, or long term offense

(79) _____Place of rape [PLACE]
1 = victim's home 5 = outside
2 = defendant's home 6 = other
3 = victim's car 7 = 1 & 2
4 = defendant's car 9 = unknown

(80) _____How entry was gained [ENTRY]
0 = no entry involved 4 = invitation
1 = forced entry 9 = unknown
2 = open window or door, uninvited
3 = deception, tricked victim

Card #2

(1-3) _____CODE NUMBER

(4) __2__CARD NUMBER

(5) _____Nature of contact between victim and defendant, prior to offense [PRVCON]
1 = hitch-hiking
2 = with victim's agreement (other than hitch-hiking, party, or tavern)
3 = not with victim's agreement
4 = party or tavern
9 = unknown

(6) _____Alcohol or drug involvement [ALCDRG]
1 = none
2 = both defendant & victim
3 = only defendant
4 = only victim
9 = unknown

SEXUAL ACTS OTHER THAN VAGINAL INTERCOURSE:

(7) _____Additional Acts of Vaginal Intercourse [ADDIC]

(8) _____Oral only [ORAL]

(9) _____Anal only [ANAL]

(10) _____Type of force [FORCE]
0 = N/A
1 = verbal threats only
2 = physical force
3 = use of weapon
4 = 1, 2, & 3
5 = 1 & 2
6 = 1 & 3
7 = 2 & 3
9 = unknown

(11) _____Use of weapon [WEAPON]
1 = firearm 2 = other 3 = both 9 = unknown

(12) _____Injuries to victim [INJV]
1 = none
2 = minor, no medical treatment
3 = required medical treatment
4 = required hospitalization
5 = death
9 = unknown

RESISTANCE BY VICTIM

1 = yes 2 = no 9 = unknown

(13) _____flight [FLITE]
(14) _____verbal [VERBAL]
(15) _____physical [PHYS]
(16) _____weapon [WEAP]
(17) _____other [OTHERS]

(18) _____Injuries to defendant by victim [INJD]
1 = none
2 = minor, no medical treatment
3 = required medical treatment
4 = required hospitalization
5 = death
9 = unknown

(19) _____Incident first reported to: [REPTO]
1 = police
2 = medical facility
3 = friend/relative/neighbor
4 = crisis center/counselor
5 = other
9 = unknown

(20) _____Time between Incident and Report to Police [REPTIME]
0 = long term offense
1 = within one hour
2 = within 24 hours
3 = within one week
4 = within one month
5 = more than one month

PROSECUTION WITNESSES

1 = yes 2 = no 9 = unknown

(21) _____Accomplice [WITAC]
(22) _____Other eyewitness [WITEYE]
(23) _____Corroborating witness with identity information [WITID]
(24) _____Corroborating witness as to victim's physical & emotional state [WITPHEM]
(25) _____Corroborating witness as to circumstantial evidence [WITEVID]

(26) _____Evidence of penetration [EVPEN]
1 = none
2 = yes (seminal matter and/or genital injury)
9 = unknown

(27) _____Extent of victim's cooperation with prosecutor's office [VCOOP]

0 = victim deceased	3 = unpredictable
1 = full	9 = unknown
2 = partial	

(28) _____Prosecutor's evaluation of the victim as a witness [VASWIT]

0 = victim deceased	3 = poor
1 = good	9 = unknown
2 = unpredictable	

APPENDIX B—PART I

Descriptive Profile of the Victim

	1972-75 data		1975-77 data	
	N	%	*N*	%
1. AGE*				
juvenile	98	48%	81	34%
adult	107	52	156	66
	205		237	
2. RACE				
white	138	76%	183	80%
black	29	16	30	13
other	12	7	13	6
	179		226	
3. OCCUPATION				
blue collar	10	5%	37	17%
unemployed (mostly blue collar)	47	25	45	21
white collar	24	13	16	8
student	107	57	114	54
	188		212	
4. MARITAL STATUS				
single	140	81%	160	82%
married	15	9	19	10
divorced, widowed, separated	12	10	16	8
	167		195	

	1972-75 data		1975-77 data	
	N	%	*N*	%
5. ADULT ARRESTS				
yes	6	30%	12	17%
no	14	70	58	83
	20		70	

* Under common law (1972-75 data): juvenile less than 18 years.
Under reform law (1975-77 data): juvenile less than 16 years.

APPENDIX B—PART II

Descriptive Profile of the Suspect

	1972-75 data		1975-77 data	
	N	%	*N*	%
1. AGE*				
15 to 20 years	43	21%	53	22%
21 to 35 years	129	59	135	58
36 to 73 years	42	20	48	20
	214		236	
2. RACE				
white	112	55%	125	53%
black	80	39	91	38
other	13	6	20	9
	205		236	
3. OCCUPATION				
blue collar	94	50%	125	54%
unemployed (mostly blue collar)	59	31	64	27
white collar	16	8	33	14
student	19	10	12	5
	188		234	
4. MARITAL STATUS				
single	73	40%	108	50%
married	64	36	62	29
divorced, widowed, separated	43	24	45	21
	180		215	

	1972-75 data		1975-77 data	
	N	%	*N*	%
5. ADULT ARRESTS				
yes	138	78%	146	66%
no	39	22	77	34
	177		223	
6. NATURE OF PRIOR ARREST				
sex crime	28	22%	35	25%
other charge	101	78	107	75
	129		142	
7. PRIOR INCARCERATION RECORD				
yes	58	45%	40	19%
no	72	55	169	81
	130		209	

APPENDIX C

Description of the Crime: Setting, Circumstances, and Reporting

	1972-75 data		1975-77 data	
	N	%	*N*	%
A. TIME AND PLACE OF RAPE				
(1) *Time of year*				
fall	33	20%	40	21%
winter	36	22	46	24
spring	43	26	51	27
summer	53	32	53	28
	165		190	
(2) *Time of day*				
day	47	23%	61	26%
night	137	66	144	62
long term offense	24	11	29	12
	208		234	
(3) *Place*				
victim's home or car	73	35%	65	28%
suspect's home or car	82	40	105	44
outside	22	11	20	9
other location	30	14	46	19
	207		236	

	1972-75 data		1975-77 data	
	N	%	*N*	%
B. SOCIAL CONTACT BETWEEN VICTIM AND SUSPECT PRIOR TO THE OFFENSE				
(1) *Victim-suspect relationship*				
strangers	79	38%	91	39%
casual acquaintances	80	38	76	32
close acquaintances	29	14	42	18
relatives	20	10	25	11
	208		234	
(2) *Victim's agreement to social contact with suspect*				
yes (*e.g.*, met at tavern, work)	141	68%	160	68%
no (*e.g.*, assault by stranger)	51	25	59	25
hitchhiking	15	7	17	7
	207		236	
(3) *Race of accused/race of victim*				
white sus./white vict.	84	47%	112	49%
minority sus./white vict.	52	29	71	31
minority sus./minority vict.	36	20	39	17
white sus./minority vict.	7	4	6	3
	179		228	
(4) *Prior sexual history between victim and suspect*				
yes	20	10%	21	10%
no	179	90	201	90
	199		222	
C. SEXUAL ASSAULT BY SUSPECT				
(1) *Type of forcible compulsion*				
low (verbal threats only)	27	23%	15	26%
medium (incl. physical force)	102	57	131	56
high (incl. weapon)	40	19	39	18
	169		185	

	1972-75 data		1975-77 data	
	N	%	*N*	%
(2) *Degree of physical force*				
none	59	29%	61	26%
medium (restraining)	86	42	97	42
high (choking, hitting)	60	29	73	32
	205		231	
(3) *Sexual acts other than vaginal intercourse*				
yes	40	19%	52	23%
no	167	81	78	77
	207		130	
(4) *Oral intercourse only*				
yes	57	28%	78	33%
no	150	72	157	67
	207		235	

D. RESISTANCE BY AND INJURY TO VICTIM

(1) *Verbal resistance*				
yes	114	55%	104	49%
no	93	45	108	51
	207		212	
(2) *Physical resistance*				
yes	58	28%	103	47%
no	149	72	117	53
	207		220	
(3) *Attempt to flee*				
yes	28	14%	51	22%
no	179	86	181	78
	207		232	
(4) *Physical injury to victim*				
none	114	57%	150	64%
minor	54	27	67	28
medical care needed	31	16	19	8
death	1	–	–	–
	200		236	

	1972-75 data		1975-77 data	
	N	%	*N*	%
E. REPORTING OF THE CRIME BY VICTIM				
(1) *First report is to:*				
friend, relative	127	62%	149	64%
police	52	25	46	20
medical facility	2	1	5	2
crisis/counseling center	5	2	13	6
other	19	9	19	8
	205		232	
(2) *Time interval between offense and report to police*				
within 1 hour	120	58%	119	50%
within 24 hours	45	22	56	24
more than 24 hours	15	7	37	16
long term offense	28	13	24	10
	208		236	

APPENDIX D

DESCRIPTION OF THE CRIME: AGE OF VICTIM, SETTING, CIRCUMSTANCES, AND REPORTING (SELECTED DATA)

	1975-77 data only*			
	Juvenile victims		*Adult victims*	
	N	%	*N*	%
Time of day of rape				
long term offense	24	24%	0	0%
Place of rape				
victim's home or car	15	19%	49	31%
suspect's home or car	38	47	56	36
Victim-suspect relationship				
close friend or relative	41	51%	26	17%
Type of forcible compulsion				
medium (physical force)	32	40%	99	63%
Degree of physical force				
none	42	52%	17	13%

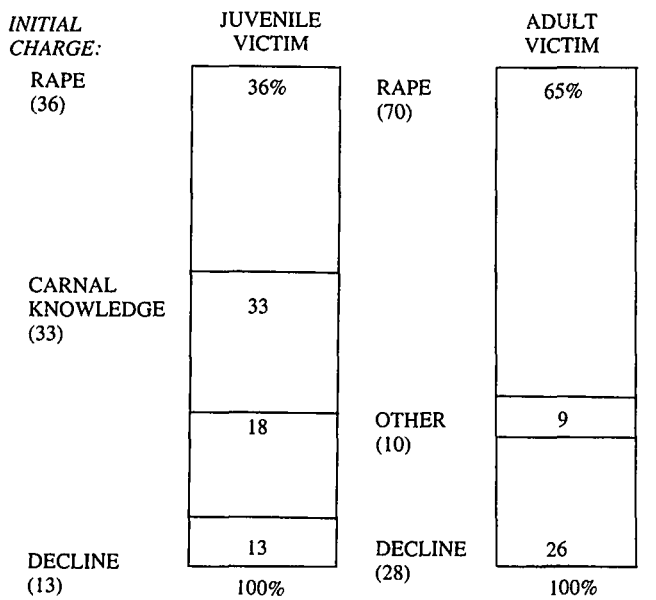
Sexual acts other than vaginal intercourse				
yes	21	26%	31	22%
Verbal resistance by victim				
yes	25	34%	79	56%
Physical injury to victim				
none	65	80%	85	55%
First report to:				
friend, relative	64	82%	85	55%
police	6	8	40	26
Time interval between offense and report to police				
within 1 hour	23	28%	96	62%
long term offense	21	26	0	0

* There are no major differences between the 1972-75 and 1975-77 data sets, so only the later data are presented.

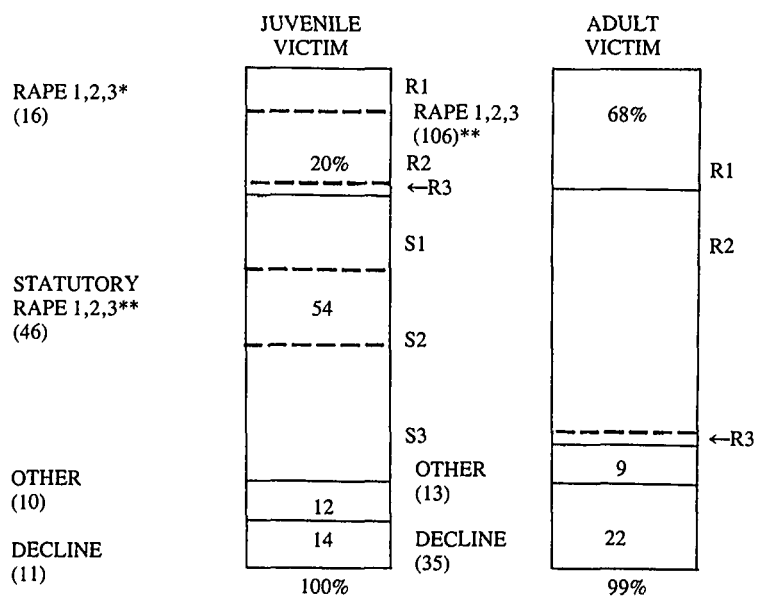
APPENDIX E

PERCENTAGE AND (NUMBER OF CASES) OF INITIAL CHARGES FILED BY AGE OF VICTIM

UNDER OLD LAW



UNDER NEW LAW



* RAPE 1 (5) 6%
RAPE 2 (10) 13
RAPE 3 (1) 1
TOTAL: (16) 20%

** STAT. RAPE 1 (10) 12%
STAT. RAPE 2 (18) 21
STAT. RAPE 3 (13) 21
TOTAL: (41) 54%

** RAPE 1 (35) 22%
RAPE 2 (70) 45
RAPE 3 (1) 1
TOTAL: (106) 68%

APPENDIX F

VERIMAX FACTOR ANALYSIS OF VARIABLES ASSOCIATED WITH CHARGING UNDER NEW LAW

Adult Victims

FACTORS:	I. (FORCE)		II. (SOCIAL INTERACTION)		III. (CORROBORATION)		IV. (VICTIM CREDIBILITY)		V. (RACE)		
VARIANCE (%):	17%		14%		9%		7%		11%		Total: 58%
	Aggravation	.97	Prior social contact	.85	Witness identification	.85	Victim as witness	.87	Race of accused	.91	
	Type of force	.88	Victim alcohol/drug use	.61					Race pairing	.87	
	Degree of force	.79	Victim-suspect relation	.87							
	Injuries to victim	.82									

Minor Victims

FACTORS:	I. (CORROBORATION)		II. (SOCIAL INTERACTION)		III. (FORCE)		IV. (CREDIBILITY)		V. (RACE)		
VARIANCE(%):	28%		23%		16%		15%		11%		Total: 93%
	Witness to victim's physical and emotional state	.95	Victim-subject relationship	.96	Injury to victim	.93	Suspect's pretrial status	.88	Race of suspect	.92	
	Witness identification	.95	Victim's cooperation	.94	Degree of force	.93	Victim as witness	.87	Race pairing	.92	
			Place of rape	.62	Evidence of penetration	.80					
			Report time to police	.72							

APPENDIX G

CROSS TABULATIONS OF FACTORS ASSOCIATED WITH INITIAL CHARGE

FACTORS:	Under Old Law				Under New Law				
	RAPE	*OTH.*	*DEC.*	*CK.*	*R1*	*R2,3*	*OTH.*	*DEC.*	*S.R.1,2,3*
1. "AGGRAVATING CONDITIONS"	N = (106)	(28)	(41)	(33)	N = (41)	(81)	(23)	(46)	(46)
yes	53%	29%	15%	9%	80%	18%	26%	14%	0%
no	47	71	85	91	20	82	74	87	100
$x^2 = 11.2$, 2df, p = .002, C = .28					$x^2 = 55.6$, 3df, p = .00001, C = .50				
2. FORCIBLE COMPULSION									
a. "type of force"	N = (106)	(27)	(41)	(33)	N = (41)	(80)	(23)	(46)	(45)
none	7%	18%	27%	45%	2%	9%	9%	18%	71%
verbal	10	7	15	24	5	11	0	4	4
physical	53	59	51	27	32	71	83	67	25
weapon	30	15	7	3	61	9	8	11	0
$x^2 = 11.8$, 6df, p = .05, C = .28					$x^2 = 52.2$, 9df, p = .00001, C = .49				
b. "degree of physical force"	N = (106)	(26)	(41)	(33)	N = (40)	(80)	(23)	(42)	(46)
none	16%	23%	37%	64%	10%	14%	9%	26%	72%
medium (restraining)	41	42	44	33	37	50	39	55	22
high (choking)	43	35	19	3	53	36	52	19	6
$x^2 = 12.5$, 6df, p = .05, C = .29					$x^2 = 56.2$, 6df, p = .00001, C = .50				

	Under Old Law				Under New Law				
	RAPE	*OTH.*	*DEC.*	*CK.*	*R1*	*R2,3*	*OTH.*	*DEC.*	*S.R.1,2,3*
c. "injuries to victim" N =	(98)	(24)	(38)	(33)	(41)	(81)	(23)	(46)	(46)
none	42%	30%	68%	79%	44%	65%	39%	63%	89%
minor or serious	58	70	32	21	56	35	61	37	11
$x^2 = 7.0$, 2df, $p = .02$, $C = .22$					$x^2 = 8.7$, 3df, $p = .03$, $C = .22$				
d. "verbal resistance" N =	(106)	(26)	(41)	(33)	(37)	(74)	(20)	(44)	(42)
yes	80%	60%	36%	33%	73%	54%	65%	37%	21%
no	20	40	64	66	27	46	35	63	79
$x^2 = 12.8$, 2df, $p = .001$, $C = .33$					$x^2 = 26.4$, 3df, $p = .001$, $C = .34$				
e. "attempted flight" N =	(106)	(28)	(40)	(33)	(41)	(79)	(23)	(44)	(46)
yes	20%	30%	4%	3%	22%	29%	22%	27%	4%
no	80	70	96	97	78	71	78	73	96
$x^2 = 5.2$, 2df, $p = .07$, $C = .19$					$x^2 = 2.2$, 3df, $p =$ n.s., $C = .12$				
3. SOCIAL INTERACTION									
a. "victim-suspect relationship" N =	(106)	(28)	(41)	(33)	(41)	(81)	(21)	(46)	(43)
strangers	51%	18%	41%	9%	61%	42%	48%	35%	14%
casual acquaintance	41	43	41	24	29	38	19	45	18
close acquaintance	7	18	18	27	7	20	14	20	26
relative	1	21	0	39	2	0	19	0	42
$x^2 = 8.2$, 6df, $p = .02$, $C = .23$					$x^2 = 16.6$, 9df, $p = .05$, $C = .30$				

	Under Old Law				Under New Law				
	RAPE	*OTH.*	*DEC.*	*CK.*	*R1*	*R2,3*	*OTH.*	*DEC.*	*S.R.1,2,3*
b. "prior social contact"	N = (106)	(28)	(40)	(33)	N = (41)	(81)	(23)	(45)	(46)
yes (*e.g.* at party)	61%	86%	90%	94%	54%	79%	65%	79%	91%
no	39	14	10	6	46	21	35	24	9
	$x^2 = 12.0$, 2df, p = .002, C = .28				$x^2 = 8.6$, 3df, p = .03, C = .23				
c. "place of rape"	N = (106)	(78)	(41)	(33)	N = (41)	(81)	(22)	(46)	(46)
suspect's home/car	20%	36%	58%	36%	29%	35%	41%	54%	39%
other place	80	64	42	64	71	65	59	46	61
	$x^2 = 9.2$, 2df, p = .05, C = .25				$x^2 = 6.1$, 3df, p = .09, C = .19				
4. CORROBORATIVE EVIDENCE									
a. "evidence of penetration"	N = (99)	(25)	(38)	(32)	N = (41)	(81)	(23)	(44)	(43)
yes	37%	30%	43%	53%	55%	38%	27%	34%	21%
no	63	70	57	47	45	62	73	66	79
	$x^2 = .58$, 2df, p = n.s., C = .06				$x^2 = 6.4$, 3df, p = .09, C = 20				
b. "circumstantial evidence"	N = (106)	(27)	(40)	(33)	N = (41)	(81)	(23)	(41)	(44)
yes	92%	90%	69%	94%	98%	78%	91%	39%	61%
no	8	10	31	6	2	22	9	61	39
	$x^2 = 10.7$, 2df, p = .004, C = .26				$x^2 = 26.7$, 3df, p = .00001, C = .38				

	Under Old Law				Under New Law				
	RAPE	*OTH.*	*DEC.*	*CK.*	*R1*	*R2,3*	*OTH.*	*DEC.*	*S.R.1,2,3*
c. "witness to victim's physical and emotional state"	N = (106)	(28)	(40)	(33)	N = (40)	(79)	(23)	(44)	(42)
yes	85%	60%	31%	55%	93%	91%	87%	82%	71%
no	15	40	69	45	7	9	13	18	29
	$x^2 = 32.1$, 2df, p = .00001, C = .43				$x^2 = .45$, 3df, p = n.s., C = .05				
d. "line-up used"	N = (106)	(28)	(41)	(30)	N = (41)	(80)	(23)	(46)	(44)
yes	23%	11%	0%	0%	32%	9%	0%	4%	4%
no	77	89	100	100	68	91	100	96	96
	$x^2 = 8.3$, 2df, p = .01, C = .23				$x^2 = 17.4$, 3df, p = .0006, C = .31				
e. "witness identification"	N = (106)	(27)	(41)	(33)	N = (40)	(81)	(23)	(35)	(44)
yes	52%	40%	23%	82%	65%	56%	78%	40%	68%
no	48	60	77	18	35	44	22	60	32
	$x^2 = 7.1$, 2df, p = .02, C = .22				$x^2 = 10.5$, 3df, p = .01, C = .24				
5. CREDIBILITY OF SUSPECT									
a. "pretrial status"	N = (79)	(22)	N/A	(30)	N = (41)	(79)	(22)	N/A	(44)
released	73%	64%	–	83%	39%	66%	82%	–	75%
detained	27	36	–	17	61	34	18	–	25
	$x^2 = 1.2$, 2df, p = n.s., C = .12				$x^2 = 9.5$, 2df, p = .008, C = .26				

	Under Old Law				Under New Law				
	RAPE	*OTH.*	*DEC.*	*CK.*	*R1*	*R2,3*	*OTH.*	*DEC.*	*S.R.1,2,3*
b. "initial defense" N =	(71)	(15)	(27)	(13)	(28)	(65)	(14)	(35)	(21)
not the assailant	38%	33%	26%	31%	46%	42%	36%	43%	62%
victim consented	48	40	60	38	43	46	7	37	14
other (prostitution, intoxication, etc.)	14	27	14	31	11	12	57	20	24
$x^2 = 5.7$, 6df, p = .02, C = .23					$x^2 = 14.2$, 6df, p = .02, C = .31				
6. CREDIBILITY OF VICTIM									
a. "cooperation with prosecutor" N =	(106)	(20)	(32)	(19)	(40)	(77)	(22)	(41)	(39)
full	83%	88%	29%	63%	87%	66%	82%	54%	67%
partial	9	12	21	5	13	22	18	19	23
uncooperative	8	0	50	32	0	12	0	27	10
$x^2 = 33.8$, 6df, p = .0001, C = .53					$x^2 = 14.3$, 6df, p = .02, C = .29				
b. "victim as witness" N =	(50)	(18)	(28)	(17)	(23)	(51)	(17)	(16)	(27)
good	38%	12%	0%	18%	57%	31%	71%	6%	37%
unpredictable or poor	62	78	100	82	43	69	29	94	63
$x^2 = 28.9$, 2df, p = .0001, C = .27					$x^2 = 28.1$, 6df, p = .0001, C = .48				
c. "alcohol or drug use by victim" N =	(74)	(15)	(29)	(19)	(32)	(75)	(22)	(40)	(42)
no	60%	20%	17%	63%	78%	57%	75%	50%	76%
yes	40	80	83	37	22	43	25	50	24
$x^2 = 12.4$, 2df, p = .002, C = .34					$x^2 = 6.7$, 3df, p = .08, C = .21				

	Under Old Law				Under New Law				
	RAPE	*OTH.*	*DEC.*	*CK.*	*R1*	*R2,3*	*OTH.*	*DEC.*	*S.R.1,2,3*
d. "time between crime and report to police" N =	(44)	(20)	(23)	(17)	(41)	(81)	(23)	(45)	(46)
within 1 hour	68%	48%	67%	21%	66%	64%	56%	42%	17%
within 24 hours	25	30	11	18	24	16	31	38	20
after 24 hours or long term offense	7	22	22	61	10	20	13	20	63
$x^2 = 10.1$, 6df, $p = .05$, $C = .29$					$x^2 = 19.5$, 6df, $p = .01$, $C = .35$				
7. RACE									
a. "race of suspect" N =	(104)	(28)	(40)	(32)	(41)	(81)	(23)	(46)	(44)
white	54%	60%	39%	72%	61%	51%	61%	23%	73%
minority	46	40	60	28	39	49	39	77	27
$x^2 = 2.2$, 2df, p = n.s., $C = .12$					$x^2 = 17.2$, 3df, $p = .0006$, $C = .30$				
b. "race of victim" N =	(87)	(20)	(33)	(28)	(38)	(80)	(23)	(44)	(41)
white	84%	80%	56%	78%	82%	76%	96%	75%	83%
minority	16	20	44	22	18	24	4	25	17
$x^2 = 9.5$, 2df, $p = .008$, $C = .27$					$x^2 = 1.9$, 3df, p = n.s., $C = .11$				
c. "race pairing" N =	(86)	(22)	(37)	(27)	(38)	(80)	(23)	(44)	(41)
white S/white V	45%	60%	33%	63%	58%	47%	57%	21%	68%
minority S/white V	38	20	22	15	24	29	39	55	15
minority S/minority V	13	20	41	15	18	21	0	21	15
white S/minority V	4	0	4	7	0	3	4	4	2
$x^2 = 12.0$, 6df, $p = .06$, $C = .30$					$x^2 = 23.5$, 9df, $p = .005$, $C = .35$				

APPENDIX H

FACTORS SIGNIFICANTLY ASSOCIATED WITH CHARGE UNDER THE NEW LAW: RESULTS OF STEPWISE REGRESSION ANALYSIS

	Beta	p-level
A. Rape 1 v. Rape 2, 3 (adult victims)		
1. *Aggravation*	.51	.001
2. *No social interaction*		
no prior contact	.23	.002
3. *Corroboration*		
circumstantial evidence	.21	.03
B. Rape 2, 3 v. Other (adult victims)		
1. *Suspect's credibility:*		
defense of consent or wrong i.d.	.21	.04
C. Decline v. Rape + Other (adult victims)		
1. *No aggravation*	.21	.005
2. *No corroboration*		
no circumstantial evidence	.13	.05
no witness identification	.15	.01
3. *Race of suspect (minority)*	.10	.05
D. Rape 1, 2, 3 v. Statutory Rape (juvenile victims)		
1. *Force*	.15	.004
2. *No social interaction*		
victim-suspect are strangers	.15	.001
3. *Victim credibility*		
no non-marital sex	.19	.05
long term offense	.18	.05
E. Other v. Statutory Rape 1, 2, 3 (juvenile victims)		
1. *Force*	.43	.05
2. *Victim's credibility*		
good witness	.13	.01
F. Decline v. Rape + Stat. Rape + Other (juvenile victims)		
1. *No corroboration*		
no circumstantial evidence	.24	.001
2. *Victim's credibility*		
uncooperative victim	.10	.04
3. *Suspect's age*		
under 30 years	.19	.01

APPENDIX I

FACTORS SIGNIFICANTLY ASSOCIATED WITH CHARGE UNDER THE OLD LAW: RESULTS OF STEPWISE REGRESSION ANALYSIS

	Beta	p-level
A. Rape v. Other (adult and juvenile victims)		
1. *Victim credibility*		
no non-marital sex	.46	.0001
2. *No social interaction*		
Victim-suspect are strangers	.13	.001
3. *Corroboration*		
circumstantial evidence	.16	.04
B. Rape v. Carnal Knowledge (juvenile victims only)		
1. *Force*	.13	.006
2. *No social interaction*		
victim-accused are strangers	.18	.001
victim attempt to flee	.12	.05
3. *Victim credibility*		
cooperative victim	.10	.05
C. Carnal knowledge v. Other (juvenile victims only)		
1. *No force*	.17	.004
2. *Victim credibility*		
no non-marital sex	.33	.01
D. Decline v. Rape & Other & CK (adult and juvenile victims)		
1. *Race*		
minority suspect/ minority victim	.32	.0001
2. *No corroboration*		
no witness of physical-emotional state	.27	.0001
3. *No aggravation*	.12	.02
4. *No force*		
no verbal resistance	.11	.03
5. *No victim credibility*		
non-marital sex	.21	.001
poor witness	.10	.005
6. *Social Interaction*		
prior contact	.11	.05
victim-suspect are friends	.09	.01

APPENDIX J

SUMMARY OF RESULTS

The principal empirical findings and conclusions can be summarized briefly.

(1) *The incidence of forcible rape.* Fears of a rising tide of forcible rape, which fueled in part the law reform movement during the high crime decade of 1965-75, are probably overdrawn. While the incidence of rape rose sharply, it cannot be said unequivocally that the actual rate increased. The reported increase was a temporary deviation, peaking in 1969 and returning to normal levels by 1974 shortly *before* the enactment of reform legislation. The drop in reported crime, therefore, cannot be credited to the new laws.

(2) *Arrest rates in forcible rape.* There is a basis for the concern over low arrest rates. From 1961 to 1977, clearances by arrest declined from 73% to 51% of founded complaints. It was not, however, unique to rape. Arrests for other violent offenses also declined as all violent crime rates soared during this period.

(3) *Statistical patterns of rape.*

a. The typical rape suspect is a blue collar or unemployed white or black male, about 25 years old, with a history of arrests. The victim is usually white, 18 years of age, of working class background, and sometimes has a record of arrests for sex offenses.

b. Most forcible rapes do not involve brutal assaults by strangers. In the majority of cases, forcible compulsion is low to moderate and victims resist verbally, and suffer no physical injury. The crime is usually intraracial.

c. Statutory rape is a long-term offense, with little or no physical force, and involves older white males. The pattern of homosexual male rape is more similar to statutory than forcible rape.

(4) *Impact on convictions.* The reform objective of increasing rape convictions by creating gradations of culpability was successful.

a. Convictions for forcible and statutory rape have increased by nearly one-fifth due to a decline, not of rape acquittals or dismissals, but of convictions for assault and other offenses. The overall conviction rate remained the same both before and after the reform: 72%. The proportion of convicted defendants is unchanged, but more offenders are labeled as "rapists" under the new law.

b. The claim of unusually low conviction rates in forcible rape is not founded. Over the years, the national conviction rate (57%) has remained stable and is only slightly below the rate for equivalent violent offenses.

(5) *Impact on manner of disposition.* Calibrating rape degrees has enhanced the prosecutor's negotiating flexibility as desired by reform proponents. The total proportion of forcible and statutory rape cases disposed by plea has declined slightly (accompanied by an increase in cases tried), but the plea is now more often to a lower degree of rape rather than to some other offense.

(6) *Impact on sentencing.* Reform legislation matched punishment to culpability because the prescribed sanctions under the common law statute were severe. In fact, the severity of sentences for forcible and statutory rape, as measured by the proportion incarcerated, is the same under the old and new statutes. The difference is in prescribed, not actual, severity. However, there are now fewer convicted persons given deferred or suspended sentences and more confined to inpatient treatment. Punishment is more certain but not harsher.

(7) *Impact on charges filed.* The distribution of all types of rape and other charges and non-prosecution is virtually identical before and after the reform. The stability of the pool of charged and convicted offenders supports the Durkheim theory of the relative constancy of criminal conduct in society.

a. Prosecutors apply the same convictability standard in screening cases prior to filing despite the increased caseload. This suggests the possibility that the increased number of reported rapes comes from digging deeper into the well of previously unreported cases, and that they were unreported because of weak fact patterns.

b. Charging rates are not disproportionately low as claimed by reform advocates. Over time, the national filing rates for forcible rape and equivalent violent offenses are basically stable and similar.

(8) *Impact on the process of charging forcible rape.* Since the distribution of charges is the same, the process of charging—*i.e.*, the factors relied upon and their respective weights in the decisionmaking—is also the same under both statutes. This is because the same kinds of evidence are used to prove nonconsent regardless of the statutory definition of rape.

a. The statutory and practical factors that determine forcible rape are (in descending order): physical force, social interaction, corroborative evidence, victim credibility, and race. Prosecutors aggregate these factors to judge convictability. The more factors present, the more convictable the case, and the higher the charge.

b. Cases of an aggravated nature are always charged and convicted of the substantive offense whether it is called rape or rape 1. Cases low in force and corroboration are declined under both the old and new statutes. Rape 3 is rarely filed; it is a plea category. The majority of cases fall in the mid-range of convictability. There is low to moderate forcible

compulsion and moderate to high social interaction. This can result in a credibility contest between victim and suspect. It is here, in cases that could be filed as rape 2 or another offense, that charging discretion is greatest and actual conviction least certain.

(9) *Impact on the process of charging statutory rape.* The way prosecutors perceive and evaluate juvenile victim cases has not been altered by the reform. Statutory rape cases are even less convictable than forcible rape complaints that are declined, indicating the importance of the presumption of nonconsent.

a. The determinative factors are age of victim and suspect, corroborative evidence, social interaction, non-aggravated physical force, credibility, and race.

b. There are three distinctive fact patterns. The "dirty-young man" type is not prosecuted; the "dirty old man" is charged with statutory rape; and forcible rape (by a young man) is filed as such.