Rape III–National Developments In Rape Reform Legislation

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I. INTRODUCTION

As of 1980, every state has considered, and most states have passed, some form of rape reform legislation. The reform legislation has usually been lobbied through state legislatures by a coalition of feminists and law-and-order groups.[1] The articulated purposes of the new laws are to increase the number of rape convictions and to ensure that the interests of victims are respected in the criminal justice process. The passage of new laws, the reform process, and the socialization efforts directed at professionals, educators, and police have generated an enormous amount of literature.[2] This literature, combined with popular discussion, has increased pressure for further reform. Rape reform legislation, nevertheless, is still controversial. The vast majority of state legislators are male; and the legislative committees where the drafting and amending processes occur are often, if not always, controlled by older, more conservative men.[3]

Passage of rape reform legislation has involved considerable grass roots lobbying in the state legislatures, with national coordination provided by the National Organization for Women (NOW) National Task Force on Rape. Local women have become familiar with the voting records of their local legislators. The lobbying effort has been similar to lobbying efforts conducted by other special interest groups. Feminists have sought support from traditional political organizations, such as the League of Women Voters and the American Civil Liberties Union.[4] The expertise and political

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This Article is a continuation of a series of articles, published by the WOMEN'S RTS. L. REP., dealing with rape reform legislation in the United States.

3 WOMEN'S RTS. L. REP. 45-57 (Winter 1976) [hereinafter cited as *Rape I*] consisted of commentaries on the legislative history of the New Jersey and Pennsylvania rape statutes, on federal law regarding rape, and on recent Supreme Court decisions.

3 WOMEN'S RTS. L. REP. 90-137 (Spring/Summer 1977) [hereinafter cited as *Rape II*] consisted of a state-by-state summary of the rape laws in chart form, a proposed model sex offense statute and commentary on the statutory changes through 1975.

This Article [hereinafter cited as *Rape III*] is a survey of national trends in rape reform legislation since 1976.

A supplement [hereinafter cited as *Rape IV*] to this issue of the WOMEN'S RTS. L. REP. is an updated and more extensive state-by-state analysis of the sex offense laws through 1979. *Rape IV* also contains detailed state-by-state historical summary of legislative changes in the rape laws from their earliest codification. Ordering information is on page 164 of this issue.

The author would like to thank the editors of the WOMEN'S RTS. L. REP., especially Marilyn Kline and Betsy Imholz, Articles Editors. Special thanks are also extended to Camille Trotto and to Alba Conte for their assistance. Ms. Conte, a student at University of Pennsylvania Law School, was employed at the Special Projects Section during the summer of 1980. Research on cases concerning rape by impersonating a husband was done by Ms. Conte.

1. If feminists had not allied themselves with law-and-order groups, the recent backlash against the women's movement might have blocked the enactment of reform legislation in many states. The sheer volume of legislative activity might lead to the impression that the reform efforts have been overwhelmingly successful; a closer examination reveals that, in fact, states have cautiously selected from a variety of reform objectives.

2. *E.g.*, S. BROWNMILLER, AGAINST OUR WILL (1975); Feild & Barnett, *Forcible Rape: An Updated Bibliography*, 68 J. CRIM. L. & CRIMINOLOGY 146 (1977) (bibliography listing 371 items). A bibliography compiled in 1980 would have twice as many entries. The Feild and Barnett bibliography is especially useful to lawyers because it includes numerous references to literature in the social sciences and in medicine as well as to books and articles written for a general audience. In the past few years, the amount of published literature concerning the psychology and treatment of sex offenders has also markedly increased. *See, e.g.*, A. GROTH, MEN WHO RAPE (1979).

3. Men are rarely committed to the enormous political effort required to enact rape reform legislation. There are exceptional cases: in New Jersey, during the effective debate on rape reform legislation, membership in the two decisive legislative committees was exclusively male; both committee chairmen were personally committed to the National Organization for Women (NOW) reform bill, and both chairmen went to considerable lengths to defeat committee amendments which would have substantially curtailed the objectives of the reformers. In contrast, a number of states have passed legislation concerning the pornographic exploitation of children with minimal political effort. Such legislation was drafted at the federal level and passed by a number of states with almost no opposition. *See, e.g.*, HAWAII REV. STAT. §§ 707-750, -751 (Supp. 1979); N.J. STAT. ANN. § 2C:24-4 (West Pamph. 1980).

4. The particular constellation of political alliances varied enormously from state to state. In some states, the American Civil Liberties Union played a more active role than citizen groups or law enforcement agencies, which were primarily interested in legislation which

sophistication of such groups were probably critical to success in several states. In every state which has passed some form of rape reform legislation, the particular compromise between legislators and lobbyists reflected the balance between the political pressures exerted by reformers and the legislature's perception of the need for reform. In some states, reform efforts were demonstrably more successful than in others.[5]

This Article analyzes legislative changes in the area of rape reform since 1976. Sections II and III outline national trends and discuss reform objectives. Sections IV through VII discuss the trends in specific areas of reform: the consent defense, the spousal exception, changes in the statutory age, and the rape reform evidence statutes. Section VIII traces the experience of reform in New Jersey. Section IX summarizes the implications of rape reform legislation.

II. National Trends in Rape Reform Legislation

During the 1976, 1977, 1978, and 1979 legislative sessions, an enormous amount of legislation affecting rape was passed at the state level. During this period, thirty-two states amended their rape statutes or their laws governing sex offenses.[6] Some of these states passed only technical amendments or made minor changes.[7] Many states passed legislation entirely rewriting their laws governing rape.[8] Despite the variety of new statutes, however, certain national trends are discernible.

The Michigan Criminal Sexual Conduct Statute, enacted in 1975,[9] continues to be the most important model for reform, although most states do not adopt the provision of the Michigan statute which totally precludes the admissibility of evidence of the prior sexual conduct of the victim with third parties.[10] The trend toward defining prohibited sexual conduct as both more than, and less than, what would have constituted rape under former law continues. Sexual penetration in reform statutes includes acts other than penile-vaginal intercourse.[11] Carnal knowledge in the traditional statutes included only penile-vaginal intercourse as the criminal act; the emphasis upon penetration in reform statutes is a carry-over from former law.

Redefinition of rape in specific terms remains a primary reform objective. Many reform statutes define the offense in terms of objective circumstances in order to move the focus of the trial away from the victim's behavior and character. Rape reform statutes commonly replace the single crime of rape, or replace the two crimes of rape and statutory rape with a series of graded offenses; statutes also include lesser offenses which carry minor penalties. Many states define offenses in terms of degrees in order to establish gradations of penalties for various prohibited acts.[12] Some

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would increase convictions and lengthen criminal sentences.

5. *Compare* Colo. Rev. Stat. § 18-3-401 to -410 (Repl. 1978) *with* D.C. Code Ann. § 22-2801 (1973) *and* Ga. Code Ann. § 26-2018 (1978).

6. The following states have made some legislative change in their rape laws since research on *Rape II* was completed in early 1976: Alabama, Alaska, Arizona, California, Delaware, Georgia, Idaho, Illinois, Iowa, Kansas, Kentucky, Louisiana, Maryland, Massachusetts, Minnesota, Montana, Nebraska, Nevada, New Jersey, New Mexico, New York, North Carolina, North Dakota, Oregon, South Carolina, South Dakota, Tennessee, Utah, Vermont, Virginia, West Virginia, and Wyoming.

7. *E.g.*, Ill. Ann. Stat. ch. 38, §§ 11-1 to -5 (Smith-Hurd 1979); Kan. Stat. §§ 21-3501 to -3508 (1974 & Supp. 1978); Minn. Stat. Ann. §§ 609.341 to .345 (West Supp. 1979).

8. *E.g.*, S.C. Code §§ 16-3-651 to -659.1 (Supp. 1979); Tenn. Code Ann. §§ 39-3701 to -3710 (Supp. 1980). California has introduced most major reforms, including sex-neutrality and the abolition of the spousal exception, by adding new offenses without repealing its traditional rape statute. Cal. Penal Code §§ 261 to 289 (West 1970 & Supp. 1980).

9. Mich. Comp. Laws Ann. §§ 750.520a to .520*l* (Mich. Stat. Ann. §§ 28.788(1) to .788(12) (Callaghan Cum. Supp. 1980)).

10. Mich. Comp. Laws Ann. § 750.520 (Mich. Stat. Ann. § 28.788 (Callaghan Cum. Supp. 1980)). See discussion in text surrounding note 159 *infra*.

11. The definition of sexual penetration in the Michigan Criminal Sexual Conduct Statute was the first such definition and is often the source of later provisions. "Sexual penetration means sexual intercourse, cunnilingus, fellatio, anal intercourse, or any other intrusion, however slight, of any part of a person's body or of any object into the genital or anal openings of another person's body, but emission of semen is not required." Mich. Comp. Laws Ann. § 750.520a(h) (Mich. Stat. Ann. § 28.788(1)(h) (Callaghan Cum. Supp. 1980)).

12. Ala. Code tit. 13A, §§ 13A-6-61 to -64, -66, -67 (1977 & Supp. 1979); Alaska Stat. §§ 11.41.410 to .430 (1979); Ark. Stat. Ann. §§ 41-1804 to -1806, -1808, -1809 (1977); Colo. Rev. Stat. §§ 18-3-402 to -404 (Repl. 1978); Conn. Gen. Stat. Ann. §§ 53a-70 to -73a (West Supp. 1979); Del. Code Ann. tit. 11, §§ 76-763 to -766 (1979); Hawaii Rev. Stat. §§ 707-730 to -732, -736, -737 (Repl. 1976 & Supp. 1978); Iowa

states, however, accomplish a similar result by increasing penalties for specific aggravating circumstances.[13]

The theory behind reducing penalties is that juries have been reluctant to convict for rape when the penalty for rape is as severe as the penalty for murder. The arguments for reduced penalties were based upon research into the imposition of the death penalty for rape. During the 1960's, when the death penalty cases were before the Supreme Court, the argument was convincingly made that the death penalty for rape, and even for assault with intent to commit rape, was overwhelmingly imposed upon black males for alleged offenses against white women.[14] The Model Penal Code commentary, on the other hand, recommended reduced penalties because of the commentators' concern with false complaints and with inappropriately imposed criminal penalties for consensual sexual behavior.[15] For a variety of reasons, then, the reduction in penalties and the introduction of gradations of penalties were incorporated in most reform legislation. Gradations of penalties also allowed for the discrete punishment of specific acts, short of intercourse, as sexual contact offenses. Formerly, such offenses had to be charged under the laws governing attempts, assaults with intent, lewdness, or "debauching and impairing the morals of a minor."[16] A significant minority of reform states, however, also adopted mandatory minimum terms and a statutory prohibition on the imposition of suspended sentences or probationary terms for repeat offenders. This trend is in contrast with concurrent trends in reduction in penalties incorporated in the majority of reform statutes.[17]

CODE ANN. §§ 709.2 to .4 (West 1979); KY. REV. STAT. §§ 510.040 to .060 (1975); MD. CRIM. LAW CODE ANN. §§ 462 to 464C (Supp. 1979); MICH. COMP. LAWS ANN. §§ 750.520b to .520e (MICH. STAT. ANN. §§ 28.788(2) to .788(5) (Callaghan Cum. Supp. 1980)); MINN. STAT. ANN. §§ 609.342 to .345 (West Supp. 1979); MO. ANN. STAT. §§ 566.040, .050, .070, .080, .100, .120C (Vernon 1979); NEB. REV. STAT. §§ 28-319 to -320 (Supp. 1978); N.Y. PENAL LAW §§ 130.25, .30, .35, .55, .60, .65 (McKinney 1975); N.C. GEN. STAT. §§ 14-27.2 to .6 (Supp. 1979); OKLA. STAT. ANN. tit. 21, § 1114 (West 1958); OR. REV. STAT. §§ 163.355, .365, .375 (Repl. 1977); S.C. CODE §§ 16-3-652 to -655 (Supp. 1979); TENN. CODE ANN. §§ 39-3703 to -3706 (Supp. 1979); V.I. CODE ANN. tit. 14, §§ 1701 to 1703 (1964 & Supp. 1978-79); WASH. REV. CODE ANN. §§ 9A.44.010 to .090 (Supp. 1980-81); W. VA. CODE §§ 61-8B-3 to -8 (1977); WIS. STAT. ANN. §§ 940.225(1), (2), (3), (3m) (West Supp. 1978-79); WYO. STAT. §§ 6-4-302 to -306 (1977).

13. *E.g.*, UTAH CODE ANN. § 76-5-405 (Repl. 1978) (defining aggravated sexual assault as rape or sodomy, or an attempt in which the actor causes serious bodily injury or threatens kidnapping, death, or serious bodily injury to be inflicted imminently on anyone).

14. The data support the proposition that the imposition of the death penalty for rape has historically been an invidious discrimination on the basis of race. Most data were collected in the 1960's by researchers who went to the records of individual state courts and laboriously obtained information on individual cases. B. PRETTYMAN, DEATH AND THE SUPREME COURT (1961); Wolfgang & Riedel, *Race, Judicial Discretion and the Death Penalty*, 407 ANNALS 120 (1973). In some states, racial discrimination was made explicit by statute. *E.g.*, Alabama (Code of 1852 provided death penalty for slave or free negro who raped a white woman); Arkansas (Code of 1838 provided death penalty for assault with intent to commit rape if actor was a negro or mulatto); Georgia (Compilation of 1861 provided separate penalty structure for offenses against slaves and free persons of color); Kansas (Compilation of 1855 provided that a negro or mulatto who raped or attempted rape of a white woman would be punished by castration at expense of defendant); Kentucky (1802 Code provided penalty of a term of years applicable to whites only, and death penalty for a slave who raped a white woman. Code of 1813 provided death penalty for slave who attempted rape of a white woman); Mississippi (statute passed in 1857 provided death penalty for a slave who raped or attempted carnal connection with a white female under 14); Missouri (statute of 1825 provided castration for rape or attempted rape by a negro or mulatto); Tennessee (1858 law provided death by hanging for rape by a slave or a free person of color upon a free white female); Virginia (death penalty for rape codified in 1792. Castration was permitted of a slave who attempted to ravish a white woman. The revised code of 1819 established two-tiered penalty structure: for slaves—rape, punishable by death; carnal knowledge of a girl under 10, death or castration; attempt to ravish, castration; for free persons—rape, 10-21 years; carnal knowledge of a girl under 10, 1-10 years. 1823 law provided death by hanging of any slave, free negro or mulatto who attempted to ravish a white woman). Nor were such distinctions only in Southern states, *e.g.*, Pennsylvania (code in effect in 1700 provided the death penalty for negroes if the offense were committed upon a white woman or maid).

15. MODEL PENAL CODE § 207.4, Comment (Tent. Draft No. 1, 1953 & Tent. Draft No. 4, 1955).

16. In New Jersey, for example, prior to the enactment of rape reform legislation, oral/genital acts with children or manual genital acts with children could only be charged as lewdness or impairing the morals of a minor under N.J. STAT. ANN. §§ 2A:96-3, -4 (repealed by N.J. STAT. ANN. § 2C:98-2 (West Pamph. 1980)). The maximum penalty for these offenses was three years or a fine of not more than $1000; it was the same as the penalty for an act of exposure.

17. *E.g.*, N.J. STAT. ANN. §§ 2C:14-2, -3a, 43-6 (West Pamph. 1980) (drastically reducing the maximum penalties for all sex offenses; however, a mandatory minimum five-year term without parole or probation was introduced for offenders convicted of a second sex offense).

Rape reform statutes in many states have replaced the term rape with a reformulation of the offense in terms of sexual assault,[18] sexual battery,[19] or criminal sexual conduct.[20] Twenty-eight jurisdictions, however, including some states which have passed reform legislation, continue to define a crime called rape.[21] The District of Columbia does not mention the word rape in the title of the offense, but the offense as defined is the traditional offense of common law rape: carnal knowledge of a female forcibly and against her will.[22] Prior to 1975, most states had rape statutes derived from the English common law offense of rape.[23] The Elizabethan rape statute did not define the acts constituting the offense.[24] In the United States,

Apollo and Daphne

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18. ALASKA STAT. §§ 11.41.410 to .430 (1978); ARIZ. REV. STAT. ANN. § 13-1406 (1978); COLO. REV. STAT. §§ 18-3-402 to -404 (Repl. 1978); CONN. GEN. STAT. ANN. §§ 53a-70 to -73a (West Supp. 1979); NEB. REV. STAT. §§ 28-408.03, .04 (Supp. 1978); NEV. REV. STAT. §§ 200.366, .373 (1977); N.H. REV. STAT. ANN. §§ 632-A:2 to -A:4 (Supp. 1977); N.J. STAT. ANN. § 2C:14-2 (West Pamph. 1980); VT. STAT. ANN. tit. 13, §§ 3252, 3253 (Supp. 1979); W. VA. CODE §§ 61-8B-3 to -5 (Supp. 1978); WIS. STAT. ANN. §§ 940.225(1) to (3m) (West 1958 & Supp. 1979); WYO. STAT. §§ 6-4-302 to -305 (1977).

19. FLA. STAT. ANN. § 794.011 (West 1976); S.C. CODE § 16-3-651 (Supp. 1979).

20. MICH. COMP. LAWS ANN. §§ 750.520a to .520e (MICH. STAT. ANN. §§ 28.788(1) to .788(5) (Callaghan Cum. Supp. 1980)); MINN. STAT. ANN. §§ 609.341 to .345 (West Supp. 1980); S.C. CODE §§ 16-3-651 to -655 (1977 & Supp. 1979); TENN. CODE ANN. §§ 39-3701 to -3710 (1977 & Supp. 1980).

21. ALA. CODE tit. 13A, §§ 13A-6-61 to -62 (1977) (two degrees); ARK. STAT. ANN. § 41-1803 (Repl. 1977 & Supp. 1979); CAL. PENAL CODE § 261 (West 1970 & Supp. 1978); DEL. CODE ANN. tit. 11, §§ 763, 764 (Repl. 1979) (two degrees); D.C. CODE ANN. § 22-2801 (1967 & Supp. 1978); GA. CODE ANN. §§ 26-2001, -2018 (1978 & Supp. 1979) (rape and statutory rape); HAWAII REV. STAT. §§ 707-730 to -732 (Repl. 1976 & Supp. 1978) (three degrees); IDAHO CODE § 18-6101 (1979); ILL. ANN. STAT. ch. 38, § 11-1 (Smith-Hurd 1979); IND. CODE ANN. § 35-42-4-1 (Burns Supp. 1979); KAN. STAT. § 21-3502 (1974 & Supp. 1978); LA. REV. STAT. ANN. §§ 14:41 to :43 (West 1974 & Supp. 1979) (aggravated rape, forcible rape, and simple rape); ME. REV. STAT. tit. 17-A, § 252 (Pamph. 1980); MD. ANN. CODE art. 27, §§ 462, 463 (Repl. 1976 & Supp. 1979) (two degrees); MASS. GEN. LAWS ANN. ch. 265, §§ 22, 23 (West Supp. 1979) (rape, rape of a child, rape and abuse of a child); MISS. CODE ANN. §§ 97-3-65, -67 (1973 & Supp. 1979) (rape, rape of a chaste female over 12 and under 18); MO. ANN. STAT. § 566.030 (Vernon 1979); N.Y. PENAL LAW §§ 130.25, .30, .35 (McKinney 1975 & Supp. 1979) (three degrees); N.C. GEN. STAT. §§ 14-27.2, .3 (1969 & Supp. 1977) (two degrees); OR. REV. STAT. §§ 163.355, .365, .375 (Repl. 1977) (three degrees); PA. STAT. ANN. tit. 18, §§ 3121, 3122 (Purdon 1973 & Supp. 1978-79); P.R. LAWS ANN. tit. 33, § 4601 (1969 & Supp. 1978); S.D. COMPILED LAWS ANN. § 22-22-1 (1979); TEX. PENAL CODE ANN. tit. 5, §§ 21.02, .03 (Vernon 1974 & Supp. 1979); UTAH CODE ANN. § 76-5-402 (Repl. 1978 & Supp. 1979); V.I. CODE ANN. tit. 14, §§ 1701 to 1703 (1964 & Supp. 1979); VA. CODE § 18.2-61 (1975 & Supp. 1979); WASH. REV. CODE ANN. §§ 9A.44.040 to .090 (Supp. 1980-81) (three degrees of rape and three degrees of statutory rape).

22. D.C. CODE ANN. § 22-2801 (1967 & Supp. 1978) ("Definition and penalty: Whoever has carnal knowledge of a female forcibly and against her will or carnally knows and abuses a female child under 16 years of age is guilty of rape.").

23. *E.g.*, North Carolina Law of 1818, which declared the Elizabethan rape statute, 18 Eliz. 1, c .7 (1576), to be in force in North Carolina; New Jersey Crimes Act of March 16, 1796, which essentially codified the Elizabethan rape statute. In the 17th and 18th centuries, states also passed omnibus legislation declaring the common law of England to be in effect.

24. The Elizabethan rape statute merely stated that rape was a felony and prohibited the defense of benefit of clergy. 18 Eliz. 1, c .7, §§ 1, 4 (1576). *See Rape I*

the legislative development began with the statutory adoption of the common law offense, followed by a recodification or statutory redefinition during the nineteenth century.[25] Even before the movement for legislative reform in the late 1970's, rape was a crime defined by statute in the majority of jurisdictions. Some states which have adopted reform legislation while keeping the term rape, now define a crime inconsistent with the traditional definition of the offense under English common law. Homosexual assaults,[26] attacks upon male victims,[27] acts other than sexual intercourse,[28] sexual assaults with an object,[29] and sexual assaults upon some categories of spouses [30] are now included in the definition of rape in many states.

In the period between 1960 and 1975, a number of states adopted reformed criminal codes; these reforms included a revision of the law regarding sex offenses and were based upon the American Law Institute's Model Penal Code.[31] Several aspects of this model rape statute differ significantly from rape reform statutes drafted after 1975. The Model Penal Code rape statute included some provisions which anticipated the reforms of the 1970's; such a provision was the introduction of sex-neutrality for minor offenses and the definition of a series of graded offenses.[32] The statutory corroboration requirement for all offenses except forcible rape,[33] the mistake as to age provision,[34] the prompt complaint requirement,[35] and the statutory references to sexually promiscuous complainants [36] were Model Penal Code provisions which were incompatible with the goals of feminists lobbying for rape reform legislation. Consequently, most states which have adopted substantive criminal code reform, following to a greater or lesser extent the Model Penal Code, have not adopted all of the provisions of the Model Penal Code concerning sex offenses.[37] Several states have adopted the Model Penal Code formulation of consent [38] and one of the Model Penal Code definitions of the offense.[39] A number of states, however, in effect adopted the Model Penal Code rape statute when

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at 45, n.1. The crime was the common law crime of rape. There was no statute defining the offense in Britain until the Sexual Offenses Act, 1956, 4&5 Eliz. 2, c .69, §§ 1-50. The element of the offense was defined by case law as carnal knowledge (sexual intercourse) by a man upon a woman not his wife without her consent; the law also required that an act of penetration have occurred.

25. The 19th century codifications usually called the prohibited act carnal knowledge, which was defined by case law as sexual intercourse with a requirement of penetration. The statutory definitions in American law often described circumstances which were deemed to indicate the absence of consent. See, *e.g.*, the California Penal Code of 1872, which became the model for a number of western and southwestern states.

26. *E.g.*, IND. CODE ANN. § 35-42-4-1 (Burns Supp. 1977).

27. *E.g.*, MD. ANN. CODE art. 27, §§ 462, 463 (Supp. 1979).

28. *E.g.*, N.J. STAT. ANN. § 2C:14-1 (West Pamph. 1980).

29. *E.g.*, S.D. COMPILED LAWS ANN. § 22-22-2 (Supp. 1978).

30. *E.g.*, ALASKA STAT. § 11.41.445(a) (1978).

31. MODEL PENAL CODE (Proposed Official Draft, 1960) [hereinafter cited as MODEL PENAL CODE]. As of 1980, 39 states had adopted revised criminal codes based on the MODEL PENAL CODE. Most states followed the MODEL PENAL CODE only in selected aspects of the revisions. The experience of New Jersey is typical. Its code closely follows the MODEL PENAL CODE in those chapters which define intent, liability, general principles, and jurisdiction. The definitions of most substantive offenses also follow the MODEL PENAL CODE, except where additions incorporate special provisions from New Jersey case law and statutes. The MODEL PENAL CODE chapter on sex offenses was replaced with rape reform legislation based upon the Michigan Criminal Sexual Conduct Statute. The chapters on sentencing are new; they follow neither prior New Jersey law nor the MODEL PENAL CODE.

32. For example, the MODEL PENAL CODE defined a crime called sexual assault. Under the MODEL PENAL CODE, the offense was a relatively minor sexual contact offense. Reformers in the 1970's began with the concept of sexual assault, redefined it, and used the revised definition to replace rape as the principal sex offense. *Compare* MODEL PENAL CODE, *supra* note 31, § 213.4 *with* N.J. STAT. ANN. § 2C:14-1 (West Pamph. 1980).

33. MODEL PENAL CODE, *supra* note 31, § 213.6(6).

34. *Id.*, § 213.6(1).

35. *Id.*, § 213.6(5).

36. *Id.*, § 213.6(4).

37. Pennsylvania, for example, enacted a revised criminal code in 1972, following the MODEL PENAL CODE and including its rape statute. In 1973, the mandatory jury instruction was repealed. In 1976, lobbyists for a reform bill were able to persuade the legislature to repeal only the common law corroboration requirements and the statutory prompt complaint requirement, and to eliminate the mistake as to age provision for victims under 14. Pub. L. 339, No. 115, § 2 (1973) (repealing PA. STAT. ANN. tit. 18, § 3106 (Purdon 1973)); Pub. L. 120, No. 53, §§ 1, 2 (1976) (amending PA. STAT. ANN. tit. 18, §§ 3102, 3104, 3105 (Purdon 1973); reinstating PA. STAT. ANN. tit. 18, § 3106 (Purdon 1973); enacting PA. STAT. ANN. tit. 18, § 3107 (Purdon Supp. 1979-80)).

38. *E.g.*, ARIZ. REV. STAT. ANN. § 13-401(5) (1978); N.Y. PENAL LAW § 130.05 (McKinney 1977) (strongest provision in effect from the point of view of defendants); WASH. REV. CODE ANN. § 9A.44.010(6) (Supp. 1980-81).

39. *E.g.*, KY. REV. STAT. § 510.010 (1975).

they adopted a revised criminal code based upon the Model Penal Code.[40]

Despite the fact that the Model Penal Code's formulation of sex offenses was based upon a 1950's view that rape was a crime fantasized by pseudo-victims, the Model Penal Code provisions concerning sex offenses contained several important changes which were incorporated in the rape reform statutes drafted by feminists in the middle and late 1970's. The Model Penal Code decriminalized consensual homosexual conduct between adults and formulated some crimes, but not rape, in sex-neutral terms. The Model Penal Code defined a series of minor crimes: it defined the crime of sexual assault which prohibited sexual contact between children and adults. The Model Penal Code also attempted to introduce objective definitions of rape, although the emphasis upon consent vitiated this goal. The Model Penal Code introduced gradations of offenses; and while one reason for the gradations was the presumed consent of the victim, rape reform legislation retained the idea of creating a series of crimes, each defined by distinct prohibited acts and carrying discrete penalties. All penalties were reduced. The Model Penal Code also, however, codified the common law doctrines of prompt complaint, corroboration, and mistake as to age,[41] despite the fact that the adoption of such provisions would have been contrary to the law of most states in 1960.

In some instances, the fact that the Model Penal Code contained blatantly sexist provisions helped activists lobbying for rape reform legislation.[42] Lobbyists for reform bills could compromise by agreeing to relatively unobjectionable Model Penal Code provisions and by pointing out that the blatantly sexist commentary to the Model Penal Code sex offense provisions was contradicted by the alarming increase in forcible rape in the 1970's. The fact that the Model Penal Code rape provisions were not sex-neutral also made it easier to argue that the Model Penal Code was out of date. If there had been no comments and if the Model Penal Code had not included a statutory corroboration requirement, a prompt complaint requirement, and a mistake as to age provision, the Model Penal Code might have accomplished some of the objectives of the feminists who lobbied against its adoption in most states in the late 1970's. In New Jersey, political pressure exerted upon the legislature to pass criminal code reform carried along rape reform legislation. Reformers in New Jersey had tried unsuccessfully in three previous years to get rape reform legislation passed. The Model Penal Code remains a significant influence, and those lobbying for rape reform legislation should be familiar with its provisions. Serious ambiguities and contradictions may arise when rape reform legislation is part of a revised criminal code based primarily upon the Model Penal Code.[43]

III. The Goals of Rape Reform Legislation

Perhaps because reformers in the area of rape legislation have not understood the workings of the criminal justice system, legislative reforms have been drafted with the presumptions that cases are disposed of at trial. The popular image of the courtroom emphasizes the drama of the adversarial process. Few cases, however, go to trial and exemplify this model. When the cases go to trial and are then reported in the newspapers, the public is left with the erroneous impression that the vast majority of lawsuits are settled in a courtroom. In fact, the realities of the criminal justice disposition process are those of small group dynamics.[44] The same participants

40. *E.g.*, Hawaii Rev. Stat. §§ 707-730 to -742 (Repl. 1976 & Supp. 1980) (amended in 1979 to define the offense in sex-neutral terms); Me. Rev. Stat. tit. 17-A, §§ 251-255 (Pamph. 1980); Pa. Stat. Ann. tit. 18, §§ 3101-3107, 3121-3127 (Purdon 1973 & Supp. 1978-79).

41. *See* Model Penal Code § 213.6 Comment (Tent. Draft No. 4, 1955).

42. *Id.* at § 213.0-.6.

43. The New Jersey Code of Criminal Justice [hereinafter cited as code] includes a general definition of consent which implicitly applies to its sexual assault provisions. The sexual assault provisions of the code never mention the word consent, nor is it defined specially in the section of the code dealing with sex offenses. The mandatory sentence for second offenders contradicts the general sentencing provisions of the code. The intent requirements for sexual assault are not spelled out in terms of the carefully formulated definitions of intent incorporated in the code. The courts' interpretation of these ambiguities will be critical to the success of reform goals.

44. For a discussion of courts in terms of functional analysis, *see* R. Nimmer, The Nature of System Change: Reform Impact in the Criminal Courts (1978) (the discussion in Chapter 2 is especially relevant). *See also* Criminal Justice: Law and Politics (G. Cole ed. 1972); Law, Justice and the Individual Society: Psychological and Legal Issues (J. Tapp &

face each other day after day. The jury trial is a rarity; indeed, any sort of trial is an exception. Reforms, therefore, which are developed for the model of a jury trial, in which issues of fact and law are contested, will not affect the informal system which accounts for the majority of criminal dispositions. During the criminal disposition process, prosecutors, defense attorneys, judges, defendants, witnesses, court clerks, and victims interact in a variety of ways. Operational decisions are usually made by prosecutors and defense attorneys, who are themselves influenced and constrained by the other actors as well as by a number of institutional factors, such as court delay, which are beyond their control. The wording of a particular statute is not the single, or perhaps even a determinative, factor in decisionmaking. Although an attorney cannot ignore the definition of the crimes with which his or her client is charged, other factors can influence the final disposition of the case. The defense attorney and the prosecutor are influenced by their perceptions of each other, the judge, the defendant, the victim, and other witnesses, as well as by a number of institutional factors which have nothing to do with the individual characteristics of the case or with the fact that the case involves sexual assault. The system is one in which there is a great deal of informal discretion exercised by all actors. Formal rules, procedural requirements, and statutory definitions do not, by themselves, determine outcome.

In theory, each actor in the process controls a part of the judicial process. The prosecutor controls the severity of the charge, the defense attorney controls the choice of defense issues or strategies, and the judge controls the meting out of sentence. In fact, however, each participant is aware of the strategic positions of the other two actors. The judge, for example, knows the sentence must bear some relationship to sentences given to offenders who share similar characteristics and who were convicted of the same offense. Practices, too, may vary enormously among jurisdictions. In one court, a judge may exercise strong personal control. In another county, the Public Defender's Office may enjoy special prestige. In some cities, the prosecutor may have a great deal of political power. Whatever the particular distribution of power within the informal network, however, the actors are primarily interested in two factors: preserving ongoing relationships and minimizing time and effort.

While reform of the rape laws has proceeded apace in the legislatures, it is unknown whether the impact of reform has conformed to the expectations of the reformers. One knowledgeable commentator has suggested that there is no consistent, systemwide set of policy objectives on the part of advocates for rape reform legislation:

> But is there a shared criminal justice goal in regard to rape? If there is, what is it? To stop rape? To convict all offenders, or to convict some offenders as "examples"? To protect women? To symbolize community approbation of sexual assault? As an observer of the criminal justice institutions, I have begun to doubt that the goals are either very clear or even shared to the extent that agencies are really functioning interdependently. The goals of organizational self-preservation appear to predominate, and often to divide the "system" into feudal preserves.[45]

The principal goals of rape reform legislation can, however, be grouped into the following categories: goals associated with the redefinition of the offense, goals associated with the repeal of the spousal exception, goals associated with the protection of the victim at trial, goals associated with changes in the penalty structure, and goals associated with changes in the statutory age.

A. Goals Associated with the Redefinition of the Offense

Reforms having this goal include redefining rape as sexual assault, redefining the crime in sex-neutral terms, and recategorizing the acts which constitute the most serious offense as more than or less than what was penalized under the former sex offenses. The major innovations can be further subdivided into changes in definitions of offenses involving adults and changes in definitions

F. Levine eds. 1977); M. HEUMANN, PLEA BARGAINING: THE EXPERIENCE OF PROSECUTORS, JUDGES AND DEFENSE ATTORNEYS (1978) (especially Chapter 4, "Adapting to Plea Bargaining: Defense Attorneys").

45. *Research into Violent Behavior: Overview and Sexual Assaults, Hearings Before the Subcomm. on Domestic and International Scientific Planning, Analysis and Co-operation of the Comm. on Science and Technology*, 95th Cong., 2d Sess. 427 (1978) [hereinafter cited as *Hearings*] (statement of Jan Ben Dor).

of offenses involving children. In terms of the general goals of feminists who lobbied for rape reform legislation, the central questions are: Are certain actors being prosecuted and convicted for behavior which would not have resulted in a conviction under prior law? Are there persons who would have been convicted or prosecuted under the prior law who would not be subject to prosecution under a reform statute? The most obvious example is the inclusion in reform statutes of males as victims and females as principals. Under a traditional formulation of rape, a woman could not be convicted of rape as a principal and a man could not be a victim. New Jersey [46] and other states which follow the Michigan formulation adopt sex-neutral terminology for both victims and actors. Has the introduction of sex-neutrality made any difference in cases which result in indictment and conviction? Has the redefinition of the offense to include more than the traditional act of sexual intercourse resulted in a different category of cases being prosecuted? Preliminary results from the University of Michigan study seem to indicate that prosecutions for sexual contact offenses are rare, despite the fact that both reformers and their adversaries expected that the criminalization of sexual contact offenses would introduce major changes in the law.[47]

46. N.J. STAT. ANN. § 2C:14 (West Pamph. 1980).

47. J. MARSH, N. CAPLAN, A. GEIST, G. GREGG, J. HARRINGTON, D. SHARPHORN, FINAL REPORT: LAW REFORM IN THE PREVENTION AND TREATMENT OF RAPE 12, 103-40 (1980).

B. Goals Associated with the Repeal of the Spousal Exception

New Jersey is one of three states to have eliminated the traditional spousal exception to rape by statutory enactment.[48] There are at least two other states where the elimination of the spousal exception is being litigated in the appellate courts.[49] In New Jersey, the common law spousal exception was eliminated by the reform statute.[50] Over twenty states have modified the traditional spousal exception; this is usually done by statutory changes which provide that the spousal exception shall not apply when the parties are legally separated or living apart. The goals of these changes are difficult to discern. They may have been enacted to protect battered wives, to increase convictions for sexual assault among separated spouses, to introduce a threat of prosecution in situations of wife abuse, or to protect all women, irrespective of their marital status. The practical effect of this reform has yet to be determined. Future research should focus on the following issues: Are spouses prosecuted and convicted? Is the rule in New Jersey similar in effect to more moderate reforms in other jurisdictions? Do the cases which result in indictment invariably concern separated spouses? Reforms which attack the spousal exception meet with great resistance from legislators; this is because the legislators may believe that the traditional sexual role of the wife is inextricably linked with marital obligations.

C. Goals Associated with the Protection of the Victim at Trial

In most states, the accomplishment of this goal has been attempted by the adoption of a rape evidence statute; perhaps this is because the passage of rape reform evidence statutes is often the first and easiest reform objective to accomplish.[51] The impact of these statutes is unknown. Does the existence of a rape evidence statute significantly alter either party's strategic position during plea negotiations? For those few cases which go to trial, do the rape evidence statutes change what evidence is admitted at trial? Is it possible to evade the intent of the evidence statutes by introducing the prohibited evidence of the victim's prior sexual conduct on some collateral issue?

Reformers, interested in the protection of victims during the criminal disposition process, have also attempted to accomplish this goal by lobbying for legislation mandating services for rape victims and training for professionals who provide services for rape victims.[52] Some of these reforms have, in theory, mandated radical changes in hospital procedures, police practices, and fiscal responsibility. There has been, however, no measure of the practical effect of this legislation.

D. Goals Associated with Changes in the Penalty Structure

Usually, reform statutes reduce penalties for the most serious sex offense defined. Under the reform statute in New Jersey, the most serious sex offense, aggravated sexual assault, carries a maximum penalty of twenty years. Under the former law, if the offense was found to fall within the purview of the Sex Offender Treatment Act, a conviction for rape carried a mandatory penalty of thirty years.[53] This reduction in rape penalties is typical of reforms in most states which have adopted rape reform legislation. Reformers reduced penalties on the theory that juries and judges would be more likely to convict if the penalties were shorter and if the judge had more discretion in sentencing. Some reformers were also concerned with the history of race discrimina-

48. The other two states are Delaware and Nebraska. Detailed commentary on the treatment of the spousal exception in reform jurisdictions follows at V *infra*.

49. In Hawaii, for example, the legislature made the Model Penal Code rape statute sex-neutral in 1979. HAWAII REV. STAT. §§ 707-730 to -732 (Supp. 1980). The former law defined female as a female not the wife of the actor. The question is whether females as defined have been eliminated from the statute. Important litigation is now taking place in Florida and other states where the statutory law is silent or ambiguous concerning the status of the spousal exception. At this time, there is no definitive case resolving this issue. The National Center on Women and Family Law in New York tracks this litigation and keeps up-to-date information on pending cases throughout the country.

50. N.J. STAT. ANN. § 2C:14-5b (West Pamph. 1980).

51. New Jersey, for example, passed a rape evidence bill in 1976, although revision of the law defining the offense was not passed until 1978. N.J. STAT. ANN. § 2C:14-7 (West Pamph. 1980) (repealing N.J. STAT. ANN. §§ 2A:84A-32.1 to -32.3).

52. A number of these laws are compiled in the Cross References section of *Rape IV*. Typically, the laws mandate the state to provide and pay for emergency room services for victims.

53. N.J. STAT. ANN. §§ 2A:138-1, 164-3 to -13 (repealed by N.J. STAT. ANN. § 2C:98-2 (West Pamph. 1980)).

tion in rape sentences.[54] On the other hand, in some states rape victim advocates specifically tried to eliminate or to reduce judicial discretion in rape cases by specifying mandatory minimum sentences,[55] because the reformers perceived judges to be part of the problem.[56] The idea that juries and judges will be more likely to convict if penalties are shorter is based more upon conjecture than upon empirical evidence.[57]

Future research should focus on the following issues: Has plea bargaining shifted from sentence bargaining to charge bargaining as a result of the introduction of mandatory minimum terms? Are offenders who are involved in offenses with children receiving longer or shorter penalties than before the reform legislation? Are persons convicted of sex offenses under reform statutes receiving harsher penalties? What kinds of convicted offenders, if any, are receiving increased penalties? Has the reduction in penalties simply meant that convicted sex offenders serve less time? [58]

E. Goals Associated with Changes in the Statutory Age

A variety of objectives, some of them contradictory, are associated with legislative changes in the statutory age.[59] This is another area in which legislatures have been extremely cautious. With the introduction of sex-neutral offenses, male victims are automatically included in the post-reform equivalent of statutory rape. This inclusion raises problems of definition, for the new age-determined offenses are broader than the former law. Both reformers and conservatives seemed to agree upon criminalizing sexual contact offenses involving children and adults, but when the question of defining consensual behavior among teenagers arises, debate usually reaches a stalemate, as each side retreats into a fortress built upon its own conception of appropriate female sexual behavior. Legislators often want to protect male victims, and not to punish sexually active males who have not reached the statutory age of consent. Feminists often are divided on the issue of the statutory age for criminal sexual conduct. Many feminists believe teenage girls need special protection, which they believe cannot be provided by sex-neutral statutes. The variety of offenses defined by age illustrate the wide divergence of opinions on the issue of statutory rape.

IV. The Status of Consent Under Reform Statutes

As American case law developed in the 1950's and 1960's, consent to rape came to mean that a woman could consent to sexual intercourse with strangers and acquaintances under circumstances of force, brutality, humiliation, and degradation. The analysis of whether consent had been given depended upon the character of the victim, her previous sexual history, her propensity to consent, and her reputation for chastity. Reformers believed that these aspects of the consent standard put victims, not assailants, on trial in rape cases. Given that social issues surrounding sexual relations are generally approached with ambivalence, contradiction, and hypocrisy, it is perhaps not surprising that the development of the law of consent in American rape cases is a disreputable chapter in our jurisprudence.[60] One clear purpose

54. *See* note 14 *supra*.

55. The reduction of judicial discretion in sentencing was an explicit reform goal in Michigan. Advocates for victims felt their objectives could not be accomplished unless judges were required to impose custodial terms. *See* Legislative Note, *Michigan's Criminal Sexual Assault Law*, 8 U. MICH. J.L. REF. 217 (1974) [hereinafter cited as Legislative Note]. A similar purpose is reflected in New Jersey's mandatory penalty for second offenders. N.J. STAT. ANN. § 2C:14-6 (West Pamph. 1980).

56. Very little work has been done on judicial attitudes toward rape victims. The work that does exist suggests that judges may refuse to sentence offenders or sentence them to probationary terms because of misogynous or punitive attitudes toward victims. *See* Bohmer, *Judicial Attitudes Towards Rape Victims*, 57 JUDICATURE 303 (1974).

57. Most commentators rely on a good but dated study of jury verdicts to support this opinion. H. KALVEN & H. ZEISEL, THE AMERICAN JURY 253 (1966). But see recent research based upon interviews with 1500 people who appeared on the jury rolls in Alabama, H. FEILD & L. BIENEN, JURORS AND RAPE: A STUDY IN PSYCHOLOGY AND THE LAW (1980).

58. In New Jersey, reduction in penalties meant that all sex offenders committed pursuant to the provisions of the former sex offender treatment statute were theoretically eligible to petition a special three-judge panel for a reduction in sentence under N.J. STAT. ANN. § 2C:1-1d(1), -1d(2) (West Pamph. 1980).

59. A detailed statement of the history of the age provisions in every state is included in the History section of *Rape IV*. The present law governing age-defined offenses is included in the Statutory Age Offenses section of *Rape IV*.

60. Harris, *Towards a Consent Standard in the Law of Rape*, 43 U. CHI. L. REV. 613 (1976); Berger, *Man's*

behind rape reform legislation was the elimination or restriction of the definition of consent which had developed in American case law.[61]

Debate continues on the definition of consent in reform statutes. For many strategists, this is the single most important unresolved issue in the area of rape reform. Redefinition, however, may be only part of the problem. Even if it is possible to redefine consent to eliminate what victim advocates find objectionable, to what extent do common law traditions regarding consent continue? There is no conclusive answer to this question, or to that of the redefinition itself. Recently enacted reform statutes indicate widely disparate approaches to both questions concerning the status of consent in reform jurisdictions.

The practical problem of eliminating the sexist traditions which have evolved around the concept of consent is enormous. As a first step, almost all reform statutes provide that the presence of certain defined circumstances or objective facts preclude a defense of consent. These provisions are intended to obviate the state's burden of proving the absence of consent. For example, use of a weapon, in most reform jurisdictions, precludes the defense of consent in sexual assault or criminal sexual conduct cases.[62] The purpose of these provisions is to create the conclusive presumption that sexual acts cannot be entered into by choice when the actor has a knife or gun. Similarly, sexual intercourse incident to the commission of another crime, such as breaking and entering or a robbery, is a circumstance in which the law will presume the acts are forcible.[63] Critics of such provisions argue that consensual conduct between co-felons would be irrationally transformed into a sex offense, but rape victim advocates consider such hypothetical examples farfetched. The underlying assumption of reformers is that the victim of a crime is necessarily helpless, and thus unable to resist a sexual assault.

Some reform statutes define circumstances in which the perpetrator holds a position of family or institutional authority as inherently coercive.[64] Other states define force in specific detail.[65] The purpose behind such definitions is to concentrate on the behavior of the actor rather than that of the victim. Force is different from, but often confused with, lack of consent.[66] The problem with defining force is that it implies that any act or circumstance not specified in such a definition of force is excluded per se. The situation is further complicated by the fact that prior to re-

Trial, Woman's Tribulation: Rape Cases in the Courtroom, 77 COLUM. L. REV. 1 (1977); Note, *Recent Statutory Developments in the Definition of Forcible Rape*, 61 VA. L. REV. 155 (1975).

61. For a discussion of the philosophical basis of consent as it came to be interpreted, see C. Pateman, *Women and Consent*, 2 POL. THEORY 149 (1980). Restricting the application of the consent defense was an explicit reform objective in a number of states. Legislative Note, *supra* note 55; Note, *Rape and Other Sexual Offense Law Reform in Maryland, 1976-1977*, 7 U. BALT. L. REV. 151 (1977) [hereinafter cited as *Reform in Maryland*]; Weddington, *Rape Law in Texas: H.B. 284 and the Road to Reform*, 4 AM. J. CRIM. L. 1 (1975-76).

62. *E.g.*, MICH. COMP. LAWS ANN. § 750.520b (Supp. 1979-80) (MICH. STAT. ANN. § 28.788(2) (Callaghan Supp. 1980-81)) (*any* sexual penetration when the actor is armed is criminal sexual conduct in the first degree); N.J. STAT. ANN. § 2C:14-2a(4) (West Pamph. 1980) (*any* sexual penetration when "the actor is armed with a weapon or any object fashioned in such a manner as to lead the victim to reasonably believe it to be a weapon and threatens by word or gesture to use the weapon or object" is aggravated sexual assault).

63. In statutes which use the commission of a felony as an aggravating circumstance, the felony specified is commonly robbery or breaking and entering. For example, South Carolina's definition of first degree criminal sexual conduct includes circumstances where "the victim is also the victim of forcible confinement, kidnapping, robbery, extortion, burglary, housebreaking, or any other similar offense or act." S.C. CODE § 16-3-652 (Supp. 1979). These statutes may facilitate conviction since during a rape incident the actor will often take the opportunity to rob the victim of the contents of her pocketbook, thereby automatically precluding the application of the consent defense in reform jurisdictions which adopt this approach.

64. The theory behind the adoption of position of authority as a circumstance precluding the consent defense is that family or institutional authority is itself the equivalent of force. *E.g.*, N.M. STAT. ANN. § 30-9-13(A) (1978) (If the perpetrator is in a position of authority over the child and uses his authority to coerce the child, that is a substitute for force. Additional subcategories of this crime define physical contact by force or when the perpetrator is armed).

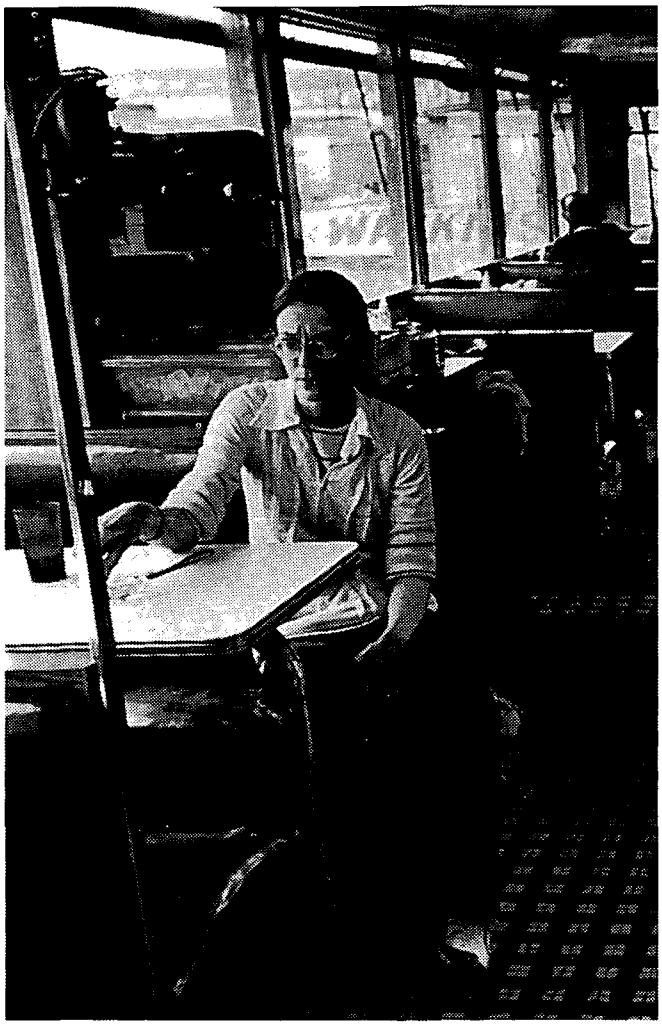
65. TENN. CODE ANN. § 39-3702(3) (Supp. 1980) which states: " 'Force' means compulsion by the use of physical power or violence and shall be broadly construed to accomplish the purposes of the sexual offenses law."

66. Consider the following knowledgeable comment: "Unfortunately, courts, including in the present case a majority of this one, often tend to confuse these two elements—force and lack of consent—and to think of them as one. They are not. They mean, and require, different things." Rusk v. Maryland, 43 Md. App. 476, 485, 406 A.2d 624, 629 (Ct. Spec. App. 1979) (Wilner, J. dissenting). The majority found that circumstances involving lightly choking were not sufficient to induce reasonable fear to overcome the will to resist.

form, many states had a resistance requirement which incorporated features similar to those of the consent standard. The factfinder's attention was focused upon the victim's resistance as proof of the absence of consent. Resistance was the mirror image of consent and functioned in the same way; if a victim resisted, there was proof of non-consent. Proof of resistance was proof that the victim screamed, fought back, attempted to flee, or demonstrated by her overt behavior that she did not consent.

The most basic distinction between reform statutes is whether the drafters have elected to use the term consent. The next crucial distinction is whether the term is specially defined for sex offenses. A number of reform states, most importantly Michigan, have adopted a strategy of defining criminal sexual conduct without using the term consent or the term resistance.[67] In such states, reformers fear, however, that defense counsel may still raise the common law consent defense, in spite of the deliberate omission of any reference to consent.[68]

New Jersey has adopted a sexual assault statute which, like the Michigan statute, defines circumstances of prohibited sexual conduct. The New Jersey statute also does not mention consent. Since New Jersey uses the term sexual assault, however, there is also an implication of non-consent. Is not assault, by definition, something to which the victim does not consent?[69] On the other hand, the assault statute continues the notion that an assault is not a serious crime which should be severely punished unless permanent physical damage occurs. Absent pregnancy, disease, or serious bodily injury, such as a broken arm, the prosecutor in jurisdictions which have redefined rape as sexual assault may be confronted with prior assault case law which excuses or downgrades the penalties for conduct which did not result in some permanent physical impairment.[70] An alternative strategy is to retain the



Cidne Hart/LNS

67. The statute does, however, define the terms force and coercion. MICH. COMP. LAWS ANN. § 750.520b(1)(f)(i)-(v) (Supp. 1979-80) (MICH. STAT. ANN. §§ 28.788(2)(1)(f)(i)-(v) (Callaghan Cum. Supp. 1980)). This approach has been criticized as allowing the old defense of common law consent to apply to every section of the law. BATTELLE MEMORIAL INSTITUTE LAW AND JUSTICE CENTER, FORCIBLE RAPE: AN ANALYSIS OF LEGAL ISSUES, 15-17 (Gov't Print. Off. 1977).

68. If the reform is to be effective, an attorney familiar with the issues will have to make the appropriate argument when confronted with defense counsel who seeks to "grandfather in" the prior case law by raising the defense of consent. It is unlikely that in every instance an informed attorney will be prepared to offer documentation of the legislative history and intent on this issue.

69. In People v. Samuels, 250 Cal. App. 2d 501, 58 Cal. Rptr. 439 (1967), *cert. denied*, 390 U.S. 1024 (1968), a California appeals court said that it was common knowledge that a normal person in full possession of his faculties does not freely consent to the use, upon himself, of force likely to produce great bodily injury. The court noted that consent is not generally a defense to assault and said the state had an interest in prohibiting certain conduct irrespective of the victim's personal submission or acquiescence. The circumstances involved the state's prosecution of actors who were making a sado-masochistic movie. There was no complaining victim.

70. Some reform states have attempted to circumvent this problem by defining the harm caused by sexual assault to include emotional harm or injury, *e.g.*, MICH. COMP. LAWS ANN. § 750.520a(f) (MICH. STAT. ANN. § 28.788(1)(f) (Callaghan Cum. Supp. 1980)); N.J. STAT. ANN. § 2C:14-1(f) (West Pamph. 1980).

concept of consent and, simultaneously, to eliminate by statute those aspects of the consent standard which have been considered to be at the heart of the problem.[71] The New Jersey sexual assault statute does not define consent for the purposes of sexual assault; however, a provision in the New Jersey Code of Criminal Justice, which was derived from the Model Penal Code, defines consent in the context of criminal prosecutions generally, in its definition of "consent to bodily harm."[72] New Jersey has also incorporated the definition of criminal coercion from the Model Penal Code in its sexual assault statute.[73]

For cases involving sexual assault, the interpretation of consent language under provisions outside of the sex offense chapter will be crucial. Is forced or coerced sexual penetration or sexual contact bodily harm? Is it bodily harm which is not serious?[74] Reformers will argue that general provisions such as these must be interpreted consistently with the overall goals of rape reform legislation, including the intention to supersede prior case law on consent. These arguments may, however, be unsuccessful, since the status of the appellate case law is ambiguous, even where the explicit purpose of rape reform legislation was to overrule or to render ineffective general principles expressed in the prior case law. When the drafters of reform legislation specifically address a statutory section to overrule a particularly offensive case, and that intent is clearly apparent from the language or recorded legislative history, the particular case presumably no longer has precedential effect.[75] As a general rule, however, prior case law which is not directly contradicted by a new statutory provision continues in effect after the enactment of a revised criminal code.[76] The objectionable aspects of the consent standard generally emerge from a series of unconnected statements in state appellate cases, rather than from a single, clearly articulated rule. After the passage of reform legislation, the status of these cases is unclear.[77] In fact, they probably are not overruled, even if the reform statutes were drafted with the intention of overruling them. An informed victim advocate can make a persuasive argument about legislative intent, but victim advocates may not be available to make such arguments. Practicing attorneys shepardizing such cases will not find a clear cut indicator specifying the status of prior case law.

The degraded view of women which emerges from some of the cases implies that the judicial system not only had no respect or regard for women who were victimized, but also that courts

71. Wisconsin, for example, defines consent as "words or overt actions by a person who is competent to give informed consent indicating a freely given agreement to have sexual intercourse or sexual contact. . . ." WIS. STAT. ANN. § 940.225(4) (West Supp. 1978-79).

72. See N.J. STAT. ANN. § 2C:2-10 (West Pamph. 1980), providing in part:

> b. Consent to bodily harm. When conduct is charged to constitute an offense because it causes or threatens bodily harm, consent to such conduct or to the infliction of such harm is a defense if: (1) The bodily harm consented to or threatened by the conduct is not serious; or (2) The conduct and the harm are reasonably foreseeable hazards of joint participation in a concerted activity of a kind not forbidden by law; . . . .

73. See N.J. STAT. ANN. § 2C:14-1(j) (West Pamph. 1980) (incorporating sections of N.J. STAT. ANN. § 2C:13-5 (West Pamph. 1980)).

74. N.J. STAT. ANN. § 2C:2-10 (West Pamph. 1980) states that a person can consent to bodily injury which is not serious. The meaning of this terminology in the context of sexual assault is unclear. *Cf.* TENN. CODE ANN. § 39-3702(9) (Supp. 1980) ("'Personal injury' means bodily injury or mental injury and includes pregnancy or the transmission of venereal disease.").

75. In New Jersey, for example, the former rape law did not include a statutory spousal exception. N.J. STAT. ANN. § 2A:138-1 (repealed by N.J. STAT. ANN. § 2C:98-2 (West Pamph. 1980)). The cases consistently interpreted the former law as including the traditional spousal exception until 1979. The reform statute makes it clear that the traditional spousal exception is repealed. N.J. STAT. ANN. § 2C:14-5(b) (West Pamph. 1980). State v. Morrison, No. 16,919 (N.J. Sup. Ct., decided Feb. 10, 1981); State v. Smith, No. 16,246 (N.J. Sup. Ct., decided Feb. 10, 1981).

76. New Jersey has an unusual provision which explicitly provides for the retention of all common law defenses. N.J. STAT. ANN. § 2C:2-5 (West Pamph. 1980) states:

> Conduct which would otherwise be an offense is excused or alleviated by reason of any defense now provided by law for which neither the code nor other statutory law defining the offense provides exceptions or defenses dealing with the specific situation involved and a legislative purpose to exclude the defense claimed *does not otherwise plainly appear.* (emphasis added).

77. For example, Nebraska had a common law corroboration requirement prior to 1975, when rape reform legislation, including an evidence statute, became effective. The Nebraska statute does not explicitly overrule the prior case law, but the stated legislative intent of the reform statute is directly counter to the rationale of a corroboration requirement. State v. Garza, 187 Neb. 407, 191 N.W. 2d 154 (1972); NEB. REV. STAT. § 28-317 (Supp. 1978).

thought women deserved to be victims of sexual assault. Reform statutes, by themselves, may be unable to erase such entrenched attitudes. Unless the intention of the reform is clear, defense attorneys may not have much difficulty in persuading the judges that the prior sexist case law remains in effect. The problems associated with the consent standard cannot be removed by statute when they are the result of deeply ingrained hostility toward women's sexuality, independence, and adulthood. Of course, research must be addressed to whether a particular legislative strategy is more effective than another. Data collection will never, however, tell us how to eradicate the anger and suspicion which create misogynous rules such as those surrounding the common law consent defense which developed in the United States in the middle of this century.

V. Legislative Changes in the Common Law Spousal Exception

Under English common law, a man could not be found guilty of raping his wife. The justification for the spousal exception, also referred to as the spousal exclusion, was usually explained in terms of consent. The seventeenth century British jurist Lord Hale made the uncontroverted assertion that a ". . . husband cannot be guilty of a rape committed by himself upon his lawful wife, for by their mutual matrimonial consent and contract the wife hath given up herself in this kind into her husband, which she cannot retract." [78] At that time, the notion that a woman had the right to deny her husband sexual access to her body would have been inconsistent with the social expectations regarding married women which were embodied in the legal institution of coverture, the laws of inheritance, primogeniture, spousal immunity for torts, and other doctrines which demonstrated that women were considered the physical property of their husbands, as children were the property of their fathers. The purpose of marriage was procreation, and the wife's promise to obey meant that the husband had a right to sexual intercourse with the wife upon all occasions. Her personal consent was irrelevant; the woman's subjective feelings on a particular occasion were not important. A wife's refusal to have sexual intercourse was a ground for divorce.

Following the English tradition, when American state legislatures in the middle and late nineteenth century enacted statutes to codify the English common law definitions of crimes, a spousal exception, which was usually phrased as a limitation upon the definition of female or woman, was commonly written into the statutory definition of rape.[79] Even though some states did not codify the spousal exception, they adopted the common law exception by the case law.[80] Failure to understand the ramifications and source of the English rule caused some confusion when reformers redrafted spousal statutory provisions.

With the introduction of rape reform legislation in the mid-1970's, the first steps were taken toward rethinking the spousal exception. The Model Penal Code previously suggested expanding the traditional English rule by defining spouses to include all persons living together in a consensual relationship. The Model Penal Code definition excluded couples living apart under a decree of

78. M. Hale, The History of the Pleas of the Crown 629 (S. Emlyn ed. 1778). Hale is also the authority for the statement that rape is ". . . an accusation easily to be made and hard to be proved, and harder to be defended by the party accused . . ." This statement has been used as a cautionary instruction to juries in many jurisdictions. As a judge, Hale sentenced women to death for being witches. Scholars have found a connection between his misogynous attitudes toward rape and witchcraft. Geis, *Lord Hale, Witches and Rape,* 5 Brit. J. L. and Soc'y 26 (1978); Geis, *Rape-In-Marriage: Law and Law Reform in England, The United States, and Sweden,* 6 Adel. L. Rev. 284 (1978); Note, *The Marital Rape Exemption,* 52 N.Y.U. L. Rev. 306 (1977); Comment, *The Common Law Does Not Support a Marital Exception for Forcible Rape,* 5 Women's Rts. L. Rep. 181 (1979).

79. Illinois, for example, defines rape as a man having sexual intercourse with "a female, not his wife" under designated circumstances. Ill. Ann. Stat. ch. 38, § 11-1 (Smith-Hurd 1980). The phrase "not his wife" was added in Illinois in 1961. One reason for making statutes sex-neutral and for redefining the substantive offense is the implication of repeal of the spousal exception.

80. The District of Columbia contains no reference to spouses in its rape law, D.C. Code Ann. § 22-2801 (1973), but since the rape statute is a codification of the common law, the common law exclusion has applied. There has never been a conviction of a spouse for rape in the District of Columbia. *See also* Commonwealth v. Fogerty, 74 Mass. (8 Gray) 489 (1857) (indictment need not aver that victim was not the wife of the defendant but defendant could raise defense of marriage). Reformers have argued that the absence of a reference to spouses in a common law statute implies no exception. Comment, *The Common Law Does Not Support a Marital Exception for Forcible Rape, supra* note 78.

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judicial separation.[81] The Model Penal Code formulation also introduced the reduction of penalties if the parties were voluntary social companions.[82] Both of these provisions indicate that the concept behind the Model Penal Code exclusion was based upon the notion of subjective, personal consent of the female. This expansion of the traditional spousal exception was consistent with the drafters' fear of fabricated or malicious complaints by women. Expanding the spousal exception to include all cohabiting adults, however, added a new dimension to the doctrine which was not present when the spousal exception was based upon a concept of wives as property. Substitution of an irrebuttable presumption of personal and subjective consent based upon the fact of cohabitation for the concept of women as property was a retrogressive step in accord with the contemporaneous development of a repressive body of law concerning the consent defense. The Model Penal Code's focus upon subjective or actual consent in cases involving spouses was consistent with the entire formulation of the Model Penal Code which stated that rape was to be proved by showing resistance and non-consent of the victim. From that point of view, it was logical to include common law spouses and to exclude spouses who were judicially separated. A number of states followed the Model Penal Code in this respect, expanding the traditional spousal exception to include all persons cohabiting in a consensual relationship.[83] It was a small advantage for women to have the Model Penal Code recommend that separated spouses be removed from the shield of the spousal exception.

When rape reform bills began to be introduced in the mid-1970's, all states had some version of the spousal exception, with most states having a codified version of the traditional exception. The Model Penal Code, which was introduced in the late 1950's and began to gain headway in the 1970's, recommended the expansion of the traditional spousal exception and the removal of separated spouses. Some states in the early 1970's followed the Model Penal Code on this issue. When the first rape reform statute was passed in Michigan in 1975, little discussion was devoted to the spousal exception. The Michigan statute adopted what has now become a relatively conservative position, that is, a spousal exception which excludes married adults living apart when one has filed for separate maintenance or divorce.[84] Only in the late 1970's, under pressure from both rape reform lobbyists and advocates for battered wives, did significant changes in the spousal exception take place. Oregon, in 1977, was the first state to repeal the spousal exception.[85] The same year, Nebraska repealed its law without reenacting the spousal exception; the new law, however, was not effective until 1979.[86] New

81. MODEL PENAL CODE, *supra* note 31, § 213.6(2).

82. MODEL PENAL CODE, *supra* note 31, § 213.1(1)(ii).

83. *E.g.*, HAWAII REV. STAT. § 707-730 (Supp. 1979) (amending HAWAII REV. STAT. § 707-700 (10), (11)). In 1973 Hawaii adopted the MODEL PENAL CODE definition of spouses. Since the 1979 amendment removed sexually discriminatory language by substitution of the word person, the status of the spousal exception in Hawaii is unclear. Formerly, sex offenses were defined in terms of male/female principals, and "female" was defined as any female person to whom the actor was not married.

84. MICH. COMP. LAWS ANN. § 750.520e (MICH. STAT. ANN. § 28.788(5) (Callaghan Cum. Supp. 1980)); *see* Legislative Note, *supra* note 55.

85. OR. REV. STAT. §§ 163.305 to .475 (Repl. 1977).

86. NEB. REV. STAT. §§ 28-317 to -323 (Reissue 1979).

Jersey explicitly repealed its common law spousal exception when rape reform legislation became effective in 1979.[87] Other states have gone significantly beyond the suggested change of excluding separated spouses. Most states which passed rape reform legislation in the late 1970's did not adopt the Model Penal Code formulation, which depended upon a formal or legal separation agreement to terminate the exception. A minority of states modified the spousal exception to exclude separated couples who had filed for divorce.[88] Note that under these statutes, a wife who had been living apart from her husband for years but who had never filed for legal divorce for religious reasons could not prosecute her husband for sexual assault.

In the late 1970's, when lobbyists began to advocate for battered wives, the spousal exception began to undergo significant doctrinal change. Now the goal of reformers with respect to the spousal exception is to define the exception not in terms of the legal status of the marriage, but in terms of cohabitation. A formal filing for divorce is no longer a prerequisite, although the emphasis upon subjective consent remains; this emphasis is based on the earlier presumption from cohabitation. Many states now make the common law spousal exception inapplicable where spouses are either legally separated or simply living apart.[89] This change is clearly in response to national efforts on behalf of battered women. Public attention has focused on the fact that spousal assault is particularly likely to occur when a divorce is pending. Some states simply define spouses to exclude those living apart, without a specific definition of living apart.[90] Under this type of statute, the wife must either move out or force her husband out to establish the absence of consent. Inequitable as that is, this standard at least begins to recognize that a married woman might not consent to intercourse with her husband under all circumstances. Some states create an affirmative defense that the couple is living together consensually.[91] The advantage of the affirmative defense is that it can be rebutted with contrary evidence.[92]

The majority of states explicitly retain what is essentially the common law spousal exception; that is, a complete bar to prosecution of a spouse no matter how brutal the circumstances.[93] Four

87. N.J. STAT. ANN. § 2C:14-5(b) (West Pamph. 1980).

88. *E.g.*, LA. REV. STAT. ANN. § 14:41 (West Supp. 1979) (spousal exception excludes those judicially separated); UTAH CODE ANN. § 76-5-407(1) (Supp. 1979) (spousal exclusion does not include those living apart pursuant to a court order); WIS. STAT. ANN. § 940.225 (6) (West Supp. 1979-80) (prosecution will be barred if parties are living apart and one has filed for annulment or separation); WYO. STAT. § 6-4-307 (1977) (spousal exception excludes those separated by a decree of judicial separation or when a restraining order has been granted).

89. IDAHO CODE § 18-6107 (1979) (divorce proceeding begun or couple living apart for 6 months); IND. CODE ANN. § 35-42-4-1(b) (Burns Cum. Supp. 1977) (no spousal exception if a petition for dissolution pending and the spouses living apart); N.H. REV. STAT. ANN. § 632-A:5 (Supp. 1979) (spousal exception excludes those who have filed for separate maintenance or divorce and those living apart).

90. ALA. CODE tit. 13A, § 13A-6-60(4) (1977 & Supp. 1979) (all persons cohabiting); ALASKA STAT. § 11.41.445 (1978) (spousal exception excludes persons living apart); COLO. REV. STAT. § 18-3-409(1) (Repl. 1978) (defines spouses to include common law spouses but does not mention whether spouses living apart are excluded); MICH. COMP. LAWS ANN. § 750.520l (MICH. STAT. ANN. § 28.788(12) (Callaghan Cum. Supp. 1980)) (excludes those living apart from the definition of spouses); MO. REV. STAT. § 566.010(2) (1979) (spousal exception excludes spouses living apart pursuant to a judgment of legal separation); MONT. REV. CODES ANN. § 45-5-506(2) (1979) (spouses are persons living together); N.M. STAT. ANN. § 30-9-10(e) (1978) (spousal exception excludes those living apart or if either husband or wife has filed for separate maintenance or divorce); N.Y. PENAL LAW § 130.00(4) (McKinney Supp. 1979-80) (spousal exception excludes those living apart); PA. STAT. ANN. tit. 18, § 3103 (Purdon 1973 & Supp. 1978-79) (spouses exclude those living apart or in the same residence but under terms of a written separation agreement or an order of a court of record and includes common law spouses); S.C. CODE § 16-3-658 (Supp. 1979) (spousal exception excludes those living apart by reason of court order); W. VA. CODE § 61-8B-1(2) (Repl. 1977) (adds to the definition of spouses those living together as man and wife regardless of their legal status).

91. CONN. GEN. STAT. ANN. § 53a-67(b) (West Supp. 1979); ME. REV. STAT. tit. 17-A, §§ 252(2), 253 (4) (Pamph. 1979).

92. New Jersey abolishes the spousal exception with a negative presumption. N.J. STAT. ANN. § 2C:14-5(b) (West Pamph. 1980) ("No person shall be presumed to be incapable of committing a crime under this chapter because of age or impotency or marriage to the victim"). The provision simultaneously eliminates the common law presumption that males under the age of 14 are incapable of committing rape, the common law defense of impotency, and the common law spousal exception.

93. D.C. CODE ANN. § 22-2801 (1973 & Supp. 1978); GA. CODE ANN. § 26-200-1 (1978); ILL. ANN. STAT. ch. 38, § 11-1 (Smith-Hurd 1979); KAN. STAT. § 21-3501 (1974 & Supp. 1978); KY. REV. STAT. § 510.010 (Supp. 1978); P.R. LAWS ANN. tit. 33, § 4061 (1969 & Supp. 1977); R.I. GEN. LAWS § 11-37-1 (1970 & Supp. 1978); TENN. CODE ANN. § 3703 (Repl. 1975 & Supp. 1980);

states [94] with common law rape statutes do not mention the spousal exception, although it is presumably incorporated in the states' common law definitions of rape. Some states have rejected the spousal exception in a piecemeal fashion during the past few years.[95] Usually the purpose behind the piecemeal abolition is to eliminate the exception for circumstances of forcible sexual assaults. Only three states have explicitly repealed the spousal exception.[96] Even states which have repealed the spousal exception still permit evidence that the parties were married or formerly married. Such evidence may carry much weight with a jury.

A number of states have enacted rape reform legislation without making reference to the status of the spousal exception.[97] The status of the spousal exception in these states is unclear. In states which recently passed rape reform legislation, it should be argued that the decision not to reenact the traditional spousal exception expresses a legislative intent to repeal the spousal exception. Most recently, California [98] and Minnesota [99] have enacted statutes which essentially eliminate the traditional spousal exclusion. An interesting and relatively recent development is the abolition of the spousal exception when a spouse is injured during a sexual assault.[100] The rationale for this approach is that the presence of physical injury rebuts the presumption of consensual sexual conduct between spouses. Such statutes may also be justified by the recent English case, *DPP v. Morgan*,[101] in which the highest British tribunal refused to convict a husband who, along with others, raped his wife. The accomplices' acquittals were based upon a theory of unreasonable mistaken belief in consent.[102] The acquittal for the husband was based upon the spousal exception.

The repeal of the spousal exception has been one of the most difficult issues to lobby through the state legislatures. The idea of a woman's appropriate place is, for most people, inextricably linked with concepts of marriage. People who accept reforms concerning the inadmissibility of evidence of the victim's prior sexual conduct still cannot understand how a wife could charge her husband with rape or sexual assault. In the past few years, the prominence of publicity concerning domestic violence has made an enormous difference. If rape would be redefined as sexual battery or sexual assault, the spousal exception would have no relevance. Prosecutors might re-

VT. STAT. ANN. tit. 13, § 3251 (Supp. 1978); WASH. REV. CODE ANN. § 9A.44.040(1979); W.VA. CODE § 61-8B-1 (Repl. 1979).

94. Massachusetts, Mississippi, Rhode Island and Texas. North Dakota retains the spousal exception, although it is incorporated in the definition of sexual act. See N.D. CENT. CODE § 12.1-20-02(1) (Repl. 1976 & Supp. 1979). Arizona defines the crime as sexual assault but retains the spousal exception. ARIZ. REV. STAT. ANN. § 13-1401(4) (1978).

95. ARK. STAT. ANN. § 41-1802 (Repl. 1977) (spousal exception applies only to carnal abuse, sexual misconduct, and sexual abuse in the second degree); DEL. CODE ANN. tit. 11, §§ 761, 762 (1975 & Supp. 1978) (spousal exception eliminated for rape and sodomy, retained for sexual assault and sexual misconduct); IOWA CODE ANN. § 709.4 (West 1979) (no spousal exclusion for sexual abuse in the first or second degree); MINN. STAT. ANN. § 609.349 (West Cum. Supp. 1980) (deletes spousal exception for all offenses except statutory rape and offenses involving mentally or physically disabled victims); S.C. CODE § 16-3-658 (1977 & Supp. 1978) (spousal exception does not apply if spouses are living apart and if the offense is an offense of the first or second degree).

The variety of these statutory formulations indicates the absence of a national consensus on the issue. California has taken the unique position of defining a separate offense, rape of a spouse. CAL. PENAL CODE § 262 (West Supp. 1980).

96. NEB. REV. STAT. § 28-317 to -320 (Supp. 1978) (re-enactment without the spousal exception) N.J. STAT. ANN. § 2C:14-5(b) (West Pamph. 1980); OR. REV. STAT. § 163.305 (Repl. 1977) (as amended, removes the former spousal exception). New Jersey is the only state which has explicitly repealed the spousal exception for all crimes. In 1975, South Dakota removed the spousal exception and reinstated it in 1977. S.D. COMPILED LAWS ANN. § 22-22-1 to -2 (1967 & Supp. 1978).

97. The most notable, but not the only, example is the Florida sexual battery statute. The statute is apparently being interpreted as allowing prosecution against spouses. State v. Findley, No. CRC #8000877CFANO (Fla. Cir. Ct., filed Feb. 7, 1980) (defendant, who was a separated husband pleaded guilty to four counts of sexual battery under FLA. STAT. ANN. § 794.011 (3) (West 1976)).

98. CAL. PENAL CODE § 262 (West Supp. 1980) (requires spousal resistance or threats preventing resistance and also requires the offense to be reported to the police or the district attorney within 30 days.)

99. Act of Apr. 11, 1980, ch. 544, § 2, 1980 Minn. Sess. Law Serv. 691 (West 1980)(amending MINN. STAT. ANN. § 609.349 (West Cum. Supp. 1980)). Minnesota has repealed the spousal exception in cases where force is used, where there is fear of imminent bodily harm or where bodily harm is inflicted.

100. E.g., ALASKA STAT. § 11.41.445(a)(2) (1980) (no spousal exception if injury occurs during the sexual assault).

101. [1975] 2 All E.R. 347.

102. Bienen, *Mistakes*, 7 PHILOSOPHY AND PUB. AFF. 224 (1978); Pateman, *Women and Consent*, 2 POLITICAL THEORY 149 (1980).

fuse to charge, or the police might refuse to answer complaints; but technically there would be no traditional legal bar to prosecution if a rape reform statute is silent as to spouses. Reform statutes which retain some version of the spousal exception have failed in the attempt to redefine rape as an act of sexual aggression.

One final curiosity remains in the law concerning spouses. Of the sixteen jurisdictions which originally provided for rape by impersonation in their nineteenth century criminal codes, nine states and Puerto Rico retain a statutory provision which extends the definition of rape to include intercourse obtained through fraud when the offender gains consent through the impersonation of the victim's husband or through deception generally.[103] Although there has been little interpretation of these provisions since the turn of the century, they have survived despite repeated revisions of the state criminal codes. Examination of the late nineteenth and early twentieth century cases reveals the judicial concerns which still seem to support these provisions.

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In jurisdictions without provisions for rape by impersonation, it was generally held that fraud does not vitiate consent or supply the requisite force.[104] Therefore, rape was generally not com-

103. ARIZ. REV. STAT. ANN. § 13-1401(5)(d) (1978); COLO. REV. STAT. § 18-3-403(1)(d) (Repl. 1978); IDAHO CODE § 18-6101(6) (1979); LA. REV. STAT. ANN. § 14-43(3) (West Cum. Supp. 1980); NEB. REV. STAT. § 28-319(1)(a) (1979) (provides for deception generally; does not specify husband); OHIO REV. CODE ANN. § 2907.03(A)(4) (Anderson Repl. 1975); OKLA. STAT. ANN. tit. 21, §§ 1111(8), 1114 (West 1958); P.R. LAWS ANN. tit. 34, § 4061(e) (Cum. Supp. 1978); TEX. PENAL CODE ANN. tit. 5, § 21.02(b)(6) (Vernon Cum. Supp. 1980); UTAH CODE ANN. § 76-5-406 (Repl. 1978).

Such provisions were usually part of a 19th century statute defining rape in terms of circumstances of nonconsent. *See, e.g.*, LA. REV. STAT. ANN. § 14-43 (West Cum. Supp. 1980):

> Simple rape is a rape committed where the anal or vaginal intercourse is deemed to be without the lawful consent of the victim because it is committed under any one or more of the following circumstances: (1) Where the victim is incapable of resisting or of understanding the nature of the act by reason of stupor or abnormal condition of the mind produced by an intoxicating, narcotic, or anesthetic agent, administered by or with the privity of the offender; or when the victim has such incapacity, by reason of a stupor or abnormal condition of the mind from any cause, and the offender knew or should have known of the victim's incapacity; or (2) Where the victim is incapable, through unsoundness of mind, whether temporary or permanent, of understanding the nature of the act; and the offender knew or should have known of the victim's incapacity; or (3) Where the female victim submits under the belief that the person committing the act is her husband and such belief is intentionally induced by any artifice, pretense or concealment practiced by the offender.

104. Commonwealth v. Goldenberg, 338 Mass. 377, 155 N.E.2d 187 (1959); Don Moran v. People, 25 Mich. 355 (1872); State v. Brooks, 76 N.C. 1 (1877); Commonwealth v. Childs, 2 Pitts. 391 (Pa. 1863); Commonwealth v. Duchnicz, 59 Pa. Super. Ct. 527 (1915); Wyatt v. State, 32 Tenn. (2 Swan) 394 (1852); Whittaker v. State, 50 Wis. 518, 7 N.W. 431 (1880). *But see* State v. Atkins, 292 S.W. 422 (Mo. 1926); People v. Bartow,

mitted where there was an impersonation of the woman's husband by the defendant. Even in states with express provisions concerning this specific type of deception, the courts displayed a reluctance to convict the man who had acted without force. Nor did they want to deny retribution to a woman who had apparently consented only to marital intercourse. This ambivalence resulted in dicta containing novel rationale for inconsistent opinions.[105]

In sustaining a conviction of rape by fraud, the courts generally required that the defendant have practiced some artifice or stratagem to accomplish the impersonation. Some courts narrowed this construction even further: the effect of the stratagem must have been to deceive, to impose upon the victim, and to make her believe that the defendant was her husband when the act was committed, and by these means, to gain her consent to the copulation. Therefore, a conviction for rape by fraud was sometimes not sustained in the case where the victim was sleeping when intercourse started, because she was not actively induced to consent.[106] In other courts, evidence of an attempt to delude the victim was sufficient to sustain a conviction of rape by fraud under the statute.[107] In those states which upheld the traditional definition of rape, courts did not ignore the issue of force when faced with an indictment of rape by fraud, nor did they allow fraud to replace the force issue. Women were protected by law from the violence of rape through severe penalties on offenders; but if there was no coercion, there could be no additional protection.[108] There is a difference, one English court explained, between "compelling a woman against her will when the abhorrence which would naturally arise in her mind was called into action; and beguiling her into consent and co-operation."[109] Statutory protection merely reflected the common law rule. Judicial and legislative reactions to cases involving marital rape illustrate the still pervasive concern for men's marital privileges. In many states, the same fear of false accusations which resulted in extension of the marital exemption to those cohabiting may be the basis of legislative retentions of provisions concerning rape by impersonating the husband. To reformers, it is somewhat absurd that legislators should focus upon this definition of the crime when violent and forcible attacks routinely fill the records of the hospital emergency rooms.

VI. Changes in Offenses Defined by Age

A. Historical Background

An understanding of the history of statutory rape laws in the United States is a prerequisite to comprehending the polyglot status of the present law. It is apparent that there is no consensus on the question of what is the appropriate age for consensual sexual conduct. Feminists, as well as legislators and members of the general public, are divided on the issue. Protection of children, particularly the protection of young children, from sexual abuse by adults, requires that a statutory age be set relatively high. At the same time, many believe that the traditional statutory rape laws which criminalize consensual, nonforcible heterosexual conduct between persons under eighteen ignore the realities of social and cultural practices in America in the 1980's. Historically,

1 Wheeler Cr. Cas. 378 (N.Y. 1823). Some early courts interpreted the impersonation provision to include the man who lured a woman into a feigned marriage which she believed was valid. A strong body of case law suggests that the provision was created to focus on specific sexual acts rather than inducement into marriage. California v. Skinner, 33 B.C. 555 (1924); Draughn v. State, 12 Okla. Crim. 479, 158 P. 890 (1916). *But see* People v. McCoy, 58 Cal. App. 534, 208 P. 1016 (1922); Wilkerson v. State, 60 Tex. Crim. 388, 131 S.W. 1108 (1910); Lee v. State, 44 Tex. Crim. 354, 72 S.W. 1005 (1902). False inducement to marriage would also be covered under the seduction statutes which were then common in the United States.

105. In a series of Texas cases, the courts narrowly defined the elements required for conviction under the statute. Huffman v. State, 46 Tex. Crim. 428, 80 S.W. 625 (1904); Payne v. State, 38 Tex. Crim. 494, 43 S.W. 515 (1897); Franklin v. State, 34 Tex. Crim. 203, 29 S.W. 1088 (1895); Ledbetter v. State, 33 Tex. Crim. 400, 26 S.W. 725 (1894); Mooney v. State, 29 Tex. App. 257, 15 S.W. 515 (1890); King v. State, 22 Tex. App. 650, 3 S.W. 342 (Crim. App. 1887).

106. Payne v. State, 38 Tex. Crim. 494, 43 S.W. 515 (1897); King v. State, 22 Tex. App. 650, 3 S.W. 342 (Crim. App. 1887).

107. *E.g.*, State v. Williams, 128 N.C. 573, 37 S.E. 952 (1901). In *Williams*, the defendant deluded the woman into believing he was her husband by disguising his voice. The court stated, " 'The voice was the voice of Jacob but the hand was the hand of Esau' is the story of an ever memorable fraud; but neither hand nor voice created a suspicion in the mind of the betrayed." *Id.* at 576, 37 S.E. at 953.

108. State v. Brooks, 76 N.C. 1 (1877).

109. Rex v. Joseph Jackson, 168 Eng. Rep. 911, 911 (1822).

the traditional rape law, in England and as it was codified in the United States, always distinguished between the forcible rape of adult women and sexual intercourse or sexual contact with young female children. The earliest English rape statute, the Statute of Elizabeth I,[110] specified ten as the statutory age. In the United States, codifications of the traditional rule usually started by adopting a statutory age of ten. Even before rape reform legislation began, many states changed their age provisions several times. A number of states seem to have made amendments in the latter part of the nineteenth century and between 1910 and 1920.[111] By the 1950's, the majority of states no longer set the statutory age at ten. Nonetheless, in the late 1950's and early 1960's, the Model Penal Code recommended ten as the statutory age.[112] If the Model Penal Code recommendation had been adopted, consent would have been a defense to any sexual conduct, including intercourse, between adults and a child over ten. Again, the Model Penal Code formulation relied upon the concept of the subjective, personal consent of the female. The Model Penal Code was more concerned with avoiding false reports and the harassment of men than it was with the protection of young persons from sexual exploitation and abuse. The pattern in most American jurisdictions, then, was the initial enactment of a statutory age of ten when the state adopted the traditional English statute, followed by a series of amendments which raised and lowered the statutory age, added restrictions to a crime called statutory rape, and usually ended up separately defining all age offenses.[113] Although the American laws started from the English law, they developed in a statutory direction which had no counterpart in England. In the United States, the statutory age offenses seemed primarily directed at regulating consensual conduct. Sometimes these statutes replaced or served the function of the traditional English common law offense of seduction. Penalties were customarily low, and legislative formulations often were elaborate and contradictory as legislators attempted to define what constituted criminal behavior.[114] A common unstated assumption underlying these laws was that men should not be exposed to risk for engaging in sexual relations with young, unmarried females. The rape statute sometimes prohibits carnal abuse with a female below a specified age.[115] Acts constituting carnal abuse were then defined by case law. Usually, carnal abuse did not require proof of penetration, although there was a great deal of variation among states and even within particular jurisdictional bodies.

As the common law defense of consent developed in American jurisprudence, the statutory age or ages became designated the age of consent: If the female was below the age specified by statute, proof of force and the absence of consent were not elements of the crime. This formulation was consonant with the English law regarding carnal abuse. The term age of consent became confusing, however, when many states enacted two distinct forms of statutory rape: (1) the traditional formulation prohibiting carnal abuse of children under the age of ten or twelve, and (2) a different formulation which prohibited consensual sexual intercourse with any female under the age of six-

110. 18 Eliz. 1, c .7 (1576).

111. See History, *Rape IV*, for details of legislative changes in the age provisions. The general pattern seems to be that states which codified their laws before the last quarter of the 19th century were more likely to set the statutory age at 10. No state now has a statutory age of 10. The following were the earliest codifications of a statutory age of consent for rape. Some inaccuracies may exist because the research depended upon the excellent historical collections of one library, the Library of the State of New Jersey in Trenton, New Jersey. Short of travelling to each state capital, there is no way to verify missing volumes or whether the volume or statute cited is indeed the earliest codification. Comments, corrections, and additions from readers would be greatly appreciated. Ala.: 12 (1852); Alaska: 16 (1899); Ariz.: 17 (1901); Ark.: 16 (1894); Cal.: 10 (1872); Colo.: 10 (1868); Conn.: 10 (1879); Del.: 10 (1829); D.C.: 12 (1857); Fla.: 10 (1868); Ga.: 10 (1862); Hawaii: 10 (1869); Idaho: 12 (1874-75); Ill.: 10 (1833); Ind.: 12 (1824); Iowa: 10 (1850); Kan.: 10 and 12 (1855); Ky.: 10 (1789); La.: 11 (1833); Me.: 10 (1822); Md.: 10 (1809); Mass.: 10 (1649); Mich.: 11 (1808); Minn.: 10 (1857); Miss.: 10 (1839); Mo.: 10 (1825); Mont.: 16 (1895); Neb.: 10 (1866); Nev.: 12 (1861); N.H.: 10 (1791); N.J.: 10 (1796); N.Y.: 10 (1829); N.C.: 10 (1818); N.D.: 16 (1877); Ohio: 10 (1833); Okla.: 14 (1890); Or.: 10 (1854); Pa.: 10 (1860); P.R.: 12 (1909); R.I.: 16 (1856); S.C.: 10 (1712); S.D.: 16 (1893); Tenn.: 10 (1831); Tex.: 10 (1866); Utah: 10 (1866); Vt.: 11 (1797); V.I.: 12 (1921); Va.: 10 (1789); Wash.: 12 (1881); W.Va.: 12 (1868); Wis.: 10 (1839); Wyo.: 10 (1876).

112. MODEL PENAL CODE, *supra* note 31, § 213.1(d).

113. *E.g.*, Iowa, History, *Rape IV*.

114. *E.g.*, Kentucky, History, *Rape IV*.

115. *E.g.*, N.J. STAT. ANN. § 2A:138-1 (repealed by N.J. STAT. ANN. § 2C:98-2 (West Pamph. 1980)).

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teen or eighteen or between the ages of twelve and sixteen. This is the offense usually referred to as statutory rape. The latter statutes were essentially equivalent to the English common law crime of seduction; seduction prohibited consensual conduct and could only be committed against an unmarried female of chaste character. In the United States, during the 1950's and 1960's, these so-called statutory rape statutes answered a social concern different from that of the traditional prohibition against carnal abuse of girls under ten. Their purpose was not the prohibition of sexual exploitation of children or young girls, but a prohibition against consensual relations with women under a specified age. Changing social attitudes on this subject can be measured by the multitude of amendments to statutory age provisions in this century.[116] At least part of the purpose of the statutory rape law was the protection of virginity. Unmarried young women were prohibited by law from engaging in sexual relations without the consent of their parents; indeed, Mississippi provides that a parent may sue for damages for the seduction of his or her daughter.[117] In statutory rape, therefore, consent did not mean the individual or personal subjective consent of the female. A defense of consent could be applied only to females above statutory age. The statutory rape laws in the United States were explicit about prohibiting conduct irrespective of the consent of the parties.[118] These statutory rape laws usually were interpreted as prohibiting carnal knowledge or intercourse, rather than prohibiting carnal abuse or acts short of intercourse.

Social attitudes toward consensual sexual relations with unmarried females under sixteen were historically ambivalent and hypocritical. Statutory rape laws were enforced infrequently; the penalties were low. The laws often were used to

116. *See generally* History sections, *Rape IV.*

117. MISS. CODE ANN. § 11-7-11 (1972).

118. *E.g.*, Nebraska, History, *Rape IV.* Amendment of 1895 increased the statutory age to 18 and added chaste character provision. The statute specifically refers to carnal knowledge with consent.

bring about a "shotgun" marriage to a pregnant teenager.

When statutory rape was included in the principal statute defining rape, the law predictably developed contradictions. The prohibition against forcible attacks upon adult women was based upon an entirely different social goal than that upon which the prohibition against consensual sexual conduct involving young unmarried women was based. Penalties for statutory rape were usually significantly lower than those for forcible rape, yet in some states with traditional statutes, forcible rape of an underage female was included under the statutory rape law. In New Jersey, for example, the penalty for carnal knowledge of a female under sixteen was a maximum of fifteen years; the maximum penalty for forcible rape of an adult female was thirty years.[119] This law was inconsistently interpreted; some judges held that the maximum possible penalty for any forcible, brutal attack upon a female under sixteen was fifteen years.[120] The law, thus, was interpreted to provide a less severe penalty for forcible attacks upon young girls than for forcible attacks upon adults.

In most statutes, the age provisions defined as criminal that behavior which society in fact tolerated; this behavior included consensual heterosexual relations, such as sexual intercourse with underage females. Special defenses to statutory rape thus developed to circumvent the over-inclusiveness of the defined behavior. These defenses then were applied to all categories of forcible rape and carnal abuse of children. The two most noteworthy statutory rape defenses which developed were the defense based upon the prior sexual history of the complainant and the mistake as to age defense. The first defense was based upon the fact that a number of statutory rape statutes specifically made reference to chaste females, to unmarried females or to females of virtuous character.[121] Chastity of the victim became an element of the offense which had to be proved by the state. The reference to marriage in such statutes should not be confused with the spousal exception. Marriage of the underage female to anyone was a defense to statutory rape, because marriage meant the female was not a virgin.[122] A defense based upon the unchaste character of the female was arguably logical for a statutory rape offense if the purpose of the statute was to protect virginity. The unchaste character of the victim had no relevance, however, to proof of a crime defined as a forcible attack.

The mistake as to age defense developed under traditional mistake theory[123] as a rule of reasonableness which excused defendants in situations where the girl was close to the statutory age. The classic case is *People v. Hernandez*.[124] In that case, the statutory age was eighteen, the prosecuting witness was seventeen years and nine months old, and the complainant had told the defendant that she was eighteen. The couple was living together in a consensual relationship; the facts could not have been more favorable to the defense. The Supreme Court of California held that the defendant's honest and reasonable, but mistaken, belief that his partner was beyond the age of consent deprived him of the requisite mens rea to sustain a conviction. Also, the result in *Hernandez* was perhaps easier to justify because the California statutory rape statute was separate from the statute defining forcible rape. If statutory rape had been a subcategory of forcible rape, the California Supreme Court might have been concerned that the mistake as to age defense would be applied to circumstances involving force.[125]

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119. N.J. STAT. ANN. § 2A:138-1 (repealed by N.J. STAT. ANN. § 2C:98-2 (West Pamph. 1980)).

120. This conclusion is based upon a review of the commitments of sex offenders who were incarcerated on September 1, 1979 at the Adult Diagnostic & Treatment Center, an institution for designated sex offenders.

121. Such references are still found in the statutes. P.R. LAWS ANN. tit. 33, § 4063 (1969 & Supp. 1978); TEX. PENAL CODE ANN. tit. 5, § 21.10 (Vernon 1974); VA. CODE § 18.2-65 (1975).

122. *E.g.*, OR. REV. STAT. § 163.445(1) (Repl. 1977) ("A person commits the crime of sexual misconduct if he engages in sexual intercourse or deviate sexual intercourse with an unmarried person under 18 years of age."). Presumably, one justification for this formulation would be to distinguish between this offense and adultery.

123. Bienen, *Mistakes, supra* note 102.

124. 61 Cal.2d 529, 393 P.2d 673, 39 Cal. Rptr. 361 (1964). For a discussion of *Hernandez*, see Annot., 8 A.L.R.3d 1100, 1105-07 (1966).

125. The California statutory rape statute is a classic example of a sex-specific statutory rape law designed to prohibit females from consensual sexual relations. The statute only prohibits sexual intercourse, and there is no restriction on the age of the male. The statute includes a spousal exception, however, instead of reference to unmarried females. *"Unlawful sexual intercourse with female under 18:* Unlawful sexual intercourse is an act of sexual intercourse accomplished with a female not

In many jurisdictions, however, the mistake as to age provision became a boilerplate defense which had little to do with the theory of a reasonable mistake of fact. The mistake as to age defense invited the jury to examine the appearance of the teenaged victim and to then make an "Alice in Wonderland" determination as to whether the defendant could have mistakenly believed that the victim was above the age of consent. Since the trial often occurred months, or even more than a year, after the statutory rape incident, the mistake as to age defense always operated to unduly burden the victim. This defense, moreover, could be used to introduce evidence that the victim provoked the attack by being physically well developed, by wearing excessive makeup, or by wearing suggestive clothes. Not only could the combination of these factors influence the jury on the question of mistake as to age, but these factors could also suggest victim precipitation and responsibility.[126]

Since many statutory rape statutes specified that the victim be an unmarried female, marriage of the girl to anyone was a complete defense. Some states went one step farther and specified in their common law that marriage of the victim to the defendant was a defense to the crime. This is further evidence that the statutory rape laws have a different purpose than the laws against forcible rape. The statutory rape laws were simply used as seduction statutes in such cases, even though many jurisdictions also had a statutory prohibition against seduction. Continued hypocrisy, confusion of social attitudes, increased constitutional protections for defendants, and the development of special defenses to statutory rape made it almost impossible to prove the forcible rape of a young girl prior to the enactment of reform legislation.

B. Developments Under Reform Statutes

Reformers generally seem to agree that the entire area of age-defined offenses needs to be reconsidered, but there seems to be no consensus on reform objectives. At what age should consensual conduct be decriminalized? Should statutory offenses be defined in terms of an age difference between the victim and the offender? Should the protection of children from sexual abuse be provided for under child abuse laws? Were incest prohibitions made unnecessary by reform statutes which created a new sex offense defined in part by an unequal relationship of authority between the victim and the actor? Should there be separate statutory age offenses for acts involving sexual contact between persons of the same sex? Victim advocates generally agree that the corroboration requirement, the prompt complaint rule, and the chaste character provisions of traditional rape statutes must be repealed if convictions are to be returned in cases where underage females are victims of sexual assault. Teenagers and young women are at significantly greater risk of being raped than other age groups, whether for reasons of vulnerability, accessibility, or carelessness,[127]

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the wife of the perpetrator, where the female is under the age of 18 years." CAL. PENAL CODE § 261.5 (West Supp. 1980). The statute is under challenge on the basis of equal protection. Michael M. v. Superior Court, 25 Cal.3d 608, 601 P.2d 571, 159 Cal. Rptr. 340 (1979), *cert. granted,* 100 S.Ct. 2984 (1980).

126. For arguments in support of the defense, see Myers, *Reasonable Mistake as to Age: A Needed Defense to Statutory Rape,* 64 MICH. L. REV. 105 (1966). The author takes the position that the criminal law should not be responsible for regulating consensual sexual behavior which is not socially harmful. The MODEL PENAL CODE and a number of states following the MODEL PENAL CODE specifically adopt this view. Many proponents of the defense, however, assume a large number of "false" complaints by spurious victims. There are no reliable, concrete data supporting this assumption and many studies refute it. For an investigation concerning the specific number of "false" complaints in one jurisdiction, see O'Neale, *Court Ordered Psychiatric Examination of a Rape Victim in a Criminal Rape Prosecution, or How Many Times Must a Woman be Raped?,* 18 SANTA CLARA L. REV. 119 (1977). The paper reports data on over 400 sexual assault cases reported to Bay Area Women Against Rape. The "unfounding" of police complaints was typically based on factors other than the likelihood that no crime had occurred, in spite of an express FBI instruction stating that unfounding should only take place when police are convinced no crime occurred. 18 SANTA CLARA L. REV. at 139.

127. In the period from 1972 to 1977, young adult (13-17 years) victims brought to Boston City Hospital constituted 58% of all victims. *See Hearings, supra* note 45, at 369 (testimony of Jan Ben Dor), Table 1. The data in the various victim studies, however, are not comparable or even consistent. For example, sex offenses reported to the Denver police in 1973 included 300 rapes of women over 16, 73 rapes of females under 16, 141 cases of child molestation, and 327 cases of sexual assault. C. HURSCH, THE TROUBLE WITH RAPE 20, Table 3 (1977). A Battelle survey reported that cases involving minor victims accounted for only 10-20% of all assaults, and that minors were more likely to be raped by adults in larger jurisdictions. BATTELLE MEMORIAL INSTITUTE LAW AND JUSTICE CENTER, FORCIBLE RAPE:

but they may also be more likely to submit reports which are later found to be false.[128]

For political reasons, legislators often had little sympathy with the goal of decriminalizing consensual relations among teenagers and were also strongly in favor of harsh penalties for sexual assaults against children. At the same time, though, male legislators expressed concern that men would be the victims of false reports. Compromises between reformers and legislators created a new set of contradictions. In New Jersey, for example, an amendment introduced by conservatives in 1978 to raise the age of consent prohibited sexual penetration with all persons under sixteen and sexual contact between persons thirteen to sixteen years old and persons four years older.[129] The reform statute in New Jersey, however, only imposes the most severe penalty for sexual penetration with a person between thirteen and sixteen when the actor is related to the victim, has supervisory power over the victim, or stands in loco parentis.[130] In comparison, in a gang rape situation involving a teenaged victim between the ages of thirteen and sixteen, the most serious penalties are invoked only if the state proves both the presence of aiders and abettors, and either that the actor actually used physical force or coercion or that the victim was physically helpless, mentally defective, or incapacitated.[131] The threat of force or the mere presence of a gang and restricted surroundings are not sufficient to support a conviction for aggravated sexual assault. The statute provides the same maximum ten year sentence for each of the following offenses: a gang rape situation in which aiders and abettors were present but it was not possible to prove the actual use of physical force;[132] consensual sexual relations between a fifteen-year-old and a person four years older;[133] and sexual contact between a victim under thirteen when the actor is four years older.[134]

On the other hand, the amended age provisions which were passed in response to political pressure provide a relatively serious penalty for any sexual contact between a person between the ages of thirteen and sixteen and a person four years older.[135] Sexual contact can be as little as the actor touching his genitals in the view of the victim.[136]

A SURVEY OF THE RESPONSE BY POLICE, POLICE VOL. I at 24, Table 28 (Gov't Print. Off. 1977).

128. *But see* C. HURSCH, THE TROUBLE WITH RAPE 14, Table 1 (1977) (Denver study reporting the same low percentage of "false" reports for complainants over 16 and under 16 (4% and 5% respectively of all reporting victims in the category)).

129. N.J. STAT. ANN. §§ 2C:14-2a(1), -2b, -2c(5) (West Pamph. 1980).

130. N.J. STAT. ANN. § 2C:14-2a(2) (West Pamph. 1980).

131. N.J. STAT. ANN. § 2C:14-2a(5) (West Pamph. 1980).

132. N.J. STAT. ANN. § 2C:14-2a(5)(a) (West Pamph. 1980).

133. N.J. STAT. ANN. § 2C:14-2c(5) (West Pamph. 1980).

134. N.J. STAT. ANN. § 2C:14-2b (West Pamph. 1980).

135. N.J. STAT. ANN. §§ 2C:14-3(b), :43-6(4) (West Pamph. 1980) (providing a maximum penalty of 18 months).

136. N.J. STAT. ANN. § 2C:14-1(d) (West Pamph. 1980).

Many legislators who did not object to a radical redefinition of the offense of rape seemed to have been unwilling to vote for the repeal of a statutory age of consent. Twenty-one jurisdictions retain a statutory provision which uses the term age of consent.[137] The age of consent is usually sixteen, although in some states it is as low as twelve and in others as high as eighteen. A number of legislators insisted upon keeping some age prohibition in the penal code to set a moral standard. This standard, however, is somewhat modified since few states which have reformed their rape laws have gone back to formulations which required the victim's chastity or to statutes designed to force marriage under threat of criminal prosecution. At the same time, some age provision beyond that needed to protect young people from adults seems to be required under our culture's present norms. Most states, including states which have adopted reform statutes, now have two[138] or three[139] graded offenses which prohibit sexual conduct with persons below a specific age; these graded offenses have replaced the traditional offense of statutory rape.

Most states which adopted reform legislation include an expanded definition of sexual penetration with a person under a specific age in the most serious category of offenses.[140] Since the crime has been redefined in sex–neutral terms, homosexual acts and acts by adult females against young boys have been included in this expanded definition. The new offense also prohibits ordinary sexual intercourse with females under a specific age. Under the reform statutes, the definition of this crime includes some segment of the acts formerly covered under statutory rape, although the age used for statutory rape was usually higher than the age specified in this definition.[141]

The reform statutes also prohibit a wider variety of acts with young people than the former law. Many statutes include a new offense which prohibits sexual contact with persons between certain ages.[142] Another common provision, even in reform states, prohibits sexual penetration with persons of a higher age under specific circumstances; this provision does not include heterosexual rela-

137. ALA. CODE tit. 13A, § 13A-6-70 (1977 & Supp. 1979) (16); ALASKA STAT. §§ 11.41.410(3), (4), .440 (1978) (16); ARIZ. REV. STAT. ANN. § 13-1405 (1978) (15); CAL. PENAL CODE § 261.5 (West Cum. Supp. 1980) (18); DEL. CODE tit. 11, § 767 (Cum. Supp. 1978) (16); D.C. CODE ANN. § 22-2801 (1973) (16); GA. CODE ANN. § 26-2018 (1977) (14); IDAHO CODE § 18-6101(1) (1979) (18); ILL. ANN. STAT. ch. 38, § 11-4 (Smith-Hurd Supp. 1979) (16); KY. REV. STAT. § 510.020 (Repl. 1975) (16); MASS. GEN. LAWS ch. 265, §§ 22A, 23 (West Supp. 1979) (16); MISS. CODE ANN. §§ 97-3-65, -67 (1972 & Cum. Supp. 1979) (12); MONT. REV. CODES ANN. §§ 45-5-502(3), -503(3), -501(2)(c) (1979) (16); N.Y. PENAL LAW § 130.05 (McKinney Supp. 1979) (17); N.C. GEN. STAT. §§ 14-27.2, .4 (Cum. Supp. 1979) (12); OR. REV. STAT. § 163.315 (Repl. 1977) (18); R.I. GEN. LAWS § 11-37-6 (Cum. Supp. 1979) (16); UTAH CODE ANN. § 76-5-406 (Repl. 1978) (14); VA. CODE § 18.2-61 (1975 & Cum. Supp. 1979) (13); W. VA. CODE § 61-8B-2 (Repl. 1977) (16); WIS. STAT. ANN. § 940.225(4) (1978 & Supp. 1979-80) (15).

New Jersey does not define an age of consent as such, but the practical effect of the amended age provisions is the enactment of a statutory offense for persons under 16. N.J. STAT. ANN. §§ 2C:14-1 to -3 (West Pamph. 1980).

138. ALA. CODE tit. 13A, §§ 13A-6-61, -62 (1977 & Supp. 1979); CONN. GEN. STAT. ANN. §§ 71(a)(1), (3), 73(a)(1)(A), (C) (West Supp. 1979); IND. CODE ANN. §§ 35-42-3(a), (b), (c), (d) (Burns Cum. Supp. 1977); MD. ANN. CODE art. 27, §§ 463(a)(3), 464A(a)(3), 464B(a)(3), 464C(a)(2), (3) (Cum. Supp. 1979); MICH. COMP. LAWS ANN. §§ 750.520b(1)(a), (b) (MICH. STAT. ANN. § 28.788(2)(1)(a), (b) (Callaghan Cum. Supp. 1980)); MISS. CODE ANN. §§ 97-3-65, -67 (1972 & Cum. Supp. 1979); N.H. REV. STAT. ANN. §§ 632-A:2(X), (XI), 3, 7 (Supp. 1979); N.M. STAT. ANN. §§ 30-9-13 (A), (B) (1978); N.C. GEN. STAT. §§ 14-27.2(a)(2), .4(2) (Cum. Supp. 1979); N.D. CENT. CODE § 12.1-20-03(1)(d) (Supp. 1979); TENN. CODE ANN. §§ 39-3703(a)(3), (4), -3704(b) (Cum. Supp. 1980); V.I. CODE ANN. tit. 14, § 1703 (Supp. 1978-79); WIS. STAT. ANN. § 940. 225(2)(e) (West Cum. Supp. 1979-80); WYO. STAT. § 6-4-303(a)(V)(c) (1977).

139. KY. REV. STAT. §§ 510.020(3)(a), .040(1)(b)(2), .050(1) (Repl. 1975); N.J. STAT. ANN. §§ 2C:14-2(a)(1), (2), -2(b)(4), -3(a)(2), -3(b)(4) (West Pamph. 1980); N.Y. PENAL LAW §§ 130.25, .30, .35 (McKinney 1977 & Supp. 1979); OR. REV. STAT. §§ 163.355(1), .365(1)(b), .375(1)(b),(c) (1977); S.C. CODE § 16-3-655 (Cum. Supp. 1979); WASH. REV. CODE ANN. §§ 9A.44.070, .080, .090 (West Cum. Supp. 1980-81); *cf.* ARK. STAT. ANN. §§ 41-1802(2), (3), -1803(1)(c), -1804(1), -1806(1), -1807(1), -1808(1)(c), -1810(1) (1977) (more than three statutory age classifications).

140. *See, e.g.*, MICH. COMP. LAWS ANN. § 750.520b(1)(a) (MICH. STAT. ANN. § 28.788(2)(1)(a) (Callaghan Cum. Supp. 1980)).

141. The most common age in traditional statutory rape laws was 16. Most reform states define the most serious crime in terms of sexual acts committed with a person under 13 or 12. *E.g.*, ALASKA STAT. § 11.41.410(3) (1978); MICH. COMP. LAWS ANN. § 750.520b(1) (MICH. STAT. ANN. § 28.788(2)(1) (Callaghan Cum. Supp. 1979-80)); N.J. STAT. ANN. § 2C:14-2(a)(1), (b) (West Pamph. 1980).

142. *E.g.*, ALASKA STAT. §§ 11.41.440(a)(1), (2) (1978); N.J. STAT. ANN. § 2C:14-3(b) (West Pamph. 1980).

tions between consenting teenagers.[143] In other states, the policy objective of excluding consenting teenagers is achieved by introducing a differential between the ages of the victim and offender.[144] A number of states compromised on the age provisions and thus retained some of the features of statutory rape; these features included the defense based upon the chastity of the victim.[145]

Some states also enacted highly unusual statutory provisions in what looks like an attempt to strike a compromise between the goals of reform advocates and the policy objectives of statutory rape law.[146] The Washington statute, for example, exhibits a number of reform features, but also defines a crime called statutory rape in the first, second, and third degrees.[147] Some reform provisions have been enacted, such as the age differential in second degree statutory rape, but the statutes retain some characteristics of the traditional statutory rape law, such as the spousal exception.[148] The Washington statute is atypical of reform statutes in that it institutes relatively high penalties for offenses against young persons. It is also contrary to the traditional view in that it precludes the admission of evidence of the victim's past sexual history for all degrees of statutory rape.[149] An unusual provision, which was probably the result of a political compromise, is a specific statutory provision eliminating the mistake as to age defense unless the defendant claims to rely upon a declaration by the victim.[150] In contrast, a number of reform states have abolished[151] or limited[152] the mistake as to age defense.

Reform statutes which define the offense in terms which make consent irrelevant usually do not define an age of consent. The concept of an age of consent was traditionally related to notions of seduction and statutory rape. Age of consent has little meaning in a statute which formulates the crime in terms of sexual assault or sexual battery. Some states, nevertheless, have adopted statutes which define both a statutory age of consent and a crime whose elements include the absence of consent.[153]

143. *E.g.*, TENN. CODE ANN. § 39-3703(a)(4) (Cum. Supp. 1979) (offense defined in terms of age and a relationship of authority between the victim and actor).

144. Four-year gap: COLO. REV. STAT. § 18-3-405(1) (Repl. 1978); DEL. CODE tit. 11, §§ 761(3), 762 (Repl. 1979); MD. ANN. CODE art. 27, §§ 463(a)(3), 464A(a)(3), 464B(a)(3), 464C(a)(2), (3) (Cum. Supp. 1979); W. VA. CODE §§ 61-8B-5, -8 (Repl. 1977). Three-year gap for some offenses: MONT. REV. CODE ANN. §§ 45-5-502(3),-503(3) (1979); S.C. CODE §§ 16-3-655(1), (2) (Cum. Supp. 1979); S.D. COMPILED LAWS ANN. § 22-22-7 (Supp. 1979); TENN. CODE ANN. § 39-3703(a)(4) (Cum. Supp. 1979); UTAH CODE ANN. § 401(2) (Repl. 1979); VA. CODE §§ 18.2-63, -64.1 (1975 & Cum. Supp. 1979).

Iowa adopted a six-year gap for some offenses. IOWA CODE ANN. § 709.4(5) (West 1979). Maine has a three-year gap and a five-year gap for different offenses. ME. REV. STAT. tit. 17-A, §§ 254, 255(c) (Pamph. 1979). Minnesota has age differentials of two years, three years, and four years for various offenses. MINN. STAT. ANN. §§ 609.342(a), (b), .343(a), (b), .344(a), (b), .345(a), (b) (West Cum. Supp. 1980).

145. IND. CODE ANN. § 35-42-4-3(a)-(f) (Burns Supp. 1977) (marriage of the child to anyone is an affirmative defense to child molesting); LA. REV. STAT. ANN. § 14:80 (West Cum. Supp. 1979) (requires that the victim be unmarried).

146. *E.g.*, NEV. REV. STAT. § 200.364(3) (1977) (adopting a compromise position on the age of consent. The age of consent is set at 15. For ages 15-17, there is a rebuttable presumption of non-consent.); WIS. STAT. ANN. § 940.225(4) (West Cum. Supp. 1979-80).

147. WASH. REV. CODE ANN. §§ 9A.44.070, .080, .090 (West Supp. 1980-81).

148. *Id.* Washington retains the spousal exception for second and third degree statutory rape and abolishes the spousal exception for first degree statutory rape.

149. WASH. REV. CODE ANN. § 9A.040.020(2)-(4) (West Cum. Supp. 1980-81).

150. WASH. REV. CODE ANN. § 9A.040.030(2) (West Cum. Supp. 1980-81).

151. ARK. STAT. ANN. § 41-1802(2)(1977); CONN. GEN. STAT. ANN. § 53a-67 (West Supp. 1979); FLA. STAT. ANN. § 794.021 (West 1976 & Supp. 1979); LA. REV. STAT. ANN. § 14:80 (West Cum. Supp. 1980); N.J. STAT. ANN. § 2C:14-5(c) (West Pamph. 1980); VA. CODE § 18.2-64.1 (Cum. Supp. 1979).

152. COLO. REV. STAT. § 18-3-406 (Repl. 1978) (only if victim is over 15); HAWAII REV. STAT. § 702-235 comment (Repl. 1976) (defendant must be reckless with regard to knowledge of age); ME. REV. STAT. tit. 17-A, § 254 (Pamph. 1980) (affirmative defense to sexual abuse of minors); MONT. REV. CODES ANN. § 45-5-506 (1) (1979) (only if victim is over 14); N.D. CENT. CODE § 12.1-20-01(1)(a) (1976) (defense available only when offense prohibits conduct with victim over 15); OR. REV. STAT. §§ 163.325(1), (2), .415(2)(a), .435(a), (b), .445(1) (1977) (defense available only when offense prohibits conduct with victim over 16); PA. STAT. ANN. tit. 18, § 3102 (Purdon Cum. Supp. 1979-80) (defense available only through preponderance of evidence when criminality of conduct involves victim over 14); WYO. STAT. § 6-4-308(b) (1977) (defense available if criminality of conduct involves victim over 12). *Accord*, WASH. REV. CODE ANN. § 9A.44.060(2) (West Cum. Supp. 1980-81) (does not limit the defense to particular crimes, but there is a requirement that the defense be reasonable).

153. ARIZ. REV. STAT. ANN. §§ 13-1401, -1404, -1405 (1978); DEL. CODE tit. 11, §§ 767, 773 (Repl. 1979); OR. REV. STAT. §§ 163.315, .365 (1977).

VII. Admissibility of Evidence

A. Recent Legislative Developments

By 1976, twenty-two states had adopted special evidentiary provisions for rape limiting the admissibility of evidence of the victim's prior sexual conduct with persons other than the defendant.[154] As of 1979, forty-one states had passed some form of a rape evidence statute. Ten jurisdictions had no special statutory provision for the admissibility of evidence of the prior sexual conduct of the victim in a rape trial.[155] Evidence statutes are often enacted before a reform of the substantive law of rape.[156] The extent of the substantive reform, however, does not necessarily correlate with the effectiveness of the evidence statute.

The enacted evidence provisions have taken a variety of approaches. It may be important that the state has adopted evidence rules modeled on the Federal Rules of Evidence.[157] Evidence rules such as those incorporated in Michigan's criminal sexual conduct statute,[158] which excludes all evidence of the victim's prior consensual acts with persons other than the defendant, are exceptional.[159] Most states have enacted rules or statutes which minimally require a pretrial hearing to determine relevance, before the evidence of the victim's prior sexual conduct with persons other than the defendant can be admitted. Some states have individualized codifications of their common law.[160] Most statutes are silent on the question of what evidence is admissible to challenge the credibility of a witness. The determination, then, is left to the discretion of the trial court.[161]

Generally, the evidence statutes fall into three categories: (1) statutes which exclude evidence of the victim's prior sexual conduct with persons other than the defendant for any purpose; (2) statutes or rules which create a presumption that evidence of the victim's prior sexual conduct with third parties is irrelevant to prove consent, but allow such evidence to be admitted after the defense shows relevance;[162] (3) statutes which attempt to limit the admissibility of evidence of the prior or present conduct of the victim to impeach credibility.[163] As part of rape reform, a number of states also have passed related statutes which eliminate special evidentiary corroboration requirements for rape or sex offenses or which forbid the judge to give a special cautionary instruction for rape. When rape reform statutes repeal statutory or common law corroboration requirements, the change is usually accomplished by an amendment to the evidence statute.[164] Independent of the legislatures, however, a number of state courts have invalidated special cautionary instructions in rape cases.[165] Arguably, even without statutes repealing corroboration requirements, case law would have effected this reform as changing public attitudes were reflected in the evolution of the common law. Statutes prohibiting the special cautionary instruction in rape cases accelerated the process of evidence reform, though statutory repeal of a mandatory cautionary instruction is not usually considered a rape reform evidence provision.

Reform provisions which require a hearing on the relevance of the victim's prior sexual conduct

154. Bienen, *Rape II*, 3 Women's Rts. L. Rep. 90, 136 n.5 (Spring/Summer 1977).

155. Alabama, Arizona, Connecticut, District of Columbia, Kansas, Maine, Puerto Rico, Utah, Virgin Islands, and Virginia.

156. *E.g.*, Cal. Penal Code §§ 261, 1127d, e (West Cum. Supp. 1980); Cal. Evid. Code § 782 (West Cum. Supp. 1980).

157. New Jersey, for example, has an evidence code based upon the federal evidence code, but the rape evidence statute was enacted as part of the substantive rape reform statute rather than as an amendment to the evidence code. *See* N.J. Stat. Ann. § 2C:14-7 (West Pamph. 1980). Congress passed a moderate rape reform evidence provision in 1978. Fed. R. Evid. 412.

158. Mich. Comp. Laws Ann. § 750.520j (Mich. Stat. Ann. § 28.788 (10) (Callaghan Cum. Supp. 1980-81)).

159. Generally, the evidence provisions passed limit the admissibility of evidence of the victim's prior sexual conduct unless there is independent proof of relevance by the defense. In most states, any evidence can come in after an initial offer of proof by the defense. *But see* S.C. Code § 16-3-659.1 (Cum. Supp. 1979).

160. *See, e.g.*, Cal. Evid. Code § 782 (West Cum. Supp. 1980).

161. California is exceptional in having enacted a special statute prohibiting introduction of evidence concerning sexual conduct of the complaining witness to attack credibility. Cal. Evid. Code § 782 (West Cum. Supp. 1980).

162. *E.g.*, N.J. Stat. Ann. § 2C:14-7 (West Pamph. 1980).

163. *E.g.*, Nev. Rev. Stat. § 49.069 (1977).

164. *E.g.*, Pa. Stat. Ann. tit. 18, § 3106 (Purdon Cum. Supp. 1979-80) (repeals former corroboration requirement, disallows Lord Hale's cautionary jury instruction explained at note 78 *supra*, and states that credibility of rape victim is to be determined by the same standard as that of any other victim).

165. *E.g.*, People v. Rincon Pineda, 14 Cal.3d 864, 538 P.2d 247, 123 Cal. Rptr. 119 (1975).

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have no counterpart in the common law. Technically, during trial a judge can order a hearing on the relevance of any issue considered potentially prejudicial. The fact that such hearings have not often been ordered can be attributed to several factors: the reluctance of the judge or the prosecutor to delay adjudication by additional hearings or motions in the absence of a compelling interest; the fact that the prosecutor represents the state and not the victim; the fact that prejudice would not accrue to the defendant by the introduction of such evidence; and the related concern with the constitutional right of the defendant to introduce all possibly favorable evidence. Such hearings and requests to exclude arguably relevant evidence do not help the prosecutor who is concerned that a conviction might be overturned on appeal.

Given these concerns, it is surprising that over forty states have enacted statutes which limit the admissibility of evidence of the victim's prior sexual conduct. These provisions are known as rape shield statutes, because their purpose is to protect victims from harassment and humiliation at trial. Most commonly, the provisions limit the admissibility of evidence of the victim's prior sexual con-

duct on the issue of consent by raising a statutory presumption of irrelevance.[166] Some states provide that introduction of evidence of the victim's prior sexual conduct with third parties must be preceded by an in camera offer of proof and a judicial finding of relevance.[167] The strongest of these statutory formulations requires that the judge approve, in camera and on the record, questions to be asked of the victim in court.[168] Usually the statutes simply require a hearing or a special judicial finding on the question of relevance.[169] Some statutes specifically restrict evidence introduced before a jury.[170] These statutes imply no restriction on admissibility in a trial without a jury.

A critical distinction, however, exists between those statutes which limit the admissibility of evidence on one issue, such as consent, and those statutes which limit the admissibility of evidence according to the form of evidence, such as evidence of specific instances of conduct. Can evidence whose admissibility is restricted for one purpose be admitted for another purpose, thus risking the prejudicial effect which that statute was designed to prevent? The evaluation of the effectiveness of these statutes will depend in part upon an evaluation of the harm caused by the admission of the evidence. If it is assumed that jurors and judges irrationally excuse defendants when they are confronted with victims of whose sexual conduct they disapprove, then it is not important whether the evidence of the victim's prior sexual conduct is admitted on the issue of consent, credibility, or as proof of the circumstances of the actus reus. Under this assumption, when confronted with the evidence the judge or jury will punish the victim for her behavior by excusing the defendant. If one assumes, on the other hand, that jurors make a causal connection only between prior sexual activity and the likelihood of consent on a particular occasion, then an evidence provision limited to admissibility on the issue of consent, with the proper instructions, is presumably sufficient. It seems reasonable to follow the first assumption and to exclude potentially prejudicial evidence; societal prejudices exist, and it has not been convincingly demonstrated that jurors or anyone else can rationally limit such information to only one issue and then come to independent conclusions as to guilt and as to the appropriateness of punishment.

Few rape evidence statutes limit questioning on cross-examination or restrict the admissibility of evidence introduced to impeach victims.[171] Some states have provided that credibility of the victim in a rape case shall be determined in the same manner as in any other criminal case.[172] As a practical matter, these provisions, which probably represent a political compromise, may be no more than moral pronouncements; an individual judge can always rule that prejudicial evidence of the victim's prior sexual conduct is relevant to consent or to credibility.

Aside from these broad categories, a wide variety of special provisions exists. Some states have enacted a special exception for evidence of prior false complaints.[173] The presence of this statutory

166. *See, e.g.*, COLO. REV. STAT. § 18-3-407 (Repl. 1978); GA. CODE ANN. § 38-202.1 (Cum. Supp. 1979); N.M. STAT. ANN. § 30-9-16 (1978).

167. *E.g.*, MD. ANN. CODE art. 27, § 461A(b) (Cum. Supp. 1979); MONT. REV. CODES ANN. § 45-5-503(6) (1979); N.M. STAT. ANN. § 30-9-16(B) (1978).

168. *E.g.*, TEX. PENAL CODE ANN. tit. 5, § 21.13 (Vernon Cum. Supp. 1980).

169. *See, e.g.*, ALASKA STAT. § 12.45.045 (1978), which was enacted in 1975 and amended in 1978 to strengthen the provisions for the proof required to be shown in the in camera hearing.

170. *E.g.*, ARK. STAT. ANN. § 41-1810.4 (1977).

171. CAL. EVID. CODE § 782 (West Cum. Supp. 1980) (The Robbins Rape Evidence Law) (procedures for the admissibility of evidence regarding the victim's character for purposes of impeachment); HAWAII REV. STAT. § 707-742 (Repl. 1976) (admissibility of evidence regarding credibility); LA. REV. STAT. ANN. § 15.498 (West Cum. Supp. 1979) (victim's prior sexual conduct with person other than the defendant, and reputation evidence concerning same, inadmissible for purposes of impeachment); MISS. CODE ANN. § 97-3-68 (Cum. Supp. 1979) (if evidence regarding the victim's sexual history is offered on the issue of credibility, the defense must make an offer of proof to the court); N.D. CENT. CODE § 12.1-20-15 (Repl. 1976) (evidence of prior sexual conduct offered for impeachment purposes must be proved relevant away from the jury, written motion required); VT. STAT. ANN. tit. 13, § 3255 (Cum. Supp. 1979) (if evidence of the victim's prior sexual conduct with third party is relevant to credibility, court may admit the evidence on limited subjects); WASH. REV. CODE ANN. § 9A.44.020 (West Cum. Supp. 1980-81) (evidence of victim's prior sexual behavior inadmissible to impeach); WIS. STAT. ANN. §§ 906.08, 972.11(2)(b)(3) (West Cum. Supp. 1979-80) (victim's credibility can be attacked only by opinion evidence or evidence of reputation for truthfulness); *cf.* OR. REV. STAT. § 163.475(6) (Repl. 1977) (no restriction on impeachment by proof of a prior conviction of a crime).

172. *E.g.*, PA. STAT. ANN. tit. 18, § 3106 (Purdon Cum. Supp. 1979-80).

173. MINN. STAT. ANN. § 609.347 (West Cum. Supp. 1980) (exception for "fabricated" charge); VT. STAT.

language indicates that the position of the evidence scholar, John Henry Wigmore, on the subject of pathological lying and false complaints [174] is still influential, despite the fact that psychiatrists have difficulty in diagnosing pathological liars.[175] One state has a specific statute to deal with the issue of a reasonable but mistaken belief in consent. Other states have passed novel statutory provisions which seem to have been directed at particular circumstances or cases, or perhaps in response to the objection of a particular legislator.[176] Some evidence statutes incorporate questionable provisions regarding retroactivity.[177] The continuing validity of statutes which phrase the evidentiary exclusions in terms of a conclusive presumption of irrelevancy may be changed by recent Supreme Court decisions concerning the constitutional validity of statutory presumptions in criminal cases.[178]

B. The Effect of Statutory Changes in the Law of Evidence

Although an enormous amount of political effort has gone into lobbying evidence rules through the state legislatures, it is questionable whether these new statutes will have a significant effect on rape trials, on the conviction rate, or on public attitudes toward victims. The new rape evidence provisions have been harshly criticized in the legal literature.[179] The substance of the criticism is generally that the evidence provisions infringe upon the constitutional right of the defendant to

ANN. tit. 13, § 3255 (Cum. Supp. 1979) (exception for specific instances of past false allegations); WIS. STAT. ANN. § 972.11 (West Cum. Supp. 1979-80) (exception for prior untruthful allegations of sexual assault).

174. Wigmore, in his TREATISE ON EVIDENCE, makes the unequivocal recommendation that all complaining witnesses in sex offense cases should be examined by a psychiatrist to determine if they are lying. Wigmore was one of the first legal scholars to recognize that psychiatry might have a role to play in legal determinations. It is, however, unfortunate that his dated and discredited views on this subject continue to be quoted as authoritative.

The 1934 supplement to the second edition of Wigmore's TREATISE ON EVIDENCE incorporated a new section, 924a, in which the author stated categorically that most women and girls who alleged they were victims of sexual assault were either lying or fabricating the charge. The "scientific" basis for his conclusion was a 1915 monograph: W. & M. Healy, *Pathological Lying, Accusation and Swindling* (1915). In addition to the monograph, Wigmore cites as support for his position several letters from prominent psychiatrists of the 1930's which appear to have been solicited. In the 1940 edition of the TREATISE, Wigmore reprinted, as additional and independent authority for the view presented, a 1937-1938 Report of the American Bar Association Committee on Improvements in the Law of Evidence. 63 ABA ANNUAL REPORTS (1939). Wigmore did not mention in the TREATISE that he himself was the chairperson of that ABA committee and the author of the report which strongly endorsed the position advocated in the TREATISE. The 1970 revised edition of the TREATISE incorporates 924a without change. Opinions of the 1970's still quote 924a as the "modern" view. IIIa J. WIGMORE, TREATISE ON EVIDENCE § 924a (3d ed. rev. 1970).

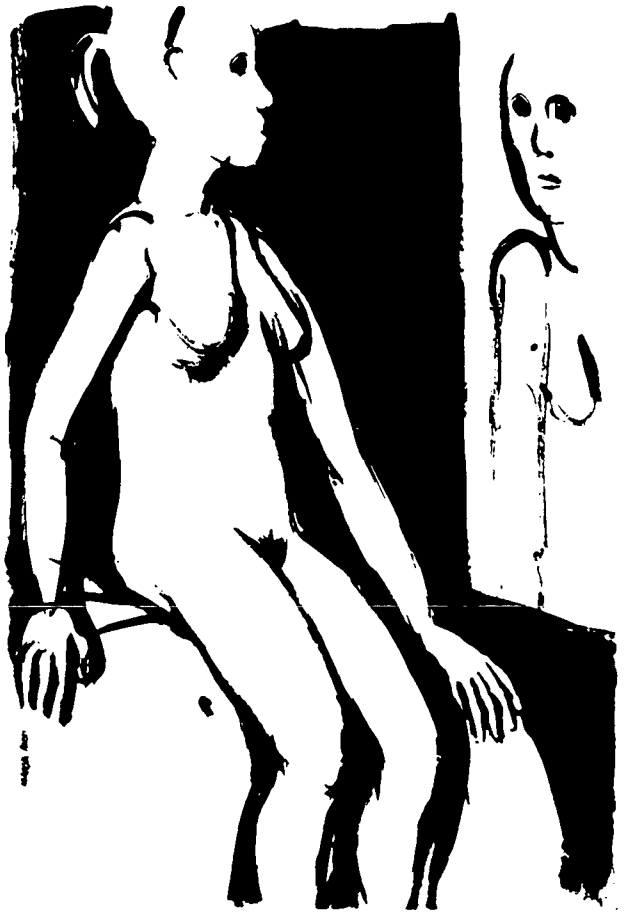
175. Beck, *Reliability of Psychiatric Diagnosis,* 119 AM. S. PSYCH. 210 (1962).

176. GA. CODE ANN. § 38-202.1 (Cum. Supp. 1979) (prior sexual history of complainant admissible to prove a reasonable belief in consent). Nebraska has a highly unusual provision which prohibits the introduction of evidence of the prior sexual history of the victim or the defendant. NEB. REV. STAT. § 28-321 (Supp. 1978). New York has a special provision allowing for the admissibility of prior convictions of the complaining witness. N.Y. CRIM. PROC. LAW § 60.42 (McKinney 1977 & Supp. 1979). The admissibility of evidence regarding the prior criminal convictions of a witness is arguably required by the sixth amendment confrontation clause of the UNITED STATES CONSTITUTION, so that the New York provision is redundant. Some states specifically mention that evidence regarding the victim's prior sexual history can be admitted if it is in rebuttal or introduced by the prosecution. Nevada, New York and West Virginia provide that prior sexual conduct of the complaining witness can be used to impeach credibility if the prosecution introduces the issues. NEV. REV. STAT. § 50.090 (1977); N.Y. CRIM. PROC. LAW § 60.42 (McKinney 1977 & Supp. 1979); W. VA. CODE § 61-8B-12 (Repl. 1977). South Carolina has a special provision which allows acts of adultery to be used for purposes of impeachment. S.C. CODE § 16-3-659.1 (Cum. Supp. 1979).

177. MD. ANN. CODE art. 27, § 461A (Cum. Supp. 1979) (specifically makes evidence provision retroactive). The Maryland retroactivity provision may violate state and federal constitutional provisions forbidding ex post facto laws; *cf.* VT. STAT. ANN. tit. 13, § 3251 (Cum. Supp. 1979) (specifically states that the section is not retroactive).

178. *E.g.,* Sandstrom v. Montana, 442 U.S. 510 (1979).

179. Eisenbud, *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 (1975); Herman, *What's Wrong with the Rape Reform Laws?* 3 CIV. LIB. REV. 60 (Dec. 1976/Jan. 1977); Sutherlin, *Indiana's Rape Shield Law: Conflict with the Confrontation Clause?* 9 INDIANA L. REV. 418 (1976); Tanford & Bocchino, *Rape Victim Shield Laws and the Sixth Amendment,* 128 U. PA. L. REV. 544 (1980); Westen, *Confrontation and Compulsory Process: A Unified Theory of Evidence for Criminal Cases,* 91 HARV. L. REV. 567 (1978); Comment, *Ohio's New Rape Law: Does it Protect Complainant at the Expense of the Rights of the Accused?,* 9 AKRON L. REV. 337 (1975-76).



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present *any* relevant and possibly exculpatory evidence during the factfinding process. This criticism seems to be an overreaction, because most rape evidence provisions simply require a hearing on relevance before the evidence of the victim's prior sexual conduct can be admitted. Assessing the strength and effectiveness of the rape evidence statute is difficult without case data. Thus, a theoretically strong evidence provision which keeps out all references to the victim's prior sexual conduct with third parties on the issue of consent will be considerably less forceful than a provision which also limits the admissibility of the same evidence on the issue of credibility. States, in fact, have tended to limit the admission of evidence of the victim's prior sexual conduct with third parties only on the issue of consent; they have been reluctant to limit the admissibility of evidence on the issue of credibility.[180] The strongest possible formulation of a rape evidence statute would preclude the admission of evidence of the victim's prior sexual conduct with the defendant or with third parties to prove consent, to prove propensity to consent, to prove a mistaken belief in consent, to show the source of pregnancy or of disease, to impeach the witness, or for any other conceivable purpose. It would also preclude the admission of such evidence as opinion evidence, specific conduct evidence, reputation evidence, or evidence in any other form. No state has taken this position. A majority of states simply construct procedural obstacles to the admission of evidence of the victim's prior sexual conduct with third parties. Some of the allegedly stronger statutes require that the judge write out the allowable questions. The effectiveness of these provisions may depend upon whether the defense can admit the identical evidence on another issue without a special hearing or a finding of relevance.

The existence of a rape shield which only precludes the admission of evidence for a particular purpose or on one issue may not provide sufficient protection for victims, irrespective of the technical wording of the statute. If the jury is going to be biased against the victim by evidence of the victim's prior sexual behavior, by evidence that a rape complainant had sexual intercourse with twelve different strangers on twelve different nights, or by the fact that a complaining witness of sixteen had consensual sexual relations with her boyfriend the same night, how the jury gets the information will be irrelevant. The same situation pertains to the judge who is faced with evidence of the victim's prior sexual conduct with third parties. Theoretically, the judge is neither influenced nor prejudiced by such evidence. Presumably, he or she is trained not to decide on the basis of evidence declared irrelevant by the legislature. The judge, however, may think that evidence of prior promiscuous conduct is itself probative of the victim's untrustworthiness. If one believes that judges, by virtue of their age and sex, are likely to disapprove of female sexual activity outside of marriage, then one might also believe that a judge would be adversely influenced by such evidence, even though the evidence is not relevant to the issue of consent. It may be that, given the struc-

180. The reluctance of state legislators to pass evidence statutes which limit cross-examination in any way may be attributed to the fact that state legislators are often lawyers whose professional experience is in trial practice. Trial lawyers traditionally have a high regard for the persuasiveness of cross-examination.

ture of the criminal justice system, it is impossible to protect victims from this societal prejudice. The jury system is based upon the notion of a societal judgment of the accused made by his or her peers. Of necessity, that societal judgment reflects existing, widespread sexist and misogynous attitudes toward rape victims.[181] In reaching its decision as to whether punishment is to be imposed, the jury considers all circumstances. An acquittal does not necessarily mean that the jury thought that the defendant did not commit a crime. If the jury believes that a defendant has had sexual intercourse without consent with a woman who regularly has consensual sexual intercourse with strangers, that jury may acquit the defendant because it believes that such behavior with that particular woman should not be punished.

From the victim advocate's point of view, the rape shield laws have another troublesome aspect. These laws are addressed to a model system which assumes a trial disposition for criminal cases. Rape shield statutes may have no effect upon disposition by plea, and in many jurisdictions, the vast majority of rape cases are disposed of by plea agreement.[182] Because of plea bargaining, the effect of rape shield statutes may differ from the expectations of reformers.

The experience in Florida is typical and instructive. The Florida sexual battery statute enacted in 1975[183] redefined the crime of rape, introduced new elements of proof, and incorporated evidence provisions which looked as if they would protect the victim from the introduction of prejudicial evidence of prior sexual conduct. The effect of the Florida evidence provisions was not as anticipated, however, partly because those lobbying for the reform did not, and could not, regulate the informal norms of the criminal justice process.

The original version of the Florida rape evidence statute excluded all evidence of prior consensual activity between the victim and any person other than the offender.[184] This version was drastically altered in committee. What was intended as reform of the evidence law changed into recodification of existing case law. The revised reform statute, which was not drafted by reformers, provided that testimony of specific instances of prior sexual conduct could be admitted when a pattern of conduct or behavior by the victim was established to be relevant to the issue of consent.[185] Some commentators considered the reform statute a step backward,[186] because the former case law allowed into evidence the prior consensual activity between the victim and third parties for the limited purpose of showing "promiscuous intercourse with men, or common prostitution."[187] By specifically stating that such a pattern of conduct was always potentially relevant to the issue of consent, the statute thus made prior sexual history admissible in every case where consent was a possible defense.

The new Florida statute provides that relevance be demonstrated away from the jury, merely codifying the judge's existing power to order such hearings. The realities of pretrial procedure in criminal court, however, seldom lead the judge to order an extensive pretrial hearing on a routine case. The threshold showing for relevance is minimal, and the tendency is to admit, not to exclude, evidence. A trial court judge is more

181. Particularly interesting are the rape evidence statutes which define prior sexual conduct to include general concepts such as "living arrangements" or "life style." *E.g.*, N.J. STAT. ANN. § 2C:14-7 (West Pamph. 1980) (sexual conduct includes living arrangement and life style); WIS. STAT. ANN. § 972.11 (West Cum. Supp. 1979-80) (sexual conduct includes use of contraceptives, living arrangement and life style). These statutes may be vulnerable to constitutional attack because they define a category which is too broad, too vague, or too all-encompassing.

182. Cases are most likely to be disposed of by plea in urban jurisdictions where most rapes occur. In 1978, in New Jersey, there were 1,115 forcible rapes in urban areas, 480 forcible rapes in suburban areas, and 130 forcible rapes in rural areas. In New Jersey urban areas approximately 80% of all cases are disposed of by plea agreement without a trial. *Five Year Comparison—Percent Changes in Index Offenses*, N.J. UNIFORM CRIME REPORTS (1978 Preliminary Annual Release, April 1979).

183. FLA. STAT. ANN. §§ 794.011-022 (West 1976 & Supp. 1979). The literature on the impact of the reform statutes is still small. There is little systematic analysis of the actual impact of legal reform in this area, in spite of the fact that over 80% of the states have passed a rape reform evidence statute.

184. "Prior consensual activity between the victim and any person other than the offender shall not be admitted into evidence in prosecutions under section 794.02." 1974 Fla. Laws, Reg. Sess., H. R. 3814 § 1(7) (introduced by Rep. Gordon).

185. FLA. STAT. ANN. § 794.022(2) (West Supp. 1979).

186. Note, *Florida's Sexual Battery Statute: Significant Reform But Bias Against the Victim Still Prevails*, 30 U. FLA. L. REV. 419, 438 (1978).

187. Rice v. State, 35 Fla. 236, 238, 17 So. 286, 287 (1895). *See also* Huffman v. State, 301 So. 2d 815, 816 (Fla. Dist. Ct. App. 1974).

likely to be reversed on appeal because he or she excluded evidence favorable to the defense than because he or she admitted evidence which was arguably prejudicial to the state. A further dilemma in the rape shield statutes is the balancing they require of the victim's privacy interests against the defendant's constitutional right to a fair trial; the defendant's right includes the right to be confronted with all possibly exculpatory evidence. Even after a hearing, judges are not disposed to keep out any arguably relevant evidence. The Florida statute, like similar provisions in other states, merely requires that the defense exert some effort to admit the evidence. Statutes which mandate a hearing may exclude only the most outrageous evidence or may only prevent flagrant misuse of evidence of the victim's prior sexual conduct.

Given the way decisions are reached in criminal cases, perhaps the implementation of reform objectives would be more successful if evidence statutes were always formed in terms of presumptions. A presumption places the burden on the defense to present information which shows that evidence of prior sexual conduct is relevant.[188] The judge then is compelled to invite the defense to rebut the legislature's intended objective as to relevance. In practice, judges may admit such evidence on any showing despite the presumption.[189] The defense now has to make a strategic decision on whether the evidence regarding the victim is worth admission. When the evidence statute is not phrased in terms of a presumption, it may be easier to ignore. A statute which requires a hearing on relevance may be interpreted as a permissive requirement. It, too, leaves a strategic decision in the hands of the defense. The calculation of whether to make a motion for the admission of evidence will be made by the defense attorney based upon a variety of considerations: the attorney's perception of the strength of the case as a whole, an estimation of how sympathetic the judge or jury will be to the client, whether the attorney has other motions before the judge in the same case, and the viability of the victim as a witness.[190]

One problem with rape evidence statutes like Florida's is that they presume a model which bears little relationship to the realities of disposition in the criminal justice system. Trial courts do not usually spend a great deal of time and effort interpreting complicated or detailed statutes. They may simply ignore, bypass, or circumvent a complicated or ambiguous statute which reformers thought would be a major instrument for change. Reform brought about through a new rape evidence statute may be insufficient to compel a busy trial judge to stop to make a determination of relevance on the issue of consent and a second independent determination on the issue of credibility, while he or she keeps open the possibility of a defense based upon a mistaken belief in consent. In Florida, according to one source, judges have invariably admitted all evidence of prior sexual conduct, irrespective of the express language limiting the admissibility of such conduct to prove

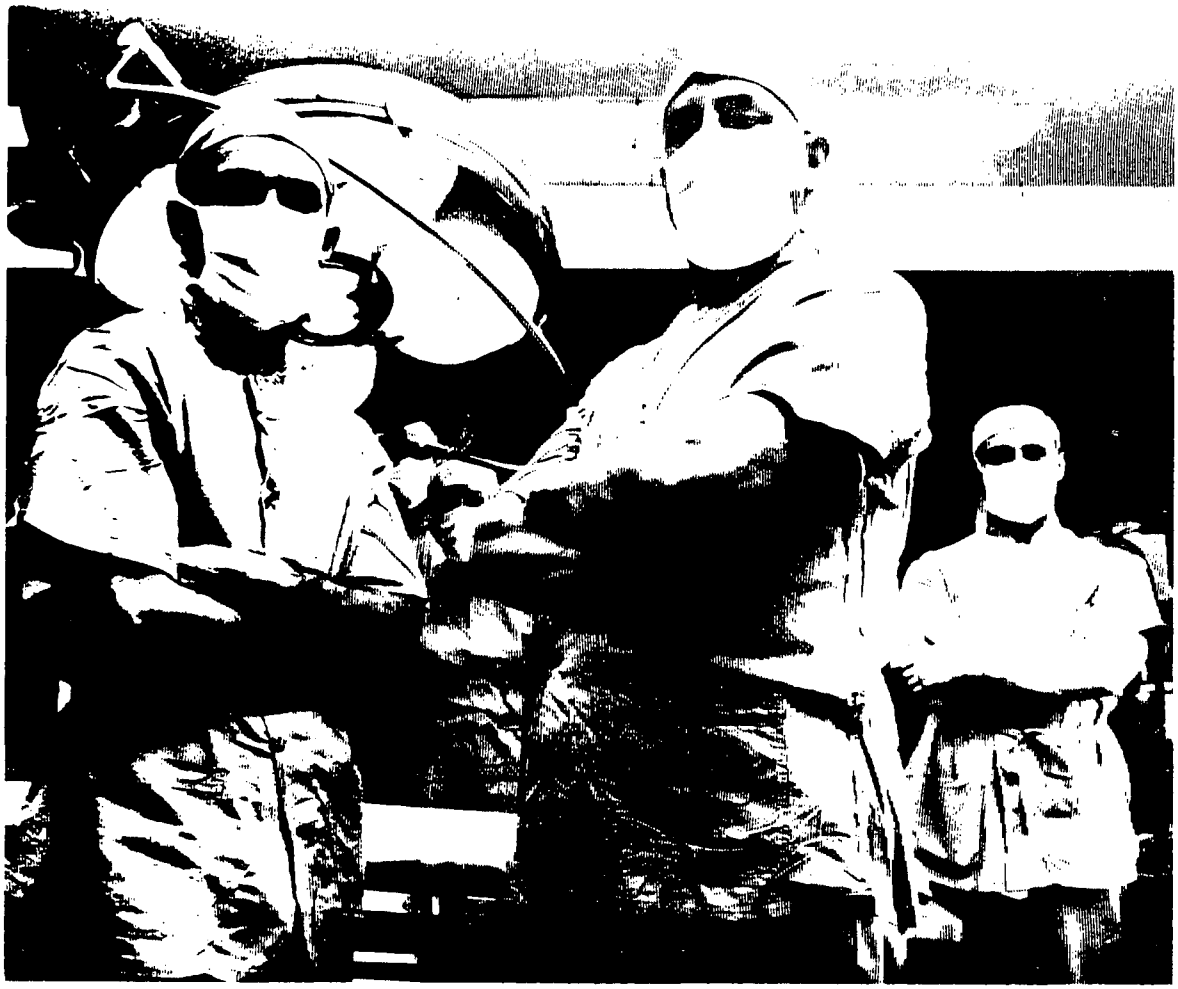
188. One commentator has suggested a statutory formulation which phrases the evidentiary exclusion in terms of a rebuttable presumption of irrelevance. *See* 30 U. FLA. L. REV., *supra* note 186, at 440.

A strong version of such a statute would state that the presumption of irrelevance or prejudice applied to evidence introduced for any purpose. These statutes could be phrased in terms of an irrebuttable presumption, but then the statute would be relatively vulnerable to attack on grounds of constitutionality. *See* Leary v. United States, 395 U.S. 6 (1969) (irrebuttable presumption concerning knowledge of possession of illegal contraband declared unconstitutional). As long as the evidence can come in after an initial offer of proof, the statute is unlikely to be declared unconstitutional.

189. On the subject of judicial attitudes toward rape victims, see Bohmer, *Judicial Attitudes Towards Rape Victims*, 57 JUDICATURE 303 (1974). *See also* Commonwealth v. Manning, 367 Mass. 605, 613, 328 N.E.2d 496, 501 (1975) (Braucher, J. dissenting) ("The admissibility of evidence of the victim's prior sexual conduct is part of a legal tradition, established by men, that the complaining witness in a rape case is fair game for character assassination in open court. Its logical underpinnings are shaky in the extreme.").

190. Very little information is available on what defense attorneys consider in making these choices. *See, e.g., Revising California Laws Relating to Rape: Hearings Before the Assembly Criminal Justice Comm. and the California Comm. on the Status of Women* at 64 (Los Angeles, October 18, 1973) (comments of Nancy McKissack):

> As a practical matter I don't think that [the introduction of evidence of prior sexual conduct] is really important as an evidentiary matter, because an experienced defense lawyer generally would not try to impeach or attack a complaining witness in a rape case where there is definite evidence, independent of the witness herself, of some force or violence. . . . Often if the woman is battered or bruised, it would backfire upon an attorney to try and attack this woman in front of a jury as a promiscuous woman.



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consent. The judges made no distinction between cases where consent was an issue and cases where it was not.[191] From the judges' perspective it was, perhaps, a waste of time to expend a pretrial hour discussing the potential admissibility of evidence at trial, when the cases were likely to be disposed of without trial. Even if judges and attorneys were personally and professionally motivated to carry out the statute's intention, the limitations of the court calendar might make such time-consuming hearings a practical impossibility. Evidence rules may be important in plea bargaining, but only if they significantly alter the bargaining position of one side. Since most evidence reforms allow for the admission of prior sexual conduct evidence upon motion, the threat of introducing such evidence is theoretically always available to the defense in plea bargaining, even when the jurisdiction has a relatively strong evidence statute.

191. The practice is for the defense attorney to ask questions regarding prior sexual activity on cross-examination. The state's attorney raises an objection. The objection is overruled and the evidence comes in before the jury. When the attorneys attempt to have the evidence held inadmissible prior to trial, the judge characteristically responds that he has no evidence before him, and he will rule during trial. In the opinion of an assistant district attorney in Florida, "[t]hat provision in the statute might as well not exist." 30 U. FLA. L. REV. 419, *supra* note 186, at 439 nn. 152 & 154 (interview with M. Jost).

Another way in which the defense can use the rape statute as a negotiating tool is to threaten in plea bargaining conferences to challenge the validity of the reform statute. Challenges are usually based upon the accused's fifth amendment right to a fair trial in accordance with due process of law and his sixth amendment right to confront the witnesses against him. The sixth amendment right is developing in a manner which suggests that courts are becoming increasingly receptive to the idea that defendants are entitled to extensively cross-examine all accusing witnesses.[192] If a state has enacted a constitutionally questionable evidence provision, the prosecutor, too, is aware that the statute will eventually be challenged. Both sides may believe, for different reasons, that their case is not the right case to test the statute. The decision to plea bargain, nevertheless, will be influenced by the existence of a statute which is ripe for challenge.

The most important constitutional challenge has been against the rape evidence statute in Michigan, which excludes evidence of the victim's prior sexual conduct with third parties.[193] A series of Michigan Supreme Court cases has interpreted that statute; an intermediate Michigan appeals court has recently declared part of the Michigan evidence statute to be unconstitutional.[194] Cross-examination is particularly sacred to trial attorneys and judges, and statutes which impose limits on cross-examination have not been favorably regarded by courts and may be particularly susceptible to constitutional challenge. A typical circumstance in which the courts have allowed limits on the scope of cross-examination has involved police informants.[195] In those cases, the courts weighed the law enforcement agency's interest in obtaining sufficient information to indict against the defendant's right of confrontation. Police have argued that informers are absolutely necessary for law enforcement; most courts have found this to be a sufficiently strong interest to withhold identification evidence. Such evidence, however, rarely has any probative value for the jury with respect to substantive guilt, and the danger to the witness-informer is immediately apparent.

In a rape case, however, the courts will weigh the interests of the state and defendant differently than they will in other cases involving confrontation rights. The counterbalancing interest of the state may be articulated as the personal right of the victim to privacy. This privacy right is generally held to be less compelling than the defendant's right to a fair trial. The United States Supreme Court, in fact, has declared unconstitutional statutes which prohibit publicity concerning rape victims.[196] For this reason, the constitutional challenges to rape shield statutes may fall upon relatively sympathetic ears.

Rape shield statutes have been justified as a way to increase victim reporting. In theory, if victims are assured that they will not be harassed or humiliated at trial, reporting will increase.[197] There has never been a reliable or

192. *See* Westen, *Confrontation and Compulsory Process: A Unified Theory of Evidence for Criminal Cases,* 91 HARV. L. REV. 567 (1978).

193. MICH. COMP. LAWS § 750.520j (MICH. STAT. ANN. § 28-788(10) (Callaghan Cum. Supp. 1979-1980)).

194. People v. Williams, 95 Mich. App. 1, 289 N.W.2d 863, leave to appeal granted, 408 Mich. 959 (1980).

Litigation involving the Michigan rape evidence statute has been the most extensive to date. The Michigan statute totally excludes all forms of evidence concerning the victim's prior sexual conduct except conduct with the defendant or conduct which would show the source of pregnancy, disease, or other relevant physical condition of the victim. Several stages of appellate review have taken place on several issues. The Michigan Supreme Court has declared recently that in some circumstances if evidence of the defendant's prior conduct is admissible, then the victim's prior conduct also must be admissible irrespective of the statutory prohibition. People v. Oliphant, 399 Mich. 472, 250 N.W.2d 443 (1976); People v. Patterson, 79 Mich. App. 393, 262 N.W.2d 835 (1978); People v. Dawsey, 76 Mich. App. 741, 257 N.W.2d 236 (1977).

195. *E.g.,* Roviaro v. United States, 353 U.S. 53 (1957).

196. Cox Broadcasting Corp. v. Cohn, 420 U.S. 469 (1975). A few states have recently enacted statutes which try to limit public accessibility to the names of victims or to hearings regarding the admissibility of evidence concerning the victim's prior sexual history with third parties. Whether these statutes will survive constitutional attack after *Cox* and subsequent first amendment cases remains to be seen. Presumably, the statutes which require an in camera hearing on relevance present no constitutional problems. *E.g.,* N.C. GEN. STAT. § 8-58.6 (Cum. Supp. 1979) (the record of the in camera hearing shall not be public); WYO. STAT. § 6-4-312 (Cum. Supp. 1979) (any motion submitted for the introduction of evidence regarding the prior sexual history of the victim is privileged and not to be released or available for public scrutiny). MASS. GEN. LAWS ANN. ch. 278, § 16A (West Supp. 1979), which excludes the public from trials for sex offenses involving persons under 18, has been upheld by the state's highest court. Ottaway Newspapers, Inc. v. Appeals Court, 372 Mass. 539, 362 N.E.2d 1189 (1977).

197. *Reform in Maryland, supra* note 61, at 157-59.

authoritative demonstration of the nexus between the enactment of a rape shield statute and an increase in reporting. We know that the number of reported rapes has dramatically increased. We also know that large numbers of victims are going to newly formed rape crisis centers. If reliable data were available indicating that the rape evidence statutes have increased victim reporting, then the courts would weigh that legislative justification against the constitutional challenges.

Rape evidence statutes may not accomplish their stated objectives for a number of reasons. First, the statutes may have a limited practical effect because most formulations only exclude evidence of one particular type or evidence introduced for one particular purpose. Second, the statutes may be ineffective because they are drafted so broadly that they may be subject to constitutional challenge. Third, the statutes may be ineffective because judges and juries make decisions according to sexist attitudes which are highly prevalent in society, and a simple rule of evidence will not change those attitudes. Fourth, evidence statutes may be ineffective because practicing lawyers and judges are uninformed or unaware of their existence. Finally, rape evidence statutes may fail to accomplish reform objectives because they are directed at a model of trial disposition, and the vast majority of criminal cases are decided by plea agreement without a trial. Far too little empirical research has been conducted on the actual effect of reform statutes, but existing commentary suggests that the Florida experience is probably not unusual.[198]

VIII. The Legislative History of Rape Reform Legislation in New Jersey

The history of the enactment of rape reform legislation in New Jersey offers both an example and an admonition to reformers in other states.[199] Although a rape reform statute went into effect in New Jersey in 1979 after an extensive lobbying effort, there are reasons to question whether the goals of reformers can be achieved with this statute or with any statutory reform unaccompanied by other major changes to the criminal disposition process.

Prior to the 1979 reform, New Jersey had a carnal knowledge statute which defined three sexual crimes: carnal knowledge of a woman over sixteen by force, carnal abuse of a "woman child" under twelve, and carnal abuse of a "woman child" over twelve and under sixteen.[200] The prior New Jersey statute called the offense rape, and the offense itself was a variant of the traditional English common law crime. A separate provision of the law addressed carnal knowledge of inmates in homes and institutions.[201] This section of the prior law was declared unconstitutional by a lower court because it totally precluded consensual sexual activity among institutionalized populations; this holding was reversed on appeal.[202] Prior to

198. Idaho passed a rape shield statute in 1977. Idaho Code § 18-6105 (1979). In 1979, a commentator interested in the legal arguments supporting such statutes conducted an informal survey of the trial courts in the state and "found a lamentable lack of awareness of even the very existence of the statute." Nicoll, *Idaho Code § 18-6105: A Limitation on the Use of Evidence Relating to the Prior Sexual Conduct of the Prosecutrix in Idaho Rape Trials*, 15 Idaho L. Rev. 323, 342 (1979). One court reportedly made a ruling directly contrary to the new statute, relying instead upon an outdated legal encyclopedia. *Id.*

199. A detailed history of legislative changes in the New Jersey rape law prior to the enactment of a rape reform statute in 1978, effective in 1979, can be found in *Rape I*.

200. N.J. Stat. Ann. § 2A:138-1 (West 1969) (repealed by N.J. Stat. Ann. § 2C:14-2 (West Pamph. 1980)) provided:

> *Rape and carnal abuse; penalty.* Any person who has carnal knowledge of a woman forcibly against her will, or while she is under the influence of any narcotic drug, or who, being of the age of 16 or over, unlawfully and carnally abuses a woman-child under the age of 12 years, with or without her consent, is guilty of a high misdemeanor and shall be punished by a fine of not more than $5,000, or by imprisonment for not more than 30 years, or both; or who, being the age of 16 or over, unlawfully and carnally abuses a woman-child of the age of 12 years or over, but under the age of 16 years, with or without her consent, is guilty of a high misdemeanor and shall be punished by a fine of not more than $5,000, or by imprisonment of not more than 15 years, or both.

201. N.J. Stat. Ann. § 2A:138-2 (West 1969) (repealed by N.J. Stat. Ann. § 2C:24-7 (West Pamph. 1980)) provided:

> *Carnal knowledge of inmates of homes or institutions for the feeble-minded or mentally ill.* Any person who has carnal knowledge of a female inmate of any home or institution for feeble-minded or mentally ill females, or of any home or training school for the feeble-minded, with or without her consent, is guilty of a misdemeanor.

202. State v. Hill, 166 N.J. Super. 224, 399 A.2d 667 (Law Div. 1978), *rev'd and remanded*, 170 N.J. Super.

the 1979 reform, New Jersey had no prompt complaint requirement, no statutory corroboration requirement, and no common law rule which required a judge to instruct the jury that rape was a crime especially difficult to prove. The carnal abuse section served as the statutory rape law, with carnal abuse interpreted to include both intercourse and sexual activity other than intercourse. Carnal abuse usually encompassed forcible rape of females between twelve and sixteen. Carnal knowledge was defined by case law as sexual intercourse. Common law principles excluded spouses from prosecution.

Although the New Jersey rape statute was amended ten times prior to the enactment of the 1978 rape reform legislation, the pre-reform statute was, in effect, the same statute enacted in 1796. That statute was derived from the Elizabethan rape statute of 1576. The age requirement for victims and offenders had been changed, and ancillary provisions regarding drugs and women in institutions had been added, but the definition of the offense and the terminology used were essentially the traditional Elizabethan formulation.

In October 1971, the New Jersey Criminal Law Revision Commission issued a Final Report and Commentary on its proposed New Jersey Penal Code.[203] The proposed New Jersey Penal Code followed the American Law Institute's Model Penal Code with respect to most substantive offenses, including rape.[204] Under the proposed code, rape and aggravated rape were the principal sexual offenses. Aggravated rape was sexual intercourse with a female other than one's wife when she was compelled to submit by force, threat of imminent death, serious bodily injury, extreme pain or kidnapping, inflicted upon her or any other person. Rape was defined as sexual intercourse to which the female was forced to submit by any threat that would prevent resistance by a woman of ordinary resolution. The statutory age of consent was twelve.[205] Sexual assault was defined as a minor sexual contact offense. The Commission statute required corroboration and prompt complaint, excluded spousal rape, and recommended a mistake as to age provision. This statute never became law in New Jersey.

Before the incorporation of rape reform legislation into the New Jersey Penal Code, a number of reform statutes were unsuccessfully introduced in the legislature. Chapter 14 of the present New Jersey Penal Code was drafted in the spring of 1978 by a coalition of feminist groups with the assistance of the NOW National Task Force on Rape. The rape reform statute was introduced into the penal code as a Senate Judiciary Committee amendment to what was essentially the 1971 draft of the penal code. After extensive public hearings in May and June of 1978, the Senate Judiciary Committee made a number of important substantive amendments to the 1971 penal code, and included the rape reform bill in the proposed legislation. Public testimony was heard, important changes in sentencing were introduced, and the rape reform statute was reported out of committee with the amended criminal code in June 1978.[206] The Assembly Judiciary Committee subsequently adopted the penal code without making major changes in the revised sex offense chapters in June 1978.

The NOW bill, which was adopted by both houses of the legislature in 1978 without major definitional change, was modeled after the 1976 Center for Rape Concern Model Sex Offense Statute.[207] That statute was based upon selected statutory provisions of the Michigan Criminal Sexual Conduct Statute [208] and the reform statutes

485, 406 A.2d 1334 (App. Div. 1979). The lower court cited *Rape I* in support of its holding.

203. NEW JERSEY CRIMINAL LAW REVISION COMMISSION, THE NEW JERSEY PENAL CODE VOL. I: REPORT AND PENAL CODE and THE NEW JERSEY PENAL CODE VOL. II: COMMENTARY (1971) [hereinafter cited as 1971 PENAL CODE and 1971 COMMENTARY].

204. 1971 PENAL CODE, *supra* note 203, at Chapter 14. The New Jersey Criminal Code enacted into law in 1978, effective 1979, adopted substantial portions of the code as recommended by the Criminal Law Revision Commission in 1971.

205. The American Law Institute's Model Penal Code recommendation for the statutory age of consent was 10. A.L.I. MODEL PENAL CODE § 213.1(1)(d) (Final Draft 1962). This meant consent was a defense to any acts with females over 10.

206. The chairmen of the Senate and Assembly Judiciary Committees were both exceptionally sympathetic to the goals of rape reform legislation. Without their personal commitment to the passage of a reform bill, the two committees might well have adopted the 1971 Commission statute.

207. Bienen & Meyer, *Philadelphia Center for Rape Concern Model Sex Offense Statute, Rape II.*

208. MICH. COMP. LAWS ANN. §§ 750.520*a-l* (MICH. STAT. ANN. §§ 28.788 (1)-(12) (Callaghan Cum. Supp. 1980)).

in New Mexico, Minnesota, and Wisconsin.[209] Prior to the enactment of the New Jersey sexual assault provisions, the New Jersey legislature had enacted a limited rape evidence statute which introduced restrictions on the admissibility of evidence of the rape victim's prior sexual conduct.[210] The reform statute strengthened these evidence provisions.[211] The penal code package was signed into law by Governor Brendan Byrne on August 10, 1978.[212]

The NOW sexual assault statute radically changed the New Jersey rape law. Two categories of sexual assault and two categories of criminal sexual contact, both sex-neutral, replaced the crime of rape. The spousal exception was removed, and incest and sodomy were no longer designated crimes. The resistance requirement, the presumption of an actor's inability because of age, and the mistake as to age defense were abolished by statute. Penalties were reduced, and mandatory terms for second offenders were adopted. Statutory rape was redefined and penalties were removed for consensual sexual activity involving persons over sixteen. Although the statute provided greater protection for victims, the sentencing provisions of the code reduced normal terms. Rape formerly carried a maximum of thirty years, and the imposition of the maximum term had been mandatory if the convicted rapist was determined to be a "compulsive and repetitive" sex offender.[213] Under the new code, a first conviction for aggravated sexual assault carries a penalty of ten to twenty years, on the theory that juries will be more likely to convict if the penalties are reduced.

The unamended 1978 version of the New Jersey reform bill included no reference to consent or to the age of consent as an operative concept. The statute defined aggravated sexual assault as an act of sexual penetration with a victim less than thirteen years old when the actor was four years older. Since the reform statute was drafted to obviate the need for proof of non-consent in most circumstances, the concept of an age of consent was meaningless within the context of the code. During the hiatus before the effective date, an enormous outcry over the reduction of the statutory age to thirteen, or the "repeal of the age of consent," as the protestors called it, produced sufficient political pressure to force the legislature to amend the age provisions in the 1979 amendments to the penal code.[214] The 1979 amendments to the rape reform statute added an offense defined as sexual penetration with a victim under the age of sixteen. The term consent was not used; and, after debate, the restriction of a four-year age gap between the victim and the actor for sexual penetration with a person under thirteen was removed.[215] An amendment to reintroduce the spousal exception and only exclude spouses who were living apart was narrowly defeated in committee during the 1979 amending process.

It may be difficult to separate the effect of New Jersey's rape reform legislation from the effect of other systemwide changes in the criminal law introduced by the 1979 Code of Criminal Justice. The success of rape reform legislation in New Jersey may well depend upon the success or failure of the implementation of the code as a compre-

209. MINN. STAT. ANN. §§ 609.341 to .351 (West Supp. 1980); N.M. STAT. ANN. §§ 30-9-10 to -17 (1978); WIS. STAT. ANN. §§ 940.225 (1)-(5) (West Supp. 1979-80).

210. N.J. STAT. ANN. §§ 2A:84-32.1 to -32.3 (West Supp. 1978). This section was replaced by a stronger evidence provision in the sex offender section of the new Code. N.J. STAT. ANN. § 2C:14-7 (West Pamph. 1980).

211. N.J. STAT. ANN. § 2C:14-7 (West Pamph. 1980) (replacing N.J. STAT. ANN. §§ 2A:84-32.1 to -32.3 (West Supp. 1978)). The 1979 evidence statute requires the defense to establish by "clear and convincing" proof the relevance of the victim's sexual conduct which has occurred more than one year before the date of the incident.

212. The effective date was September 1, 1979. In 1979 there were numerous unsuccessful attempts to push forward the effective date, and important amendments were passed in July and August of 1979, such as the change in the statutory age for sex offenses. See text surrounding note 214 *infra*.

213. N.J. STAT. ANN. §§ 2A:164-1 to -13 (West Supp. 1978). The reenacted sex offender statute removed the mandatory maximum term and made other significant amendments concerning offenders who were found to be "compulsive" and "repetitive" and sentenced to "specialized treatment for his mental condition." N.J. STAT. ANN. §§ 2C:47-1 to -5, -7 (West Pamph. 1980).

214. During this same period, there was also a great deal of publicity concerning the repeal of the former sodomy statute and the decriminalization of consensual homosexual conduct. Amendments recriminalizing consensual homosexual conduct between adults failed to pass.

215. 1979 N.J. Laws, ch. 178, §§ 26, 27 (Aug. 2, 1979) (amending N.J. STAT. ANN. §§ 2C:14-2, -3 (West Pamph. 1980)). Essentially, these amendments reintroduce the offense of "statutory rape" and create a new offense of statutory criminal sexual contact when the victim is over 13 and under 16 and the actor is over four years older. See N.J. STAT. ANN. § 2C:14-3(b) (West Pamph. 1980).

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hensive package of criminal reforms. If reforms are to be successful, they must include a realistic assessment of the existing criminal justice system. They must anticipate other major changes in the criminal law, such as those now taking place in the area of sentencing, where legislatures are enacting statutes which increase penalties and add mandatory periods of incarceration.

IX. The Social Implications of Legislative Changes in the Rape Laws

It is impossible to measure whether legislative changes in the area of rape reflect changing social attitudes toward women, or whether the changes in the rape laws produce changes in public attitudes. Regardless of causation, the educative role of rape reform legislation is significant. For professionals such as police, prosecutors, investigators, court clerks, hospital personnel, and others whose job it is to carry out society's instructions in institutional settings, changing the law means an immediate change in some behavior or practice. An eventual change in personal attitudes may follow. Institutional actors, whether or not they agree with the policy objectives, often have no choice but to implement the reform imposed by statute. Even if those objectives are not perfectly realized, the reform has accomplished something if it simply announces that the formal law requires changed behavior.

Inevitably, reform statutes will accomplish less than their drafters had hoped. At the moment, we have almost no reliable data on the impact of rape reform legislation.[216] It is crucial that such data be generated so that the backlash regarding women's issues in general will not find expression in a political movement to reverse reforms in the area of rape.[217]

However, even without empirical data, it is clear that statutory reform in the area of rape has already had an important effect upon public opinion, regardless of any impact upon decision-making or adjudication within the labyrinths of the criminal justice system. Victims, and women generally, are more aware that hospitals have special facilities for rape victims and that hotlines and crisis counseling are available. This knowledge may well increase the number of reporting victims. Social attitudes toward rape have

216. The most extensive research to date is the University of Michigan's study of Michigan's Criminal Sexual Conduct Law, funded by the National Center for the Prevention and Control of Rape. This study is an assessment of the impact of the 1975 statutory reforms in Michigan based upon interviews with prosecutors, police, rape crisis counselors, and others. J. Marsh, N. Caplan, A. Geist, G. Gregg, J. Harrington, D. Sharphorn, Final Report: Law Reform in the Prevention and Treatment of Rape (1980).

217. In 1975 Nevada enacted a statute which mandated that the state pay for counseling and medical care for victims and their spouses. Nev. Rev. Stat. § 217.300 to .320 (1977). In 1977 the provisions for what had to be shown in order to qualify for counseling were made more strict. Nev. Rev. Stat. § 217.300 to .320 (1977), as amended by L. 1979, ch. 353. Perhaps this was in response to abuse under the former law. South Dakota removed the spousal exception in 1975 and put it back in 1977. The right-to-life groups in New Jersey were very active in lobbying against the criminal code and were successful in lobbying through the amendments to the statutory age in New Jersey.

changed to the extent that articles in the press, for example, treat the subject in an entirely different manner than they did five years ago. This change may be attributed to educational efforts which accompanied the lobbying for reformed legislation. Certainly, these changes would not have occurred without some change in attitudes. Women who lobbied for legislative changes flexed their political muscle and delivered the message that women voters were no longer prepared to tolerate a legal definition of rape which presumed that women could consent to brutal sexual assaults, that they routinely lodged false and vindictive complaints, and that only virgins deserved protection. The passage of rape reform legislation in over forty states makes an important political statement. Even if no rapist is convicted who would not have been convicted under the old law, the fact that some form of rape reform legislation has been passed by most state legislatures is itself a significant social comment.

Unfortunately, there is every reason to believe that the institutional characteristics of the criminal justice system will preclude rape reform legislation from achieving its articulated purpose. Most strikingly, the norms which purport to be upheld by the system are in fact disregarded by the system. Prior to the reform of the 1970's, the law stated that rape was a serious crime, but few offenders were arrested, prosecuted, or convicted. Reform began with frustration caused by the fact that criminal laws and institutions paid no attention to rape victims. Perhaps one reason the rape evidence provisions have been so popular with reformers is that they are seen as statutes which attempt to directly address the status and problems of victims in the criminal justice process. Most defendants accept a plea bargain long before trial. The conviction is the result of negotiation between the prosecutor and the defense attorney. The victim in a rape case probably will not even be informed of the bargained conviction, the sentence agreed upon, or the exact plea.[218] There will be no rulings on issues of law; there will be no jury findings of fact. Legislative reform which does not explicitly address the realities and local practices in plea bargaining will have no effect upon the vast majority of criminal dispositions.

Rape reform legislation must have a discrete impact upon sentencing or add new offenses in a dramatic way to change the outcome in the majority of cases.[219] Independent of the passage of rape reform legislation, reforms and changes in the area of sentencing have great importance for rape; included are the imposition of higher or different penalties when severe injury occurs,[220] mandatory custodial sentences,[221] restrictions on parole,[222] and the definition of special or extended terms.[223] The effect of rape reform legislation is, and will continue to be, significantly affected by a national movement away from indeterminate sentencing.[224] Formal rules, evidence requirements, statutory definitions of offenses, and jury

218. An innovative legislative approach to this intractable problem has recently been taken in Indiana. A 1979 Indiana statute requires the prosecutor to inform the rape victim of the terms of the plea bargain, to allow her to object to the plea bargain, and to allow her to testify at the judicial hearing on the plea at sentencing. The victim also has a right to be present during plea negotiations. This statute was passed after rape crisis counsellors persuaded the prosecutor's office to adopt an informal rule instituting these reforms on a trial basis. IND. CODE ANN. §§ 35-5-6-1 to -5 (Burns 1978 & Supp. 1979).

219. In a few states, rape reform legislation has attempted to address this issue. Most rape statutes have introduced reduced penalties for rape on the questionable theory that reduced penalties make it more likely that a jury will return a conviction. *See Reform in Maryland, supra* note 61, at 164. Certainly a reduction in penalties without any other reforms will simply reduce sentences. A number of states have introduced mandatory custodial sentences. *E.g.*, CAL. PENAL CODE § 1203.065 (West Supp. 1980). Other states have mandatory minimum sentences for repeated offenders. *E.g.*, N.J. STAT. ANN. § 2C:14-6 (West Pamph. 1980) (mandatory minimum of five years for a second sex offense).

220. *E.g.*, CAL. PENAL CODE § 264 (West Supp. 1978); KY. REV. STAT. § 510.040(2) (Repl. 1975); MONT. REV. CODES ANN. § 45-5-502(3) (1979); NEB. REV. STAT. § 28-408.03(2) (1975); NEV. REV. STAT. § 200.366(2)(a) (1977); TENN. CODE ANN. § 39-3703(a)(1)(B) (Cum. Supp. 1980).

221. *E.g.*, MASS. GEN. LAWS ANN. ch. 276, § 87 (West Cum. Supp. 1979).

222. *E.g.*, FLA. STAT. ANN. §§ 775.082(1), (2), 794.011(2) (West 1976); IDAHO CODE § 20-223 (Cum. Supp. 1980); LA. REV. STAT. ANN. § 14:42(3) (West Cum. Supp. 1979).

223. *E.g.*, HAW. REV. STAT. § 706-661 (Repl. 1976); IOWA CODE ANN. § 902.9 (West Pamph. 1979); MO. ANN. STAT. § 558.016 (Vernon Pamph. 1979); N.J. STAT. ANN. § 2C:47-6 (West Pamph. 1980); N.M. STAT. ANN. § 31-18-5 (1978); N.Y. PENAL LAW § 70.02 (McKinney 1977 & Supp. 1979); S.D. COMPILED LAWS ANN. § 22-1-2(8) (1979); WYO. STAT. § 6-4-306 (1977).

224. *But see* N.J. STAT. ANN. §§ 2C:45-1 to -4 (West Pamph. 1980). The special mandatory 5-year minimum sentence for second offenders sex offense cases is counter to this general philosophy.

instructions may be largely irrelevant to the way in which decisions are made.[225] The strategic decision of the prosecutor in a rape case may be governed by a variety of factors.[226] The prosecutor may respond to political pressure from the community to increase rape convictions. Whatever the particular pressures in a single case, however, the prosecutor will see this case as one of many in his or her caseload. If this case goes to trial, it means another case will not, because all actors in the system are committed to taking only a small percentage of cases through the trial process. For public defenders, a cost-effectiveness analysis of time and effort operates upon both overall caseload and specific cases. Private attorneys with a significant number of criminal cases usually conform to norms of systematic cooperation with other professionals in the criminal justice system.

Since the crucial factor in plea bargaining is sentencing, the introduction of a new factor such as the redefinition of an offense may operate in unexpected ways. The effect of the reform statutes may be an increase in plea bargaining, which necessarily means a reduction in the amount of time served. If the new definition of sexual assault, for example, is accompanied by shortened penalties, and if there are ambiguities in the statute, the only result may be shorter bargained sentences until one side decides to test the new statute at trial. Similarly, new provisions which increase the number of procedural hurdles before the defense can introduce evidence of the victim's prior sexual conduct at trial may simply make it more likely that cases will not reach trial. Thus, the legislative change in the evidence laws may have an actual result which frustrates the desired or expected result.

It is not uncommon for the results of a change in the rape laws to differ from what was expected by those who initiated the reform.[227] In the District of Columbia, the removal of the corroboration requirement in rape, which most reformers regard as a major goal, seemed to have no measurable effect upon case disposition or upon sentencing.[228] Factors which have been found to be significantly related to the conviction rate are not necessarily factors which are changed by rape reform legislation. The factors found to influence the conviction rate were the age of the defendant, whether a sodomy charge was also brought, whether property or other evidence was recovered, time between offense and arrest, and presence of witnesses other than the victim. The presence of a sodomy charge would be changed by the redefinition of rape as sex-neutral or as sexual assault, and presence of witnesses other than the complaining witness might constitute the presence of legally required corroboration, but the other considerations would not vary with new legislation. It is also significant that the factors which the data indicate are determinative of conviction differ markedly from the factors cited by prosecutors as being important to conviction.[229] Prosecutors cited use of force and injury to the victim as the two most important factors in obtaining a conviction, but serious offenses were no more likely than other cases to result in conviction.[230]

The enactment of some form of rape reform legislation in a majority of states is an example of both the success and the failure of the feminist movement in the United States. The mere passage of rape reform legislation through overwhelmingly male state legislative bodies dominated by regional and party concerns is a demon-

225. *See* L. MATHER, PLEA BARGAINING OR TRIAL? THE PROCESS OF CRIMINAL-CASE DISPOSITION (1979).

226. *See* BATTELLE MEMORIAL INSTITUTE LAW AND JUSTICE STUDY CENTER, FORCIBLE RAPE: A NATIONAL SURVEY OF THE RESPONSE BY PROSECUTORS, PROSECUTORS' VOL. I at 18, Table 29 (Gov't Print. Off. 1977). The Battelle Prosecutors' Survey asked prosecutors a number of questions about their perception of the strength of the case, the strength of the law, etc. The Battelle analysis did not address itself to the informal aspects of judicial process, except to note that the vast proportion of all rape cases were plea bargains and that situation was unlikely to change.

227. The fact that legislative reform is less than perfectly successful is not peculiar to rape. In a recent study of mandated procedural reforms in Denver, it was found that a reform which was intended to increase the number of pleas and speed cases to disposition actually had the effect of increasing the average elapsed time to disposition. The failure of the reform was explained in part by the fact that reform goals were set unrealistically high. INSTITUTE FOR COURT MANAGEMENT, U. OF DENVER LAW CENTER, PLEA NEGOTIATIONS IN DENVER (1972), cited in R. NIMMER, THE NATURE OF SYSTEM CHANGE: REFORM IMPACT IN THE CRIMINAL COURTS 110 (1978).

228. K. WILLIAMS, THE PROSECUTION OF SEXUAL ASSAULTS 30 (1978).

229. *See* BATTELLE MEMORIAL INSTITUTE LAW AND JUSTICE STUDY CENTER, FORCIBLE RAPE, *supra* note 226 at 18, Table 30, cited in K. WILLIAMS, *supra* note 228, at 31.

230. *Id.*

stration of the political power of feminists. Fifteen years ago, the most radical feminists would not, and could not, have predicted that state legislatures would be persuaded to redefine the crime of rape in a manner which reflected the concerns of women. The impact of rape reform legislation, however, upon those factors which motivated feminists to lobby for legislative change has been, if not negligible, at least far short of reform goals.

The educational side effects of getting rape reform legislation passed, rather than the direct substantive impact upon the processes of the criminal justice system, may be most important. Such benefits can be seen in the introduction of special police training for rape cases and in the provisions of mandated hospital services for victims.[231] Not only does the latter benefit spare the victim the outrage and expense of hospital bills for examinations required by the state, but it also serves as an admission by the state of social responsibility. Specially trained support staff, new community services, and public discussions of the subject are additional benefits.

Another important parallel development can be seen in those few states which have introduced crime victim compensation statutes, which provide for reparation and restitution.[232] Nevada is still unique in requiring the state to fund counseling for rape victims and their spouses, but a number of states now define injury from rape to include psychological and emotional harm.[233] Although these reforms have not taken place in the majority of states, they represent an important step toward the recognition that rape is a violent crime against women which bears no relationship to consensual sexual activity among adults. Until society internalizes that reality, women will continue to be victims of rape on the street, in their homes, and in their offices. Women will continue to be degraded and humiliated by the social and judicial institutions which tell the victim that what happened to her was really her fault. If statutory reform cannot by itself change people's attitudes toward rape or implement comprehensive change within the criminal justice system, it does represent an important first step toward these goals. Public opinion has been importantly influenced by the frank and critical discussions in the press of the problems rape victims face in the criminal justice system. Perhaps the overall impact of new legislation will only be seen after several years. Even though laws take effect almost immediately, customs, attitudes, and unwritten procedures take longer to change.

The history of the enactment of rape reform legislation in New Jersey is an illuminating example of both the success and failure of reform efforts. In New Jersey, the passage of rape reform legislation accompanied the adoption of a new criminal code which redefined other crimes, codified new defenses, and introduced new criteria for sentencing. The fact that rape reform legislation is incorporated in a comprehensive reform of the criminal laws may make it difficult to attribute a specific effect to the change in the rape laws.

Over thirty states have enacted comprehensive penal code reform. The status of rape reform legislation within such codes has not been adequately dealt with in the literature. At present, it is possible only to comment upon the intended effect of rape reform legislation and speculate upon systemwide impact. The important empirical work remains to be done; systemwide, detailed research will tell us if rape reform legislation has brought about the goals of the reformers.

Reforms in the area of rape may be ineffective if they do not address the intractable social problems within the criminal justice system. Yet legislative reform in the area of sex offenses represents more than a technical change in the criminal law. The society is adjusting to recent radical changes in the status of women through its collective reconsideration of legislative changes in rape laws. The culture as a whole is rethinking these issues while expressing ambivalence and some hostility toward women's insistence upon defining new and independent roles for themselves, roles which are predicated upon women's possession

231. *E.g.*, IOWA CODE ANN. § 709.10 (West Pamph. 1979); MD. ANN. CODE art. 41, § 70A (1978 & Supp. 1979); MINN. STAT. ANN. § 299B.03 (West Cum. Supp. 1980); NEV. REV. STAT. § 217.300 (1977); WYO. STAT. § 6-4-309 (1977).

232. *E.g.*, MINN. STAT. ANN. § 299B.03 (West Cum. Supp. 1980) ("reparations" include the cost of the victim's attorney's fees); N.M. STAT. ANN. § 31-17-1 (1978); PA. STAT. ANN. tit. 18, § 1106 (Purdon Cum. Supp. 1979-80); S.D. COMPILED LAWS ANN. § 23A-28-1 to -10 (Revision 1979). New Mexico, Pennsylvania, and South Dakota use the term "restitution."

233. *E.g.*, DEL. CODE ANN. tit. 11, § 764(1) (Repl. 1979).

and control of their sexuality. Reforms in the area of rape speak to more than the criminal justice system, even though rape, by whatever name, is a crime. Because in the past rape served to express more than the society's declaration of an illegal act, reforms in the area of sex offenses will continue to be a vehicle for women to insist that their autonomy must be protected by the agents of social control. In the coming decade, legislative reforms in the area of rape will continue to mirror and to measure the ongoing transformation of the status of American women.