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RECENT STATUTORY DEVELOPMENTS IN THE DEFINITION OF FORCIBLE RAPE

If the appropriate measure of law's success is its effect on the primary conduct of citizens, then the law of forcible rape[1] today is simply inadequate. The proven reluctance of victims to report rape,[2] the dramatic increase in the incidence of the crime,[3] and the low conviction rates for defendants[4] are all indices of a law that has gone awry. One trial judge's frustration with the current situation, shown in a lecture to a jury which had just acquitted a rape defendant, is typical:

> It is almost impossible in this country to get a conviction of rape. . . . I am reluctantly coming to the conclusion . . . [that] at least as far as jurors are concerned, rape is no longer a crime. . . . [I]nstead of trying the defendant, you make the poor girl the defendant. . . . [G]irls don't report rape for the humiliation involved in it, the degradation they go through in the trial. . . . They are made the defendant, and they walk out of this courtroom with one thought in their mind: In our courts there is no justice for the victims of rape. And I can't say that I disagree with them.[5]

While perhaps much of the problem of rape lies with the social and moral fabric which the law must accept as a given confinement, it is the premise of this note that the criminal law's very definitions of conduct constituting forcible rape are one of the major sources of the difficulty. Accordingly, the note will analyze the progress currently being made in various attempts to revise four specific aspects common to all definitional schemes: (1) the relation between the actor's and victim's conduct, (2) the gradation of forcible rape into degrees, (3) the need for corroboration, and (4) the requirement of mens rea.[6] Each of these four definitional problems will in

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[1] This note deals primarily with forcible rape and does not address the numerous problems relating to statutory rape. The term "forcible rape" as used herein includes all forms of nonconsensual sexual intercourse accomplished through force or coercion. While intercourse through deception and intercourse with an unconscious, drugged, intoxicated, mentally defective, or physically helpless victim are not included in this definition, these acts will be discussed in several contexts throughout the note, particularly as they relate to the grading of different types of rape. For a discussion of cases involving these issues, see Puttkammer, *Consent in Rape*, 19 ILL. L. REV. 410 (1925).

[2] 1973 FBI UNIFORM CRIME REPORTS FOR THE UNITED STATES 15.

[3] The reported incidence of forcible rape increased by 62.4% between 1968 and 1972. This was the greatest increase of any serious crime for that period. *Id.* at 1.

[4] Thirty-six percent of those adults prosecuted for forcible rape in 1973 were convicted. *Id.* at 15. This conviction rate compares with 45 percent for murder, *id.* at 10, at 46 percent for robbery, *id.* at 19. These rates are for adults only, although rape is primarily a crime of young offenders. *Id.* at 15.

[5] Willis, *Rape on Trial*, ROLLING STONE, Aug. 28, 1975, at 30, col. 4.

[6] Although the evidentiary problems of victim cross-examination are equally important,

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turn be discussed through the perspective of four major models currently existing in the area of rape law: the common law "carnal knowledge" statute,[7] the American Law Institute's Model Penal Code (MPC),[8] the New York Penal Law,[9] and the sexual conduct statute recently enacted in Michigan.[10]

A typical "carnal knowledge" statute simply punishes "[a]ny person who shall ravish and carnally know any female. . . by force and against her will."[11] These statutes, reflecting the earlier common law of rape, were based on a concern with chastity and violation of a woman's "virtue." In a world in which a woman's pre-marital virginity and post-marital fidelity were of utmost importance, the loss of either required public explanation and, if appropriate, harsh vindication.

The Model Penal Code official draft was published by the American Law Institute in 1962, but the sections dealing with sexual assault were substantially developed as early as 1955 in Tentative Draft No. 4. The MPC was a massive effort to codify the entire criminal law, including both general principles of criminal liability and definitions of specific offenses. The Code built on the common law but incorporated the perspective of modern theories about the kinds of behavior that constitute danger to society and to individuals. In the sections governing rape, the drafters were concerned primarily with specifying the minimum amount of coercion or deception necessary and then devising a rational grading system to classify all culpable conduct.[12] Their proposed statute on rape has been followed in numerous jurisdictions.[13]

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they are beyond the scope of this analysis and will only be discussed tangentially when relevant to definitional problems.

[7] See note 21 *infra* for a typical carnal knowledge statute.

[8] MODEL PENAL CODE §§ 213.0-.6 (Proposed Official Draft, 1962) [hereinafter cited as MPC].

[9] N.Y. PENAL LAW §§ 130.00-.35 (McKinney 1975) [hereinafter cited as N.Y.].

[10] MICH. COMP. LAWS ANN. §§ 750.520(a)-(f) (Supp. 1975) [hereinafter cited as MICH.].

[11] *See* note 21 *infra*. *See also* D.C. CODE ENCYCL. ANN. § 22-2801 (1967). "Carnal knowledge" means sexual intercourse; any penetration of the vagina, no matter how slight, would be sufficient. The term "female," however, does not include the wife of the accused, as intercourse is considered consented to at marriage and the consent abrogated only with divorce.

[12] MPC § 207.4 Comments at 241 (Tent. Draft No. 4, 1955). *See generally* Wechsler, *The Challenge of a Model Penal Code*, 65 HARV. L. REV. 1097 (1952).

[13] The MPC has also been the catalyst for recent efforts by the majority of states to codify their criminal statutes into one integrated whole. *See, e.g.*, Baldwin, *Criminal Law Revision in Delaware and Hawaii*, 4 J.L. REFORM 476, 479 (1971); Bartlett, *Proceedings of Governor's Conference on Crime*, Apr. 21, 1966, at 69; Cohen, *Criminal Law Legislation and Legal Scholarship*, 16 J. LEGAL ED. 253, 254 (1963); Fox, *Reflections on the Law Reforming Process*, 4 J.L. REFORM 443, 444, 459 (1971); W.P. Keeton & Reid, *Proposed Revision of the Texas Penal Code*, 45 TEXAS L. REV. 399, 404, 406 (1967). *See also* Note, *Justification: The Impact of the Model Penal Code on Statutory Reform*, 75 COLUM. L. REV. 914, 915 (1975).

The New York Penal Law was adopted in 1961, after the MPC's tentative draft including rape had been published but before the official draft. The New York statute is noteworthy as a modern contrast to the Code, for its draftsmen did not follow many of the MPC concepts of forcible rape. This statute has also had a significant effect on the criminal codes of other jurisdictions.[14]

Michigan's adoption of a criminal sexual conduct statute in 1974, which became effective in April 1975, represents a meaningful departure from all previous approaches to rape. The statute is sexually neutral and addresses all forms of criminal sexual conduct. Michigan's statute is already being presented as a model in numerous jurisdictions.[15]

The impact of each of these four approaches on the 24 other states that have adopted modern criminal codes,[16] the four current state proposals,[17]

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[14] The rape sections of the Oregon, Kentucky, and Connecticut criminal codes have been strongly influenced by the New York statute.

[15] The Michigan statute has been adopted independently of consideration of an integrated criminal code. It has served as an example to other states in re-evaluating their sex crime statutes within recently adopted codifications. Connecticut, Minnesota, and New Mexico are three examples. Other states are presently considering new sex crime statutes and show the impact of the Michigan model. *See, e.g.*, Colorado, 17 CR. L. REP. 2079 (1975); New Hampshire, *id.* at 2223.

[16] The rape sections of these statutes are codified as follows: COLO. REV. STAT. ANN. §§ 18-3-401 *et seq.* (1973) [hereinafter cited as COLO.]; Act of July 7, 1975, No. 75-619, [1975] Conn. Leg. Serv. Jan. Sess. 1216, *formerly* CONN. GEN. STAT. ANN. §§ 53a-65 *et seq.* (1972), *as amended* (Supp. 1975) [hereinafter cited as CONN.]; DEL. CODE ANN. tit. 11, §§ 763 *et seq.* (Supp. 1974) [hereinafter cited as DEL.]; FLA. STAT. ANN. § 794.011 (Supp. 1974) [hereinafter cited as FLA.]; GA. CODE ANN. § 26-2001 (1972) [hereinafter cited as GA.]; Act of Apr. 7, 1972, No. 9, ch. 7, §§ 730 *et seq.*, [1972] Hawaii Laws 90, *as amended*, Act of June 10, 1974, No. 197, [1974] Hawaii Laws 409, *formerly* HAWAII REV. STAT. §§ 768-81 *et seq.* (1968) [hereinafter cited as HAWAII]; ILL. ANN. STAT. ch. 38, § 11-1 (Smith-Hurd Supp. 1975) [hereinafter cited as ILL.]; KAN. STAT. ANN. §§ 21-3501 *et seq.* (1974) [hereinafter cited as KAN.]; KY. REV. STAT. ANN. §§ 510.010 *et seq.* (1975) [hereinafter cited as KY.]; Acts of July 17, 1975, Nos. 333, 612, [1975] La. Sess. Law Serv. 573, 974, *formerly* LA. REV. STAT. ANN. §§ 14:41 *et seq.* (1974) [hereinafter cited as LA.]; ME. REV. STAT. ANN. tit. 17-A, §§ 251 *et seq.* (Supp. 1975) [hereinafter cited as ME.]; Act of June 5, 1975, ch. 374, [1975] Minn. Sess. Law Serv. 1st Reg. Sess. 1084, *formerly* MINN. STAT. ANN. §§ 609.291 *et seq.* (Supp. 1975) [hereinafter cited as MINN.]; MONT. REV. CODES ANN. § 94-5-503 (Supp. 1974), *as amended* (Supp. 1975) [hereinafter cited as MONT.]; N.H. REV. STAT. ANN. § 632:1 (Supp. 1973) [hereinafter cited as N.H.]; N.M. STAT. ANN. §§ 40A-9-20 *et seq.* (Supp. 1975) [hereinafter cited as N.M.]; N.D. CENT. CODE §§ 12.1-20-01 *et seq.* (Supp. 1975) [hereinafter cited as N.D.]; OHIO REV. CODE ANN. §§ 2907.01 *et seq.* (Page Supp. 1973) [hereinafter cited as OHIO]; ORE. REV. STAT. §§ 163.305 *et seq.* (1973) [hereinafter cited as ORE.]; PA. STAT. ANN. tit. 18, § 3121 (1973) [hereinafter cited as PA.]; TEX. PENAL CODE art. 2, §§ 21.01 *et seq.* (1974), *as amended*, Act of May 15, 1975, ch. 203, [1975] Tex. Sess. Law Serv. 476 [hereinafter cited as TEX.]; UTAH CODE ANN. §§ 76-5-402 *et seq.* (Supp. 1975) [hereinafter cited as UTAH]; VA. CODE ANN. §§ 18.2-61 *et seq.* (Repl. Vol. 1975) [hereinafter cited as VA.]; Act of Apr. 28, 1975, ch. 14, [1975] Wash. Leg. Serv. 1st Extra. Sess. 171, *formerly* WASH. REV. CODE ANN. §§ 9.79.010 *et seq.* (Supp. 1974) [hereinafter cited as WASH.]; WIS. STAT. ANN. § 944.01 *et seq.* (1958) [hereinafter cited as WIS.].

Idaho enacted a criminal code based on the MPC in 1971 but repealed it in 1972 and reinstated its original criminal statutes. Ch. 143, § 1, [1971] Idaho Laws 630, 682-86, *repealed by* ch. 109, § 1, [1972] Idaho Laws 223; ch. 336, § 1, [1972] Idaho Laws 844, 961-62, *codified as* IDAHO CODE §§ 18-6101 *et seq.* (1948).

and the two current federal proposals[18] will be described in more detail in the following sections.

I. The Relation Between the Actor's and Victim's Conduct

Forcible rape is in many respects an imponderable crime. It is the only form of violent criminal assault in which the physical act accomplished by the offender (sexual intercourse) is an act which may, under other circumstances, be desirable to the victim.[19] For this reason the relation between the actor's conduct and the victim's conduct is particularly important for the issue whether coercion existed. These unusual circumstances surrounding rape were the basis for Lord Hale's oft-quoted remark that rape "is an accusation easily to be made and hard to be proved, and harder to be defended by the party accused, tho never so innocent."[20] The desire to

[17] The rape sections in the current criminal code proposals now available are California Joint Legislative Committee for Revision of the Penal Code, Penal Code Revision Project §§ 900 *et seq.* (Staff Draft, undated) [hereinafter cited as Cal. Prop.]; Maryland Commission on Criminal Law, Proposed Criminal Code §§ 130.00-.20 (Report & Part I, 1972) [hereinafter cited as Md. Prop.]; Massachusetts Criminal Law Revision Commission, Proposed Criminal Code of Massachusetts ch. 265, §§ 16-20 (1972) [hereinafter cited as Mass. Prop.]; New Jersey Criminal Law Revision Commission, The New Jersey Penal Code ch. 14, §§ 2C:14-1 *et seq.* (1971) [hereinafter cited as N.J. Prop.].

Massachusetts has recently enacted a new rape law. Mass. Gen. Laws Ann. ch. 265, § 22 (Supp. 1975). This statute amends the previous carnal knowledge statute by making rape sexually neutral, and including "unnatural" sexual intercourse as well. The new law employs the MPC "compels . . . to submit by force" idea of forcible rape. *See* note 49 *infra*. The Massachusetts draft discussed referred to in this note, however, is the rape section of the comprehensive criminal code proposal, not this 1974 amendment to the carnal knowledge statute. The conceptual difference between statutes devoted to defining and punishing a particular crime and criminal codes purporting to classify all criminal conduct under several unifying principles is an important one which the efforts of the Model Penal Code demonstrate. *See* authorities cited in note 13 *supra*.

[18] S. 1, 94th Cong., 1st Sess. §§ 1641-42 (1975) [hereinafter cited as Senate Prop.]; H.R. 333, 94th Cong., 1st Sess. §§ 1641-42, 1648 (1975) [hereinafter cited as House Prop.]. The House bill is based directly upon the recommendations made in National Commission on Reform of Federal Criminal Laws, Final Report (1971), *published in Hearings Before the Subcomm. on Criminal Laws and Procedure of the Senate Comm. on the Judiciary*, 92d Cong., 1st Sess., pt. 1, at 129-517 (1971). This study is better known and is hereinafter cited as the Brown Report, named after its chairman, Edmund G. Brown, former governor of California.

[19] A somewhat analogous situation is that presented by contact sports, which involve consent to physical contact which under other circumstances would constitute a criminal assault. The difference, of course, is that in contact sports it is far easier to judge by circumstances whether consent exists than it is in the case of sexual activities. *But cf.* the recent decision by a Minnesota prosecutor to charge one professional hockey player with assault for a rather violent attack upon his opponent while on the ice. The Washington Post, Aug. 12, 1975, at D1, col. 5. The case was not reprosecuted after a hung jury.

[20] 1 M. Hale, The History of the Pleas of the Crown 635 (1680). This statement is often included in jury instructions at rape trials. As an instruction, however, it has recently come under legislative attack. Minn. § 609.347 subd. 5(c) now prohibits the charge. Pending

protect women from degrading sexual assault has always been accompanied by the fear of convicting innocent men. The difficult task of the criminal law is to define the crime of forcible rape in the manner which best accommodates both these concerns.

The case law which developed from the common law definition of forcible rape evinced a disproportionate concern with the latter. This imbalance was necessitated in part by the fact that conviction usually brought the death penalty or long terms of imprisonment. The carnal knowledge statutes, too, which incorporated the common law definitions through case law, were interpreted in most jurisdictions to impose numerous and often insuperable obstacles for a prosecutrix to overcome to obtain a conviction.

In this regard, two important elements necessary for forcible rape under a carnal knowledge statute are that intercourse be accomplished "by force" and "against the will" of the female.[11] The emphasis of the inquiry under such a statute has traditionally been on the latter. Rather than seeing the nonconsensual conduct of the victim as relevant to show that the actor must have used force, the carnal knowledge statute sees force only as relevant to show non-consent. One commentator has described this relationship by stating that " 'force' is not truly speaking an element of the crime itself, but if great force was not needed to accomplish the act the necessary *lack of consent* has been *disproved* in other than exceptional situations."[12] Under carnal knowledge statutes, then, the crime is defined primarily in terms of the conduct of the *victim*. The actor's conduct becomes criminal only if the victim's conduct meets the defined requirements.[13]

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amendments to state criminal codes would also forbid its use. *See* 17 CRIM. L. REP. 2079 (Apr. 23, 1975) (Colorado); *id.* 2182 (May 28, 1975) (California). Some courts have also evinced criticism. *See, e.g.*, People v. Rincon-Pineda, 14 Cal. 3d 864, ____, 538 P.2d 247, 256, 123 Cal. Rptr. 119, 128 (1975); State v. Tedderson, 230 N.W.2d 510, 514 (Iowa 1975).

[11] The typical carnal knowledge statute reads as follows:

> Any person who shall ravish and carnally know any female of the age of fourteen years or more, by force and against her will, shall be punished by imprisonment in the state prison not more than thirty years nor less than ten years . . . .

Law of May 2, 1895, ch. 370, § 2, [1895] Wis. Laws 753. This statute governed in Brown v. State, 127 Wis. 193, 106 N.W. 536 (1906), discussed in notes 24-28, 33-35 *infra* and accompanying text. The language remained substantially unchanged until 1955, when "sexual intercourse" replaced "carna[l] know[ledge]." Law of Dec. 24, 1955, ch. 696, § 1, [1955] Wis. Sess. Laws 996. The important "by force and against her will" language remains, however. WIS. § 944.01. A common synonym for "against the will" is "without the consent." Wilson v. State, 49 Del. 37, 57, 109 A.2d 381, 392 (1954); R. PERKINS, CRIMINAL LAW 160, 161 (2d ed. 1969).

[12] R. PERKINS, *supra* note 21, at 162.

[13] At least one modern code has maintained this position. Discussing the force required of the actor, the drafters of the new Texas code noted that it continues the requirement of the old law that "the amount of force necessary to negate consent is a relative matter to be judged

Meeting these requirements under carnal knowledge statutes as developed by courts has become extremely difficult. In the well-known case of *Brown v. State*,[24] for example, the Supreme Court of Wisconsin faced a situation under its old carnal knowledge statute in which the complainant testified that she had been raped by a neighbor's son with whom she was well acquainted.[25] She received no bruises from the alleged attack, nor did the defendant have any marks indicating a struggle. The court found no indication of "the terrific resistance which [a] determined woman should make,"[26] thus requiring as a fulfillment of "against her will" not simply the general absence of mental consent but rather "the most vehement exercise of every physical means or faculty within the woman's power to resist the penetration of her person, . . . to persist until the offense is consummated."[27] The court buttressed this high standard with statements of medical writers that a woman could pose insuperable obstacles against sexual attack.[28]

This case was merely a restatement of the rule, adopted by Wisconsin courts and others,[29] "that the woman must resist to the utmost and that

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under all the circumstances, the most important of which is the resistance of the female." TEX. § 21.02, Practice Commentary at 308.

[24] 127 Wis. 193, 106 N.W. 536 (1906).

[25] *Id.* at 195, 106 N.W. at 537.

[26] *Id.* at 201, 106 N.W. at 539.

[27] *Id.* at 199, 106 N.W. at 538.

[28] *Id.* at 200, 106 N.W. at 538. The court indicated that attempts at "escape or withdrawal" were insufficient:

> A woman's means of protection are not limited to that, but she is equipped to interpose most effective obstacles by means of hands and limbs and pelvic muscles. Indeed, medical writers insist that these obstacles are practically insuperable in the absence of more than the usual relative disproportion of age and strength between man and woman, though no such impossibility is recognized as a rule of law.

But see East, *Sexual Offenders—A British View*, 55 YALE L.J. 527, 543 (1946):

> It is sometimes alleged that it is impossible for a man of ordinary physique to overcome a woman of ordinary strength and have carnal knowledge of her by force and against her will. It would almost seem that those who hold this view persuade themselves that the rapist treats his victim with the consideration that men usually adopt towards the women they meet socially. But medical men dealing with these cases are sometimes revolted by the brutality inflicted upon the victim.

[29] The use of Wisconsin as an example in the ensuing discussion of the focus upon victim conduct, and of the use of an utmost resistance test for this focus, affords an insight into the jurisprudence of rape in one particular jurisdiction. It by no means implies that Wisconsin was unique in its legal requirements for prosecution. Another particularly severe case was People v. Dohring, 59 N.Y. 374, 17 Am. R. 349 (1874), in which the court, although recognizing that utmost resistance was a relative term depending upon the strength of the particular victim, concluded that the victim "must resist until exhausted or overpowered unless overawed by the number of assailants or the threat of death." *Id.* at 386, 17 Am. R. at 353. *See also* Cascio v. State, 147 Neb. 1075, 1078-79, 25 N.W. 3d 897, 900 (1947); Perez v. State, 50 Tex. Crim. 34, 38, 94 S.W. 1036, 1038 (1906). Other courts held that any indication in an

voluntary submission to the act of intercourse, although yielded after assault and attempt to accomplish the act by force, [negates] an essential element of the crime."[30] This "utmost resistance" formulation of "against her will" involved two separate requirements. First, the victim must have resisted intercourse to the "utmost" of her physical capacity. Second, she must have resisted to the utmost in the sense that this resistance must not have abated during the struggle. The use of such a standard exacerbated the difficulties facing the prosecutrix by the focus on "against her will."

For one thing, it demanded conduct which was inordinately dangerous. The assumption here was that a woman will always defend herself from sexual attack to the limits of her physical capacity.[31] In an age when a woman's status in society depended on her virginity or marital fidelity, one could arguably expect a woman to feel that she must defend herself "to the utmost" to avoid being publicly ostracized. Yet, as has been recognized in most other crimes of violence,[32] resistance may often provoke greater injury, so that it is probably inadvisable, as well as unlikely in the abstract, as soon as the use of force or coercion becomes apparent.

A second weakness of the "utmost resistance" formulation was that it imposed a difficult burden of proof which was almost impossible to meet

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instruction that consent could be disproved other than by firm resistance to force would be ground for reversal. Mills v. United States, 164 U.S. 644, 648-49 (1896).

For a rare expression of judicial concern about this issue, see People v. Norrington, 53 Cal. App. 103, 202 P. 932 (1921). After stating that "it would be a reproach to the law to make the crime hinge on the utmost exertion by the woman" and that the prosecutrix need not "run the risk of being choked into insensibility," the court upheld the jury decision as being supported by the evidence. *Id.* at 110, 111, 202 P. at 935, 936. *See also* State v. Neil, 13 Idaho 539, 547, 90 P. 860, 862 (1907), criticizing courts for "revers[ing] the order of the inquiry" by focusing on the conduct of the complainant rather than on the behavior and purpose of the accused.

[30] Starr v. State, 206 Wis. 310, 311-12, 237 N.W. 96, 97 (1931). This attitude led one commentator to write:

> Obviously a man should not be convicted of this very grave felony where the woman merely put up a little resistance for the sake of 'appearance,' so to speak, taking care not to resist too much. The law goes beyond this. The absence of consent is necessary for this crime. And even where the resistance is genuine and vigorous in the beginning, if the physical contact arouses the passion of the woman to the extent that she willingly yields herself to the sexual act before penetration has been accomplished,—or if she so yields before this time for any other reason—it is not rape.

R. PERKINS, *supra* note 21, at 161-62.

[31] One commentator has suggested that resistance is a fact of "human nature," at least absent "intimidation." R. PERKINS, *supra* note 21, at 162.

[32] *See* V. Nordby, Legal Effects of Proposed Rape Reform Bills at 5 (undated)(mimeograph prepared as Lecturer in Law, University of Michigan). *See also* the comparison made by a New York prosecutor dealing with sex offenses: "Would any more resistance be required of a man who, when faced by the same assailants, yielded his wallet in fear of physical injury or death if he did not comply?" Fainstein, DICTA: *Rape Law Revisions Increase Indictments*, 28 VA. L. WEEKLY, Nov. 21, 1975, at 1, 4, col. 1.

in cases where there was no corroborating evidence, either by witness testimony or obvious physical abuse, of the victim's claim of force or coercion. Even if the jury were satisfied and reached a guilty verdict, a trial judge or an appellate court could overrule the verdict merely by asserting that the *victim*'s conduct was insufficient to constitute "utmost resistance," without having to rule on the sufficiency of the evidence that the *actor* had indeed used force.

In practice, what seems to underlie court opinions in these cases is a two-tiered standard of judicial scrutiny on the consent issue, depending upon whether or not there exists corroborating evidence of force. In *Brown v. State*,[33] for example, the supreme court reversed the jury's conviction because of its own perception that the prosecutrix had failed to prove utmost resistance:

> Not a bruise or scratch on either [party] was proved, and none existed on prosecutrix, for she was carefully examined by physicians. Her outer clothing not only presented no tearing, but no disarray, so far as the testimony goes. When one pauses to reflect upon the terrific resistance which the determined woman should make, such a situation is well-nigh incredible.[34]

The court's assumption of the fact-finding role regarding credibility seems totally improper.[35]

The Wisconsin courts did interpret their carnal knowledge statute to excuse a victim from resisting to the utmost if she were put in fear by the threats or behavior of the accused.[36] However, the standard of fear required was exceedingly high. It was described in *State v. Hoffman*[37] as a

> "fear of death or great bodily harm," a "fear of great personal injury" or "serious personal injury," a fear that "so overpowers her that she dares not resist," a "fear and terror so extreme as to preclude resistance."[38]

In *Hoffman*, the physician who examined the complainant testified that

> "Her condition, when she came into my room, was that she was absolutely terrified; she was shaking like a leaf and so incoherent it took almost half an hour to make out anything she said. She was very hysterical. I tried to get

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[33] 127 Wis. 193, 106 N.W. 536 (1906). *See* notes 24-28 *supra* and accompanying text.

[34] 127 Wis. at 201, 106 N.W. at 539.

[35] This same scope of review has been employed in cases in which the circumstances underlying the jury's finding of non-consent are more convincing. *See, e.g.*, State v. Hoffman, 228 Wis. 235, 280 N.W. 357 (1938).

[36] Bohlmann v. State, 98 Wis. 617, 74 N.W. 343 (1898).

[37] 228 Wis. 235, 280 N.W. 357 (1938).

[38] *Id.* at 240, 280 N.W. at 359.

> something out of her . . . and finally she told me she had been out, been raped. . . ."[39]

It is a measure of the attainability of the aforementioned standard of fear that despite this testimony the court held her fear to be no excuse to utmost resistance.[40] When coupled with the general expectation that any virtuous woman would by nature resist, the requirement that the victim's fear render her "practically incapable of resistance" became a third major obstacle to successful prosecutions of forcible rape.

A fourth significant consequence of the statutory and case law emphasis on the victim's conduct has been the weight given to evidence of the victim's prior sexual conduct. Since the focus of the entire rape inquiry is whether the victim has consented to sexual intercourse, the defendant's chances of acquittal are far greater if he can show that the victim has experienced prior consensual sex with others or has a bad reputation. Such prior activities are thought to be probative evidence of consent to the intercourse in question, because of the supposedly clear distinction between a chaste and an unchaste woman.[41] There is today no general agreement as to the admissibility of evidence of specific acts of intercourse with persons other than the defendant. Wigmore states that no evidentiary question has been more controverted;[42] his statement still seems valid in view of the amount of recent attention that the issue has received.[43] Although the potential admission of such evidence is probably one of the major reasons for the reluctance of rape victims to report the crime, a comprehensive discussion of the issue is beyond the definitional scope of

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[39] *Id.* at 246, 280 N.W. at 361.

[40] *Id.* at 245, 280 N.W. at 361 (Fairchild, J., dissenting).

[41] The difference was between "one who has already submitted herself to the lewd embraces of another" and the "coy and modest female, severely chaste and instinctively shuddering at the thought of impurity." People v. Abbot, 19 Wend. 191, 195 (N.Y. Sup. Ct. 1838), *quoted in* 140 A.L.R. 364, 387 (1942). *See also* R. PERKINS, *supra* note 21, at 158:

> Fortunately the character of the woman as to chastity or unchastity is admissible in evidence because of its probative value in judging whether she did or did not consent to the act in question. And the jury usually supplies the common sense which the law itself seems to have overlooked at this point.

[42] 1 J. WIGMORE, EVIDENCE § 200, at 632 (1940).

[43] *See, e.g.*, Note, *California Rape Evidence Reform: An Analysis of Senate Bill 1628*, 26 HASTINGS L.J. 1551 (1975); 27 BAYLOR L. REV. 362 (1975); 3 HOFSTRA L. REV. 403 (1975). The admissibility of evidence has been the subject of an explosion of legislation. *See, e.g.*, CAL. EVID. CODE §§ 782, 1103 (West Supp. 1975); FLA. § 794.022(2); HAWAII § 707-739; IOWA CODE ANN. § 782.4 (Supp. 1975); Act of July 23, 1975, No. 732, [1975] La. Sess. Law Serv. 1245; MINN. § 609.347; MONT. § 94-5-503; N.M. § 40A-9-26; TEX. § 21.13; WASH. § 9.79(2) (2)-(4). *See also* the following current statutory proposals: Colorado, 17 CRIM. L. REP. 2079 (1975); Illinois, *id.* at 2020; Ohio, *id.* at 2203; New Hampshire, *id.* at 2223. *Cf.* Wynne v. Commonwealth, No. 740771 (Va., October 10, 1975).

this note. The purpose here is rather to point out that the great weight still given in some jurisdictions to evidence of past unchastity is simply part of the larger view that rape laws are designed primarily to protect virginity and marital fidelity and that the amount of resistance exhibited by the victim is the best evidence of nonconsensual intercourse.

Modern case law has generally been more flexible as to the amount of resistance or the level of fear required to satisfy or excuse the element of non-consent.[14] Nevertheless, the various assumptions underlying these statutes and the traditional judicial considerations are still apt to surface, particularly in those cases like *Brown*, where the objective evidence of nonconsent is unconvincing. This tendency can still be seen even by drafters of newer criminal codes in their attempts to articulate standards of conduct which can define forcible rape.

The earliest such codification of criminal laws was enacted in 1942 by Louisiana. The sections on aggravated rape merely enumerated those circumstances which had already been seen as evincing lack of consent: resistance to the application of force and submission to serious threats. The statute curiously selected the "utmost resistance" standard[15] and provided only a broad definition of the types of threats that would excuse it.[16] Wisconsin's present criminal code, adopted in 1958 before the official draft of the Model Penal Code was published, took a similar approach, including the incorporation of the "utmost resistance" standard[17] and the vague definition of threats.[18]

In contrast to the Louisiana and Wisconsin codes, the Model Penal Code

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[14] *See, e.g.*, People v. Jones, 28 Ill.App.3d 396, 399, 329 N.E.2d 355, 358 (1975). Here, the traditional standard applied: "[r]esistance is not necessary . . . under circumstances where resistance would be futile and would endanger the life of the victim or where the victim is overcome by superior strength or paralyzed by fear." While the conviction was reversed on other grounds, the appellate court found the evidence sufficient to support a guilty verdict on the basis of this rule.

[15] Act of July 1942, No. 43, [1942] La. Acts 137, *codified at* LA. REV. STAT. ANN. § 14:42 (1974) (repealed 1975). This choice was probably inappropriate since most courts had already retreated from this position by the time the code was enacted. One of the drafters has written that "[r]egardless of the phrase adopted it is obvious that the jury will require conclusive proof that the resistance is genuine." Bennett, *The Louisiana Criminal Code*, 5 LA. L. REV. 6, 30 (1942).

[16] A female was excused from resistance only in the face of threats of "great and immediate bodily harm, accompanied by apparent power of execution." Act of July 1942, No. 43, [1942] La. Acts 137, *codified at* LA. REV. STAT. ANN. 14:42 (1974) (repealed 1975). The victim might have thus theoretically been required physically to resist the actor who threatened bruises or broken limbs, since both those injuries can heal and may not be considered great bodily harm. In addition, the provision failed to specify at whom the threats must be directed.

[17] WIS. § 944.01(2). The Wisconsin courts, however, no longer interpret this requirement rigidly. State v. Schmear, 28 Wis. 2d 126, 130, 135 N.W.2d 842, 846 (1965).

[18] WIS. § 944.01(2).

set forth a comprehensive restatement of the crime of rape.[49] In defining the amount of coercion necessary for forcible rape, the drafters selected an innovative standard. There is no separate element of "without her consent" or "against her will." Nor is there any reference to the need for resistance. Instead, a male is guilty of rape if he "compels" the female to "submit by force or by threat of imminent death, serious bodily injury, extreme pain or kidnapping, to be inflicted on anyone." This definition represented a significant development, shifting the focus from the victim's conduct to the amount of force or coercion applied by the assailant. As the drafters explained,[50] they intentionally made a change to avoid the stringent requirements often imposed under the older approach. The victim's submission need be compelled by the use of force or threats; her conduct is examined solely as a response to that of the defendant. The only exception to this general rule is the drafters' comment that "compels to submit" does require more than "a token initial resistance."[51] Apparently, they felt

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[49] The section of the MPC dealing with forcible rape follows:

> Section 213.1. Rape and Related Offenses.
>
> (1) *Rape.* A male who has sexual intercourse with a female not his wife is guilty of rape if:
>
> (a) he compels her to submit by force or by threat of imminent death, serious bodily injury, extreme pain or kidnapping, to be inflicted on anyone; or
>
> (b) he has substantially impaired her power to appraise or control her conduct by administering or employing without her knowledge drugs, intoxicants or other means for the purpose of preventing resistance; or
>
> (c) the female is unconscious; or
>
> (d) the female is less than 10 years old.
>
> Rape is a felony of the second degree unless (i) in the course thereof the actor inflicts serious bodily injury upon anyone, or (ii) the victim was not a voluntary social companion of the actor upon the occasion of the crime and had not previously permitted him sexual liberties, in which cases the offense is a felony of the first degree. . . .
>
> (2) *Gross Sexual Imposition.* A male who has sexual intercourse with a female not his wife commits a felony of the third degree if:
>
> (a) he compels her to submit by any threat that would prevent resistance by a woman of ordinary resolution; or
>
> (b) he knows that she suffers from a mental disease or defect which renders her incapable of appraising the nature of her conduct; or
>
> (c) he knows that she is unaware that a sexual act is being committed upon her or that she submits because she falsely supposes that he is her husband.

[50] MPC § 207.4, Comment at 247 (Tent. Draft No. 4, 1955).

[51] The drafters support their choice with the following argument:

> Sometimes, in order to make it perfectly clear that a token initial resistance is not enough, existing law specifies that the woman must resist "to the utmost." We believe the text requirement that she be "compelled to submit" is adequate for this purpose. It avoids a possible ambiguity of the "utmost" phrase which might be construed as calling for some showing that the woman was physically incapable of additional struggle against her assailant. Where additional struggle would obviously be useless and dangerous, the failure to struggle should not absolve the accused.

MPC § 207.4, Comment at 248-47 (Tent. Draft No. 4, 1955).

that some resistance by the victim still needed to be proven as an element of the crime.

In another departure from the Louisiana and Wisconsin code precedents, the MPC also adopted the position, then asserted by only a minority of jurisdictions, that the fear caused by the threat need not be reasonably grounded.[52] The drafters analogized that "[o]ne who takes advantage of a woman's unreasonable fears of violence should not escape punishment any more than the swindler who cheats gullible people by false statements which they should have found incredible."[53]

Concern that a failure to require reasonableness might result in unfair convictions based solely on the victim's subjective appraisal of the circumstances can be answered in two ways. First, even with an unreasonable fear, the prosecutor must still prove that the actor had the requisite intent to "compel" the victim's submission to the threat. If the actor was not aware of the risk that the victim would perceive his conduct as threatening, then the prosecutor will be unable to prove this element of the offense. Second, juries inevitably inject objectivity into any subjective standard. If the victim's assertion under the particular circumstances that she perceived a threat is too divorced from that of a reasonable person, the jurors simply will not believe that she actually did so.

It should also be recognized that the Code only waives a reasonableness requirement for threats of "imminent death, serious bodily injury, extreme pain or kidnapping, to be inflicted on anyone,"[54] that is, for threats which may result in first or second degree felonies. For the newly imposed third degree crime of "gross sexual imposition," the Code requires that the threat "prevent resistance by a woman of ordinary resolution."[55] An example here would be a threat "to disclose an illicit affair, to foreclose the mortgage on her parents' farm, to cause her to lose her job, or to deprive her of a valued possession."[56] In such cases, especially since the objective facts might well fade into the "shadow area between coercion and bargain,"[57] the victim must convince the jury that the threat was realistic enough to convince a reasonable woman that the proper choice was submission.[58]

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[52] *Id.* § 207.4, Comments at 247 (Tent. Draft No. 4, 1955).

[53] *Id.* The MPC also made clear, in accordance with some case law, *see, e.g.*, Madison v. State, 61 Wis.2d 333, 212 N.W.2d 150 (1973), that threats directed toward someone other than the victim might be sufficient proof that the intercourse was forcible. *See* MPC § 213, at 143.

[54] MPC § 213.1(1)(a). *See* note 49 *supra*.

[55] MPC § 213.1(2)(a). *See* note 49 *supra*.

[56] MPC § 207.4, Comments at 248 (Tent. Draft No. 4, 1955). The victim in these situations is not being overwhelmed by compulsion but rather making "a deliberate choice to avoid some alternative evil." *Id.*

[57] *Id.*

[58] At least six jurisdictions have adopted or are considering the MPC formula for punishing

The MPC's definition of rape described above has had a fairly widespread effect upon state criminal codifications. The "compels to submit" language has been adopted or is currently being proposed in six jurisdictions.[39] The proposed California rape section goes further, endorsing this standard and expressly declaring that the female need not "resist or attempt to resist the defendant's use or threat of force."[40] The Texas[41] and Utah[42] statutes have changed the language slightly to "compels to submit or participate"; the Senate version of the federal proposal, to "compels to participate in such act."[43] "Participation" is a more objective description of the act and avoids whatever subjective connotations are still attached to "submission." With respect to the nature of threats that will establish a rape case, jurisdictions have shown varying degrees of receptiveness to the MPC approach. Three codes have used the exact MPC language.[44] Others have omitted the threat of extreme pain.[45] Ohio[46] and New Hampshire,[47] on the other hand, have adopted a position that a mere threat of "force" is enough to establish criminal conduct.

A striking contrast to the general trend begun by the Model Penal Code, however, is the statutory scheme adopted in New York. The New York Penal Law, adopted in 1961, maintains lack of consent by the victim as an element of each sex crime.[48] Lack of consent may result from "forcible compulsion,"[49] which in turn means

> physical force that overcomes earnest resistance; or a threat, express or implied, that places a person in fear of immediate death or serious physical

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less severe threats under the concept of gross sexual imposition. COLO. §§ 18-3-402, 18-3-404; HOUSE PROP. § 1642(c); MASS. PROP. § 17(a)(3); N.D. § 12.1-20-04; N.J. PROP. § 2C:14-1(b); UTAH § 76-5-406(2). The Senate proposal would not require reasonableness from the victim in this situation; it would rely instead on the necessary proof of causation between actor conduct and victim participation. STAFF OF SENATE COMM. ON THE JUDICIARY, 93D CONG., 2D SESS., REPORT ON CRIMINAL JUSTICE CODIFICATION, REVISION, AND REFORM ACT 593 (Comm. Print 1974). This proposal would, however, require proof that the actor was aware that his conduct was compulsive. SENATE PROP. § 303(b)(1).

[39] COLO. § 18-3-401; DEL. § 767(1); HOUSE PROP. § 1641(1)(a); MONT. § 94-5-501(2)(a); N.H. § 632:1(I)(a); OHIO § 2907.02(A)(1).

[40] CAL. PROP. § 902(a)(1), Comment at 70.

[41] TEX. § 21.02(b)(1).

[42] UTAH § 76-5-406(1)-(2).

[43] SENATE PROP. § 1641(a)(1).

[44] *See* COLO. §§ 18-3-401, 18-3-403; DEL. § 11-767; N.J. PROP. § 2C:14-(a)(1).

[45] *See* HOUSE PROP. § 1641(1)(a); MASS. PROP. § 16(a)(2); ME. § 252(1)(B)(2); MONT. § 94-5-501(2)(a); N.D. § 12.1-20-03(a); UTAH § 76-5-406(a)(ii).

[46] *See* OHIO § 2907.02(A)(1).

[47] *See* N.H. § 632:1(I)(a).

[48] N.Y. § 130.05.

[49] *Id.* § 130.05(2)(a).

> injury to himself or another person, or in fear that he or another person will immediately be kidnapped.[70]

This focus on the earnestness and amount of the victim's resistance represents a regressive step in the development of modern rape law. Unfortunately, the New York statute has had a significant impact on other recent codifications and proposals. Three states have adopted the definition intact.[71] Three others have combined the New York language with language from the MPC.[72]

In addition, several relatively recent codes, while not adopting New York's "earnest resistance" approach, have nevertheless chosen to adopt the general design of the carnal knowledge statutes. Georgia[73] and Virginia,[74] for example, prohibit carnal knowledge by force and against the will of the victim. The definition in Illinois parallels this formulation, merely substituting modern language.[75] Kansas prohibits sexual intercourse with a woman "without her consent" when her "resistance is overcome by force or fear."[76]

Michigan, however, has gone further than any other formulation in providing specific definitions of the kinds of actor conduct that constitute criminal sexual behavior. At the same time, Michigan eliminates where possible any reference to the victim's conduct as a separate element of the crime. The statute includes a section asserting that "[a] victim need not resist the actor" in order to prosecute for criminal sexual conduct.[77] The crime is now also sexually neutral, helping to eliminate the traditional

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[70] *Id.* § 130.00(8).

[71] HAWAII §700(12); KY. § 510.010(2); ORE. § 163.305. WASH. § 9.79.1(5) employs the New York concept of "forcible compulsion" but eliminates the requirement that the resistance be "earnest."

[72] The Texas and Utah statutes combine MPC and New York language in the formulation "he compels her to submit or participate by force that overcomes such earnest resistance as might reasonably be expected under the circumstances." TEX. § 21.02(b)(1); UTAH § 76-5-406(1). The Texas commentary makes clear, however, that the crucial factor is the victim's resistance. *See* note 23 *supra*. The Maryland proposal combines "physical force that overcomes her earnest resistance" with threats which "[compel] the victim to submit to the sexual intercourse through fear." MD. PROP. § 130.15(1).

[73] GA. § 26-2001.

[74] VA. § 18.2-61.

[75] The Illinois code defines forcible rape as "sexual intercourse with a female . . . by force and against her will." ILL. § 38-11.1. The comments further state that the definitions of "force" and "against her will" are those used in Starr v. State, 205 Wis. 310, 237 N.W. 96 (1931), which explicitly recognized the "utmost resistance" rule, and in People v. Serrielle, 354 Ill. 132, 188 N.E. 375 (1933), in which the court said that a successful prosecution must show beyond a reasonable doubt that there was resistance in order to demonstrate that the act was against the victim's will.

[76] KAN. § 21-3502(1)(a).

[77] MICH. § 750.520i.

attitude that the victim is expected to resist earnestly to protect her virginity, her female "virtue," or her marital fidelity. The drafters have embodied neutrality in the code by defining "sexual penetration" as

> 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.[78]

These devices help to direct judicial focus in the rape inquiry on the dangerousness of the actor's conduct rather than the inflammatory—and mistaken—issue of victim "consent." The Michigan statute reinforces these devices by identifying specific objective circumstances which themselves indicate that the victim was not a willing participant.[79] One of these requires the use of "force or coercion,"[80] for which the statute provides a non-exclusive list of examples.[81] The two examples involving physical force[82] both use the phrase, "overcome[s] the victim," rather than the MPC language "compels to submit by force." The difference may be negligible in practice, however, because of the explicit elimination of victim resistance as a separate element of the offense. The point is that these circumstances themselves satisfy the statute, bypassing the need for the prosecutor to prove lack of consent.

The two examples which define rape by use of threat,[83] as opposed to

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[78] *Id.* § 750.520a(h).

[79] The different circumstances are used primarily to distinguish among the four degrees of criminal sexual conduct, *see* notes 130-50 *infra* and accompanying text. However, "force or coercion" is one of the possible circumstances under each degree.

[80] For the numerous other circumstances selected by Michigan, see note 133 *infra* and accompanying text.

[81] MICH. § 750.520b(1)(f) states in part:

> Force or coercion includes but is not limited to any of the following circumstances:
>
> (i) When the actor overcomes the victim through the actual application of physical force or physical violence.
>
> (ii) When the actor coerces the victim to submit by threatening to use force or violence on the victim, and the victim believes that the actor has the present ability to execute these threats.
>
> (iii) When the actor coerces the victim to submit by threatening to retaliate in the future against the victim, or any other person, and the victim believes that the actor has the ability to execute this threat. As used in this subdivision, "to retaliate" includes threats of physical punishment, kidnapping, or extortion.
>
> (iv) When the actor engages in the medical treatment or examination of the victim in a manner or for purposes which are medically recognized as unethical or unacceptable.
>
> (v) When the actor, through concealment or by the element of surprise, is able to overcome the victim.

[82] *Id.* §§ 750.520b(1)(f)(i), 750.520b(1)(f)(v). *See* note 81 *supra*.

[83] *Id.* § 750.520(f)(ii)-(iii). The final Michigan example of "force or coercion" involves intercourse effected through unethical or unacceptable medical treatment. MICH. §

force, are unusually explicit, in contradistinction to many of the older statutes. They distinguish between threats of immediate and future harm. The former are included only if made to the victim; the latter, on the other hand, may be included even if made to another person. Hence, a victim whose date has been beaten, for example, or a mother who submitted without struggle because the actor held a knife to her child, would not seem to be presented with the requisite statutory threats, although the examples, again, are not exclusive.[84]

Neither of these examples of "force or coercion" involving threats requires that the victim's subjective perception of the actor's threat be reasonable.[85] In this sense, the approach of the Michigan statute may be more consistent than that of the MPC, which requires reasonableness for acts constituting gross sexual imposition.[86] In any event, as with the MPC, there are other statutory protections which replace reasonableness. Coercion must be proven, as well as an honest belief in the threat. The inquiry will still examine the culpability of the actor and his intent to accomplish nonconsensual sexual penetration.

A final outgrowth of Michigan's determination to focus as much as possible on the conduct of the actor is its rule that evidence of the victim's prior consensual sexual activities with third parties is inadmissible.[87] Only "[e]vidence of the victim's past sexual conduct with the actor," and "[e]vidence of specific instances of sexual activity showing the source or origin of semen, pregnancy, or disease" are now admissible.[88] Recognizing the potential breadth of this exception, the statute allows such evidence only to the extent that the judge finds it "material to a fact at issue in the case and that its inflammatory or prejudicial nature does not outweigh its probative value."[89] The statute also provides specific procedures for giving

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750.520b(1)(f)(iv). This rather specialized situation may have been included by the drafters in response to a long-standing decision which had held that a doctor's fraud in obtaining the victim's consent to intercourse did not meet the statutory requirement of force. Don Moran v. People, 25 Mich. 356, 12 Am.R. 283 (1872). The drafters may have been heeding the judge's assertion that it was for the legislature to make criminal an act that was so "prejudicial to society." *Id.* at 365, 12 Am.R. at 289.

[84] This problem is more serious in Florida, which has adopted some Michigan examples of "force or coercion" without specifying that they are non-exclusive. FLA. § 794.011(4).

[85] Minnesota, however, whose statute is premised upon Michigan's model, does impose a requirement for its first degree crime that the complainant's fear "of imminent great bodily harm" be a reasonable one. MINN. § 609.342(c).

[86] MPC § 213.1(2)(a). *See* notes 52-58 *supra* and accompanying text.

[87] Also inadmissible, except to the extent that the standards explained in the text *infra* have been satisfied, are opinion and reputation evidence of the victim's sexual conduct. MICH. § 750.520j(1).

[88] *Id.* § 750.520j.

[89] *Id.*

notice of the use of such evidence and for in camera hearings at the judge's discretion.[10] These developments signify a recognition that there is no logical relationship between the fact that a woman has had consensual intercourse with one man and the likelihood of her consenting to intercourse with another man in the future. The restrictions on admissibility will also help to alleviate the current reluctance of rape victims to report the crime, since they no longer need fear that their entire sexual history will be divulged on cross-examination. More importantly, these evidentiary protections serve to reinforce Michigan's stated purpose to shift the focus of the rape inquiry away from the sexual proclivities of the victim and toward the culpability of the actor himself.[11]

Given the unique difficulty in sex crimes of determining whether the act was accomplished forcibly, particularly where there is little objective evidence of force and only conflicting testimony by the parties, the relative focus upon the conduct of the victim and that of the actor is of tremendous importance. The gradual shift in emphasis which began with the MPC and which was furthered by Michigan has improved the ability of the criminal law both to identify when a forcible rape has occurred and to provide the necessary consideration for the victim of sexual assault. Under these approaches, testimony regarding the conduct of the victim is still admissible as probative evidence of the amount of force or coercion used by the actor. The nature of the victim's conduct should not, however, be treated as a separate element of the crime of rape. This apparent trend reflects a growing concern for protecting society through more accurate identification of those persons who have committed criminal sexual assaults. This change has, in turn, been made more feasible through the modern use of statutory grading for various circumstances of forcible rape.

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[10] *Id.* § 750.520j(2).

[11] Two statutes which have postdated that of Michigan have also attempted to deal with the question of actor-victim conduct. Minnesota, like Michigan, specifies that the victim need not prove resistance. MINN. § 609.347 subd. 2. Nevertheless, sexual contact and sexual penetration are both defined by Minnesota so as to make non-consent an element of every sexual offense. *Id.* §§ 609.341 subds. 11, 12. Consent is defined, almost in contractual terms, as "a voluntary uncoerced manifestation of a present agreement to perform a particular sex act." *Id.* § 609.341 subd. 4. This element is meaningless. If the other required elements of the crime (force or coercion, or fear) are proved, there would be no further need for proof of lack of "a voluntary uncoerced manifestation of a present agreement."

The new Washington statute also takes a novel approach to the problem of consent, and its concept is more meaningful. WASH. § 9.79.6(1)(a) establishes a crime of third degree rape which substitutes lack of victim consent for the other elements required for first and second degree rape. Consent exists if "at the time of the act of sexual intercourse there are actual words or conduct indicating freely given agreement to have sexual intercourse." WASH. § 9.79.1(6).

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II. The Gradation of Forcible Rape

Both at common law and under the carnal knowledge statutes, there was only one degree of forcible rape, which was punishable by death or long prison sentences.[12] The imposition of a uniform penalty was understandable, since the major aspect of the crime, regardless of the amount of violence involved, was thought to be the violation of a woman's virtue. The result, however, was that juries were forced to choose between acquittal and extremely harsh penalties. Naturally, in less compelling cases there was an unwillingness to convict a defendant even if the complainant's testimony were believed. Particularly when these statutes were applied to modern social situations, where a woman is more apt to be out alone at night or on a date without a chaperone, so that evidence could be difficult to evaluate, a complaint of rape would generally result in a conviction only when supported by the strongest evidence of forcible intercourse.

In 1942, Louisiana became the first state with a comprehensive criminal code that separated rape into different degrees.[13] The Louisiana legislature employed two categories—"aggravated"[14] and "simple"[15] rape. Only

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[12] *See* note 104 *infra*.

[13] The 1958 Wisconsin statute also separated rape into degrees in a manner similar to that of Louisiana. WIS. §§ 944.01-.02.

[14] The Louisiana code defined aggravated rape as

> a rape committed where the sexual intercourse is deemed to be without the lawful consent of the female because it is committed under any one or more of the following circumstances:
>
> (1) Where the female resists the act to the utmost, but her resistance is overcome by force.
>
> (2) Where she is prevented from resisting the act by threats of great and immediate bodily harm, accompanied by apparent power of execution.
>
> (3) Where she is under the age of twelve years. Lack of knowledge of the female's age shall not be a defense.
>
> Whoever commits the crime of aggravated rape shall be punished by death.

Act of July 1942, No. 43, [1942] La. Acts 137, *codified at* LA. REV. STAT. ANN. § 14:42 (1974), *as amended*, Act of July 17, 1975, No. 612, § 1, [1975] La. Sess. Law. Serv. 974.

[15] Simple rape was defined as

> a rape committed where the sexual intercourse is deemed to be without the lawful consent of the female because it is committed under any one or more of the following circumstances:
>
> (1) Where she 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 she has such incapacity, by reason of a stupor or abnormal condition of mind from any cause, and the offender knew or should have known of her incapacity.
>
> (2) Where she 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.
>
> (3) Where she is incapable, through unsoundness of mind, whether temporary or

aggravated rape—intercourse through force or threat (or with a victim below the age of consent)—was punishable by death.[86] The classification of simple rape was reserved for those situations in which the female was incapable of resisting or of understanding the nature of the act or was deceived into believing that the actor was her husband. The punishment for simple rape was imprisonment at hard labor for one to twenty years. Louisiana thus took a first step in recognizing that the conduct of an offender in this second situation did not represent as grave a threat to the security and individual dignity of women or as great a danger to society in general.

However, because its statute really had only one degree of forcible rape, Louisiana did not remedy the dilemma faced by a jury in a case in which aggravated rape is charged but in which the force or threats used would still not seem to warrant the death penalty. The result in such cases may likely be that the jury will not find the defendant guilty at all. This statutory defect was partially avoided through a judicial manipulation which allowed a jury to return a verdict of simple rape even though the rape was by force and the defendant has accordingly been charged with aggravated rape. In *State v. Miller*,[87] the victim testified that she had been held down forcibly, beaten, choked, and threatened with death. Her testimony was corroborated by photographs and slides of her bruises (which had healed by the time of trial). On the basis of the Louisiana responsive verdict statute,[88] the trial judge instructed the jury on both simple and aggravated rape. The jury found the defendant guilty of simple rape and imposed the maximum penalty of twenty years' imprisonment.

The instruction was upheld on appeal on the ground that the prosecutor had proved a charge of simple rape. The court first looked to the language in the simple rape statute which encompassed "incapacity, by reason of . . . abnormal condition of mind from any cause, and the offender knew or should have known of her incapacity."[89] The court then interpreted this language to include a victim's abnormal condition of mind caused by fear, assuming knowledge by the defendant that any female "faced by an attacker, who intends to commit the crime of rape upon her, is . . . immediately thrown into a state of great fear or an abnormal condition of mind."[89a]

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permanent, of understanding the nature of the act; and the offender knew or should have known of her incapacity.

Whoever commits the crime of simple rape shall be imprisoned at hard labor for not less than one nor more than twenty years.

Id. § 14:43.

[86] *Id.* § 14:42.

[87] State v. Miller, 237 La. 266, 111 So.2d 108 (1959).

[88] See Note, *Criminal Procedure—Simple Rape as a Responsive Verdict Under an Indictment for Aggravated Rape*, 20 La. L. Rev. 606 (1960), for a discussion of the responsive verdict aspects of *Miller*.

[89] La. § 14:43(1).

[89a] 237 La. at 282, 111 So.2d at 114. The *Miller* interpretation was recently reaffirmed in

This convoluted reasoning, which in effect established a lesser degree of forcible rape, points out the need for more precise statutory grading.[101]

Such precision was a major goal of the Model Penal Code. The Code involved an extensive restructuring of the crime of rape according to the dangerousness of the actor's conduct. The drafters identified as one of their two chief problems[102] devising "a grading system that distributes the entire group of offenses rationally over the range of available punishments."[103] Their concern for establishing sounder grading techniques for rape arose partially from the problems created by the typically severe penalties then existing for the crime.[104] They also specified discrete circumstances justifying harsher penalties in order to provide "objective support" for the prosecutrix' assertion of the still important, "subtle psychological" fact of nonconsent.[105] Finally, they gave special attention to the grading problem simply because they felt gradation so difficult a task, involving an evaluation of the relative threats to society posed by offenders in differing situations.[106]

The Model Penal Code separates the crime generally known as forcible rape into two degrees,[107] thus adding to the flexibility of the Louisiana approach. As the drafters explain, the severe punishment for first degree felony is reserved for cases presenting conduct "most brutal or shocking, evincing the most dangerous aberration of character and threat to public security."[108] These cases were then defined as those in which

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State v. Beard, 312 So. 2d 278 (La. 1975).

[101] The Louisiana legislature has recently responded to the problem of inadequate grading illustrated by *Miller*. Act of July 17, 1975, No. 333, [1975] La. Sess. Law Serv. 578. The new act supplements the crimes of aggravated and simple rape with a new crime of "forcible rape," which is defined as "sexual intercourse without the lawful consent of the female where she is presented [*sic*] from resisting the act by force or threats of physical violence wherein the victim reasonably believes her resistance to be useless." The legislature has thus in effect provided for two degrees of forcible rape in addition to the crime of simple rape, which involves deception, the new offense carrying not death as a penalty but a maximum of 20 years' imprisonment. The need for a *Miller* interpretation of the simple rape statute has been eliminated.

The Louisiana legislature has also included the possibility of a jury conviction of forcible rape in its newest responsive verdict statute. Act of July 17, 1975, No. 334, [1975] La. Sess. Law Serv. 579.

[102] The other was deciding the minimum amount of coercion or deception necessary. MPC § 207.4, Comment at 241 (Tent. Draft No. 4, 1955).

[103] *Id.*

[104] At the time this section of the MPC was being drafted, 20 jurisdictions punished rape with the death penalty; 22 provided for penalties of up to 99 years' or life imprisonment. *Id.*

[105] *Id.* at 241, 242.

[106] *Id.* at 241.

[107] MPC § 213.1. *See* note 49 *supra*, which presents this section of the Code in its entirety.

[108] MPC § 207.4, Comment at 242 (Tent. Draft No. 4, 1955).

> (i) . . . the actor inflicts serious bodily injury upon anyone, or (ii) the victim was not a voluntary social companion of the actor upon the occasion of the crime and had not previously permitted him sexual liberties. . . .[108]

The existence of either of these two "aggravating circumstances" elevates to the first degree those situations which would otherwise be second degree felonies. Therefore, first degree rape first requires proof of the second degree crime, which contains the Code's basic definition of forcible rape. The Code also provides for a third degree crime, designated as "gross sexual imposition."[109] This last category prohibits nonconsensual intercourse by threat, or with knowledge of mental deficiency in the victim, or with knowledge of the victim's unawareness that the act is being committed or that the actor is not her husband. The drafters felt that these situations warranted lower limits on punishment.[111]

The Model Penal Code's selection of different degrees for forcible rape represented significant progress by more accurately reflecting current social attitudes toward rape. For example, it imposes its severest penalty upon one who rapes an involuntary companion with whom he has never previously experienced sexual liberties. As the drafters stated, "[a] community's sense of insecurity (and consequently the demand for retributive justice) is especially sharp in relation to the character who lurks on the highway or alley to assault whatever woman passes, or who commits rape in the course of burglary."[112] The drafters of the Code sought to identify objective circumstances—here, surprise—from which a jury could find a more serious felony and yet not set a high legal standard of victim conduct in order to do so.

The other possible aggravating circumstance—infliction of "serious bodily injury upon anyone"—is also a proper justification for imposing the severest penalty. Serious bodily injury is defined by the Code as

> bodily injury [physical pain, illness or any impairment of physical condition][113] which creates a substantial risk of death or which causes serious, permanent disfigurement, or protracted loss or impairment of the function of any bodily member or organ.[114]

It is not clear why the drafters chose such a severe standard for bodily injury. Its stringency increases the relative importance of the non-

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[108] MPC § 213.1(1).

[109] *Id.* § 213.1(2). Since this section deals with intercourse accomplished through a threat, it in fact creates a third degree of forcible rape.

[111] MPC § 207.4, Comment at 243 (Tent. Draft No. 4, 1955).

[112] *Id.* at 246.

[113] MPC § 210.0(2).

[114] *Id.* § 210.0(3).

voluntary companion factor. A simple example illustrates this point. Under the Code, one who compels a non-voluntary companion with whom he has not had prior sexual contact to submit by a *threat* of "extreme pain" has committed a felony of the first degree. Yet because "extreme pain" alone does not qualify as "serious physical injury," one who compels either a voluntary social companion or a person with whom he has had prior sexual contact to submit by *actually inflicting* "extreme pain" has only committed a second degree felony. In other words, in this particular situation the Code would punish the threat of extreme pain more severely than the infliction of extreme pain. Internal consistency alone requires that less severe types of bodily injury be included under the first aggravating circumstance. In addition, because forcible rape is a form of violent assault, the amount of violence involved rather than the relationship between the parties[115] would seem a better, though not complete, measure of the actor's threat to society.

The reason for one of the distinctions drawn between second and third degree felonies is also unclear. In drawing this line, the drafters were apparently attempting to measure the extent to which an actor either affects or has knowledge of a victim's inability to resist or comprehend the nature of the sexual act. One who gives drugs or intoxicants to an unknowing woman can be as dangerous, in terms of possible physical harm, as one who uses physical force, and the Code punishes both offenders as second degree felons. The rape of an unconscious woman is arguably an equally condemnable act and is properly placed in the same category. The rape of a woman suffering from "a mental disease or defect," however, is only classified as a third degree felony. The 1955 draft described the third degree crime as turning on whether the actor knew that the victim's submission was "due to substantially complete incapacity to appraise or control her own behavior."[116] This situation was designated only as a third degree felony, according to the drafters, because, unlike having intercourse with an unconscious woman, which presented an "unequivocal" and obvious powerlessness to resist, it presented the actor with the duty of making "nicer discriminations and ethical judgments."[117] The requirement for third degree crime was changed in the final draft, however, so that now intercourse becomes criminal only if the actor knows that the victim suffers "from a mental disease or defect which renders her incapable of appraising the nature of her conduct."[118] The discrimination required by a defendant, therefore, is no longer quite as difficult. Yet the crime is still graded less severely than

[115] The particular relationship of the actor and victim, however, is extremely important. *See* note 125 *infra*.

[116] MPC § 207.4(2)(b)(Tent. Draft No. 4, 1955).

[117] *Id.* § 207.4, Comment at 250.

[118] MPC § 213.1(2)(b).

rape of an unconscious woman, with no further explanation.[119] It seems logically inconsistent to treat one who rapes an unconscious woman as any more dangerous than one who know that his victim is so mentally deranged as to be unable to appraise the nature of her conduct.[120]

Despite the aberrations of the New York Penal Law[121] and statutes in other jurisdictions[122] which consider every forcible rape as the same crime, the general trend in the last decade has been to specify degrees of forcible rape and further to identify specific aggravating circumstances to distinguish between them, as exemplified by the Model Penal Code. This is not to say that the MPC's exact approach has always been followed. Some codifications and proposals have chosen to vary the types of rape included under each degree.[123] Furthermore, while numerous states have adopted, or are contemplating the adoption of, both of the MPC's aggravating circumstances,[124] others have adopted only the "serious bodily injury"

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[119] The drafters of the final version merely indicated that the "typical case" which would still be covered by the section is "the case of intercourse with a woman known to the defendant to be manifestly and seriously deranged." *Id.* § 213, Status of Section at 144.

[120] The drafters also further defined what is meant by "appraising the nature of her conduct": "[W]e are not talking about appraisals involving value judgments or consideration of remote consequences of the immediate acts." *Id.*

[121] N.Y. § 130.35. The crime of rape is divided into four degrees in New York, but most of the distinctions deal with statutory rape.

[122] *See, e.g.*, ORE. § 163.375. The Ohio statute divides forcible rape into two degrees but differentiaties only on the basis of threatening conduct. OHIO §§ 2907.02 to -.03. New Hampshire, which employs certain Model Penal Code language in its definition of rape, treats every rape as a class A felony. N.H. § 632:1. However, the maximum prison sentence for a class A felony is only fifteen years. *Id.* § 651:2(II)(a). The statute further provides that a court may impose an extended term of imprisonment on a convicted defendant over 21 years old if, *inter alia*, "he manifested exceptional cruelty or depravity in indicting death or serious bodily injury on the victim of his crime." *Id.* § 651.6 (I)(d). In effect, this provision substitutes a judicial for a legislative determination of a separate degree of forcible rape.

The Senate proposal, while providing for two separate degrees of forcible rape, does not supply an objective list of aggravating factors within each degree. SENATE PROP. §§ 1641-42.

[123] The House proposal, for example, includes two degrees of forcible rape but has no specific provision for intercourse with an unconscious woman. If the accused has caused the victim's unconsciousness by administering drugs or intoxicants or by physical force, the offense would come within these already enumerated circumstances. If not, the crime charged would presumably be gross sexual imposition, given the "he knows that she is unaware that a sexual act is being committed upon her" language. *See* HOUSE PROP. § 1642(b). This represents a less severe grading than suggested in the Model Penal Code, which classifies intercourse with an unconscious woman as at least a second degree felony.

[124] DEL. § 763; HAWAII § 707-730; HOUSE PROP. § 1641; MASS. PROP. § 18(a); N.D. § 12.1-20-03(2); N.J. PROP. § 2C:14-1(a). The House proposal, however, requires that the serious bodily injury be inflicted "upon the victim." HOUSE PROP. § 1641(2). The MPC language is "serious bodily injury upon anyone." MPC § 213.1(1). The latter is preferable, since an offender who severely beats a victim's companion, thereby frightening the victim into sexual submission, has manifested himself to be as dangerous as one who severely beats the victim.

factor.[125] Some jurisdictions have also expanded the number and type of aggravating circumstances relating to personal injury. One proposal has included group rape;[126] four states, the use or threat of use of a deadly weapon;[127] two others, emotional injury.[128] Finally, two states have added kidnapping, the threat of serious bodily injury, and the attempt to cause death.[129]

Michigan stands far apart in identifying the greatest number of aggravating circumstances. In a unique classification pattern, the Michigan statute first divides sexual conduct into the two categories of sexual penetration[130] and sexual contact.[131] Penetration is the subject of first and third

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Another slight deviation from the MPC is Hawaii's change of the non-voluntary companion factor to require that the victim not have permitted sexual contact for twelve months prior to the rape. HAWAII § 707-730(1)(a)(i).

Colorado's analogous use of the bodily injury factor is unusual, in that it does not raise certain rapes from one degree to another but rather serves as one of the possible acts constituting the crime:

> Any male who has sexual intercourse with a female person not his spouse commits rape, if:
>
> (a) He compels her to submit by force or by threat . . .
>
> . . . .
>
> (e) In the commission of the offense the offender inflicts bodily injury upon anyone.

COLO. § 18-3-401(1).

Therefore, the victim need only prove that the accused had sexual intercourse with her, that she was not the wife of the accused, and that someone suffered bodily injury at the hands of the accused in the commission of the act of sexual intercourse. An earlier Colorado draft proposal treated serious bodily injury simply as an aggravating factor. COLORADO LEGISLATIVE COUNCIL, REPORT TO THE COLORADO GENERAL ASSEMBLY: PRELIMINARY REVISION OF COLORADO CRIMINAL LAWS § 40-10-1 (Research Pub. No. 98 1964). The legislature apparently felt that the less controvertible fact of bodily injury negated any need for proving the normally required element of "compelled to submit by force." Such a presumption seems reasonable, assuming that the defendant is allowed the defense of consent or accident, although it has not been adopted elsewhere. The statute does provide, as recommended by the Code, for a reduction in degree "if the victim was a voluntary social companion of the offender upon the occasion of the crime and had previously voluntarily engaged in sexual intercourse or deviate sexual intercourse with him." *Id.* § 18-3-401(2).

[125] *See, e.g.*, MONT. § 94-5-503(3); WASH. § 9.79(4)(1)(c). Eliminating the MPC's "involuntary companion" factor is unfortunate. In addition to providing an appropriate measure of culpability, the non-voluntary companion factor helps to divert the inquiry from any focus on consent and, more generally, mitigates the need for difficult jury decisions.

[126] MD. PROP. § 130.20.1(c). For a discussion of the merits of this factor, see notes 134-36 *infra* and accompanying text.

[127] FLA. § 794.011(3); MD. PROP. § 130.20.1(b); WASH. § 9.79(4)(1)(a). *Cf.* Act of July 7, 1975, No. 75-619, [1975] Conn. Leg. Serv. 1216, 1218-19 (creating new felony, "sexual assault in the first degree with a firearm").

[128] DEL. § 764(1); MONT. § 94-2-101(5). For a discussion of the problems presented by this factor, see notes 141-50 *infra*.

[129] TEX. § 21.03(a)(2); UTAH § 76-5-405(a)(ii).

[130] See note 78 and accompanying text *supra* for the definition of "sexual penetration" under the Michigan statute.

[131] "Sexual contact" is defined as including

degree crimes; contact, of second and fourth. The aggravating circumstances for penetration and contact, however, are roughly identical.

The first degree crime, which encompasses traditional forcible rape, involves sexual penetration plus any one of the following aggravating circumstances:

> . . . .
> (c) Sexual penetration occurs under circumstances involving the commission of any other felony.
> (d) The actor is aided or abetted by 1 or more other persons and either of the following circumstances exists:
>
> > (i) The actor knows or has reason to know that the victim is mentally defective, mentally incapacitated or physically helpless.
> > (ii) The actor uses force or coercion[132] to accomplish the sexual penetration. . . .
>
> (e) The actor is armed with a weapon or any article used or fashioned in a manner to lead the victim to reasonably believe it to be a weapon.
> (f) The actor causes personal injury to the victim and force or coercion is used to accomplish sexual penetration. . . .
> (g) The actor causes personal injury to the victim, and the actor knows or has reason to know that the victim is mentally defective, mentally incapacitated, or physically helpless.[133]

The first aggravating circumstance, "the commission of any other

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

MICH. § 750.520a(g). Violence, as will be shown, is the primary factor in the Michigan grading scheme. Sexual contact, for example, if effected under any of the enumerated aggravated circumstances, is punishable for the same maximum time as is sexual penetration without aggravation. Nevertheless, penetration with aggravation is punished more severely than mere contact with aggravation, and penetration without aggravation is much more seriously punished than contact without aggravation. To this extant the distinction between penetration and contact is important, and unfortunately the broad definition of the former may create some difficulty in making that distinction. Since sexual penetration includes penetration by the actor's hand, the difference between this type of penetration and sexual contact, which includes the intentional touching of intimate parts, is problematic, especially since penetration need only be slight.

[132] See note 95 *supra* and accompanying text for a discussion of the various kinds of circumstances that may constitute force or coercion.

[133] MICH. § 750.520b(1).

felony," requires more precision to clarify the implied premise that the sexual activity must occur between the felon and the victim of his felony. Otherwise, the presumed elements of force and danger to the victim would not be present. The current statutory language seems to make criminal sexual intercourse even between two felons, perhaps while en route to or escaping from the scene of the felony.

The inclusion of group rape as a separate aggravating circumstance is entirely justified.[134] Multiple rape is perhaps the most humiliating and degrading form of sexual abuse, even in the absence of serious physical injury.[135] The statute therefore correctly makes group rape a first degree crime even without resulting physical injury. All that is required is force or coercion or knowledge of mental deficiency, incapacitation, or physical helplessness. Empirically, this expansiveness makes sense. Physical injury should not be the governing criterion for culpability of group rapes; usually, group rape involves less severe injury.[136] Yet the humiliation inflicted on the victim signifies severe actor culpability, and the crime should be graded accordingly.

The third aggravating circumstance, "armed with a weapon," would apparently apply even where two people engage willingly in sexual activity and one happens to have a weapon in his pocket. There is no requirement that the actor threaten the victim with the weapon or that he be in a position to use it. The statute can easily be revised to exclude any innocent circumstances from the crime.

The fourth and fifth aggravating factors, personal injury occurring either through (1) "force or coercion"[137] or (2) knowledge that "the victim is mentally defective, mentally incapacitated, or physically helpless," raise several problems. First, they are both limited to situations involving injury

[134] Group rape would be a first degree crime under the Model Penal Code only if it produced serious bodily injury or if the victim was not a voluntary social companion and had not previously permitted the actors sexual liberties. Yet group rape is frequently committed against a female who is a date or acquaintance of one of the group, whose collective conduct can be as culpable as when manifested toward strangers. Nonconsensual intercourse seems implicit in all group rapes, since consensual intercourse is normally engaged in privately.

[135] A recent Philadelphia study found that "sexual humiliation was significantly prevalent" in group rape. M. AMIR, PATTERNS IN FORCIBLE RAPE 222 (1971).

[136] *See id.* at 220 & n.105.

[137] The non-exclusive definition of "force or coercion" in the Michigan statute, *see* note 81 *supra*, includes the situation in which the actor "through concealment or by the element of surprise, is able to overcome the victim." MICH. § 750.520b(1)(f)(v). This example shows that the drafters were specifically concerned with the stranger who suddenly confronts a victim. Nevertheless, this concern is not by itself enough to elevate the crime from third degree to first degree status—as it would be by virtue of of the MPC's non-voluntary companion factor. In Michigan it must be coupled with group rape, *id.* § 750.520b(1)(d), or personal injury, *id.* § 750.520b(1)(f).

to the victim. This restriction is less preferable than the MPC position that (serious) bodily injury to anyone should be an aggravating circumstance.[138] One who has inflicted personal injury on a victim's companion has evidenced conduct which is just as dangerous as that of one who has injured the victim. Of course, injury to another may rise to the level of an aggravated circumstance if it constitutes a felony. In Michigan, for example, assault with a dangerous weapon, with intent to commit murder, with intent to commit great bodily harm, or with intent to maim constitutes a felony.[139] If such offenses are perpetrated against the victim's companion, then rape of the victim would be elevated to first degree status. Indeed, bodily injury to another might very well be perpetrated in situations also giving rise to a charge of assault with intent to commit great bodily harm. But this bootstrap argument should not be necessary, limited as it is only to certain statutory assaults.

Second, the definition of personal injury within these aggravating circumstances is extremely broad, extending beyond objective evidence of the dangerousness of the offender to include not only bodily injury but also "disfigurement, mental anguish, chronic pain, pregnancy, disease, or loss or impairment of a sexual or reproductive organ."[140] The troubling portions of this definition are those including mental anguish and pregnancy.

The statute does not require that mental anguish[141] be serious. As a result, the first degree crime seems nearly indistinguishable from the third degree crime, since any undesired sexual penetration may create mental anguish.[142] There is also another problem posed by the use of mental anguish as part of an aggravating factor. The consideration of mental anguish dissipates the impact of Michigan's important shift in statutory emphasis to the conduct of the actor and his dangerousness. The infliction of physical injury during a rape clearly and objectively manifests the type of dangerous conduct which should be punished as a first degree crime. The mental or emotional reaction of a particular victim, however, does not. As noted previously, the law already recognizes that any rape has a particularly severe emotional impact on its victim; therefore, the punishments for

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[138] *See* note 124 *supra*.

[139] MICH. §§ 750.82, 750.83, 750.84, 750.86.

[140] *Id.* § 750.520a(f).

[141] Michigan was not the first state to include some form of mental injury in its definition of personal injury. Delaware and Montana had already done so. *See* note 128 *supra* and accompanying text.

[142] The Minnesota statute, which generally follows the Michigan model, changes the aggravating circumstance of personal injury slightly by requiring, *inter alia*, that mental anguish be "severe." MINN. § 609.341 subd. 8. *See also* N.M. § 40A-9-21.A(2) ("great mental anguish"). This change makes a somewhat clearer distinction between the types of conduct proscribed under the first degree and those proscribed under the third degree. Yet it still presents some problems in distinguishing between sexual penetration offenses.

rape defendants are uniquely harsh. In this respect, the law imputes to the rape defendant an awareness that his conduct will cause unusual mental injury. Yet an actor's circumstantial[143] choice of a victim particularly susceptible to heightened mental or emotional anguish is not a legitimate means by which to distinguish him from one who sexually assaults a mentally stable victim. Another way of making the point is to say that the criminal law has not yet reached the stage where a defendant can generally be held responsible for knowing the particular emotional reaction which his conduct will evoke in the victim. Although in tort law it may seem preferable to assign a financial loss to the culpable party, the criminal defendant is not required to "take his victim as he finds him," at least insofar as emotional instability is concerned.[144] Where incarceration, not compensation, is the remedy, different notions of liability apply.[145]

The inclusion of mental anguish may also in particular cases be apt to cause evidentiary problems at trial. The particular mental impact that a rape has on its victim may be largely the result of both her particular mental state before the rape, her attitudes toward sexual intercourse with men, and her prior sexual experiences. A woman who claims that she experienced mental anguish beyond the normal level because of the rape should not be able to testify to that effect without some cross-examination as to these potential independent causes. Yet an interesting difficulty awaits the defendant who attempts to prove that pre-existing susceptibility was the reason for the victim's psychic damage. The evidence provisions of the new Michigan rape statute prohibit any scrutiny of the victim's prior sexual conduct with third parties, or even opinion evidence, such as by an expert psychiatrist, unless designed to show the source of "semen, pregnancy, or disease."[146] So it would appear that the defendant would be unable to prove that the mental anguish that so seriously damaged the

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[143] Of course, if the actor *knows* that the victim is mentally unstable, his rape manifests dangerousness warranting punishment equivalent to that meted out for those inflicting physical injury. Like the actor who indicts the latter, he is aware that injury may well result, and he may be held legally accountable for it. MICH. § 750.520b(1)(g) appropriately covers this situation.

[144] Of course, should a rapist employing force or coercion cause *physical* injury to an abnormally frail victim, he would also be guilty of a first degree felony, by a liberal reading of the statute's causation requirement. While this result may be equally inappropriate, it seems less of a problem, the body being more predictable than the mind.

[145] This analysis assumes that the objective of the criminal law is to punish the most culpable person most severely, rather than to exact purely retributive justice. Admittedly, retribution plays an important role in the law, sublimating societal outrage through the confines of a structured legal process. Modern grading schemes, however, allow the judge a wide range of punishments for sentencing purposes, within which the desire for retribution may run its course.

[146] MICH. § 750.520j.

victim was due to the fact, for instance, that she had had psychologically unhealthy sexual encounters in the past which rendered her acutely sensitive to sexual advances. Moreover, even assuming that the defendant could argue successfully that the evidence was needed to prove the origin of a *psychological* "disease," the end result would thus be a complete description of the victim's sexual conduct in the past—an approach which the statute has specifically sought to avoid.

There are, of course, understandable reasons why the Michigan drafters sought to include mental anguish as an aggravating factor. However, if it is to be used as a criterion for distinguishing between different degrees of forcible rape, it should do so by identifying particularly evil conduct that would create abnormally high mental disorder in a stable victim, not by isolating the actor who perhaps by accident chose a victim unusually susceptible to the mental anguish likely to result from forcible rape. It is impossible to include all acts likely to cause a particularly severe mental or emotional reaction.[147] It might be feasible, however, to set some standard by which a jury could measure the conduct. Ideally, such a standard would be aimed at conduct deemed so degenerate or sadistic that even without the infliction of serious physical injury[148] it would elicit a severe emotional or mental reaction from an otherwise mentally sound victim. The use of such a standard would require an accompanying jury instruction to ignore for gradation purposes the mental anguish normally suffered by the victim and already reflected by the generally harsh penalties for forcible rape.[149] Obviously, defining actor conduct which is condemnable solely for its mental impact is an extremely difficult task which should depend primarily on psychological study. If the standard can be objectively defined,[150] the actor who inflicts severe mental anguish might fairly receive as harsh a punishment as the actor who inflicts severe physical injury.

Michigan's inclusion of pregnancy in the definition of personal injury is also an inaccurate means of measuring the degree of danger represented by an actor's conduct. Like mental anguish, the possibility that pregnancy may result from sexual intercourse is one of the factors responsible for the

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[147] One act which might result in such a reaction is the rape of a pregnant woman who has reached a state where her pregnancy is obvious. A legislature might presume that a pregnant woman would experience a more severe emotional reaction to a forcible rape than a woman not pregnant, even though there is no physical injury to her or to her fetus.

[148] Of course, the probably accompanying infliction of serious physical injury would, in itself, make the rape a first degree crime, eliminating the need to inquire about mental anguish.

[149] The trial judge, who has the advantage of seeing a broader range of rape cases than the jury, could also dismiss the first degree charge if he felt there was insufficient evidence of this type of conduct.

[150] The Minnesota standard, *supra* note 142, is of course subjective, focusing only upon victim reaction rather than actor conduct, except as limited by the causation language.

generally severe statutory treatment of forcible rape compared to other violent assaults. But the fact that one rapist's victim becomes pregnant as a result of being raped while another's does not should not justify treating the former as a more dangerous person. The inclusion of pregnancy also makes vaginal intercourse potentially more serious an offense than the other forms of penetration prohibited by the Michigan statute. This distinction seems inappropriate in view of Michigan's attempt to remain neutral as to the sex of the actor and victim, unless one makes the value judgment that vaginal intercourse represents more dangerous conduct than the other forms of sexual penetration covered by the statute.

The trend of modern rape statutes to define aggravating circumstances for the grading of forcible rape is a positive trend in several respects. Perhaps most important is the elimination of a single severe penalty for all forcible rape, which tended to preclude convictions in cases where the jury was not convinced that the offender's actions, though culpable, were sufficient to warrant the death penalty or life imprisonment. In addition to eliminating this jury incentive, gradation is a proper response of the legal system to a change in moral values which de-emphasizes female virginity or chastity. Today, forcible rape is viewed as a heinous crime primarily because it is a violent assault on a person's bodily security, particularly degrading because that person is forced to submit to an act of the most intimate nature.

Gradation appropriately helps focus the inquiry on the culpability of the actor. The particular aggravating circumstances which should be used to identify the most evil offenders are largely a question of individual legislative preference. However, the most acceptable grading scheme seems one with the greatest general emphasis on objective evidence of violence. The scheme should also make the policy decision that rape by a stranger is apt to be more reprehensible than rape by a person toward whom the victim had exhibited some prior social or sexual interest. These criteria are also more probative of the actor's possible use of force or coercion than criteria based on the prior sexual experiences of the victim. The identification of different levels of violence and familiarity thus not only are more likely to punish the most evil offender most severely but also in doing so provide a jury with objective standards when dealing with the difficult consensual aspects of the crime.

III. The Corroboration Requirement

The problem of testimonial safeguards has always been unique to rape prosecutions. Since there are seldom any witnesses to a rape, conviction often depends on whose testimony the jury believes. There is a widespread suspicion of the motives behind the allegation of rape, and as a result

corroborating evidence is often essential to the prosecutor's case.[151] In this sense, the corroboration requirement evokes many of the issues of consent that form the crux of the question whether to focus on actor or victim conduct.

At common law corroboration was not required to prove rape.[152] In those jurisdictions which still do not require corroboration, there is a wide variety of rules.[153] In some jurisdictions, if the complainant's testimony is not "clear and convincing," the court may in its discretion require corroboration before submitting the case to the jury.[154] It can thus be used as a safeguard when the court feels that the circumstances raise doubts regarding the nonconsensual nature of the intercourse.[155]

In some jurisdictions today, however, corroboration is a prerequisite to conviction, established either by the courts[156] or by statute.[157] The many problems inherent in a *requirement* of corroboration are apparent from its stormy history in New York.[158] Corroboration was at one time required in

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[151] Another testimonial safeguard aside from independent corroboration is the requirement of some jurisdictions that victims report rape promptly. Most courts have considered the promptness of the victim's complaint of the alleged crime as merely one factor with which to determine the veracity of the complainant, *see* State v. Dill, 42 Del. 533, 538, 40 A.2d 443, 445 (1944); Brown v. State, 127 Wis. 193, 201, 106 N.W. 536, 539 (1906); Greenfield, *The Prompt Complaint: A Developing Rule of Evidence*, 9 CRIM. L.Q. 286 (1967). The MPC, however, requires that "an alleged offense" must be "brought to the notice of public authority within [3] months of its occurrence." MPC § 213.6(5). Since the surrounding circumstances of the victim's complaint, including promptness, are evaluated by the police and prosecutors in deciding whether to charge, *see* Comment, *Police Discretion and the Judgment that a Crime Has Been Committed—Rape in Philadelphia*, 117 U. PA. L. REV. 277 (1968), and since evidence of an extended time period before complaint may be presented for jury evaluation, it seems unreasonable to require prompt complaint as a condition for prosecution in those cases in which prosecution might otherwise be appropriate.

[152] 7 J. WIGMORE, EVIDENCE § 2061, at 342 (3d ed. 1940).

[153] Among the standard instructions as to the weight of the evidence is that promulgated by Lord Hale. *See* note 20 *supra* and accompanying text.

[154] *See, e.g.*, People v. Jones, 28 Ill. App. 3d 896, 900, 329 N.E. 2d 855, 859 (1975).

[155] In addition to the concern about false reporting by women who really may have consented to the act originally but who later sought to punish the actor, the courts have commonly cited two other justifications for the corroboration requirement—the inaccuracy threatened by the emotion raised in the jury by a rape charge and the oft-cited but now questioned difficulty of disproving an accusation of rape. *See* Note, *The Rape Corroboration Requirement: Repeal Not Reform*, 81 YALE L.J. 1365, 1373-84 (1972).

[156] Carter v. United States, 427 F.2d 619 (D.C. Cir. 1970); Franklin v. United States, 330 F.2d 205 (D.C. Cir. 1963).

[157] *See, e.g.*, GA. § 26-2001.

[158] The New York experience has been well documented. *See, e.g.*, Note, *Corroboration in the New York Criminal Law*, 24 BKLYN. L. REV. 324 (1958); Ludwig, *The Case for Repeal of the Sex Corroboration Requirement in New York*, 36 BKLYN. L. REV. 378 (1970); Younger, *The Requirement of Corroboration in Prosecutions for Sex Offenses in New York*, 40 FORDHAM L. REV. 263 (1971); Note, *supra* note 155.

New York for each material element of the offense: force, penetration, and identity of the accused.[159] Partially as a result of this rule, in 1969 there were only 18 rape convictions in New York City out of 1085 arrests.[160] Thus, the corroboration requirement for forcible rape was changed in 1972 to apply only to the element of force.[161] Yet this element, of course, is the key to many rape cases, and prosecutors reported after the 1972 amendment that "rape still remain[ed] the easiest crime to get away with in the state."[162] In 1974 New York finally abandoned the requirement completely for forcible rape.[163]

The drafters of the Model Penal Code did not have the benefit of this practical experience. One of the least satisfactory sections of the Code's article on sexual offenses is its requirement of corroboration:

> No person shall be convicted of any felony under this Article upon the uncorroborated testimony of the alleged victim. Corroboration may be circumstantial. In any prosecution before a jury for an offense under this Article, the jury shall be instructed to evaluate the testimony of a victim or complaining witness with special care in view of the emotional involvement of the witness and the difficulty of determining the truth with respect to alleged sexual activities carried out in private.[164]

The drafters of the Code acknowledged that Wigmore opposed a corroboration requirement in rape cases, both because jurors are naturally suspicious of the complainant and because the court may always set aside a conviction for insufficient evidence.[165] They further recognized similar attitudes in the courts. Despite the admitted opposition to their position, they give no indication why they included the requirement.[166]

Corroboration seems unnecessary and illogical in view of the grading structure of the Code. Since only those cases which present the most objective evidence of rape are classified as first degree crimes, corroboration of

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[159] People v. Masse, 5 N.Y.2d 217, 219, 156 N.E.2d 452, 453, 182 N.Y.S.2d 821, 822 (1959).

[160] N.Y. § 130.16 (practice commentaries).

[161] In place of the requirement of corroboration for penetration, the legislators added a requirement of some "other evidence" which tended to establish that an attempt was made to have sexual intercourse with the victim. N.Y. § 130.15 (1972).

[162] Montgomery, *New Drive on to Make Rape Convictions Easier*, N.Y. Times, Nov. 13, 1973, at 47, col. 5.

[163] N.Y. § 130.16 (practice commentaries at 458).

[164] MPC § 213.6(6).

[165] 7 J. WIGMORE, EVIDENCE § 2061, at 354 (3d ed. 1940). Wigmore, however, believed that a corroboration rule was inadequate to determine the complainant's credibility and preferred the expert scientific analysis of modern psychology for this purpose. *Id.*

[166] The brief discussion is directed toward the reasons for corroboration in seduction cases, where it has been a common requirement. There is no elucidation of the reasons for extending corroboration to all sex crimes. MPC § 207.4, Comments at 263-64 (Tent. Draft No. 4, 1955).

the witness' testimony should be unnecessary. The elimination of a single severe punishment for rape also mitigates the need for objective supporting evidence in that a jury that is unconvinced that a first degree rape occurred may nevertheless convict the defendant of the lesser offense.

More important, corroboration need not be elevated to a requirement of law because of its potency as a matter of fact in each case. Corroborating evidence will be admissible in any rape trial as relevant to the victim's allegations, and, realistically, the jury's assessment of the victim's credibility may often turn on the existence of such support. It will be to the advantage of the defense, conversely, to point out the uncorroborated nature of the complainant's testimony. Hence, it seems better to depend upon the protections afforded by the conventional rule that the evidence of criminality must be sufficient to prove guilt beyond a reasonable doubt than to erect unique barriers to the prosecutrix by dictating by law the kinds of evidence which will be required of her. As the drafters of the Oregon statute have explained,

> While a general caution against convicting on the bare testimony of the complainant has validity, it would seem that the emphasis would be better placed on the credibility of the complainant than on the mere weight of the evidence. If the testimony of the complainant is credible, it should be sufficient. The other alternative would be to require corroboration as to every element of the crime, since there is no reason to believe that the complainant is more likely to lie or deceive herself on one point rather than another.[167]

New York's repeal of its corroboration requirement has been part of a recent trend against corroboration,[168] perhaps in response to these factors. This trend should be accelerated by New York's recent repeal, since several jurisdictions which have recently decided to require corroboration or are

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[167] Oregon Criminal Law Revision Commission, Proposed Oregon Criminal Code § 106, Commentary (Final Draft and Report, 1970). Oregon has not included corroboration. *See also* Fairstein, DICTA: *Rape Law Revisions Increase Indictments*, 28 Va. L. Weekly, Nov. 21, 1975, at 1, col. 3.

[168] Conn. § 53a-68 was repealed in 1974. *See also* Ga. § 26-3001; Fla. § 794.022 (jury instruction regarding weight and quality of testimony only); Hawaii § 768-76 (prompt complaint only); Minn. § 609.347 subd. 1; N.D. § 12.1-20-01 (prompt complaint only); N.M. § 40A-9-25; Pa. § 3105 (prompt complaint only); Texas Code Crim. Pro. art. 38.07 (Supp. 1975) (prompt complaint only, and only as reflection upon weight of evidence); Wash. § 9.79(2)(1). Pennsylvania had adopted the MPC cautionary instruction but repealed it almost immediately. [1973] Pa. Acts No. 115, *repealing* Pa. § 3106. New Hampshire also has pending a bill that would eliminate the corroboration requirement. 17 Crim. L. Rep. 2223 (June 11, 1975). The requirement has been included, however, in Mass. Prop. § 20 (either prompt complaint or corroboration required); N.J. Prop. § 2C:14-6c to -d (prompt complaint and corroboration). Corroboration was also recommended by "[a] substantial body of opinion" in the Brown Commission. Brown Report § 1648, Comment at 192. It does not exist, however, in the House proposal itself. House Prop. § 1648.

considering proposals to do so have been citing New York as an important precedent.[169] Michigan's new approach, too, requires no corroboration for victim testimony,[170] for it has recast the law in such objective terms as to require little dependence upon anything but the extent of actor force, which it seeks to measure by objective, non-testimonial standards.

IV. Problems of Mens Rea in Rape

In addition to defining and measuring the different types of physical conduct which constitute the actus reus of forcible rape, rape laws must specify the requisite mental state, or mens rea, that accompanies the physical act. The issue of mental culpability is often not a significant problem in a forcible rape case. Once the element of forcible or coercive physical conduct has been proven, some mental culpability is apt to be assumed, since it is unlikely that the use of force or coercion to accomplish sexual intercourse was accidental.[171] However, in newer statutory definitions of rape which focus more closely upon the actor's conduct rather than the amount of resistance exhibited, determining the level of mental culpability required of the actor becomes a more difficult inquiry.

Rape statutes reflecting the common law contain no mens rea language,[172] but courts have generally held pursuant to common law that one must entertain the "general" intent to do the act—here, to have intercourse with a woman by force and against her will.[173] While normally, as has been noted, the presumption is that an actor "intends" to do acts that

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[169] Connecticut, which has already repealed its corroboration requirement, *see* note 168 *supra* and accompanying text, patterned its statute closely after New York's. Mass. Prop. § 20, which requires either prompt complaint or corroboration by direct or circumstantial evidence, cites the New York provision as authority for imposing the requirement. The drafters of a proposed Washington code provision explained that the reason for demanding corroboration was "the ease with which [rape] complaints can be made and the difficulty of overcoming the repugnance to such acts held by typical jurors." Washington Legislative Council's Judiciary Committee, Revised Washington Criminal Code § 9A.44.010, Comments (19) at 174. The drafters also claimed that "New York has used the rule for many years, presumably with no reduction in the deterrent effect of the law on this subject." *Id.* at 173. Washington's rape statute as passed in final form, however, explicitly obviates the need for corroboration. Wash. § 9.79(2)(1).

[170] Mich. § 750.520h.

[171] *See, e.g.*, Walden v. State, 178 Tenn. 71, 77-78, 156 S.W.2d 385, 387 (1941) (no intent is required "other than that evidenced by the doing of the acts constituting the offenses"). While courts generally do not admit that this is the premise of their mens rea analysis, it seems implicit in their approach. Just as force implies resistance, it implies intention. The only cases which focus more directly upon the mens rea which can be assumed from force or coercion are those involving charges of assault with intent to commit rape.

[172] *See, e.g.*, the old Wisconsin statute reproduced in note 21 *supra*.

[173] *See, e.g.*, Henry v. United States, 432 F.2d 114, 119 (9th Cir. 1970), *modified*, 434 F.2d 1283 (9th Cir. 1971), *cert. denied*, 400 U.S. 1011 (1971).

he in fact does, intent does assume some complexity when the defendant raises a defense of either intoxication or mistake of fact. The general common law rule allows intoxication as a defense when it negates a required element of the crime, typically mens rea.[174] Many courts have taken the further position as a matter of law that intoxication will negate "specific intent," such as the intent to commit a felony within the building, required for burglary, but will not excuse a crime which requires only a "general intent," such as rape.[175] On the other hand, at common law or with carnal knowledge statutes if the defendant can show that he mistakenly believed that the victim consented to intercourse, he may negate the required intent—assuming that his mistake of fact was both honest and reasonable.[176]

The treatment of mens rea was a major innovation of the Model Penal Code. The drafters defined four possible levels of criminal intention: purpose,[177] knowledge,[178] recklessness,[179] and criminal negligence.[180] They then

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[174] W. LaFave & A. Scott, Handbook on Criminal Law 342 (1972).

[175] *See, e.g.*, Abbott v. Commonwealth, 234 Ky. 423, 28 S.W.2d 486 (1930); State v. Scarborough, 55 N.M. 201, 230 P.2d 235 (1951). One commentator disagrees with this analysis and prefers the view expressed in Director of Public Prosecutions v. Beard, [1920] A.C. 479, that one might be too intoxicated to entertain the general intent to have sexual intercourse. He argues that

> . . . it is better, when considering the effect of the defendant's voluntary intoxication upon his criminal liability, to stay away from those misleading comcepts of general intent and specific intent. Instead one should ask, first, what intent (or knowledge) if any does the crime in question require; and then, if the crime requires some intent (knowledge), did the defendant in fact entertain such an intent (or, did he in fact know what the crime requires him to know).

W. LaFave & A. Scott, *supra* note 174, at 344 (footnote omitted).

[176] In United States v. Short, 4 U.S.C.M.A. 437, 16 C.M.R. 11 (1954), the conviction of a defendant for assault with intent to commit rape was affirmed. The defendant was a serviceman stationed in Japan who testified that he mistook the Japanese victim's resistance for an oral acceptance of his offer of payment for sexual services. His requested instruction that he could not be convicted if he believed the victim had consented was held to be too broad, since it did not include the qualification that the belief must have been reasonable. For a criticism of this decision that argues from the distinction between rape and assault with intent to rape, see W. LaFave & A. Scott, *supra* note 174, at 358. Other cases have also required reasonableness. McQuirk v. State, 34 Ala. 426, 4 So. 775 (1888); State v. Dizon, 47 Hawaii 444, 390 P.2d 759 (1964).

[177] A person acts purposely with respect to a material element of an offense when:

> (i) if the element involves the nature of his conduct or a result thereof, it is his conscious object to engage in conduct of that nature or to cause such a result . . .

MPC § 2.02 (2)(a).

[178] A person acts knowingly with respect to a material element of an offense when:

> (i) if the element involves the nature of his conduct or the attendant circumstances, he is aware that his conduct is of that nature or that such circumstances exist; and
>
> (ii) if the element involves a result of his conduct, he is aware that it is practically certain that his conduct will cause such a result.

Id. § 2.02(2)(b).

[179] A person acts recklessly with respect to a material element of an offense when he

proceeded to allocate these various levels of mens rea over the spectrum of the criminal law, assigning a specific mens rea requirement to each crime, and often to various elements within each crime. Where the particular Code section which defines a crime does not identify the required culpability level, the Code provides that the element "is established if a person acts purposely, knowingly or recklessly with respect thereto."[181] Since the Code does not specify the mens rea which must accompany forcible rape, recklessness will suffice.[182]

Within this general framework, the Code also contains a specific provision that deals with the use of voluntary intoxication as a defense.[183] This section specifies that self-induced intoxication cannot be used to negate recklessness.[184] As a result, it is ineffective as a defense to forcible rape,[185] and the MPC position on intoxication is thus identical to that of the common law and carnal knowledge statutes. This limitation is desirable since alcohol frequently plays a role in sex crimes, at least in the more

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consciously disregards a substantial and unjustifiable risk that the material element exists or will result from his conduct. The risk must be of such a nature and degree that, considering the nature and purpose of the actor's conduct and the circumstances known to him, its disregard involves a gross deviation from the standard of conduct that a law-abiding person would observe in the actor's situation.

Id. § 2.02(2)(c).

[180] A person acts negligently with respect to a material element of an offense when he should be aware of a substantial and unjustifiable risk that the material element exists or will result from his conduct. The risk must be of such a nature and degree that the actor's failure to perceive it, considering the nature and purpose of his conduct and the circumstances known to him, involves a gross deviation from the standard of care that a reasonable person would observe in the actor's situation.

Id. § 2.02 (2)(d).

[181] *Id.* § 202(3).

[182] For several of the situations defined under the section entitled "Gross Sexual Imposition," the Code has assigned the specific requirement of knowledge. These situations occur where the victim suffers from a mental disease or defect, is unaware that a sexual act is being committed upon her, or mistakenly supposes that he is her husband. *See* note 49 *supra*.

Although normally knowledge of a victim's inability to consent is an element of the crime to be proved by the prosecution beyond a reasonable doubt, a few jurisdictions consider lack of knowledge a defense which must be proved by the accused. *See, e.g.*, KY. § 434A.4-040; N.Y. § 130.10; ORE. § 163.325; WASH. § 9.79(3)(1). Where the defense is an affirmative one, the defendant must only prove his lack of knowledge by a preponderance of the evidence. MD. PROP. § 130.05(1).

[183] MPC § 2.08.

[184] When recklessness establishes an element of the offense, if the actor, due to self-induced intoxication, is unaware of a risk of which he would have been aware had he been sober, such unawareness is immaterial.

Id. § 2.08(2).

[185] The defense can, however, be used for those situations defined as "gross sexual imposition" which require knowledge. *See* note 182 *supra*.

condemnable cases.[186] The generally known effect of alcohol on sexual inhibitions also lends support to the drafters' assertion of "a general equivalence between the risks created by the conduct of the drunken actor and the risks created by his conduct in becoming drunk."[187] It therefore permits the per se assignment of a "conscious disregard" to the intoxicated rapist that is implied in disallowing intoxication as a defense to recklessness.

The MPC addresses the possible defense of mistake as to the consent of the victim in a situation of forcible rape through its general section dealing with "ignorance or mistake."[188] Under this provision a mistake of fact is a defense if it negates the mens rea required to establish a material element of the offense.[189] Therefore, a mistaken belief that the victim was consenting rather than being "compel[led] to submit by force or threat"[190] would be adequate, assuming that this mistake of fact was not made recklessly. The implied premise of this analysis is that if the actus reus must not be recklessly committed, then the mistake must not be recklessly arrived at.

Several jurisdictions have adopted[191] or are considering the adoption of[192] a mens rea requirement of "intention" for forcible rape. Such a requirement would result in a markedly different approach to the problems of intoxication and mistake of fact. In Hawaii, for example, the requirement is that the defendant have "intentionally engage[d] in sexual intercourse, by forcible compulsion."[193] "Intentionally" is defined as a "conscious object to engage in such conduct";[194] "forcible compulsion," as "physical force that overcomes earnest resistance" or threats of serious harm that place the other person in fear.[195] A defendant who claims he was intoxicated can thus introduce evidence to negate "the state of mind sufficient to establish an element of the offense."[196] He might attempt to show that he was not capable of forming the "conscious object" to use physical force or to threaten serious harm. Alternatively, he could try to prove that he was too intoxicated to make distinctions as to the "earnestness" of the victim's resistance or determinations as to her fear.[197]

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[186] *See* East, *Sexual Offenders—A British View*, 55 YALE L.J. 527, 535 (1946). Amir reported the presence of alcohol in the offender in only 24% of his studied cases. *See* M. AMIR, *supra* note 135, at 98. He did, however, establish a significant association in these cases between the presence of alcohol and brutal beatings or sexual humiliation. *Id.* at 103-04.

[187] MPC § 2.08, Comment at 9 (Tent. Draft No. 9, 1959).

[188] MPC § 2.04.

[189] *Id.* § 2.04(1)(a).

[190] *See* note 49 *supra*.

[191] *See, e.g.*, HAWAII § 707-730(1)(a); MONT. § 94-2-109; N.M. § 40A-9-21.

[192] CAL. PROP. § 902(a)(1).

[193] HAWAII § 707-730(1)(a).

[194] *Id.* § 206(1)(a).

[195] *Id.* § 700(12).

[196] *Id.* § 230(1).

[197] The defendant must be "aware of the existence of such circumstances." *Id.* § 206(1)(5).

Presumably, a mistake of fact as to the victim's consent would also negate these elements. It is not clear from the Hawaii statute, however, whether such a mistake would have to be reasonable. Statutes like Hawaii's that employ the language of specific intent will undoubtedly have to resolve this issue at some point, as will those statutes which are unclear as to what level of intent they require. The case likely to raise the issue will probably involve a defense that the victim not only consented to but actually enjoyed forcible sexual intercourse. It is impossible to resolve these questions without some reference to the two recent cases in which the English courts confronted similar allegations. The results reached may be indicative of possible developments in the United States.

In *Director of Public Prosecutions v. Morgan*,[198] three of the defendants asserted that they were told by the fourth defendant that his wife would welcome intercourse with them all and that they must not be surprised if she struggled a bit, since she was "kinky."[199] The wife's testimony recounted brutality and humiliation. The defendants testified, however, that she had consented willingly and had enjoyed the experience. On the issue of intent, the trial judge instructed the jury that a person would not be guilty of rape if he believed that the woman consented, so long as his belief was reasonable.[200] The jury found all four defendants guilty of rape. An appeal by the three defendants was dismissed by the Court of Appeal, which held the instruction proper. That court, however, certified to the House of Lords the question "[w]hether in rape the defendant can properly be convicted notwithstanding that he in fact believed that the woman consented, if such belief was not based on reasonable grounds."[201] The Lords responded to this question in the negative (by a 3-2 vote), but they unanimously affirmed the conviction on the basis that no miscarriage of justice had occurred.[202] They based their affirmance on the fact that the jury had not believed the defendants' bizarre testimony about a "sexual orgy" that had allegedly reinforced their belief in her consent.[203]

The Lords were unwilling to apply a reasonableness requirement, feeling that an honest belief[204] that the victim had consented was sufficient to disprove the crime which "always has been intercourse without consent of the victim" and the mental element for which was "and always had been the intention to commit that act."[205] The majority acknowledged that in

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[198] [1975] 2 W.L.R. 913.

[199] *Id.* at 929.

[200] *Id.* at 917.

[201] *Id.* at 922 (emphasis deleted).

[202] *See* Criminal Appeal Act 1968, 16 & 17 Eliz. II, ch. 19, § 2(1).

[203] 2 W.L.R. at 927.

[204] As the Lords noted, the word "honest" here is "tautologous," only used to intensify the idea of "mistake." 2 W.L.R. at 941 (Simon, L., dissenting on the question).

[205] *Id.* at 937 (Hailsham, L.). The relevant statute in *Morgan* simply provides that it is a

crimes which specify no particular mens rea, courts may imply from the common law[206] a *defense* of honest and reasonable mistake, which operates to strengthen the otherwise loose or non-existent mens rea requirement. The 1889 bigamy case of *Regina v. Tolson*,[207] for example, implied such a defense into a poorly-drawn criminal statute which simply forbade remarriage during the life of the other spouse. As in the case of other defenses such as self-defense, because a "general" intent can at first be presumed from the doing of the act itself, the defendant is practically presented with the initial burden of going forward although the burden of persuasion remains with the prosecution.[208]

While the dissents both urged that *Tolson* governed,[209] the majority distinguished that case, asserting that the intent required for common law rape was specified as the actual "intent to rape," that is, an intention to have intercourse and an intention to do so without the victim's consent. A mistake of fact for this particular crime, therefore, does not technically operate as a defense at all. The majority portrayed this distinction in terms of its procedural effect:

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felony "for a man to rape a woman." Sexual Offences Act 1956, 4 & 5 Eliz. II, ch. 69, § 1(1). As a result, unfortunately, the inquiry had to focus on the common law of rape, interpretation of which became a point of disagreement among the Lords.

[206] 2 W.L.R. at 941 (Simon, L., dissenting on the question).

[207] 23 Q.B.D. 168 (1889).

[208] 2 W.L.R. at 939-40 (Simon, L., dissenting on the question).

[209] Both Lord Simon and Lord Edmund-Davies took a more general approach, believing that whatever the requirements of the particular crime, the general common law rule required that the mistake have been reasonably made. Both cited Justice Stephen in *Tolson*:

> Apart, indeed, from the present case, I think it may be laid down as a general rule that an alleged offender is deemed to have acted under that state of facts which he in good faith and on reasonable grounds believed to exist when he did the act alleged to be an offence.
>
> I am unable to suggest any real exception to this rule, nor has one ever been suggested to me.

23 Q.B.D. at 188, *quoted in* 2 W.L.R. at 941, 963. In response to Professor Glanville Williams' criticism that the mens rea for serious crimes ought not to include an objective standard, Lord Edmund-Davies cited Sweet v. Parsley, [1970] A.C. 132, 164-65 (Diplock, L.):

> It has been objected that the requirement laid down in [*Tolson*] that the mistaken belief should be based on reasonable grounds introduces an objective mental element into mens rea. This may be so, but there is nothing novel in this. The test of the mental element of provocation which distinguishes manslaughter from murder has always been at common law and now is by statute the objective one of the way in which a reasonable man would react to provocation. There is nothing unreasonable in requiring a citizen to take reasonable care to ascertain the facts relevant to his avoiding doing a prohibited act.

2 W.L.R. at 955. This perspective taken by the *Morgan* dissents sees the generic issue of mistake not as a problem of mens rea at all but rather as implying a separate duty imposed by law upon the actor.

> The primary "defence" was consent. I use the word "defence" in inverted commas, because, of course, in establishing the crime of rape, the prosecution must exclude consent in order to establish the essential ingredients of the crime. There is no burden at the outset on the accused to raise the issue.[30]

In other words, a true "defense" can be viewed as a court-made exception to the crime, which the defendant must claim himself and which only indirectly reflects mens rea. A defense can properly be governed by an objective standard, since the legislature or the common law has not previously established any other. A specific intent, on the other hand, is an element of the crime itself and as such must be shown to exist by the prosecutor initially. In rape, for example, any belief in consent—whether reasonable or not—negates an element of the crime and thus prevents conviction. As Lord Cross explained the majority's distinction,

> . . . I can see no objection to the inclusion of the element of reasonableness in what I may call a "*Tolson*" case. If the words defining an offence provide either expressly or impliedly that a man is not to be guilty of it if he believes something to be true, then he cannot be found guilty if the jury think he may have believed it to be true, however inadequate were his reasons for doing so. But, if the definition of the offence is on the face of it "absolute" and the defendant is seeking to escape his prima facie liability by a defence of mistaken belief, I can see no hardship to him in requiring the mistake—if it is to afford him a defence—to be based on reasonable grounds.[31]

The Lords thus ruled that a defendant's factual error need not have been reasonably made. Nevertheless, language in two of the three majority opinions appears to suggest that it must not have been made recklessly, because recklessness—however English law defines that level of culpability—implies some form of intention. As noted by Lord Hailsham,

> The prohibited act in rape is to have intercourse without the victim's consent. The minimum mens rea or guilty mind in most common law offences, including rape, is the intention to do the prohibited act . . . .
>
> The only qualification I would make . . . is the refinement . . . that if the intention of the accused is to have intercourse nolens volens, that is recklessly and not caring whether the victim be a consenting party or not, that is

[30] 2 W.L.R. at 929 (Hailsham, L.). Or, in the words of Lord Edmund-Davies,

> But to speak of "the defence of mistake" is, with respect, to use lax language. In the context of the present case, it constitutes a challenge that the mens rea necessary for rape existed, and it has a defensive connotation only in the sense that, if a prima facie case of rape is established, it is for the accused . . . to raise an issue fit to go to the jury as to his belief in the woman's unwillingness.

Id. at 951.

[31] *Id.* at 926 (Cross, L.).

> equivalent on ordinary principles to an intent to do the prohibited act without the consent of the victim.[212]

Or, as he later notes, ". . . [T]he prohibited act is and always has been intercourse without consent of the victim and the mental element is and always has been the intention to commit that act, or the equivalent intention of having intercourse willy-nilly not caring whether the victim consents or no."[213] Lord Cross expressed this premise less clearly: "Rape, to my mind, imports at least indifference as to the woman's consent."[214]

As a result, the Lords reached a conclusion on mistake of fact analogous to that of the Model Penal Code.[215] To the extent that these approaches both allow an honest mistake to excuse what otherwise would be rape, they are a proper reflection of the movement in the law of rape to focus, as with all other crimes, on the actor's rather than the victim's conduct. The adoption of a subjective test forces the jury to concentrate on the actual mental state of the defendant at the time of intercourse and not, as it would in trying to infer reasonableness, upon the nature of the victim's acts.[216]

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[212] *Id.* at 932 (Hailsham, L.).

[213] *Id.* at 937.

[214] *Id.* at 926. *See also* the interpretation made by Professor Glanville Williams of the mens rea standard set forth in *Morgan*: "What the judge must not tell the jury . . . is that they can convict the defendant although he did not know that the vital facts existed *and was not reckless as to those facts*, if he was stupid in not realising that they existed." Letter of Professor Glanville Williams to The Times (London), May 8, 1975, at 15, col. 7 (emphasis supplied). *Cf.* the characterization in United States v. Short, 4 U.S.C.M.A. 437, 446, 16 C.M.R. 11, 20 (1954) (Brosman, J., dissenting on the question): "he was just not the sort of person who worries about hypothetical problems."

[215] This comparison must be drawn with caution, however. The Lords' use of seriatim opinions makes any description of their institutional "position" on the matter somewhat challengeable. More importantly, their concept of recklessness, only intimated in dictum upon dictum, may not be at all the same as that embodied in the MPC. Perhaps this is the really disturbing point in *Morgan*—that the defendants' conduct was not seen as reckless. It would certainly seem that believing the husband's rather bizarre description of the wife's sexual preferences, at least after the wife's screams and struggles had been emitted, would have qualified as a conscious disregard of the substantial, unjustifiable risk that non-consent was present. MPC § 2.02(2)(c). Why the Lords did not seriously consider the possibility is not clear from their opinions, although the question as certified did not specifically include this question.

[216] Of course, as even the defendants in *Morgan* admitted, if the mistake is unreasonably made, the jurors will have a difficult time finding that a defendant actually made it. In this sense, the subjective and objective levels of inquiry are somewhat inseparable. *See* Letter of Professor Glanville Williams, *supra* note 214, defending the result in *Morgan*: "There is nothing in the Lords' decision to prevent a judge directing the jury that if anyone would have realised from what the woman said and did that she was not consenting, then they are entitled to conclude that the defendant realised it, unless there are some other facts to raise a doubt in their minds."

Unlike the rule of the Model Penal Code, however, the rationale in *Morgan* may already have been extended, by the Court of Appeal, to the quite different context of intoxication. In *Regina v. Cogan and Leak*,[217] Cogan admitted having had intercourse with Mrs. Leak at the urging of her husband. Although the victim was sobbing, and terrified of her husband, who had beaten her the night before, Cogan testified that he had believed she had consented. The jury found that he had so believed but that he had no reasonable ground for doing so. The Court of Appeal quashed his conviction on the basis of the recent *Morgan* rule.

If it is true that "[d]rink seemed the only reason for his mistaking her sobs and distress for consent,"[218] then *Cogan* would represent a major and unfortunate departure from the common law and MPC rule that intoxication cannot negative the mens rea required for rape. It would include self-induced intoxication within the *Morgan* notion that rape requires a specific intent to have intercourse without consent. The MPC proscription of the intoxication defense seems preferable. It acts in effect as a per se rule that one who becomes intoxicated (as distinct from one who soberly reaches a mistaken conclusion) consciously disregards the well-known risk that his intoxication may lessen his sexual restraint and blur his perceptions. While under *Morgan* a jury might theoretically find that the decision to drink in the particular case constituted "willy-nilly" disregard of the consequences, it seems preferable from an institutional point of view to place this decision with the judge.[219]

However, since Cogan had also been given false information by the husband, the relationship between his mistaken belief and intoxication is not clear; perhaps *Morgan* is still only being applied to a mistake of fact. If so, it is interesting to note that (at least from the initial and admittedly brief account of Lord Justice Lawton's opinion in *The Times*) the Court of Appeal never addressed the recklessness possibility intimated in *Morgan*. The court automatically quashed a rape conviction because of reliance upon the advice of others. Yet given the important policy of assigning individual responsibility for criminal action, recklessness seems an essential limitation on *Morgan*. And, in view of the English experience, recklessness also seems a far more appropriate standard of mens rea for rape than the "intention" now required by Hawaii and other states.

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[217] The Times (London), June 10, 1975, at 11, col. 6.

[218] *Id.*

[219] Professor Williams suggested—prior to *Cogan*—that *Morgan* would theoretically allow intoxication to negate the intent required for rape. He argued that probably no such defense could succeed, given that "[a] sensible jury may take the view that a man who is sober enough to perform is sober enough to realise that the woman is resisting." Nevertheless, while purporting to have faith in the institution of the jury, he acknowledged the need for "legislative attention." Letter of Professor Glanville Williams, *supra* note 214.

V. Conclusion

Perhaps inevitably, statutory definitions of forcible rape are becoming more consistent with society's changing attitudes toward the offense. The underlying objectives of rape law have changed significantly since the formulation of common law doctrines and carnal knowledge statutes. The traditional, competing objectives of protecting women from loss of their virginity or chastity and protecting innocent men from the harsh penalties attendant upon conviction have gradually been replaced by the goal of identifying as fairly and as accurately as possible those persons who have committed violent sexual assaults.

This change has clearly altered the focus of the rape inquiry. It has also resulted in significant progress in the protection of all women from sexual assaults. When there are credible witnesses to the crime or where there is physical injury to the victim, juries will convict offenders no matter what legal standard is used. But in the more frequent instances when there is only conflicting testimony from the prosecutrix and the defendant, the standard employed may be determinative. The change in focus from victim to actor conduct, the gradation of forcible rape to punish according to the degree of actor culpability, the treatment of corroboration as probative evidence of victim credibility rather than as a legal requirement for conviction, and the change in mens rea requirements to measure only the subjective state of mind of the particular actor all help to establish a legal standard for rape that is appropriately analogous to that employed in cases involving other kinds of criminal assaults.

It must be admitted in conclusion that the effect of these changes may also be limited by existing social mores. The connotation of the word "rape" is difficult to alter, and thus the traditional idea of a rape trial as an inquiry into the prior sexual conduct of the victim in order to determine whether she "got what she deserved" will take time to erase. A more effective solution might include the complete elimination of the word "rape" from criminal codes. As several state legislatures have already recognized, such a recharacterization of forcible rape merely as one particular type of violent criminal assault which has resulted in sexual penetration would help eliminate some of the traditional social reactions which have placed such a strain on the legal system.[229] Viewing the crime as a violent assault immediately raises the proper legal question of the amount of

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[229] *See, e.g.*, Fla. § 794.011 ("sexual battery"); Mont. § 94-5-503 ("sexual intercourse without consent"); N.D. § 12.1-20-03 ("gross sexual imposition"). Such a redefinition has also been proposed in New Hampshire and approved by the state senate. The crime would be renamed "aggravated felonious assault." 17 Crim. L. Rep. 2223 (June 11, 1975). *See also* Ohio's proposal, employing the term "felonious sexual penetration." *Id.* at 2203 (June 4, 1975).

violence and social danger embodied in the actor's conduct. It is perhaps only in this way that the full impetus of reform in the law of rape can be realized.

H.S.S.