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This is to certify that the thesis prepared under my supervision by

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The Politics of Rape

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THE POLITICS OF RAPE

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PREFACE

This thesis is an examination of the male-dominated institutions which give rape a political nature. In particular, it will focus on the legal realm, investigating the roles of attorney and judge, but devoting special attention to law itself. Despite Sam Ervin's claim to the contrary, people's attitudes can be changed by changing the laws. "If the laws were changed to relate more rationally to the reality of [rape] and to the goal of sexual equality, attitudes about the crime might also change."¹ Accordingly, this thesis will examine Illinois' laws on the subject and will include a comparative study with other states, to reach a model for reform. The implications of these reforms will be dealt with only insofar as they affect the victim; any effects on the defendant are clearly beyond the scope of this thesis.

Being men, those who have made and compiled the laws have favored their own sex, and jurists have elevated these laws into principles.

- Poulain de la Barre
I. Introduction

A peculiar mythology has developed surrounding the crime of rape. One of the myths is the assumption that a woman really cannot be made to have sexual intercourse against her will and without her consent. This myth is perpetuated by the notion of "rape fantasies." All women are thought to harbor such secret fantasies in which the victim enjoys the pain and horror of a rape experience in some sort of sexually masochistic way. These ideas unjustly and unjustifiably undermine the credibility of a rape victim. Furthermore, such thinking represents a perverted version of the so-called rape fantasy. A fantasy by its very nature is a situation in which the fantasizer has complete control and determines the sequence of events. This is certainly not the case in an actual rape situation. (For a more detailed explanation, see Molly Haskell's excellent article "Rape Fantasy" in Ms., November, 1976).

A second myth is the idea that rape occurs only in dark alleys, perpetrated by sleazy characters who are complete strangers to the victims. Moreover, the mythology contends that rape is a sudden, impulsive act, in reaction to an attractive women who is inviting just such an act. The first half of this myth precludes the consideration of rape occurring between acquaintances or especially between marital partners. The sleazy stereotype is rarely the case. In reality, a rapist has no definable psychological make-up which differentiates him from other men, and in fact most have normal sex lives; rape is not necessarily a means of sexual gratification.2 Furthermore, a majority of rape victims do indeed know

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their attackers and rather than being an impulsive act, 60 to 70 percent of rapes are premeditated. The idea that the victim somehow invited the attack is a prevalent one. The notion of victim precipitation was fully developed by Freud in his work with hysterical women. According to Freud, women are masochistic and have self-destructive needs which can be satisfied by being raped. A woman is therefore responsible for her rape as she was seeking satiation of those needs. A current example of the idea of a victim's invitation to be raped is illustrated by the recent Wisconsin case: Former Judge Archie Simonson ruled that a 15-year old boy who was accused of raping a 16-year old girl was reacting "normally" to prevalent sexual permissiveness and women's provocative clothing. Simonson claimed, "This community [Madison] is well-known to be sexually permissive. Should we punish a 15- or 16-year old boy who reacts to it normally?" Such a view is particularly shocking, and the fact that it was enunciated in a court of law is especially significant. This blaming-the-victim tactic is frequently used in rape cases, even to the point of the victim herself believing that she somehow precipitated the attack. Actually, the majority of rapes are motivated by a desire to be aggressive. "Sexual penetration was only another form of hostile expression, not the motive for the crime." Still, the myth persists in the face of evidence to the contrary.

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6 Michigan Women's Task Force on Rape, op. cit., p. 5.
The ultimate myth is the view of rape as a sexual crime; it is not. Rape is a crime of violence as indicated by the hostile motivation involved. "A major study of forcible rape in Pennsylvania showed that in 85% of all reported rapes some form of overt violence, including roughness, beating, and choking, was perpetrated upon the victim." Little involved in a rape resembles an act of passion, yet it is the "carnal knowledge" element of rape which has been emphasized in statutory definitions.

In contemporary American society, rape is also a political crime of sorts. Brownmiller contends it is the means through which "all men keep all women in a state of fear." On a less generalized level, it is the means through which a male asserts dominance and demonstrates the ultimate vulnerability of his victim. Power plays of this kind are the essence of politics. Rape is political in that "raping a woman humiliates her. Gaining her acquiescence convinces both her and the rapist that she is inferior, that the male deserves to dominate." This attitude is extended to the police and the judicial system, and can be termed the politics of rape. Two particular dimensions to the politics of rape are the socio-psychological and the politico-legal. The former tries to determine why men rape. The latter, the focus of this paper, directs its attention to the legal institutions involved, and tries to understand why rape is seldom reported and its conviction rate is so low. The F.B.I. estimates that only one in five rapes is reported.

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7Ibid., p. 5.
According to the Uniform Crime Reports, there are an estimated 51,000 rapes a year, and given the approximate underestimation, this amounts to more than a quarter of a million rapes a year. Moreover, the rate of reported rapes has increased 175 percent since 1960, and currently approximately one out of every three American women can expect to be a victim of a sexual assault. Finally, it must be noted that less than one in ten trials for rape ends in a guilty verdict. An inherent component of these statistics is the role of the law, and those institutions responsible for its execution. The politics of rape, previously defined as the sexist attitudes and beliefs exhibited in the act itself and in police and courtroom activities, is intimately tied in with the exact nature of the law. A closer examination of legal statutes and traditions is therefore in order.

Historical Development of Rape Laws

An unfortunate legal tradition was established with regard to rape as the crime was viewed as a property crime, perpetrated against a man's possession. The earliest written evidence of this tradition is the Babylonian Code of Hammurabi from the early seventeenth century before Christ. Women were seen as man's property, a possession whose value decreased if she was not pure and virginal. In this sense, rape was not only a degradation of women but a unique insult to their men. Thus the legal definitions of rape were first introduced into the property code, not the criminal code of the law; and it is a sad commentary on the law

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13 Shana Alexander, Women's Legal Rights (Los Angeles: 1975, p. 121.
14 The major source of information for this section is Susan Brownmiller, Against Our Will, op. cit.
that remnants of this situation persist today. Brownmiller writes, "By this circuitous route the first concept of criminal rape sneaked its tortuous way into man's definition of law. Criminal rape, as a patriarchal father saw it, was a violation of the way of doing business. It was, in a phrase, the theft of virginity, an embezzlement of his daughter's fair price on the market." 15

Precautions were also taken to insure that innocent men were not accused of rape by vengeful, spiteful women. The anticipation of a fake cry of rape has seriously undermined all victims' credibility and resulted in very different rules of evidence for rape than for other crimes. The classic example of the falsely accusing female is Potiphar's wife in Biblical Egypt. According to the story, she asked Joseph to "lie down" beside her. When he refused and fled instead, she twisted the story to accommodate her fallen ego and accused Joseph of rape. If women could easily fabricate rape stories (i.e., the lesson of Potiphar's wife), they similarly could be as guilty in an actual rape as the rapist. This concept was enunciated early and continues into modern laws. According to the Code of Hammurabi, a married women who was raped had to share the blame with her attacker. The law saw it as adultery, not rape, and both individuals were thrown into the river as punishment. The same code found a "betrothed virgin" innocent when raped and the punishment for her attacker was death; however no mention is made of an unbetrothed virgin. Ancient Hebrews, like the Babylonians, considered a raped married woman guilty; her punishment was to be stoned to death. Unlike the Babylonians though, the same punishment was meted out to a defiled virgin. It is particularly relevant that the Ten Commandments make no prohibition on rape. The social

15 Brownmiller, p. 9.
control to prevent rape was the threat of retribution. If one raped the daughters of a particular group, the same fate could be expected for one's own women. Moreover, rapists often had to marry their victims or at least make monetary compensations to their fathers.

Hebrew law eventually allowed a woman to become a litigant, pressing her own charges. Women were also allowed to receive punitive damages, originally to cover the cost of their stolen virginity (i.e., her value decreased because of her unchastity), but increasingly for damage to their bodies. Still, according to the ancients, rape was defined as a property crime; a definition which colored the development of rape laws since.

The Anglo-Saxon tradition in rape laws still failed to define rape clearly as a crime committed against a woman and not against a man's property. The confusion was confounded by the differentiation of people into economic classes. Thus, prior to the Norman Conquest of England (1066), a man who raped an upper-class woman faced death and dismemberment. Such practices continued into the Middle Ages (indeed, the death penalty for rape lasted into the twentieth century); however it is a significant advance that the victim faced no such penalty. She was to receive the proceeds from her attacker's estate or else save him by marrying him. It should be apparent that the emphasis was still on property and its accumulation rather than on the challenge to the victim's sexual integrity and freedom. The punishment was reduced to castration and blinding by William the Conqueror's time.

Probably one of the most significant steps forward came under Henry II's rule. A trial by jury was instituted as the proper forum to decide a rape case (previously duel or combat was used). This procedure was
apparently only used in the case of a raped virgin as no mention is made of nonvirgins charging rape. The victim was to file a civil suit (appeal) and if an indictment was returned, a king's jury heard the case. This sequence was not as simple as it appears. The burden of proof was on the victim to show that a rape had actually occurred and concurrently, the accused had a variety of defenses. According to the law of the time, a rape victim

must go at once and while the deed is newly done, with hue and cry, to the neighboring townships and there show the injury done to her to men of good repute, the blood and her clothing stained with blood, and her torn garments. And in the same way she ought to go to the reeve of the hundred, the king's serjeant, the coroner and the sheriff, and let her make her appeal at the first county court. . . . Let her appeal be enrolled in the coroners' rolls, every word of the appeal, exactly as she makes it, and the year and day on which she makes it. They will be given her at the court of the justices, at which let her again put forward her appeal before them, in the same words as she made it in the county court, from which she is not permitted to depart lest the appeal fall because of the variance. . . .

Among the defenses available were the claim that the accused was elsewhere at the time of the alleged rape, that the victim actually consented or that he had her as his concubine. It is interesting to see how very little the procedures have changed since then. The burden of proof is still the victim's, although it is the state which brings the charges. The state's interest and responsibility in rape cases dates back to the statutes of Westminster at the end of the thirteenth century. Equally significant was the recognition of the crime occurring against married women in addition to virgins. The distinction was virtually obliterated between married and unmarried women as even the punishments for offenders in either case

16Henry of Brocton quoted by Brownmiller, op. cit., p. 18.
were the same. By obvious implication, marriage to the victim was no longer a salvation for the rapist under these statutes. Current legal definitions of statutory rape (i.e., sexual intercourse with a minor female in which her consent is an irrelevant factor) have their origins in this set of statutes.

The major failure of these new legal concepts was, as it is today, the exclusion of rape between marriage partners. "Within a marriage, the theory went that there could be no such crime as rape by a husband since a wife's 'consent' to her husband was a permanent part of the marriage vows and could not be withdrawn." 17 Such thinking still permeates laws governing rape as no state recognizes rape between legally married people; and it is a major source of controversy as well as a potential area for reform.

By the end of the thirteenth century, the idea that rape was a "public wrong" and an encroachment on public safety was generally accepted and embodied in the law. However, it was not unaccompanied by the stubborn myth that a woman had somehow brought about her fate and therefore was to blame. These lines of thinking guided rape laws for the next seven centuries.

A curious paradox developed in America surrounding the crime of rape. Women who were raped were seldom believed, or at least their testimony was suspect, unless the accused was black. In that case, the victim was automatically innocent and the defendant (a term used loosely because the judgment was often made outside of a courtroom) was automatically guilty. The result was often lynching. Rape involving blacks is the penultimate in racism and sexism. "To black people, rape has meant the lynching of

17Brownmiller, p. 21.
the black man," and if the victim were black and the assailant white, the property code was enforced to its fullest. Black women were, according to the tradition of slavery, chattel, the property of white men.

Rape in America spawned a peculiar paranoia—the fear of interracial rape. However, this view was really only applied to the rape of a white woman by a black man. In actual fact, most rapes are intraracial. Figures for 1967 show only 10 percent of rapes being black-on-white, and a negligible .3 percent were white-on-black. The problem of underreporting is even more severe regarding white-on-black rapes. "Because white males have long had nearly institutionalized access to Negro women with relatively little fear of being reported, it is likely that the true proportion of Negroes raped by whites is larger." Today a typical state rape law (if there is such a thing) reads as follows:

The perpetration of an act of sexual intercourse with a female, not one's wife, against her will and consent, whether her will is overcome by force or fear resulting from the threat of force, or by drugs or intoxicants; or when, because of mental deficiency, she is incapable of exercising rational judgment; or when she is below an arbitrary 'age of consent.'

The key elements in a state which has not yet reformed its laws are that the act be against the victim's will; that even the slightest penetration be achieved, although the act need not be sexually completed; that the victim be of at least a particular age; and that the victim not be the actor's wife. Although the law may appear simple, many legal complexities

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18Brownmiller, p. 233.
19Brownmiller, p. 234.
20Ibid.
21Brownmiller, p. 412.
arise such as proving that it was a nonconsensual act and that penetration occurred in the absence of any semen, or establishing a particular standard of resistance. These issues, as well as others previously discussed, are the points for reform and will be more fully developed in sections II and III.
There is no difference between being raped and being run over by a truck except that afterward men ask you if you enjoyed it... 

There is no difference between being raped and going head first through a windshield except that afterward you are afraid not of cars but of half the human race.

- Marge Piercy
Living in the Open
II. The Police and the Courts

"The law alone is not responsible for [the victim being treated more harshly than the suspect], although the rape laws are inadequate in many ways. It is the complex interaction of the laws with two other factors--social attitudes related to women and to sex, and the rules of evidence in criminal trials, . . . that conspire against the woman who is raped." 22 The question is often asked in a rape case, "Who is on trial, the suspect or the victim?" The traditions established in the development of the laws have resulted in both the police and the courts blaming the rape victim. Rules of evidence are often embarrassing and unjustly accusing of the victim; corroboration requirements and resistance standards severely undermine a woman's credibility by their very existence; finally a woman's previous sexual habits, totally irrelevant to the commission of the crime, is somehow made relevant in many open courts today. However, before examining the problems in the courts, it is necessary to look briefly at the role the police play.

Rape is one of the most underreported crimes in America. It was estimated in 1975 that a rape occurred every 11 minutes, 23 and only a year later, the estimate was every 7 minutes. 24 Despite this exceptional rate, only 1 in 5 to 1 in 20 rapes is even reported. Inherent in these figures is the treatment accorded rape victims by the police. Although there has been an increasing sensitivity on the part of law enforcement agents in recent years, especially because of the development of specially-trained rape squads, the police are still inadequate in many respects. Brownmiller claims that "despite their knowledge of the law they are supposed to enforce, the male police mentality is often identified to the stereotypic

22Shana Alexander, Women's Legal Rights, op. cit., p. 117.
23Alexander, op. cit., p. 122.
24Manarelli, op. cit.
views of rape that are shared by the rest of the male culture. The tragedy for the rape victim is that the police officer is the person who validates her victimization.\textsuperscript{25} Victims' accounts of their treatment by the police typically include a disbelief on the part of the officer that a rape really did occur. This is particularly the case when the victim knows her attacker, even in the slightest way. (This is usually the situation as "about half of all rapes are committed by men known to their victims, although the degree of acquaintance is usually slight."\textsuperscript{26}) When the rapist is a stranger, the police often react the same way. One victim relates the following:

These two policemen had really come to the conclusion among themselves that I knew this guy, so they tried to get that out of me. They kept saying, 'Are you sure you didn't know this guy already?' And they told me that they have a lot of women who come in and say they've been raped just to get men in trouble. Their attitude was, here's this woman trying to get this guy hooked. They said lots of women know the man, and it comes out later.\textsuperscript{27}

Implicit in this kind of questioning is a tactic of blaming the victim. If the victim did not fabricate the story, then somehow she was responsible for her fate. According to a California police manual, "forcible rape is one of the most falsely reported crimes. The majority of 'second day reported' rapes are not legitimate."\textsuperscript{28} However, a delay in reporting is not the only factor by which the police determine a case "unfounded."

Others include evidence that the victim was intoxicated; a lack of physical condition supporting the allegation; the victim's refusal to submit to a medical examination; the prior relationship between the victim and offender; and the use of a weapon without an accompanying battery.\textsuperscript{29} Such biased

\textsuperscript{25}Brownmiller, p. 409.
\textsuperscript{26}LeGrand, p. 922.
\textsuperscript{27}Russell, p. 181.
\textsuperscript{28}Brownmiller, p. 408.
\textsuperscript{29}LeGrand, p. 928.
thinking fails to explain what benefits there are for a falsely-accusing woman. The traumas and humiliation involved in the encounters with the police and courts far outweigh any possible vindictive pleasures which would accrue to the victim.

Another form of degradation inflicted by the police results from their questioning, in which they sometimes take a perverse interest in all the details of the crime. A new booklet put out by the National Institute of Law Enforcement and Criminal Justice advises rape victims that "some of the questions might seem embarrassing. If you don't understand why a question is asked, have the officer explain why your answer is important." 30 Yet at least one victim, representative of many others, reports,

They got more and more interested in the physical details. What did the man say to me? What did I say to him? Did he unzip his pants or take them off? How long did it take? In what position did he do it? Why did I help him? Did he have a climax? Did I? 31

A woman who was composed enough to notice the details about her assailant and answer all questions is not often believed; the same is true of the hysterical woman who did not take note of such things and is therefore incapable of answering. The problem is compounded by having to deal with male officers at a time when a woman's integrity as a woman and as a human being has been challenged. This situation has been partially rectified by the development of specially-trained rape squads which include female members. This is certainly the right direction to go but it is as yet insufficient to redress the political nature of rape.

30 Forcible Rape: Medical and Legal Information. Law Enforcement Administrative Agency, October, 1977, p. 2.
31 Brownmiller, p. 408.
The Courts

Rape is political because it is perpetrated by one class of people, men, against another class of people, women. The relative powerlessness of women in society is reflected in individual cases of rape, as well as in the male-dominated institutions responsible for solving and prosecuting rape cases. The courts are intricately involved in the politics of rape. The myths used to describe rape often find their manifestations in a court of law. Lord Hale, in the seventeenth century, described rape as "an accusation easily to be made and hard to be proved." Indeed, this maxim governs rape trials today as the standards of evidence all but preclude a guilty verdict and often result in the victim being on trial rather than the accused. Most cases never go to trial; of those that do, fully one-third are resolved by acquittal or dismissal. Freda Adler best describes the general situation:

Perhaps it is the only crime in which the victim becomes the accused and in reality, it is she who must prove her good reputation, her mental soundness, and her impeccable propriety. While the letter of the law treats the victim equitably, in reality, the spirit of its application is one of innuendo and suggestion about 'sick women' who may want to 'trap' men with 'fabricated stories' supported by 'vivid imagination.' In the adversary process, pre-judicial questions become sinister suggestions as cooperation, consent and chastity are contested; past encounters determine present credibility as the victim struggles to establish her sexual purity.

The victim is naturally the prosecution's key witness; without her testimony there would be no case. Constitutionally though, the defendant need not testify. These two facts place the burden of proof squarely on the victim's shoulders, and her credibility is an imperative. Furthermore

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33 "If she consented once, she consented again - A Legal Fallacy in Forcible Rape Cases", Valparaiso University Law Review, vol. 10, 1975, p. 156.
there is an apparent inclination to presume the victim is guilty until she proves herself innocent. Several rules of evidence are at work to try the victim. These include the consent standard, the prior sexual history of the victim, the resistance standard, and the corroboration requirement. These have generally been developed by the courts in their interpretations of the statutes, primarily to protect "innocent" men from fake accusations of rape.

The Consent Standard

Rape by definition is a nonconsensual crime; it is sexual intercourse against the will of the victim, without her consent. Therefore, the issue of consent is unique to rape and has been central to proving a rape occurred; such proof is indeed absurd to all other crimes. A victim of a robbery is not asked if he agreed to turn over his money, but the same standards do not apply to rape victims. The notion still prevails that sexual intercourse cannot take place unless the woman agrees. There is a persistent belief in Clarence Darrow's analogy that you can not stick a straw into a moving bottle.

The claim that sexual intercourse did occur but was consensual is one of three defenses available to the accused. (The other two being that the alleged event did not even occur, or if it did, the defendant did not do it.) Indeed, the issue of consent is not raised at all unless the defense counsel brings it up. Then it is the victim who must prove that she did not want to take part in sexual intercourse. Like most laws and procedures dealing with rape, this standard has its own peculiar property-oriented bias.

The consent standard in our society does more than protect a significant item of social currency for women:
it fosters, and is in turn bolstered by, a masculine pride in the exclusive possession of a sexual object. The consent of a woman to sexual intercourse awards the man a privilege of bodily access, a personal 'price' whose value is enhanced by sole ownership.\textsuperscript{35}

There is a central assumption underlying the consent standard which contends that if a woman consented once, she quickly consents again and again. Implicit in this reasoning is a denial of the possibility of a woman saying no; and also an apparent legal protection only of chaste women. It should be obvious that the consent standard is deeply involved with the victim's prior sexual history. However, prior consent, contrary to the rationale of a consent standard, does not equal or imply consent with the defendant.

\textbf{Previous Sexual History}

There is "a legal tradition, established by men, that the complaining woman in a rape case is fair game for character assassination in open court."\textsuperscript{36} Nowhere is this more apparent than in the admissibility of evidence concerning the victim's prior sexual experiences. This factor has been deemed to be relevant to the issue of consent and the determination of whether a rape actually occurred. It stems from the myth that good girls cannot be raped. Therefore, if a woman was raped, it must somehow be shown that she is a "bad girl" (i.e., no longer a virgin). "The result is that once a woman has voluntarily engaged in intercourse, the law grants less protection to her right to refuse intercourse in the future, without consideration of whether her past decision expresses anything about the

\textsuperscript{35}1952 \textit{Yale Law Journal} quoted by Camille LeGrand, p. 35.

likelihood of her having exercised her choice in the present case." 37

Clearly this is a denial of equal protection of the laws as so-called virtuous women deserve the protection of the law while those considered unchaste do not. Moreover, the entire notion of chastity is very nearly outdated by the current age of premarital sex. The important point is that "the victim was not attacked because she was promiscuous or because she had a reputation for unchastity, but only because she was a woman." 38

In Champaign County, according to Assistant State's Attorney David Bailie, the prior sexual history of the victim is not at all relevant to his prosecution of a rape case. Unfortunately, the defense counsel usually finds it of relevance and introduces such testimony with the effect of twice traumatizing the victim (first the rape, then the trial). Indeed, many rape victims report that the trial experience was much worse than the assault.

Generally, the most relevant event of a victim's sexual history is her past relations with the defendant. The principle underlying the admissibility of such evidence was articulated in Bedgood v. State in 1888.

37Evidence of previous illicit commerce renders it probable that force was not used. This principle has a two-fold effect, inasmuch as it affects the credit of the woman who charges that her person was forcibly violated, and also supplies the accused with a circumstance making it probable that he did not obtain by violence what he might have secured by persuasion or for money. It is, the rule assumes, not probable that a man who has procured without committing a felony what he desired would commit a felony to obtain it.

38"If She Consented Once, She Consented Again--a Legal Fallacy in Forcible Rape Cases," op. cit., p. 140.
A man accused of crime has a right to all relevant testimony that tends to make it improbable that he is guilty of the crime with which he is charged.\(^{39}\) (emphasis added)

The lesson is clear that prior consent is equal to consent in the case in question, and therefore a victim's sexual past is relevant in court. Although written in 1888, the same rationale is at work today. (This will be described further in Section III on what a new law should do.)

**The Resistance Standard**

Just as the prior sexual history of the victim has been twisted into a measurement of consent, the resistance standard is a similar index. The above passage from *Bedgood* indicates the two legal possibilities for a woman: consent or resist. Conversely, if there is no evidence of resistance, the victim, by process of elimination, must have consented. This standard evolved from the myth that if a woman says no, she really means yes, unless she physically "resists to her utmost. The idea of resistance is undermined by two critical factors. The first of these is simply fear. Very often a woman is totally paralyzed by fear. Her nonaction does not in any way imply consent; rather it is indicative of an effective threat by a rapist to get his way. Secondly, the assumption that a woman should fight back in such a situation is incompatible with a woman's socialization. Throughout her life, a woman is taught to be passive and not fight back verbally or physically. Yet, when her very life is threatened, a woman is expected to ignore all that prior learning and aggressively fight a rapist off. This situation is accurately summed up by a Philadelphia judge: "The definition of force is a male definition... women are

conditioned in our society to passivity." Still women are expected to resist short of endangering their lives to prove nonconsent. According to the new booklet by the National Institute of Criminal Justice, "the detective will also ask you to recall anything you said or did to resist the rapist. These details are important because they support the fact that you did not agree to the sexual act and they are necessary for presentation in court to prove the legal elements of the crime."  

**Corroboration**

The final legal requirement in some jurisdictions is corroboration of the victim's testimony. This also is unique to rape cases. Again the fear of false accusation underlies this element. A major problem with such an evidential requirement is that it contradicts the essential nature of rape. Although rape is definitely not an intimate sexual experience, it seldom takes place in front of numerous witnesses. The corroboration requirement had a unique place in the evolution of rape laws as it developed as one of the few safeguards available to the defendant in the seventeenth century. (The premise was still the fear of false accusation; any possible relevance or applicability has long since been precluded by modern safeguards for the defendant.) In the 1670s, Sir Matthew Hale, Lord Chief Justice of the Court of King's Bench wrote,

> The heinousness of the offense many times inspiring the judge and jury with so much indignation, that they are over hostily carried to the conviction of the accused thereof, by the confident testimony of sometimes malicious and false witnesses.  

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40 Nancy Gager and Cathleen Schurr, Sexual Assault: Confronting Rape in America (New York: Gossett and Dunlap, 1976), p. 141.

41 Forcible Rape, p.6.

A corroboration requirement thus was developed to protect the accused.

Another parallel reason for it was the supposed problem of credibility of the complaining witness. On this, Lord Hale wrote:

The party ravished may give evidence upon oath, and is in law a competent; but the credibility of her testimony, and how far forth she is to be believed, must be left to the jury, and is more or less credible according to the circumstances of fact that concur in testimony... It is one thing whether a witness is admissible to be heard, another thing, whether they are to be believed when heard. 43

Basically, two facts require corroboration; these are penetration and the identification of the defendant as the perpetrator. Corroborative evidence is not restricted to eyewitnesses, but regardless of the shape it takes, "the fact remains that proof of rape in most cases is sufficient only when the evidence is corroborated." 44 The types of corroborative evidence were extensively outlined in Allison v. U.S. 45

Among the 'circumstances' we have deemed corroborative are the following: (1) medical evidence and testimony, (2) evidence of breaking and entering the prosecutrix' apartment, (3) condition of clothing, (4) bruises and scratches, (5) emotional condition of prosecutrix, (6) opportunity of accused, (7) conduct of accused at time of arrest, (8) presence of semen or blood on clothing of accused or victim, (9) promptness of complaints to friends and police, (10) lack of motive to falsify. 46 (emphasis added)

There is at least some consolation in the fact that currently thirty-nine states do not have corroboration requirements.

A related issue to the evidence standards and requirements is the question of appropriate penalty for convicted rapists. Traditionally, the penalty for rape has been severe and there are those who contend that such severity actually has an adverse effect on the rate of conviction (i.e.,

44 Hibey, p. 314.
45 404 Fed. 445 (D.C. Cir. 1968).
46 Hibey, p. 320.
Lord Hale described the historic penalty when he wrote:

Rape was anciently a felony... and was punished by loss of life. But in the process of time that punishment seemed too hard; but the truth is, a severe punishment succeeded in the place thereof; viz. castration and the loss of eyes.  

Indeed, today there are those who advocate castration as punishment for rape but this misses the essential nature of the crime. Rape is a crime of violence not a sexual one. Castration would merely proscribe one type of violence but probably would not eliminate aggression against women.

The other severe punishment for rape has been the death penalty. Since 1930, there have been 455 executions for rape across the country; 90 percent of these were nonwhite defendants.  There are apparent injustices in the application of the death penalty to rape cases. The Supreme Court ruled in Coker v. Georgia (1977) that states may not impose the death penalty for rape cases. In a 7 to 2 ruling, the Court wrote "We have an abiding conviction that the death penalty, which is unique in its severity and irrevocability, is an excessive penalty for the rapist who, as such, does not take human life."  However, the justices were not quite so appreciative of the "female" victim's situation.

We do not discount the seriousness of rape as a crime. It is highly reprehensible, both in a moral sense and in its almost total contempt for the personal integrity and autonomy of the female victim. ... Short of homicide, it is the ultimate violation of self.

Rape is without doubt deserving of serious punishment; but in terms of moral depravity and of the injury to the person and to the public, it does not compare with murder, which does involve the unjustified taking of human life. Life is over for the victim of the murderer; for the rape victim, life may not be nearly so happy as it was, but it is not over and normally is not beyond repair.

47 Hibey, p. 312.
48 Gager, p.
49 "Court bans death penalty for rape," Patrick Oster, Chicago Sun-
Times, June 30, 1974, p. 3.
There must be an equalization of the severity of the crime and the severity of its punishment, but not at the expense of a decreased number of convictions. Currently the penalty for rape in Illinois is a minimum of four years.

III. What a New Law Should Do - The Question of Reform

Having examined the various problem areas in the laws of rape, it is both appropriate and necessary to describe what a new law should do, and offer certain alternatives for reform. The most basic change necessary is to define rape as a crime of violence, not of sex, and have the same evidentiary standards that apply to other felonies. This would mean eliminating the consent and resistance standards as well as the corroboration requirement and evidence of the victim's previous sexual activity. Other general recommendations are to create statutes which clearly and specifically delineate the behavior being governed so that there is no way to put the victim on trial; and to include married women in the protection of the law. A new law would be ideal if it took into account all, or at least most, of the rights of rape victims (as published by the Rape Crisis Center in Washington, D.C.). These include the right to:

- be treated with dignity and respect by institutional and legal personnel
- have as much credibility as a victim of any other crime
- be considered a victim of rape when any unwanted act of sex is forced on her through any type of coercion, violent or otherwise
- be asked only those questions that are relevant to a court case or to medical treatment
- not report the rape to the police
- receive medical and mental health treatment, or participate in legal procedures only after giving her informed consent
- not be exposed to prejudice against race, class, age, lifestyle or occupation
- not be asked questions about prior sexual experience
- be treated in a manner which does not take control from the victim, but which enables her to determine her own needs and how to meet them
- receive medical and mental health services whether or not the rape is reported to the police, and at no cost
- be protected from future assault
- be provided with information about all possible options related to legal and medical procedures
- have her name kept out of the media
- be considered a victim of rape regardless of the assailant's relationship to the victim, such as the victim's spouse
- be provided with information about her rights
- receive medical treatment without parental consent if she is a minor
- have the best possible collection of evidence for court
- have legal representation that supports the victim, if the case goes to court
- be advised of the possibility of a civil suit

The fact that there is a long way to go to achieve reform is illustrated by the comments of a lawyer in Michigan, the state with the most comprehensively reformed rape laws in the country.

I also note with great disapprobation and disgust the rancid, fetid and feeculent efforts of women's libbers and other fascists to change the burden of proof in rape cases to the defendant, who usually has it in practice anyhow. While the prospect of any such change in the law provokes me to vomit, I have a counter proposal to make. . . . When a female has induced the prosecutorial authority to institute a charge of rape against a man, and that man is acquitted, without further delay the prosecutrix shall be carried in a cart to the nearest public square and there dismembered alive, and then hanged by the feet and left to rot in the sun.51

With such attitudes still existing, it is indeed amazing that any reform is effectuated at all.

The most widely discussed proposal for change, and the one generally adopted in new laws, is the idea of defining rape in varying degrees, as is the case with murder. The criterion would be the severity and type of coercion and violence, and the amount of physical and mental

harm caused to the victim. Included in the notion of coercion and violence would be threats of immediate or future harm and physical confinement of the victim. "The degree structure is expected to criminalize assaults where the victim is not seriously physically injured, assaults heretofore often ignored by police and attorneys." Furthermore, it eliminates the "all or nothing" choice a jury is forced to make in its decision to acquit or convict. That is, if a jury is unconvinced that a rape in the first degree occurred, it could convict on the second or third degree. The end result would be the same as the rapist would be incarcerated and therefore taken off the street.

However, not all prosecutors subscribe to the degree model. When asked if he would favor a provision for varying degrees of rape, Assistant State's Attorney David Bailee replied,

No, I think that's a stupid idea. I have no idea why people want to go back to that. We've had those kind of ideas since the turn of the century. It was one of the main steps forward to give up that silliness and I don't know why people want to go back to it. . . . Everything that is taken into account when you go into classes or steps is all taken into account in sentencing now. So why one wants to do that, why you want to take what is one of the simplest, clearest criminal codes in the country and bury it in minutia is beyond me.

Implicit in the degree structure is a recognition of varying amounts of resistance on the victim's part. There is an increasing sensitivity to the subjective nature of resistance and the idea that an absence of resistance does not imply or convey consent. In State v. Herzl, a 1971 Wisconsin case, this changed attitude was well put in the opinion. "The test of whether a woman's will to resist is overcome by threats of imminent physical violence likely to cause great bodily harm is subjective and it need not be

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52 Gager, p. 200.
expressed in terms of fear and incapability to resist in every case." 53
Currently, prosecutors in three states (Ohio, Michigan, and Minnesota) need not prove resistance.

Changes have also been made in several states eliminating the corroboration requirement. In that it is unique to rape cases, it reflects a bias against rape victims and a peculiar mistrust not displayed with regard to victims of other crimes. Recently, seven states have enacted laws which state that a victim's testimony need not be corroborated. Inherent in such laws is the long-awaited recognition of the various pre-trial procedures for expelling false charges from the judicial system. (In actual fact, only 2 percent of rape complaints in 1975 were false.) 54

A key area of reform, both actually and potentially, is the prior sexual history of the victim. The humiliating and embarrassing questions asked in this vein though irrelevant to the case have had the distinct effect of putting the victim on trial. The reforms made reflect a policy that all women not just virgins are to be protected by the law. As Michigan law professor Yale Komisar explains, "The very least that can be done is that this sort of argumentative cross-examination implying lack of chastity on the part of the victim should not go on. It simply should not be allowed. There should be legitimate questions. Period." 55

The general trend is to only allow evidence of prior sexual relations with the defendant or to show the origin of disease, pregnancy, or semen. This is the case in Michigan, Florida, Iowa, Indiana, California, Texas, Ohio, Oklahoma, and Illinois. The admissibility of any such evidence is determined in an in camera hearing in the judge's chambers where the standard

53 Landau, p. 22.
54 Harris, p. 626.
test is if its prejudicial nature does not outweigh its probative value, it is admissible. In California, a woman can be questioned about her sexual conduct only if the judge, after a special hearing, finds it useful as a "measure of her credibility." The Texas statute on the subject (Sec. 21.13 of the Texas Penal Code) reads:

(a) Evidence of specific instances of the victim's sexual conduct, opinion evidence of the victim's sexual conduct, and reputation evidence of the victim's sexual conduct may be admitted under Sections 21.02 through 21.05 of this code... only if and only to the extent that, the judge finds that the evidence is material to a fact at issue in the case and that its inflammatory or prejudicial nature does not outweigh its probative value.

In no state can a legally married woman charge her husband with rape. The "rationale [of rape laws] is that marriage raises an irreputable presumption of consent to sexual contact with one's spouse."56 In the seventeenth century, Lord Hale developed this concept:

But the husband cannot be guilty of a rape committed by himself upon his lawful wife, for by their mutual matrimonial consent and contract the wife hath given up herself in this kind unto her husband, which she cannot retract.57

The exception recognized by Lord Hale is reflected in current statutes in that a husband can be named in the first degree if he hires someone to rape his wife. The only other exception to the spouse exemption is in Michigan, Wisconsin, and Ohio where charges of rape can be brought against the husband if the couple is living apart and entered into written separation or action for an annulment or divorce is pending.

Rape has traditionally been defined as the unlawful carnal knowledge of a woman, by a man, by force and against her will. Reform of rape law includes not only changing the terminology used to describe the act,

57 Lord Hale quoted by Sasko and Sesek, p. 470.
but also expanding the definition to include forced oral and anal sex, and penetration of an orifice by an instrument other than the sex organ. Thus, in Ohio, the rape law covers both heterosexual and homosexual assaults, and the statutes in Michigan, Wisconsin, and Washington are not sex-specific (i.e., either a man or a woman can bring charges of rape).

Various other elements from the victim's 'Bill of Rights' have been incorporated in recently revised legislation. Four states (Florida, Georgia, South Carolina, and Wisconsin) specifically proscribe the publication of the name or identity of the victim, while in Ohio, the court can order suppression of such information upon request of either the victim or the offender. Also in Ohio, during the in camera hearing, the 'victim may be represented by counsel; and in the event of indigency or inability to obtain counsel, the court upon request shall appoint counsel without cost to the victim.'\(^{58}\) Four states (California, Minnesota, Nevada, and Ohio) provide for the medical care given rape victims to be paid for, while under the Rape Victim's Emergency Treatment Act in Illinois, hospitals can be reimbursed by the Department of Public Health for the services they give victims.

The Wisconsin Model

The state of Wisconsin changed its rape law in 1975, effective 1976. It incorporates many of the proposed reforms and is a good model of what a new law should be. The old law was quite brief. W.S.A. Section 944.01 entitled "Rape" read:

1. Any male who has sexual intercourse with a female he knows is not his wife, by force and against her will, may be imprisoned not more than 50 years.

\(^{58}\) Sasko and Sesek, pp. 468-69.
(2) In this section, the phrase 'by force and against her will' means either that her utmost resistance is overcome or prevented by physical violence or that her will to resist is overcome by threats of imminent physical violence likely to cause great bodily harm.

The old version was typical in that it specified the sex of the offender and of the victim; it limited the type of sexual assault to penile vaginal intercourse; it precluded prosecution between spouses; and it included a specific resistance standard. By marked contrast, the new law is divided into several degrees and is not sex specific except for the reference to a resulting pregnancy in (1a). The new statute, W.S.A. Section 940.225 is entitled 'Sexual Assault' and it reads as follows:

(1) First degree sexual assault. Whoever does any of the following shall be fined not more than $15,000 or imprisoned not more than 15 years or both:
(a) Has sexual contact or sexual intercourse with another person without consent of that person and causes pregnancy or great bodily harm to that person.
(b) Has sexual contact or sexual intercourse with another person without the consent of that person by use or threat of use of a dangerous weapon or any article used or fashioned in a manner to lead the victim reasonably to believe it to be a dangerous weapon.
(c) Is aided or abetted by one or more persons and has sexual contact or sexual intercourse with another person without consent of that person by use or threat of force or violence.
(d) Has sexual contact or sexual intercourse with a person 12 years of age or younger.

(2) Second degree sexual assault. Whoever does any of the following shall be fined not more than $10,000 or imprisoned not more than 10 years or both:
(a) Has sexual contact or sexual intercourse with another person without consent of that person by use or threat of force or violence.
(b) Has sexual contact or sexual intercourse with another person without consent of that person and causes injury, illness, disease or loss or impairment of a sexual or reproductive organ, or mental anguish requiring psychiatric care for the victim.
(c) Has sexual contact or sexual intercourse with a person who suffers from a mental illness or deficiency which renders that person temporarily or permanently incapable of, praising the person's conduct, and the defendant knows of such condition.

(d) Has sexual contact or sexual intercourse with a person who the defendant knows is unconscious.

(e) Has sexual contact or sexual intercourse with a person who is over the age of 12 years and under the age of 18 years without consent of that person, as consent is defined in sub. (4).

(3) Third degree sexual assault. Whoever has sexual intercourse with a person without the consent of that person shall be fined not more than $5,000 or imprisoned not more than 5 years or both.

(3m) Fourth degree sexual assault. Whoever has sexual contact with a person without the consent of that person shall be fined not more than $500 or imprisoned not more than one year in the county jail or both.

(4) Consent. "Consent," as used in this section, means words or overt actions by a person who is competent to give informed consent indicating a freely given agreement to have sexual intercourse or sexual contact. A person under 15 years of age is incapable of consent as a matter of law. The following persons are presumed incapable of consent but the presumption may be rebutted by competent evidence:

(a) A person who is 15 to 17 years of age.

(b) A person suffering from a mental illness or defect which impairs capacity to appraise personal conduct.

(c) A person who is unconscious or for any other reason is physically unable to communicate unwillingness to an act.

(5) Definitions. In this section:

(a) "Intimate parts" includes the breast, buttock, anus, penis, vagina or pubic mound of a human being.

(b) "Sexual contact" means any intentional touching of the intimate parts, clothed or unclothed, of a person to the intimate parts, clothed, of another, or the intentional touching by hand, mouth or object of the intimate parts, clothed or unclothed, of another, if that intentional touching can reasonably be construed as being for the purpose of sexual arousal or gratification or if such touching contains the elements of actual or attempted battery as defined in s. 940.20.

(c) "Sexual intercourse" includes the meaning assigned under s. 939.22(36) as well as 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 opening of another, but emission of semen is not required.

(6) No prosecution of spouse. No person may be prosecuted under this section if the complainant is the legal spouse, unless the parties are living apart and one of them has filed for an annulment, legal separation or divorce.
This statute exemplifies the use of varying degrees to reflect the different amounts of force used and/or harm perpetrated on the victim. Moreover, it makes use of more reasonable penalties which are in line with the severity of the offense. The other major, important feature is that rape is redefined as sexual assault and is made to include other forms of sexual penetration or contact. Finally, the concept of consent is rather specifically defined, removing it from the interpretation of the courts. It is reassuring to discover that at last mere words are enough to convey nonconsent. It is often contended that "legislatures must stop concentrating their attention on the victim's conduct but rather should focus on the offender's criminal behavior."59 The Wisconsin model is one such response and is indeed a viable alternative.

The Michigan Model

The most comprehensive rape reform legislation was enacted in the state of Michigan in 1975. It has become the model for other states wishing to revise all or parts of their rape statutes. It represents the culmination of active lobbying and research on the part of women's groups, and the central recognition that existing legislation was insufficient to deal with the growing epidemic of rape. Michigan was the first state to attempt and accomplish major revamping of its laws, and "while the new Michigan law has not answered every reform needed, it comes closest to any existing model in the country today."60 Rape is the only crime in which the action or nonaction of the victim has occupied more legal attention than the criminal's behavior. The new Michigan law at last shifts the focus to where it belongs, on the criminal, whom the law is supposed to regulate."61

59Sasko and Sesek, p. 477.
60Gager and Schurr, p. 201.
Specifically, the new law redefines rape as sexual assault, and
extends the definition to include sexual contact, oral and anal intercourse, and penetration by any object. The statute is divided into degrees and it is important to note that sexual assault in the fourth degree is a misdemeanor and not a felony as are the other degrees. It deals with virtually every earlier objection to rape laws and procedures. The issue of nonconsent is removed because if the act were not "against her will," the victim would not have brought charges. It should be readily apparent that the new law is predicated on a basic trust in both the victim and the judicial system, rather than on the ancient mistrust which assumed vindictive women would falsely cry rape. Furthermore, the statute specifically states that corroboration is not necessary, and that resistance is not required to prove force. The law goes even further in that the prior sexual history of the victim is prohibited as evidence (with a few defined exceptions). Like the Wisconsin statute, Michigan's is sexually neutral with the victim being defined merely as "the person alleging to have been subjected to criminal sexual conduct." The new law is very much in touch with the realities of rape and goes the furthest to depoliticize the crime. Under this statute there is little room for judicial interpretation or creations of evidence standards. Perhaps with these reforms, the victim will no longer be made to feel she is on trial.

The old Michigan statute was typical of rape laws. It was short, vague and subject to unequitable judicial interpretation. M.C.L.A. 750.520 was entitled "Carnal Knowledge" and it read:

Any person who shall ravish and carnally know any female of the age of 16 years, or more, by force and against her will, or who shall unlawfully and carnally know and
abuse any female under the full age of 16 years, shall be guilty of a felony, punishable by imprisonment in the state prison for life or for any term of years, or if such person was at the time of said offense a sexually delinquent person, may be punishable by imprisonment in the state prison for an indeterminate term, the minimum shall be 1 day and the maximum shall be life. Such carnal knowledge shall be deemed complete upon proof of any sexual penetration however slight.

That statute dated from 1857 and consequently embodies many of the old notions about rape. The expression "ravish and carnally know" is a Biblical one which is scarcely adequate to describe rape. At least one author contends that "the word 'knowledge' tends to upgrade and intellectualize a violent crime, while de-emphasizing the criminal hostility associated with rape." 62

The new law is a radical departure from the ancient influence exhibited in the old one, as well as from the biased traditions extracted from it in 117 years of case law. The current law (M.C.L.A. 750.520) is reprinted in the Appendix.

Despite the enthusiastic reception which greeted this new legislation, rape reform is not without its critics. The lawyer quoted in Section III was voicing his outrage at this very bill. Other opponents include an Assistant State's Attorney for Champaign County. David Bailie contends that prosecutors in Michigan dislike the new law because it makes their jobs more difficult. He is of the opinion that the people who think Michigan has a "tremendous law" are mistaken. Certainly as a prosecutor, Bailie's opinion must be listened to, but not at the expense of foregoing progressive legislation which affords more equitable treatment of rape victims.

62 Gager and Schurr, p. 131.
IV. Reform in Illinois

Illinois has traditionally been thought of as a leader in the reform of criminal procedure. Yet, regarding the crime of rape, this state lags far behind, particularly because most recent attempts at reform have failed. The current law on rape in Illinois is found in Chapter 38, Article II:

Rape. (a) A male person of the age of 14 years and upwards who has sexual intercourse with a female, not his wife, by force and against her will, commits rape. Intercourse by force and against her will includes, but is not limited to, any intercourse which occurs in the following situations:
(1) where the female is unconscious; or
(2) where the female is so mentally deranged or deficient that she cannot give effective consent to intercourse.
(b) Sexual intercourse occurs when there is any penetration of the female sex organ by the male sex organ.
(c) Penalty. A person convicted of rape shall be imprisoned in the penitentiary for an indeterminate term with a minimum of not less than 4 years.

David Bailie calls this statute "the clearest statement of the crime of rape in the country." However, in light of the foregoing critique of rape laws and procedures, it is certainly inadequate in many respects. Governor Thompson vetoed measures designed to revise the law, but even the revisions would not have been as far-reaching as those in Michigan.

Specifically, three measures were put before the governor of which he vetoed one, amended another, and approved the third. The first, HB1185, while not dividing the crime into degrees, would have created two categories of rape. The current definition would comprise the first category and retain the title 'rape.' Additionally, the idea of force would have
extended to include "threat of force;" and it expanded the definition of those women incapable of giving effective consent to include women institutionalized and attacked by an employee of the facilities. Rape would still be limited to penile penetration of the vagina. Under this bill, the crime would be a Class 2 felony punishable by 1 to 20 years in the penitentiary. (The current statute defines rape as a Class 1 felony with a minimum 4 year sentence. In Illinois, a Class 1 is a more serious offense than a Class 2.) The other classification would have been "Aggravated Rape," which is rape as previously defined, committed under one of the following circumstances:

The male person...  
(1) Is armed with a dangerous weapon; or  
(2) inflicts bodily harm upon the female; or  
(3) Commits another felony upon the female; or  
(4) Wears a hood, robe, mask or conceals his identity; or  
(5) Enters by deception or by force into a dwelling or a temporary place of lodging and therein commits rape; or  
(6) Commits rape with a female under the age of 14.

Aggravated rape would be a Class 1 felony. This bill passed both houses on June 28, 1977 and was vetoed by the governor on September 22. The other portion of the bill dealt with "deviate sexual conduct," which would have been renamed "Criminal Sexual Assault." It was here that other forms of sexual intrusion were dealt with (i.e., oral or anal intercourse and the insertion of foreign objects into the victim's sex organs). This would be a Class 2 felony. Aggravated criminal sexual assault would be subject to the same set of circumstances as aggravated rape and would also be a Class 1 felony. In vetoing the bill, Thompson maintained that it would create "two artificial classes of rape when the crime should be considered equally heinous no matter how it occurs."

Although this may be

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theoretically true, it ignores the realities of the situation. Not all rape cases are the same, and it is indeed an injustice to presume a rape did not occur simply because violence was not involved.

Another measure of the same legislation was HB760 which dealt with the admissibility of evidence of the victim's previous sexual history. This bill was given an amendatory veto by Governor Thompson on September 16, and subsequently approved. Therefore, according to current legislation in Illinois, rape victims can no longer be made to testify about their past sexual conduct. The exception, like that in most states, is evidence of previous sexual encounters with the accused. Such evidence, along with opinion evidence of the victim's reputation for sexual promiscuity, must first be determined admissible by the judge during an in camera hearing. Even such a mild reform as this is not without its critics. Opponents complained that it would allow a prostitute to cry "rape" and get away with it. The bill's sponsor, Senator Harold Washington, succinctly summarized the meaning of the politics of rape when he responded, "We exhibit an extreme male chauvinist attitude when we assume a prostitute can't be raped." 64

The single measure of this package of rape bills unconditionally approved by the governor was HB637. It authorizes the Illinois Department of Public Aid to provide free medical services to rape victims, including the tests to secure the necessary evidence. Finally, a bill which was tabled on April 30, 1977 (HB1938) would have made "opinion evidence, reputation evidence or evidence of specific instances of the victim's sexual conduct with anyone other than the defendant" inadmissible as evidence to prove consent. Thus the attempt to reform Illinois' legislation

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64"Rape victims no longer must testify on sex life," Chicago Daily News, November 5, 1977, p. 47.
on rape have been piecemeal and only minimally successful at that. It
should be apparent that sweeping reform is the only logical way to
correct the current injustices and effectively minimize the political
nature of the crime of rape.

Using the Michigan model as a basis, a new law in Illinois should
broaden the concept of rape and provide for varying degrees of the crime.
It is questionable whether it should be sex specific or not. Rape, or
sexual assault, is a certain abuse of a woman and to make it gender free
actually detracts from the existing reality. While a nonsex specific
statute would virtually eliminate the political character of the crime,
it is important to realize that rape mirrors the power relations between
men and women; and more is involved in changing that relationship than the
semantics of a particular statute. After considering these objections
though, it would be of value to include at least one sex-free provision
among the varying degrees. The other major concept which should be em-
bodyied in a new law is a deemphasis of the sexual aspects of the crime and
a manifest recognition that rape, and all sexual assault, are crimes of
violence motivated by hostility. Finally, the new law need not include
references to consent, corroboration, resistance nor an exemption on
marital rape.

**A Proposed Statute**

**Definitions:**

1. "Intimate parts" includes the genital area
   and sex organs, groin, inner thigh, buttock,
   or breast of an individual.
2. "Personal injury" means bodily injury, dis-
   figurement, mental anguish, chronic pain,
   pregnancy, disease, or loss or impairment
   of a sexual or reproductive organ.
(3) "Sexual contact" includes the intentional touching of the victim's or defendant's intimate parts, or of clothing covering said parts.
(4) "Sexual penetration" means sexual intercourse, cunnilingus, fellatio, anal intercourse, or any other intrusion, however slight, of any part of a person's body or of any object into the genital or anal openings of another person’s body, but emission of semen is not required.

First degree sexual assault is sexual penetration perpetrated on the victim in any of the following circumstances:

1. The victim is less than 13 years of age.
2. Sexual penetration occurs under circumstances involving the commission of any other felony.
3. Force, threat of force, either immediate or in the future, coercion or deception is used to accomplish sexual penetration.
4. A weapon is used to accomplish sexual penetration.
5. Personal injury is caused to the victim.

Punishable by imprisonment of not less than 15 years.

Second degree sexual assault is sexual contact perpetrated on the victim in any of the circumstances delineated in 1 through 5 above.

Punishable by imprisonment of not more than 15 years.

Third degree sexual assault is sexual penetration perpetrated on the victim in any of the following circumstances:

1. The victim is between 13 and 17 years of age.
2. Force, threat of force, either immediate or in the future, deception or coercion is used to accomplish sexual penetration.

Punishable by imprisonment of not more than 15 years.

Fourth degree sexual assault is sexual contact perpetrated on the victim and force, threat of force, either immediate or in the future, coercion or deception occurs.

Punishable by imprisonment of not more than 5 years.

The testimony of the victim need not be corroborated.

The victim need not resist the defendant.

Evidence of the victim's prior sexual conduct shall be restricted to evidence of specific instances of sexual conduct with the defendant, or to show the origin of semen, pregnancy or disease.
Such evidence shall be admissible following a determination by the judge in an in camera hearing. At any such hearing the victim is entitled to counsel and if he/she cannot afford an attorney, the court shall appoint one without charge.

Upon request of the victim or defendant, the court may order the suppression of the names of the victim and defendant and all other details of the offense until such time as the request is rescinded.

Prosecution under this statute is not limited to persons unrelated, by blood or marriage, to the victim.

Conclusion

Rape reform legislation is at once a necessity and a difficulty. It involves a virtual reversal of many long-held attitudes and a recognition that the law must regulate the actions of the rapist not the victim. Current reform in Michigan has provided the foundation for reform in other states, including Wisconsin. The central features are the division of rape into different degrees which reflect the varying amounts of force involved and corresponding punishment; a redefinition of rape as sexual assault, inclusive also of sodomy and previously defined deviate sexual conduct; and gender-free terminology. The courts have long been arenas for trying the victim, judging her a "good woman or a whore" rather than determining the guilt or innocence of the defendant. Judicial interpretations of rape statutes have resulted in evidence standards for rape not found in other crimes. New legislation must specifically outlaw corroborations and resistance requirements, and exclude consent as an issue. Regulations must be imposed on the admissibility of a victim's sexual history. The laws have evolved and seem to be departing from the property codes into which rape was first introduced. This is certainly the direction of progress, but it must be accomplished by a change in
attitude, particularly on the part of the police. In this regard, the development of specially-trained rape squads is of value. All the various legal institutions are drawn into play in the definition of the politics of rape. Rape is political because it represents the dominance of one entire class of people over another entire class. This is true of the crime itself and unfortunately also true of the legal systems which legislate, investigate, and try rape cases. Reform is not the total solution, nor is it perfect. But perhaps if the law is changed, a change in people's attitudes will follow.
750.520a Definitions

Sec. 520a. As used in sections 520a to 5201:

(a) "Actor" means a person accused of criminal sexual conduct.
(b) "Intimate parts" includes the primary genital area, from inner thigh, buttock, or breast of a human being.
(c) "Mentally defective" means that a person suffers from a mental disease or defect which renders that person temporarily or permanently incapable of appraising the nature of his or her conduct.
(d) "Mentally incapacitated" means that a person is rendered temporarily incapable of appraising or controlling his or her conduct due to the influence of a narcotic, anesthetic, or other substance administered to that person without his or her consent, or due to any other act committed upon that person without his or her consent.
(e) "Physically helpless" means that a person is unconscious, asleep, or for any other reason is physically unable to communicate unwillingness to an act.
(f) "Personal injury" means bodily injury, disfigurement, mental anguish, chronic pain, pregnancy, disease, or less or impairment of a sexual or reproductive organ.
(g) "Sexual contact" includes the intentional touching of the victim's or actor's intimate parts or the intentional touching of the clothing covering the immediate area of the victim's or actor's intimate parts, if that intentional touching can reasonably be construed as being for the purpose of sexual arousal or gratification.
(h) "Sexual penetration" means sexual intercourse, cunnilingus, fellatio, anal intercourse, or any other intrusion, however slight, of any part of a person's body or of any object into the genital or anal openings of another person's body, but emission of semen is not required.
(i) "Victim" means the person alleging to have been subjected to criminal sexual conduct.

Sec. 502b. (1) A person is guilty of criminal sexual conduct in the first degree if he or she engages in sexual penetration with another person and if any of the following circumstances exists:

(a) That other person is under 13 years of age.
(b) The other person is at least 13 but less than 16 years of age and the actor is a member of the same household as the victim, the actor is related to the victim by blood or affinity to the fourth degree to the victim, or the actor is in a position of authority over the victim and used this authority to coerce the victim to submit.
(c) Sexual penetration occurs under circumstances involving the commission of any other felony.
(d) The actor is aided or abetted by 1 or more other persons and either of the following circumstances exists:
(i) The actor knows or has reason to know that the victim is mentally defective, mentally incapacitated or physically helpless.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(ii) The actor uses force or coercion to accomplish the sexual contact. Force or coercion includes but is not limited to any of the circumstances listed in sections 520b(1)(f)(1) to (v).
(e) The actor is armed with a weapon, or any article used or fashioned in a manner to lead a person to reasonably believe it to be a weapon.

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

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

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

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

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

(b) Force or coercion is used to accomplish the sexual penetration. Force or coercion includes but is not limited to any of the circumstances listed in section 520b(11)(f)(i) to (v).

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

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

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

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

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

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

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

(2) For purposes of this section, an offense is considered a second or subsequent offense if, prior to conviction of the second or subsequent offense, the actor has at any time been convicted under section 520b, 520c, or 520d or under any similar statute of the United States or any state for a criminal sexual offense including rape, carnal knowledge, indecent liberties, gross indecency, or an attempt to commit such an offense.
Sec. 520g. (1) Assault with intent to commit criminal sexual conduct involving sexual penetration shall be a felony punishable by imprisonment for not more than 10 years.

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

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

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

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

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

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

Sec. 520k. Upon the request of the counsel or the victim or actor in a prosecution under sections 520b to 520g the magistrate... shall order the names of the victim and actor and details of the alleged offense be suppressed...

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


