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FORCIBLE RAPE AND STATUTORY RAPE: THE DELICATE BALANCE BETWEEN THE RIGHTS OF VICTIM AND DEFENDANT

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INTRODUCTION

In the past several years, the subject of rape has been extensively discussed, particularly by feminists and other advocates of women's rights who have viewed the topic as a condition of injustice and oppression that women endure in our society. Susan Brownmiller, the author of a best seller which covered the history and sociology of rape, as well as its current status in the law, stated that rape is a "conscious process of intimidation by which *all men* keep *all women* in a state of fear."[1]

Numerous articles have recently appeared advocating changes in the criminal laws on sexual offenses.[2] Criticism of current rape law is principally directed at three aspects of the law which are viewed as unjust and unnecessary obstacles to the successful prosecution of sexual offenses. These obstacles are: (1) the requirement that the complainant resist her assailant unless force or the threat of force sufficient to cause bodily injury was used to gain her submission; (2) the evidentiary rules that permit a defense attorney to question the moral character of the complainant in an effort to suggest her consent to the sexual act; and (3) the corroboration requirement that exists in a minority of jurisdictions and prevents the prosecution's case from reaching the fact-finder on the complainant's testimony alone.

This article will take into account the above considerations in examining the changing status of the law of both forcible and

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1. S. BROWNMILLER, AGAINST OUR WILL 15 (1975) (emphasis in original) [hereinafter cited as BROWNMILLER].

2. *See, e.g.*, Bohmer, *Judicial Attitudes Toward Rape Victims*, 57 JUD. 303 (1974); Comment, *Rape and Rape Laws: Sexism in Society and Law*, 61 CAL. L. REV. 919 (1973) [hereinafter cited as *Rape and Rape Laws*]; Comment, *If She Consented Once, She Consented Again—A Legal Fallacy in Forcible Rape Cases*, 10 VAL. U.L. REV. 127 (1976) [hereinafter cited as *A Legal Fallacy*]; Comment, *Rape Victim: A Victim of Society and the Law*, 11 WILLAMETTE L.J. 36 (1974); Note, *The Victim in a Forcible Rape Case: A Feminist's View*, 11 AM. CRIM. L. REV. 335 (1973).

statutory rape. The ensuing analysis of recent case law will indicate the trends that appear to be developing as a result of the efforts of reformers to eliminate the prejudices and legal barriers which have made the prosecution of sex offenders a particularly trying experience for the victims. Some of these cases illustrate that a rigid interpretation of the laws tends to place unreasonable expectations upon the conduct of the victim by assuming that her accusation is inherently unreliable. In other cases, however, insightful jurists demonstrate that there remains a need to protect the rights of defendants against an accusation long described as one which is easily made, difficult to prove, and even more difficult to defend against.[3]

FORCIBLE RAPE

Elements of the Offense

The three principle elements of the crime of forcible rape that the prosecution must prove are identity, penetration, and force.

Identity

Although the accused must be identified in any criminal prosecution, identification poses special problems for the rape victim in jurisdictions where the victim's testimony must be corroborated.[4] Some states, such as Illinois, follow a modified cor-

3. 1 M. HALE, THE HISTORY OF THE PLEAS OF THE CROWN 635 (1778).

4. GA. CODE ANN. § 26-1301 (1972), *construed in* Strickland v. State, 207 Ga. 284, 61 S.E.2d 118 (1950) (corroboration of evidence of female alleged to have been raped is essential to convict); IDAHO CODE § 18-6101 (1947), *construed in* State v. Bowler, 40 Idaho 74, 231 P. 706 (1924); State v. Trego, 25 Idaho 625, 138 P. 1124 (1914); State v. Anderson, 6 Idaho 706, 59 P. 180 (1899) (corroboration required if the complainant's testimony is contradictory or her reputation for truthfulness is impeached); MINN. STAT. ANN. § 617.02 (West 1964), *construed in*, State v. Siebke, 216 Minn. 181, 12 N.W.2d 186 (1944) (testimony of an underage complainant necessary where there are facts casting doubt on its truth); MISS. CODE ANN. § 97-3-69 (1972) ("[N]o person shall be convicted upon uncorroborated testimony of the injured female"); MO. STAT. ANN. § 559.260 (Vernon 1953), *construed in* State v. Mitchell, Sup., 86 S.W.2d 185 (1935), State v. Wade, 306 Mo. 457, 268 S.W.2d 52 (1924), State v. Cox, Sup., 263 S.W. 215 (1924) (corroboration necessary only if the testimony of the prosecutrix is contradictory and unconvincing); NEB. REV. STAT. §§ 28-408.02.-408-04 (1943), *construed in* State v. Garza, 187 Neb. 407, 412, 191 N.W.2d 454, 457 (1971) (corroboration needed for the material facts and circumstances of the crime which will tend to support the complainant's testimony); TENN. CODE ANN. § 39-3706 (1975) (no conviction for statutory rape "on the unsupported testimony of the female in question"); TEX. PENAL CODE ANN. tit. 2, § 21.02 (Vernon Supp. 1976-77), *construed in* Hindman v. State, 152 Cr.R. 75, 211 S.W.2d 182 (1948) (corroboration necessary where there is neither an outcry nor prompt complaint); V.I. CODE ANN. tit. 14, § 1706 (1957) ("no conviction can be had for rape upon the testimony of the female defiled, unsupported by other evidence").

In People v. Linzy, 31 N.Y.2d 99, 286 N.E.2d 440, 335 N.Y.S.2d 45 (1972),

roboration rule that allows an uncorroborated identification by a complainant to go to the jury only if her testimony is clear and convincing on its face.[5] For example, in *People v. Appleby*[6] the alleged rape occurred at night in the complainant's unlit bedroom. She was only able to identify her assailant by the light coming from a 60 watt bulb in the bathroom. The appellate court reversed the defendant's conviction, holding that the complainant's testimony alone was insufficient to establish a clear and convincing identification of the defendant.

If the defendant chooses to base his defense on the claim that the prosecutrix made a faulty identification, he is generally barred from introducing evidence of her reputation for unchastity, either for the purpose of establishing consent or for the tactical advantage of diminishing the prosecutrix's credibility in the eyes of the jury. The rationale behind this rule is well expressed in an opinion of the Tenth Circuit which states:

> [I]n rape prosecutions the law does not allow the complaining witness's character to be put in issue ordinarily when the defense is alibi and . . . generally it is only allowed when the defense is one of consent.
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> . . . The very nature of the alibi defense raises no issue that the crime charged did not in fact occur. It simply raises the issue that it could not have involved the accused. It is therefore inconsistent to permit an accused who presents an alibi defense to present evidence of the prosecutrix's character which goes beyond evidence of her general reputation in public opinion.[7]

Penetration

Another essential element of the offense of rape is proof of

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the complainant's identification of the accused was held to be insufficiently corroborated under New York's old corroboration rule (N.Y. Penal Law 1965, § 130.15), even though she accurately described his car and a ring he was wearing when arrested. There was no doubt in the court's mind that the complainant had, in fact, been forcibly raped. When she reported the assault she was bruised, disheveled, and emotionally disturbed, and there was medical verification of coitus. The court felt compelled by statute to reverse the defendant's conviction, but it called upon the state legislature to dispense with corroboration requirements for rape convictions. *Id.* at 104, 286 N.E.2d at 443, 335 N.Y.S.2d at 49. New York's strict corroboration requirement was modified in 1974; *see* note 87 *infra*. For an interesting method of identification see State v. McClinton, 265 S.C. 171, 217 S.E.2d 584 (1975), where the court held that identification of assailant by teeth marks on his hand and a description of his pants by the rape victim adequately supported a finding of identity in lieu of visual recognition.

5. *See, e.g.*, People v. Morrow, 132 Ill. App. 2d 293, 300, 270 N.E.2d 487, 492 (1971) (identification made from the flickering light of a cigarette lighter that was used to intimidate the victim was held to be insufficient corroboration).

6. 104 Ill. App. 2d 207, 244 N.E.2d 395 (1968).

7. United States v. Spoonhunter, 476 F.2d 1050, 1057 (10th Cir. 1973).

penetration.[8] The penetration may be slight,[9] and ejaculation is not necessary,[10] although the presence of spermatozoa within the sexual organ of the complainant is persuasive evidence in establishing this element of the offense.[11] The requirement that the victim's sexual organ be penetrated by the defendant's is strict, and conduct such as oral copulation or anal intercourse is prosecuted not as rape but as sodomy.[12]

If there has been no penetration, the prosecution has, at most, a case of assault with intent to rape.[13] This principle of

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8. Joe v. United States, 510 F.2d 1038 (10th Cir. 1975); People v. Shivers, 29 Ill. App. 3d 359, 330 N.E.2d 288 (1975).

9. *In re* Williams, 24 Ill. App. 3d 593, 596, 321 N.E.2d 281, 284 (1975) (any penetration of the female sex organ by the male sex organ, however slight, is sufficient). *But see* State v. Williams, 111 Ariz. 175, 177, 526 P.2d 714, 716 (1974) (mere contact between sexual organs is insufficient).

10. *See, e.g.*, Young v. Paderick, 378 F. Supp. 1143 (W.D. Va. 1974); State v. Williams, 111 Ariz. 175, 177, 526 P.2d 714, 716 (1974).

11. Penetration can be proven by circumstantial evidence, or, in a jurisdiction not requiring corroboration, by the testimony of the prosecutrix, in which case a credibility question will often arise for resolution by the fact-finder. A physician attending the victim immediately after the alleged assault is perhaps the best witness to establish penetration. There are, however, restrictions concerning the admission of a doctor's examination. For example, see People v. Kirtdoll, 391 Mich. 370, 217 N.W.2d 37 (1974), where the court applied a species of the best evidence rule in reversing a rape conviction because the prosecution failed to exercise sufficient effort to produce the attending physician indorsed on the information on the ground that he had left the jurisdiction; People v. McGillen, 392 Mich. 278, 220 N.W.2d 689 (1974), where it was held to be reversible error for a doctor to testify to penetration when a second rape occurred subsequent to the charged offense, and before the victim was examined by the physician.

12. *But cf.* DEL. CODE tit. 11, § 763(b) (Supp. 1977) which is illustrative of the debate over the attempted broadening of the definition of rape. By recent legislative enactment, the definition of rape has been broadened in Delaware to include non-genital sexual intercourse. The Supreme Court of Delaware upheld the constitutionality of the statute in Martin v. State, 346 A.2d 158 (Del. 1975). However, in State v. Doe, 351 A.2d 84 (Super. Ct. 1976), the Delaware Superior court held that the new statute did not permit a rape prosecution for penetrating an orifice of the victim's body with something other than his own sexual organ. In response to the *Doe* decision, the Delaware legislature specifically included the act of cunnilingus in the definition of sexual intercourse. DEL. CODE tit. 11 § 773 (Supp. 1976).

The statutes which define sodomy are often broadly written, occasionally vague, and usually set a less severe penalty than for rape. For example, the Mississippi statute states that "every person who shall be convicted of the detestable and abominable crime against nature committed with mankind or with a beast, shall be punished by imprisonment in the penitentiary for a term of not more than ten years." MISS. CODE ANN. § 97-29-59 (1972). However, the penalty for forcible rape on any female under 12 by any person 18 years or older is death, or life imprisonment. MISS. CODE ANN. § 97-3-65(1) (Supp. 1977), although Furman v. Georgia, 408 U.S. 238 (1972) would prohibit that death penalty as enacted. Generally, the statutes do not distinguish between consensual and nonconsensual sodomy.

13. *See* People v. Hamil, 20 Ill. App. 3d 901, 906, 314 N.E.2d 251, 255 (1974) where the court stated:

To support a conviction for attempt [sic] rape, the proof of which in-

law resulted in a reversed rape conviction in *State v. Torres*[14] where the nine year old victim testified that the defendant had undressed her and himself, rubbed his penis against her vulva, and ejaculated. The Arizona Supreme Court held that the defendant's actions were insufficient to sustain a conviction for rape because the state had not proven beyond a reasonable doubt that there was penetration.[15] However, the court added that the defendant's conduct was certainly "despicable" and although it did not amount to rape, was probably sufficient to find him guilty of another criminal offense.[16]

Force

The crime of rape does not occur unless the sexual act is against the will of the complainant.[17] The prosecution must therefore establish that the defendant used force or the threat of force to overcome the complainant's will to resist. Failure to resist, coupled with a lack of force or the threat of force, will lead to a presumption that the sexual intercourse was consensual. The Illinois Court of Appeals in *People v. Wilcox* stated:[18]

> If the complaining witness has the use of her faculties and physical powers the evidence must show such resistance as will demon-

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cludes every element of the crime of rape except penetration, the evidence must show that the male person intended to have carnal knowledge of the female person against her will by means of force and that he took a substantial step toward accomplishing that purpose.

The prosecution must prove that there was an assault upon the complainant which was conducted with the *intent* to engage in sexual intercourse. Houge v. State, 54 Ala. App. 682, 312 So.2d 86 (1975); Charles v. State, 328 N.E.2d 455 (Ind. App. 1975). The prosecution must also show that it was the purpose of the assailant to carry into effect his intent with force and against the will of the complainant. Baber v. United States, 324 F.2d 390 (D.C. Cir. 1963) (quoting Hammond v. United States, 127 F.2d 752 (D.C. Cir. 1942)).

14. 105 Ariz. 361, 464 P.2d 953 (1970).

15. *Id.* at 363, 464 P.2d at 955.

16. *Id. See also* Newton v. Commonwealth, 212 Va. 415, 184 S.E.2d 808 (1971). *But cf.* Ogden v. Wolff, 522 F.2d 816 (8th Cir. 1975), *cert denied*, 427 U.S. 911 (1976) (no error in a rape conviction even where the prosecutrix testified that the defendant was unable to penetrate her).

17. Rape is often defined as sexual intercourse against the will of the complainant. *See, e.g.*, IND. CODE ANN. § 35-42-4-1 (Burns Supp. 1976) (effective after Oct. 1, 1977); WASH. REV. CODE ANN. § 9.79.180 (Supp. 1977).

In People v. Stanworth, 11 Cal. 3d 588, 605 n.15, 522 P.2d 1058, 1070 n.15, 114 Cal. Rptr. 250, 262 n.15 (1974), the court stated that "the essential guilt of rape consists in the outrage to the person and feelings of the female." The court, however, sustained the defendant's conviction for rape even though the facts were uncontested that he had shot and killed his victim before penetrating her. The court reasoned that since the defendant had pleaded guilty to the rape, he was precluded from alleging the invalidity of the conviction based on the fact that the victim was not alive at the moment of penetration.

18. 33 Ill. App. 3d 432, 337 N.E.2d 211 (1975). *See also* State v. Hampton, 215 Kan. 907, 529 P.2d 127 (1974).

> strate that the act was against her will. . . . If the victim retains the power to resist, her voluntary submission, no matter how reluctantly yielded, constitutes consent.[19]

The duty of a complainant to resist is apparently not diminished by a relationship of trust. In *People v. Borak*,[20] the complainant testified that she had been raped by her gynecologist while undergoing a pelvic examination. She stated that first the defendant placed his tongue on her vaginal area and about thirty seconds later penetrated her with his penis. The court held that the defendant's act of penetration could not have come as a surprise to the complainant having been preceded by an act of fellatio.[21] The court reversed the defendant's rape conviction on the ground that despite the lack of force the complainant failed to resist.[22]

Furthermore, a man can be convicted of rape if he knowingly relies on the force used by a third person to intimidate a woman into submission. In *State v. Gray*,[23] the defendant's brother forced the prosecutrix into his car and into his brother's apartment by threatening her with a gun. Once inside the apartment she was ordered to take off her clothes, at which time the defendant had sexual intercourse with her while his brother observed. The court concluded that the requirement of showing force is satisfied if the victim submits through fear of physical injury perpetrated by someone other than the defendant who is fully aware that submission is due to this fear.[24]

If the defendant in a rape case is able to establish a reasonable doubt that the act in question was not against the will of an adult complainant, he can defeat the charges against him. The defense of consent is facilitated by a strict application of the resistance requirement. Further, if the prosecutrix delays in making a complaint, this may also lead to an inference that her accusation is not reliable but is motivated by other considerations. Another method used to suggest a consensual relationship is to attack the complainant's reputation for chastity. By questioning the complainant's past conduct, the defendant attempts to imply that she consented to the particular act for which he is now being tried.

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19. 33 Ill. App. 3d at 435-36, 337 N.E.2d at 215.
20. 13 Ill. App. 3d 815, 301 N.E.2d 1 (1973).
21. *Id.* at 821, 301 N.E.2d at 6.
22. *Id.* at 822, 301 N.E.2d at 6. Although the rape conviction was reversed, a conviction for deviate sexual assault was affirmed.
23. 497 S.W.2d 545 (Mo. App. 1973).
24. *Id.* at 549.

The Resistance Standard

The extent to which a complainant is required to show resistance varies depending on the jurisdiction, and sometimes, on the individual moral values of the appellate judges.[25] The general rule is that a woman who is threatened with rape is expected to resist to the limits of her mental and physical resources, up to the point where resistance is likely to result in serious physical injury. A failure to resist, when resistance is reasonable, indicates a consensual relationship.

The question of what constitutes a threat sufficient to induce fear of serious injury in the victim is subject to diverse

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25. *Compare* People v. Hughes, 41 App. Div. 2d 333, 343 N.Y.S.2d 240 (1973) *with* State v. Gallup, 520 S.W.2d 619 (Mo. App. 1975) *and* State v. Isham, 70 Wis. 2d 718, 235 N.W.2d 506 (1975). In *Hughes* the complainant was a runaway who, along with two male companions, borrowed the defendant's room when offered. When the defendant returned he found the complainant lying nude upon upon his bed, having just had sex with a male companion. The complainant stated that she was forced to have sex with the defendant who had an open knife, yet she made no outcry even though her companions were asleep in the same room. In reversing the defendant's conviction the New York court stated:

> [R]ape is not committed unless the woman opposes the man to the utmost of her power. The resistance must be genuine and active [citations omitted]. It is difficult to conclude that the complainant waged a valiant struggle to uphold her honor. . . . [G]enuine and active resistance would seem to have called for screams and a loud and fervent prayer for assistance from her male friends.

41 App. Div. 2d at 336, 343 N.Y.S.2d at 242. In *Gallup*, the Missouri court held that the complainant's utmost resistance was not required since she was placed in fear of bodily injury. The complainant was forced from her car and abducted by three men; one of whom told her "don't fight me and you will be all right." 520 S.W.2d at 621. There was no indication that a weapon was displayed. The complainant testified that she never screamed nor cried out for help because she was afraid. In *Isham*, the Wisconsin court held that the prosecutrix need not have resisted where the defendant threatened that her younger brothers, who were present in the room, would be physically harmed if she attempted to resist or scream.

An additional example of how it is often the conduct of the *complainant* which must withstand the moral scrutiny of a judge in a rape case is provided in Harris v. State, 441 S.W.2d 189 (Tex. Crim. App. 1969). The defendant jumped into the prosecutrix's car and demanded to be driven to a certain destination. Along the way he pulled out a knife, ordered her to drive off the road and to follow him on foot into a completely secluded and wooded area. Once there he hit her in the stomach with his fist, placed his hand over her mouth, and raped her. The prosecutrix testified that she was in fear of her life and of serious bodily inury. She stated that her lack of resistance did not imply consent. In *affirming* the conviction the court commented on the prosecutrix's conduct:

> While [the] prosecutrix, before reaching the scene of the offense, failed to exhibit the courage, determination, resourcefulness or judgment that one would hope to find in a 24 year old virgin who had graduated from college, we are unable to agree the evidence is not sufficient to sustain the jury's verdict.

Id. at 191.

opinion. In *People v. Evans*,[26] the defendant told the complainant that she was in a vulnerable situation and that it would be easy for him to rape, harm, or kill her. The court held that where threatening remarks made by a defendant are ambiguous regarding the intent to rape, the crucial test is not whether the defendant's statements induced terror in the complainant, but whether he intended them to be threatening.[27] A different test, however, was used in *Dinkens v. State*,[28] where the court concluded that the state need not prove that the complainant acted as an "objectively reasonable woman" in submitting to defendant's sexual assault. "As long as the evidence establishes that the victim was induced to submit to the sexual acts by actual fear, whether a 'reasonable' woman under such circumstances would have experienced the same fear is not a determination that courts and juries have to make."[29]

If resistance can reasonably be expected on the part of the complainant, it should be continual resistance up to the moment of penetration. In *Baldwin v. State*,[30] the court stated that "[i]f the woman consents, no matter how reluctantly, . . . the act does not constitute rape."[31] In *People v. Helton*,[32] a rape conviction was reversed because the trial court failed to include in its instructions to the jury that "[v]oluntary submission by the female, while she has power to resist, no mater how reluctantly yielded, amounts to consent and removes from the act an essential element of the crime of rape."[33]

Although resistance is not required when it would result in serious bodily injury to the complainant,[34] the expectation of serious injury should be real and not just fancied. In *Farrar v. United States*,[35] Chief Judge Prettyman said:

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26. 85 Misc. 2d 1088, 379 N.Y.S.2d 912 (1975).
27. *Id.* at 1097, 379 N.Y.S.2d at 921.
28. 546 P.2d 228 (Nev. 1976).
29. *Id.* at 230.
30. 59 Wis. 2d 116, 207 N.W.2d 630 (1973).
31. *Id.* at 124, 207 N.W.2d at 634.
32. 106 Ill. App. 2d 231, 245 N.E.2d 1 (1969).
33. 106 Ill. App. 2d at 235, 245 N.E.2d at 3.
34. *See, e.g.*, Barnett v. Commonwealth, 216 Va. 200, 202, 217 S.E.2d 828, 830 (1975), where the court said:

> The law is clear that to sustain a charge of rape there must be evidence of some array or show of force sufficient to overcome resistance. However, the woman is not required to resist to the utmost of her physical strength if she reasonably believes that resistance would be useless and result in serious bodily harm to her.

See also Larkins v. State, 230 Ga. 418, 197 S.E.2d 367 (1973); State v. Smith, 192 Neb. 794, 224 N.W.2d 537 (1974).

35. 275 F.2d 868 (D.C. Cir. 1960) (memorandum opinion on petition for rehearing en banc). *See also* People v. Bowder, 21 Ill. App. 3d 223, 315 N.E.2d 168 (1974); Dixon v. State, 348 N.E.2d 401 (Ind. 1976); Rush v. State,

> As I understand the law of rape, if no force is used and the girl in fact acquiesces, the acquiescence may nevertheless be deemed to be nonconsent if it is induced by fear; but the fear, to be sufficient for this purpose, must be based upon something of substance; and furthermore the fear must be of death or severe bodily harm. A girl cannot simply say, "I was scared," and thus transform an apparent consent into a legal non-consent which makes the man's act a capital offense.[36]

In *Gonzales v. State*,[37] the court noted the trial judge's statement on the extent of resistance required of a complainant:

> We all know the law does not require a woman to fight to the utmost. All she is required to do is to resist until such time as she becomes convinced resistance is going to do her no good. She does not have to subject herself to a beating, knifing, or anything of that nature. As long as she is convinced something of a more serious nature will happen, she is given the right to submit.[38]

In reversing the defendant's rape conviction, the Wyoming Supreme Court stated that: "[I]f this standard had been the basis of an instruction it would have been *reversible error* because it would place the determination solely on the judgment of the prosecutrix. . . ."[39]

The duty of resistance places a heavy burden upon the victim of a sexual assault. Occasionally, when an appellate court strictly applies the resistance requirement in a factual context where resistance would have been particularly difficult, the results can be startling. One such case is *People v. Anderson*,[40] where the defendant's conviction for rape and deviate sexual assault was reversed on the grounds that the evidence was insufficient to prove that the acts in question were performed against the will of the complainant.

The prosecutrix in *Anderson*, a white female, testified that while walking along a Chicago street she was abducted by a black man who claimed to have a gun. When she tried to scream he put his hand over her mouth and forced her across an

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301 So.2d 297 (Miss. 1974); State v. Campbell, 190 Neb. 22, 206 N.W.2d 53 (1973); State v. Armstrong, 287 N.C. 60, 212 S.E.2d 894 (1974); State v. Verdonne, 114 R.I. 613, 337 A.2d 804 (1975).

36. Farrar v. United States, 275 F.2d at 876 (citations omitted).

37. 516 P.2d 592 (Wyo. 1973).

38. *Id.* at 594.

39. *Id.* (emphasis added). *See also* State v. Bohannon, 526 S.W.2d 861, 864 (Mo. App. 1975) (rape conviction reversed and remanded because the trial court refused to tender instructions to the jury offered by the defendant which stated that the defendant could only be found guilty of the crime of rape if he caused the prosecutrix to fear physical violence to herself). *Cf.* People v. Jones, 28 Ill. App. 3d 896, 329 N.E.2d 855 (1975) (reversed because of prejudicial instructions on resistance). *See generally* 65 AM. JUR. 2d *Rape* § 7 (1972); Note, *The Resistance Standard in Rape Legislation*, 18 STAN. L. REV. 680 (1966).

40. 20 Ill. App. 3d 840, 314 N.E.2d 651 (1974).

intersection and into a building. At the entrance to the building she attempted to cry out and struggled with her abductor but he struck her in the face and choked her. Once inside the building the complainant made one attempt to escape, but was caught by the defendant and hit in the face. She made no further attempt to cry out or solicit help even when, as the defendant was forcing her along a hall with her hands held behind her back, they passed another man.[41] Her explanation for this was that the defendant and the second man appeared to be friends, and also that she expected no help from him since both he and her abductor were black. At one point during the alleged rape the prosecutrix was left alone in a bathroom. Believing she heard the defendant's voice outside in the hall, she made no attempt to escape nor to cry out. The court considered this failure to exercise an opportunity to escape or to summon assistance to be a significant factor in warranting reversal.[42]

As soon as she was released, the complainant went directly to the police. A medical examination indicated the presence of spermatozoa in her person and a portion of defendant's undershorts as well as bruises and scratches about her face and neck. There was also evidence of vaginal bleeding, however, the emergency room physician testified that this was probably due to normal menstruation or another form of internal discharge because of the absence of vaginal injury or trauma. The defendant testified that his relations with the complainant were consensual and that, in fact, she solicited him. He explained that the bruises and scratches upon the face and neck of the complainant were caused by a ring he wore on the hand he used to push her away during an act of fellatio.[43]

The court in *Anderson* held that the ultimate issue in the case was whether "the evidence . . . is sufficient to create an

41. Failure to cry out when there is a possibility of obtaining the assistance of a third party is often a crucial factor weighed by appellate courts in deciding to reverse convictions for rape or sexual assault. In State v. Johnson, 132 Ill. App. 2d 564, 270 N.E.2d 130 (1971), a rape conviction was reversed because of the complaintant's failure to immediately cry out when first approached by her assailants. In *Johnson*, the complainant was approached by three men while walking near her home. They continued to walk and talk with her for a while until they reached an alley when the three men forced her into it while holding her mouth. She testified that they took turns holding her mouth while tearing off her clothes and raping her. She made no attempt to escape nor to fight off her assailants, and she was not bruised. In an unfortunate choice of words, when asked how the sex act was performed, she said "[h]e just did what any other man would do to a lady." *Id.* at 565, 270 N.E.2d at 131; People v. Morrow, 132 Ill. App. 2d 293, 270 N.E.2d 487 (1971); *see also* People v. Grant, 45 Mich. App. 686, 207 N.W.2d 198 (1973).

42. 20 Ill. App. 3d at 849, 314 N.E.2d at 657.

43. *Id.* at 845-46, 314 N.E.2d at 654-55.

abiding conviction that the defendant is guilty of intercourse with the complainant by force and against her will."[44] The court was skeptical of the complainant's testimony as to how she was originally accosted and forced into the building against her will and stated that "[i]t is doubtful that an attacker could brazenly accost a victim in broad daylight, then successfully spirit that victim across an admittedly busy street in a forcible manner without attracting the attention or intervention of anyone."[45] The *Anderson* court also found it incredible that the complainant would refrain from making an outcry and from struggling with the defendant when he originally put his arm around her and threatened her with a gun on the street, but would struggle vigorously, according to her testimony, at the entrance of the building.[46]

What apparently hurt the prosecution's case the most in the eyes of the *Anderson* court was the complainant's failure to seek help, or to escape when the opportunity presented itself, despite the fact that "she had sufficient control over her faculties and physical powers to request assistance."[47] The court rejected the complainant's explanation that the man in the hallway appeared to be a friend of the defendant,[48] and that she could expect no help in her predicament from a black man since her assailant was black.[49]

The Illinois Court of Appeals summarized its position in the *Anderson* case by saying that "[r]eviewing courts are especially charged with the duty of carefully examining the evidence of rape cases," and that "it is the duty of a reviewing court . . . to reverse the judgment if that evidence does not remove all reasonable doubt and create an abiding conviction that the defendant is guilty of the crime itself."[50] The court concluded that the evidence was simply insufficient to *remove all reasonable doubt* that the alleged acts of intercourse were performed by force against the defendant's will, and therefore the defendant's conviction was reversed.[51]

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44. *Id.* at 847-48, 314 N.E.2d at 656.

45. *Id.* at 847, 314 N.E.2d at 656.

46. *Id.* at 848, 314 N.E.2d at 656. *See also* People v. Barfield, 113 Ill. App. 2d 390, 251 N.E.2d 923 (1969).

47. *Id.* at 849, 314 N.E.2d at 657.

48. No proof was offered by the state to establish that the man in the hallway was in fact a friend of the defendant.

49. 20 Ill. App. 3d at 849, 314 N.E.2d at 657. *See also* People v. Qualls, 21 Ill. 2d 252, 171 N.E.2d 612 (1961), where the court held that the fact that a potential intervenor is of the same race as the assailant does not justify the victim's failure to seek help.

50. 20 Ill. App. 3d at 847, 314 N.E.2d at 656.

51. *Id.* at 850, 314 N.E.2d at 658. *See also* Winnegan v. State, 10 Md. App.

The *Anderson* case is astounding both for its lack of understanding of human nature and for its application on the law on reversible error. The complainant was accosted on the street by a man who claimed to have a gun. Her attempt to scream was unsuccessful because the man put his hand over her mouth. For those few brief moments the complainant might reasonably have anticipated that she was the victim of a mugging and that the defendant was only interested in taking her money and quickly fleeing. Hence, the complainant could easily believe that a violent struggle on her part at that time would pointlessly provoke a nervous gunman into a rash act. It is also conceivable that events happened so quickly that the complainant was too startled to resist at first. When the defendant attempted to force her into the building and it became apparent that more serious consequences might await her, she did struggle with her assailant but was overpowered. Yet, because the complainant did not struggle with the defendant when first accosted, the *Anderson* court suggests that her whole testimony was unreliable because "it is doubtful that an attacker could brazenly accost a victim in broad daylight, then successfully spirit that victim across [a] . . . busy street."[52] Instead, the court should have considered the fact that many bystanders to urban street crime do not wish to become involved, and that a struggle while crossing the street may have proven pointless. An extreme example of such indifference is the murder of Kitty Genovese on the streets of a middle class New York neighborhood where dozens of her neighbors heard her calls for help but not one called the police.[53]

During the course of her abduction and rape, the complainant in *Anderson* attempted to escape once at which time she was physically struck by her assailant, yet she was criticized for not attempting to escape again. The average woman is at a con-

196, 268 A.2d 585 (1970), a case in which the factual circumstances were similar to *Anderson*. The complainant in *Winnegan*, while walking alone, was accosted by the defendant who claimed he had a gun. Although the complainant never saw the gun, she nevertheless obeyed his directions. The defendant forced the complainant into his rooming house, ordered her to undress and forced her to have sexual intercourse and perform fellatio. The court constrained to reverse the defendant's rape conviction because the lack of resistance by the complainant gave the appearance that any acts of intercourse were consensual. The court held that the factual situation could not support the complainant's explanation that she failed to resist because she was overcome with fear.

52. 20 Ill. App. 3d at 848, 314 N.E.2d at 656.

53. Kitty Genovese was murdered on a residential/commercial street in Queens, New York in the early morning hours of March 14, 1964, while at least 38 of her neighbors heard her screams or saw part of the attack without taking any action to assist her or call the police. *See generally* BROWNMILLER, *supra* note 1, at 199-200; TIME, June 26, 1964, at 21-22.

siderable disadvantage to the average man in a contest of brute strength. When the complainant was alone in the bathroom, it was likely that her abductor was directly outside, and thus it was unreasonable for the court to insist upon a second escape attempt that would probably result in another beating. Finally, the court stated that there was no justification for the complainant's failure to seek help from the black man who passed by in the hall.[54] However, the complainant's failure to act at that point is understandable. She had already been physically struck after her escape attempt, and her abductor was immediately behind her holding her hands. The *Anderson* court rejected the complainant's explanation that she expected no help from another black man but did not question the obvious fact that although she was a stranger in the building, being forced down the hall with her hands held behind her back, the passerby made no apparent attempt to assist her or to inquire as to what was happening. The ideal hope may be that there would be no distrust between the races, but the fact is that such distrust does exist and the court should take cognizance of it. What is perhaps most startling about the court's interpretation of the testimony is that while it expresses disbelief for each specific aspect of the complainant's explanation of what occurred, it does not question the defendant's unlikely explanation for the complainant's cuts and bruises.

The *Anderson* court's interpretation of the record is incredulous because it belies the obviousness of the complainant's situation. But even more incredible is that the court chose to reverse the defendant's conviction because it felt that the "evidence [did] not remove all reasonable doubt and create an abiding conviction that the defendant is guilty."[55] A reviewing court rarely reverses a jury on a factual interpretation of the evidence since the jury, able to observe the witnesses' demeanor on the stand, is in the best position to judge the credibility of the testimony. Appellate courts generally reverse a fact-finder on the record in a criminal case when the jury's decision is "flagrantly against the clear weight of the evidence."[56] A jury's verdict is generally allowed to stand if there is "evidence reasonably tending to sustain the verdict [or] evidence as will justify a reasonable inference of guilt. . . ."[57] Yet, the *Anderson* court chose to substitute its judgment for that of the jury because the evidence,

54. 20 Ill. App. 3d at 849, 314 N.E.2d at 657.

55. *Id.* at 847, 314 N.E.2d at 656.

56. 24A C.J.S. *Criminal Law* § 1880(1962). *See also* People v. Wilcox, 33 Ill. App. 3d 432, 436, 337 N.E.2d 211, 215 (1975).

57. 24A C.J.S. *Criminal Law* § 1880 (1962).

from the record, did not establish *guilt beyond a reasonable doubt.*

The *Anderson* case is proof of the need for reform in the laws of sex offenses where a defendant's guilt or innocence is determined not by his own conduct but by the behavior of his victim. In other crimes the law does not fault the victim who is careless, foolhardy, or even enticing. The average citizen is well aware of the danger of walking alone at night on a city street, or of leaving his home or valuables unlocked, but each of us would be outraged if that were used as a reason to set free a person charged with battery or theft. A kidnaper is not found innocent of his crime because of his victim's failure to attempt to escape. Nor is a bank robber cleared of his offense because a startled clerk failed to trip the alarm which summons the police. Why, therefore, is a rapist freed because of the victim's failure to offer sufficient resistance, or because of her precipitating conduct? It would be a wiser jurisprudence that determined the guilt or innocence of a sex offender, as of any other criminal, on the basis of his own conduct and not the conduct of his victim.

Failure to Make an Immediate Complaint

If a complainant in a rape case fails to make her complaint as soon as possible after the alleged incident, the court may infer that the relationship was consensual. In *People v. Bain*,[58] the complainant and defendant had sexual intercourse while on a blind date. During the complainant's direct testimony she stated that after the sexual intercourse occurred she put on her clothes and they smoked a cigarette and talked. She further testified that when he asked her if she was ready to be taken home she had replied that it was up to him. As they drove up to her parent's home, they saw the complainant's mother pulling into the driveway and she then asked the defendant not to stop but instead to take her to her own apartment. She arrived at her apartment around midnight and made no mention of the incident to her roommate. Shortly thereafter the complainant went to her mother's house and around 1:15 a.m. the police were called. The *Bain* court reversed the defendant's conviction holding that the complainant's failure to report the alleged rape at both the first and second opportunity was more probative of a consensual relationship than the complainant's bruised mouth was of a non-consensual relationship.[59]

The risk in cases like *Bain* is that the complainant enters a rape charge either because another person has encouraged her

58. 5 Ill. App. 3d 632, 283 N.E.2d 701 (1972).
59. *Id.* at 634-35, 283 N.E.2d at 703.

to do so, or because she wishes to cloak her own indiscretions when accused of immoral conduct. An immediate report of an assault dispells any of these doubts, and makes it less likely that a jilted, embarrassed, or vindictive woman has fabricated a rape charge.

The Complainant's Reputation

When the defense in a rape trial is consent, the defendant may wish to establish that the prosecutrix is known to be promiscuous.[60]

> [A]n accused has a right to impeach the State's witness by competent evidence of bad reputation of the witness. In addition to the right to attack the credibility of the State's witness, the character of the alleged victim in a rape prosecution may be shown by evidence of her reputation as bearing upon the question of consent.[61]

Courts generally admit evidence of unchastity [62] on the belief that an unchaste woman is more likely to consent than a chaste woman.[63] However, a complainant's reputation for promiscuity can serve only to diminish her credibility before the fact-finder.

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60. On the subject of introducing into evidence the complainant's reputation and past behavior, see Giles v. Maryland, 386 U.S. 66 (1967); Comment, *Evidence—Rape Trials—Victim's Prior Sexual History*, BAYLOR L. REV. 362 (1975); Comment, *Psychiatric Examination of Prosecutrix in Rape Cases*, 45 N.C. L. REV. 234 (1966).

61. State v. Cole, 20 N.C. App. 137, 139, 201 S.E.2d 100, 101 (1973). *See also* Coles v. Peyton, 389 F.2d 224 (4th Cir. 1968). The *Coles* court held that the petitioner was denied effective assistance of counsel at his trial where his court appointed attorney failed to investigate the prosecutrix's reputation for chastity. The court stated that "effective representation would require some investigation of the reputation of the prosecutrix for chastity . . . , especially when petitioner's version of the incident . . . was that he had an encounter with a common street walker." *Id.* at 227.

In Conyers v. Rundle, 300 F. Supp. 422 (E.D. Pa. 1969), the court granted a state petitioner's habeas corpus petition partly because of his attorney's failure to fully investigate the available evidence of the prosecutrix's unchasteness. The *Conyers* case is especially interesting because the indictment was for statutory rape. Under 18 Penal Stat. Pa. § 4721 (1939) (current version at 18 PA. CONS. STAT. ANN. § 3122 (Purdon Supp. 1977-78)) a person accused of statutory rape is entitled to introduce evidence of the complainant's bad reputation. *See* note 109 *infra* on the issue of consent in statutory rape cases. In Massey v. State, 447 S.W.2d 161 (Tex. Crim. App. 1969), the court held that despite the rule that consent is not an issue in cases of statutory rape, it was prejudicial error to deny the defendant the opportunity to prove that the prosecutrix was sexually promiscuous as well as the opportunity to introduce expert testimony that it would be most unlikely that spermatozoa found in the vagina of the prosecutrix six and a half days after the alleged rape was the result of the alleged act and not of a more recent act.

62. While chastity is often considered to be synonymous with virginity, a woman is chaste in the eyes of the law if she has "never had unlawful sexual intercourse with a male person." State v. Richards, 193 Neb. 345, 346, 227 N.W.2d 18, 19-20 (1975) (quoting State v. Brionez, 188 Neb. 488, 490, 197 N.W.2d 639, 640 (1972)).

63. The presumption that a sexually promiscuous woman is more likely

It should not serve to negate the crime itself. In *State v. Howard*,[64] the court ordered a new trial so that evidence of the prosecutrix's promiscuous reputation could be admitted to impeach her credibility on the issue of consent, but cautioned that:

> It is not to be questioned that the fact that a woman may be of bad reputation, or that she may be known to be immoral or even completely dissolute of character, does not give anyone license to forcibly violate her; nor that anyone who does so would be guilty of rape.[65]

An attack upon the character of the complainant can usually be made only by evidence of her general reputation and *not* by proof of specific acts with other men.[66] The sound rationale for this rule is to avoid situations where in order to escape a rape conviction the defendant would enlist the assistance of several friends to testify that they had engaged in consensual relations with the prosecutrix. Such testimony would create the impression that the prosecutrix had also consented to sexual relations with the accused. The rule against eliciting testimony concerning specific, past sexual relations of the complainant bars the type of defense which encourages perjury and destroys an innocent woman's reputation. Further, it facilitates prosecution of their attackers without fear of having their past relationships

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to consent to a sex act has been questioned. *See generally A Legal Fallacy*, *supra* note 2.

64. 544 P.2d 466 (Utah 1975). In Virgin Islands v. John, 447 F.2d 69 (3d Cir. 1971), the court criticized the trial court's failure to provide the jury with adequate instructions on the relevance of a complainant's bad reputation to the question of consent. In reversing and remanding the defendant's rape conviction, the *John* court stated: "It is settled that where the issue of consent of a rape-complainant is presented and evidence is adduced of her bad reputation for chastity, the trial judge is required to instruct the jury that such evidence is "of substantial probative value in judging the likelihood of her consent."
Id. at 73.

65. 544 P.2d at 469.

66. *See* Williams v. State, 51 Ala. App. 1, 282 So. 2d 349, *cert. denied*, 282 So. 2d 355 (1973) (testimony sought to be introduced by a defendant in a rape prosecution is prima facie inadmissible if it relates to specific acts of unchaste behavior); People v. Wilcox, 33 Ill. App. 3d 432, 436, 337 N.E.2d 211, 216 (1975); State v. Yowell, 513 S.W.2d 397 (Mo. 1974); State v. Ball, 527 S.W.2d 414 (Mo. App. 1975) (defendant in rape prosecution cannot attack a victim's previous chaste character by showing specific acts of intercourse); Roper v. State, 375 S.W.2d 454 (Tex. Crim. App. 1964); Wynne v. Commonwealth, 216 Va. 355, 218 S.E.2d 445 (1975); State v. Geer, 13 Wash. App. 71, 533 P.2d 389 (1975); 65 AM. JUR. 2d *Rape* § 82 (1965); 8 GA. L. REV. 973 (1974). *But see* Burton v. State, 471 S.W.2d 817, 821 (Tex Crim. App. 1971) (prosecutrix's reputation for unchastity with others may be shown when her consent is at issue in a rape case); State v. Howard, 544 P.2d 466 (Utah 1975) (it is allowable to introduce specific acts or prior misconduct by the victim where it reasonably appears that such evidence would have sufficient probative value to outweigh any detriment arising from the admission of such testimony).

paraded before an open court.[67]

Efforts on the part of defense attorneys to suggest that the victim has a bad reputation are particularly offensive to reformers, who point to recent statistics showing the prevalence of sexual activity before and outside of marriage.[68] From these statistics, the reformers conclude that since so large a percentage of the female population would technically be considered "unchaste" in the eyes of the law, such definitions are no longer relevant in the context of a rape prosecution and hence, such testimony should not be admissible. This reform has been energetically pursued,[69] and several jurisdictions, including Illinois, have recently enacted legislation which restricts the introduction into evidence of a complainant's reputation for unchastity.[70] However, it appears to be too early to determine

67. *See* People v. Whitfield, 58 Mich. App. 585, 228 N.W.2d 475 (1975). It is permissible for the defense to establish that the prosecutrix had willfully engaged in prior acts of sexual intercourse with the defendant if the purpose is to establish that the act in question was consensual.

68. A recent study determined that 45% of all females have engaged in sexual intercourse before the age of twenty. *See A Legal Fallacy*, *supra* note 2, citing R. SORENSON, ADOLESCENT SEXUALITY IN CONTEMPORARY AMERICA (1973).

69. *See, e.g.*, *A Legal Fallacy*, *supra* note 2; Note, *Evidence—Rape Trials—Victim's Prior Sexual History*, 27 BAYLOR L. REV. 362 (1975); Note, *Indicia of Consent? A Proposal for Change to the Common Law Rule Admitting Evidence of a Rape Victim's Character for Chastity*, 7 LOY. CHI. L.J. 118 (1976).

70. CAL. EVID CODE § 1103(2)(a) (West Supp. 1978). California permits evidence of the victim's prior sexual history only when the prosecutor introduces such evidence, or testimony relating to such evidence. The defendant may then cross-examine the witness or offer rebuttal evidence limited to that necessary to counter the evidence offered against him. ILL. REV. STAT. ch. 38, § 115-7 (Supp. 1978). Illinois now limits inquiries into the prior sexual activity of the victim to the extent of past sexual conduct with the accused. The evidence may only come in when a judge has determined, in an in camera hearing, that the defense has the evidence to impeach the witness in the event that prior sexual activity with the defendant is denied. IND. STAT. ANN. § 35-1-32.5-1 (Burns Supp. 1977). Indiana prohibits evidence of the victim's past sexual conduct and reputation of past sexual conduct unless a 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. IOWA CODE ANN. § 782.4 (Supp. 1977). The Iowa statute excludes the introduction of evidence of unchaste conduct on the part of the complainant committed more than one year prior to the date of the alleged crime, with the exception of acts committed with the accused. MICH. STAT. ANN. § 28.788(10)(§ 520j)(Supp. 1976). The Michigan statute provides the same prohibition and exception as the Indiana statute. TEXAS PENAL CODE ANN. tit. 2, § 21.13 (Vernon Supp. 1977). The Texas statute permits the admission of evidence of a complainant's prior sexual history only after a judge has determined in an in camera hearing that the inflammatory and prejudicial nature of such evidence does not outweigh its probative value.

See also S. Rudstein, *Rape Shield Laws: Some Constitutional Problems*, 18 WM. & MARY L. REV. 1 (1976); Comment, *Due Process Challenge to Restrictions on the Substantive Use of Evidence of a Rape Prosecutrix's Prior Sexual Conduct*, 9 U. CAL. D. L. REV. 443 (1976).

whether there is a clear trend toward a general revision of the rule of evidence to protect a complainant's past reputation from exposure and attack.

Critics of character evidence also point out that evidence of the defendant's past sexual conduct is not admissible, and even if it were, most jurors would not consider a man's admissions of sexual promiscuity to indicate that he is a potential rapist. Furthermore, his past convictions are admissible only if he takes the stand and then only to attack his veracity. The complainant on the other hand must take the stand. She can expect that her private life will be questioned by the defense attorney with an eye toward painting her as a promiscuous woman with a propensity toward agreeing to sexual liasons.

There remain sound reasons to support the admissibility of the complainant's past reputation for chastity. Such evidence can be probative on the issue of consent and should be part of the total weight of evidence considered by the jury. The jury should know if a complaining witness has engaged in acts of prostitution, or lodged the charge of rape against another man who was acquitted, or is commonly known among her friends and acquaintances to be sexually promiscuous.

The risk of an unjust conviction is simply too great[71] for a defendant to be completely deprived of the opportunity to inform the jury of the bad moral character of the prosecutrix. The prosecution can always counter such evidence through testimony of the complainant's reputation for veracity and by explaining to the jurors in closing argument that there are many valid reasons why certain past acts on the part of the complainant do not in any way diminish the seriousness of the crime committed against her.

The Corroboration Requirement

There are many jurisdictions which do not require corroboration of a complainant's testimony in a sexual assault.[72] Of the jurisdictions requiring corroboration, most require only a modified form.[73] The corroboration requirement has been harshly criticized as saying, in effect, that while the testimony of all other crime victims is inherently believable, that of the victim in a rape prosecution is inherently unbelievable and must be sup-

71. *See* note 3 *supra.*

72. *See* 65 AM. JUR. 2d *Rape* § 94 (1972). Comment, *Criminal Law—Rape—Sufficiency of Evidence to Support Conviction—Corroboration of Complainant's Testimony*, 15 DUQ. L. REV. 305 (1976).

73. *See* note 4 *supra.*

ported by additional evidence before a guilty verdict can be returned.[74] This criticism seems justified particularly when a strict adherence to the corroboration rule results in a serious miscarriage of justice. Several recent cases illustrate that a requirement of corroboration can operate as a technicality which permits seemingly guilty men to escape conviction.

In *United States v. Wiley*,[75] the Court of Appeals for the District of Columbia reversed a conviction for the carnal knowledge of a twelve year old girl which was insufficiently corroborated.[76] The *Wiley* court held that the failure to corroborate penetration was fatal to the prosecution's case, despite other persuasive evidence of guilt. Two police officers testified that when the child reported the crime she was crying and upset, her clothing was disheveled, and she had no coat on a cold day. The girl stated that she had been invited inside a friend's apartment, where the defendant grabbed her while another man choked her. She testified that she was dragged into a bedroom, thrown onto a bed, stripped of her clothes, and then raped by both men. At the first opportunity she ran from the apartment leaving her coat behind. The coat was later found in the apartment. Once the girl obtained the assistance of the police she returned with them to the apartment where she identified her two assailants on the street. Both men attempted to flee when they saw the police car approaching. The girl was examined by a physician shortly after the incident, and although the doctor had been subpoenaed to testify three times, and was apparently prepared to testify, the trial was postponed three times and when a fourth trial date was set, the physician was unavailable. The prosecution went to trial without his testimony.[77]

The lack of medical testimony in *Wiley* was probably the crucial reason for the court's reversal. Judge Wisdom, speaking for the majority, harshly criticized, as irresponsible, the prosecution's decision to take the case to trial without the testimony of the examining physician.[78] Further, the court defended the corroboration requirement as "an essential safeguard in such cases where the risk of unjust conviction is high," explaining that "[c]omplainants all too frequently have 'an urge to

74. *See Rape and Rape Laws*, *supra* note 2, at 936.

75. 492 F.2d 547 (D.C. Cir. 1973).

76. Until very recently, the District of Columbia required corroboration of all three elements of the crime of rape. United States v. Bryant, 420 F.2d 1327 (D.C. Cir. 1969). For a discussion of the abolition of the corroboration rule in the District of Columbia, see notes 96-97 and accompanying text *infra*.

77. 492 F.2d at 549, 551, 559 n.19.

78. *Id.* at 551.

fantacize or even a motive to fabricate.' "[79]

In a blistering dissent, Judge Wilkey sharply criticized his colleagues for an overly strict interpretation of the corroboration requirement. In Judge Wilkey's eyes the law in the District of Columbia is that "*not every element* of a sexual offense need be *corroborated*."[80] Rather, the law is that "every element of an offense must be *proved*."[81] In his opinion, every element was proved in this case since the complainant's testimony was clear, unequivocal, and uncontradicted.[82] Judge Wilkey pointed out that medical testimony could never establish that the complainant had been penetrated by both the defendant *and* his accomplice, but at most could only corroborate penetration by one of them.[83]

In *In re F.*,[84] a New York court, constrained by a strict corroboration rule, acquitted three boys in the face of strong evidence against them. The complainant was attacked by three juveniles[85] who threatened her with a knife and razor while walking through a park. After stealing her money and wristwatch, one boy acted as a lookout while the other two removed her clothing. While one of the youths attempted to rape her, another forced her to perform an act of oral sodomy. The three youths fled when they heard approaching footsteps. The prosecutrix made an immediate complaint to the police and a medical examination revealed the presence of spermatozoa around the vagina, although none was found in the complainant's mouth. The complainant later identified two of her assailants from a police lineup. The court held that while all elements of the offense were proved beyond a reasonable doubt, there was insufficient corroboration of sodomy because the medical examination had revealed no sperm inside the victim's mouth. Nor was there corroboration of the victim's identification of her assailants, despite the fact that the lineup identification performed in the police station was constitutionally valid.[86]

79. *Id.* at 550.

80. *Id.* at 560 (Wilkey, J., dissenting) (emphasis in original).

81. *Id.* (emphasis in original).

82. *Id.* at 561.

83. *Id.* In an exculpatory pretrial statement the defendant claimed that he was asleep in the apartment while the complainant was with the other man. The defendant's trial and that of his alleged accomplice were not joined because the accomplice fled the jurisdiction. *But cf.* State v. Gainey, 32 N.C. App. 682, 233 S.E.2d 671 (1977), where the court stated that the prosecution need not prove by an offer of scientific evidence that spermatozoa in the person of the complainant came from the defendant.

84. 88 Misc. 2d 244, 327 N.Y.S.2d 237 (1971).

85. The judge made a point of noting that two of the boys were about 6 feet tall. *Id.* at 245, 327 N.Y.S.2d at 238.

86. *See* Stovall v. Denno, 388 U.S. 293 (1967) (suspect shown alone for

Although the court felt compelled to dismiss the charges against the defendants because of the technical requirements of the then current New York law on corroboration in sex offenses,[87] it stated:

> The sole object of this opinion is to expose again, and to persuade the Legislature to rectify, the miserable state of the law in respect to the requirement for corroboration in cases of sexual assault.
>
> . . . .
>
> '[I]t is an immature jurisprudence that places reliance on corroboration, however unreliable the corroboration itself is, and rejects overwhelming, reliable proof because it lacks corroboration, however slight and however technical even to the point of token satisfaction of the rule.'[88]

Statistics on the difficulty of obtaining convictions under the old corroboration requirements[89] clearly show that an overzealous concern for the rights of an accused can seriously jeopardize the rights of victims and potential victims, and the interest of society in punishing those who commit violent street crimes. Fortunately, there has been a steady movement away from the strict requirement of the corroboration rule in recent years. New York's rule, which was responsible for freeing obviously guilty sex offenders in *In re F.* and numerous other

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identification in police "show-up" held unconstitutional unless extraordinary circumstances require it); Gilbert v. California, 388 U.S. 263 (1967) (in court identification of defendant without determining legality of line-up proceeding created constitutional error); United States v. Wade, 388 U.S. 218 (1967) (sixth amendment guarantees a defendant a right to counsel at all critical pretrial proceedings including lineup identification).

87. Prior to 1974, New York required strict corroboration of a prosecutrix's testimony on all material elements of a sex crime. N.Y. PENAL LAW § 130.15 (McKinney 1916) (repealed 1974). *See also* notes 3 & 11 *supra*.

88. 68 Misc. 2d at 245, 246-47, 327 N.Y.S.2d at 237, 239 (quoting Judge Breitel's concurring opinion in People v. Radunovic, 21 N.Y.2d 186, 191, 287 N.Y.S.2d 33, 36-37, 324 N.E.2d 212, 215 (1967)). Additional examples of cases reversed under the former New York corroboration rule are: *In re* R., 34 App. Div. 2d 402, 312 N.Y.S.2d 447 (1970); People v. Doyle, 31 App. Div. 2d 490, 300 N.Y.S.2d 719 (1969) (corroboration requirement does not extend to sexual abuse in the third degree—the subjecting of another to sexual contact without the latter's consent). *But see* People v. Scruggs, 31 App. Div. 2d 842, 298 N.Y.S.2d 194 (1969), where the court held that since both burglary and assault charges arose out of the same assault, committed solely in furtherance of the ultimate goal of rape, a logical distinction could not be drawn which would require corroboration for one charge and not for the other. The uncorroborated burglary and assault charges were reversed and a new trial was ordered.

89. BROWNMILLER, *supra* note 1, at 372, gives the following statistics for 1971, in New York City, indicating the chances of conviction under the old rule:

2,415	"founded" rape complaints
1,085	arrests
100	cases taken to the grand jury
34	indictments
18	convictions.

cases,[90] was modified in 1974 after it had come under increasingly harsh attack from the press,[91] women's rights advocates,[92] legal commentators,[93] and prosecuting attorneys.[94] The corroboration rule in the District of Columbia, which resulted in a reversal of the defendant's conviction in *Wiley*,[95] was recently abolished in *Arnold v. United States*,[96] wherein the court said:

> We reject, therefore, the notion given currency so long in this jurisdiction, that the victim of a rape and other sex related offenses is so presumptively lacking in credence that corroboration of her testimony is required to withstand a motion for a judgment of acquittal. Accordingly, we mandate that in the future no instruction directed specifically to the credibility of any mature female victim of rape or its lessor included offenses and the necessity for corroboration of her testimony shall be required or given in the trial of any such case in the District of Columbia court system.[97]

By statutory act, Iowa has also abolished its corroboration rule which required that there be evidence in addition to the testimony of the complainant "tending to connect the defendant with the commission of the offense."[98] Under the new Iowa statute,[99] it is now possible for the prosecution to overcome a

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90. *See* People v. Linzy, 31 N.Y.2d 99, 286 N.E.2d 440, 335 N.Y.S.2d 45 (1972); cases cited in note 88 *supra*.

91. *E.g.*, Taylor, *The Rape Victim: Is She Also the Unintended Victim of the Law*, N.Y. TIMES, June 15, 1971, at 52.

92. *E.g.*, Lear, *Q. If You Rape a Woman and Steal Her TV, What Can They Get You For in New York? A. Stealing Her TV*, N.Y. TIMES, Jan. 30, 1972, § 6 (Magazine), at 11.

93. *E.g.*, Comment, *Corroboration in Rape Cases in New York—A Half Step Forward*, 37 ALB. L. REV. 306 (1973); Comment, *The Rape Corroboration Requirement: Repeal Not Reform* , 81 YALE L.J. 1365 (1972).

94. *E.g.*, Ludwig, *The Case for Repeal of the Sex Corroboration Requirement in New York*, 36 BROOKLYN L. REV. 378 (1970) (the author was Chief Assistant District Attorney for Queens County, New York, when this article was published).

95. *See* text accompanying notes 75-83 *supra*.

96. 358 A.2d 335 (Ct. App. D.C. 1976).

97. *Id.* at 344. The court further stated that "because of the adequacy of the constitutional protections available to every defendant in a sex case, we are persuaded that the requirement of corroboration of the victims' testimony presently serves no legitimate purpose." *Id.* at 343. The court also cites with approval People v. Rincon-Pineda, 14 Cal. 3d 864, 123 Cal. Rptr. 119, 538 P.2d 247 (1975) where the California court stated that:

> Whatever might have been its historical significance, the disapproved instruction now performs no just function, since criminal charges involving sexual conduct are no more easily made or harder to defend against than many other classes of charges, and those who make such accusations should be deemed no more suspect in credibility than any other class of complainants.

Id. at 343.

98. IOWA CODE ANN. § 782.4 (West 1950) (repealed 1974). *See* State v. Taylor, 222 N.W.2d 439, 441-42 (Iowa 1974), for a full description of the former corroboration rule in Iowa.

99. IOWA CODE ANN. § 782.4 (West Supp. 1977-1978).

motion to dismiss and go to the jury, in a rape or other sexual offense case, if it meets the traditional tests applicable to other criminal offenses.

STATUTORY RAPE

The carnal knowledge of a female child is almost invariably a crime by statute.[100] The purpose of these statutes is to protect young girls from being enticed into sexual promiscuity.[101] While the laws on sex offenses committed against adults have made the prosecution of offenders difficult and onerous for the victim, statutory rape remains a simpler crime to prosecute, and one in which the scrutiny of the court is directed more to the defendant's conduct than that of the victim. Thus, while proof of force and resistance are necessary elements of the crime of forcible rape, statutory rape, with few exceptions, depends only upon proof of the age and penetration of the complainant.[102]

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100. *E.g.*, CAL. PENAL CODE § 261.1 (West 1970) (under 18); CONN. GEN. STAT. ANN. § 53a-72(a)(3) (West 1972) (14 years of age or less); FLA. STAT. ANN. § 794.05(1) (West Cum. Supp.) (renumbered as § 10-4201, effective October 1, 1977) (under 16); MASS. GEN. LAWS ch. 265, § 22A (Michie/Law Coop Cum. Supp. 1977) (under 16); TEX. PENAL CODE ANN. tit. 2, § 21.09 (Vernon Cum. Supp. 1976-1977) (under 17 with defense for sexual promiscuous female between 14 and 17).

101. In Powell v. State, 53 Ala. App. 30, 297 So. 2d 163 (Crim. App. 1974), the court stated that the purpose of the laws against statutory rape are:

> [T]o protect young girls of tender years from falling victims to the wiles, schemes, debasedness and depravity of over-sexed men who use acts of flattery and other inducements to persuade them to surrender their most precious possession to the gratification of men who have lost their moral values and think of nothing save their animal instincts regardless of specific intent on the part of the accused to carry forward by force the sexual act to completion, and regardless of consent or nonconsent of the child.

Id. at 34-35, 297 So. 2d at 167.

See also State v. Berry, 373 A.2d 355 (N.H. 1977), where the court held that the fact that the underage complainant was physically mature, or that she might have consented, is immaterial to the charge of statutory rape; State v. Heisinger, 252 N.W.2d 899 (S.D. 1977), where it was held that the willingness of the complainant is no defense to the crime of statutory rape.

102. While the general rule is that a mistaken belief that the prosecutrix was above the age of consent will not constitute a defense, a few jurisdictions allow this defense by statute. *See* 65 AM. JUR. 2d *Rape* § 36 (1972); Annot., 8 A.L.R.3d 1100 (1966). One jurisdiction has done so by common law. People v. Thomas, 267 Cal. 2d 698, 73 Cal. Rptr. 590 (1968), held that it was reversible error for the trial court not to give the defendant's requested instructions to the jury that he could reasonably and in good faith have believed the prosecutrix to be of age (18 in California).

Just as the law wishes to protect underage women who have yet to gain the maturity to intelligently consent to an act of sexual intercourse, so the law also seeks to protect those who are mentally diseased or deficient to the point where they cannot consent intelligently to an act of sexual intercourse. The burden of proof in such cases is high. In Harris v. State, 474 S.W.2d 706 (Tex. Crim. App. 1972), the court stated that at the time of the alleged act the "prosecutrix . . . [must be] mentally unsound to the extent

Consequently, while the need to protect victims of forcible rape requires that the laws be modernized to reduce the heavy burdens of resistance and corroboration, the need to protect victims of statutory rape from their own indiscretion and immaturity requires the retention of strict traditional rules of law in which the willingness, bad reputation, or apparent physical maturity of the complainant are immaterial.

Occasionally, exceptions are made to these general rules. Under the deviate sexual assault statute of the Illinois Criminal Code, it is a crime when "[a]ny person of the age of 14 years and upwards who, by force or threat of force, compels any other person to perform or submit to any act of deviate sexual conduct. . . ."[103] The question that arises is how this statute should be interpreted when the deviate sexual assault is upon a very young victim. In *People v. Mueller*,[104] an eighteen-year-old defendant was convicted of deviate sexual assault upon a seven-year-old girl after allegedly entering her bedroom early in the morning and performing an oral sex act upon her. The defendant was well known to the child since he had been employed on previous occasions as her babysitter.

The defendant in *Mueller* contended that his conviction was invalid because there was no evidence tending to prove force or the threat of force. The state responded that because of the great disparity in size and age between the defendant and the young girl, a threat of force was implied in his actions. The Illinois Supreme Court rejected the state's argument and held that absent evidence to support a finding of force or threat of force the conviction could not stand.

In a sharp dissent in *Mueller*, Justice Davis stated that "force" as used in the statute need not be actual or physical violence but that "[t]he tender age of the victim, coupled with the

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that she had no will to oppose the act." *Id.* at 707. The state must also show that if the prosecutrix lacked the mental capacity to consent the defendant should reasonably have known this. *Id.* at 708.

103. ILL. REV. STAT. ch. 38, § 11-3(a) (1977). Deviate sexual conduct is defined in the Illinois Criminal Code as "any act of sexual gratification involving the sex organs of one person and the mouth or anus of another." ILL. REV. STAT. ch. 38, § 11-2 (1975). The Illinois Criminal Code does not contain a specific statute outlawing statutory rape. There are, however, two broadly written statutes proscribing sexual offenses against children, including indecent liberties with a child and contributing to the sexual delinquency of a child. ILL. REV. STAT. ch. 38, §§ 11-4, 11-5 (1977). Neither of these statutes requires an element of force and, accordingly, if the defendant in People v. Mueller, 54 Ill. 2d 189, 295 N.E.2d 705 (1973) (see text accompanying note 104 *infra*) had been prosecuted under either, he would not have been able to rely on the defense that the state had not proven all elements of the offense with which he was charged.

104. 54 Ill. 2d 189, 295 N.E.2d 705 (1973).

fact that the defendant . . . had exercised a type of parental control over her, was sufficient to establish force by intimidation and the legal incapacity of the victim to consent."[105] He added that a seven-year-old girl cannot be expected to understand the nature of such an act, let alone possess the will to resist, and that force is always present in any act of intercourse between so youthful a minor and an adult man.

At first glance, the *Mueller* case appears to be an instance of a court influenced by the letter rather than the spirit of the law. A careful reading of the full opinion, however, indicates that the majority held serious reservations concerning the youthful complainant's veracity. Cases have occurred where young children have been manipulated to make false accusations, with serious injustices being narrowly avoided by appellate courts that were able to see through a childhood fantasy.[106] It is possible, therefore, that the Illinois Supreme Court, unable to reverse Mueller's conviction on the evidence, chose instead to find reversible error in the trial court's failure to adhere strictly to the statute's requirements that the act be *forcefully* performed. Still, the *Mueller* decision remains an unfortunate precedent because, as Justice Davis said, the authority of an adult figure among a young child should satisfy the force requirement, which is intended to ensure that the relationship was not consensual.[107]

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105. *Id.* at 197, 295 N.E.2d at 709.

106. *See* Barret v. Commonwealth, 210 Va. 153, 169 S.E.2d 449 (1969), the defendant's conviction for assault with intent to rape his 12 year old daughter was reversed. The facts of *Barret* are interesting for the way they seemingly conspire together to create the appearance of the defendant's guilt: while at a dance with his wife the defendant "got drunk" and was required to leave by order of a police officer. He and his wife returned home and put their three children to bed. The defendant's wife then left to perform an errand. When she returned she heard her daughter "hollering pretty loud," and upon turning on the lights in her (and her husband's) bedroom she found him on top of his daughter "pretty near naked" with his "britches" down around his legs. The girl's gown was "pulled up, sort of" above her waist. The defendant did not have an erection.

The defendant in *Barret* testified that he had no intent to rape his daughter, and that he had mistaken her for his son with whom he frequently scuffled and wrestled. The young girl testified at trial that after she was put to bed she asked her father if she could come down to watch television with her brother in the living room but was told that she could not. She then slipped downstairs and got into her parent's bed so that she could watch television through a crack in the bedroom door. When her father reduced the volume on the TV set she went to sleep. She awoke when her father came into the room and started screaming because she was afraid that he might "whip" her for being in his bed. The defendant's wife took the child immediately to a neighbor's home and then called the police. She testified at trial that she intended to divorce her husband. *See also* State v. Bradshaw, 7 N.C. App. 97, 171 S.E.2d 204 (1969), where a widower and father of 8 was charged with assault with intent to rape a 7 year old girl left in his care.

107. 54 Ill. 2d at 200, 295 N.E.2d at 710 (Davis, J., dissenting). Justice Davis

The same principle that applies to alibi defenses to bar the admission of evidence of the complainant's bad reputation is also applicable in statutory rape cases where consent is not an issue. Since a defendant who offers an alibi claims that he did not commit the offense, he is precluded from submitting evidence of the complainant's unchastity for the purpose of suggesting that the act was consensual. Statutory rape is an offense regardless of whether the act in question was consensual and, therefore, any prior unchaste acts of the complainant are irrelevant. An exception to this rule was made in *State v. McDaniel*,[108] where the defendant was convicted of assault and battery upon a fifteen year old with intent to commit rape. Corroborating evidence was offered by the prosecution in the form of testimony indicating the presence of spermatozoa within the person of the prosecutrix. The defendant denied that he had participated in any form of sexual act and sought to introduce evidence that the prosecutrix had engaged in sexual intercourse with her boyfriend earlier in the evening. The trial court rejected this offer of evidence, relying on the rule that evidence pertaining to the unchastity of the prosecutrix is inadmissible when she is under the statutory age of consent.[109]

The appellate court in *McDaniel* held that it was reversible error not to admit testimony of the prosecutrix's activities on the day in question with her boyfriend relevant to the presence of spermatozoa in her person.[110] "Such evidence was admissible, not on the issue of consent or justification for the act, but in answer to any inferences which might arise by reason of the state's offer of evidence on the laboratory tests and physical

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cites with approval language from People v. Riley, 84 Ill. App. 2d 296, 228 N.E.2d 190 (1967), to indicate he endorses the idea that the force required need not be actual or violent.

108. 204 N.W.2d 627 (Iowa 1973).

109. *Id.* at 630. Since the very purpose of the law against statutory rape is to protect underage girls from being enticed into lascivious conduct, or even to allow such girls the opportunity to engage in such conduct, courts will generally not allow a defense to be based upon the prosecutrix's own seductive conduct. However, some courts have allowed defendants to benefit from the defense that they reasonably believed that the prosecutrix was of age and that she then seduced her partner into a sexual relationship. *See, e.g.*, People v. Thomas, 267 Cal. 2d 698, 73 Cal. Rptr. 590 (1969); State v. Deveau, 354 A.2d 389 (Me. 1976); 65 AM. JUR. 2d *Rape* § 36 (1972). Still, the general rule in such situations appears to be that the defendant remains culpable for his conduct and there are numerous cases where defendants were not allowed to establish the promiscuous habits of the underage prosecutrix as proof that she consented to sexual intercourse. *E.g.*, Gandy v. State, 49 Ala. App. 123, 269 So. 2d 141 (1972); People v. Walton, 6 Ill. App. 2d 17, 284 N.E.2d 508 (1972). *But see* State v. DeLawder, 28 Md. App. 212, 344 A.2d 446 (1975).

110. 204 N.W.2d at 630.

condition of the prosecutrix."[111] The court reasoned that the defendant has a right in cases of this sort to show that another person was responsible for any violation of the complainant.[112] The *McDaniel* decision breaks with past precedent on the question of introducing specific acts of unchastity on the part of the prosecutrix, although for the well reasoned purpose of countering the inference of a specific factual situation.[113]

CONCLUSION

Rape is a traumatic and dehumanizing crime. At the very least, the victim of a sexual assault is subjected to a highly personal intrusion upon her person. Often she is brutally treated by her attacker and suffers substantial physical injuries. She is entitled to the protection of the law and to a vigorous prosecution, as is any victim of a violent street crime, without social stigmatization,[114] indifferent treatment from authorities,[115] or a grueling cross-examination at the hands of a defense attorney in an attempt to malign her reputation for chastity. On the other hand, a defendant in a criminal trial must be allowed to face and question his accuser and present relevant evidence in his behalf. Balancing these two interests, while preserving the very purpose of a criminal trial—an impartial search for the truth—is particularly difficult in a crime so emotionally charged as rape, where the conduct expected of the victim, as well as the defendant, is peculiarly based on an ever-shifting sense of morality.

The corroboration requirement which still remains to some degree in a significant minority of jurisdictions should be completely eliminated. It is sufficient that a defendant in a rape case is free to impeach his accuser's reputation for veracity, as is true in any other criminal charge.

The resistance standard, like the corroboration requirement, is based on suspicion of a woman's motives in accusing a man of rape. A rule of law that requires a rape complainant to physically resist an assault until the very moment that the crime is perpetrated, or until she is placed in fear of grave bodily injury, perpetuates the myth that women wish to be forced into

111. *Id.*

112. *Id.*

113. *See* State v. Murphy, 353 A.2d 346 (Vt. 1976) (reversible error occurred when the defendant was not allowed to introduce evidence of a prior specific sexual act by the complainant to show that some of her injuries may have been sustained during an earlier occurrence).

114. On the issue of social stigmatization and self-blame felt by rape victims in our society and other societies see BROWNMILLER, *supra* note 1, at 78-86, 361-67.

115. *See, e.g.*, Bohmer, *Judicial Attitudes Toward Rape Victims*, 57 JUD. 303 (1974).

sexual acts regardless of what they indicate verbally. It also encourages men to force themselves upon women in quest of sexual gratification in the knowledge that anything short of wholehearted resistance will be interpreted as consent. This requirement shows a shocking lack of awareness on the part of certain courts of the considerable fear that many women live in of physical assault, particularly in urban areas, and the fact that resistance will often lead to serious physical injury. There should not be a presumption in any court of law that if a woman failed to resist, she consented to sexual intercourse. Rather, each case should be tried on its own factual circumstances allowing the fact-finder to decide whether the conduct of the complainant was consensual. A rule of law which places such unrealistic expectations upon a complainant only encourages reprehensible behavior on the part of men.

Several jurisdictions have recently revised their criminal codes or rules of evidence to exclude evidence of a complainant's reputation for unchastity,[116] or to place such information under judicial scrutiny prior to admission where its probativeness can be balanced against its inflammatory and prejudicial nature. While these reforms are intended to eliminate evidence which may be of no real relevance to the crime itself, the result might well be prejudicial to the defendant since such evidence may be necessary to impeach a complainant's reputation for veracity and to rebut evidence that any sexual contact with the defendant was against her will. It is an accepted principle of law that evidence of prior conforming habits of conduct is admissible to establish the likelihood of questioned conduct. This rule should not be abandoned at the demand of feminists who wish to protect women from the embarrassment of having their prior sexual conduct brought to light in open court. The penalties that attach to a rape conviction are too severe to deny a potential defendant so important an element of his defense. If a defendant in a rape trial is entitled to claim as a defense that the complainant consented, then he is entitled to present evidence even mildly probative of the contention, and, it is for the jury to evaluate the weight and meaning of that evidence.

The rule of law generally adhered to in statutory rape cases, as stated earlier, is that the only two elements of the crime are penetration and that the complainant was under the age of consent.[117] Some courts have attempted to obviate the harsh impact of these minimal requirements by allowing a defendant to plead unusual circumstances such as the mature appearance of

116. *See* note 70 *supra*.
117. *See* text accompanying notes 100-102 *supra*.

the complainant or her willingness to comply.[118] Though the law is admittedly harsh, *it is harsh by necessity* and should be *strictly enforced.* It should not matter how willing or promiscuous the complainant was in a statutory rape case. The very purpose of the law is to protect her from her own promiscuity. It should not be a defense that the underage complainant appeared to be sexually mature. Such a complainant may well be sexually mature, physically, but not be prepared to handle the emotional or biological consequences of a sexual liason or a promiscuous life-style. There is no more effective way to protect an underage girl from promiscuity than to place an absolute burden upon the male to make certain that his sex partners are above the age of consent. Because of the naivete and impetuousity of youth, and a natural tendency on the part of some men to take advantage of the willingness of the young to experiment, to flaunt conventions or authority, or simply to be overly trusting, the strict rule of law on statutory rape must be firmly adhered to.

118. *See* notes 102 & 109 *supra.*

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