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RAPE IN ILLINOIS: A DENIAL OF EQUAL PROTECTION

INTRODUCTION

The Illinois legislature has segregated forcible sexual assault in the criminal code according to the anatomical difference between men and women.[1] Although rape and deviate sexual assault carry the same penalty for obtaining sexual gratification by the use of force,[2] the criminal liability of the accused and the courtroom treatment of the complainant vary depending upon whether the act was of vaginal, oral or anal intercourse. Forcible intercourse, if vaginal, falls within the rape statute[3] and, if oral or anal, comes under the deviate sexual assault statute.[4] This distinction has fostered presumptions and rules of evidence which treat women in cases of rape inconsistently with the treatment of men and women in deviate sexual assault. The inconsistency is supported by Illinois law in spite of an Illinois constitutional provision that "equal protection of the laws shall not be denied or abridged on account of sex by the State or its units of local government. . . ."[5]

If a woman has been forcibly violated no one questions that this anti-social behavior is punishable by the state. The real problem lies in determining whether the charge is a truthful

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1. ILL. REV. STAT. ch. 38, §§ 11-1, 11-3 (1973).

2. Each offense "is a Class 1 felony for which an offender may not be sentenced to death." ILL. REV. STAT. ch. 38, §§ 11-1(c), 11-3(b) (1973).

3. ILL. REV. STAT. ch. 38, § 11-1 (1973) states:

(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 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 that she can not give effective consent to intercourse.

(b) Sexual intercourse occurs when there is any penetration of the female by the male sex organ.

(c) Sentence.

Rape is a Class 1 felony for which an offender may not be sentenced to death.

4. ILL. REV. STAT. ch. 38, § 11-3 (1973) states:

(a) Any 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 commits deviate sexual assault.

(b) Sentence.

Deviate sexual assault is a Class 1 felony for which an offender may not be sentenced to death.

ILL. REV. STAT. ch. 38, § 11-2 (1973) reads:

"Deviate sexual conduct," for the purpose of this Article, means any act of sexual gratification involving the sex organs of one person and the mouth or anus of another.

5. ILL. CONST. art. 1, § 18 (1970).

one.[6] As a general rule, evidence of a poor reputation for veracity is the accepted American means of impeaching a witness in criminal trials.[7] The testimony of male and female complainants of deviate sexual assault is tested for truthfulness in this manner. However, the consent element of the rape statute provides the foundation for the admission of special impeaching evidence.[8] If the forcible sexual assault is an act of vaginal intercourse alone or in combination with oral or anal intercourse, the woman's testimony is subject to impeaching evidence beyond that admitted against witnesses in other criminal proceedings.[9]

Reading rape cases to discern rules of law can be misleading. There are only a few rules of law and they appear to be well settled.[10] Frequently cases cite the same rules of law and yet arrive at opposite results.[11] This is true because is-

6. 3A WIGMORE, EVIDENCE § 924a (Chadbourn rev. 1970); ILLINOIS INSTITUTE FOR CONTINUING LEGAL EDUCATION, ILLINOIS CRIMINAL PRACTICE §§ 8.11-8.49 (1971); Hibey, *The Trial of a Rape Case: An Advocate's Analysis of Corroboration, Consent and Character*, 11 AM. CRIM. L. REV. 309 (1973); Note, *The Victim in a Forcible Rape Case: A Feminist View*, 11 AM. CRIM. L. REV. 335 (1973); 1957 U. ILL. L.F. 651; Puttkammer, *Consent in Rape*, 19 ILL. L. REV. 410 (1925).

7. 3A WIGMORE, EVIDENCE § 922 (Chadbourn rev. 1970).

8. 3A WIGMORE, EVIDENCE § 924b (B) (Chadbourn rev. 1970).

9. Women who complain of deviate sexual assault are generally accorded the presumption of credibility which men enjoy. They need only prove force or the threat of force. People v. Garriott, 20 Ill. App. 3d 994, 313 N.E.2d 189 (1974); People v. Bendig, 91 Ill. App. 2d 337, 235 N.E.2d 284 (1968). Women who charge both rape and deviate sexual assault must meet the proofs of rape on both counts. In addition to force, there must be proof of a lack of consent. People v. Canale, 52 Ill. 2d 107, 285 N.E.2d 133 (1972); People v. Taylor, 48 Ill. 2d 91, 268 N.E.2d 865 (1971); People v. Mullenhoff, 33 Ill. 2d 445, 211 N.E.2d 744 (1965); People v. Garreau, 27 Ill. 2d 388, 189 N.E.2d 287 (1963); People v. Elder, 25 Ill. 2d 612, 186 N.E.2d 27 (1962); People v. Stephens, 18 Ill. App. 3d 971, 310 N.E.2d 824 (1974); People v. Montgomery, 19 Ill. App. 3d 206, 311 N.E.2d 361 (1974); People v. Ware, 11 Ill. App. 3d 697, 297 N.E.2d 289 (1973); People v. Boatman, 3 Ill. App. 3d 652, 279 N.E.2d 425 (1972); People v. Mixter, 8 Ill. App. 3d 531, 290 N.E.2d 705 (1972); People v. Bruno, 110 Ill. App. 2d 219, 249 N.E.2d 252 (1969).

10. The five rules which appear frequently in Illinois rape cases are: (1) to support a conviction the complainant's testimony must be clear and convincing, People v. Strong, 120 Ill. App. 2d 52, 256 N.E.2d 76 (1970), (2) a conviction must be reversed unless a reassessment of the evidence establishes guilt beyond a reasonable doubt, People v. Mixter, 8 Ill. App. 3d 531, 290 N.E.2d 705 (1972), (3) a reputation for unchastity raises a probability of consent, People v. Fryman, 4 Ill. 2d 224, 122 N.E.2d 573 (1954), (4) complainant is required to resist, People v. De Frates, 33 Ill. 2d 190, 210 N.E.2d 467 (1965) and, (5) resistance is waived where futile or dangerous, People v. Chambers, 127 Ill. App. 2d 215, 262 N.E.2d 170 (1970).

11. Many courts have cited the rule that resistance will not be required where it would be futile, where the complainant's life is in danger, where the complainant is paralyzed with fear, or where the aggressor possesses superior strength. These courts have reversed and affirmed the convictions. The decisions resulted from determinations of fact and assessments of the complainants' credibility rather than a determination of what the law is. The following cases were affirmed although there was no resistance: People v. Smith, 8 Ill. App. 3d 36, 288 N.E.2d 171

sues of fact and the admissibility of evidence are more determinative of the outcome than are rules of law. Thus, in a study of rape, practice is more crucial than law.

The purpose of this article is to determine whether the means which Illinois has employed to test the veracity of rape complainants are within constitutional limitations. The first issue is whether the consent element is necessary to the substantive cause of action for rape. Thereafter, the propriety of using the consent element for impeachment purposes will be explored as a possible violation of equal protection on the basis of sex.

Lack of Consent as a Substantive Element

According to legislative definition, one commits deviate sexual assault "who, by force or threat of force, compels any other person to perform or submit to any act of deviate sexual conduct,"[12] and one "who has sexual intercourse with a female . . . by force and against her will" commits rape.[13] At first blush, these definitions appear roughly equivalent and should lead to similar results. Whether they are in fact equivalent is the focus of this section.

The relationship between the concepts of force, lack of consent, and compelled conduct is a lesson of life taught by experience. Society and the law have decided that compelled conduct is not an exercise of the freedom of choice which our democratic government seeks to preserve.[14] For example, where property has been obtained from the person by force or threat of force, the aggressor cannot avoid criminal liability by claiming that the complainant consented to the forceful taking because of the presumption that force vitiates consent. In other words, the force compelled the involuntary action of releasing dominion and control over the property.

The presumption that force vitiates consent is implicit in the statutory definition of deviate sexual assault. The prosecutor need only prove that force or the threat of force was employed to obtain sexual gratification. Thus, proof of force in

(1972) (butcher knife); People v. Chambers, 127 Ill. App. 2d 215, 262 N.E.2d 170 (1970) (knife); and People v. Lee, 96 Ill. App. 2d 105, 238 N.E.2d 63 (1968) (abducted by two men). However, other cases were reversed because there was a lack of resistance: People v. Taylor, 48 Ill. 2d 91, 268 N.E.2d 865 (1971) (gun); People v. Scott, 407 Ill. 301, 95 N.E.2d 315 (1950) (held captive/theatened with death); and People v. Mixter, 8 Ill. App. 3d 531, 290 N.E.2d 705 (1972) (beaten).

12. Ill. Rev. Stat. ch. 38, § 11-3 (1973).

13. Ill. Rev. Stat. ch. 38, § 11-1 (1973).

14. *See generally* U.S. Const. amend. I-VIII, Ill. Const. art. I (1970).

deviate sexual assault precludes the possibility of consent.[15]

In contrast to the deviate sexual assault statute, a literal reading of the statutory definition of rape indicates that the use of force and consent can coexist. In addition to proof of force, the prosecutor must establish the negative, that the victim did not consent, because there is an inference that the victim consented to the sexual conduct. As a result of the proof of an additional element where the charge is rape, a dichotomy exists in Illinois' treatment of victims of forcible sexual aggression. Whereas in deviate sexual assault, force vitiates consent; in rape, consent vitiates force. Thus, force and a lack of consent are two independent elements, and a failure of proof of either element defeats the state's cause of action.[16]

A historical study of the offenses of rape and deviate sexual assault reveals the development and parameters of this dichotomy.

Common Law Definitions of Blackstone

The Illinois definitions of rape and deviate sexual assault are derived from the commentaries of Blackstone.[17] These crimes were felonies at common law.[18] Deviate sexual assault was referred to as sodomy or the 'infamous crime against nature'. Whether the act was accomplished by the use of force or was against the will of the other participant was irrelevant, as the conduct itself was subject to punishment on a theory of strict liability.[19]

Blackstone's definition of rape, which the Illinois statute paraphrases, requires "the carnal knowledge of a woman forcibly and against her will."[20] While Illinois paraphrased the definition accurately, it failed either to comprehend or to adopt the message of the commentary. The annotations to the rape statute do not disclose whether the legislature misapprehended Blackstone or rejected his commentary while adopting the definition.[21] A reading of Blackstone's article as a whole establishes that the definition was phrased to distinguish common law rape from the civil law's strict liability approach. At civil law, rape was committed when the woman was stolen from

15. *See* ILLINOIS JUDICIAL CONFERENCE COMMITTEE ON PATTERN JURY INSTRUCTIONS, ILLINOIS PATTERN JURY INSTRUCTIONS—CRIMINAL, § 9.06 (1968).
16. *Id.*, § 9.03.
17. ILL. ANN. STAT. ch. 38, § 11-1, Commentary at 291 (Smith-Hurd 1972).
18. 4 W. BLACKSTONE, COMMENTARIES *210, *215.
19. *Id.*, *215.
20. *Id.*, *210.
21. Note 17 *supra.*

her parents or guardian and debauched, whether she consented or was forced.[22] Blackstone believed that the male should not be sanctioned for the mutual fault of both parties. Thus, in England where the male and female combined to steal away for the purpose of intercourse, the force directed against the family did not establish the crime of rape. When the definition is read in context, the commentary supports the proposition that where force is applied directly against the female there need not be an additional finding of a lack of consent, *i.e.*, force vitiates consent.[23]

Blackstone's definition of rape has produced confusion through the centuries.[24] The application of the requirement that both force and a lack of consent be proven has caused difficulty in cases where the defendant used force but the complainant failed to demonstrate a lack of consent by resistance. Thus, some authorities concluded that the law required "resistance to the uttermost."[25]

The concepts enunciated by Blackstone formed the basis of Illinois law prior to 1961. Until then, for a conviction of sodomy, the prosecutor only needed to prove that the accused participated in an act of deviate sexual conduct (oral or anal intercourse).[26] To obtain a conviction in a rape case, however, the prosecutor had to prove both the use of force by the accused and resistance on the part of the complainant.[27]

The Illinois Law of Deviate Sexual Assault and Rape

Both men and women may be victims of deviate sexual assault. As early as 1950, Illinois held that deviate sexual assault was not limited to participants of the same sex but might be committed between persons of the opposite sex.[28] Women who have charged only deviate sexual assault have been accorded the same treatment as the male complainants of this offense. They need only prove force or threat of force. Where rape and deviate sexual assault occurred during the same con-

22. 4 W. BLACKSTONE, COMMENTARIES *210.
23. *Id.*
24. PERKINS, CRIMINAL LAW 161 (2d ed. 1969).
25. *Id.* (footnote references in quote omitted).
Blackstone defined rape as "carnal knowledge of a woman forcibly and against her will." This reference to force was not found in the earlier definition by Coke and its use has tended to cause confusion rather than to clarify the law. It led to a notion that "resistance to the uttermost" on the part of the woman is one of the elements of rape. In the absence of intimidation, it was said by one court, "the female must resist to the utmost of her ability, and such resistance must continue till the offense is complete."
26. ILL. REV. STAT. ch. 38, § 141 (1961).
27. *See* notes 3 and 15 and accompanying text *supra*.
28. People v. Whitham, 406 Ill. 593, 94 N.E.2d 506 (1950).

frontation, the rules of rape have been applied requiring proof of force and a lack of consent.[29]

For simplicity of expression, those who complain of rape or rape and deviate sexual assault will be referred to in the feminine gender. Hereinafter, a woman who charges only deviate sexual assault will be labeled a "par-male". A par-male is accorded equality in value or standing under Illinois law because in given circumstances she can be viewed the same as a man.

Forcible sexual aggression is dealt with differently depending upon whether the aggressor seeks vaginal intercourse or deviate sexual conduct. Should the accused be interrupted by a third party after force is used and clothing stripped away but before the accused has exhibited which type of intercourse is sought, the charge may be either attempted rape or attempted deviate sexual assault.[30] Thus in *People v. Mullenhoff*,[31] a prima facie case for attempted deviate sexual assault was held to be identical to a prima facie case of attempted rape. Once either vaginal intercourse or deviate sexual conduct occurs, the similarity between such proceedings ends. When the aggressor makes this choice, criminal liability is dependent upon different considerations.

Development of Deviate Sexual Assault

Prior to 1961, criminal liability for sodomy existed regardless of whether it was accomplished by the use of force or against the will of the complainant. The uncorroborated testimony of males and par-males that the act had occurred unquestionably supported convictions.[32]

Publication of the Kinsey Report, which indicated a high incidence of consensual sodomy, precipitated legislative concern leading to a change in the law.[33] The legislature determined that it was inadvisable to continue to punish the occurrence of anal or oral intercourse and so provided a criminal penalty only for its procurement by the use of force or the threat of force. The Committee Comment, which annotated the new statute, stated that the force element was to be the equivalent of the force required in rape and that the sufficiency of threats was to be determined by case law.[34]

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29. See authority cited in note 8 *supra*.
30. People v. Mullenhoff, 33 Ill. 2d 445, 211 N.E.2d 744 (1965).
31. *Id.*
32. People v. Stevens, 11 Ill. 2d 21, 141 N.E.2d 33 (1957); People v. Sampson, 1 Ill. 2d 399, 115 N.E.2d 627 (1953); People v. Kraus, 395 Ill. 233, 69 N.E.2d 885 (1946); People v. Elder, 382 Ill. 388, 47 N.E.2d 694 (1943); People v. Dabbs, 370 Ill. 378, 19 N.E.2d 175 (1938).
33. Note, *Post-Kinsey: Voluntary Sex Relations As Criminal Offenses*, 17 U. CHI. L. REV. 162 (1949).
34. ILL. ANN. STAT. ch. 38, § 11-3, Commentary at 369 (Smith-Hurd

Where the defendant uses force or threat of force to procure deviate sexual gratification, the state's case will not be defeated by the lack of resistance by the complainant. In *People v. Bendig*,[35] the defendant asserted that the complainant had not made an offer of resistance. Rejecting the contention that this lack of resistance exculpated his use of force, the court decided that holding the complainant's arm while sitting on complainant obviated any duty to offer resistance. In another case the defendant claimed to have a razor blade, although it was never produced. This was held to be a sufficient threat of force so that neither an outcry nor resistance was required of the complainant.[36]

In rape proceedings, the complainant's assertion that she did not consent is frequently rebutted by the defendant's testimony charging her failure to resist.[37] However, *People v. Garriott*[38] held that marks and lacerations on the deviate sexual assault complainant negate a consent defense. Any hint that resistance would be required in addition to proof of force or threat of force has been put to rest in *Garriott*. Furthermore, the court in *People v. Myers*[39] refused to transplant the resistance requirement from rape to deviate sexual assault.

While deviate sexual assault complainants are not required to resist, in practice most rape complainants must resist. The general rule and its exceptions are set out below. The complainants of forcible sexual aggression (young males, males in prison, par-males, and women) appear to be in positions of comparative weakness in relation to their aggressors. Thus, the deviate sexual assault approach, which allows the victims to submit to force or threat of force, is quite enlightened.

Development of Rape

The Illinois definition of rape has not substantially changed since Blackstone's time.[40] The force element in rape requires actual force as opposed to the threat of force allowed in

1972); People v. Mueller, 54 Ill. 2d 189, 295 N.E.2d 705 (1973); People v. Fickes, 89 Ill. App. 2d 300, 231 N.E.2d 602 (1967).

35. 91 Ill. App. 2d 337, 235 N.E.2d 284 (1968).

36. People v. McClaine, 132 Ill. App. 2d 669, 270 N.E.2d 176 (1971).

37. Note 43 *infra*.

38. 20 Ill. App. 3d 994, 313 N.E.2d 189 (1974).

39. 92 Ill. App. 2d 129, 234 N.E.2d 811 (1968). Citing a force rule from a rape case, the court glossed over the resistance language noting that the only witness who testified to a lack of resistance was the defendant. Although this is a distinction without a difference, the decision establishes that resistance has no place in a crime without a consent element. In a forceful or threatening situation, the complainant may obey any orders of the aggressor with no duty to resist.

40. *See* notes 3 and 20 and accompanying text *supra*.

deviate sexual assault. In *People v. Taylor*,[41] although the complainant testified to entering the defendant's car at gunpoint, the court determined that there was insufficient evidence of force at the time of intercourse. The defendant in *People v. Clarke*[42] broke into the complainant's apartment, threatened to kill her when she screamed, bound her hands, and put a pillow case over her head before the intercourse occurred. At the trial, he contended that a lack of resistance showed the intercourse to be consensual. The court determined that allowing her hands to be tied was the result of fear which did not establish consent. Once her hands were tied further resistance would have been unavailing, and the law does not require resistance where it would be futile. In rejecting the defendant's claim that there had been no force, the court found the act of placing the pillow case over her head to be quite significant as the rape complainant must see the weapon, which the defendant himself made impossible here. Thus, where the complainant has been totally disabled, a court will strain to find force but still will not allow mere threats of force. Where the woman survives the attack and there are no third-party witnesses to the defendant's use of force, the state must establish that the intercourse took place against the woman's will. This requires a showing of resistance. The extent of the resistance required in cases of rape is set out in the following jury instruction:

> You must find on the part of the woman not merely a passive policy or equivocal submission to the defendant; such resistance will not do. Voluntary submission by the woman, while she has the power to resist, no matter how reluctantly yielded, removes from the act an essential element of rape. If the carnal knowledge was with the voluntary consent of the woman, no matter how tardily given or how much force had theretofore been employed, it is not rape.[43]

This general rule has been tempered by the following exceptions: (1) where resistance would be useless or foolhardy,[44] (2) where the woman's life is in danger,[45] (3) where she is

41. 48 Ill. 2d 91, 268 N.E.2d 865 (1971).
42. 50 Ill. 2d 104, 277 N.E.2d 866 (1972).
43. Reynolds v. State, 27 Neb. 90, 91, 42 N.W. 903 (1889). This is the leading American case on rape instructions. It has been paraphrased in varying degrees of completeness by numerous Illinois cases, *e.g.*, People v. De Frates, 33 Ill. 2d 190, 194-5, 210 N.E.2d 467, 469 (1965); People v. Scott, 407 Ill. 301, 305-6, 95 N.E.2d 315, 317 (1950); People v. Chambers, 127 Ill. App. 2d 215, 221-2, 262 N.E.2d 170, 173 (1970).
44. People v. Simental, 11 Ill. App. 3d 537, 297 N.E.2d 356 (1973); People v. Smith, 8 Ill. App. 3d 36, 288 N.E.2d 694 (1972); People v. Chambers, 127 Ill. App. 2d 215, 262 N.E.2d 170 (1970); People v. Lee, 96 Ill. App. 2d 105, 238 N.E.2d 63 (1968).
45. People v. Canale, 52 Ill. 2d 107, 285 N.E.2d 133 (1972); People v. Elder, 25 Ill. 2d 612, 186 N.E.2d 27 (1962); People v. Boatman, 3 Ill.

paralyzed with fear,[46] or (4) where she is overcome by superior strength.[47] These exceptions, however, are generally unavailable to a complainant whose testimony is not clear and convincing.[48]

Should the complainant's testimony fail to be clear and convincing, only corroborative evidence can sustain a finding of mortal danger or the futility of resistance. Exception 1 is unavailable to one who has not attempted to resist or to escape, for without such attempts how can the fact-finder determine beyond a reasonable doubt that resistance was useless or foolhardy? Without corroboration of the futility of resistance or danger to life, the complainant's testimony cannot justify the use of either exceptions 1 or 2. Thus, where there is neither corroborative evidence of a weapon nor bruises to support a claim of rough handling, resistance will be expected.[49] Bruises or lacerations may not be enough, however, where the complaint is not timely[50] or where the scene of the encounter was not in sufficient turmoil to evidence a desperate struggle.[51]

Where there is testimony of normal functioning, such as conversation with the accused,[52] allowing him to return her to her home or neighborhood,[53] cooking for him during captiv-

App. 3d 652, 279 N.E.2d 425 (1972); People v. Carter, 84 Ill. App. 2d 135, 228 N.E.2d 522 (1967).

46. People v. Clarke, 50 Ill. 2d 104, 277 N.E.2d 866 (1972); People v. Ardelean, 368 Ill. 274, 13 N.E.2d 976 (1938).

47. People v. Ardelean, 368 Ill. 274, 13 N.E.2d 976 (1938); People v. Sims, 5 Ill. App. 3d 727, 283 N.E.2d 906 (1972); People v. Flournoy, 1 Ill. App. 3d 918, 275 N.E.2d 289 (1971).

48. An instruction delineating these exceptions has caused reversal. The evidence in each case must show resistance as long as a woman has use of her faculties and physical powers. The court felt that the instruction was not strong enough as the defendant claimed that the complainant was a prostitute. People v. Eccarius, 305 Ill. 62, 136 N.E. 651 (1922).

49. People v. Taylor, 48 Ill. 2d 91, 268 N.E.2d 865 (1971); People v. Jeanor, 23 Ill. 2d 347, 178 N.E.2d 384 (1961); People v. Scott, 407 Ill. 301, 95 N.E.2d 315 (1950).

50. Although the complainant was bleeding profusely, the court held that resistance was not proven beyond a reasonable doubt. Where the act of intercourse is admitted, resistance becomes the gist of the offense, and so the evidence must demonstrate beyond a reasonable doubt that the act was against her will. People v. Serrielle, 354 Ill. 182, 188 N.E. 375 (1933). Where the complainant had multiple bruises but obeyed the defendant's orders, did not scream, and appeared calm after the alleged attack, the court reversed the judgment, noting that it had not been established whether the bruises had been inflicted by the defendant. People v. Mixter, 8 Ill App. 3d 531, 290 N.E.2d 705 (1972).

51. Regardless of a dispute over the precise number of bruises, there was bruise evidence of force which the court reasoned was outweighed by the complainant's failure to make an outcry and the fact that her apartment did not evidence a desperate struggle. People v. Faulisi, 25 Ill. 2d 457, 185 N.E.2d 211 (1962).

52. People v. Taylor, 48 Ill. 2d 91, 268 N.E.2d 865 (1971).

53. People v. Bain, 5 Ill. App. 3d 632, 283 N.E.2d 701 (1972). *Contra*, People v. De Frates, 395 Ill. 439, 70 N.E.2d 591 (1946). The point seems trivial, as in most cases (those reversed and affirmed) involving motor vehicles the complainant is returned to her home or neighborhood.

ity or falling asleep after the attack,[54] resistance will be expected as these facts rebut a state of fear-induced paralysis. Additionally, when the male and female are of approximately the same height and weight, the superior strength exception is unavailable.[55]

Unless the complainant meets the above tests, there is a duty to resist. The absence of resistance under these circumstances establishes consent and so defeats the state's case even if proof of force has been admitted. In numerous rape cases, the testimony of the complainant regarding force is uncorroborated so that evidence of little or no resistance will often tip the scales toward impeachment (consent vitiates force) or exculpation (the woman failed to cope effectively with the amount of force the defendant used).

Proof of resistance is not required where there are third-party witnesses to the use of force. In *People v. Hill*,[56] the accused broke into the apartment, tied up the husband, and had intercourse with the wife. Resistance was immaterial, for while the claim of non-resistance will impeach the testimony of the complainant, it has no affect upon the testimony of a third-party witness. Also, where two witnesses testified to the force directed against the complainant in her abduction, a failure to resist the act of intercourse was immaterial.[57] In practice, where force is proven independently of the complainant's testimony, the consent element seems to drop out of the definition of rape. The survival of a substantive element of a crime should not depend upon the form of evidence. Thus, in practice the function of the duty to resist is to test the truthfulness of the complainant.

The issue of a lack of resistance is raised frequently by defendants—often in quite unlikely cases as is illustrated in *People v. Hunter*.[58]

> The defendant next contends that the evidence fails to show the act of intercourse took place forcibly and against the will of Millie Savage. This record shows a 14 year old girl, awakened in the early morning, who had no previous sexual experience, saw

54. In People v. Scott, 407 Ill. 301, 305, 95 N.E.2d 315, 317 (1950), the complainant fell asleep in the same bed with the defendant, cooked for him, and made no escape attempt while alone. The court found these factors to negate her testimony that she was beaten and was held captive by several men. Accordingly, the court determined that the complainant was not paralyzed with fear. To the court it was "[c]lear that, however reluctantly begun, the sexual acts were engaged in without any resistance whatsoever on the part of the prosecutrix."

55. Note 42 *supra*.

56. 28 Ill. 2d 438, 192 N.E.2d 872 (1963).

57. People v. Hall, 1 Ill. App. 3d 949, 275 N.E.2d 196 (1971); People v. Carter, 84 Ill. App. 2d 135, 228 N.E.2d 522 (1967).

58. 14 Ill. App. 3d 879, 887, 303 N.E.2d 482, 487 (1973).

> her mother attacked in her own home with a knife by a man on a rampage, was struck by that man, was ignored by bystanders and threatened if she cried out she would be killed, had her clothes torn from her, had intercourse on a basement landing, ran down the street naked and made an immediate complaint, was examined by a physician who found recent trauma in her vaginal area. We are asked to say that that evidence shows that she yielded without that degree of resistance required by law. We not only will not say it, but, rather we agree completely with the trial court's finding.

During the past decade, several Illinois courts have held that evidence of force precludes the possibility of consent.[59] The court in *People v. Perez*[60] stated, "Such evidence of the use of force, clearly indicates to the reasonable mind that the act was accomplished against the will of the girl." In *People v. Strong*[61] it was held that obeying the orders of a defendant who employs force does not constitute the voluntary submission necessary to establish consent. Recently, in *People v. Casner*[62] it was noted that evidence of trauma about the face and vaginal area causes a consent defense to be improbable and incredible. The trend is by no means established. Throughout this period most courts have taken the traditional approach toward cases of rape.[63]

New Directions

In 1961, the law of sodomy was changed because of altered attitudes motivated by the Kinsey Report. Perhaps, the last mentioned cases in the rape section signal a new attitude toward rape, viewing it as the equivalent of deviate sexual assault.

However, this decisional trend is unavailing without a statutory change, as diverse rules of law continue to be presented to the jury in the form of the pattern jury instructions. As the jury deliberates, the only documents which are present as an aid to deliberation are the court's instructions which explain the statutory definitions. The rape instruction directs the jury

59. People v. Clarke, 50 Ill. 2d 104, 277 N.E.2d 866 (1972); People v. Sims, 5 Ill. App. 3d 727, 283 N.E.2d 906 (1972); People v. Hall, 1 Ill. App. 3d 949, 275 N.E.2d 196 (1971); People v. Chambers, 127 Ill. App. 2d 215, 262 N.E.2d 170 (1970); People v. Lee, 96 Ill. App. 2d 105, 238 N.E.2d 63 (1968); People v. Carter, 84 Ill. App. 2d 135, 228 N.E.2d 522 (1967).

60. 412 Ill. 425, 429, 107 N.E.2d 749, 751 (1952).

61. 120 Ill. App. 2d 52, 256 N.E.2d 76 (1970).

62. 20 Ill. App. 3d 107, 312 N.E.2d 709 (1974).

63. People v. Taylor, 48 Ill. 2d 91, 268 N.E.2d 865 (1971); People v. Anderson, 20 Ill. App. 3d 840, 314 N.E.2d 651 (1974); People v. Reese, 14 Ill. App. 3d 1049, 303 N.E.2d 814 (1973); People v. Mixter, 8 Ill. App. 3d 531, 290 N.E.2d 705 (1972); People v. Bain, 5 Ill. App. 3d 632, 283 N.E.2d 701 (1972); People v. Bruno, 110 Ill. App. 2d 219, 249 N.E.2d 252 (1969).

to first focus upon the behavior of the accused: "That the act of sexual intercourse with ———— was by force and against her will . . . ." Next, the jury is directed to focus upon the behavior of the accuser: "and that she did not voluntarily consent to it."[64] This disjunctive approach leads to the conclusion that force need not vitiate the consent of women in cases of rape. The deviate sexual assault instruction, however, narrows the jury's focus quite exclusively to the behavior of the accused: "That the defendant, by force or threat of force, compelled ———— to perform or submit to an act of deviate sexual conduct. . . ."[65] This blended approach leads to the conclusion that force or even the threat of force vitiates the consent of males and par-males in cases of deviate sexual assault.

In 1961, the legislature expressed an intention to create a comprehensive plan to protect the adult body from forcible sexual aggression and to protect children from their immaturity.[66] If forcible sexual assault proceedings are to be carried out in a comprehensive manner, it is necessary for the legislature to enact a comprehensive statute.

Such a statute would require the consistent application of criminal liability and the consistent courtroom treatment of the parties whenever sexual gratification has been obtained by force or threat of force. Forcible sexual aggression statutes concentrate upon the force used against the person rather than the violation of sexual mores or stereotypes. The Illinois deviate sexual assault statute could easily be transformed into a comprehensive statute protecting all from forcible sexual aggression.

> Any 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 sexual conduct commits forcible sexual assault. "Sexual conduct," for the purpose of this Article, means any act of sexual gratification involving the sex organs of both or the sex organs of one person and the mouth or anus of another.

Like all simple solutions, such a statute would not necessarily bring uniformity to the treatment of all cases of forcible sexual assault. As will be discussed below, evidence is admissible to impeach the rape complainant which would be inadmissible to impeach witnesses in other types of criminal proceedings. Such rules should be abolished to prevent the evidentiary rules from attaining a life of their own under the new statute, although their foundation, *i.e.*, the consent element, is absent in the new statute.

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64. Note 16 *supra.*
65. Note 15 *supra.*
66. ILL. ANN. STAT. ch. 38, § 11-3, Commentary at 369 (Smith-Hurd 1972).

THE CONSENT ELEMENT: FOUNDATION FOR IMPEACHING EVIDENCE

In deviate sexual assault it is necessary to establish that force or threat of force compelled the action or inaction of the victim. In rape it must be established that the woman did not consent. To test whether the action or inaction of the rape victim manifests a lack of consent, the courts have fashioned a stereotype, which contains the attributes assumed to be part of a true victim's character. Like negligence's reasonable man, the true victim of rape exercises due care and caution for her own safety. She possesses a reputation for chastity in her community. Additionally, she copes well with aggression, usually meeting force with force. Should she fail to overpower her aggressor and rape occurs, she will make an immediate complaint in a hysterical state.

Introduction of evidence showing deviation from that standard performs three functions: (1) it establishes a probability of consent, (2) it impeaches testimony of force, and (3) if the use of force is corroborated, it exculpates that use of force.

Impeaching Evidence in Rape Cases

The credibility of the complainant is always an issue in a rape trial.[67] Illinois uses the "clear and convincing" test to determine whether the testimony of the complaining witness is sufficient to support a verdict against the defendant.[68] Where the testimony is of this character, a reviewing court will not reverse the judgment in spite of discrepancies in the testimony.[69] A court of review is not limited to the consideration of whether error has occurred or whether the weight of evidence is sufficient to support the verdict. Rather, the court has a special duty to reverse a conviction for rape if a reassessment of the evidence does not support an abiding belief of guilt beyond a reasonable doubt.

The special rule for the appeal of rape cases is succinctly stated in *People v. Porter*:[70]

> With respect to the issue of fact (and the conflicting testi-

67. People v. De Frates, 33 Ill. 2d 190, 210 N.E.2d 467 (1965); People v. Kazmierczyk, 357 Ill. 592, 192 N.E. 657 (1934); People v. Montgomery, 19 Ill. App. 3d 206, 311 N.E.2d 361 (1974); People v. Mixter, 8 Ill. App. 3d 531, 290 N.E.2d 705 (1972).

68. People v. Scott, 407 Ill. 301, 95 N.E.2d 315 (1950); People v. Freeman, 244 Ill. 590, 91 N.E. 708 (1910); People v. Strong, 120 Ill. App. 2d 52, 256 N.E.2d 76 (1970).

69. People v. Reese, 54 Ill. 2d 51, 294 N.E.2d 288 (1973); People v. Eilers, 18 Ill. App. 3d 213, 309 N.E.2d 627 (1974); People v. Smith, 8 Ill. App. 3d 36, 288 N.E.2d 694 (1972).

70. 13 Ill. App. 3d 893, 898, 300 N.E.2d 814, 818-19 (1973).

> mony), the jury, as finders of fact in criminal litigation, normally is entitled to believe or disbelieve such evidence as it wishes, so long as the evidence, as a matter of law, raises a reasonable inference of guilt. When the criminal trial involves a crime of rape, we recognize that somewhat different rules apply to determine compliance with the standard of proof. Where the act of sexual intercourse is not questioned, the accused inherently is vulnerable to conviction on the basis of facts, known only to the complainant and the accused which if accorded a slightly different interpretation, could establish either guilt or innocence.

A special rule for rape is an interesting anomaly. In deviate sexual assault and robbery, for instance, where the occurrence of the deviate sexual conduct or the possession of the property is not disputed by the defendant, he is also vulnerable to conviction. The issue is the same as it is in rape—whether the defendant used force against the person to obtain his objective. In fact a defendant is more likely to be convicted of deviate sexual assault or robbery, as the prosecution need only prove a threat of force by the defendant.

Should the complainant's testimony fail to meet the "clear and convincing" test, the consent element offers an opportunity for impeachment or exculpation beyond that afforded by the usual test of a witness *i.e.*, a reputation for veracity.[71]

A reputation for unchastity has been thought to establish a probability of consent.[72] This testimony weakens the complainant's assertion of the lack of consent, and by implication impeaches her testimony regarding force or exculpates the force where bruises or lacerations corroborate that testimony.[73] However, a reputation for unchastity is irrelevant where third-party witnesses testify to the use of force,[74] or inadmissible

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71. 3A WIGMORE, EVIDENCE §§ 922, 924b(B)(a) (Chadbourn rev. 1970).

72. Force does not negate consent where the complainant has an unchaste reputation. The *Fryman* court went on to state:

> The underlying thought is that it is more probable that an unchaste woman would assent to such an act than a virtuous woman, but in such case the evidence must be confined to general reputation for chastity before the act charged.

People v. Fryman, 4 Ill. 2d 224, 229, 122 N.E.2d 573, 576 (1954). Evidence of chastity is not always admissible, however. In People v. Stephens, 18 Ill. App. 3d 971, 310 N.E.2d 824 (1974), the court cautioned that where the defendant does not rely upon a consent defense the admission of evidence of prior chastity may be inflammatory and prejudicial.

73. In People v. Jeanor, 23 Ill. 2d 347, 178 N.E.2d 384 (1961), the unchaste reputation of the complainants impeached their testimony that force was used, enabling the court to decide that the evidence of force and resistance was insufficient.

74. The testimony of the complainant, a married women having an affair, was not impeached where a male friend testified that she was abducted at gunpoint. People v. Bush, 11 Ill. App. 3d 31, 295 N.E.2d 548 (1973). In People v. Collins, 25 Ill. App. 2d 605, 186 N.E.2d 30 (1962), the defendant unsuccessfully attempted to exclude the force testimony of a male third-party witness on ground of his meretricious relationship with the complainant. His testimony was of a brutal and vicious case of forcible rape so the court reasoned that whether the complainant was

where the victim died as a result of the attack.[75] In the former situation she is probably not fabricating, and in the latter she is incapable of fabrication.

While evidence of a reputation for unchastity is not a defense, it still performs two functions: (1) it establishes a probability that the woman consented to the intercourse, and (2) unchastity in women is thought to be a character flaw affecting truthfulness.[76] Thus, where corroborating evidence is thin or nonexistent, unchastity of the female appears to be a de facto defense.

Except for medical testimony, often the only corroborating evidence available to a rape complainant is that her complaint was timely and made in a hysterical state.[77] This type of testimony is admissible under the spontaneous declaration exception to hearsay evidence. Testimony of a timely complaint does not prove any element of the rape cause of action but merely helps to establish a presumption that the claim is credible.

The failure to make a timely complaint often defeats the state's case.[78] Reversal is assured where the complaint is weeks old[79] or is badgered out of the complainant by a relative.[80] The following examples illustrate some of the situations where the lack of a timely complaint impeached or exculpated the use of force: (1) where the assistance of police to escape

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a prostitute was immaterial. Also, where there was evidence of a forcible entry into the complainant's home, the testimony of the complainant was not impeached by evidence of unchastity. People v. Alexander, 11 Ill. App. 3d 782, 298 N.E.2d 355 (1973).

75. In People v. Nemke, 46 Ill. 2d 49, 263 N.E.2d 97 (1970), the court rejected the defendant's contention that his confession was involuntary while the intercourse was voluntary on the part of the dead girl. The court decided that an unchaste reputation could not exculpate the force used in light of torn clothing and a brutally beaten body.

76. GARD, ILLINOIS EVIDENCE MANUAL, Rule 94c (1963); 3A WIGMORE, EVIDENCE § 924a (Chadbourn rev. 1970).

77. People v. Reese, 54 Ill. 2d 51, 294 N.E.2d 288 (1973); People v. Garreau, 27 Ill. 2d 388, 189 N.E.2d 287 (1963); People v. Romano, 306 Ill. 502, 138 N.E. 169 (1923); People v. Hood, 11 Ill. App. 3d 329, 296 N.E.2d 393 (1973). In People v. Romano, at 504, 138 N.E. at 170, the court revealed the reason for admitting such evidence.

> Evidence of the complaint is admitted on the theory that the natural instinct of a female thus outraged and injured prompts her to disclose the occurrence at the earliest opportunity to the relative or friend who naturally has the deepest interest in her welfare, and it is deemed relevant on the ground that it corroborates her statement that she was assaulted.

78. People v. Taylor, 48 Ill. 2d 91, 268 N.E.2d 865 (1971); People v. Mixter, 8 Ill. App. 3d 531, 290 N.E.2d 705 (1972); People v. Bain, 5 Ill. App. 3d 632, 283 N.E.2d 701 (1972).

79. People v. Abbate, 349 Ill. 147, 181 N.E. 615 (1932).

80. People v. Freeman, 244 Ill. 590, 91 N.E. 708 (1910). *Cf.* People v. Myers, 92 Ill. App. 2d 129, 234 N.E.2d 811 (1968). Here, a male victim of deviate sexual assault made no complaint until his father made inquiries.

from the defendant was sought without charging rape,[81] where the charge of rape was made in response to the third time a fireman asked what was the matter with the complainant,[82] and where the complainant avoided relating the occurrence to two women friends minutes after an attack but instead told her mother an hour later.[83]

A less frequently used but quite effective source of impeachment and exculpation is the failure of corroborating witnesses to appear.[84]

Impeaching Evidence in Deviate Sexual Assault

A reputation for unchastity has not been admitted in deviate sexual assault proceedings. However, evidence of a timely complaint has been admitted, but has never been dispositive. In a deviate sexual assault case, a delay in making a complaint goes only to the weight of the evidence and the credibility of the complainant but will not of itself defeat the state's case.[85] A delayed complaint of deviate sexual assault is just one truth-seeking test which may or may not cause the jury to believe the testimony of the complainant. In rape, however, a delayed complaint serves an additional function. It creates a probability of consent.[86] In turn, a probability of consent creates a reason-

81. People v. Mixter, 8 Ill. App. 3d 531, 290 N.E.2d 705 (1972). *Contra*, People v. Lee, 96 Ill. App. 2d 105, 238 N.E.2d 63 (1968). Here, the complainant sought the aid of a policeman to escape from the defendants without mentioning any specific reason. The court held that this fact was corroborative of the fact that the intercourse took place against her will.

82. People v. Taylor, 48 Ill. 2d 91, 268 N.E.2d 865 (1971). In this case, when the complainant alighted from the defendant's car she went to a nearby fire station seeking to use the phone. Appearing upset, a fireman asked her what was the matter twice without response. After telephoning her father to whom she related the attack, the complainant finally revealed the rape charge to the fireman. The fireman's testimony was inadmissible as her declaration was not spontaneous. In addition, failing to establish that she had made a spontaneous declaration adversely affected her testimony that the defendant had forced her into his car at gunpoint. However, several Illinois courts have said that the complainant need not relate the charge of rape to initial contacts but may seek out a close and trusted relative or friend. People v. Romano, 306 Ill. 502, 138 N.E. 169 (1923); People v. Sims, 5 Ill. App. 3d 727, 283 N.E.2d 906 (1972); People v. Flournoy, 1 Ill. App. 3d 918, 275 N.E.2d 289 (1971).

83. In People v. Bain, 5 Ill. App. 3d 632, 635, 283 N.E.2d 701, 703 (1972), the court held that the testimony of force corroborated by a bruised and cut mouth was negated by a failure to make a timely complaint. "In our opinion such failure to complain at both the first and second opportunity is more striking than the evidence of her bruised mouth which may or may not have been caused by an attempt of the defendant to force her into submission."

84. Where conflicts and gaps exist in the complainant's testimony *i.e.*, whether the complaint was timely, it is fatal to the state's case if those with knowledge of this corroborating evidence are not called upon to testify. People v. Scott, 407 Ill. 301, 95 N.E.2d 315 (1950); People v. Reese, 14 Ill. App. 3d 1049, 303 N.E.2d 814 (1973).

85. People v. Garriott, 20 Ill. App. 3d 994, 313 N.E.2d 189 (1974).

86. Notes 76 and 81 *supra*.

able doubt as to a substantive element of rape and thus defeats the state's case. In *People v. Myers*,[87] the conviction of the defendant was affirmed although the charge of deviate sexual assault occurred weeks after the confrontation. In fact the story was elicited from the complainant by questioning of a relative. Additionally, a generalized fear of reprisals has been recognized as a valid reason for a delayed complaint.[88]

Finally, in deviate sexual assault proceedings, the failure of witnesses who have knowledge of the occurrence to appear will not defeat the state's case.[89]

Comparative Analysis

As the deviate sexual assault statute does not contain a consent element, the impeaching evidence used in rape proceedings is for the most part irrelevant. Should a defendant wish to impeach the complainant's testimony of force, the only generally available avenue is testimony that the complainant has a poor reputation for veracity. This is the only accepted method for impeaching witnesses in criminal trials.[90] Although deviate sexual assault is highly analogous to rape because it is a crime only where force is involved, unlike rape its procurement by force cannot be exculpated.

Credibility

Blackstone admonished that because a charge of deviate sexual assault was more difficult to defend against (as strict liability existed at that time), greater restraint should be exercised before lending credence to the complainant's allegations than in cases of rape.[91] At that time, as in Illinois before 1961, the crime did not contain an element of force.[92] In 1961, the legislature attempted to establish the same force element as in rape, yet they failed to also include a consent element and instead expanded the force element by the inclusion of threat of force.[93] Thus, there is no foundation for special impeaching evidence as there is in rape.

Introduction of a reputation for unchastity by means of the consent element in rape has been considered necessary to guard

87. 92 Ill. App. 2d 129, 234 N.E.2d 811 (1968).
88. People v. McClaine, 132 Ill. App. 2d 669, 270 N.E.2d 176 (1971).
89. People v. Fickes, 89 Ill. App. 2d 300, 231 N.E.2d 602 (1967).
90. 3A WIGMORE, EVIDENCE § 922 (Chadbourn rev. 1970).
91. 4 W. BLACKSTONE, COMMENTARIES *215.
92. ILL. REV. STAT. ch. 38, § 141 (1961); People v. Sampson, 1 Ill. 2d 399, 115 N.E.2d 627 (1953); People v. Kraus, 395 Ill. 233, 69 N.E.2d 885 (1946); People v. Dabbs, 370 Ill. 378, 19 N.E.2d 175 (1938).
93. ILL. ANN. STAT. ch. 38, § 11-3 Commentary at 369 (Smith-Hurd 1972).

against the complainant's abuse of the judicial process. This approach has been based on the premise that should a consensual act of intercourse become public knowledge a woman will seek the conviction of an innocent man to protect her reputation.

In an article dealing with rape by fraud rather than force, Professor Puttkammer expressed an apprehension which has also been applied to the complainant of forcible rape.[94]

> If fraudulent charges are always to be feared, they are specially dangerous here where the central fact of prime importance is, not the woman's objective conduct, but her unmanifested thoughts and beliefs. To ascertain them with any degree of assurance is bound to be an excessively difficult task. But it is not alone true that fraudulent charges are especially easy in rape, it is also true that there are special inducements to make such charges, which do not apply in other crimes. Thus a man's automobile may be stolen. He is ordinarily under no inducement to hide the fact of a theft or to accuse an innocent person. If, on reasonable suspicion he has made an accusation he will generally have no ground to desire a conviction, should it appear that the defendant is innocent. His reputation will not suffer if the jury is not convinced of the defendant's guilt or concludes that the defendant honestly believed he had the prosecutor's consent. In a rape charge all these considerations are reversed. If the commission of a sexual act becomes known, the prosecutrix is impelled by many motives of self-interest to assert that it was done criminally. If thereafter a man is put on trial she has every selfish inducement to bring about his conviction, as every ground of acquittal except possibly mistaken identity would involve a reflection on her.[95]

Query: Does this logic hold when forcible rape is compared with deviate sexual assault? While an affirmative answer could be implied from the absence of a consent element in deviate sexual assault,[96] logic dictates a negative response as there is equal opportunity and motivation available to both types of complainants. The deviate sexual assault complainant actually possesses a slight advantage in opportunity as the male or parmale need only allege and prove a threat of force. This advantage is equalized by the slightly higher motivation of the rape complainant should there be reason to fear pregnancy. Either type of complainant poses a greater threat to an innocent defendant only when the complainant has a good reputation for veracity. The threshold question is whether a consent element actually reaches a truthful person who makes a false sex charge.

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94. Puttkammer, *Consent in Rape*, 19 ILL. L. REV. 410 (1925).
95. *Id.* at 421.
96. *See* note 93 and accompanying text *supra*.

Unchastity

This type of person can be discovered if unchastity is a specific character flaw which adversely affects veracity. However, common sense indicates that one who possesses a wholesome reputation would strive harder to protect it than one whose reputation is unwholesome. Perhaps, the legislature, in concentrating on force rather than consent in deviate sexual assault, made a pragmatic decision that a truthful person, who brings a false sex charge, is not reached by the use of the consent element as an impeaching device.

An unchaste reputation raises a probability of consent and so could thwart an attempt of malicious prosecution if admitted. Of course, such a reputation would have the same effect upon a truthful charge of rape unless this impeaching device actually reaches only false claims. Only false claimants would be reached if it is more probable than not that a reputation concerning a private and emotionally charged area of life is a more reliable test of credibility than a reputation for truthful dealing in the public areas of life. In concentrating on aggression to define deviate sexual assault, perhaps the legislature determined that the consent element would not effectively test a complainant's credibility beyond the introduction of evidence of a poor reputation for veracity.

The legislature may have also been influenced by a third and extrinsic consideration, *i.e.*, unchastity in women but not in men affects veracity. Professor Wigmore, for instance, has collected authority which supports the proposition that unchastity in women is a grave depravity while the same characteristic in men is thought to be shared by the most noble of men.[97]

If the legislative decision was that unchastity does not effectively reach a generally truthful but false complainant, then an equal protection problem occurs. The rape complainant is faced with the admission of prejudicial evidence which has no value as a truth-seeking device. The deviate sexual assault defendant is prohibited from presenting beneficial evidence (although irrelevant as it is not probative of the impeachment issue), which the rape defendant finds admissible. If the omission of a consent element was based upon the extrinsic matter, female complainants may have an equal protection argument due to discrimination by the state on the basis of sex.

Resistance

Although weakened by exceptions, the resistance require-

97. 3A WIGMORE, EVIDENCE § 924a (Chadbourn rev. 1970).

ment in rape is a powerful issue upon which many defendants rely. In deviate sexual assault, resistance has not been required. The few courts which have discussed resistance have consistently excused its absence. This dichotomy allows men and parmen, who are subjected to force in furtherance of oral or anal intercourse, to be timid in the face of aggression.[98] Women, who are subjected to force in furtherance of vaginal intercourse (and oral or anal intercourse if part of the same confrontation), must resist unless force can be proven independently of their testimony.[99] For victims of deviate sexual assault, this is indeed a humane alternative as rape frequently provides the motivation for murder. In Chicago during 1971 and 1972, 1 out of 6 murders of women was motivated by rape.[100]

While more detailed statistics would be needed to state that the high mortality rate is a function of an offer of resistance, the possibility of such a relationship is at least suggested. Perhaps, as in the other class 1 felonies of robbery and deviate sexual assault, the rape statute should concentrate upon the use of force or threat of force against the person.

The state provides penalties for those who obtain property by the use of force. Similarly, the attainment of anal or oral sexual gratification by force or the threat of force is equally proscribed. Perhaps it would not be beyond the power of the state to eliminate the requirement of resistance when sexual gratification is forcibly gained by vaginal intercourse.

Equal Protection

Through judicial decision, the 1870 Constitution has been held to provide for equal protection under the law.[101] The 1970

98. People v. Garriott, 20 Ill. App. 3d 994, 313 N.E.2d 189 (1974); People v. McClaine, 132 Ill. App. 2d 669, 270 N.E.2d 176 (1971); People v. Bendig, 91 Ill. App. 2d 337, 235 N.E.2d 284 (1968); People v. Myers, 92 Ill. App. 2d 129, 234 N.E.2d 811 (1968); People v. Fickes, 89 Ill. App. 2d 300, 231 N.E.2d 602 (1967).

99. *See* notes 42 through 56 and accompanying text *supra*.

100. Chicago Police Department, *Statistical Summary* (1972); Chicago Police Department, *Chicago Police Annual Report* (1971). Additional information necessary to the computations establishes that 150 women were murdered in 1971 and 129 in 1972.

101. Ill. Const. art. IV, § 22 (1870).

> This provision supplements the equal-protection clause of the fourteenth amendment to the Federal constitution and prevents the enlargement of the rights of one or more persons in discrimination again the rights of others.

Schuman v. Chicago Transit Authority, 407 Ill. 313, 317, 95 N.E.2d 447, 449-50 (1950).

> The equal protection clause in the Fourteenth Amendment applies only to the states, but the United States Supreme Court has made the due process clause of the Fifth Amendment, which is applicable to Congressional action, serve as an equal protection clause. Thus, the United States Supreme Court has found a substitute, just as the

Constitution, in addition to the guarantee of equal protection, contains a specific provision mandating that neither the state nor its subdivisions will deny equal protection of the law on the basis of sex.[102] While this latter section is presumed not to be self-executing,[103] it further defines the general guarantee of equal protection. As women have had suffrage as well as citizenship in Illinois and the United States since 1920,[104] they have the standing to enforce the general guarantee as specifically defined prohibiting sex discrimination.

Tests of Equal Protection

One must look beyond the differences in treatment experienced by diverse groups to determine whether there has been a denial of equal protection. Identical treatment by the state is not always the goal to be sought. Special groups may have specific interests which require diverse treatment, and the state grants the special treatment so that all may develop fully. Rights and duties accorded one group need not be extended to all unless the deprivation of those excluded is not a result of reasonable classification in the furtherance of a valid state interest. Equal protection may be at times elusive, for under certain circumstances diverse treatment is the essence of the doctrine while under other conditions diverse treatment is repulsive to the doctrine. Although frequently difficult to apply, the test of equal protection is simply that all must freely enjoy equal opportunities and obligations under the law unless the reasonable classification of groups in furtherance of a valid state interest dictates otherwise.[105]

While the guarantee of equal protection on the basis of sex certainly covers areas where men and women are viewed as the same, the question remains whether equal protection of the law must be provided where the anatomical difference between men and women appears to be relevant. For example, it would be a clear violation of equal protection should the state, as an employer, compensate men and women at different rates for

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Illinois Supreme Court found a substitute in Section 22.
G. BRADEN & R. COHN, THE ILLINOIS CONSTITUTION: AN ANNOTATED AND COMPARATIVE ANALYSIS 224 (1969).

102. ILL. CONST. art. I, §§ 2, 18 (1970).

103. ILL. ANN. CONST. art. I, § 18, Commentary at 674 (Smith-Hurd 1971).

104. U.S. CONST. amend. XIX.

105. The same test, *i.e.*, reasonable classification, is used whether one relies upon the state or federal guarantee of equal protection. Royster Guano Co. v. Virginia, 253 U.S. 412 (1919); Tometz v. Board of Education, 39 Ill. 2d 593, 237 N.E.2d 498 (1968); People *ex rel.* Rusch v. Ladwig, 365 Ill. 574, 7 N.E.2d 313 (1937); Lipman v. Goebel, 357 Ill. 315, 192 N.E. 203 (1934).

rendering the same services. However, as an employer, the state would not violate equal protection by requiring the gynecological portion of a routine physical examination to be taken only by women.

Closer cases involve not only the physical difference between men and women but also the social stereotyping attributed to those differences. For example, a man who prefers the role of child raising might seek a parental leave (*i.e.*, maternity leave) to maintain the accumulated seniority in his employment. A woman who possesses the requisite strength and endurance might seek a position as a fire-fighter.

The segregation of forcible sexual aggression on the basis of sex presents such a close case. In addition, the time-honored common law distinction between rape and sodomy and the emotionalism attached to this segregation has caused the dichotomy between rape and deviate sexual assault to escape logical analysis.

Hypotheticals

While the courtroom treatment of the complainants and the criminal liability of the defendants could be based upon the same considerations, are the distinctions in the following hypotheticals necessary and within the limitations of the Illinois Constitution?

A man comes to the apartment door on some business pretense and then forces his way into the apartment as soon as the door is opened. He threatens to shoot the occupant, although a weapon is never produced. The intruder is of approximately the same height and weight as the occupant. The occupant experiences fear but not terror. To avoid accelerating the confrontation, the occupant obeys the orders of the intruder and neither screams, attacks the intruder, nor attempts to escape. The intruder leaves after obtaining sexual gratification. The occupant slumps into a chair. Sometime later, a neighbor stops by, notices that the occupant is out of sorts, asks several times what was the matter, and receiving no answer, leaves. The occupant then telephones a relative and relates the occurrence of the attack.

Case 1: The occupant was a female and the confrontation resulted in vaginal intercourse.

Case 2: The occupant was a female and the confrontation resulted in vaginal and oral intercourse.

Case 3: The occupant was a par-male and the confrontation resulted in oral intercourse.

Case 4: The occupant was a male and the confrontation resulted in oral intercourse.

At trial the occupant in case 1 or 2 would have to allege that she was paralyzed with fear to attempt to overcome the fact that she saw no weapon. Additional factors at issue would be any reputation for unchastity, a failure to resist, and a failure to make a timely complaint.

In cases 3 and 4, a threat of force had occurred and fear compelled submission. The statutory definition of deviate sexual assault has been satisfied. Based on Illinois case law, no offer of resistance is required, and a reputation for unchastity has never been admissible. While the timeliness of the complaint is admissible it should not be dispositive.

The deviate sexual assault count in case 2 will probably receive the same verdict as the rape count although the types of special evidence introduced to test the credibility of the rape complainant should be for the limited purpose of the rape count (*i.e.*, reputation for unchastity, failure to resist, delayed complaint, and the failure of corroborating witnesses to appear).

Whether these diverse results are proper under the Illinois Constitution depends upon the validity of the state interest in using special tests to uncover possible fraud in only case 5 below.

Two high school friends attend a party. One offers the other a ride home. On the way, the car stops in a remote area, and sexual gratification occurs. The passenger is driven home and relates what transpired only after parental inquiries about the cause of the passenger's bruises—one on the face, one on the right arm. The passenger claims that sexual gratification occurred through the use of force and offers evidence of the two bruises. The driver claims that there was consent, that there was reason to expect consent, and that the bruises were the result of "clowning around".

Case 5: The passenger was a female and vaginal intercourse took place.

Case 6: The passenger was a male and oral intercourse took place.

In case 5, the testimony of the complainant can be impeached by a poor reputation for veracity and also by a reputation for unchastity. In case 6, the testimony of the complainant can be impeached only by a poor reputation for veracity. However, case 5 will probably not go to court as the parents coaxed the story of the attack from the complainant.

State Interest

Rape and deviate sexual assault carry the same penalty,[106] and criminal liability arises only when force is used against the person. Thus, one must investigate the segregation of the offenses by Illinois to determine whether this classification is reasonable. The state is using its police power in a segregated fashion to protect the right of all to be free from forcible sexual aggression. The threshold question is whether women must be physically identical to men to be entitled to equality in the protection of the same right?

An answer to this question touches the essence of our law. In general the state may not discriminate on the basis of sex where the protection of its citizens' bodies from forcible violation is involved. Illinois may view its citizens as males, par-males, and females only if such tripartite treatment is reasonable in light of a valid state interest.

This segregation is eminently reasonable if the law may assign rights and delegate duties to men first and then recognize these exact rights and duties as applicable to women only where they can be deemed the same as men, *i.e.*, par-men. And so, in situations where women cannot be accorded the par-male status due to physical differences, the law may alter the elements of its protection offered to men in highly analogous circumstances in order to alleviate the fear of women ipso facto misusing that protection.

Foreseeable misuse of the law is of course a valid state interest. The legends of the vindictive and the scorned woman are widely subscribed to by both sexes. Evidence of this bias in a particular woman would naturally be grounds for impeachment. However, the real issue is whether the fear of vindictive women should dictate the state's treatment of all women.

Wigmore: Compulsory Psychological Tests

Illinois cases reveal that female as well as male witnesses impeach their own testimony by their admissions, poor reputations for veracity, and mental derangements.[107] To catch the inscrutable female, however, Illinois has used a special element

106. ILL. REV. STAT. ch. 38, §§ 11-1, 11-3 (1973).

107. People v. Qualls, 21 Ill. 2d 252, 171 N.E.2d 612 (1961) (no testimony of force coupled with a strange and inconsistent story); People v. Fryman, 4 Ill. 2d 224, 122 N.E.2d 573 (1954) (agreed to future date with defendant); People v. Ravenscroft, 325 Ill. 225, 156 N.E. 281 (1927) (poor reputation for veracity and admitted to third-party that the charge was false); People v. Keeney, 10 Ill. App. 3d 296, 293 N.E.2d 492 (1973) (poor reputation for veracity coupled with confusing testimony); People v. Bain, 5 Ill. App. 3d 632, 283 N.E.2d 701 (1972) (agreed to future date).

of the cause of action (*i.e.*, a lack of consent) for impeachment purposes beyond that used against the male and par-male.

The recent Illinois case, *People v. Glover*,[108] is the genesis of a pervasive threat to the equal protection of women. The supreme court, while holding that the trial court did not abuse its discretion in refusing to order a psychological examination of the complainant, recognized the state's right to order an examination of any woman who brings a sex charge against a man, citing the authority collected by Wigmore.[109] A thorough examination of this authority exposes the support for the state interest in avoiding abuse of the law by women.

The general American rule for impeachment of testimony is that the witness must have a poor reputation for veracity rather than a generally poor reputation.[110] Although a general belief exists that a reputation for unchastity in women, but not in men, adversely affects veracity, Wigmore cites the contra holding in *State v. Randolph*[111] with approval. In *Randolph* the defendant attempted to impeach the testimony of two witnesses in a murder trial by previous convictions for prostitution. The court refused to adhere to such an attack upon the women's credibility, noting that while unchastity in women may have some effect upon their veracity, a number of moral infractions in the general public such as "gambling, horse-racing, drunkeness, sabbath breaking, &c."[112] would have the same effect. Thus, the court refused to carve out an exception to the general veracity basis of impeachment for unchastity in women. This is the general rule for impeachment of female witnesses in cases other than rape.

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108. 49 Ill. 2d 78, 273 N.E.2d 367 (1971).

109. 3A WIGMORE, EVIDENCE § 924a (Chadbourn rev. 1970). Although *Glover* involved a complaint of deviate sexual assault by a par-male, she was a woman bringing a sex charge against a man so the situation satisfied Wigmore's theory.

110. 3A WIGMORE, EVIDENCE § 922 (Chadbourn rev. 1970).

111. 24 Conn. 363, 368-9 (1856) stated:

> General bad character is undoubtedly a serious blemish in a witness, and might justly detract from the weight of his testimony, and so might the character of a witness for the specific blemish of licentiousness, especially in the female sex. But where shall we stop the enquiries? Witnesses, who can have no opportunity to exculpate themselves, or give explanations of their acts, ought not to be exposed to unjust obloquy, nor should the trial be complicated and prolonged by trying collateral issues. If it were wise and just to enquire for one's reputation for virtue, why not for gambling, horse-racing, drunkenness, sabbath breaking, &c.? These are serious blemishes on character.

It should be born in mind that a rape complainant cannot effectively refute attacks upon her character as only her reputation for unchastity is admissible (not specific acts). However, witnesses may be called in rebuttal to testify to her chaste reputation. Also where the complainant has the corroboration of third-party witnesses or was killed as a result of the rape, unchastity is a collateral issue, and there are strong arguments supporting the proposition that it is always immaterial where the defendant has employed force to procure sexual gratification.

112. *Id.* at 369.

Regarding a sex charge brought by a woman against a man, Professor Wigmore proposes quite a different approach.

> *No judge should ever let a sex offense go to the jury unless the female complainant's social history and mental make up have been examined and testified to by a qualified physician.*[113]

In addition, he has proposed a model statute:

> On any criminal charge of a sex offense, or in any civil suit involving seduction or illegitimacy, when a principal witness against the defendant is a female, the following rules of evidence shall apply:
>
> 1. The disposition of such witness as to chastity and as to morality and mentality in general, is admissible.
>
> 2. The opinion of other witnesses based on observation of such female witness, or on hypothetical questions submitted to experts, as to such moral and mental traits, may be received.
>
> 3. Witnesses so testifying may report specific instances of the female's behavior to verify and illustrate their testimony, including other like complaints against other men, and for this purpose may relate behavior not personally observed by themselves, except so far as the trial judge may exclude testimony based on mere rumor.
>
> 4. The record of a juvenile court, including the reports of probation officers and other members of the staff, as well as such records and reports of any asylum, detention home, or other institution for care or refuge, may be received.[114]

Wigmore cites medical and judicial authority for his theory that malevolent attitudes of women toward men are undetectable and, therefore, not reached by a rule of impeachment based only upon veracity.[115] Wigmore details five case histories published by the medical authorities, Dr. William Healy and Mary Tenney Healy, which expose females between the ages of 7 and 19 who lie compulsively and have made false sex charges against men. During the investigations of such charges, these females proved to be quite discoverable as individuals with extremely poor reputations for veracity. Applying the logic used in rape, perhaps it can be safely assumed that neither law enforcement officers nor state's attorneys can discern a male or female complainant's veracity without such investigation, and that a false charge of murder, manslaughter, robbery, burglary, arson, or deviate sexual assault, etc. as well as rape would provide serious problems for the innocent defendant. After a thorough exposé of female depravity the article mentions in one succinct sentence that "[i]n male youths this peculiar sex-disposition plays a far smaller part."[116] Perhaps Wigmore is implying that males

113. 3A WIGMORE, EVIDENCE § 924a at 737 (Chadbourn rev. 1970).
114. 3A WIGMORE, EVIDENCE § 924b(5) at 747-8 (Chadbourn rev. 1970).
115. 3A WIGMORE, EVIDENCE § 924a at 740-3 (Chadbourn rev. 1970).
116. *Id.* at 744. Another cited medical expert, Dr. Karl A. Men-

are only more difficult to detect because of the present state of psychiatric knowledge.

With more impact upon Illinois, Wigmore cites the Illinois case of *People v. Hudson*[117] as judicial authority for the additional scrutiny when any woman brings a sex charge against a man. *Hudson* was an arson case in which the sole male witness against the defendant testified that the defendant had paid him to set a building afire on which the defendant held a mortgage. Several witnesses testified that the chief witness had a very poor reputation for veracity, that he possessed moronic intelligence of no greater than 9 or 10 years, and that he was nearly blind. One such witness had been the family doctor for 8 years. By agreement of counsel, a psychiatric examination by three doctors was ordered.

The support which this case could lend to a theory that every female who brings a sex charge against a male must be psychologically tested is obscure. A defendant falsely charged with a sex crime deserves the protection of the law, but requiring psychological examinations of all women cannot be constitutional. Generally, the testimony of witnesses in criminal trials may be impeached only by a poor reputation for veracity. Psychological examinations may be ordered only where an individual witness exhibits a mental deficiency or bias. Unless the entire class of women can be shown to be untrustworthy in cases of rape, equal protection requires that the general rule of impeachment should apply to rape complainants.

In *Hudson*, the supreme court cited four Illinois cases for the proposition that where the testimony of the chief witness against the defendant has been impeached the judgment shall be reversed. Although Wigmore finds support for his theory in that many rape cases are reversed, three of the cases cited in *Hudson* involved male witnesses to crimes other than rape.[118]

The rights of a defendant in a criminal case should be

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ninger, believes psychological examinations should be ordered for those charged with crime and, interestingly enough, "those who make criminal charges, not only of rape but also of malpractice. . . ."

A third expert, Dr. W.F. Lorenz, cautions in strong language that developing female prostitutes are quite disarming due to angelic faces yet are already imperceptibly hardened at an early age.

Dr. William A. White appears to be more concerned with § 11-4, "Indecent Liberties with a Child", which is beyond the scope of this paper, as does the 1937-1938 A.B.A. Committee. ILL. REV. STAT. ch. 38, § 11-4 (1973).

117. 341 Ill. 187, 173 N.E. 278 (1930).

118. People v. O'Hara, 332 Ill. 436, 163 N.E. 804 (1928) (male witness/armed robbery); People v. Ravenscroft, 325 Ill. 225, 156 N.E. 281 (1927) (female witness/rape); People v. Harvey, 321 Ill. 361, 152 N.E. 147 (1926) (male witness/armed robbery); People v. Pattin, 290 Ill. 542, 125 N.E. 248 (1919) (male witness/burglary and larceny).

zealously protected; yet making all women complaining of rape the collective scapegoat for the perplexing problem of incredible chief witnesses is no solution and is unconstitutional. The issue becomes whether including a special element to test the veracity of a given class of complainants, or requiring those complainants to be psychologically tested does make rape victims scapegoats, thus denying them equal protection of the law. To illustrate the issue two analogies may be helpful. (1) A study of five case histories revealed that white merchants had falsely accused black men and women of robbery. The charges were motivated by bigotry and an irritation with pilferages. To prevent possible malicious prosecutions a special robbery statute was written to be used whenever a white brought a robbery charge against a black. It read "and against the white man's will." (2) Another five case histories revealed that blacks, who had been scorned and slighted by bigotry, had falsely charged whites with aggravated battery. To prevent misuse of the judicial process, psychological examinations were made mandatory whenever a black brought a charge of aggravated battery against a white.

In each case the state would be attributing the misdeeds of a few members to the entire class. The rules of evidence could allow impeachment by any character trait, but they do not. The character trait of veracity is considered the only trait relevant to truthfulness and its admission is not considered prejudicial.[119] The rules of evidence could allow the impeachment of a member by admission of his group's reputation for veracity. While such a policy might be attacked as unfair and prejudicial, a more concrete objection is that unless the state is protecting a valid state interest, it may not sully the testimony of the members by the reputation of the group. Such action is clearly a violation of equal protection. It follows then that the treatment of women in cases of rape is a violation of equal protection.

False female complainants, who subvert justice should be guarded against; and this can be done, as effectively as with all other witnesses in criminal proceedings, by the introduction of a poor reputation for veracity. A woman who exhibits bias and makes false charges as a result of this bias presents no special problem to a defendant. This is also true when the complainant has a poor reputation for veracity. In each case a generally applied truth-seeking test will impeach the false testimony. Only a woman who exhibits no bias and has a reputation for truthfulness poses a special threat to an innocent defendant.

119. 3A WIGMORE, EVIDENCE § 922 (Chadbourn rev. 1970).

Before a special rule for women in rape cases can be justified, there must be more accurate and complete documentation that the general truth-seeking tests are inadequate. The charge that women who are unimpeachable because of their good reputations for veracity still bring false sex charges against men must be fully proved, not assumed. For as female fantasies should not subvert the law, so too, possible fantasies concerning the frequency of fraudulent rape charges should not define the law.

A possible solution for the equal protection problem would be to rewrite the rape statute reflecting the elements of deviate sexual assault. A separate but equal approach may not be enough, however.

Separate but Equal

While a state guarantee of equal protection may be broader than the federal guarantee, it may not be more narrow.[120] The United States Supreme Court has taken notice of the fact that when groups are segregated in highly analogous circumstances, a relationship of superiority and inferiority often develops. For this reason, the state interest is often strictly construed. In other words, if the same treatment of diverse groups would not proximately cause the breach of an important state interest, the state must treat the diverse groups in the same way. *Brown v. Board of Education*[121] held that the separate but equal doctrine employed to segregate the races in public schools was a violation of equal protection. The holding was based upon the following considerations: (1) where the state creates a right it must be available on equal terms to all, (2) to determine the effect of separate treatment one must look not only to the outward appearances but also to the intangible considerations, and (3) separate treatment often denotes the inferiority of one group, retarding its development.

In applying the *Brown* reasoning, it should be noted that the protection of a woman's body from forcible aggression is a matter of primary concern. A woman can neither develop to full capacity nor maintain a meaningful position in society if her efforts to secure protection for her body are thwarted by proof of a special element employed to test her veracity beyond that applied to her male counterpart in analogous circumstances. To continue to segregate women complainants because only a woman possesses a vagina is as reasonable as the segregation of school children because some possess a dark complexion. To

120. U.S. CONST. art. VI, cl. 2.
121. 347 U.S. 483 (1954).

continue to segregate women complainants because they imperceptibly possess moral turpitude beyond the reach of veracity testimony of those in their community is as acceptable a state interest as the segregation of multicolored school children because some possess an influential but imperceptible moral turpitude which affects another color of children. Such an alleged reasonable classification based upon a state interest has been consistently held to violate equal protection. While these beliefs may be deeply rooted in the minds of many, perhaps even a majority, and can be supported by selected examples of debased members of any particular group, they may not supply an adequate basis for state law. The lesson of the past decade is that equal protection is the cornerstone of our society. Where the law leads in this area, human dignity for all follows.

Conclusion

Vaginal, anal, and oral intercourse procured by the use of force or threat of force should be dealt with in the same unprejudicial manner envisioned by the Illinois legislature's partially completed attempt to protect the adult body from sexual aggression. Whether the victim is male or female, the one who takes control of a situation by force has no right to rely upon another's compelled performance or submission as a manifestation of voluntary consent. The essence of a democratic society, that force and consent are incompatible, applies to all citizens regardless of race, origin, creed or sex. Force directed against the person should not be construed as acceptable behavior by the courts of Illinois unless the force was used pursuant to the exercise of legal authority.

To establish protection for all from forcible sexual aggression, the rules for the admission of proof of force must be uniform whether that force was employed to obtain vaginal, anal, or oral intercourse. Where the truthfulness of male and parmale testimony of force may be impeached only by a reputation for veracity, inconsistency, bias or incompetency, equal protection demands that the same tests apply to females.[122] This is the moment for Illinois to follow the reform movements pioneered by Michigan, California, and the Model Penal Code which abolish the unconstitutionally discriminatory treatment of female victims of sexual assault.

Sharon Maloney

122. At the time this article goes to print, several bills are pending before the Illinois General Assembly which would largely effectuate the reforms urged in this comment. This legislation, sponsored by Repre-

INTRODUCTION TO APPENDICES

The reform legislation adopted by Michigan, California, and the Model Penal Code is set out in full as appendices. The text of the proposed legislative reform in Illinois is also included. The following substantive and procedural reforms have been adopted:

APPENDIX A Michigan:

a. integrated its approach to all sex offenses by enacting a blended statute entitled "Criminal Sexual Conduct".
b. omitted the genders of the actor and victim as the comprehensive plan concentrates on force or threat of force rather than sexual stereotyping.
c. required neither corroboration nor resistance.
d. made inadmissible prior sexual conduct of the complainant except where such conduct was with the defendant.

APPENDIX B California:

a. made inadmissible prior sexual conduct of the complainant to prove consent except where such conduct was with the defendant.
b. made admissible prior sexual conduct of the complainant to attack the complainant's credibility only after a hearing out of the presence of the jury to determine its relevancy.
c. prohibited the use of the term "unchaste character", prohibited instructions which allow the inference that a female who has consented to others consented to intercourse with the defendant and prohibited instructions which state that prior sexual behavior in itself can be considered in determining the credibility of the complainant.

APPENDIX C The Model Penal Code used the same definitions of force and threat of force in rape and in deviate sexual assault.

APPENDIX D Sets out the text of the reform legislation filed in the Illinois General Assembly on February 10, 1975.

APPENDIX A

Criminal Sexual Conduct

MICH. COMPILED STAT. ANN. §§ 750.520a to 750.5201 (Legislative Service at 694-8 1974).

520a. Definitions.

As used in sections 520a to 5201:

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sentative Aaron Jaffee, 4th D, would: (1) include the threat of force within the definition of rape, (2) make inadmissible prior sexual conduct of the complainant except where such conduct was with the defendant, and (3) make a failure to resist inadmissible to prove consent on the part of the complainant. For a complete text of the proposed legislation, see, APPENDIX D.

(a) "Actor" means a person accused of criminal sexual conduct.

(b) "Intimate parts" includes the primary genital area, groin, 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 loss 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.

520b. Criminal sexual conduct in the first degree.

(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.

520c. Criminal sexual conduct in second degree.

(1) A person is guilty of criminal sexual conduct in the second degree if the person engages in sexual contact 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 this 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)(i) 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.

520d. Criminal conduct in third degree.

(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(1)(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.

520e. Criminal sexual conduct in fourth degree.

(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)(i) 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.

[Sections 520f and 520g omitted.]

520h. Corroboration; lack of necessity for.

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

520i. Resistance by victim.

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

520j. Admissibility of evidence.

(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.

Motion and offer of proof; determination as to admissibility.
(2) If the defendant proposes to offer evidence described in subsection (1)(a) or (b), the defendant within 10 days after the arraignment on the information shall file a written motion and offer of proof. The court may order an in camera hearing to determine whether the proposed evidence is admissible under subsection (1). If new information is discovered during the course of the trial that may make the evidence described in subsection (1)(a) or (b) admissible, the judge may order an in camera hearing to determine whether the proposed evidence is admissible under subsection (1).

[Sections 520k and 5201 omitted.]

APPENDIX B

WEST'S CAL. EVID. CODE §§ 782, 1103 (Legislative Service ch. 569 at 1723, 1974), *amending* WEST'S CAL. EVID. CODE §§ 782, 1103 (1966).

SECTION 1. Section 782 is added to the Evidence Code, to read:
782

(a) In any prosecution under Section 261 [Rape.], or 264.1 of the Penal Code, or for assault with intent to commit, attempt to commit, or conspiracy to commit any crime defined in any such section, if evidence of sexual conduct of the complaining witness is offered to attack the credibility of the complaining witness under Section 780 [General rule as to credibility.], the following procedure shall be followed:

(1) A written motion shall be made by the defendant to the court and prosecutor stating that the defense has an offer of proof of the relevancy of evidence of the sexual conduct of the complaining witness proposed to be presented and its relevancy in attacking the credibility of the complaining witness.

(2) The written motion shall be accompanied by an affidavit in which the offer of proof shall be stated.

(3) If the court finds that the offer of proof is sufficient, the court shall order a hearing out of the presence of the jury, if any, and at such hearing allow the questioning of the complaining witness regarding the offer of proof made by the defendant.

(4) At the conclusion of the hearing, if the court finds that evidence proposed to be offered by the defendant regarding the sexual conduct of the complaining witness is relevant pursuant to Section 780, and is not inadmissible pursuant to Section 352 [Discretion of court to exclude evidence.] of this code, the court may make an order stating what evidence may be introduced by the defendant, and the nature of the questions to be permitted. The defendant may then offer evidence pursuant to the order of the court.

(b) As used in this section, "complaining witness" means the alleged victim of the crime charged, the prosecution of which is subject to this section.

SEC. 2 Section 1103 of the Evidence Code is amended to read:
1103

(1) In a criminal action, evidence of the character or a trait of character (in the form of an opinion, evidence of reputation, or evi-

dence of specific instances of conduct) of the victim of the crime for which the defendant is being prosecuted is not made inadmissible by Section 1101 [Evidence of character to prove conduct.] if such evidence is:

(a) Offered by the defendant to prove conduct of the victim in conformity with such character or trait of character.

(b) Offered by the prosecution to rebut evidence adduced by the defendant under subdivision (a).

(2) (a) Notwithstanding any other provision of this code to the contrary, and except as provided in this subdivision, in any prosecution under Section 261, or 264.1 of the Penal Code, or for assault with intent to commit, attempt to commit, or conspiracy to commit a crime defined in any such section, opinion evidence, reputation evidence, and evidence of specific instances of the complaining witness' sexual conduct, or any such evidence, is not admissible by the defendant in order to prove consent by the complaining witness.

(b) Paragraph (a) of this subdivision shall not be applicable to evidence of the complaining witness' sexual conduct with the defendant.

(c) If the prosecutor introduces evidence, including testimony of a witness, or the complaining witness as a witness gives testimony, and such evidence or testimony relates to the complaining witness' sexual conduct, the defendant may cross-examine the witness who gives such testimony and offer relevant evidence limited specifically to the rebuttal of such evidence introduced by the prosecutor or given by the complaining witness.

(d) Nothing in this subdivision shall be construed to make inadmissible any evidence offered to attack the credibility of the complaining witness as provided in Section 782.

*Changes or additions in text are indicated by underline.

WEST'S CAL. PEN. CODE § 1127e (Legislative Service ch. 1093 at 3011, 1974).

SECTION 1. Section 1127e is added to the Penal Code, to read:
1127e

The term "unchaste character" shall not be used by any court in any criminal case in which the defendant is charged with a violation of Section 261 or 261.5 of the Penal Code, or attempt to commit or assault with intent to commit any crime defined in any such section, in any instruction to the jury.

WEST'S CAL. PEN. CODE § 1127d (Legislative Service ch. 1093 at 3011, 1974).

SECTION 1. Section 1127d is added to the Penal Code to read:
1127d

(a) In any criminal prosecution for the crime of rape, or for violation of Section 261.5 or for attempt to commit, or assault with intent to commit, any such crime, the jury shall not be instructed that it

may be inferred that a female who has previously consented to sexual intercourse with persons other than the defendant would be therefore more likely to consent to sexual intercourse again.

(b) A jury shall not be instructed that the prior sexual conduct in and of itself of the complaining witness may be considered in determining the credibility of the witness pursuant to Chapter 6 (commencing with Section 780) of Division 6 of the Evidence Code.

APPENDIX C

MODEL PENAL CODE §§ 213.1, 213.2 (1974).

213.1. Rape and Related Offenses

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

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

(b) he has substantially impaired her power to appraise or control her conduct by administering or employing without her knowledge drugs, intoxicants or other means for the purpose of preventing resistance. . . .

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

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

(b) he knows that she suffers from a mental disease or defect which renders her incapable of appraising the nature of her conduct. . . .

213.2. Deviate Sexual Intercourse by Force or Imposition

(1) By Force or Its Equivalent. A person who engages in deviate sexual intercourse with another person, or who causes another to engage in deviate sexual intercourse, commits a felony of the second degree if:

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

(b) he has substantially impaired his conduct, by administering or employing without the knowledge of the other person drugs, intoxicants or other means for the purpose of preventing resistance. . . .

(2) By Other Imposition. A person who engages in deviate sexual intercourse with another person, or who causes another to engage in deviate sexual intercourse, commits a felony of the third degree if:

(a) he compels the other person to participate by any threat that would prevent resistance by a person of ordinary resolution; or

(b) he knows that the other person suffers from a mental disease or defect which renders him incapable of appraising the nature of his conduct. . . .

APPENDIX D

HB 273, 79th Gen. Assembly, 1975 Sess.*

Section 1. Sections 11-1 and 11-2 of the "Criminal Code of 1961" approved July 28, 1961, as amended, are amended to read as follows:

(Ch. 38, par. 11-1)

Sec. 11-1. 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 *or threat of force, compels any other person not his or her spouse, to perform or submit* [and] against *the* [her] will *of that person, to any act in which the genital or anal openings of any person are penetrated by any part of the body of another person, or by any other object,* commits rape. *Any such act is compelled* [Intercourse] by force *or threat of force,* and against *the* [her] will *of the person being compelled to act or submit, when it* [includes, but is not limited to, any intercourse which] occurs in the following situations:

(1) Where the actor coerces the victim by threatening to use force or violence on the victim or any other person and the victim believes that the actor has the present ability to execute the threats; or

(2) Where the actor coerces the victim by threatening to kidnap the victim or any other person, and the victim believes the actor has the ability to execute the threat; or

(3) [(1)] Where the *victim* [female] is *physically helpless or* unconscious; or

(4) [(2)] Where the *victim* [female] is so mentally deranged or deficient as to be unable to [that she cannot] give effective consent to *the act involved* [intercourse].

[(b) Sexual intercourse occurs when there is any penetration of the female sex organ by the male sex organ.]

(b) The failure of the victim of rape to make outcry or offer physical resistance to the attacker is not evidence of consent on the part of the victim.

(c) It shall not be a defense to rape that consent was given by the victim, if the victim, at the time of the rape, was a patient or committed person in any facility or institution of the following description, wherein the victim was dependent upon the accused for life services or needs:

(1) A hospital or licensed private hospital, as defined by Sections 1-5 or 1-6 of the "Mental Health Code of 1967", approved August 14, 1967, as now or hereafter amended; or

(2) A penal institution, as defined by Section 2-14 of the "Criminal Code of 1961", approved July 28, 1961, as now or hereafter amended; or

(3) Any health care facility defined in Section 3 of the "Illinois Health Facilities Planning Act", approved August 27, 1974, as now or hereafter amended.

(d) [(c)] Sentence. Rape is a Class 1 felony for which an offender may not be sentenced to death.

(Ch. 38, par. 11-2)

Sec. 11-2. Deviate Sexual Conduct.) "Deviate sexual conduct", for the purposes of this Article, means any act of sexual gratification involving the sex organs of one person and the mouth [or anus] of another.

Section 2. This amendatory Act takes effect upon its becoming a law.

*(Material deleted from the existing statutes is bracketed while additional matter is printed in italics.)

H.B. 274, 79th Gen. Assembly, 1975 Sess.

Section 1. Section 115-7 is added to the "Code of Criminal Procedure of 1963", approved August 14, 1963, as amended, the added Section to read as follows:

(Ch. 38, new par. 115-7)

Sec. 115-7. Past Sexual Conduct as Evidence in Trials of Rape. No record, whether written, oral, or otherwise, regarding the past sexual conduct of a rape victim, shall become admissible as evidence in a criminal proceeding against a defendant charged with rape, except such records as concern the past sexual conduct of the victim with the accused.

Section 2. This amendatory Act takes effect upon its becoming a law.

H.B. 271, 272, 275-279, 79th Gen. Assembly, 1975 Sess.

A synopsis of each of the remaining rape bills is set out below:

271. Creates the Rape Victims Emergency Treatment Act. Requires hospitals to furnish emergency hospital service to rape victims, in accordance with rules and regulations adopted by the Illinois Department of Public Health. Establishes minimum requirements for hospitals providing such service. Requires this service to be furnished by the hospital without charge to persons who are not eligible for medical services under the Public Aid Code and who do not have insurance which provides for such services and provides for the reimbursement of the hospital's costs in such cases by the Department of Public Health.

272. Appropriates $300,000 to the Department of Public Health for reimbursement to hospitals of the costs of providing services to certain rape victims as provided in the Rape Victims Emergency Treatment Act.

275. Amends the Criminal Code of 1961. Eliminates the affirmative defense against a charge of indecent liberties with a child of the fact that the child is a prostitute.

276. Amends the Unified Code of Corrections. Requires the Department of Corrections to establish rules and regulations to protect all committed persons within its institutions against acts of criminal sexual assault and all other acts of violence and authorizes the Department to develop programs for that purpose.

277. Amends the Illinois Police Training Act. Requires the Illinois Local Government Law Enforcement Officers Training Board to include training in techniques of rape investigation as a part of

the minimum curriculum requirement for police training schools certified by the Board.

278. Amends the Non-Profit Hospital Service Plan Act and the Illinois Insurance Code. Prohibits the exclusion of coverage for the treatment of injuries resulting from rape in accident and health insurance policies and hospital service plans.

279. Amends the Illinois Public Aid Code. Adds medical services for rape victims to the list of medical services the Department is authorized to provide under the medical assistance program and includes in such services tests to secure evidence in relation to the rape.

NOTE: The Illinois House of Representatives passed H.B. 278 on Feb. 12, 1975, and H.B. 274 on March 19, 1975. These bills are awaiting action by the Senate.