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## An Analysis of Thirty-Five Years of Rape Reform: A Frustrating Search for Fundamental Fairness

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**AN ANALYSIS OF THIRTY-FIVE YEARS OF RAPE  
REFORM: A FRUSTRATING SEARCH FOR FUNDAMENTAL  
FAIRNESS**

*Richard Klein\**

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This article will analyze the most significant changes in the manner in which individuals who are charged with the crime of rape are prosecuted for that offense. In the last thirty five years, there has been a steady erosion of the due process rights of those accused of rape. I have designated the first stage of “reforms,”<sup>2</sup> which affected the arrest, pre-trial, and trial phases of rape prosecutions, as the First Wave of rape reform. The Second Wave are the more recent changes in the law that have focused on measures, such as sexual registry or civil commitment statutes, that restrict the freedoms of those convicted of sexual assault in the hope of enhanced community safety.

A full comprehension of the statutory enactment and judicial creation of, for example, the doctrine of affirmative consent,<sup>3</sup> requires an examination of the context in which the doctrine arose. Decisions, such as that of the New Jersey Supreme Court in *M.T.S.*,<sup>4</sup> or in the legislative enactments of the Wisconsin Sexual Assault in the Third Degree statute,<sup>5</sup> or in the Florida Sexual Battery Offense Law,<sup>6</sup> or in the Criminal Code of the State of Washington<sup>7</sup> did not occur in a vacuum. As is the case with virtually all of the reforms that this article will analyze, affirmative consent may be understood as a somewhat natural

2. Rape scholars have consistently used the word “reforms” to refer to the changes in rape laws which have occurred since the 1970s. This article uses this term reluctantly, since “reform” indicates positive and progressive change, and I do not believe that all of the changes in the prosecution of rape have been either positive or progressive. Choice of language can, of course, be of critical import; those individuals, usually non-lawyers, who have championed “tort reform” have consciously selected that phrase in order to win popular support for their call for the enactment of laws to limit plaintiffs’ recovery in product liability as well as in medical malpractice cases.

3. See *infra* notes 152-206 and accompanying text.

4. State in the Interest of M.T.S., 609 A.2d 1266, 1279 (N.J. 1992).

5. WIS. STAT. § 940.225 (3) (2007). The crime is defined as having sexual intercourse with a person without the consent of that person. *Id.* Consent is defined in § 940.225(4) as meaning “words or overt actions by a person who is competent to give informed consent indicating a freely given agreement to have sexual intercourse or sexual contact.”

6. FLA. STAT. § 794.011(5) (2007) requires an offender committing the crime of sexual battery to have acted without the alleged victim’s consent; the Preamble states that commission of the crime does not “require any force or violence beyond the force and violence that is inherent in the accomplishment of ‘penetration’ or ‘union.’” The statute requires “intelligent, knowing and voluntary consent. . . .” *Id.* at § 794.011(1)(a).

7. “Consent” is defined to mean “that at the time of the act of sexual intercourse or sexual contact there are actual words or conduct indicating freely given agreement to have sexual intercourse or sexual contact.” WASH. REV. CODE ANN. § 9A.44.010(7) (West 2008).

progression from the “reforms” in rape prosecutions that had their origin in the mid-1970s. But a thorough understanding of the rather remarkable revamping of our rape laws demands scrutiny, not only of the initial reforms, but also of the changes that have taken place in recent years such as the enactment of the Louisiana statute providing for the death penalty for aggravated rape<sup>8</sup> and the eliminations of any statute of limitations requirements for the crime of rape in New York<sup>9</sup> and Connecticut.<sup>10</sup>

### I. OVERVIEW OF RAPE REFORM LAW

To be sure, the rape laws in this country had, up until the 1970s, made it quite difficult to convict even the guilty for the crime of rape. The peculiarities of rape statutes, coupled with longstanding juror cynicism toward women who claimed they were raped by an acquaintance, led to the revelation in the landmark study of jurors by Kalven and Zeisel in the 1960s that jurors were more inclined to acquit defendants in rape cases than was true for any other charge.<sup>11</sup> Jurors were found to focus not just on the legal issues involved relating to force used and lack of consent, but also to be judgmental as to the alleged victim’s character and provocative conduct and ways that the woman could have contributed to the occurrence.<sup>12</sup> When judges were questioned as to their reactions to jurors’ acquittals of defendants in rape cases, the judges in almost 50% of the instances would not have been as lenient as was the jury.<sup>13</sup>

There are many long-standing reasons for jurors’ suspicions, and those suspicions may well reflect stereotypical and sexist views about the validity of a rape charge. The alleged victim may just be vindictive because the guy she dated never called back to see her again; women may subconsciously desire to be raped, fantasize about it and then

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8. LA. REV. STAT. ANN. § 14.42(C) (1996).

9. N.Y. CRIM. PROC. LAW § 30.10(2)(a) (McKinney 2006) (saying a prosecution for first degree rape can be commenced at any time).

10. In August 2007, the Connecticut governor signed legislation eradicating the statute of limitations for the six most serious sexual assault crimes as long as the crime had been reported to the police within five years of the attack and the perpetrator can be identified through DNA evidence. *Gov. Rell Highlights New Law Eliminating Statute of Limitations in Rape Cases with DNA Evidence*, U.S. ST. NEWS, Aug. 21, 2007, available at <http://www.ct.gov/governorrell/cwp/view.asp?A=2791&Q=391712>. Jodi Rell, the Governor, called the legislation a “major step forward for crime victims in our state.” *Id.*

11. HARRY KALVEN, JR. & HANS ZEISEL, *THE AMERICAN JURY* 249-57 (1966).

12. *Id.* at 249-50.

13. *Id.* at 253-54.

believe that their fantasy actually occurred; a long-term boyfriend decided to end the relationship and the rejected woman wished to retaliate; the complaining witness was just after money and believed that the threat of bringing a rape charge (particularly against a politician, celebrity, or sports hero) would lead to a cash settlement. The often used term “cry rape” is indicative of the traditional suspicion that men, in particular, have regarding rape accusations.<sup>14</sup> Male jurors may identify with the male defendant and fear that they themselves may be subjected in the future to such a charge. This fear, Susan Brownmiller concluded in her 1975 groundbreaking work on rape, “is based on the cherished male assumption that female persons tend to lie.”<sup>15</sup>

The rape reform movement began in earnest in the 1970s as part of the feminist movement with leading women’s rights organizations, such as the National Organization of Women, developing task forces on rape. Rape laws were viewed as indicative of a patriarchal system of power and laws, and women’s groups joined with organizations of police and prosecutors and politicians wanting to be seen as “tough on crime” to enact a number of highly significant changes to criminal codes across the country. Claims were made that women were extremely reluctant to bring rape charges due to undesirable provisions in the criminal codes, and a groundbreaking work on rape claimed that there may be twenty times more rape occurring than that which was reported.<sup>16</sup> Reform was needed because, as another leading feminist wrote, rape was so frequent an occurrence as to have become a “national pastime.”<sup>17</sup> Women’s lives were described as being controlled by the fear of rape:

Most women experience fear of rape as a nagging, gnawing sense that something awful could happen, an angst that keeps them from doing things they want or need to do. . . . Women’s fear of rape is a sense that one must always be on guard, vigilant and alert, a feeling that causes a woman to tighten with anxiety if someone is walking too closely behind her, especially at night.<sup>18</sup>

The goals of the reformers were lofty indeed. The desire was “to

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14. See, e.g., SUSAN BROWNILLER, *AGAINST OUR WILL: MEN, WOMEN AND RAPE* 313, 370 (1975).

15. *Id.* at 369.

16. *Id.* at 175. Others, however, believed the ratio to be far lower. See, e.g., M. JOAN McDERMOTT, *RAPE VICTIMIZATION IN 26 AMERICAN CITIES* 43 (1979).

17. Germaine Greer, *Seduction Is a Four Letter Word*, reprinted in *SEXUAL DEVIANCE AND SEXUAL DEVIANTS* 327 (Erich Goode & Richard Troiden eds., 1974).

18. MARGARET GORDON & STEPHANIE RIGER, *THE FEMALE FEAR: THE SOCIAL COST OF RAPE* 2 (1991).

improve male behavior, not merely by curbing forcible rape, but also by eliminating aggressive seduction. . . . The aim here is to abolish the traditional sexual roles. . . .”<sup>19</sup> Some of the proposed changes “would potentially shift public perceptions of women and their role in sexual relationships.”<sup>20</sup> The goals were specifically instrumentalist as well: to encourage more women to come forward and press charges after a rape, and to change the rape laws in ways that would be likely to result in a higher conviction rate of those charged with rape.<sup>21</sup>

But it was not just jury prejudice and doubts about the credibility of women who claimed to be raped that was responsible for the high acquittal rates, it was the fact that the law itself set up barriers to conviction that were not true for other crimes. First and foremost, perhaps, was the requirement that there be corroboration for the woman’s claim that she had been raped. Our criminal justice system did not require corroboration for any other crime; were the jury to find an alleged victim of any other offense to be credible, the jury could convict solely on the word of that individual. Such was not the case for rape.<sup>22</sup>

## II. THE REQUIREMENT FOR CORROBORATION

Corroboration of the woman’s claim was required because of the general acceptance of the notorious claim by Sir Matthew Hale that an allegation of rape is “easily to be made and hard to be proved, and harder to be defended by the party accused, tho never so innocent.”<sup>23</sup> John Henry Wigmore, the American icon of evidence, was even more damning of a woman’s claim. In the highly influential treatise, *Evidence in Trials at Common Law*,<sup>24</sup> Wigmore instructed that the findings of modern psychiatry have revealed that women’s “psychic complexes are

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19. David Bryden, *Redefining Rape*, 3 *BUFF. CRIM. L. REV.* 317, 478 (2000).

20. Nicholas Little, *From No Means No to Only Yes Means Yes: The Rational Results of an Affirmative Consent Standard in Rape Law*, 58 *VAND. L. REV.* 1321, 1324 (2005).

21. See, e.g., James Galvin, *Rape: A Decade of Reform*, 31 *CRIME & DELINQ.* 163, 165 (1985).

22. The requirement that there be corroboration for the crime of rape was all the more problematic since rapes are commonly committed privately in the home of the attacker or victim and when no witnesses would be present. See, e.g., Note, *The Rape Corroboration Requirement: Repeal, Not Reform*, 81 *YALE L.J.* 1365 (1972).

23. SIR MATTHEW HALE, *THE HISTORY OF THE PLEAS OF THE CROWN* 635 (London Professional Books 1971). Hale was the Chief Justice of the Court of King’s Bench in England. This treatise was first published in 1736 and has been enormously significant in the development of American law.

24. JOHN HENRY WIGMORE, *EVIDENCE IN TRIALS AT COMMON LAW* (James H. Chadbourne rev. ed., 1970).

multifarious, distorted by inherent defects, partly by diseased derangements or abnormal instincts, partly by bad social environment, partly by temporary physiological or emotional conditions.”<sup>25</sup> But it was not just that women had such problems, it was that these complexes led to the “contriving false charges of sexual offenses by men. . . one must infer that many innocent men have gone to prison because of tales whose falsity could not be exposed.”<sup>26</sup> What Wigmore recommended and instructed was that, “No judge should ever let a sex-offence charge go to the jury, unless the female complainant’s social history and mental makeup have been examined and testified to by a qualified physician.”<sup>27</sup>

The Model Penal Code,<sup>28</sup> designed by experts in the criminal justice field to serve as an example of an appropriate criminal code for a jurisdiction to adopt,<sup>29</sup> stated that there should be no conviction for sexual offenses “upon the *uncorroborated* testimony of the alleged victim.”<sup>30</sup> Corroboration was required in this unique instance because of “the difficulty of determining the truth with respect to alleged sexual activities carried out in private”<sup>31</sup> and the “jury shall be instructed to evaluate the testimony of a victim or complaining witness with special care in view of the emotional involvement of the witness . . . .”<sup>32</sup>

Corroboration could take the form of vaginal injuries, deep scratches or wounds on the woman or man’s body, torn clothing, or neighbors’ testimony about hearing screams for help. By 1974, 35 states had rejected the concept of requiring corroboration.<sup>33</sup> Twelve years

25. *Id.* at 736.

26. *Id.*

27. JOHN HENRY WIGMORE, A TREATISE ON THE ANGLO-AMERICAN SYSTEM OF EVIDENCE IN TRIAL AT COMMON LAW (3d ed. 1940). See MENACHEM AMIR, PATTERNS IN FORCIBLE RAPE 253-57 (1971) for a review of the literature maintaining that a woman’s subconscious desire to be raped and violently attacked led to fabrications and fantasies about actually having been raped.

28. MODEL PENAL CODE (Official Draft 1962).

29. Academics and practitioners spent 10 years developing the Code to provide the “basis for comprehensive legislative reform in every American jurisdiction.” *Id.* at pmb1. The American Law Institute claims that in the twenty years following the publication of the Code, thirty-four states enacted criminal codes based, at least, to some degree, on the Code. Sanford H. Kadish, *Fifty years of Criminal Law: An Opinionated Review*, 87 CAL. L. REV. 943, 948 (1999).

30. MODEL PENAL CODE § 213.6(5) (Official Draft 1962) (emphasis added).

31. *Id.*

32. *Id.*

33. See *United States v. Wiley*, 492 F.2d 547, 552 (D.C. Cir. 1974) (Bazelon, C.J., concurring). The rejections were straightforward and unambiguous. See, e.g., WASH. REV. CODE ANN. § 9A.44.020 (West 2008) (“[I]t shall not be necessary that the testimony of the alleged victim be corroborated.”).

later, only 8 states still required corroboration.<sup>34</sup> There is no state which, as of 2001, still generally requires corroboration,<sup>35</sup> although Texas does so when the offense has not been reported until more than a year after the date of the alleged rape.<sup>36</sup>

### III. REQUIREMENT OF “UTMOST” OR “REASONABLE” RESISTANCE

Historically, in order for an accused to be convicted of rape, it was required to be proven that the victim “resisted to the utmost.” As the Supreme Court of Wisconsin stated in 1906: “[T]here must be the most vehement exercise of every physical means or faculty within the woman’s power to resist the penetration of her person, and this must be shown to persist until the offense is consummated.”<sup>37</sup> It was believed that any good woman who didn’t want the intercourse to occur, would fight it off with every bone in her body. As the Mississippi Supreme Court stated, “a mere tactical surrender in the face of an assumed superior physical force is not enough. Where the penalty for the defendant may be supreme, so must resistance be unto the uttermost.”<sup>38</sup>

There clearly was a connection between concerns about women fabricating rape charges and the requirement that to convict someone of rape, it must be shown that the victim fought and struggled to the utmost; how else would it be known that the woman hadn’t really *desired* the intercourse?<sup>39</sup> Nevertheless, as years went by, the impracticality of requiring such combative behavior on the part of the victim became clear. Police departments began to instruct women that, at times, they should not fight to the utmost; such struggling just resulted in the victim’s sustaining great physical injuries from an assault that would accompany the sexual assault. Reformers were able to cite empirical research which indicated that there are far more serious injuries for women who resisted a forcible sexual attack.<sup>40</sup> States, in

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34. Cassia Spohn, *The Rape Reform Movement: The Traditional Common Law and Rape Law Reforms*, 39 JURIMETRIC J. 119, 126 (1999).

35. SANFORD H. KADISH & STEPHEN J. SCHULHOFER, CRIMINAL LAW AND ITS PROCESSES 374 (7th ed. 2001).

36. *Id.* at 374 n.33 (citing TEX. CODE CRIM. PROC. § 38.07 (1998)).

37. *Brown v. State*, 106 N.W. 536, 538 (Wisc. 1906).

38. *Moss v. State*, 45 So.2d 125, 126 (Miss. 1950).

39. See ROSEMARIE TONG, WOMEN, SEX AND THE LAW 98 (1984) (saying it is because women are viewed as temptresses and liars that the police, prosecutors and judges prefer the alleged victim to have fully resisted the intercourse).

40. See, e.g., AMIR, *supra* note 27, at 164-71.



response, began to adopt the *reasonable* resistance requirement.<sup>41</sup> The Oregon Supreme Court<sup>42</sup> described this concept: “The woman must resist by more than mere words. Her resistance must be reasonably proportionate to her strength and her opportunities.”<sup>43</sup>

Reasonable resistance, to be sure, would vary depending on the circumstances of the attack. If the man possessed a weapon that clearly would be used if needed to overcome any resistance by the female, then none ought to be required. Sometimes, reasonable resistance may mean none at all.<sup>44</sup> If, however, the assault were to occur in an apartment building in New York City, then screams for help and struggling to delay the intercourse may prove fruitful; however, there may be no point in such resistance if one is being attacked in a desolate field.<sup>45</sup> Even though our common sense might not lead to such a conclusion, studies have found that it is psychologically beneficial for a woman to have physically resisted the sexual assault.<sup>46</sup>

Surely, when a jury hears testimony about the victim’s physical resistance, such resistance is of import in determining that there has been nonconsensual intercourse. A male defendant whose claim is that, “I thought she was consenting,” is much less likely to be believed if the jury finds that there was physical resistance on the part of the victim. Nonetheless, approximately half of the states have changed their rape laws to no longer require there to have been any physical resistance;<sup>47</sup>

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41. See, e.g., *State v. Harris*, 174 A.2d 645, 648 (N.J. App. 1961) (declaring the resist-to-the-utmost test to be obsolete).

42. *State v. Risen*, 235 P.2d 764 (Or. 1951).

43. *Id.* at 765.

44. The New York State Court of Appeals first expressed this perspective in 1891. “[T]he extent of the resistance required of an assaulted female is governed by the circumstances of the case, and the grounds which she has for apprehending the infliction of great bodily harm.” *People v. Connor*, 126 N.Y. 278, 281 (N.Y. 1891). See also *State v. Terry*, 215 A.2d 374, 376 (N.J. App. 1965) (saying utmost resistance is to be required no more. The test is whether the woman did “resist as much as she possibly can under the circumstances”).

45. Traditional Jewish Law is of interest here. Physical resistance may well be evidence of lack of consent, but has never been required as an element to prove a sexual attack. The crime of rape has been defined simply as “sexual intercourse with a woman against her will.” *ENCYCLOPEDIA JUDAICA* 1548 (1972), cited in Beth C. Miller, *A Comparison of American and Jewish Legal Views on Rape*, 5 *COLUMB. J. GENDER & L.* 182, 194 (1996).

46. See, e.g., Michelle Anderson, *Reviving Resistance in Rape Law*, 1998 *U. ILL. L. REV.* 953, 989-90 (1998). Anderson concluded that resisting the attack causes the victim to engage in less self-blame, require a shortened period for recovery, and create a greater likelihood in seeking treatment after the rape. *Id.*

47. *KADISH & SCHULHOFER*, *supra* note 35, at 329.

the focus now has been placed on the defendant's use, or threatened use, of force.<sup>48</sup>

In 1975, the state of Michigan enacted rape reform legislation that formed the basis for statutory changes in many states; the statute eliminated any requirement of physical resistance.<sup>49</sup> New York State's current rape statute is typical of many present day states in its defining of the requisite "forcible compulsion" as encompassing either the use of actual force or the implied or express threat of such use.<sup>50</sup> If threats articulated by the defendant had paralyzed the capacity of the alleged victim to resist and had undermined her will, then the statutory requirement of forcible compulsion has been met. Concerns have often arisen as to which is of primary significance: the intention of the accused to have threatened the use of force, or the alleged victim's belief that there was such a threat. The New York case of *People v. Evans*<sup>51</sup> involved a situation where the defendant had told the alleged victim that "I could kill you, I could rape you. I could hurt you physically."<sup>52</sup> The State claimed that those words clearly indicated the defendant's intention to threaten the victim, who, perceiving a threat, proceeded to engage in intercourse with the defendant.<sup>53</sup> The state Supreme Court Judge presiding at the bench trial, however, determined that the controlling state of mind regarding whether or not there was a threat of force was *not* that of the alleged victim who perceived a threat, but rather that of the man accused of the rape.<sup>54</sup> Evans had met the 20 year old college student at La Guardia airport where he had gone as part of his planned seduction of a vulnerable new arrival to New York City.<sup>55</sup> The defendant posed as a psychologist, and several hours later the young woman accompanied the defendant to his apartment. The defendant explained at trial that he uttered the words which were interpreted as threatening, merely to inform the woman that she should not put herself in such vulnerable positions in the future; were she confronted in a similar scenario at some later date with a different man, she may at that

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48. *Id.* The statutory inclusion of the *threat* to use force was itself a reform. *Id.* During the period when utmost resistance was required to have been utilized by the victim, *actual* force was required by the perpetrator. *Id.*

49. MICH. COMP. LAWS ANN. § 750.520i (West 1975).

50. N.Y. PENAL LAW § 130.00(8) (2006).

51. *People v. Evans*, 379 N.Y.S.2d 912 (N.Y. App. Div. 1975), *aff'd*, 390 N.Y.S.2d 768 (N.Y. App. Div. 1976).

52. *Id.* at 917.

53. *Id.*

54. *Id.* at 920-21.

55. *Id.* at 915.

time actually be physically at risk. The Court concluded that there is no crime when the “words . . . are taken as a threat by the person who hears them, but are not intended as a threat by the person who utters them . . . .”<sup>56</sup>

#### IV. RAPE SHIELD LEGISLATION

One of the most significant and far-reaching changes in the prosecution of rape has been the enactment of what is commonly referred to as rape shield laws. These laws protect, i.e., shield, the complaining witness from being asked questions about her sexual history prior to the occurrence of the rape. There were two primary reasons for these laws. First, it was believed that many women would not come forward to report the fact that they’ve been raped if they knew they’d be subjected to questions about their sexual past. Secondly, there was great concern that jurors were being unduly influenced and prejudiced by hearing information about prior sexual involvements of women who were claiming at trial that they had not consented to relations with the defendant. It was believed by many that if the woman had consented to have sexual relations with a number of people in the past, it was more likely that she had done so with the defendant on the day in question. Additionally, changes in the rape shield statutes could promote important policies and “reverse certain antiquated misconceptions concerning rape.”<sup>57</sup> A lot to ask for.

At common law, questions concerning the prior sexual history of the alleged rape victim were admissible for two reasons. First, it was believed that a woman who had been sexually active was a less credible witness in general. Secondly, a woman who was unchaste—defined as participating in either pre-marital or extra-marital sex—was thought more likely to have agreed to have relations with this defendant. A standard jury instruction that had been used in California illustrates the point: “A woman of unchaste character *can* be the victim of a forcible rape, but it may be inferred that a woman who has previously consented to sexual intercourse would be more likely to consent again.”<sup>58</sup>

The goal of the reformers to preclude questions about the complaining witness’s prior sexual involvements gained rapid

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56. *Id.* at 921. The court did acknowledge that the complaining witness indeed “was intimidated” and “perhaps was terrified.” *Id.* at 919.

57. *Drake v. State*, 836 P.2d 52, 54 (Nev. 1992).

58. Harriet Galvin, *Shielding Rape Victims in the State and Federal Courts: A Proposal for the Second Decade*, 70 MINN. L. REV. 763, 783 n.96 (1986) (emphasis added).

momentum, and within one decade every state had enacted some version of a rape shield law. The first significant shield law was passed in the state of Michigan; the 1975 statute has been deemed to constitute “the most important model for reform.”<sup>59</sup> The language was simple, clear and to the point: “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 . . . .”<sup>60</sup>

Congress, however, failed to amend the Federal Rules of evidence until 1978; the “Privacy Protection for Rape Victims Act” of that year eventually became Rule 412 of the Federal Rules. The goals of the legislation were clear. Senator Joseph Biden described the law as one which “will eliminate the defense strategy . . . of placing the victim and her reputation on trial in lieu of the defendant.”<sup>61</sup> President Jimmy Carter, upon signing the bill into law, stated the law would “end the public degradation of rape victims” and “prevent a defendant from making the victim’s private life the issue in the trial.”<sup>62</sup>

The shield statutes attempted to avoid not just the re-victimization of the complaining witness by direct and potentially embarrassing questioning of her, but also the testimony by prior sexual partners of the woman, who could inform the jury about her reputation for promiscuity.<sup>63</sup> The more past sexual involvements of a woman, the more jurors may see her as being in control of, and responsible for, her sexual involvement with men in general, and with this defendant in particular. It is, in fact, common in acquaintance rape situations that the woman had a history of sexual involvements; it is those women who are more likely to be socially adventuresome and find themselves in bars or

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59. Leigh Bienen, *Rape III, National Developments in Rape Reform Legislation*, 6 WOMEN’S RTS. L. RPTR. 171, 172 (1980).

60. MICH. COMP. LAWS ANN. § 750.520j(1) (West 1991). The Rape shield statutes of some states attempt to be more comprehensive. The following is a portion of the State of Washington Rape Shield Statute: “Evidence of the victim’s past sexual behavior including but not limited to the victim’s marital history, divorce history, or general reputation for promiscuity, nonchastity, or sexual mores contrary to community standards is inadmissible . . . .” WASH. REV. CODE ANN. § 9A.44.020(2) (2008).

61. 124 Cong. Rec. 36,256 (1978).

62. Statement on Signing H.R. 4727 into Law, 14 Weekly Comp. Pres. Doc. 1902 (Oct. 30, 1978). Rule 412 was extended by amendment in 1994 to apply the shield to all criminal cases, not just those where the defendant was charged with rape.

63. Courts have often highlighted the need to avoid placing the alleged victim on trial as a justification for rape shield laws. See, e.g., *Commonwealth v. Joyce*, 382 Mass. 222, 227 (1981) (saying evidence of prior sexual history diverts the jury from its proper focus on the alleged acts of the defendant).

clubs where they would meet men interested in sexual encounters in the first place.<sup>64</sup>

Another factor that may impact jurors is the perception that a woman who has frequently engaged in sexual relations is less likely to be psychologically damaged by an acquaintance rape than would be the case for a woman with little or no prior sexual relationships.<sup>65</sup> Jurors may, consciously or subconsciously, believe in some way that a woman with an active sexual life takes on an “assumption of risk” that she’ll meet a guy who won’t take “no” for an answer. What is perceived to be a “high risk lifestyle” may effectively lead to “contributory negligence.”

But the shield laws have most certainly not been without their critics. The limitation on the ability of defense counsel to conduct a full and comprehensive cross examination of the alleged rape victim has proven to be of much concern. The right to confront one’s accusers is a basic tenet of our system of criminal justice. The Sixth Amendment provides that “[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have compulsory process for obtaining witnesses in his favor . . . .”<sup>66</sup> The Fourteenth Amendment Due Process Clause has been held to incorporate the Sixth Amendment and, therefore, such guarantees apply to state prosecutions. The Supreme Court, in *Washington v. Texas*,<sup>67</sup> cited the 14th Amendment provision that no state “deprive any person of life, liberty or property without due process of law”<sup>68</sup> and concluded that “the right to offer the testimony of witnesses, and then compel their attendance, if necessary, is in plain terms the right to present a defense . . . .”<sup>69</sup> The ability to present relevant testimony on the defendant’s own behalf, the Court continued, is a “fundamental element of due process of law.”<sup>70</sup>

The goal of the reformers to shift the focus of the trial from the alleged rape victim (her sexual background, what clothing she may have been wearing, her presence at a singles’ bar at 2:00 in the morning) to

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64. One study of college women found that women who have stated that they have been raped had, in fact, a greater number of sexual partners than the general population of female students. Mary P. Koss, *The Hidden Rape Victim: Personality, Attitudinal, and Situational Characteristics*, 9 PSYCHOL. WOMEN Q. 193, 208 (1985).

65. See generally Hubert S. Feild, *Rape Trials and Juror’s Decisions: A Psycholegal Analysis of the Effects of Victim, Defendant, and Case Characteristics*, 3 LAW & HUM. BEHAV. 261, 264, 273, 279 (1979).

66. U.S. CONST. amend. VI.

67. *Wash. v. Texas*, 388 U.S. 14 (1967).

68. *Id.* at 15 n.2.

69. *Id.* at 19.

70. *Id.*

what the defendant allegedly did, has proven to be quite difficult. The jurors' focus on *mens rea*, the defendant's state of mind, will raise questions about what the victim herself had been doing which may have impacted upon the defendant's perceptions of what was occurring. There is, for instance, no way of shielding the woman from the fact that she had gone to a bar, then to the defendant's apartment in the middle of the night. Even though at trial the victim is shielded from questions about her past sexual relations with others, there is no control over what inferences, prejudices, and conclusions the jurors may form because of her actions that night.

All rape shield statutes contain exceptions, which do permit questioning of the alleged victim's sexual past in the following instances: a) questions relating to the sexual history with this defendant can be asked in order for the jury to be able to assess most fairly what occurred between them that night,<sup>71</sup> b) if the woman has been convicted of prostitution in the years prior to this occurrence because it's believed that the conviction may be seen by the jurors as affecting her credibility, c) a catch-all category generally providing the trial judge with discretion to permit questioning if it's determined to be required to best serve the interests of justice.<sup>72</sup>

The presumption that the victim will be shielded is only that, a presumption.<sup>73</sup> Judges are left with the overall discretion as to what any particular trial may demand. In the Kobe Bryant case, where the issue was whether the acknowledged sex was consensual or forced by the

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71. It is generally believed that such information is needed to provide a context for the relationship between the defendant and the woman who is claiming that she was raped. All states, whether by statute or court decision, have this exception to the rape shield laws.

72. In *Crawford v. Wash.*, 541 U.S. 36 (2004), a case involving the right of a defendant to engage in cross examination, Justice Scalia emphasized that the framers of the Constitution knew that judges "could not always be trusted to safeguard the rights of the people . . . [and] were loath to leave too much discretion in judicial hands." *Id.* at 1373. Judges may well choose to act in ways that are designed to protect themselves from public criticism or controversy and determine that the safest course of conduct is to just prohibit the questioning.

73. See, for example, COLO. REV. STAT. § 18-3-407(1) (2007), which says:

Evidence of specific instances of the victim's or a witness's prior or subsequent sexual conduct, opinion evidence of the victim's or a witness's sexual conduct, and reputation evidence of the victim's or a witness's sexual conduct . . . shall be *presumed* to be irrelevant except:

- a) Evidence of the victim's or witness's prior or subsequent sexual conduct with the actor;
- b) Evidence of specific instance of sexual activity showing the source or origin or semen, pregnancy, disease, or any similar evidence of sexual intercourse offered for the purpose of showing that the act or acts charged were or were not committed by the defendant.

*Id.* (emphasis added).

famous basketball player, the judge was confronted with the highly charged claim that testimony that showed that the alleged victim had intercourse with another man within fifteen hours after the claimed rape by Bryant should be permitted “in the interest of justice.” The Colorado rape shield statute provides that, “if the court finds that the evidence proposed to be offered regarding the sexual conduct of the victim or witness is relevant to a material issue to the case, the court shall order that evidence may be introduced . . . .”<sup>74</sup> Jurors might appropriately determine that if the victim had been violently raped in Bryant’s hotel room as claimed, she wouldn’t have so shortly thereafter found another man with whom to once again have intercourse.

The prosecutor’s case fell apart after of the judge’s ruling that the rape shield statute in this case would not prohibit defense questions about the woman engaging in sexual relations with another man within 15 hours after the alleged sexual attack by Bryant. As the Denver prosecutor told the Court, “the victim has informed us, after much of her own labored deliberation, that she does not want to proceed with this trial.”<sup>75</sup> There has been a suspicion in recent years that those who make such claims against celebrities might be doing so to extort funds in exchange for keeping silent. Even in the Kobe Bryant case where criminal charges were dismissed, a handsome civil settlement resulted just six months later.<sup>76</sup>

A judge’s use of discretion may often be guided by an analysis of the probative aspect versus the prejudicial nature of the proffered testimony. Federal Rule of Evidence 403 provides for a balancing between the probative value of the desired evidence versus the prejudicial impact such evidence would have on the fact finders.<sup>77</sup> To an extent, this balancing act is what some rape trials entail—a potentially embarrassing and degrading examination of a woman’s sexual past, versus the need for the jury to hear all the evidence that may appropriately have influenced the defendant and all the testimony that

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74. COLO. REV. STAT. § 18-3-407(2)(e) (2007).

75. Howard Pankratz & Steve Lipsher, *Dismissed Prosecution: Accuser is Unable to Proceed with Trial Defense: Bryant Apologizes for Actions “That Night,”* DENVER POST, Sept. 2, 2004, at A1.

76. Jon Sarche, *Kobe Bryant Settles Civil Suit, Terms Not Disclosed*, ASSOCIATED PRESS, Mar. 3, 2005.

77. Rule 403 states: “Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.” FED. R. EVID. 403.

may prove critical in assessing the reliability and credibility of the complaining witness.

The Supreme Court, while never specifically ruling as to the constitutionality of rape shield laws, did give tacit approval to such statutes in *Michigan v. Lucas*.<sup>78</sup> The Court, while ruling on a notice requirement unique to the Michigan statute, noted that the rape shield protections reflect “a valid legislative determination that rape victims deserve heightened protection against surprise, harassment, and unnecessary invasions of privacy.”<sup>79</sup>

The Court, however, has repeatedly emphasized the fundamental import of the right to cross examine one’s accuser.<sup>80</sup> In *Davis v. Alaska*,<sup>81</sup> the prosecution maintained that cross examination of the primary witness testifying against the defendant should not be permitted to encompass questions about the juvenile delinquency record of that witness because it would violate the right to privacy and create embarrassment.<sup>82</sup> Alaska law specifically prohibited cross examination on such matters in order to protect against public exposure of offenses committed while a juvenile. The Court acknowledged that the desire to protect privacy rights was a valid concern, but such concerns were “outweighed by [the defendant’s] right to probe into the influence of possible bias in the testimony of a crucial identification witness.”<sup>83</sup>

The impact of the *Davis* decision was immediate, but, strangely, short-lived. Very soon after *Davis* was decided, a Maryland appeals court in *State v. De Lawder*<sup>84</sup> reversed its earlier holding<sup>85</sup> which had supported the prohibition of defense counsel’s questions concerning the prior sexual relations of the woman claiming to have been raped by the defendant.<sup>86</sup> The Maryland court cited the strong language used in

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78. 500 U.S. 145 (1991).

79. *Id.* at 149-50.

80. Indeed, the Court has noted that this right dates back to Roman times. *Coy v. Iowa*, 487 U.S. 1012, 1015-16 (1988). *See also Crawford v. Wash.*, 541 U.S. 36 (2004).

81. *Davis v. Alaska*, 415 U.S. 308 (1974).

82. *Id.* at 310. The prosecutor moved, pre-trial, for a protective order to prevent reference to the witness’s juvenile record by the defense on cross examination. The witness had been adjudicated a juvenile delinquent at age sixteen due to the commission of two burglaries. *Id.* at 311. The prosecutor took the position that exposure of the witness’s juvenile record would impair the rehabilitative goals of the state. *Id.* at 319.

83. *Id.* at 319.

84. *State v. DeLawder*, 344 A.2d 446 (Md. Ct. Spec. App. 1975).

85. The Maryland court concluded that the Supreme Court’s decision in *Davis* needed to be applied retroactively. *Id.* at 455.

86. *Id.*



*Davis* regarding the critical import of the right of cross examination<sup>87</sup> to now hold that the objective that the alleged rape victim “fulfill her public duty to testify free from embarrassment and with her reputation unblemished *must fall before the right of an accused to seek out the truth in the process of defending himself.*”<sup>88</sup> Nonetheless, the momentum for enactment of rape shield legislation continued after *Davis* and *De Lawder* with, however, some major exceptions to the restriction of the right of cross examination.

One prime limitation is when the defense wants to introduce evidence of the alleged victim’s prior sexual conduct to show that the woman has a *motive* to lie about the incident with the defendant. The Supreme Court, in *Olden v. Kentucky*,<sup>89</sup> considered a situation where defense claimed that the woman had fabricated the sexual assault in order to protect herself from her live-in boyfriend’s discovering that she had cheated on him.<sup>90</sup> The trial court judge prohibited questions designed to reveal to the jurors the existence of that live-in relationship, based in part on the judge’s concern that the Kentucky jurors would be prejudiced against the white complaining witness upon learning that her boyfriend was black.<sup>91</sup> The trial court refused to permit defense counsel to question the witness about her living arrangements even after she lied on the witness stand by stating as part of the prosecutor’s direct examination that she was living with her mother.<sup>92</sup> The Supreme Court, citing its holding in *Davis v. Alaska*,<sup>93</sup> held that “[s]peculation as to the effect of jurors’ racial biases cannot justify exclusion of cross examination with such strong potential to demonstrate the falsity of [the defendant’s] testimony.”<sup>94</sup>

The *Olden* Court emphasized that the Confrontation Clause of the Sixth Amendment requires the defendant to be able to expose to the jury facts which may challenge the reliability of a witness.<sup>95</sup> A more

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87. The Supreme Court emphasized the import of cross examination as a primary aspect of the Sixth Amendment’s Confrontation Clause, stating that “[c]ross-examination is the principal means by which the believability of a witness and the truth of his testimony are tested.” *Davis*, 415 U.S. at 316.

88. *DeLawder*, 344 A.2d at 455 (emphasis added).

89. *Olden v. Kentucky*, 488 U.S. 227 (1988).

90. *Id.* at 230.

91. *Id.* at 230, 232.

92. *Id.* at 230.

93. *See supra* note 87.

94. *Olden*, 488 U.S. at 232. The Court added that “the exposure of a witness’ motivation in testifying is a proper and important function of the constitutionally protected right of cross-examination.” *Id.* at 231.

95. *Id.*

common motive to lie about being raped is illustrated in *State v. DeLawder*.<sup>96</sup> In that case, the defense claim was that the young girl was terrified of telling her mother that she had gotten pregnant from consensual sex with her boyfriend, and chose, instead, to tell her very strict mother that, "I've been raped; now, I am pregnant . . . ."<sup>97</sup>

## V. JUDICIAL EXPANSION OF THE CONCEPT OF RAPE SHIELD

Courts have not only been generally supportive of rape shield legislation, but have even expanded it beyond the scope of the drafters. A prime example of this is the decision of the Third Circuit in *Government of the Virgin Islands v. Scuito*.<sup>98</sup> The defense had requested that the trial judge grant its motion to have a psychiatric examination conducted of the complaining witness.<sup>99</sup> The attorney's affidavit submitted to the Court stated that "any number of persons in the community" had told counsel that the alleged victim "appears to be often, if not almost constantly, in a 'spaced out' or trancelike state; I have personally observed this."<sup>100</sup> Counsel added that he had been informed by individuals that the complainant is addicted to drugs and "is frequently in altered states of consciousness therefrom."<sup>101</sup>

One would think that evidence of a complaining witness's use of "mind-altering [hallucinogenic] drugs"<sup>102</sup> and of a "personality which fantasizes to extremes"<sup>103</sup> goes to the heart of the overriding issue of the credibility of the witness. There is no issue presented here relating to questioning the witness about her prior sexual relations, so one may not see the relevance of the federal rape shield statute, Rule 412 of the Federal Rules of Evidence.<sup>104</sup> Yet, the Third Circuit upheld the decision of the trial court that Rule 412 *does* apply, not based on the "letter" of 412, but on the "spirit;"<sup>105</sup> the spirit being to prevent the victim from being put on trial.<sup>106</sup> Such an incursion on the right to cross-exam and

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96. *State v. DeLawder*, 344 A.2d 446 (Md. Ct. Spec. App. 1975).

97. *Id.* at 453; *see also* *Johnson v. State*, 632 A.2d 152, 161 (Md. 1993) (saying that evidence was admissible that suggests the alleged victim had a motive to lie in accusing defendant of rape).

98. *Virgin Islands v. Scuito*, 623 F.2d 869 (3d Cir. 1980).

99. *Id.* at 874.

100. *Id.*

101. *Id.*

102. *Id.*

103. *Id.*

104. *See supra* notes 60-62 and accompanying text.

105. *Scuito*, 623 F. 2d at 874-75.

106. *Id.* at 876 (citing 2 JACK B. WEINSTEIN & MARGARET A. BERGER, WEINSTEIN'S EVIDENCE § 412(01), at 412-19 (1979)).

confront one's accusers could well be seen as prohibiting many instances of relevant questioning that certainly challenges the credibility of one who accuses another of a crime. A serious and comprehensive attack on the veracity, honesty, and reliability of a witness's testimony might well be characterized as an attempt to put the victim on trial and, therefore, be improper.

At times, trial courts' rulings in the name of rape shield statutes have been unfortunate indeed. Consider the court's action in *Neeley v. Commonwealth*.<sup>107</sup> The alleged victim was a 14 year old white girl who claimed that a black male had broken into her house and forcibly raped her.<sup>108</sup> Neeley, a black man, denied ever having entered the house that night at all. The Commonwealth of Virginia introduced expert evidence from a technician at a forensic laboratory that a hair which was "characteristic of hair from a person of African-American descent" was found on the girl's cervix.<sup>109</sup> The defendant wished to question the complainant about the intercourse she had had with her boyfriend, who was also black, before the alleged rape. Defense wished to counter the prosecution's claim that the hair from a black man found on the woman was evidence of the guilt of the defendant. Defense counsel had an expert he was prepared to call to testify and who would maintain that the hair found could well have come from the girl's boyfriend.<sup>110</sup>

The trial court's ruling in *Neeley* prohibited the defendant from introducing evidence to provide an alternative explanation for the hair that was found on the complainant. The court's ruling prohibiting any testimony that would involve evidence of the alleged rape victim's prior sexual relations, in the name of protecting the girl from embarrassment, provides an alarming example of the use of rape shield statutes to thwart justice. It took a decision of the Court of Appeals of Virginia to conclude that the operation of the statute in this case denied the defendant his "constitutional rights of compulsory process, confrontation and due process . . . ."<sup>111</sup>

Another instance of a court broadly, and, I suggest, inappropriately, applying a rape shield statute to encompass sexual conduct other than the alleged victim's prior sexual relations, is the Ninth Circuit's decision

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107. *Neeley v. Commonwealth*, 437 S.E.2d 721 (Va. App. 1993).

108. *Id.* at 722.

109. *Id.* at 723.

110. *Id.*

111. *Neeley*, 437 S.E.2d at 726-27. The court held that the utilization of the rape shield statute in this instance denied the defendant his constitutional right to present relevant evidence. *Id.*

in *Wood v. Alaska*.<sup>112</sup> There was no dispute as to whether or not intercourse had occurred; the issue before the jury was whether there was consent. Wood wanted to introduce evidence that prior to the night in question, the alleged rape victim had told him that she had posed for photographs for Penthouse magazine, that she had acted in pornographic films, and that she received payment to engage in sex in a room full of mirrors while people photographed her.<sup>113</sup> Wood maintained that the woman had shown him the Penthouse photos<sup>114</sup> and that he perceived her conduct to have been a sexual come-on. The defendant's attempts to bring these issues out before the jury failed because the judge ruled that such testimony was prohibited under the rape shield law in Alaska.<sup>115</sup> The defendant was convicted of sexual assault.<sup>116</sup>

The Ninth Circuit Court of Appeals acknowledged that since the conduct Wood desired to introduce was publicly displayed in nationally distributed magazines and films, no privacy rights of the complainant would be violated by introducing the information at trial.<sup>117</sup> The Court also accepted Wood's claim that the information that the complainant provided Wood might well have established a certain type of relationship between the two, but, nevertheless, concluded that the potential prejudicial effect outweighed the probative value.<sup>118</sup> Furthermore, any introduction of such evidence may have "confused" the jury.<sup>119</sup>

The Court determined that the mere willingness to have posed for Penthouse and to act in sexual films was of no relevance as to whether she would have wanted to have had sex with Wood. What the Court failed to give sufficient weight to is the significance of the woman's making a special effort to impart that information to Wood and how he may have interpreted the motivation and interests of the woman providing him with such detailed information about her past sexual conduct. The woman's discussions, initiated by her, of her pornographic

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112. *Wood v. Alaska*, 957 F.2d 1544 (9th Cir. 1992).

113. *Id.* at 1546.

114. The court accepted this as fact. *Id.* at 1547.

115. The trial judge issued a pretrial protective order excluding all the above mentioned evidence. *Id.* at 1547.

116. *Id.* The defendant unsuccessfully appealed in the Alaska state courts and the federal district court denied his habeas corpus writ based on his Sixth Amendment claim. *Id.* at 1547-48.

117. It was clear that the purpose of the woman's exposure was to have her images seen by the public. *Id.* at 1552. It would be difficult to maintain that the woman would be embarrassed by the revelation of her photos or acting career.

118. *Id.* at 1554.

119. *Id.*

acting and modeling career, could most certainly be deemed to be sexually provocative and taken by Wood to mean she was interested in a sexual relationship with him. The mere *facts* by themselves that she had posed nude and acted in pornographic films might appropriately be precluded by the rape shield statute, but her *communications* to Wood about her past and the showing of nude photographs of herself to Wood are quite another matter. A jury may well have regarded such actions as more than of “limited probative value,”<sup>120</sup> and more than just “relevant to a limited degree.”<sup>121</sup>

## VI. THE MARITAL EXEMPTION FROM THE CRIME OF RAPE

To be sure, one of the most significant reforms in rape law has been the elimination of the marital exception for the commission of crime of rape. Once again, we turn for historical perspective to the seminal work of Lord Matthew Hale: “[T]he husband cannot be guilty of a rape committed by himself upon his lawful wife, for by their mutual matrimonial consent and contract the wife hath given up herself in this kind unto her husband, which she cannot retract.”<sup>122</sup> The first case in America to recognize the common law exemption for marital rape was the decision of the Supreme Judicial Court of Massachusetts in *Commonwealth v. Fogerty*.<sup>123</sup>

There are four primary justifications that have been offered over the years for the marital exception. The first was that the wife was viewed as the property of the husband and had no legal identity of her own; the woman, sexual parts included, belonged to the man.<sup>124</sup> Secondly, the marriage contract was deemed to encompass an agreement for sexual relations; it was the husband’s conjugal right and his wife was obliged to obey his commands.<sup>125</sup> Thirdly, it was believed that the state should simply keep out of the private relationship that exists between a married

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120. *Id.* at 1546.

121. *Id.* In a case that offers a contrast to the Ninth Circuit’s holding in *Wood*, the court in *People v. Jovanovic*, 700 N.Y.S.2d 156, 171 (N.Y. App. Div. 1999), held that the defendant should have been able to make the jury aware of provocative e-mails discussing sado-masochistic sex between the parties so as to “effectively place the complainant in a somewhat less innocent and possibly more realistic light.”

122. HALE, *supra* note 23, at 629.

123. *Commonwealth v. Fogerty*, 74 Mass. 489 (Mass. 1857).

124. See 1 BLACKSTONE’S COMMENTARIES 189 (1941) (saying the wife’s legal existence was “incorporated into that of the husband”).

125. Such was not the Biblical perspective on sexual activity in marriage. Relations were to occur only when each party so chose and marital rape was indeed an offense. Miller, *supra* note 45, at 207-08.

couple. As the Commentary to the Model Penal Code's marital rape exemption explains, the exception "avoids [an] unwarranted intrusion of the penal law into the life of the family."<sup>126</sup> It was also believed that any involvement of the criminal law after an accusation of rape would cause any reconciliation between the spouses to be more difficult and would ultimately harm the marriage and make things even more difficult for any children involved.<sup>127</sup> Some maintained that the exemption was required in order to prevent wives from falsely claiming to be raped in order to gain an advantage in any divorce or child custody litigation.

And, lastly, a rationale of particular controversy has been the claim that the harm, the injury to a sexually assaulted wife, is far less than the impact on other women. The Model Penal Code's Commentary illustrates this theme: "Where the attacker stands in an ongoing relation of sexual intimacy, that evil, as distinct from the force used to compel submission, may well be thought qualitatively different."<sup>128</sup> There are many, however, who maintain that the actual psychological harm that results from such an attack by an intimate who had once been so trusted, is great indeed.<sup>129</sup> Marital rape may be, in fact, seen as the ultimate humiliation.<sup>130</sup>

In spite of the offensiveness of the "it's not so bad if the attacker is someone you're married to" claim, the focus of the rape reform movement of the 1970s did not initially include the marital exemption. However, it is interesting to note that one of the prime concerns of the first organized women's movement dating back to the Seneca Falls Convention of 1848, was to oppose any concept of a man's right to engage in coerced sex with his wife.<sup>131</sup>

As of early 2008, most states have eliminated the marital exemption, although some states deem spousal rape to be a less serious

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126. MODEL PENAL CODE § 213.1 cmt. 8(c) (Official Draft & Revised Cmts. 1980).

127. This is a most peculiar view. One would think that when there has been a forceful sexual assault by a husband of his wife that the marriage had already reached a point where reconciliation would neither be a goal, nor conceivable.

128. See MODEL PENAL CODE § 213.1 cmt. 8(c) (Official Draft & Revised Cmts. 1980). The Commentary does indicate that even though the "drastic sanctions of rape" should not apply in the spousal context, the charge of assault may well be appropriate. *Id.*

129. See GERMAINE GREER, SEXUAL DEVIANCE AND SEXUAL DEVIANTS 329-30 (Erich Goode & Richard R. Troiden eds., 1974) (saying the harm to a woman who is raped by a complete stranger may well be less than the humiliation resulting from the rape by someone who the woman was trying to love).

130. *Id.*

131. See Jill Elaine Hasday, *Contest and Consent: A Legal History of Marital Rape*, 88 CAL. L. REV. 1373, 1377 n.10 (2000).

offense than either stranger or acquaintance rape. Oklahoma<sup>132</sup> and Kentucky<sup>133</sup> still retain limited forms of the spousal exception and exclude the spouse, but not others, from prosecution in instances where the victim is not mentally able and competent to consent.

This fundamental change in our laws regarding the marital exemption for rape came not just by legislative action,<sup>134</sup> but from the judiciary as well. One of the most influential and significant court decisions was that of the New York State Court of Appeals in *People v. Liberta*.<sup>135</sup> The Court held that “there is no rational basis for distinguishing between marital rape and nonmarital rape. . . . We therefore declare the marital exemption for rape in the New York statute to be unconstitutional.”<sup>136</sup> And in spite of the long common law tradition in England for spousal immunity,<sup>137</sup> in 1991 the House of Lords eliminated the marital exemption.<sup>138</sup>

#### VII. THE ELEMENT OF *MENS REA* IN THE CRIME OF RAPE

A major concern in defining any crime is which *mens rea*, which guilty mind, is required to deem one a criminal. Historically, in a rape prosecution, the guilty defendant must have had the intention to have intercourse with a woman without her consent. If he *thought* there was consent, the act of intercourse would not have constituted the crime of rape even if the alleged victim was, in fact, not consenting. The extreme example that is often used to illustrate this point is the case of *Director of Public Prosecutions Respondent v. Morgan Appellant*,<sup>139</sup> a 1976

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132. Oklahoma’s rape statute does not apply to a spouse in numerous situations such as “where the victim is incapable through mental illness or any other unsoundness of mind, whether temporary or permanent, of giving legal consent.” There is no exemption if force or the threat of force is used. OKLA. STAT. ANN. tit. 21, § 1111 (West 2007) (defining rape).

133. Kentucky exempts spouses who would otherwise be guilty of rape if the victim is mentally retarded. KY. REV. STAT. ANN. § 510.035 (West 2007).

134. See, e.g., N.J. STAT. ANN. § 2C:14-1 (West 1978) (abolishing New Jersey’s marital exemption in 1978).

135. *People v. Liberta*, 474 N.E. 2d 567 (N.Y. 1984). At the time of that decision, forty states still retained the marital exemption. *Id.* at 572.

136. *Id.* at 573. The Court also found the designation of “he” as the actor and a “woman” as the victim violated the equal protection clause because it exempted females from liability for forcible rape. *Id.* at 577-78. The Court did not proceed to strike the entire statute, however, as unconstitutional. The rape statute remained but it was deemed to be, from that point on, gender-neutral and with no marital exception. *Id.* at 59.

137. See HALE, *supra* note 23 and accompanying text; HALE, *supra* note 122 and accompanying text.

138. *R. Respondent v. R. Appellant*, [1991] 1 A.C. 599.

139. *R. v. Morgan*, [1976] A.C. 182 (H.L.).

matter before the House of Lords which characterized the facts surrounding the incident as “somewhat bizarre.”<sup>140</sup>

Four members of the British Royal Air Force had been drinking in a bar when Morgan suggested to his three companions that they return to his house to have sex with his wife. The three friends testified at trial that Morgan had told them that his wife would initially struggle and that this was the only way she would get “turned on,” and that her resistance would be a mere “pretence,” not to be taken seriously.<sup>141</sup> Morgan led the three others to believe that his wife, in spite of her protests, would certainly be consenting to the intercourse. The men admitted that there was some struggle in the wife’s bedroom, but then all the parties involved calmed down and engaged in consensual sex.<sup>142</sup> The issue presented here was clear: Is it rape when a) the alleged victim clearly objected to the intercourse *but*, b) the defendants thought, nevertheless, that there was consent.<sup>143</sup>

The House of Lords’ decision is a noted one because it adopts such an extreme position that it has been an easy target for the rape law reformers.<sup>144</sup> The trial judge told the jury that the intent of the defendant was all-controlling as long as it was based on reason and not completely fanciful.<sup>145</sup> The House of Lords, considering the matter on appeal, went quite a bit further. Since the *mens rea* of rape was intent to have intercourse without consent, as long as the particular defendant was of the belief, however unreasonable, that there *was* consent, then no conviction would be appropriate.<sup>146</sup>

Attacks on the House of Lords<sup>147</sup> began the next day with a sharply critical editorial in *The Times of London*.<sup>148</sup> The decision “does not

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140. *Id.* at 186

141. *Id.* at 187, 206.

142. *Id.* at 206. The alleged victim’s husband was not charged with rape due to the common law marital exemption existing at the time in Britain. *Id.* at 205.

143. *Id.* at 192-93. There was a Certificate, under the Criminal Appeal Act of 1968, that a point of law of general public importance was to be decided: “Whether in rape a defendant can properly be convicted notwithstanding that he in fact believed the woman consented if such belief was not based on reasonable grounds.” *Id.* at 192.

144. As one commentator noted, “authors of law review articles cannot leave it alone.” John H. Biebel, Note, *I thought She Said Yes: Sexual Assault in England and America*, 19 SUFFOLK TRANSNAT’L L. REV. 153, 167 n.106 (1995).

145. *Id.* at 168. A much earlier case, *R. v. Flattery*, (1877) 2 Q.B.D. 410, 414, supported this view.

146. *Morgan*, [1976] A.C. at 213-15. The answer to the certified question was “No.” See *supra* note 143 and accompanying text.

147. For any given appeal of a criminal conviction that is considered by the House of Lords, only a few of the actual Law Lords decide the case.

148. See David P. Bryden, *Redefining Rape*, 3 BUFF. CRIM. L. REV. 317, 329 n.67 (quoting



accord with common sense. . . . the law lords have been unduly legalistic.”<sup>149</sup> The British public reacted to the *Morgan* decision with outrage.<sup>150</sup> The controversy in Britain led to Parliament’s enactment of a new Sexual Offenses Act which made it clear that a rape would be committed in cases where a male may have been *reckless* as to whether the alleged victim consented to the intercourse.<sup>151</sup> Mere intent on the defendant’s part would control no longer, the *mens rea* of recklessness would suffice.

### VIII. THE DOCTRINE OF AFFIRMATIVE CONSENT

Outrage, shock, disbelief, and mockery was the reaction to the case on the other end of the spectrum, the decision which highlighted the issue of affirmative consent, *State in the Interest of M.T.S.*<sup>152</sup> The New Jersey Supreme Court made it clear in *M.T.S.* that its decision was influenced by, and directly responsive to, the goals of the rape reformers. The New Jersey legislature considered adoption of a criminal code in the early 1970s which would have been based on the Model Penal Code’s approach to rape laws, but in 1978 a new Code of Criminal Justice was enacted.<sup>153</sup> The rape provisions of the code were formulated by the National Organization of Women (NOW) Task Force on Rape and other feminist groups.<sup>154</sup> The bill was referred to in the legislature as the NOW bill, and it passed both houses of the New Jersey legislature and was signed into law by the Governor.<sup>155</sup>

The NOW bill had been closely shaped by the Model Sex Offense Statute of the Philadelphia Center for Rape Concern.<sup>156</sup> The Center was a lobbying group for feminists’ interests, and the stated intent of the Model Statute was to simply “remove all features [of past rape laws] found to be contrary to the interests of rape victims.”<sup>157</sup> When the New Jersey Supreme Court determined that it was required to interpret what it deemed to be vague and crucial language contained in the statute, the

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Editorial, *TIMES OF LONDON*, May 5, 1975, at 15).

149. *Id.*

150. See Biebel, *supra* note 144, at 169-70.

151. See *id.* at 170; *supra* note 126 and accompanying text; see also Sexual Offences (Amendment) Act, 1976, 24 & 25 Eliz., ch. 82, § 1 (Eng.).

152. *State in the Interest of M.T.S.*, 609 A.2d 1266 (N.J. 1992).

153. N.J. CODE OF CRIM. J. L. (1978); *M.T.S.*, 609 A.2d at 1274.

154. *M.T.S.*, 609 A.2d at 1274.

155. *Id.* at 1274-75.

156. *Id.* at 1275.

157. *Id.* (describing the intent of the Model Statute).

court was guided by the legislative intent and therefore the goals and interests of the NOW Task Force on Rape and the Philadelphia Center for Rape Concern.<sup>158</sup> The Court expressed a consciousness that any definitional task “runs the risk of undermining the basic legislative intent to reformulate rape law.”<sup>159</sup> To emphasize its desire to be supportive of the goal to reform the rape laws in the manner in which the backers of the reforms would have wanted, the Court cited the failure of the Michigan Supreme Court<sup>160</sup> to adhere to the legislative intent reflected in the creation of Michigan’s groundbreaking rape reform legislation.<sup>161</sup>

M.T.S., a 17 year old boy,<sup>162</sup> had been living at the house of C.G., a 15 year old girl, for five days before the alleged rape occurred.<sup>163</sup> During three of those days, there had been “kissing and necking” and discussions of intercourse.<sup>164</sup> Although some facts were in dispute, the trial court concluded—and the Supreme Court affirmed—that C.G. had consented to partake in a session of “kissing and heavy petting” with M.T.S. immediately prior to the intercourse.<sup>165</sup> Penetration occurred without any threat of force and without any statement or action by C.G. that she did not want the intercourse.<sup>166</sup> C.G. had clearly become upset after the penetration and the next morning she and her mother filed a complaint with the police.<sup>167</sup>

The New Jersey Code of Criminal Justice defines the crime of sexual assault as penetration “us[ing] physical force or coercion . . . .”<sup>168</sup> Nowhere in the statute is there any elaboration on physical force. Although one could well maintain that the words are *not* ambiguous and should be applied in accordance with their plain meaning, the Court concluded to the contrary. “Physical force” does not “evoke a single

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158. The Court emphasized that its interpretation of the statute must fully comport “with the public policy sought to be effectuated by the Legislature.” *Id.* at 1277.

159. *Id.* at 1275.

160. The Michigan case that was discussed by the *M.T.S.* Court was *People v. Patterson*, 410 N.W.2d 733 (Mich. 1987). *M.T.S.*, 609 A.2d at 1275.

161. See *supra* note 49 and accompanying text for a discussion of the 1975 Michigan statute. The *M.T.S.* decision clearly sympathizes with the dissent in the Michigan *Patterson* case which “soundly criticized the majority’s position as a distortion of the legislature’s intent . . . .” *M.T.S.* 609 A.2d at 1275.

162. Initials are commonly used in cases involving juveniles in order to protect the privacy of the youths.

163. *M.T.S.*, 609 A.2d at 1268.

164. *Id.* at 1267-68.

165. *Id.* at 1267.

166. *Id.*

167. *Id.* at 1268.

168. N.J. STAT. ANN. § 2C:14-2c(1) (West 2004).

meaning that is obvious and plain,” and therefore it became necessary for the Court to “pursue avenues of construction in order to ascertain the meaning of that statutory language.”<sup>169</sup> And therein, the examination of the legislative history and the consideration of the wishes and goals of the feminist coalition that had proposed and supported adoption of the statute.

The statute would seem to clearly contain two separate elements. First, there must be the sexual penetration, and second, there must have been the use of physical force. The Court, however, concluded that to require physical force *in addition to* the act of unwanted penetration would be “fundamentally inconsistent with the legislative purpose . . . .”<sup>170</sup> Were there to be penetration without the affirmative permission of the other individual, that penetration will be deemed to constitute the statutory requirement of physical force.<sup>171</sup> “[P]hysical force in excess of that inherent in the act of sexual penetration is not required for such penetration to be unlawful.”<sup>172</sup>

There was some, but little, concession by the court to interactions in the real world. “Persons need not, of course, *expressly announce* their consent to engage in intercourse for there to be affirmative permission.”<sup>173</sup> The Court concluded that the failure of the alleged victim to have protested or resisted was of no significance.<sup>174</sup> In fact, a new shield was created: there is to be *no inquiry permitted* as to why the alleged victim did not resist or even protest the sexual penetration, and there is to be no inquiry as to what the actual desire of the alleged victim may have been.<sup>175</sup>

The defendant, M.T.S., therefore, had committed the crime of sexual assault even though the penetration followed a period of bedroom kissing and heavy petting, and even though C.G. had never protested the initial penetration or resisted in any way. The doctrine of Affirmative Consent had been established . . . by a unanimous decision of the Supreme Court of New Jersey.<sup>176</sup>

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169. *M.T.S.*, 609 A.2d at 1270.

170. *Id.* at 1276.

171. *Id.* at 1277.

172. *Id.*

173. *Id.* (emphasis added).

174. *Id.* at 1279.

175. *Id.* The inquiry is to be on the conduct or words of the alleged victim that would have led a reasonable person to have believed that there was affirmative and freely-given permission. *Id.*

176. *Id.* at 1279-80. A leading scholar on rape prosecutions has accepted the court’s decision in *M.T.S.* for his definition of consent which requires that “. . . at the time of the act of sexual penetration there are actual words or conduct indicating affirmative, freely given permission to the

The reaction to the *M.T.S.* decision was predictable. Women's groups, such as the National Organization of Women, applauded the court's holding.<sup>177</sup> The Public Policy Analyst for the Pennsylvania Coalition Against Rape, an organization that counsels rape crisis organizations, commented that "I haven't heard of any other court decision that says 'No' will mean 'No' and that is simply enough."<sup>178</sup> The defense attorney in the *M.T.S.* case, however, sarcastically suggested that as a result of the decision, "those who are dating should bring a 'condom and a consent form' with them."<sup>179</sup> The Chair of the Criminal Law Section of the New Jersey Trial Lawyers Association commented that the decision "sounds like you have to give a Miranda warning before you have sexual intercourse . . . ."<sup>180</sup>

In addition to the judicially-imposed affirmative consent requirement in New Jersey, the states of Wisconsin<sup>181</sup> and Washington<sup>182</sup> have enacted legislation yielding the same result. Wisconsin's Sexual Assault statute's requirement that consent be illustrated by "words or overt actions" of the alleged victim, has been challenged on several grounds. The first was that there was unconstitutional shift in the burden of proof to the defendant. The Wisconsin Court of Appeals, however, rejected the claim in *Gates v. State*.<sup>183</sup> The Court held that under the statute, the prosecutor continued to have the mandated burden and was "required to prove that the victim did *not* by either words or overt actions freely agree to have sexual contact or intercourse with the defendant."<sup>184</sup> A second challenge was made on the basis that it was fundamentally unfair and inappropriate to require that the defendant show that the victim had demonstrated affirmative consent in order for the intercourse to be deemed consensual and not rape. The court in *State v. Lederer*<sup>185</sup> responded to that claim: "Defendant contends that two parties may enter into consensual sexual

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act of sexual penetration." STEPHEN SCHULHOFER, UNWANTED SEX: THE CULTURE OF INTIMIDATION AND THE FAILURE OF THE LAW 283 (1998).

177. Peggy O'Crowley, *Date Rape Redefined: A New Jersey Supreme Court Ruling Will Change the Way Juries and Couples Look at Sexual Consent*, N. JERSEY REC., Aug. 9, 1992, at A17.

178. Jerry Gray, *Court Says Sexual Assault Can Occur Without Force*, N.Y. TIMES, July 31, 1992, at B5.

179. O'Crowley, *supra* note 177.

180. *Id.* (quoting D. William Subin).

181. *See supra* note 5.

182. *See supra* note 7.

183. *Gates v. State*, 283 N.W.2d 474, 477 (Wisc. App. 1979).

184. *Id.* at 478 (emphasis added).

185. *State v. Lederer*, 299 N.W. 2d 457 (Wisc. Ct. App. 1980).

relations without manifesting freely given consent through words or acts. We reject this contention as we know of no other means of communicating consent.”<sup>186</sup>

The Washington State rape statute<sup>187</sup> defining consent as requiring “actual words or conduct indicating freely given agreement to have sexual intercourse,” was, however, silent as to where the burden lay as to the showing of consent. The defendant in *State v. Camara*<sup>188</sup> claimed that judge’s charge to the jury improperly inferred that the burden was upon him. The Washington Supreme Court determined that there was “support in the history and purposes of rape law reform”<sup>189</sup> to conclude that the intent of the legislature was to shift the burden of proof to the defense.<sup>190</sup> As a result of the *Camara* decision, Washington courts typically included the following instruction to juries in rape cases:

A person is not guilty if the sexual intercourse is consensual. “Consent” means that at the time of the act of sexual intercourse, there are actual words or conduct indicating a freely given agreement to have sexual intercourse. The burden is on the defendant to prove by a preponderance of the evidence that the sexual intercourse was consensual.<sup>191</sup>

This instruction was challenged in 2006 in *Washington v. Gregory*.<sup>192</sup> The defendant was not claiming that the judge’s instruction was wrong as to the current state of the law in Washington,<sup>193</sup> the defendant conceded that the instruction did reflect the court’s holding in *Camara*.<sup>194</sup> Gregory was seeking a reversal of the holding in *Camara*, but none was forthcoming: “We decline to overrule *Camara*, and conclude that the jury instructions here complied with due process.”<sup>195</sup>

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186. *Id.* at 460.

187. *See supra* note 7.

188. *State v. Camara*, 781 P.2d 483 (Wash. 1989).

189. *Id.* at 639. One commentator believed that the real motivation of the court was to show to the electorate that they are not “soft on crime,” and in so doing became hard on the constitution. David Hirsch, *Presumption of Innocence NOT so clear in this State*, SEATTLE TIMES, June 26, 1991, at A9.

190. *Camara*, 781 P.2d at 486-87. The concurring judge was even stronger and concluded that the “Legislature expressly intended to shift the burden of showing consent to the defendant. . . .” *Id.* at 490 (Utter, J., concurring) (emphasis added). The judge’s two sentence concurrence offered no support whatsoever for his conclusion.

191. *See, e.g.*, *State v. Gregory*, 147 P.3d 1201, 1258 (Wash. 2006) (Sanders, J., concurring in result).

192. *Id.* at 1224-25 (majority opinion).

193. *Id.* at 1225.

194. *See supra* notes 188-190 and accompanying text.

195. *Gregory*, 147 P.3d at 1225. But see the opinion of Judge Sanders in this case wherein the

Unlike the court decision in New Jersey and the legislative enactments in Wisconsin and Washington State which permitted affirmative *actions* as well as words to show consent, what occurred at Antioch College in Ohio as a response to two date rape incidents was more extreme. The reformers in this instance were the Womyn of Antioch,<sup>196</sup> and the “reform” achieved was that only *verbal* consent would suffice to show that the intercourse was consensual and not criminal.<sup>197</sup> But, however clear the policy may have been as to what form of consent was mandated, it was vague and ambiguous in other respects. “If the level of sexual intimacy increases during an interaction . . . the people involved need to express their clear verbal consent before moving to that new level.”<sup>198</sup>

But sexual relations are not made up of distinct and discrete components so as to know when a new “level” has been reached and therefore the need for verbal consent. And what is to be deemed sexual intimacy? Is holding hands included? Is stroking a partner’s hair a higher level than having one’s arms around the other’s body in a hug? The request to proceed must precede the sexual stimulation that often sets off the desire to continue. The policy didn’t account for the truth that *after* some sexual touching there may very well be the desire for intercourse even though no such desire had existed earlier.

But the greatest weakness of the policy was perhaps in its requirement that there be consent “each and every time there is sexual activity.”<sup>199</sup> If the couple were living together and had relations every night upon undressing and going onto the bed, under the policy there must still be the series of verbal consents before any new level (whatever precisely that may be) is reached. The parties’ prior sexual history and

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judge finds that placing the burden on the defendant “violates his most fundamental due process right . . .” *Id.* at 1266 (Sanders, J., concurring in result).

196. “Womyn” has been used by some feminists to protest the masculine root of the word “women.” See Corey Rayburn, *Better Dead than Raped? The Patriarchal Rhetoric Driving Capital Rape Statutes*, 78 ST. JOHN’S L. REV. 1119, 1121 n. 14 (2004) (noting that the use of “womyn” is an important symbol of breaking patriarchal linguistic patterns).

197. THE ANTIOCH COLLEGE SEXUAL OFFENSE PREVENTION POLICY (2006), available at <http://www.antioch-college.edu/campus/SOPP> (last visited Sept. 18, 2007).

198. *Id.* The Policy made it clear that asking “Do you want to have sex with me?” is not enough. The request for consent must be specific to each act.” *Id.* at ¶ 3 (1990). In 1995, the *Antioch College Sexual Offense Policy* became known as *Antioch College Sexual Offense Prevention Policy*.

199. ANTIOCH COLLEGE SEXUAL OFFENSE PREVENTION POLICY, *supra* note 197, at 1-2 (Clarifying Points).

their ongoing relationship do not relax the requirements laid out to prevent consensual sex from becoming rape.<sup>200</sup>

The Antioch approach toward affirmative consent—the consent must be articulated verbally—has its supporters amongst modern day reformers targeting legislatures for changes in rape laws. Indeed, the approach has its virtues—there are not likely to be mistakes arising from miscommunications—because of the clear need for the “yes, let’s go to the next level.” A defendant who believed there was consent just because his live-in girl friend of two years got completely undressed, went on their bed and threw her arms wide open, will clearly be a sexual assaulter unless words of consent accompanied the girlfriend’s conduct. Coded, non-verbal communications such as tongue kissing won’t suffice.

The Antioch reformers, as tends to be the case of most reformers, were not modest in their goals. As the Preface to the Sexual Offense Prevention Policy, effective January 1, 2006, stated, the regulations are about “empowerment, changing our rape culture, and healing.”<sup>201</sup> Therefore, the policy applies not just to students but to “all . . . persons who use or visit the Antioch campus, regardless of their relationships to Antioch . . . .”<sup>202</sup> The College had acted as a locality enacting its own rape laws where the *actus reus* of the offense did not have to be penetration but just any sexual contact or touching,<sup>203</sup> there is, furthermore, formal and official notice given that “body movements and non-verbal responses such as *moans* are not consent.”<sup>204</sup>

Any consideration of Affirmative Consent must examine the dynamic between that doctrine and the concept of *mens rea*. *Mens rea* is a fundamental aspect of our criminal justice system; to be guilty of a crime one must have had a guilty mind when the act was done. Unless one had the intention to cause the harm that resulted from one’s conduct, or the knowledge that is required by the statute (e.g., the crime of possession of stolen property requires knowledge that the property indeed had been stolen) a crime is not committed. As Blackstone’s Commentaries elaborated on the classic Latin principle of *mens rea*, an “unwarrantable act, without a vicious will, is no crime at all.”<sup>205</sup> The

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200. *Id.* at 2.

201. *Id.* at 1.

202. *Id.*

203. *Id.* at 1-2.

204. *Id.* at 1 (emphasis added).

205. BLACKSTONE’S COMMENTARIES, *supra* note 124, at 758.

existence of knowledge, or intent, is an element of the crime that must be proven by the prosecutor to exist beyond a reasonable doubt.

Traditionally, for the commission of the crime of rape, an individual must have had knowledge that the other person was not consenting to the intercourse. The actor must have had the intention to have had sexual relations with the woman even though the woman did not wish to engage in the sexual activity.

But what if there is a legitimate mistake of fact? What if the defendant in *M.T.S.*<sup>206</sup> did think that after the kissing and petting in the bed that C.G. wanted to have intercourse? That the intercourse was a natural progression from what was occurring? That C.G.'s passion in the foreplay indicated she wanted more? That, in M.T.S.'s experience, such heated bedtime involvement did lead to both parties desiring intercourse and nothing C.G. did or said that night indicated otherwise? Mistake of Fact in our criminal justice system has historically been recognized as a defense to a crime; mistake of fact can negate the existence of the statutory requirement of knowledge.

#### IX. "NO MEANS NO," SEDUCTION, AND "MEN JUST DON'T GET IT"

The Mistake of Fact defense in the context of rape, however, has been the target of the rape reformers. The initial phrase used, "No Means No," was a clear affirmation that there would be no valid excuse by an accused who proceeds with intercourse after the "No." It doesn't matter how many Hollywood films the defendant may have seen where the initial "No" dissolved into a passionate kiss and ecstatic lovemaking followed by adoration and hugging in the morning. It doesn't matter what the accused's experience had been in the past with women saying "No" when they really meant "Yes" because they wanted to convey the impression of Good, and certainly not loose, Girls. It doesn't matter if the man had read of the study of undergraduates in Texas<sup>207</sup> which found that 68.5% of those females sampled reported that even though they had said "No," what they meant was "Maybe."<sup>208</sup> Or if he knew that recent

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206. See *supra* notes 152-175 and accompanying text (discussing the case).

207. Charlene L. Muehlenhard & Lisa C. Hollabaugh, *Do Women Sometimes Say No When They Mean Yes? The Prevalence and Correlates of Women's Token Resistance to Sex*, 54 J. PERSONALITY & SOC. PSYCHOL. 872 (1988).

208. *Id.* at 874. The students' responses were based on the following hypothetical situation: "You were with a guy who wanted to engage in sexual intercourse and you wanted to also, but for some reason you indicated that you did not want to, although *you had every intention to and were willing to engage in sexual intercourse*. In other words, you indicated 'no' and you meant 'yes.'" *Id.* (emphasis in original).



studies have found very similar results as the Texas findings across the country.<sup>209</sup> Or that one study found that 90% of sexually experienced women who had said “No” when they meant “Yes,” had stated that an important factor in their initial “No” had been the fear of appearing promiscuous.<sup>210</sup> Or that some women undergraduates may even offer token resistance for “game playing” or “manipulative” reasons.<sup>211</sup>

What about a “No” that’s given at 7 PM, but the evening activity of the date—cocktails, dinner, dancing, after-dinner liquor—has brought the couple closer together and, according to the man, the lovemaking flowed naturally and passionately at midnight. Is he to be a rapist because of the 7 PM “No”? Minds change about all kinds of things, one’s attitude toward sex certainly amongst them. Some men are indeed successful suitors who have wowed and courted their date, and what had seemed terribly improbable at the beginning of the evening, may certainly change.<sup>212</sup>

If force is used by the man to get a woman who had said “No” to change her mind, that is most certainly rape. If the woman who said “No” physically resisted or protested or said “No” again as the defendant was attempting intercourse, that would be rape. But if the man has charmed his date during the course of the evening, if all of his lines and routines worked, if the woman had become “smitten” and responded to the man in a manner in which a reasonable person would conclude indicated that she had changed her mind, then that earlier “No” should not cause the later intercourse to be deemed rape. Surely it is whether or not the woman was consenting *at the time of the intercourse* that must control.

Seduction is not rape. Seduction implies that a reluctant partner, even one who had previously said “No,” had been lured to change her mind—voluntarily so. Even regretting it in the morning and thinking “how did I ever allow that to happen,” does not transform the earlier seduction into rape. Were the reformers to achieve a broader definition of rape so as to encompass situations where an initially reluctant individual consented to intercourse not due to forcible compulsion but due to the charm and appeal of a dating partner, our criminal justice system would not be well served. A very rare instance where seduction

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209. KADISH & SCHULHOFER, *supra* note 35, at 260.

210. *Id.* at 362.

211. Muehlenhard & Hollabaugh, *supra* note 207, at 877-78.

212. *But see* Lynne Henderson, *Rape and Responsibility*, 11 L. & PHIL. 127, 215 (1992) (maintaining that once a woman has said “No,” the man has been alerted to the lack of consent and strict liability should apply).

has been criminalized is the Model Penal Code's deeming it a misdemeanor if a male induces a female to "participate [in the intercourse] by a promise of marriage which the actor does not mean to perform."<sup>213</sup>

The reactions by reformers to the refusal by some courts to accept that a "No" means "No" is certainly understandable. And relatively recent cases where courts hold that "verbal protestations" are not sufficient to show that a rape was committed by the man who proceeds to intercourse immediately after the protests, do lead to unjust results.<sup>214</sup> It most certainly must be a woman's choice to decide whether to engage in intercourse; concepts of autonomy and control over one's body demand that such be the case. But is it unreasonable to require that the man be made aware that the woman did not desire the intercourse even though the interaction between the two individuals would have led a reasonable man to think otherwise? Should silence be viewed as a matter of law to mean "No"?

Rape reformers often use the phrase, "men just don't get it," and hope that changes in rape laws can lead to societal and cultural changes in the interactions between the sexes. Men must understand, it is maintained, that a woman may freeze immediately prior to intercourse and not be able to communicate any negativity and men must not take that silence as indicating consent. That's why an affirmative indication of consent is required; no assumptions ought be made. If the law makes this clear to men, then men will act far more cautiously, respectfully, and judiciously. The law must compensate for the failings of men. As one feminist and rape reform advocate stated, "men are systematically conditioned not even to notice what women want. They may have not a glimmer of women's indifference or revulsion."<sup>215</sup> It was as though the mere presence of testosterone prohibited the ability of its possessor to be respectful of women's concerns and interests and desires. After all, "Men Are from Mars and Women Are from Venus."<sup>216</sup>

There is little doubt that alcohol use by either of the two individuals

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213. MODEL PENAL CODE § 213.3(d) (Official Draft 1962).

214. See, e.g., *Commonwealth v. Berkowitz*, 609 A.2d 1338 (Pa. Supr.Ct. 1992) (saying verbal protestations are not dispositive or sufficient evidence that a rape had been committed).

215. Catherine MacKinnon, *Feminism, Marxism, Method and the State: Toward a Feminist Jurisprudence*, 8 SIGNS 635, 653 (1983).

216. *Men Are from Mars, Women Are from Venus* was the title of a longtime bestselling book highlighting the different perspectives between the sexes. JOHN GRAY, *MEN ARE FROM MARS, WOMEN ARE FROM VENUS* (Harper Collins 1992). Over thirty-million copies of the book have been sold. Marsvenus.com, <http://www.MarsVenus.com> (last visited Mar. 4, 2008). The book has been translated into forty languages. *Id.*

can further enhance miscommunication. Alcohol can lead to impulsive conduct, a loss of control and a misreading of the cues that are coming from the other person. The use of alcohol by one or both parties in acquaintance rape cases may have great impact on juries. Jurors might view the claim that the sex was non-consensual as having first arisen the next morning when the woman regretted both having gotten drunk and sleeping with the guy. But that doesn't mean that the woman had not been competent to, and didn't choose to, consent to intercourse. Jurors may also consider the level of intoxication in assessing the ability of the woman to fully remember what had occurred.

#### X. STRICT LIABILITY AND MISTAKE OF FACT

Requiring affirmative consent clearly takes us beyond the "No Means No" mandate. But should we go, as some reformers and courts have advocated, to a Strict Liability perspective on sexual relations? Under that theory, it matters not what the man thought as to whether there was consent, and it matters not what the woman may have done to have indicated to a reasonable person that she was consenting. It will be rape as long as it is determined afterward that there was no consent. An accused will be held strictly and completely accountable for his partner's lack of consent.

Consider the Massachusetts case of *Commonwealth v. Simcock*.<sup>217</sup> At trial, the judge instructed the jury that, "[e]ven a good faith belief on the part of the defendants that the alleged victim consented is not a defense."<sup>218</sup> If the jurors were to conclude that there was no consent, what the defendants knew or intended was of no import. The judge emphasized to the jurors that "[t]he focus of the offense in rape is lack of consent on the part of the victim and not the subjective intent of the defendant while performing the act."<sup>219</sup> The Court ruled as it did in spite of its acknowledgement that "[t]he evidence, viewed as a whole, raised the issue of honest and reasonable mistake."<sup>220</sup> Three of the defendants testified that the alleged victim's actions created the impression that she welcomed the sexual advances of the men.<sup>221</sup>

'The *Simcock* decision was expanded by the holding of the Supreme Judicial Court of Massachusetts in 2001 in the matter of

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217. *Commonwealth v. Simcock*, 575 N.E. 2d 1137 (Mass. App. Ct. 1991).

218. *Id.* at 1140.

219. *Id.*

220. *Id.* at 1141.

221. *Id.*

*Commonwealth v. Kenny Lopez*.<sup>222</sup> The defense had requested the trial judge to instruct the jurors that if a mistake as to the consent of the alleged victim was found to be a reasonable one, that would constitute a defense.<sup>223</sup> Massachusetts judges had frequently given such an instruction as to a reasonable mistake of fact constituting a defense,<sup>224</sup> but the trial judge in *Lopez* did not. The *Lopez* court agreed with the lower court and concluded that even a reasonable, honest perception on the part of the defendant as to the victim's consent is not relevant in a rape prosecution.<sup>225</sup> The Supreme Judicial Court of Maine, in *State of Maine v. Glenn Reed*,<sup>226</sup> similarly determined that the state of mind of the defendant is irrelevant as to a defendant's guilt of a rape charge; rape "requires no culpable state of mind."<sup>227</sup>

Such "reforms" in our rape laws go against the very core of our concept of criminal responsibility. The Supreme Court in *Morissette v. United States*,<sup>228</sup> over fifty years ago, observed that it was basic that a guilty mental state of mind accompany prohibited conduct. "The contention that an injury can amount to a crime only when inflicted by intention is no provincial or transient notion."<sup>229</sup> There are exceptions; strict liability offenses do exist for some minor crimes. States commonly do not permit mistake of fact defenses for charges such as sale of alcohol to a minor. Mistakes as to age are also not typically a defense to consensual statutory rape charges.<sup>230</sup> But to incarcerate an individual to what may well prove to be life imprisonment when there has been no guilty state of mind has simply been unheard of in this country.

Some go even further. It's rape not only when the perpetrator didn't know there was no consent, it's rape even though the "victim"

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222. *Commonwealth v. Kenny Lopez*, 745 N.E. 2d 961 (Mass. 2001).

223. *Id.* at 963-64.

224. *See Simcock*, 575 N.E. 2d at 1141.

225. *Lopez*, 745 N.E. 2d at 966 (citing *State in the Interest of M.T.S.*, 609 A.2d 1266 (N.J. 1992)).

226. *State v. Glenn Reid*, 479 A.2d 1291 (Me. 1984).

227. *Id.* at 1296.

228. *Morissette v. United States*, 342 U.S. 246 (1952).

229. *Id.* at 250.

230. *See, e.g.*, MODEL PENAL CODE § 213.6(1) (Official Draft 1962) (saying it is not a defense if a defendant either did not know the age of the victim or even reasonably believed the person to be older than ten); N.Y. PENAL CODE § 130.25 (saying no *mens rea* is required as to the actor's knowledge of the age of the victim); WIS. STAT. § 948.02 (saying a Class B felony is committed whenever the victim is less than 13 years old, no *mens rea* required); *Commonwealth v. Miller*, 385 Mass. 521, 525 (Mass. 1982) (saying a defendant is not entitled to a jury instruction informing that a reasonable mistake as to the age of the victim is a defense).

didn't know it. "That a woman does not realize she has been raped does not, *of course*, mean that the rape has not occurred."<sup>231</sup> If one is at a loss to understand how the defendant can be held accountable for a crime that even the victim hadn't perceived of as constituting improper conduct, two rape reformers explain that "the moral lessons taught by society make it difficult for many women to understand when they have been the victim of rape."<sup>232</sup> And in case one might assume that the fact that the victim proceeded on subsequent occasions to have intercourse with the defendant might constitute some evidence that no rape had taken place, that behavior could rather be explained as nothing more than the "victim's need to normalize the situation."<sup>233</sup> Or, as another rape scholar maintained, by having consensual sex on a subsequent occasion with the rapist, the victim is merely attempting to regain control over her world.<sup>234</sup> Such reasoning may well be used to support a reform that would preclude questioning the alleged rape victim about any attempts on her part to initiate further sexual relationship with the accused after the "rape," because such evidence would not be deemed probative and would be highly and unfairly prejudicial—after all, the jurors might misinterpret the information and confusion might result.<sup>235</sup>

#### XI. RAPE TRAUMA SYNDROME AND THE EXPERT WITNESS

One major reform effort in rape prosecutions has dealt directly with weaknesses in the prosecutor's case arising from victim conduct which appears to be inconsistent with that of an individual who had just been sexually assaulted. Prosecutors are often confronted with alleged victims who, after the rape, had not told anyone of the attack. Not family, not friends, not police nor doctors. Often the woman went about business as usual and mentioned nothing about being assaulted until many days had passed.

The solution for reformers came in the form of

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231. Little, *supra* note 20, at 1358 (emphasis added).

232. *Id.* (quoting MARTIN D. SCHWARTZ & WALTER DEKESEREDY, SEXUAL ASSAULT ON THE COLLEGE CAMPUS: THE ROLE OF MALE PEER SUPPORT 23 (1997)).

233. *Id.*

234. ROBIN WARSHAW, I NEVER CALLED IT RAPE: THE MS. REPORT ON RECOGNIZING, FIGHTING AND SURVIVING DATE AND ACQUAINTANCE RAPE 63-64 (1988), *cited in* Little, *supra* note 20, at 1358. Warsaw's comment reflects a survey by Ms. magazine which found that only twenty-seven percent of those who, as a matter of law, had been raped considered themselves to be actual rape victims.

235. See *supra* notes 57-65 for discussion of the justification provided for the enactment of rape shield legislation.

psychologists/psychiatrists<sup>236</sup> who would testify at trial as experts on rape trauma syndrome.<sup>237</sup> The testimony would, in substance, inform the jurors that they should not conclude that the alleged victim's conduct after the rape was evidence that she had not been raped. The victim may have feared mistreatment by the police and the courts, or a lack of sympathetic support from family.<sup>238</sup> Some people who have been sexually attacked become traumatized, unable to discuss with anyone what had happened because they may have entered a state of denial.<sup>239</sup> Shame and guilt at what the woman might have done to provoke the attack may also play a role in the victim's silence. As one judge in Philadelphia noted, "[u]nlike the victims of any other crime, they [rape victims] are somehow suspected by society of being partially guilty; they are imagined to have contributed to the crime through some form of explicit or implicit seduction, or simply by not being as careful as they should have been."<sup>240</sup>

Rape trauma can be considered to be a form of Post-Traumatic Stress Disorder, which the American Psychiatric Association recognizes to be a pattern of symptoms that develop after exposure to a certain uniquely stressful situation that is outside the common range of life's

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236. Until 1962, it was generally the rule that only doctors could testify as to the existence of any mental disorder. In *Jenkins v. United States*, 307 F.2d 637, 643-44 (D.C. Cir. 1962), the court held that psychologists with the appropriate knowledge and experience could qualify as experts as well. Experts in rape trauma can have a variety of titles, see, for example, *Clark v. State*, 654 So.2d 984 (Fla. Dist. Ct. App. 1995) where the testifying witness was an expert in "Forensic Psychology With a Specialty With Rape Victims." In at least one instance, a graduate student in psychology was qualified as an expert. *People v. Stanley*, 681 P.2d 302, 305 (Cal. 1984). But see *State v. Willis*, 888 P.2d 839, 845 (Kan. 1995) where the court held that rape trauma syndrome was a medical diagnosis and therefore a social worker would not be a qualified expert.

237. "Syndrome" is defined as "a group of signs and symptoms that occur together and characterize a particular abnormality." MIRIAM-WEBSTER'S COLLEGIATE DICTIONARY (9th ed. 1988). Perhaps the most commonly known syndrome is the battered woman syndrome that is used to support a claim of self defense in a murder or assault trial. There's been some attempt by war veterans to use post-traumatic stress to form the basis of a defense when charged with assault. See Geraldine L. Brotherton, Note, *Post-Traumatic Stress Disorder—Opening Pandora's Box?*, 17 NEW ENG. L. REV. 91 (1981-82).

238. See *In re Pittsburgh Action Against Rape*, 428 A.2d 126, 143 (Pa. 1981) (Larsen, J., dissenting), *superseded by statute*, 42 Pa. C.S.A. § 5945.1, *as recognized by Com v. Cody*, 584 A.2d 992 (Pa. 1991) ("Many victims do not even bother to report a rape because they feel the process they must go through in order to obtain a conviction may be as offensive as the crime.").

239. To be sure, there is great variation in the ways that victims react to having been raped. The relationship, if any, that may have existed with the accused is crucial, as is family support, the victim's personality traits and prior sexual history, the nature of the attack, and the overall coping abilities of the individual.

240. *Commonwealth v. Gray*, Nos. 748-678, Feb. 1980, *as reported in Pittsburgh Action Against Rape*, 428 A.2d at 139 (Larsen, J., dissenting).

experiences.<sup>241</sup> The reaction to having been raped may occur in two distinct phases. The first, the acute phase, may be characterized by a complete disruption of an individual's life, including the numbing of emotional responses.<sup>242</sup> The second phase may begin months after the rape occurred and entails the victim's attempt at a long term resolution of the after-effects of the sexual assault.<sup>243</sup>

To be sure, there was initial reluctance by the courts to permit such testimony.<sup>244</sup> Expert testimony can generally only be admitted upon a showing that scientific or other specialized knowledge will assist the trier of fact to better understand the evidence, and that the testimony is reliable and based on sufficient facts or data.<sup>245</sup> States "progressed" at varying speeds as to allowing expert testimony regarding rape trauma; some states enacted legislation, in others, judicial determinations occurred. The first case that this author was able to uncover that dealt directly with the issue was the 1982 Kansas case of *State v. Marks*.<sup>246</sup> The state Supreme Court found the proposed expert testimony to be admissible and that rape trauma was a common reaction of one who has been sexually assaulted.<sup>247</sup> The court found, furthermore, that such testimony would not improperly invade the province of the jury.<sup>248</sup>

The California Supreme Court found otherwise. In *People v. Bledsoe*,<sup>249</sup> the court found that the medical purpose for recognizing the existence of the syndrome was to devise a tool to aid in therapy and treatment, and not for any determination of whether or not a rape had indeed occurred.<sup>250</sup> The court held that "permitting a person in the role of an expert to suggest that because the complainant exhibits some of the

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241. AMERICAN PSYCHIATRIC ASSOCIATION, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 247 (3d ed. 1987). More specifically, rape trauma syndrome is the pattern of psychological symptoms that follow the sexual assault.

242. See, e.g., ANN WOLBERT BURGESS & LYNDA LYTTLE HOLMSTROM, RAPE: VICTIM OF CRISES 37 (1974).

243. See Pamela Wilk, *Expert Testimony on Rape Trauma Syndrome: Admissibility and Effective Use in Criminal Rape Prosecution*, 33 AM. U. L. REV. 417 (1984).

244. The concept of rape trauma syndrome did not really exist until the mid-1970s when therapists who had been working with rape victims observed typical reactions by those who had been assaulted and designated those responses as rape trauma syndrome. *Id.* at 417 n.3.

245. FED. R. EVID. 702.

246. *State v. Marks*, 647 P.2d 1292 (Kan. 1982). Although the California appellate court in *People v. Matthews*, 154 Cal. Rptr. 628 (Cal. Ct. App. 1979) observed that the trial court had permitted rape trauma expert testimony, no issue concerning this was raised on appeal.

247. *Marks*, 647 P.2d at 1299.

248. *Id.*

249. *People v. Bledsoe*, 681 P.2d 291 (Cal. 1984).

250. *Bledsoe*, 681 P.2d at 300. The court accepted the fact that rape trauma syndrome had, overall, reached a level of scientific reliability.

symptoms of rape trauma syndrome, the victim was therefore raped, unfairly prejudices the appellant by creating an aura of special reliability and trustworthiness.”<sup>251</sup> The Washington Supreme Court in *State v. Black*,<sup>252</sup> similarly concluded that such testimony would unfairly harm and prejudice a defendant and also determined that the concept of rape trauma syndrome had not been shown to be of sufficient scientific reliability.<sup>253</sup>

Courts prohibiting such proposed expert testimony noted that the alleged victim could herself certainly testify as to the emotional trauma which she endured after the rape and explain that such trauma led to her failure to immediately report the incident to anyone. Furthermore, lay, but not expert, witnesses, could be called to testify about the emotional state of the alleged victim.<sup>254</sup> Nevertheless, courts started down the path of determining that the expert testimony was relevant and appropriate.<sup>255</sup> To be sure, there was an increasing acceptance by the psychiatric and scientific community of the concept of rape trauma syndrome. So, for example, by the time that the Vermont Supreme Court considered the matter in *State v. Kinney*<sup>256</sup> in the year 2000, the Court found that the rape trauma expert testimony was “professionally recognized as a type of post-traumatic stress disorder, and the behavioral characteristics of rape victims has been the subject of numerous professional studies.”<sup>257</sup> By 2004, the Colorado Court of Appeals was secure in noting that, “[i]t has been *repeatedly* held that rape trauma syndrome evidence is reasonably reliable[,]” and therefore admissible.<sup>258</sup>

The expert, in most instances, would *not* have even interviewed or professionally evaluated the complainant, and the problems in permitting such expert testimony are several. First, jurors might infer that an expert is being permitted to testify as to the manner in which rape victims act after they’ve been raped *because* the court has determined that such

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251. *Id.* at 301 (quoting *State v. Saldana*, 324 N.W.2d 227, 230 (Minn. 1982)).

252. *State v. Black*, 745 P. 2d 12 (Wash. 1987).

253. *Id.* at 19.

254. *See, e.g., Bledsoe*, 681 P.2d at 301.

255. There was a similar development with the use of experts in battered women’s syndrome cases where the female defendant claimed to be acting in self defense. Although the D.C. Circuit Court of Appeals in *Ibn-Tamas v. United States*, 455 A.2d 893 (D.C. 1983) held that the concept of the battered woman syndrome was not generally accepted in the scientific community, such expert testimony is used currently in virtually all jurisdictions.

256. *State v. Kinney*, 762 A.2d 833 (Vt. 2000). Vermont’s Supreme Court had not previously ruled on the admissibility of rape trauma syndrome evidence. *Id.*

257. *Id.*

258. *People v. Baenziger*, 97 P.3d 271, 275 (Colo. App. 2004) (emphasis added).



evidence is relevant in this case *because* the alleged victim had indeed been raped. This very serious concern is typically dealt with by the trial judge's instructions to the jury that the expert testimony was not to be considered as evidence that a rape had actually occurred in the case at hand.<sup>259</sup> Any experienced trial lawyer will dispute the efficacy of such an instruction. The jurors will make assumptions about the relevancy of the expert testimony, and the expert will have bolstered this complainant's testimony that she was a victim of rape. That's the prosecutor's goal in calling the expert to testify.

A second problem with such expert testimony is the overt play to the emotions and passions of the jurors; the expert will describe the horrid impact on women who have been raped and how traumatized many become. The expert can give accounts of the destroyed lives of clients that he or she has treated, and inform that many rape victims never recover from the assault. Even though the expert is not permitted to say, "Jurors, I am an expert in dealing with the devastating aftermath of a rape and the traumatizing impact it can have, and my expertise enables me to tell you that this complainant was indeed raped," the jurors may well conclude that such is the thrust of the testimony.<sup>260</sup> And *that* is prejudicial. And that prejudice is *not* countered, as the Vermont Supreme Court held it was, by the jurors' knowledge that "[t]he expert never interviewed the victim and offered no opinion whether the victim suffered from rape trauma syndrome or exhibited any of the behavior of a rape victim."<sup>261</sup>

## XII. THE REQUIREMENTS OF A PROMPT COMPLAINT

Another object of reform, and one that has met great success, were the laws requiring a prompt complaint by a woman who has claimed to have been raped. The expectation that a raped woman will immediately tell others of the crime dates back to the 13<sup>th</sup> century judge and legal scholar Henry de Bracton's instruction that such a victim "forthwith and whilst the act is fresh, she ought repair with hue and cry to the neighboring vills, and there display to honest men the injury done to her,

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259. *See, e.g.*, *People v. Nelson*, 22 A.D.3d 769, 770 (N.Y. App. Div. 2005) (saying any prejudice to the defendant will be dissipated by the court's instruction to the jurors).

260. Experts are not to draw legal conclusions; such determinations are for the jurors or the judge to make.

261. *Kinney*, 762 A.2d at 843. Instances where the expert would testify that the complainant's responses were certainly consistent with women who had been raped, have been deemed error—although perhaps, harmless. *See, e.g.*, *People v. Coleman*, 768 P.2d 32, 49 (Cal. 1989).

the blood and her dress stained with blood, and the tearing of her dress . . . .”<sup>262</sup>

The Model Penal Code of 1962 was somewhat more forgiving, the complainant had up to three months to inform the authorities. The Code’s concern was that any longer period of time would then be one which could include women who had consensual sex but subsequently discovered that they had become pregnant. Such knowledge “might change a willing participant in the sex act into a vindictive complainant, as well as the sound reasoning that one who has, in fact, been subjected to an act of violence will not delay in bringing the offense to the attention of authorities.”<sup>263</sup> The Commentary to the Code added that an objective, fixed period of time was required due to the “dangers of blackmail or psychopathy in the complainant.”<sup>264</sup> As of 2004, only three states—California, Illinois and South Carolina—retained a requirement for a prompt complaint, and then only in the spousal abuse context.<sup>265</sup>

### XIII. ADMISSION INTO EVIDENCE OF THE DEFENDANT’S PRIOR CRIMINAL RECORD

It is a basic tenet of our criminal justice system that jurors are not to be informed of any prior criminal record of the defendant. The rationale is that jurors must focus exclusively on the facts of the case on trial and determine whether each element of the crime charged has been proven beyond a reasonable doubt. Were the jurors in a robbery case to be told of the defendant’s prior robbery convictions, they might assume that if the defendant has done it before, he probably did it this time as well—even though proof is lacking. That is the reason that Federal Rule 404(b) provides that, “[e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith.”<sup>266</sup>

The one standard exception to the rule that jurors are not to be

262. HENRICI DE BRACON, 2 DE LEGIBUS ET CONSUEUDINIBUS ANGLIAE 483 (Sir Travers Twiss trans., 1879), cited in Michelle Anderson, *The Legacy of the Prompt Complaint Requirement, Corroboration Requirement, and Cautionary Instructions on Campus Sexual Assault*, 84 B.U.L. REV. 945, 947 n.5 (2004). The “hue and cry” language was picked up by the Pennsylvania Superior Court centuries later: “The lack of evidence of hue and cry that one might expect to ensue from rape casts doubt on the existence of the rape itself.” *Commonwealth v. Freeman*, 441 A.2d 1327, 1332 (Pa. Super. Ct. 1982).

263. MODEL PENAL CODE § 207.4(23) cmt. at 265 (Official Draft 1962).

264. *Id.*

265. Anderson, *supra* note 262, at 964.

266. FED. R. EVID. 404(b). Evidence of crimes or other bad acts may be admissible to show proof of preparation, plan, motive or opportunity. *Id.*

informed of the defendant's prior criminal record is when the defendant takes the stand to testify. At such times, the defendant, as is the case with all witnesses, is subject to an attack on his credibility and prior bad acts are fair game.<sup>267</sup> However, jurors in such instances are instructed by the court that they should not consider the prior crimes as in any way indicating that the defendant committed the crime for which he is on trial. The past criminal record is only to be used as part of a consideration of the defendant's credibility while on the witness stand. Pretrial hearings will often restrict the crimes which can be raised by the prosecutor at trial, and the more similar the prior crime is to the one on trial, the more likely it will be that no mention of the crime can occur in cross examination of the defendant because of its highly prejudicial nature.

But a rape trial is different; there have been "reforms." Federal Rule of Evidence 413 provides that "[i]n a criminal case in which the defendant is accused of an offense of sexual assault, evidence of the defendant's commission of another offense or offenses of sexual assault is admissible, and may be considered for its bearing on any matter to which it is relevant."<sup>268</sup> The jury is to be informed of the defendant's prior acts whether or not the defendant takes the stand.

An analysis of the Congressional Record reveals the goals of the legislation. First, there is an assumption that individuals who commit crimes of sexual assault are predisposed to repeat such acts, therefore, propensity evidence has a relevance unusual for other criminal cases. Secondly, there are the reasons generally provided as the rationale for enactment of changes in rape laws—victims are often not believed so additional forms of evidence may be needed to obtain a conviction,<sup>269</sup> victims will be more likely to come forth to prosecute if they believe that there is a greater likelihood of the conviction of the defendant.

The import and need for such evidence at trial was highlighted by Congressional leaders. Former Vice Presidential Candidate Robert Dole, Minority Leader of the Senate at the time, was direct when speaking of the need for the new rule: It's an "entirely sound perception that evidence of this type is frequently of critical importance in establishing the guilt of a rapist or child molester, and that concealing it from the jury often carries a *grave risk* that such criminal will be turned

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267. FED. R. EVID. 609.

268. FED. R. EVID. 413(a).

269. See Christina Wells & Erin Motley, *Reinforcing the Myth of the Crazy Rapist: A Feminist Critique of Recent Rape Legislation*, 81 B.U.L. REV. 127, 140-41 (2001).

loose to claim other victims.”<sup>270</sup> The “grave risk” is that the defendant’s trial may have all the safeguards that protect the accused throughout our justice system. The “grave risk” is that the prosecutors would not be able to prove the case beyond a reasonable doubt if they played by the regular rules, so permit them to utilize this prejudicial information that has always been prohibited in the past.

The Judicial Conference Committee on Rules of Practice and Procedure had strenuously argued that this proposed revision to the Federal Rules of Evidence could “diminish significantly the protections that have safeguarded persons accused in criminal cases . . . against undue prejudice.”<sup>271</sup> The Committee had received a report from the Advisory Committee on Evidence Rules which revealed strong opposition by the legal profession to the proposed revision of the Federal Rules. The overwhelming majority of lawyers, judges, legal organizations and law professors on the Advisory Committee concluded that the rules would permit the admission at trial of unfairly prejudicial evidence.<sup>272</sup> The Committee, therefore, recommended to Congress that the proposed revisions not be adopted.<sup>273</sup> The revisions, the Committee determined, were neither based on nor supported by empirical evidence.<sup>274</sup>

Federal Rule 413 was not restricted to prior criminal *convictions* or even arrests of the defendant, rather, any form of evidence of commission of a prior sexual offense would be admissible. This could clearly lead to trials within trials whereby the prosecutor would call individuals who had claimed to have been attacked to the stand to present evidence about what happened on some former occasion, and the defendant would proceed to engage in a defense against these old charges. Were Rule 413 to have permitted the admission only of prior convictions, that would have presented problems, but the admission of all forms of evidence opens the doors to a host of potential difficulties. Furthermore, the burden on the prosecutor to prove to the court that the prior offense occurred is not the traditional beyond a reasonable doubt standard, but only proof by a preponderance of the evidence.<sup>275</sup>

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270. 137 CONG. REC. 4927 (Apr. 24, 1991), cited in Wells & Motley, *supra* note 269, at 142 n.60 (emphasis added).

271. JUDICIAL CONFERENCE OF THE U.S., REPORT OF THE JUDICIAL CONFERENCE OF THE UNITED STATES ON THE ADMISSION OF CHARACTER EVIDENCE IN CERTAIN SEXUAL MISCONDUCT CASES, reprinted in 159 F.R.D. 51, 53 (1995).

272. FED. R. EVID. 413, 28 U.S.C.A., at III (Discussion).

273. *Id.*

274. *Id.*

275. See, e.g., United States v. Enjady, 134 F.3d 1427, 1433 (10th Cir. 1998) (saying the

The dangers are twofold, at least. Information about prior claims of sexual assault against the defendant may well prompt the jurors to desire, whether consciously or subconsciously, to convict the individual for his past uncharged crimes. The defendant may be convicted for being a bad person, even when the current charges against the defendant were not proven beyond a reasonable doubt. And there is no time limit imposed as to required proximity of the bad acts to the charged criminal conduct upon which the trial is based. The jurors might just conclude that even though the *current* charges have not been proven beyond a reasonable doubt, this is a bad guy who we do not wish to see on the streets.

Congressional action, however, reflected the political forces of the day. The coalition of women's groups and the 'get tough on crime' adherents won out over the opposition of the legal profession. The Violent Crime Control and Law Enforcement Act of 1994, adding what was to be a new Federal Rule of Evidence 413, was passed. Another "reform" had occurred.

The rationale behind rape shield laws is that prior conduct of the victim should have no impact on an assessment of what occurred as to the incident on trial. But as to the defendant, evidence of prior conduct is to be allowed with the inference that "if he did it in the past, he did it this time as well."<sup>276</sup> Such a determination, one not based on fact or evidence, was exactly what rape shield laws were designed to, and do, guard against as to the alleged victim. The *accuser* is protected, the *accused* is not.

#### XIV. THE ANONYMOUS VICTIM: PROTECTING THE IDENTITY OF THE ACCUSER

Rape law reforms have led, as well, to changes relating to revealing the identity of the woman who is claiming to have been raped. Our system of justice has required that the court process be an open one—trials are public. Defendants as well as accusers are referred to by name. The only times, historically, that the public has been kept out of the courtroom is when an undercover police officer is testifying and there is

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district court is to make a preliminary determination that the jury could believe by a preponderance of the evidence that the prior offense did occur). See generally Aviva Orenstein, *Deviance, Due Process, and the False Promise of Federal Rule of Evidence 403*, 90 CORNELL L. REV. 1487 (2005).

276. One study found that there was a strong relationship between jurors' knowledge of the prior criminal record of a defendant and conviction at a rape trial where consent is the issue. Gary LaFree, et al., *Jurors' Responses to Victims' Behavior and Legal Issues in Sexual Assault Trials*, 32 SOC. PROBS. 389 (1985).

a need to preserve the officer's role as someone who is not known to be a police officer. The only other instances when names have not been used is when juveniles are involved. On occasion, the court, in a manner similar to the way a judge may impose a gag order on attorneys, may prohibit the media from disclosing any information which may identify the victim.

To be sure, a defendant accused of rape is publicly so charged. Newspapers will headline the name of any well known celebrity or sports figure, and even if ultimately found to be innocent, the reputation of the accused may be forever tarnished. But the media has been increasingly protective of the alleged victim; often such non-disclosure of the woman's identity is self-imposed by the news sources. A somewhat peculiar example of self-censorship is the policy of the Denver Post, the most highly regarded newspaper in Colorado, in the celebrated Kobe Bryant matter.<sup>277</sup> After the prosecutor's dismissal of the case against Bryant because the alleged victim had no longer wished to proceed, the civil case which had been filed three weeks before the dismissal continued in the federal court. By that time, the accuser's name had been widely reported in numerous websites and used any number of times in court. Nevertheless, the Post continued to protect the somewhat discredited alleged victim. The Post took what it deemed to be the high road: "Though her identity will be available to anyone who attends the federal trial or reads court documents, and many in the community know her name, it is not the same as [the Post's] publishing her name . . . ."<sup>278</sup>

An increasing number of states have enacted statutes prohibiting identification of a woman who is alleging that she has been raped.<sup>279</sup> The most common policy arguments presented in support of such legislation have been that the privacy of someone who has been sexually assaulted ought to be protected, and more women might report a rape to the authorities if they believed that their identity would be protected. Certainly, it is desirable to avoid additional humiliation to a woman who has been sexually assaulted. Certainly, it is a legitimate state interest to encourage those who have been victimized to report the perpetrator to the police for arrest and prosecution. And certainly, as internet use rapidly increases throughout the world, the potential exposure of anyone

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277. See *supra* notes 75-76 and accompanying text.

278. *A Note to Our Readers*, THE DENVER POST, Oct. 17, 2004, at A2.

279. See Daniel Murdock, *A Compelling State Interest: Constructing a Statutory Framework for Protecting the Identity of Rape Victims*, 58 ALA. L. REV. 1177 (2007).

involved in a trial to universal comment and critique has expanded exponentially.

The non-disclosure statute in Florida, one of the first states to enact such a ban, provided that, "No person shall print, publish, or broadcast, or cause to allow to be printed, published, or broadcast, in any instrument of mass communication the name, address, or other identifying fact or information of the victim of any sexual offense . . . ."<sup>280</sup> In spite of this prohibition, a newspaper did proceed to publish a rape victim's name and was ultimately found to be civilly liable.<sup>281</sup> The newspaper was ordered to pay \$100,000 in punitive and compensatory damages to the rape victim whose name had been published.<sup>282</sup> The Supreme Court, however, in *Florida Star v. B.J.F.*,<sup>283</sup> found the statute unconstitutional. The primary focus of the Court's holding was that the Florida Star had legally obtained from court records the victim's name.<sup>284</sup> An additional finding of the Court was that the statute was overly-broad in that it applied even in circumstances when the victim was already known to the community or when the victim herself sought the attention of the media.<sup>285</sup>

Some states attempted to protect the alleged victim's identification by enacting legislation which would ban the public, press included, from the courtroom in certain instances. Massachusetts passed a statute excluding the public when a minor who has claimed to have been sexually assaulted is testifying.<sup>286</sup> Once again, the Court in *Globe Newspaper v. Superior Court*<sup>287</sup> found the state's attempt to be unconstitutional.<sup>288</sup> The Court emphasized the importance for the public to be able to exercise the constitutionally protected right to gain access

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280. FLA. STAT. § 794.03 (1981).

281. An earlier Supreme Court case, *Cox Broadcasting v. Cohn*, 420 U.S. 469 (1975), concerned a Georgia statute which criminalized publication of the name of an alleged victim in a sexual assault case. The Court sided with the media, *Cox Broadcasting*, and emphasized the crucial role of the press in guaranteeing that trials be fair by public scrutiny of the judicial process. *Id.* at 492. Punishing the media for disclosure could well encourage "timidity and self-censorship and very likely lead to suppression of many items that would otherwise be published and that should be made available to the public." *Id.* at 496.

282. *Fla. Star v. B.J.F.*, 491 U.S. 524, 529 (1989).

283. *Id.*

284. *Id.* at 538.

285. *Id.* at 539. The Court made it clear that there may be some instances where a publication could be punished for publishing a rape victim name. *Id.* at 541.

286. MASS. GEN. LAWS ANN. ch. 278, § 16A (West 2008).

287. *Globe Newspaper v. Superior Court*, 457 U.S. 596 (1982).

288. *Id.* at 610.

to trials,<sup>289</sup> one function of which is to “serve as a check upon the judicial process . . . .”<sup>290</sup> Whereas the Court did note the compelling state interest in protecting juvenile victims, such interest did not excuse the compulsory courtroom closure.<sup>291</sup>

Since in both *Florida Star*<sup>292</sup> and *Globe Newspaper*,<sup>293</sup> the Court emphasized that the victim’s identity had been revealed in the court records prior to publication causing the information to be readily available to the public, states responded by attempting to prevent the government itself from identifying the accuser in its official court and police records.<sup>294</sup> As of 2007, eleven states have enacted laws<sup>295</sup> which provide for non-disclosure of the victim’s name, but vary as to the other information that is similarly deemed to be protected.<sup>296</sup> Some states go as far as to prohibit court papers from providing “details of the alleged offense” itself.<sup>297</sup>

The major concern raised by keeping the victim anonymous is the damage done to the presumption of innocence. If it is perceived that the victim’s name is not released so that she will be protected from *further* humiliation and victimization, there is an assumption that indeed she has been raped as claimed. Those who bring false charges would not be deemed to be in need of such protections from public scrutiny; when an alleged victim’s name is not released, it will be assumed that is because she *is* indeed a victim. She has been subjected to great harm, she has been violated, her identity needs to be kept secret, she has been raped.

Some women’s advocates believe that laws prohibiting disclosure of alleged rape victims continues and perpetuates the concept that the victim is shamed, stigmatized and disgraced. A former President of National Organization of Women concluded that prohibiting disclosure

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289. *Id.* at 604.

290. *Id.* at 606.

291. *Id.* at 607.

292. *Fla. Star v. B.J.F.*, 491 U.S. 524 (1989).

293. *Globe Newspaper v. Superior Court*, 457 U.S. 596 (1982).

294. *Murdock, supra note 279*, at 1186 n.99. The Court had as early as 1979 in *Smith v. Daily Mail*, 443 U.S. 97 (1979), a case involving a newspaper which had published details about a juvenile defendant, determined that when “a newspaper lawfully obtains truthful information about a matter of public significance then state officials may not constitutionally punish publication of the information, absent a need to further a state interest of the highest order.” *Id.* at 103.

295. Alaska, California, Connecticut, Florida, Massachusetts, Nevada, New York, Ohio, South Dakota, Texas, and Wyoming enacted such statutes. *Murdock, supra note 279*, at 1186 n.99.

296. *Id.* at 1188.

297. *See Murdock, supra note 279*, at 1189 n.119 (citing OHIO REV. CODE ANN. § 2907.11 (West 2007)); *Murdock, supra note 279*, at 1189 n.119 (citing S.D. CODIFIED LAWS § 23A-6-22 (1988)).



“merely establishes [the victim] as an outcast . . . .”<sup>298</sup> The feminist leader’s recommendation was to “Pull off the veil of shame. Print the name.”<sup>299</sup>

Like many issues in rape prosecutions, any non-disclosure of the victim’s name requires a balancing test. One middle ground would be to let the alleged victim make the choice and only in instances where the woman clearly indicates that she does not want her name disclosed, would her identity be kept secret. But such a compromise would still impact upon the First Amendment and freedom of the press; such a policy may still lead to perceived inequities when the defendant’s identity is plastered on the front pages of newspapers and his life torn apart as was the case with each of the three Duke University lacrosse players.<sup>300</sup> And, such a policy could still negate the presumption of innocence for the defendant who claims that there was, in fact, no victim, and that the sex was consensual.

#### XV. PROHIBITING ADMISSIBILITY OF THE VICTIM’S CLOTHING AT THE TIME OF RAPE

The reform of rape laws has led to prohibiting disclosure of more than just the prior sexual history or name of the alleged victim, many states now prohibit any mention to be made of the clothing that the complainant was wearing on the occasion where she and the defendant had been together before the intercourse occurred. The Criminal Procedure Law of New York State is typical: “Evidence of the manner in which the victim was dressed at the time of the commission of an offense may not be admitted in a prosecution for any [rape] offense. . . .”<sup>301</sup>

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298. Kevin O’Brien, *South Carolina: Last Haven for Rape Victim Privacy?*, 50 S.C. L. REV. 873, 880 n.69 (1999) (citing Karen DeCrow, *Stop Treating Victims as Pariahs; Print Names*, USA TODAY, Apr. 4, 1990, at 8A).

299. *Id.* at 880 n.70.

300. Those claiming to have suffered from the now generally perceived to be false charges of rape include more than three dozen Duke Lacrosse Team Players. A federal lawsuit against the University and the city of Durham claims that the players suffered emotional distress and invasion of their right to privacy because of the unqualified support of the prosecutor’s case and the negative treatment of the players. Associated Press, *North Carolina: Lacrosse Players Sue*, N.Y. TIMES, Feb. 22, 2008, at A17.

301. N.Y. CRIM. PROC. LAW § 60.48 (Consol. 2007). The statute does permit the admission of such evidence were a court to determine that the interests of justice so required. *See also* 2004 La. Acts 676 § 4, art. 412.1 (prohibiting admission of the “manner and style” of the victim’s attire as evidence that the victim consented to or encouraged the intercourse); N.D. CENT. CODE § 12.1-20-15.1 (1997) (replaced by N.D. R. EVID. 412) (complainant’s dress was generally inadmissible unless the court finds the evidence to be material and highly probative).

The genesis of these laws can be traced back, in part, to the country's shocked reaction to a jury verdict acquitting a man who was charged with a knife-point kidnapping and sexual assault in Ft. Lauderdale, Florida. The victim in the case had been dressed in a very short, lace skirt, a tank top, and a leather belt; she was wearing no underwear.<sup>302</sup> The defense offered these items into evidence at trial. The jury acquitted the defendant.<sup>303</sup> Life would have gone on as usual had it not been for the presence of a member of the press in the courtroom, and the willingness of the jurors to explain their unanimous vote to acquit.<sup>304</sup> "We all feel she asked for it for the way she was dressed," said the jury foreman.<sup>305</sup> "The way she was dressed with that skirt, you could see everything she had," the foreman continued.<sup>306</sup> Then he added the kicker, "she was advertising for sex."<sup>307</sup> Another juror added, "she was obviously dressed for a good time."<sup>308</sup>

The verdict drew both national attention as well as outrage.<sup>309</sup> A New York attorney with the National Organization of Women's Legal Defense and Education Fund claimed that the case showed that "[i]n most rape trials, it's the victim, not the suspect, who's on trial."<sup>310</sup> The director of a Sexual Assault Treatment Center in Florida stated that the verdict could have a chilling effect on rape cases and discourage victims from coming forward.<sup>311</sup> The fact that the defendant pled guilty two months afterward to having committed a rape in Georgia,<sup>312</sup> just strengthened the perception that he had been guilty of the Florida rape but acquitted because the jury had blamed the victim.

Reform was quick in coming. The jurors' claim that somehow the

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302. Kevin Davis, *Rape Verdict Delivers Outburst of Controversy*, SOUTH FLORIDA SUN-SENTINEL, Oct. 6, 1989.

303. *Id.*

304. *Id.*

305. Cynthia Tucker, *Glorifying the Use of Force Against Women Distorts True Nature of Rape*, ATLANTA J. & CONST., Dec. 13, 1989.

306. Associated Press, *Miniskirt Cited in Rape Acquittal*, WICHITA EAGLE, Oct. 6, 1989.

307. Davis, *supra* note 302. America is not the only country where such views prevail. An Amnesty International survey in Britain found that 25% of Britons believe that if a woman is wearing provocative clothing, she is partly to blame for the rape, especially if she had been drinking. Tom Parry, *Shock Rape Survey: Asking for it*, THE MIRROR, Nov. 21, 2005.

308. Tucker, *supra* note 305. See also Donna Williams Lewis, *Acquitted in Florida, He's Guilty in Dekalb, Accused Admits Rape to Spare Georgia Victim*, ATLANTA J. & CONST., Dec. 6, 1989.

309. *Bills That Passed*, ST. PETERSBURG TIMES, June 3, 1990.

310. Davis, *supra* note 302.

311. *Id.*

312. Lewis, *supra* note 308. The defendant was sentenced to life in prison for the rape and received a 20-year concurrent sentence for the kidnapping of the victim of the rape. *Id.*

victim had precipitated the rape provided the impetus for a reform that few had previously seriously considered. Even though the jurors' blaming-the-victim was nothing so unusual for those who have analyzed rape trials, the spectacle of defense counsel pointing in court to the clothes worn by the woman and implying, "What do you expect?" was horrifying. Whereas jurors had in the past concluded that a woman who is out drinking at a bar and then goes to a man's apartment at 3 AM may somehow have contributed to a defendant's belief that there was to be consent for sex, the claim that "I knew she wanted sex by the way she was dressed," was qualitatively different. A woman's right to autonomy, to freedom, certainly includes the right to choose what clothing to wear without fear that such decision may be interpreted to indicate that she is consenting to have intercourse. It is totally inappropriate to conclude that just because the accuser was dressed in a certain way when she arrived at the defendant's house that she wanted to have sex—her choice of clothing is by no means *determinative* of the issue. The following bill passed the Florida legislature and was signed into law within nine months of the jury verdict: "[E]vidence presented for the purpose of showing that manner of dress of the victim at the time of the offense incited the sexual battery shall not be admitted into evidence. . . ."<sup>313</sup>

#### XVI. ANALYSIS OF THE IMPACT OF THE FIRST WAVE OF REFORMS

I will refer to the reforms discussed up to this point of the article as the First Wave of changes relating to rape prosecutions. The reforms' primary goals were to make it easier to convict individuals accused of rape and to encourage more women who had been sexually attacked to report the attack to the police and choose to fully participate in the subsequent court proceedings. If a potential rapist believes that a possible victim is much more likely to prosecute under a system where she, and not he, would get legal protections and support, then perhaps the incidence of rape would be diminished. If the potential rapist believes that there is a far greater likelihood that any rape he committed would lead to a conviction, one would expect a rather sharp downturn in the incidence of rape.

However, analysis of the impact of these reforms has shown that the expected gains have not been achieved. The most thorough examination, conducted by Cassia Spohn and Julie Horney, of the

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313. FLA. STAT. § 794.022(3) (West 2008).

percentage of indictments that actually resulted in convictions found there to be no correlation between changes in rape laws and convictions in five of the six jurisdictions studied.<sup>314</sup> In Detroit, unlike Washington, D.C., Atlanta, Chicago, Houston and Philadelphia, there may have been some discernible advances.<sup>315</sup>

What are the most significant factors to be examining in assessing the impact of the reforms? Does an increase in the number of rapes reported mean that more women feel freer to go to the authorities (showing a benefit from the rape reforms) or that there are actual increases in the occurrences of the rapes? Should the amount of bail that is set upon initial arraignment be used to show that an accusation of rape is being treated more harshly if the bail is being set at higher levels than in the past?

In 1993, Ronet Bachman and Raymond Paternoster attempted to assess results of the reforms beginning twenty years earlier.<sup>316</sup> It was found, however, the law reforms had not significantly impacted either the reporting rates of victims or the responses to the reports by the criminal justice system.<sup>317</sup> The one positive finding was that those who were ultimately convicted of rape were somewhat more likely to receive prison sentences than had previously been the case.<sup>318</sup> One must bear in mind that harsher treatment of those accused of rape may just be reflective of the overall toughening of our sentencing laws. The nationwide trend toward mandatory and harsher sentences has had an impact on rapist and non-rapist alike.

After a thorough review and survey of the existing empirical studies of the impact of the rape reforms, two researchers concluded that “[t]here is growing evidence that . . . the legal reforms have generally had little or no effect on the outcomes of rape cases, or the proportions of rapists who are prosecuted and convicted.”<sup>319</sup> And, significantly, the researchers conclude that the crime of rape continues to be underreported.<sup>320</sup> A more recent report analyzing data emerging from

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314. CASSIA SPOHN & JULIE HORNEY, *RAPE LAW REFORM: A GRASSROOTS REVOLUTION AND ITS IMPACT* 160 (1992).

315. *Id.*

316. Ronet Bachman & Raymond Paternoster, *A Contemporary Look at the Effects of Rape Law Reform: How Far Have We Really Come?*, 84 J. CRIM. L. & CRIMINOLOGY 554 (1993).

317. *Id.* at 573.

318. *Id.* at 574.

319. David Bryden & Sonya Lengnick, *Rape in the Criminal Justice System*, 87 J. CRIM. L. & CRIMINOLOGY 1194, 1199 (1997).

320. *Id.* at 1220-21.

statistical studies of the impact of rape reforms also concluded that there was no showing that the reforms have met the expected goals.<sup>321</sup>

One comprehensive study of the impact of the groundbreaking Michigan rape reform statute which was enacted in 1975<sup>322</sup> concluded that the reforms had not even led to subtle changes and that the “reformers had unrealistic expectations for the rape law reforms.”<sup>323</sup> The failure of the reforms in Michigan to have led to a higher incidence of reporting by rape victims is troubling. The enactment of the statute was accompanied by a great amount of publicity which certainly attempted to make women aware of the protections—for example, prohibition of questions about prior sexual conduct—that they were now being afforded. Women were informed that there was no longer any need to show that they had engaged in any form of physical resistance, and that no corroboration was required.

The rape reforms were premised on the belief that more women would trust the police and prosecutors to support their claim and that changes in the evidentiary laws regarding rape would make it easier to obtain convictions. The lack of increase in the percentage of those who have been raped who then report the rape is a strong indication of the failure, on one level, of the reforms. But perhaps a more important question is, have the reforms led to an actual downturn in the commission of rapes? Do potential rapists understand how the changes in the laws have certainly increased the likelihood of conviction for the commission of rape? An extensive and comprehensive review of that very question concluded that there is no correlation between the extent of reform of the rape laws in a state and the numbers of rapes committed.<sup>324</sup> The enactment of reforms has not diminished the frequency of sexual assaults.<sup>325</sup>

## XVII. STATUTE OF LIMITATIONS LAWS FOR THE CRIME OF RAPE

The Second Wave of reforms do not concern what actually occurs at the trial, but reflect continuing and recent attempts to change the laws to reflect a harsher treatment of the crime itself. There have, for

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321. Stacy Futter & Walter Mebane, Jr., *The Effects of Rape Law Reform on Rape Case Processing*, 16 BERKELEY WOMEN'S L.J. 72, 111 (2001).

322. *See supra* note 59-60 and accompanying text.

323. Cassia Spohn & Julie Horney, *The Impact of Rape Law Reform on the Processing of Simple and Aggravated Rape Cases*, 86 J. CRIM. L. & CRIMINOLOGY, 861, 884 (1996).

324. Ronald Berger et al., *The Impact of Rape Law Reform: An Aggregate Analysis of Police Reports and Arrests*, 19 CRIM. JUSTICE REV. 1, 5, 19 (1994).

325. *Id.*

example, been radical, not just reformist, changes in the statute of limitations laws as applied to rapes.

Statutes of limitations have been a fundamental aspect of our criminal justice system. The general rule is that an individual cannot be prosecuted for a criminal act unless he has been arrested for the crime within a specified period of time from the date of the commission of the crime. The most common time frames across the country are a two to three year period between the date of the crime and arrest for misdemeanors, and a five year period for felonies.<sup>326</sup>

The primary function of the statutes are, as the Supreme Court noted in *Toussie v. United States*,<sup>327</sup> to “protect individuals from having to defend themselves against charges when the basic facts may have become obscured by the passage of time and to minimize the danger of official punishment because of acts in the far-distant past.”<sup>328</sup> The New York Court of Appeals provided an additional justification of the statutes: the laws “encourage law enforcement officials promptly to investigate suspected criminal activity.”<sup>329</sup> In the rape context, it would prove most difficult for an individual who is accused of a sexual assault many years after it allegedly occurred to be able to provide a full defense; witnesses, alibi testimony, or any records that might have been relevant may no longer be available. And since corroboration is no longer required, a conviction could result from the unsubstantiated claim of the alleged victim that a rape had occurred in the distant past.

New York, like many states, had an exception to the general five year statute of limitations for felonies. Category “A” felonies, most notably murder and kidnapping, were the primary exceptions,<sup>330</sup> a prosecution “for any other felony must be commenced within five years of the commission thereof.”<sup>331</sup> Any other felony, that is, except – as of 2006 – rape.<sup>332</sup> A prosecution based on the occurrence of a rape, “may be commenced at *any* time.”<sup>333</sup> Some states have not gone quite as far as

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326. Statutes of limitations are a standard part of our civil system as well. Unless an individual files a claim within a specified period of time, he will lose the right to pursue the cause of action.

327. *Toussie v. United States*, 397 U.S. 112 (1970).

328. *Id.* at 114-15.

329. *People v. Seda*, 93 N.Y.2d 307, 311 (N.Y. 1999).

330. N.Y. CRIM. PROC. LAW § 30.10(2)(a) (Consol. 2008). See also Vermont which has no statute of limitations for aggravated sexual assault. VT. STAT. ANN. tit. 13, § 4501(a) (2008).

331. N.Y. CRIM. PROC. LAW § 30.10(2)(b) (Consol. 2008).

332. The exceptions included other sexual abuse statutes of the New York Penal Law as well. 2006 N.Y. Laws 3. The law extended the time for the rape victim to commence a civil action based on sexual abuse from one to five years. *Id.*

333. *Id.* (emphasis added). See also IDAHO CODE ANN. § 19-401 (West 2008) (stating there is

New York. Massachusetts, in 2006, instituted a fifteen year period for the defendant to be indicted for commission of rape,<sup>334</sup> Pennsylvania has a twelve year limitation period<sup>335</sup> and Iowa has a ten year limitation period.<sup>336</sup>

Whereas the state of Connecticut has eliminated a statute of limitation requirement as to a rape prosecution under certain circumstances,<sup>337</sup> it is Georgia where the reform has led to perhaps the most puzzling result. For most felonies, there is a four year period after the crime's commission during which there must be an arrest or indictment, or else an individual cannot be charged.<sup>338</sup> That period of time increases to seven years if the crime is such a severe one as to be punishable by death or life imprisonment.<sup>339</sup> One would expect that a murder charge would, as is generally the case in most states, have the longest statute of limitations associated with it, but that's not the case. For rape, the case a prosecution can commence for a fifteen year period after the commission of the crime.<sup>340</sup>

There are a number of reasons that help explain the radical changes in the application of statutes of limitations to the crime of rape. Firstly, the change is a reflection of the perception today that rape is a much more serious crime than had been thought in the past. Connecticut Governor, M. Jodi Rell, presiding over a ceremonial bill-signing in 2007, commented on the new law which would abolish any statute of limitations for rape in certain circumstances:<sup>341</sup>

Make no mistake: Sexual assault is [a] violent crime – it is not a crime of passion. . . . It is violence of the most personal and devastating kind, as *brutal in its own right as murder*. And it deserves not only harsh punishment but our very best – and unswerving – effort to bring the perpetrators to justice. Today Connecticut takes another step in that direction.<sup>342</sup>

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no statute of limitations for a rape charge), IND. CODE § 35-41-4-2 (2008) (stating there is no statute of limitations for a rape charge if it constitutes a class A felony).

334. MASS. ANN. LAWS ch. 277 § 63 (2008).

335. 42 PA. CONS. STAT. § 5552 (2007).

336. IOWA CODE § 802.2 (2007).

337. See *supra* note 10.

338. GA. CODE ANN. § 17-3-1 (2007).

339. *Id.*

340. *Id.*

341. See *supra* note 10.

342. Press Release, The Office of Governor M. Jodi Rell, Governor Rell Highlights New Law Eliminating Statute of Limitations in Rape Cases with DNA Evidence (Aug. 21, 2007), available at <http://www.ct.gov/governorrell/cwp/view.asp?A=2791&Q=391712> (emphasis added).

The rape reformers' focus on the traumatizing impact of a sexual assault on the victim has led to the realization that the victim, at times, is not able to discuss the incident until many years have passed. Statutes of limitations had the effect of precluding any prosecution of an accused if the set number of years had transpired before the victim was able to come forward. Another factor weighing against the traditional time period is that there have been recent instances of "recovered memory," where therapy or hypnosis has enabled a victim many years after the rape to remember what exactly occurred that was so traumatic.

But, for some states at least, the advances in DNA testing which could enable fairly certain identification many years afterwards of the individual who committed the rape, have been most significant.<sup>343</sup> The traditional weakness in testimonial evidences as it ages and memories fade and witnesses disappear, are compensated for by the near-certainty of DNA identification. In rape cases where consent is not the issue, but rather identification of the attacker is, indictments have been issued in the name of "John Doe, unknown male," in instances when DNA tests have been possible from evidence recorded from the scene of the crime and the attacker was not apprehended.<sup>344</sup> The expectation is that that such a timely indictment satisfies the requirement of the statute of limitations, and if subsequently there is a DNA match that comes up from some jurisdiction's databank, the suspect's name can be substituted for "John Doe" and the prosecution will proceed.<sup>345</sup>

Many states do not require such an indictment in order to prosecute an individual for an unlimited period of time after the occurrence of the rape. Oklahoma, for instance, while having a general statute of limitations for rape of twelve years,<sup>346</sup> permits a prosecution to commence at anytime if there has been a DNA profile obtained from physical evidence.<sup>347</sup> And Georgia's fifteen year statute of limitations

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343. Governor Rell of Connecticut, when signing the bill eliminating Connecticut's statute of limitations for rape, emphasized the import of DNA technology in identification of rape suspects. *See id.*

344. *See, e.g.,* Steve Chapman, *Rapists Shouldn't Be Able to Run Out the Clock*, CHI. TRIB., Mar. 12, 2000, at C19.

345. In Milwaukee, Wisconsin, the District Attorney, shortly before the six year statute of limitations was due to expire, charged "John Doe" with the rape based on DNA markers. The D.A. commented that, "[s]omeday, somewhere, we hope this guy comes up in somebody's databank. . . . And we'll nail him." *Id.*

346. 22 OKLA. STAT.22, § 152(C)(1) (2007)

347. § 152(C)(2)(b).



for rape<sup>348</sup> does not apply if DNA evidence is recovered; after that period, the prosecution can be commenced at anytime.<sup>349</sup>

#### XVIII. SEXUAL REGISTRY LAWS AND RESTRICTIONS ON LIBERTY

Heightened scrutiny of those who have been convicted of rape in recent years has led to a belief that those charged with sexual assault are likely to commit another such crime after they are released from custody. Reforms that have occurred in response to this perception had taken two different paths. The first reform has been the creation of sexual registry laws.

Congress, in response to a horrifying crime, enacted the Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Act in 1994.<sup>350</sup> The Act created a national Registry requiring all states and municipalities to submit data to the Registry; failure to comply would lead to a 10% reduction in federal funding allocated under the Omnibus Crime Control and Safe Streets Act.<sup>351</sup> The Act succeeded in its goal: every state has created a sex offender registration program.<sup>352</sup>

The Jacob Wetterling Act has been amended five times since its enactment,<sup>353</sup> most importantly, the 1996 amendment commonly referred to as Megan's Law.<sup>354</sup> The effect of that law was highly significant, it provided for public dissemination of the names of those who had registered. Megan's Law was followed by the Pam Lychner Sex Offender Tracking and Identification Act of 1996,<sup>355</sup> the Jacob

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348. GA. CODE ANN. § 17-3-1 (2007).

349. *Id.*

350. Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Program, 42 U.S.C. § 14071 (1994), *repealed by* Adam Walsh Child Protection and Safety Act of 2006, 42 U.S.C. § 16901(1) (2006). Jacob Wetterling was an 11 year old who was believed to have been abducted in 1989 by released sex offenders in Minnesota. Steven Costigliacci, Note: *Protecting Our Children From Sex Offenders: Have We Gone Too Far?* 46 FAM.CT REV 180, 182-83 (2008). The high degree of publicity concerning the crime led Minnesota to create a state registry to contain the names of released sex offenders. *Id.*

351. *Id.* The Omnibus Crime Control Act 42 U.S.C. § 3758 (2006) disbursed \$1.09 billion to the states in 2006; \$2.7 million was the minimum allocated to any one state. Costigliacci, *supra* note 350, at 182.

352. See State Statutory Surveys Sex Offender Registration (West 2007).

353. Costigliacci, *supra* note 351, at 181.

354. Megan's Law, Pub. L. No. 104-145, 110 Stat. 1345 (1996).

355. Pam Lychner Sex Offender Tracking and Identification Act of 1996, Pub. L. No. 104-236, 110 Stat. 3093 (1996).

Wetterling Improvements Act of 1997,<sup>356</sup> Jennifer's Law,<sup>357</sup> and the Victims of Trafficking and Violence Protection Act of 2000.<sup>358</sup> Finally, in 2006, the Jacob Wetterling Act was repealed by Congress and replaced with the Adam Walsh Child Protection and Safety Act of 2006.<sup>359</sup>

As is often the case, the federal legislation prompted states to expand upon what Congress has enacted. As of 2007, 22 states and hundreds of municipalities have passed laws prohibiting those convicted of sexual offenses from living near schools, playgrounds, parks, or day care centers.<sup>360</sup> One major problem with these reforms is that there simply is not any evidence available to support these residential restrictions. There is no research of any sort that has substantiated a claim that living in close proximity<sup>361</sup> to the specified locations increases the likelihood of sexually recidivating. The Medical Director of the New York State Psychiatric Institute has commented on an additional concern: "When there's a great degree of restrictions on sex offenders, it becomes almost impossible for them to find an acceptable neighborhood, and they wind up being homeless and then even harder for us to track."<sup>362</sup>

There is certainly no empirical research that has demonstrated that residential restrictions provide a viable strategy for reducing sexual assaults.<sup>363</sup> Nevertheless, there is widespread popular support for these laws. In California, for example, a referendum prohibiting sex offenders from living within 2000 feet of a park or school had overwhelming support from voters.<sup>364</sup> To be sure, there is the perception of the public

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356. Jacob Wetterling Improvements Act of 1997, Pub. L. No. 105-119, 111 Stat. 2440, 2461-71 (1997).

357. Jennifer's Law, 42 U.S.C. § 14661 (2000).

358. Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106-36, 114 Stat. 1464, 1537-1539 (2000).

359. Adam Walsh Child Protection and Safety Act of 2006, 42 U.S.C. § 16901(1) (2006).

360. See Jill Levenson et al., *Sex Offender Residence Restrictions: Sensible Crime Policy or Flawed Logic?*, FED. PROBATION 2, 2 (2007).

361. It is common for jurisdictions to define a 1000-2500 distance as being in close proximity. *Id.*

362. *I, New York*, TIME OUT NEW YORK, Feb. 28-Mar. 4, 2008, at 6 (quoting Richard Krueger, M.D., medical director of the Sexual Behavior Clinic at the New York State Psychiatric Institute), available at <http://www.timeout.com/newyork/articles/i-new-york/26921/sex-offenders>. There are, as of February 2008, over 26,000 registered sex offenders in New York State, including 5,700 in New York City. *Id.*

363. Levenson et al., *supra* note 360, at 2.

364. *Id.*

that a high percentage of sexual offenders are likely to commit such crimes in the future.

That is a perception shared by lawmakers as well. The legislative purpose behind the passage of the New York State Sexual Offender Registration Act clearly identifies the concern:

The legislature finds that the danger of recidivism posed by sex offenders . . . and that the protection of the public from these offenders is of paramount concern or interest to government. The legislature further finds that law enforcement agencies' efforts to protect their communities, conduct investigations and quickly apprehend sex offenders are impaired by the lack of information about sex offenders who live within their jurisdiction and that the lack of information shared with the public may result in the failure of the criminal justice system to identify, investigate, apprehend and prosecute sex offenders.<sup>365</sup>

The opening sentence of this statute certainly hints at the greater incidence of recidivism by sex offenders than by those convicted of other crimes. Not only is there lack of empirical support for such a claim,<sup>366</sup> but a study by the U.S. Department of Justice in 2002 actually found much higher rates of recidivism for larceny (75%), burglary (74%), auto theft (79%), and driving while intoxicated (52%).<sup>367</sup>

It is the desire by state authorities to watch over and regulate ex-sex offenders that raises serious concerns. If the registration and regulation is a form of punishment of the sex offender, the prohibition against double jeopardy would be violated. The Double Jeopardy Clause of the U.S. Constitution provides: "[N]or shall any person be subject for the same offence to be twice put in jeopardy of life or limb. . . ."<sup>368</sup> The Supreme Court, in *Benton v. Maryland*,<sup>369</sup> ruled that the Clause was applicable to the states through the Due Process Clause of the Fourteenth Amendment.<sup>370</sup> The Supreme Court, in *Witte v. United States*,<sup>371</sup> interpreted the ban to prevent the government from "punishing twice, or attempting a second time to punish criminally, for the same offense"<sup>372</sup>

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365. N.Y. CORRECT. LAW § 168 (Consol. 2008).

366. See Levenson et al., *supra* note 360.

367. BUREAU OF JUSTICE STATISTICS, UNITED STATES DEPARTMENT OF JUSTICE, RECIDIVISM OF PRISONERS RELEASED IN 1994, at 1 (2002).

368. U.S. CONST. AMEND. V.

369. *Benton v. Maryland*, 395 U.S. 784 (1969).

370. *Id.* at 787.

371. *Witte v. United States*, 515 U.S. 389 (1995).

372. *Id.* at 396 (emphasis omitted).

The individual served his time and no additional punishment can be inflicted upon his departure from prison. States get around this most serious problem by insisting that the defendant is not being *punished* by having to register, or by being told that he is not permitted to live in certain areas. The state is merely engaging in *regulation* of ex-cons. And those ex-cons have no reason to expect to have the same rights as others. The New York State Legislative Findings regarding the rationale for the Sex Offender Registry statute continued:

Persons found to have committed a sex offense have a reduced expectation of privacy because of the public's interest in safety and in the effective operation of government. In balancing offenders due process and other rights, and the interests of public security, the legislature finds that releasing information about sex offenders to law enforcement agencies and, under certain circumstances, providing access to limited information about certain sex offenders to the general public, will further the primary government interest of protecting vulnerable populations and in some instances the public, from potential harm.<sup>373</sup>

It is difficult to maintain that causing the ex-sex offender to “wear a Scarlet Letter”<sup>374</sup> identifying himself as “Sex Offender” is going to prompt an easy reintegration of that person into the community. Landlords have ready access to sex registry records and often will refuse to rent to a sex offender. The antagonism of many toward living near an ex-offender can be illustrated by residents in Connecticut who petitioned the local tax assessors to lower their local property taxes because of the reduction in the value of their homes brought about by an ex-sex offender moving into their neighborhood.<sup>375</sup> The community notification and public dissemination provisions, which publicize where an offender lives and information about his crime, have led to widespread labeling, ostracizing, and attacks on the ex-offender.<sup>376</sup>

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373. N.Y. CORRECT. LAW § 168 (Consol. 2008).

374. See NATHANIEL HAWTHORNE, *THE SCARLET LETTER* (1850). Nathaniel Hawthorne wrote the novel, *The Scarlet Letter*, in 1850 and describes a situation in Boston in the Seventeenth Century wherein a woman must wear the scarlet letter “A” on her chest to indicate to all that she had committed adultery. *See id.*

375. Corey Kilgannon, *Woman With a Mission*, N.Y. TIMES, Mar. 8, 2008, at B5.

376. *Id.* In areas where there is no active dissemination of information by the police about the residences of ex-offenders, groups of citizens may take on that function. An organization in Suffolk County, New York, Parents for Megan's Law and the Crime Victims' Center, compiles detailed data about sex offenders and distributes the information to neighbors. *Id.* Updates such as a change in automobile used by the offender are provided regularly. The organization received in March, 2008 a \$593,000 federal grant to administer the program on a national level. *Id.*

When this is coupled with the financial instability that results from employer reluctance to hire such an individual, re-entry into society becomes difficult indeed. Even if the offender does not reveal his past, many employers check with local registries to see if the potential employee has been registered as a prior sex offender. If rape is, as many feminists believe that it is, an act of violence prompted by aggression, anger, and hatred, then isolating and stigmatizing the ex-offender may well prove to create bitterness and resentment and be counterproductive.

#### XIX. CIVIL COMMITMENT OF THE SEXUAL OFFENDER AFTER RELEASE FROM PRISON

Another post-rape-conviction reform is the enactment of statutes aimed at prohibiting the freedom of a rapist after the prison sentence has been completed. The same double jeopardy claim exists—an individual cannot be subjected to additional punishment once the originally-imposed sentence is completed. Although an individual may well regard being denied his freedom because he has been civilly committed to a mental institution as a punishment, statutes providing for such commitment claim to be for the purpose of rehabilitation or for the protection of the society at large. Statutes for commitment of sex offenders are designed to apply when no mental disease or defect can be shown, and therefore the more traditional involuntary commitment statute would not apply.

Although civil detainment statutes can be traced back to a 1937 Michigan law,<sup>377</sup> the real impetus for the recent enactments has been the ongoing rape reform movement. The early statutes, often referred to as Mentally Disordered Sex Offender statutes, provided for civil confinement of sexual psychopaths and deviants based on a finding that a particular individual would be likely to commit a sexual offense as a result of his mental disease or defect.<sup>378</sup> These statutes applied even when the individual had not actually committed a crime or had been incarcerated prior to such commitment.

These first sets of statutes providing for civil commitment of sex offenders hit a major roadblock when the Supreme Court decided

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377. See John Fabian, *Examining Our Approaches to Sex Offenders & the Law: Kansas v. Hendricks, Crane and Beyond: "Mental Abnormality" and "Sexual Dangerousness": Volitional vs. Emotional Abnormality and the Debate Between Community Safety and Civil Liberties*, 29 WM. MITCHELL L. REV. 1367, 1372 (2003).

378. *Id.*

*Baxstrom v. Herold, State Hospital Director*,<sup>379</sup> and *Specht v. Patterson*.<sup>380</sup> In *Baxstrom*, the Court reviewed a New York State statute authorizing prisoners to be committed to a state mental hospital at the expiration of their prison sentences. The statute was similar to the Mentally Disordered Sex Offender laws, except that it applied to individuals who had been incarcerated for any, not just a sex, offense.

The Court's unanimous decision invalidated the statute because there was no jury review of the decision to civilly commit the prisoner.<sup>381</sup> The Court also held that the equal protection rights of the individual had been denied. The Court reasoned that since he had not been incarcerated at the time the decision was made that he was to be civilly committed, he should have been entitled to a full hearing as to the issue regarding his alleged status as a dangerously mentally ill individual.<sup>382</sup> The petitioner in *Specht* had been convicted of a sex offense and, in accordance with the Colorado Sex Offenders Act,<sup>383</sup> was to be civilly committed to a state hospital for an indeterminate period which may have been for the remainder of his life.<sup>384</sup>

The Court dealt directly with the claim that the procedures for committing a convicted sex offender to a state mental hospital were civil in nature and therefore neither the Equal Protection Clause nor the Due Process Clause of the Fourteenth Amendment were applicable.<sup>385</sup> The Court held that even though the claimed purpose for the civil commitment was not designated as retribution, but rather to keep individuals from engaging in future harm, it *was*, in fact, criminal punishment.<sup>386</sup> The statute had led to a violation of due process because there was no provision for counsel for the individual nor the opportunity to present evidence on his own behalf prior to being civilly committed.<sup>387</sup>

The civil commitment for sex offender statutes had clearly received a setback, as the designation of such commitment as a civil or as a criminal matter was crucial. However, the impact of the reformers of the 1970s and 1980s, and the change in the society's view of rape, altered the court's perspective on civil commitment. In 1986, the Supreme

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379. *Baxstrom v. Herold*, 383 U.S. 107 (1966).

380. *Specht v. Patterson*, 386 U.S. 605 (1967).

381. *Baxstrom*, 383 U.S. at 110.

382. *Id.* at 110, 115.

383. *Specht*, 386 U.S. at 607 (citing COLO. REV. STAT. ANN. §§ 39-19-1 to 10 (West 1963)).

384. *Specht*, 386 U.S. at 607.

385. *Id.*

386. *Id.* at 608-09.

387. *Id.*

Court took a large step back from the *Baxstrom* and *Specht* decisions of the 1960s.<sup>388</sup> In *Allen v. Illinois*,<sup>389</sup> the Court was confronted with a situation wherein the sexual assault charges against the defendant had been dismissed by the trial court after a preliminary hearing, finding that there was a lack of probable cause to conclude that the defendant had committed the assault.<sup>390</sup> The state then embarked, in what it claimed to be a civil proceeding, to have the accused deemed to be a “sexually dangerous person” and thereby committed to a maximum security mental institution.<sup>391</sup>

The accused’s claim was that the proceeding which found him to be dangerous was in reality a criminal one and therefore one at which he should have been afforded all of his constitutional protections.<sup>392</sup> The accused claimed that the mere fact that the Illinois Sexually Dangerous Persons Act designated proceedings covered by the Act to be civil and not criminal should not be dispositive.<sup>393</sup> Indeed, the Court had decided just six years prior to *Allen*, in *United States v. Ward*,<sup>394</sup> that if such a process is “punitive in either purpose or effect” it can negate any intention by the state to have the matter deemed civil and must be considered criminal with accompanying privileges and protections.<sup>395</sup> The Court in *Allen*, however, in a 5-4 decision, concluded that proceedings for civil commitment under the Act were to be considered civil and not criminal and, therefore, the Due Process Clause was not applicable.<sup>396</sup> The state’s purpose in committing an individual under the Act was not punitive, but rather therapeutic for the individual and protective of the safety of other citizens of the state.<sup>397</sup>

But it was the 5-4 decision of the Supreme Court in *Kansas v. Hendricks*<sup>398</sup> that has most directly endorsed the reform of civilly committing an individual immediately upon conclusion of his prison sentence. Hendricks was the first individual that Kansas had attempted to cover under its Sexually Violent Predator Act.<sup>399</sup> The Act was

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388. *Allen v. Illinois*, 478 U.S. 364 (1986).

389. *Id.* at 366.

390. *Id.*

391. *Id.* at 368.

392. *Id.*

393. *Id.* at 367-68.

394. *United States v. Ward*, 448 U.S. 242 (1980).

395. *Id.* at 251.

396. *Allen*, 106 S.Ct. at 375.

397. *Id.* at 373.

398. *Kansas v. Hendricks*, 521 U.S. 346 (1997).

399. *Id.* at 350.

designed to commit those who do *not* have a mental disease or defect, so a traditional civil commitment statute would not apply.<sup>400</sup> The state legislature had determined that commitment was required because “sexually violent predators’ likelihood of engaging in repeat acts of predatory sexual violence is high.”<sup>401</sup> No empirical evidence nor any research studies, were referenced for this conclusion. The fifty-nine year old Hendricks was not exempted from the generalization about sexual offenders. The Act provided for an indefinite commitment because “the treatment needs of this population are very long term and the treatment modalities for this population are very different than the traditional treatment modalities for people appropriate for commitment under the [general involuntary commitment statute].”<sup>402</sup>

Hendricks maintained that such confinement was most assuredly punishment and that proceedings under the Act were, therefore, criminal in nature.<sup>403</sup> Hendricks argued that he had served his full ten year prison sentence, and such additional loss of liberty constituted double jeopardy.<sup>404</sup> And the loss of liberty could be for the remainder of his life. Justice Clarence Thomas, writing for the Court, concluded that the Act was “civil in nature” and therefore the “initiation of its commitment proceedings does not constitute a second prosecution.”<sup>405</sup> And whatever Hendricks may think to the contrary notwithstanding, “involuntary confinement pursuant to the Act is *not* punitive.”<sup>406</sup> The *ex post facto* claim was similarly dismissed; there was no new punishment for an act previously committed because confinement under the Act does not constitute punishment.<sup>407</sup> Even confinement for life. Even confinement in, as was the case, a unit that was physically within the prison system.<sup>408</sup>

Even though the Kansas Sexual Violent Predator statute had been upheld by the narrowest of margins, many jurisdictions proceeded to

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400. *Id.* at 350-51.

401. *Id.* at 351.

402. KAN. STAT. ANN. § 59-29a 01 (West 1994).

403. *Hendricks*, 521 U.S. at 361.

404. *Id.*

405. *Id.* at 369.

406. *Id.* at 368 (emphasis added).

407. *Id.* at 370. The four dissenters strongly disagreed. The Act, Justice Breyer wrote, “was not simply an effort to commit Hendricks civilly, but rather an effort to inflict further punishment upon him.” *Id.* at 373 (Breyer, J., dissenting).

408. *Id.* at 368.



pass similar laws.<sup>409</sup> By early 2007, nineteen states had enacted civil commitment programs for sexual offenders; a special report for the New York Times deemed such confinement to be “a growing national movement.”<sup>410</sup> New York became the twentieth state as the then newly-elected Governor Eliot Spitzer signed, with a great deal of ceremony, the first major piece of legislation of his short-lived administration—a civil commitment for sexual offenders bill.<sup>411</sup> Congressional legislation, signed by President Bush, provides money to states that civilly commit sex offenders after the prison term has been served.<sup>412</sup> Conditions in the civil commitment facilities have been found to “look and feel like prisons, with clanking double doors, guard stations, fluorescent lighting, cinder-block walls, overcrowded conditions and tall fences with razor wire. . . .”<sup>413</sup>

But it should not be assumed that such prison-like conditions constitutes punishment. The Supreme Court in *Mark Seling, Superintendent, Special Commitment Center, Petitioner v. Andre Brigham Young*,<sup>414</sup> considered such a claim. The state of Washington enacted a statute, the Sexually Violent Predators Act,<sup>415</sup> virtually identical to the Kansas law considered in *Hendricks*.<sup>416</sup> Young’s claim was that, as applied to him, the statute was punitive and therefore violative of the Double Jeopardy Clause.<sup>417</sup> It was not a frivolous claim—a court-appointed psychologist assigned to write a report on conditions in the Washington Commitment Center did conclude that “the Center was designed and managed to *punish* and confine individuals for life without any hope of release to a less restrictive setting.”<sup>418</sup> The Center was located within a larger prison operated by the Department of Corrections (DOC) and the DOC was actively involved in the management of the Center.<sup>419</sup>

The Ninth Circuit concluded in *Young v. Weston*<sup>420</sup> that

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409. Grant Morris, *Mental Disorder and the Civil/Criminal Distinction*, 41 SAN DIEGO L. REV. 1177, 1190 (2004).

410. Monica Davey & Abby Goodnough, *Doubts Rise as States Hold Sex Offenders After Prison*, N.Y. TIMES, Mar. 4, 2007.

411. *Wrong Turn on Sex Offenders*, N.Y. TIMES, Mar. 13, 2007, at A18.

412. Davey & Goodnough, *supra* note 410.

413. *Id.*

414. *Seling v. Young*, 531 U.S. 250 (2001).

415. WASH. REV. CODE ANN. § 71.09.060 (LexisNexis 2008).

416. *Seling*, 531 U.S. at 259-60.

417. *Id.* at 258

418. *Id.* at 260 (emphasis added).

419. *Id.*

420. *Young v. Weston*, 192 F.3d 870 (9th Cir. 1999).

Hendricks<sup>421</sup> had not precluded a challenge to the statute *as applied* to a particular individual.<sup>422</sup> The actual conditions of confinement could well lead to a conclusion that the effect is punitive and, therefore, the statute would no longer be deemed to be a civil one.<sup>423</sup> The Circuit determined that if the conditions at the facility were as claimed, Young would be entitled to relief. The case was remanded to the District Court to hold a fact finding hearing.<sup>424</sup> No such hearing, however, was to take place; the Supreme Court granted the state's request for certiorari.<sup>425</sup>

The Supreme Court reversed the holding of the Circuit.<sup>426</sup> An "as-applied" analysis would prove unworkable because conditions at such facilities are subject to change.<sup>427</sup> The Act was civil in accord with *Hendricks*, and could not be deemed to be punitive as applied to a single individual.<sup>428</sup> There was, therefore, no valid Double Jeopardy claim. There could not be, as suggested by the dissent of Stephens, an inquiry into the "effects of the statute."<sup>429</sup> "Civil" is civil, treatment (even if there be none) is not punishment, loss of liberty for the duration of one's lifetime is not punitive.

Since the legislation of virtually all of the states provide for an indefinite period of commitment (subject to an annual review) the population in the facilities is an aging one. These likely-to-commit-future-sex-offense predators need wheelchairs and walkers, and senility is an increasing occurrence.<sup>430</sup> Hendricks is now 72, but it's certainly not expected that he'll be released. He has much company in Kansas, where the cost for the civil commitment of sex offenders has increased from \$1.2 million in 2001 to \$6.9 million in 2005.<sup>431</sup>

## XX. THE DEATH PENALTY FOR RAPE OF A CHILD

The last time that someone was sentenced to the death penalty for rape was in Mississippi in 1964.<sup>432</sup> The Supreme Court held, in 1977 in

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421. See *Kansas v. Hendricks*, 521 U.S. 346 (1997).

422. *Young*, 192 F.3d at 874-75.

423. *Id.* at 873.

424. *Id.* at 877.

425. *Seling v. Young*, 531 U.S. 250, 267 (2001).

426. *Id.*

427. *Id.* at 263.

428. *Id.* at 267.

429. *Id.* at 275 (Stevens, J., dissenting).

430. Davey & Goodnough, *supra* note 410.

431. *Id.*

432. Corey Rayburn, *Better Dead Than Raped? The Patriarchal Rhetoric Driving Capital Rape Statutes*, 78 ST. JOHN'S L. REV. 1119, 1120 (2004).

*Coker v. Georgia*,<sup>433</sup> that executions for rape violated the Eighth Amendment in that it constituted cruel and unusual punishment.<sup>434</sup> The plurality opinion of Justice White explained:

[r]ape is without a doubt deserving of serious punishment; but in terms of moral depravity and of injury to the person and to the public, it does not compare with murder. We have the abiding conviction that the death penalty, which is unique in its severity and irrevocability, is an excessive penalty for the rapist.<sup>435</sup>

Justices Blackman, Stevens, and Stewart joined Justice White; Justices Brennan<sup>436</sup> and Marshall's<sup>437</sup> separate concurrences reflected their determinations that the death penalty in all circumstances is cruel and unusual punishment. Justice Powell concurred in the judgment because he concluded that the rape in this case was not one of excessive brutality and no serious, longlasting injuries had resulted.<sup>438</sup> The dissent of Chief Justice Burger, joined by Justice Rehnquist, opined that legislating in this matter should be left to the states, and the federal courts should not intervene.<sup>439</sup>

As a result of *Coker*, there was no statute in the country providing for the death penalty for rape until Louisiana enacted such a law in 1995.<sup>440</sup> The statute initially provided for a possible death sentence when there is oral, anal, or vaginal intercourse with someone under the age of twelve,<sup>441</sup> but the law was subsequently amended to make the age under thirteen.<sup>442</sup> The Louisiana Supreme Court considered the constitutionality of the statute the next year in *State v. Wilson and Bethley*,<sup>443</sup> because two different lower courts had quashed indictments finding the statute to be unconstitutional.<sup>444</sup> The state supreme court held that the death sentence was not excessive and that the Louisiana

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433. *Coker v. Georgia*, 433 U.S. 584 (1977).

434. *Id.* at 592.

435. *Id.* at 598. The decision certainly did not diminish the severity of the act of rape: "It is highly reprehensible, both in a moral sense and in its almost total contempt of the person integrity and autonomy of the female victim . . . . Short of homicide, it is the ultimate violation of self." *Id.* at 597.

436. *Id.* at 600.

437. *Id.*

438. *Id.* at 601.

439. *Id.* at 604.

440. LA. REV. STAT. ANN. § 14:42(D)(2)(a) (1997).

441. § 14:42 (D)(2).

442. *See* § 14:42 (A)(4).

443. *State v. Wilson*, 685 So.2d 1063 (La. 1996).

444. *Id.* at 1065.

statute was significantly different from the situation that the Supreme Court had considered in *Coker*. The Louisiana court noted that the Supreme Court referred fourteen times in its *Coker* decision to the victim as an *adult* woman.<sup>445</sup>

The Louisiana court concluded that due to the adult/child distinction, *Coker* did not directly apply to the newly-enacted statute. The court concluded that “given the appalling nature of the crime, the severity of the harm inflicted upon the victim, and the harm imposed on society, the death penalty is not an excessive penalty for the crime of rape when the victim is a child under the age of twelve years old.”<sup>446</sup> The U.S. Supreme Court denied certiorari, emphasizing the jurisdictional problem in this pre-enforcement challenge to the law—the petitioner had neither been convicted nor sentenced.<sup>447</sup>

Within several years of the Supreme Court’s denial of certiorari, five other states – Oklahoma,<sup>448</sup> Montana,<sup>449</sup> Texas,<sup>450</sup> South Carolina<sup>451</sup> and Georgia<sup>452</sup>—started the process of enacting statutes providing for the death penalty for rape of a juvenile. But it was Louisiana that first actually imposed the sentence of death for the commission of a rape. In January, 2008, the Supreme Court agreed to review the sentence of the defendant and determine whether the imposition of a death sentence for the rape of a child was constitutional. Shortly before the petition for certiorari was granted,<sup>453</sup> a second individual in Louisiana was also convicted of rape and was scheduled to receive a sentence of death as well.<sup>454</sup> These are the only two individuals in the country who are on death row for the commission of a crime other than homicide.<sup>455</sup>

The individual sentenced to death in the case before the Supreme Court, Patrick Kennedy, is a forty-three year old African American

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445. *Id.* at 1066 n.2 (providing the fourteen excerpts from the *Coker* decision, each about one sentence in length).

446. *Id.* at 1070.

447. *Bethley v. Louisiana*, 520 U.S. 1259, 1259 (1997) (Stevens, J., dissenting).

448. OKLA. STAT. ANN. tit. 10, § 7115(K) (West 2008).

449. MONT. CODE ANN. § 45-5-503(3)(c)(i) (2008).

450. TEX. PENAL CODE ANN. § 12.42(c)(3) (Vernon 2007).

451. S.C. CODE ANN. § 16-3-655 (c)(1) (2007).

452. GA. CODE ANN. § 16-6-1(a)(1)(2) (2007).

453. *Kennedy v. Louisiana*, 957 So.2d 757 (La. 2007), *cert. granted*, 76 U.S.L.W. 3113 (Jan. 4, 2008).

454. Letter from Jeffrey L. Fisher, Counsel for Petitioner, Stanford Legal Clinic, to the Clerk of the Supreme Court of the United States Re: *Kennedy v. Louisiana*, No. 07-343 (December 13, 2007).

455. Posting of Lyle Denniston to SCOTUSblog, *Court to Rule on Death Penalty for Child Rape*, <http://www.ScotUSblog.com/wp/court-to-rule-on-death-penalty> (Jan. 4, 2008, 2:58 EST).

whose IQ has been measured at 70.<sup>456</sup> His only prior convictions were for writing five worthless checks between the years 1987 and 1992.<sup>457</sup> Race has long been a factor both in the prosecution of rape in this country and in the implementation of the death penalty. In the pre-Civil war south, slaves convicted of rape were hung, whereas whites so convicted were not.<sup>458</sup> During the years 1930-1964, 89% of those who had been executed for rape were black.<sup>459</sup> And in the state of Louisiana, every single one of the fourteen men executed for rape during that period was black.<sup>460</sup>

A major concern in any consideration of a child rape statute is the reliability of a child witness. In *Kennedy v. Louisiana*, the case before the Supreme Court, the alleged victim was eight at the time of the rape and had initially claimed that two boys on a bicycle had taken her from the garage and one of the boys attacked her in the yard.<sup>461</sup> This account is what the girl repeatedly told the police, doctors, her mother, investigators, a psychologist and a social worker.<sup>462</sup> The girl continued with this version of the event until she told her mother, twenty-one months later, that it was Kennedy who had raped her.<sup>463</sup> An Amicus Curiae brief filed on behalf of the National Association of Criminal Defense Lawyers focused on children as witnesses and maintained that “[h]istory is replete with examples of damning false accusations made by children . . . .”<sup>464</sup> It surely is the case that children may be particularly susceptible to suggestions by others, even if the form of suggestion is as apparently benign as repeated questioning by those in position of authority.<sup>465</sup>

456. Petition for a Writ of Certiorari, *Kennedy v. Louisiana*, 128 S. Ct. 829 (2007) (No. 07-343).

457. *Id.*

458. *Id.* at 21 (citing STUART BANNER, *THE DEATH PENALTY: AN AMERICAN HISTORY* 139-42 (2002)).

459. Petition for a Writ of Certiorari, *Kennedy v. Louisiana*, 128 S. Ct. 829 (2007) (No. 07-343) (citing United States Dep’t of Justice, Bureau of Prisons, National Prisoner Statistics, Bulletin No. 45, *Capital Punishment 1930-1967*, at 7 (Aug. 1969)).

460. Petition for a Writ of Certiorari, *Kennedy*, 128 S. Ct. 829 (No. 07-343).

461. Brief in Opposition to Petition for Certiorari at 2-3, *Kennedy*, 128 S. Ct. 829 (No. 07-343), 2007 WL 4104370.

462. Brief of the National Association of Criminal Defense Lawyers as Amicus Curiae in Support of Petitioner at 9, *Kennedy*, 128 S. Ct. 829 (No. 07-343), 2007 WL 4104371.

463. Brief in Opposition to Petition of Certiorari at 6-12, *Kennedy*, 128 S. Ct. 829 (No. 07-343), 2007 WL 4104370.

464. Brief of the National Association of Criminal Defense Lawyers, *supra* note, 462, at 4.

465. See, e.g., Stephen J. Ceci, Maggie Bruck & Robert Rosenthal, *Children’s Allegations of Sexual Abuse: Forensic and Scientific Issues*, 1 PSYCHOL. PUB. POL’Y & L. 494, 506 (1995) (noting that scientific research clearly shows that some children make false claims of sexual abuse when

The focus of the Supreme Court's decision will undoubtedly be on the issue of whether or not a sentence of death for child rape is grossly disproportionate, excessive, and in violation of the Eight Amendment protection against cruel and unusual punishment. The Louisiana statute encompasses not just vaginal intercourse but also deems oral-genital contact<sup>466</sup> a capital crime.<sup>467</sup> There is no requirement that the child under the age of thirteen was in any manner forced to engage in the sexual contact. Mistake of fact as to the age of the victim is not a defense.<sup>468</sup>

#### XXI. ANALYSIS OF THE IMPACT OF THE SECOND WAVE OF RAPE REFORM LAWS

Will the Second Wave reforms be more of a success in terms of impact than the original reforms had been? If prison sentences are longer, if sex offenders are civilly committed<sup>469</sup> and not walking the streets or going to bars, if death awaits the rapist of a child,<sup>470</sup> then predators who might pose threats may simply not be able to attack members of the community. It is more difficult to see what benefits can come from the sexual registry statutes,<sup>471</sup> but all of these post-conviction reforms depend upon a conviction of the individual who did commit the crime of rape. And the long existing problems which make a conviction so difficult to achieve, continue.

In any "He said, She said" battle, the prosecutor's burden of proof creates a very real obstacle. Even were a jury to be more persuaded by the alleged victim's account than that of the defendant, such does not necessarily lead to a finding of proof beyond a reasonable doubt. Corroboration may not be legally required any longer,<sup>472</sup> but jurors may still wish to see more evidence than just the claim of the woman. And biases, perhaps more common amongst male than female jurors,

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adults in position of power pursue them with suggestive comments); *Maryland v. Craig*, 497 U.S. 836, 868 (1990) (Scalia, J. dissenting) (suspicion of child testimony is warranted because studies have demonstrated that children are "substantially more vulnerable to suggestion than adults . . .").

466. LA. REV. STAT. ANN. § 14:42(A) (2008).

467. § 14:42(D)(2). *See also* Brief of the National Association of Social Workers, the Louisiana Foundation Against Sexual Assault, the Texas Association Against Sexual Assault, and the National Alliance to End Sexual Violence as Amici Curiae in Support of Petitioner at 3, *Kennedy*, 128 S. Ct. 829, (No. 07-343), 2007 WL 3444963.

468. LA. REV. STAT. ANN. § 14:42(A)(4) (2008) ("Lack of knowledge of the victim's age shall not be a defense.").

469. *See supra* notes 377-431 and accompanying text.

470. *See supra* notes 432-467 and accompanying text.

471. *See supra* notes 350-375 and accompanying text.

472. *See supra* notes 23-36 and accompanying text.

continue. If a woman was at a bar drinking late at night and then went to the apartment of a man she had never met before, many jurors will think “she was asking for it” even if they are never permitted to be informed of the clothing the woman was wearing.<sup>473</sup> Many still tolerate, if not admire, the sexually active and aggressive man while viewing such a woman as promiscuous and loose. The stereotyping will continue even if the woman is shielded from questions about her prior sexual history. Her motive for finally telling people she was raped only after much time had passed since the alleged attack will still be suspect even after a rape trauma syndrome expert explains that many women react that way.<sup>474</sup>

No shield laws protect the jurors from finding out that the woman had a lot to drink that night, and the jury then concluding that the alcohol may have lowered the woman’s inhibitions. The jurors will know about any past drug use or mental history or prior criminal record or motive to lie. Jurors might be influenced by the highly publicized occasions when women may well have lied about being raped – whether the defendant was a Duke University lacrosse player<sup>475</sup> or Kobe Bryant.<sup>476</sup> A woman who has indeed been raped may simply not want to press charges and face a trial where the mere recounting of the events may lead to a retraumatizing of the horrible sexual assault. And whatever instructions the jurors may receive on affirmative consent, if the jury concludes that the defendant reasonably believed there to have been consent, an acquittal may still result.

But, however influenced jurors might be by their prejudices, bias, and overall suspicions of the claim of rape, judges may act quite differently. The vast majority of criminal cases, including rape, do not go to trial.<sup>477</sup> Defendants often are persuaded by a judge’s assessment of a case and by the judge’s pressure on the defendant to enter a guilty plea. Whether judges are appointed or elected, they know there is little sympathy for the person charged with rape. Judges may not be eager to preside over a trial where a defendant is acquitted of rape, that is not the way to curry the favor of interest groups that may be needed either for

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473. See *supra* notes 301-313 and accompanying text.

474. See *supra* notes 236-261 and accompanying text.

475. See *supra* note 300.

476. See *supra* notes 74-76 and accompanying text.

477. In 2004, the last year for which statistics are available, 83% of all those convicted of rape had entered a guilty plea, 13% of convictions resulted from a jury trial and 3% from a bench trial. Bureau of Justice Statistics, United States Department of Justice, *State Court Sentencing of Convicted Felons 2004: Distribution of types of felony convictions in State courts, by offense, 2004*, <http://www.ojp.usdoj.gov/bjs/pub/html/scscf04/tables/scs04401tab.htm>.

reappointment or for promotion to a higher court.<sup>478</sup> Political correctness does not cease when one enters the door of a courtroom. There is much a judge can do to affect the outcome of a trial – evidentiary rulings deciding motions, the extent of discovery permitted, treatment of witnesses and counsel, and the instructions to the jurors may all carry great weight.<sup>479</sup> Jurors often look to the trial judge for cues as to the guilt or innocence of the accused.

The defendant who is aware of how he will be restricted at the trial regarding cross examining his accuser, while also knowing that any prior record of *his* relating to sexual offenses will become known to the jury, may be quite tempted to plead guilty to avoid trial. The defendant will know that many potential jurors have been greatly influenced by society's change in perspective of the severity of sexual assault and that many female jurors would not be eager to tell friends and colleagues that they voted to acquit, and therefore free, a man charged with rape.<sup>480</sup> If the defendant is a black man and his accuser white, any calculation as to the risk of going to trial will consider the possible impact of race on the jurors. The existence of the sexual offender registry laws provide prosecutors with a strengthened hand in plea bargaining in that a defendant may readily plead guilty to a reduced charge that would not require registering as a sexual predator upon completion of his incarceration.

## XXII. CONCLUSION

To be sure, the rape laws that existed in the early 1970s needed to be reformed. They reflected age-old prejudices and unfair, pervasive doubts about the credibility of any woman who claimed to have been

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478. An example of how judges perceive and respond to the public's attitude to those accused of rape is illustrated by a recent study of judges in Pennsylvania. It was found that judges as their re-election approached, increased their sentences for those who were convicted of rape. Adam Liptak, *Rendering Justice With One Eye on Re-election*, N.Y. TIMES, May 25, 2008, at A1.

479. For a comprehensive discussion of the varying ways that a judge can influence the course of a trial and affect the outcome, see Richard Klein, *Due Process Denied: Judicial Coercion in the Plea Bargaining Process*, 32 HOFSTRA L. REV. 1349, 1401-04 (2004).

480. Attempts continue to educate Americans about the frequency of rape as well as its devastating impact on victims: April, for example, is Sexual Assault Awareness Month and Take Back the Night demonstrations occur at college campuses throughout the country. Susan Dominus, *Rape Worn Not on a Sleeve, But Right Over the Heart*, N.Y. TIMES, Apr. 4, 2008, at B2. One addition to the Take Back the Night rallies this year is expected to be the weaving of T-shirts emblazoned with the word "Raped" on the front. The goal of those who designed the shirt is to encourage everyday conversation about rape and to diminish the guilt and shame that may afflict victims. *Id.*



raped. When a woman did decide to confront the criminal justice system and pursue criminal charges against her attacker, she was met with obstacles that the legal system had put into place to thwart a fair resolution of her charges. The law wouldn't accept her word alone, and even though rapes are almost always done in a private setting with no witnesses present, corroboration was required.<sup>481</sup> It was expected that if a woman really had not consented to the intercourse she would have "resisted to the utmost" in spite of the use of overwhelming physical force against her.<sup>482</sup> If the charges did survive the legal impediments that were in place and the woman testified at trial, her prior sexual relations would be revealed with subsequent attacks on her character.<sup>483</sup> And if the case reached the point where the judge instructed the jurors, the judge would inform the jury of the need to be suspicious of any claim by a woman that she was raped.<sup>484</sup> Husbands were protected as a matter of law – by definition, a husband's forcible sexual assault of his wife would not constitute rape.<sup>485</sup> But, have the reforms that were designed to counter such inequities gone too far? Have the Due Process rights that must be afforded any individual charged with a crime been sacrificed when the charge is rape? Has the pendulum swung so far as to create a system of policies and laws that are fundamentally unfair?<sup>486</sup>

To fully answer that question, one must look at the reforms in their totality. It might well be the case that any single legislative reform was justifiable, but have the odds against the defendant become inappropriate and unjust in a criminal justice system that champions its unique place in the world because of its protections for those charged with crime? Has

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481. See *supra* notes 22-27 and accompanying text. The American Bar Association was an early critic of the corroboration requirement. In 1975, the House of Delegates approved a Resolution in support of the elimination of laws mandating corroboration as part of an overall call for the "development of new procedures for police and prosecutors in processing rape cases." *House of Delegates Redefines Death, Urges redefinition of Rape, and Undoes the Houston Amendments*, 61 A.B.A. J. 463 (1975).

482. See *supra* notes 37-56 and accompanying text.

483. See *supra* notes 57-97 and accompanying text.

484. *Id.*

485. See *supra* notes 123-138 and accompanying text.

486. The need to compensate for past inequities became a perspective of judges as well as reformers. One Pennsylvania Supreme Court Judge wrote that he believed it was necessary to emphasize the appalling truth that the law – the criminal justice system – has not been a mere passive observer to the legal injustice perpetrated upon the rape victim, or to the legal bonanza afforded the rapist. It is fitting then that the law generally, and this Court particularly, embrace this opportunity to help to rectify the imbalance, to actively and affirmatively encourage the physical and psychological treatment of rape victims and the reporting of the crime to the police.

*In re Pittsburgh Action Against Rape*, 482 A.2d 126, 143 (Pa. 1981) (Larsen, J., dissenting).

the crime of rape become an exception to these protections, and if so, should it be?

Some of the reforms are of particular concern. Foremost, perhaps, is the abolition in some jurisdictions of the requirement that in order to hold an individual responsible for a criminal act, that person must have had a *mens rea*, a guilty mind. For one to be guilty of a crime in our justice system, it has historically been required that the individual possessed the intention to cause harm, or the knowledge that he was causing harm.<sup>487</sup> No conviction where the loss of liberty may be as severe as it is for rape should result if the defendant had no *mens rea*; this is a basic and an extraordinarily vital aspect of our system of criminal justice.<sup>488</sup>

Yet, the doctrine of affirmative consent and the decisions of some states to extend that concept even further, are deemed by some to be progressive reforms. Silence, preceding and during sexual relations, ought not be deemed sufficient to transform intercourse into a rape. In some jurisdictions, an accused can be convicted even if he believed there was consent, even if such a belief was a reasonable one,<sup>489</sup> and even if there was no indication whatsoever, no physical or verbal resistance, of the lack of desire for the intercourse.

A defense of mistake of fact – that the defendant was truly mistaken about a requisite element of the offense – is a valid and long recognized defense in our justice system.<sup>490</sup> But, increasingly, not for the crime of rape. Strict liability, a principal of criminal law most commonly reserved for minor offenses, may apply; rape, according to the Supreme Judicial Court of Maine, “requires no culpable state of mind.”<sup>491</sup>

In criminal cases, the burden of proof is on the prosecutor, and the standard is beyond a reasonable doubt. But, for those states that have not adopted a strict liability perspective of rape and still permit the defendant’s belief that there was consent to be a defense to the charge, the defendant may well have the burden of proof. Instead of the historical requirement that the state prove each element of the offense –

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487. Some criminal statutes, generally signifying less serious offenses, identify the requisite *mens rea* as recklessness or negligence. The definitions of each of these concepts lack precision, and there is frequent disagreement among courts as to their meaning. See KADISH & SCHULHOFER, *supra* note 35, at 220-21.

488. See *In re Winship*, 397 U.S. 358, 361 (1970) (due process requires that the burden is on the state to prove each element of the crime beyond a reasonable doubt). The *mens rea* identified within a statute is a crucial element of a criminal offense.

489. See *supra* notes 152-206 and accompanying text.

490. *State v. Glenn Reid*, 479 A.2d 1291 (Me. 1984).

491. See *supra* note 227 and accompanying text.

and lack of consent is the crucial element – it now may well be the case that the defendant must prove there *was* consent by a preponderance of the evidence.<sup>492</sup> And in the eyes of some rape reform advocates, sexual intercourse should be deemed rape even if there *was* consent at the time, but *afterwards* the woman felt as though she's been violated.<sup>493</sup>

A defendant's ability to even establish that there is a reasonable doubt that he committed the rape has certainly been made more difficult in recent years. Rape shield laws, precluding a defendant from conducting a cross examination of his accuser that would inquire about her prior sexual conduct, have been expanded in ways that could not have been foreseen when the initial legislation was passed. Desire by judges to comply with "the spirit" of such laws has led to situations where jurors are denied knowledge of events that occurred prior to the rape that are crucial for any proper assessment of the credibility of the alleged victim.<sup>494</sup>

It is not just the state's control over what the jury may learn about what the woman had done or said *prior* to the rape that may determine the outcome of the trial. Recently-enacted statutes or court holdings now permit a prosecutor to call an expert witness to explain the woman's conduct *after* the alleged rape when there is concern that such conduct may be perceived by jurors to be inconsistent with that of a true rape victim. Testimony by a rape trauma syndrome expert will explain why the alleged victim told no one about the horrible attack for many days or months.<sup>495</sup> Jurors will hear how women other than the complainant have been terribly traumatized by a rape, and how their lives have been destroyed.<sup>496</sup> Such testimony, certain to elicit great sympathy from the jurors, occurs even though the expert has never met or spoken with the alleged victim in the case on trial.<sup>497</sup> The mere fact that the rape trauma expert is permitted to testify will infer to the jurors that there has been a determination by the expert, and perhaps by the judge as well, that the complainant was raped.<sup>498</sup> That is prejudicial, and perhaps overwhelmingly so. It is the very essence of prejudice for juries to make

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492. See, e.g., *State v. Gregory*, 147 P.3d 1201 (Wash. 2006).

493. CATHERINE MACKINNON, *FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW* 82 (1987).

494. See *supra* notes 98-121 and accompanying text.

495. See *supra* notes 236-261 and accompanying text.

496. See *supra* notes 260-261 and accompanying text.

497. See *supra* notes 258-259 and accompanying text.

498. See *supra* notes 236-261 and accompanying text.

emotionally-based decisions which may not have been founded on hard, real, and relevant evidence.

Whereas the alleged victim may be shielded from relevant questions being asked about her past even though victims of other crimes receive no similar protections, the defendant himself receives significantly less protection if he is charged with rape than would normally be the case in a criminal matter. Traditionally, juries are not permitted to be informed of the defendant's prior criminal record due to the prejudice that might attach.<sup>499</sup> In a rape case, however, propensity evidence is admissible. Federal Rule of Evidence 413 provides that when, and only when, the defendant is accused of a sexual assault, evidence of prior sexual assault offenses are admissible.<sup>500</sup> The "evidence" is not limited to convictions – uncharged crimes may be admissible, arrests that never led to prosecution are admissible. The testimony of someone coming forward in 2008 to claim that in 1998 the defendant had sexually assaulted her is admissible even though that individual had never informed anyone previously of any assault. The undue prejudice that could well result against the accused<sup>501</sup> was of no import to the legislators in Congress, the Congressional concern was centered on the goal of increasing the likelihood of a conviction of someone charged with rape.<sup>502</sup>

Whereas previously unproven accusations can be admitted into evidence against the defendant, the very identity of the defendant's accuser for the instant case may not be revealed. Newspapers will shout out the name of a well known sports figure or celebrity who has been accused of rape, but will not reveal the identity of the accuser. The media will provide protection to the accuser either voluntarily, through self-censorship, or in compliance with the laws that exist in an increasing number of states.<sup>503</sup> Such policies undermine the presumption of innocence. The rationale for not revealing the accuser's name is to protect her from *further* humiliation and victimization; she has been victimized once by the defendant, it should not happen again. Such protection is based on an assumption that the woman *has* been the victim of a rape by the defendant, she has been severely harmed, she has been violated, her identity needs to be withheld—she has been raped.

Statutes prohibiting any mention of the clothing the accuser was

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499. See *supra* notes 266-276 and accompanying text.

500. See *supra* notes 268-276 and accompanying text.

501. See *supra* notes 326-349 and accompanying text.

502. See *supra* notes 269-270 and accompanying text.

503. See *supra* notes 257-300 and accompanying text.

wearing before the intercourse occurred may appear to be non-controversial and clearly desirable.<sup>504</sup> After all, how is the dress of the woman possibly indicative of whether she had consented to have intercourse with the defendant? But if such information clearly was not relevant, then no special statutes would be required to prohibit admissibility. The fear is that jurors might find descriptions or photographs of the woman's outfit to be all *too* relevant. "We can't trust the jurors" is the rationale for exclusion. The jurors may conclude that the woman was leading the defendant on by the see-through blouse and very short skirt. Or, a juror might feel that the accuser "was asking for it." Stereotypes certainly do still haunt us – there's the "bad girl," and the "good girl."

But is it fundamentally fair to keep some truths out of the truth-finding process? Is justice best served by *limiting* information for those who must make the very hard choice in determining who is telling the truth? If the defendant's claim is that he believed there to be consent, isn't it necessary for the jury to develop a complete understanding of whatever factors he maintains may have played a role in the formation of his belief? And doesn't that include an understanding of the alleged victim's communications and conduct leading up to the sexual interaction? There is a clear distinction between evidence being admissible as relevant and it being deemed decisive and conclusive. Shouldn't a jury have all the facts before it, including all of the information that may have some degree of relevance, some degree of materiality prior to reaching a decision that could lead to the accused losing his liberty for the rest of his life? If one is to err, shouldn't the choice be to permit evidence in and allow the jury to determine what if any weight ought be given to the evidence? And, as part of the jury's assessment, the prosecutor on closing argument is always free to maintain and attempt to persuade the jurors that they should give no weight whatsoever to any information regarding the background of the accuser or her prior relationship with the defendant.

Reforms of rape laws have had very substantial impact on what happens after any conviction. Even if one escapes a sentence of life in prison, punishment hardly ends upon release from incarceration. Civil commitment of a convicted sex offender occurs with increasing frequency, and such internment can most certainly be for life.<sup>505</sup> If, however, one is not so detained in an effort by the state to hospitalize

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504. See *supra* notes 301-313 and accompanying text.

505. See *supra* notes 377-431 and accompanying text.

people for crimes they may commit in the future, then compliance with sex registry laws as a sexual predator awaits. Social isolation, verbal and physical attacks from neighbors, and the inability to attain employment or housing are just some of the ramifications of this particular reform.<sup>506</sup> And the branding as a sexual offender may continue for the remainder of one's life.<sup>507</sup>

The goals of the reformists were not just to change the laws relating to rape, but to change society's view regarding the need for women to have autonomy in sexual relations. Criminal laws concerning rape were seen as instruments to attain the broader goal of educating the community, much as the early laws of the civil rights movement had an impact on changing the popular culture as to racial matters.<sup>508</sup> But is it fair to convict any single individual and deprive him of his liberty in what may be an unjust and unfair proceeding in order to "create a new cultural understanding of female sexuality?"<sup>509</sup> Should any individual accused of rape be denied the opportunity to present relevant testimony on his own behalf, a right which the Supreme Court deemed to be a "fundamental element of due process law?"<sup>510</sup>

The laws concerning rape which were in existence in the 1970s reflected centuries of stereotypical thinking about a woman who accused a man of sexual assault. Reforms were needed, and radical revisions ensued. There are, however, serious concerns which now must be addressed regarding the nature and extent of these reforms. The vast majority of all of the exonerations in this country as of 2008 which were based on DNA evidence have been for those wrongfully convicted of rape.<sup>511</sup> A trial which may have been fundamentally unfair to the accused is a very high, and unjust price to pay for the pervasive changes in the laws relating to rape.

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506. See *supra* notes 350-376 and accompanying text.

507. See *id.* Whereas sexual predator registries have the effect of creating many obstacles in the way of ex-offenders re-integrating into society, attempts proceed to help others get community support as they are released from prison. See e.g., David Gonzales, *With An Ex-Inmate's Help, Returning to Life Outside*, N.Y. TIMES, Apr. 7, 2008, at B1.

508. See Little, *supra* note 20, at 1356.

509. PEGGY REEVES, A WOMAN SCORNED: ACQUAINTANCE RAPE ON TRIAL 292 (1996).

510. *Washington v. Texas*, 388 U.S. 14, 19 (1967).

511. Adam Liptak, *Consensus On Counting The Innocent: We Can't*, N.Y. TIMES, Mar. 25, 2008, at A14 (noting that "almost all" of DNA exonerations have been in rape cases according to the Innocence Project). See also Aviva Orenstein, *Special Issues Raised By Rape Trials*, 76 FORDHAM L. REV. 1585, 1590 n.25 (2002) (noting most of those shown to have been wrongfully convicted had been convicted of rape).

