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A Comparative Survey of Canadian and American Rape Law

by Professor Constance Backhouse* and Lorna Schoenroth†

I. INTRODUCTION

WITHIN THE LAST five years there has been an explosion of interest in the law as it applies to the crime of rape, yet little of this interest has focused on a comparison of the legislation and jurisprudence of different countries. The laws of Canada and the United States prove an excellent source for comparable legal research in the area of rape as English common law provided the foundation for the criminal law of both countries. Many similarities developed as a result of this common legal heritage, although some differences emerged since the American jurisprudence was separated from its English influence at an earlier point in time. The socio-cultural resemblance between Canada and the United States also produced notable similarities in the recent movement for rape law reform, although some marked distinctions remain. In an attempt to begin a comparative analysis of Canadian and American rape law, this article will focus on the following issues: spousal exemption, the standards of force, resistance, and consent; the admissibility of the complainant's prior sexual conduct; corroboration; and the recent redefinition and restructuring of the crime of rape.

II. THE SPOUSAL EXEMPTION

Although the legal status of women, particularly married women has changed radically since rape laws first developed, a man still cannot be charged with raping his wife in Canada and many of the American states. The spousal exemption effectively preserves the ancient status of wives as their husband's chattels. Arguably, rape laws were developed to protect the property interest of a father or husband in his daughter or wife's sexual capacity.¹ From this perspective, a husband who raped his wife was

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¹ See S. BROWN MILLER, *AGAINST OUR WILL: MEN, WOMEN AND RAPE* 18 (1975); L. CLARK & D. LEWIS, *RAPE: THE PRICE OF COERCIVE SEXUALITY* 115-19 (1977); Gold & Wyatt, *The Rape System: Old Roles and New Times*, 27 CATH. U.L. REV. 695 (1978); LeGrande, *Rape and Laws: Sexism in Society and Law*, 61 CALIF. L. REV. 919, 924 (1973); Robin, *Forcible Rape: Institutionalized Sexism in the Criminal Justice System*, 23 *Crime & Delinq.* 136, 149 (1977); Note, *The Marital Rape Exemption*, 52 N.Y.U.L. REV. 306, 309 (1977).

"merely making use of his own property."² The originators of the spousal exemption, however, structured their analysis within the framework of contract law. Lord Matthew Hale, writing in the 17th century, stated "But the husband cannot be guilty of a rape committed by himself, upon his lawful wife, for by their mutual matrimonial consent and contract the wife hath given up herself in this kind unto her husband, which she cannot retract."³

Lord Hale's view that the marriage contract presumed irrevocable consent to sexual relations was, until recently, widely accepted. Consequently little caselaw deals with the issue of marital rape. English courts discussed marital rape in the 1888 case of *R. v. Clarence*.⁴ The accused was charged with assault causing bodily harm after transmitting gonorrhea to his wife. His conviction was quashed on appeal, but of the commenting six judges in *obiter*, only Stephen J. and Baron Pollock clearly supported Lord Hale's view that rape within marriage was a legal impossibility.⁵ Baron Pollock, referring to sexual intercourse between spouses, wrote: "It is done in pursuance of the marital contract and of the status which was created by marriage, and the wife as to the connection itself is in a different position from any other woman, for she has no right or power to refuse her consent."⁶

In contrast, Hawkins J. commented that a woman "conferred upon her husband an irrevocable privilege to have sexual intercourse with her."⁷ However in his view, the privilege applied only during the time in which the "ordinary relations" of the marriage existed between them. Similarly, A.L. Smith J. felt that a husband could not be said to have assaulted his wife by exercising his right to intercourse unless "consent given at marriage was revoked."⁸ Thus, consent was not necessarily irrevocable as Lord Hale had suggested. Two of the judges were more critical of Lord Hale's position. Field J. commented:

The authority of Hale, C.J., on such a matter is undoubtedly as high as any can be, but no other authority is cited by him for this proposition, and I should hesitate before I adopted it. There may, I think, be many cases in which a wife may lawfully refuse intercourse, and in which, if the husband imposed it by violence, he might be held guilty of a crime.⁹

Wills J. referred to the proposition that rape between married persons was impossible, as one "to which I certainly am not prepared to assent,

² Note, *supra* note 1, at 309.

³ 1 M. HALE, HISTORY OF THE PLEAS OF THE CROWN *629.

⁴ The Queen v. Clarence, 22 Q.B.D. 23 (Cr. Cas. Res 1888).

⁵ *Id.* at 46 (Stephen, J.; *id.* at 64 (Pollock, B.) (quoting Lord Hale).

⁶ *Id.* at 64 (Pollock, B.).

⁷ *Id.* at 51 (Hawkins, J., dissenting).

⁸ *Id.* at 37 (Smith, J.).

⁹ *Id.* at 57 (Field, J. dissenting).

and for which there seems to me to be no sufficient authority."¹⁰

In *R. v. Clark*,¹¹ the first English case in which the issue of marital rape was dealt with directly, the court held that the wife's consent was revoked by the separation order which she had obtained and that therefore her husband could be found guilty of rape. Byrne J. followed the judgment of Hawkins J. in *Clarence* in stating that consent continued only as long as the "ordinary relations created by the marriage contract subsisted between them."¹² Later English cases followed the same line of reasoning. Although in *R. v. Miller*¹³ the court held that a petition for divorce did not revoke the wife's consent, in *R. v. O'Brian*¹⁴ a decree nisi of divorce served as sufficient revocation. In *R. v. Steele*,¹⁵ a case in which the couple was separated, the husband's promise to the court that he would not molest his wife effectively revoked consent.

These five court decisions reduced the scope of the common law principle. Matrimonial consent, which Hale viewed as irrevocable, may now be revoked in England under certain limited circumstances. As one commentator has noted, however, "the courts have never acknowledged as valid any withdrawal of the wife's consent to intercourse other than an order by the court of possibly an agreement by the spouses to separate."¹⁶

In Canada, these cases have had no effect. Rape was first statutorily defined in Canada in 1892.¹⁷ Section 266 of the *Criminal Code, 1892* read: "Rape is the act of a man having carnal knowledge of a woman who is not his wife without her consent, or with consent, which has been extorted by threats or fear of bodily harm. . . ."¹⁸ The legislative history of this statute did not indicate that the legislators intended to do anything other than codify the state of the law on spousal immunity as it existed in England and Canada at the time.¹⁹ The modern version of the Criminal Code also specifically incorporates spousal immunity: "A male person commits rape when he has sexual intercourse with a female person who is not his wife, without her consent . . ."²⁰ By definition a man in Canada cannot rape his wife, regardless of whether they are cohabiting or are separated. The words in the statute are unambiguous. In Canada no cases in which the accused and the complainant were married at the time of the offence

¹⁰ *Id.* at 33 (Wills, J.).

¹¹ *R. v. Clarke*, [1949] 2 All E.R. 448, 449 (Leeds Assizes).

¹² *Id.*

¹³ *R. v. Miller*, [1954] 2 Q.B. 282, 290.

¹⁴ *R. v. O'Brien*, [1974] 3 All E.R. 663, 665 (Crown Ct. Bristol).

¹⁵ *R. v. Steele*, 65 Cr. App. 22, 25 (C.A. 1976).

¹⁶ Mitra, " . . . *For She Has No Right or Power to Refuse Her Consent*, 1979 CRIM. L. REV. 558, 562.

¹⁷ Criminal Code, 1892, ch. 29, § 266, 1892-1893 Can. Stat. 107, 208.

¹⁸ *Id.*

¹⁹ See generally, PARL. DEB., SEN. (1892); 1 PARL. DEB., H.C. (1892); 11 *id.*

²⁰ An Act Respecting The Criminal Law, CAN. REV. STAT. ch. C-34, § 143 (1970).

have been reported.²¹ Abolition of the spousal exemption or reduction of its scope can only be achieved through statutory amendment.

The status of the law in the United States, prior to reform, was identical to the position taken in Canada. Virtually "no criminal liability on behalf of a husband for an assault to rape, or a rape upon his wife, where he is charged as the prime actor . . ." ²² was imposed. This rule developed from the common law and was based on the "mutual matrimonial consent" theory enunciated by Lord Hale. It was first applied in the United States in *Commonwealth v. Fogerty*²³ where the court in dictum stated that the defendant's marriage to the victim was a defence to the charge of rape. The court in *Frazier v. State*²⁴ referred to five other cases following *Fogerty* and concluded:

So far as we are aware, all the authorities hold that a man cannot himself be guilty of actual rape upon his wife. One of the main reasons being when she assumes the marriage relation and which the law will not permit her to retract in order to charge her husband with the offense of rape.²⁵

The marital exemption is specifically adopted by statute in twelve of the American states²⁶ and in nine others, while no reference is made to

²¹ In *R. v. Faulkner*, 16 B.C. 229, 19 Can. Crim. Cas. 47 (1911), the accused had been convicted at trial of raping a young girl. On appeal, defense counsel argued unsuccessfully that the accused had been wrongfully convicted on the ground that the Crown had failed to prove that the girl was not the accused's wife. The court concluded that there was evidence in the Crown's case from which the jury could infer that the complainant and the accused were not married.

²² Annot., 84 A.L.R. 2d 1017, 1019 (1962).

²³ *Commonwealth v. Fogerty*, 74 Mass. (8 Gray) 489, 69 Am. Dec. 264 (1857).

²⁴ *Frazier v. State*, 48 Tex. Crim. 142, 86 S.W. 754 (1915).

²⁵ *Id.* at 143, 86 S.W. at 755.

²⁶ ALA. CODE § 13A-6-60(4)(1975 & 1977 Supp.) (defining "female" as "any female person who is not married to the actor"); ARIZ. REV. STAT. ANN. § 13-1406(A) (1978) ("A person commits sexual assault by intentionally or knowingly engaging in sexual intercourse . . . with any person not his or her spouse. . ."); CONN. GEN. STAT. ANN. §§ 53a-65(3), 67(b)(West Supp. 1981) (defining "sexual contact" as "contact with the intimate parts of a person not married to the actor" and providing that cohabitation, regardless of marital status, is an affirmative defense); ILL. ANN. STAT. ch. 38, § 11-1(a) (Smith-Hurd 1979) ("male person . . . who has sexual intercourse with a female, not his wife, . . . commits rape"); KAN. STAT. ANN. § 21-3502(1)(1981) ("Rape is the act of sexual intercourse committed by a man with a woman not his wife . . ."); OHIO REV. CODE ANN. § 2907.02 (Page Supp. 1980) ("No person shall engage in sexual conduct with another, not the spouse of the offender . . ."); OKLA. STAT. ANN. titl 21, § 1111 (West Supp. 1981) ("Rape is not an act of sexual intercourse accomplished with a male or female, not the spouse of the perpetrator . . ."); S.D. CODIFIED LAWS § 22-22-1 (Supp. 1981) ("Rape is an act of sexual penetration accomplished with any person other than the actor's spouse. . ."); TEX. PENAL CODE ANN. § 21.02(a)(Vernon 1974) ("A person commits an offense if he has sexual intercourse with a female not his wife. . ."); VT. STAT. ANN. tit. 13, § 3252 (Supp. 1981) ("A person who engages in a sexual act with another person, other than a spouse. . ."); WASH. REV. CODE ANN. § 9A.44.040 (Supp. 1981) ("A person is guilty of rape . . . when such person engages in sexual intercourse with another person not married to the perpetrator . . ."); W. VA. CODE

spousal immunity, the common law rules is presumed to apply.²⁷ The issue of spousal immunity has been litigated in two of the "common law" states: New Jersey and Massachusetts. In *State v. Smith*,²⁸ the New Jersey court held that Hale's common law rule applied despite the statute's silence on spousal immunity. The court concluded that "a statute is not presumed to make any change in the common law beyond that expressed or fairly implied in its provisions."²⁹ In Massachusetts, however, the statute was construed not to comply with the common law notion of spousal immunity. In *State v. Chretien*,³⁰ a husband was convicted of raping his wife when the attack occurred while they were separated and awaiting for the final divorce decree. This conviction, however, is being appealed to a higher court.³¹

Whether the spousal immunity should be retained is a hotly debated question in both countries. Defenders of spousal immunity base their arguments on broad public policy grounds, focusing on five key grounds. They argue first that abolition of the immunity would unduly invade the sanctity of marriage.³² This argument is partially premised on the need for privacy inside the marital relationship, and partially on the concern that the prohibition against spousal rape might increase the probability of marital collapse.³³

Opponents of the spousal immunity doctrine regard this position as unpersuasive. They question whether any further damage can result from

§ 61-881(7)(1977)(defining "sexual intercourse" as "any act between persons not married to each other . . .").

²⁷ States in this category include Arkansas, Florida, Georgia, Massachusetts, Mississippi, Nebraska, North Carolina, Virginia, and the District of Columbia.

²⁸ 148 N.J. Super. 219, 230-33, 372 A.2d 386, 392-93 (Essex County Ct. 1977), *aff'd*, 169 N.J. Super. 98, 404 A.2d 331 (N.J. Super. Ct. App. Div. 1979), *rev'd*, 85 N.J. 193, 426 A.2d 38 (1981). The current New Jersey Code of Criminal Justice provides that a person "shall not be presumed to be incapable of committing a crime under this chapter [Sexual Offenses] because of . . . marriage to the victim." N.J. STAT. ANN. 2C:14-5(b)(West 1981).

²⁹ 148 N.J. Super. at 231, 372 A.2d at 392 (citing *Blackman v. Isles*, 4 N.J. 82, 71 A.2d 633 (1950)). The New Jersey Supreme Court analyzed the three major justifications for the common law marital exemption, finding that each rationale was in apposite to the *Smith* case, and reinstated the rape count of the indictment.

³⁰ 1981 Mass. Adv. Sh. 661, 417 N.E.2d 1203.

³¹ *Id.* at 1210.

³² See, e.g., *State v. Smith*, 148 N.J. Super at 225, 372 A.2d at 389.

³³ The latter concern was recently articulated in an editorial published by the International Christian Communications. The editorial argues:

The spouse rape concept will put a barrier between husband and wife in the marriage bed!

. . . .

In instances where a marriage rift is growing, it will guarantee the "right" of one spouse to deprive the other of sexual satisfaction within marriage.

It will deepen the rift at the very point where it might best be bridged. It will drive men and women to obtain sinful sexual satisfaction outside of marriage.

New Bill Threatens The Family and Public Morality, CHRISTIAN INQUIRER, Feb. 1981. [copy on file at the JOURNAL].

legal action, once the relationship has deteriorated to the point where intercourse is coerced.³⁴ They contend that the preservation of marriage relationships characterized by violence and sexual abuse is not acceptable.

The second argument raised against the abolition of spousal immunity focuses on the potential increased risk of fabricated accusations and blackmail between spouses. In *State v. Smith* the court noted that if a wife were able to charge her husband with rape, she might gain an unfair advantage over an estranged husband in a future property settlement.³⁵ The court itself, however, recognized that "the law already furnishes an arsenal of weapons to a woman bent on revenge" and that the criminal justice system is designed to test the validity of all accusations.³⁶ The court asserted that the requirement of proof beyond a reasonable doubt and the use of the jury should be sufficient safeguard to prevent falsified complaints from resulting in convictions.³⁷

The third argument against the abolition of the immunity is the contention that spousal rape is somehow less traumatic than other forms of rape. One commentator criticizes the continuing consent doctrine as an unreasonable inference that married women intend to be sexually accessible to their husbands at all times,³⁸ yet the commentator differentiates between what he calls classic rape: "perpetrated by a stranger in a deserted place at night,"³⁹ and rape within a marriage relationship. Classic rape, he contends, is "the expression of an unprovoked, unpredictable, and highly brutal impulse."⁴⁰ Where rape occurs within marriage, he argues, "the possibilities of serious social, physical, or mental harm form a familiar if unwanted conjugal embrace are rather small."⁴¹

Recent studies have shown, however, that we have vastly underestimated the incidence and severity of interspousal violence.⁴² Sexual abuse is often an integral part of wifebattering. In Lenore Walker's, *The Battered Woman*, the majority of women questioned admitted having been raped by their batterers.⁴³ Rape perpetrated by the husband of the victim has not been shown to be any less violent or emotionally traumatic than rape perpetrated by a stranger. As Susan Brownmiller points out in *Against Our Will*,⁴⁴ sexual assault is an invasion of bodily integrity and a

³⁴ See Comment, *Rape in Marriage: The Law in Texas and the Need for Reform*, 32 BAYLOR L. REV. 109, 115 (1980).

³⁵ 148 N.J. Super. at 225, 372 A.2d at 389.

³⁶ *Id.*

³⁷ See Note, *The Victim in a Forcible Rape Case: A Feminist View*, 11 AM. CRIM. L. REV. 335, 337-38 (1973).

³⁸ Comment, *Rape and Battery Between Husband and Wife*, 6 STAN. L. REV. 719, 722 (1954).

³⁹ *Id.* at 723-24.

⁴⁰ *Id.* at 724.

⁴¹ *Id.* at (footnote omitted).

⁴² See, e.g., L. MACLEOD, *WIFE BATTERING IN CANADA: THE VICIOUS CIRCLE* (Canadian Advisory Council on the Status of Women 1980).

⁴³ See L. WALKER, *THE BATTERED WOMAN* 108 (1979).

violation of freedom and self-determination wherever it happens to take place, in or out of the marriage bed."⁴⁴ She notes that rape within marriage is not likely to be an isolated occurrence and that the woman's situation is often complicated by her financial and emotional dependence upon her rapist-husband.⁴⁵ While some victims of rape by a stranger direct their anger externally, victims of marital rape often become angry with themselves.⁴⁶ Spousal immunity reinforces the woman's feelings of anger, guilt and humiliation. "The ensuring self-disgust is increased when the victim wonders if she provoked the degrading behavior. She may feel she was an accomplice in her own humiliation."⁴⁷

Proponents of spousal immunity also argue that the right of the wife to press criminal charges of assault and battery⁴⁸ is an adequate substitute for her inability to press rape charges. In *R. v. Miller*⁴⁹ the court held that although the husband could not be found guilty of rape, he could be found guilty of assault if the act resulted in either physical injury to the wife or in an "hysterical or nervous condition."⁵⁰ This view, however, fails to address the basic violation.⁵¹ A sexual assault is by nature a greater invasion than other types of physical assault.⁵² Consequently, the penalties are more severe for rape than those for battery. One rape victim described the difference in this manner: "There's something worse about being raped than just being beaten. It's the final humiliation, the final showing you that you're worthless and you're there to be used by whoever wants you."

A British writer, Peter English, further contends: "The label attached to the conduct should be the appropriate label. So long as rape remains a separate crime, not simply one form of assault, conduct which is in reality, rape, should be so charged."⁵³

Finally, it is argued that evidentiary problems "reach their zenith" with marital rape.⁵⁴ Admittedly the offence would be extremely difficult to prove. Where the complainant and the accused have voluntarily engaged in consensual sexual intercourse in the past, the issue of consent

⁴⁴ S. BROWNMILLER, *supra* note 1, at 381.

⁴⁵ Griffin, *In 44 States, It's Legal to Rape Your Wife*, STUDENT LAW., Sept. 1980, at 21, 59.

⁴⁶ *Id.* at 59-60.

⁴⁷ *Id.* at 60.

⁴⁸ Comment, *supra* note 38, at 726.

⁴⁹ [1954] 2 Q.B. 282.

⁵⁰ *Id.* at 292.

⁵¹ S. BROWNMILLER, *supra* note 1, at 381.

⁵² See Comment, *The Marital Exception to Rape: Past, Present and Future*, 1978 DET. C.L. REV. 261, 275. One rape victim, comparing rape with non-sexual assault, has stated "There's something worse about being raped than just being beaten. It's the final humiliation, the final showing you that you're worthless and that you're there to be used by whoever wants you." D. RUSSELL, *THE POLITICS OF RAPE* 77 (1975).

⁵³ English, *The Husband Who Rapes His Wife*, 126 NEW L.J. 1223, 1225 (1976).

⁵⁴ Comment, *supra* note 38, at 724.

becomes a difficult obstacle.⁵⁵ This difficulty is compounded if the parties are married and have engaged in consensual sexual intercourse many times.⁵⁶ The wife must produce strong evidence that she did not consent. Indeed, a conviction in many jurisdictions probably requires evidence not only that she resisted, but that force was used against her. The difficulty, however, is not sufficient justification for maintaining spousal immunity, where it denies justice to women who are able to meet the burden of proving they have been raped.

Criticism of the spousal exemption by legal writers and feminist groups has resulted in changes in the law. Reform in the United States has consisted largely of incremental changes while in Canada, the broad implications of pending reform have yet fully been realized. By 1980, 30 American states had enacted legislation to abolish or limit the common law spousal immunity rule.⁵⁷ Although the situation in many of these states has improved markedly for married women who have separated from their husbands, in all but seven states, the spousal exemption still applies to spouses who are cohabitating and who have not taken legal steps to end their marriage.⁵⁸ In four of these states, however, the wife must be physically injured or, threatened with serious injury before the husband can be charged with first degree rape.⁵⁹ Only three states, New Jersey, Oregon, and California, have effectively abolished the spousal immunity.⁶⁰

Despite recent reforms, few men have been prosecuted for raping their wives.⁶¹ In 1978, however, much media coverage was given to *State v. Rideout*,⁶² the first marital rape case tried in Oregon since the passage of legislation abolishing spousal immunity.⁶³ John Rideout was acquitted of raping his wife Greta when the prosecution was unable to prove her lack of consent. Since the case turned on the evidentiary issue, the deci-

⁵⁵ See Griffin, *supra* note 45, at 57.

⁵⁶ *Id.*

⁵⁷ See *id.* at 58-59.

⁵⁸ The seven states where the spousal exception does not apply even though spouses are cohabiting are: Alaska, ALASKA STAT. § 11.41.445 (1978); California, CAL. PENAL CODE § 262 (West Supp. 1980); Delaware, DEL. CODE ANN. tit. 11, §§ 763-64 (1979); Hawaii, HAWAII REV. STAT. §§ 707-700(10), 707-730 (Supp. 1981); Iowa, IOWA CODE ANN. § 709.2 (West 1979); New Jersey, N.J. STAT. ANN. § 2C:14-5(b)(West 1981); Oregon, OR. REV. STAT. § 163.375 (1981).

⁵⁹ ALASKA STAT. § 11.41.445 (1978); DEL. CODE ANN. tit. 11, §§ 763-64 (1979); HAWAII REV. STAT. §§ 707-700(10), 707-730 (Supp. 1981); IOWA CODE ANN. § 709.2 (West 1979).

⁶⁰ CAL. PENAL CODE § 262 (West Supp. 1980); N.J. STAT. ANN. § 2C:15-5(b)(West 1981); OR. REV. STAT. § 163.375 (1981).

⁶¹ Joanne Schulman of the National Centre on Women and Family Law reports that as of June 1981 only 23 cases of spousal rape have gone to trial in the United States. *Rape of Spouse Legal in Canada, Most U.S. States*, *Globe & Mail*, June 3, 1981, at 14, col. 1.

⁶² No. 108866 (Or. Cir. Ct. Dec. 27, 1978).

⁶³ See Note, *The Marital Rape Exemption: Legal Sanction of Spouse Abuse*, 18 J. FAM. L. 565, 578 (1980).

sion is not considered a rejection of the Oregon reforms.⁶⁴ After the trial, the Rideouts reconciled and appeared on television giving a number of newspaper interviews. They have since been divorced, however, and in September of 1979 John Rideout was convicted of criminal trespass for breaking into his ex-wife's home.⁶⁵ In February, 1980, he was convicted of harassing his ex-wife and received a jail sentence.⁶⁶ Greta Rideout has been described as a "battered wife caught in a destructive cycle of rebellion against and reconciliation with her abusive husband."⁶⁷ Unfortunately, the couple's behavior and the "carnival atmosphere"⁶⁸ which characterized the trial trivialized the serious problem of marital rape and Oregon's attempt to criminalize it.

In Canada, bill C-53, the most recent rape reform bill, is to be introduced into the House of Commons in September 1, 1981.⁶⁹ Statements from the Minister of Justice indicate that spousal immunity will be abolished.⁷⁰ One of the proposed amendments will apparently "spell out in law that a spouse can be the victim of a sexual assault by his or her marriage partner." Section 244 of the draft bill reads:

- 1) A person commits an assault when
 - a) without the consent of another person, he applies force intentionally to that other person, directly or indirectly . . .
- 2) This section applies to all forms of assault, including sexual assault and aggravated sexual assault.⁷¹

By not specifically adopting spousal immunity, this new section is an improvement. However, the new bill does not unequivocally state that spousal immunity is to be abolished. An additional section stating that the new provisions are to apply without regard to the gender and marital relationship of the actor and the victim, is needed. Without such language the common law spousal immunity rule could still be incorporated into the new law. The bill in its present draft form will discourage victims of marital rape from pressing charges. Thus, prosecutors and judges will be forced to adopt a more "creative", law making role, one which in all likelihood they would rather avoid. The wording of the proposed reforms must be more specific to be at all effective in eliminating spousal immunity.

⁶⁴ *Id.*

⁶⁵ Griffin, *supra* note 55, at 23.

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ House of Commons C053, 32d Parl., 1st Sess. (1981) [hereinafter cited as Bill C053 [copy on file in the JOURNAL Office].

⁷⁰ See J. Chretien, Information Paper: Sexual Offenses Against the Person and the Protection of Young Persons 15 (Dec. 1980). Early news reports indicated that the proposed legislation would "[s]pell out in law that a spouse can be the victim of a sexual assault by his or her marriage partner." Goar, *Chretien To Get Tough on Child Porn*, Toronto Star, Dec. 20, 1980, at A-6, col. 6.

⁷¹ Bill C-53, *supra* note 69, at § 244.

Despite the obvious weaknesses of the proposed reforms, some fear that the new provisions will be criticized as too radical by members of Parliament and that the bill will not be passed as long as it is perceived as effectively abolishing spousal immunity. Should such opposition develop it is speculated that a more specific clause would be enacted which would abolish immunity only with respect to spouses who are living separate and apart. Such a compromise would be consistent with English case law⁷² and statutory reform in most of the American states,⁷³ and would reduce opposition to the reform package. Only total abolition of spousal immunity, however, is an adequate response to the serious harms resulting from marital rape. As Dennis Drucker concluded recently, spousal immunity is a "barbaric anachronism" which "has no place in a society which recognizes women as equal human beings and wives as more than the property of their husbands."⁷⁴

The law of Canada and the United States concerning spousal immunity for rape is significantly similar. Historically, both countries trace the rationale for the immunity to Lord Hale's theory that irrevocable consent to sexual relations was assumed through the marriage contract. The codification of criminal law, which occurred in both Canada and the United States, resulted in the statutory enactment of the Lord Hale position. Although English common law narrowed the scope of spousal immunity, the Canadian and American exemption was securely entrenched. Reform in both countries, thus, become dependant upon statutory amendment.

III. THE STANDARDS OF FORCE, RESISTANCE, AND CONSENT

Although Anglo-Canadian and American definitions of the crime of rape vary historically, they are characterized by three distinct elements: force; resistance; and nonconsent. These elements are emphasized in the case law and the relevant statutes. Force, resistance, and lack of consent have been described as "standards." It becomes evident during a chronological comparison that the applicable standard has shifted a number of times. The force standard focuses on the physical actions of the accused while the resistance standard focuses on the complainant's physical response. To establish either element, evidence of physical violence is required. In contrast, the consent standard focuses on the complainant's subjective state of mind. The crucial element of the crime is her lack of consent, while evidence of force and resistance are highly relevant but not essential. A fourth element, the *mens rea*, focuses on the subjective state of mind of the accused.

Historically, the common law in England viewed the elements of

⁷² See *supra* notes 11-16 and accompanying text.

⁷³ See Griffin, *supra* note 55, at 58-59.

⁷⁴ Comment, *The Common Law Does Not Support a Marital Exception for Forcible Rape*, 5 WOMEN'S RTS. L. REP. 181, 200 (1979).

force and resistance as determinative in proving the crime of rape. Sir William Blackstone's definition of rape in the 18th century specifically included the use of force as a requirement, and also incorporated the phrase "against her will". The latter implied that the victim's resistance was also necessary.⁷⁵ In fact, clear dissent, not merely a lack of assent was required.⁷⁶ The early English cases also favored the view that force and resistance were required. In *R. v. Jackson*⁷⁷ the court held that having carnal knowledge of a woman who consented, upon the mistaken belief that the accused rapist was her husband, did not amount to rape. The court distinguished between compelling a woman "against her will" and "bequiling her into consent".⁷⁸ In a similar case reported 15 years later, the accused was found guilty of assault but not rape;⁷⁹ this decision was affirmed in *R. v. Williams*.⁸⁰ Fraud was sufficient to support the assault charge whereas resistance and lack of consent were required to prove rape but not assault.

In 1845, however, an apparent shift away from lowering of the resistance standard had taken place. In *R. v. Camplin*⁸¹ the accused was convicted of rape after he gave a 13-year-old girl liquor, and proceeded to have intercourse with her after she had become intoxicated. Lord Denman, C.J. stated "It is put as if resistance was essential to rape, but that is not so, although proof of resistance may be strong evidence in the case."⁸² Several other judges referred to the 13th century *Statute of Westminster*⁸³ as authority for the view that rape was defined as ravishing a woman "where she did not consent" rather than ravishing her "against her will", implying that physical resistance was not a critical element of proof for rape.

This definition was also applied in *R. v. Fletcher*⁸⁴ where the victim, a 13-year-old retarded girl, was found to be incapable of consenting. Lord Campbell referred to the same 13th century statute⁸⁵ which required force as implied in the word ravish, and lack of consent, but did not require intercourse to be against the woman's will.⁸⁶ As Lord Campbell

⁷⁵ 4 W. BLACKSTON, COMMENTARIES at 210.

⁷⁶ *But see* J.C. SMITH & B. HOGAN, CRIMINAL LAW 326 (3d ed. 1973) (indicating that since the middle of the nineteenth century the use of the consent standard has relieved the Crown of the burden of proving a positive dissent by the victim).

⁷⁷ 168 Eng. Rep. 911 (1822).

⁷⁸ *Id.*

⁷⁹ *R. v. Saunders*, 173 Eng. Rep. 488 (1838).

⁸⁰ 173 Eng. Rep. 497, 498 (1838).

⁸¹ 169 Eng. Rep. 163 (1845).

⁸² *Id.* at 164 (Denman, C.J.).

⁸³ *Id.* The Statute of Westminster provided "if a man from henceforth do ravish a woman married, maid, or others, where she did not consent, neither before or after, he shall have judgment of life. . . ." Statute of Westminster II, 1285, 13 Edw. 1, ch. 34.

⁸⁴ 169 Eng. Rep. 1168 (1926).

⁸⁵ The statute was apparently repealed. 9 Geo. 4, ch. 31, 1828.

⁸⁶ 169 Eng. Rep. 1171 (1926).

noted, prior to *Camplin*, the definition contained in the statute was apparently never referred to in the cases. Although ignored by early writers such as Hale and Blackstone and criticized by Stephen,⁸⁷ the resurrection of the 13th century statute effectively shifted the emphasis in rape cases from resistance to lack of consent. The consent standard thus replaced the resistance standard in mid-19th century England, although evidence of resistance still retained some significance.⁸⁸

Defined as "unlawful and carnal knowledge of a woman by force, and against her will" by an early Canadian writer,⁸⁹ rape was not statutorily defined in Canada until 1892,⁹⁰ although it had been considered a felony for more than 50 years prior to codification.⁹¹ When the crime of rape was finally codified in 1892 the consent standard was adopted with the language "rape is the act of a man having carnal knowledge of a woman who is not his wife without her consent . . ."⁹² This statutory definition has remained largely unaltered to the present day.

The common law consent standard was adopted in the modern criminal law statutes in both England and Canada. The sections pertaining to rape charges in the *Canadian Criminal Code*⁹³ and the *Sexual Offences Act*⁹⁴ of Great Britain specifically refer to intercourse without consent. In Canada, rape is also defined to include intercourse with the woman's consent if that consent is "extorted by threats or fear of bodily harm".⁹⁵ At least in theory, lack of consent need not be proven where consent is extorted by threat of violence. Conversely, if lack of consent can be proven by the prosecution, it is not necessary, as it is in many American states, to prove that force was used or serious harm threatened.

Although not statutorily required in either England or Canada, as a matter of practice, some evidence of force by the assailant and resistance by the victim is usually necessary before a court will hold that consent was lacking. Unless the victim is completely helpless or incapacitated, lack of consent must usually be physically manifested before the accused will be convicted.⁹⁶ The victim is generally expected to show "good faith resistance," or resistance reasonable under the circumstances to signify she did not consent.⁹⁷ British and Canadian courts rely primarily upon

⁸⁷ SIR. J. STEPHEN, A DIGEST OF THE CRIMINAL LAW 190 n.1 (1877).

⁸⁸ Scutt, *Study of Consent in Rape*, NEW ZEALAND L.J. 462 (1976).

⁸⁹ S. R. CLARKE, A TREATISE ON CRIMINAL LAW AS APPLICABLE TO THE DOMINION OF CANADAS 264 (1872).

⁹⁰ Criminal Code, 1892, ch. 29, § 266.

⁹¹ Criminal Code, 1841, ch. 27, § 17.

⁹² Criminal Code, *supra* note 87.

⁹³ Criminal Code, CAN. REV. STAT. ch. C-34, § 143 (1970).

⁹⁴ The Sexual Offences (Amendment) Act, 1976, ch. 82.

⁹⁵ Some commentators argue that consent so obtained is not consent in the true sense but merely submission. See Boyle, *Married Women—Beyond the Pale of the Law of Rape*, 1 WINDSOR YEARBOOK OF ACCESS TO JUSTICE 192 (1981) at 201.

⁹⁶ See Scutt, *supra* note 88, at 465.

⁹⁷ *Id.* at 466.

evidence of force and resistance in determining consent; the central substantive issue.⁹⁸ In practice, the British and Canadian positions do not differ significantly from the American position, while some important theoretical distinctions remain.

In the United States, the applicable standard varies from state to state.⁹⁹ The phrases "by force", "against her will", and "without her consent" are used interchangeably in the state criminal codes and are not always treated as distinctly different standards by the courts.¹⁰⁰ In the majority of states force is required, although threats of serious bodily harm have been held in a number of cases to satisfy this requirement.¹⁰¹ Force may be constructive or implied as well as actual.¹⁰² In some parts of the United States, the resistance standard focuses entirely on the physical resistance of the victim as a manifestation of her lack of consent.

In the past, the victim was required to "resist to the utmost" even in situations where such resistance would clearly be futile or would endanger her life. In *Morrow v. State*,¹⁰³ this requirement was clearly articulated by Chief Justice Hill: "[Resistance] must not be a mere pretext, the result of womanly reluctance to consent to intercourse, but the resistance must be up to the point where it is overpowered by actual force."¹⁰⁴ The victim must demonstrate "the utmost reluctance and the utmost resistance" to prevent the jury's inference that the act was not against her will.¹⁰⁵ The modern view is less strict, requiring only that resistance should be reasonable or proportionate under the circumstances. Such a requirement still places a duty of self-defense on rape victims.¹⁰⁶

Comparisons can be drawn between the American emphasis on force

⁹⁸ *Beaudoin v. The King*, 5 Can. Rep. 88, 94 (1948).

⁹⁹ Compare LA. REV. STAT. ANN. § 14.41 (West)(Supp. 1981). Rape—" . . . without the person's lawful consent." § 14.42 Aggravated Rape—"victim resists to the utmost but whose resistance is overcome by force or . . . is prevented from resisting the acts by threats of great and immediate bodily harm accompanied by apparent power of execution . . ."; MASS. GEN. LAWS. ANN. ch. 265 § 22 (West)(Supp. 1981) " . . . compels such person to submit by force and against his will, or compel such person to submit by threat of bodily injury . . ."; ILL. ANN. STAT. ch. 38 § 11-1 (Smith-Hurd (1979) " . . . by force and against her will."; N.Y. PENAL LAW § 130.05 (McKinney) (Supp. 1981) " . . . without consent of the victim . . . lack of consent results from . . . forcible compulsion . . . (physical force . . . capable of overcoming earnest resistance or a threat expressed or implied that places a person in fear of immediate death or serious physical injury); CAL. PENAL CODE § 261 (West)(Supp. 1980) " . . . person's resistance is overcome by force or violence or . . . person is prevented from resisting by threats of great and immediate bodily harm . . ."

¹⁰⁰ Reed Harris, *Toward a Consent Standard in the Law of Rape*, 43 U. CHI. L. REV. 613, 618 (1976).

¹⁰¹ See generally, *id.* at 613 & 615.

¹⁰² *McQuirk v. State*, 84 Ala. 435; 3 So. 775 Sup. Ct. 1887.

¹⁰³ 13 Ga. App. 189; 79 S.E. 63 Ct. App. 1913.

¹⁰⁴ *Id.* at 194, 79 S.E. at 66 per Hill, C.J.

¹⁰⁵ Note, *Forcible and Statutory Rape: An Exploration of the Operation and Objectives of the Consent Standard*, 62 YALE L.J. 55, 56 (1952).

¹⁰⁶ Scutt, *supra* note 88.

and resistance rather than lack of consent, and the rape law of England at the time of the American Revolution. It was not until 1845 that the shift to the element of nonconsent began in England. Canada recognized this shift and adopted it in the 1892 criminal law codification. Similar developments did not occur in the United States, and it is only in recent years that rape has begun to be redefined. Although modern statutory provisions tend to maintain the emphasis on force, in a growing number of states, resistance, particularly resistance "to the utmost", is no longer required.¹⁰⁷

The direction of modern rape law reform in Canada is clear from bill C-53. It retains the consent standard and incorporates the force standard, yet places less emphasis on the resistance standard. The new provisions are modeled after the old assault provision:

- 244 (1) A person commits an assault when (a) without the consent of another person, he applies force intentionally to that other person, directly or indirectly;
- (b) he attempts or threatens, by an act or gesture, to apply force to another person, if he has, or causes that other person to believe upon reasonable grounds that he has, present ability to effect his purpose; . . .
- (2) This section applies to all forms of assault, including sexual assault and aggravated sexual assault.¹⁰⁸

The language of the statute does not clearly indicate whether the physical act of sexual intercourse itself constitutes sufficient use of force, or whether some additional evidence of violence is required. If intercourse itself is insufficient, those women who are incapable of consent or resistance due to either physical or mental helplessness, are no longer protected unless unnecessary force is used. Therefore a court could conceivably acquit a man of rape because the violence or threat to the woman was not deemed sufficiently serious, even though intercourse occurred clearly without her consent.

The consent provisions in the new law attempt to distinguish between true consent and mere submission. For example, Section 244(3) provides that:

- For the purpose of this section, no consent is obtained where the complainant submits or does not resist by reason of:
- (a) the application of force;
- (b) threats or fear of the application of force;
- (c) fraud; or
- (d) the exercise of authority.¹⁰⁹

¹⁰⁷ Bienen, *Rape III—National Developments in Rape Legislation*, 6 *WOMEN'S RTS. L. REP.* 170, 182 (1981). A number of reform states, most importantly Michigan, have adopted a strategy of defining criminal sexual conduct without using the term consent or the term resistance." *Id.* at 102 n.67.

¹⁰⁸ See Bill C-52, *supra* note 69, § 244, at 8.

¹⁰⁹ *Id.*

The notion of submission resulting from the use or threatened use of force expands the previous notion of consent standard. Submission as a result of the exercise of authority or fraud thus broadens the scope of the new provisions. The question of consent is to be treated as a question of fact and is "not necessarily to be inferred from evidence of submission or lack of resistance where force is used."¹¹⁰ Bill C-53 has explicitly included force and resistance as part of an expanded element of consent. Perhaps this change was motivated by a desire to emphasize the behavior of the accused rather than the behavior of the victim.

The consent issue is further complicated by the requirement that the accused must have possessed a certain "*mens rea*", or state of mind, before conviction is possible. This mental element may also be described as the accused's intent. Both the intent of the accused to commit the act and evidence of the act itself are required to prove a case of rape.¹¹¹ No definition of *mens rea* exists, but rather, each crime may require a different mental element. In the case of rape, Stephen J. stated that "an intention to have forcible connection with a woman without her consent" was required.¹¹² The modern view seems to be that knowledge of the rapist of lack of consent or recklessness as to whether or not consent exists is sufficient. "The *actus reus* is sexual intercourse with a woman who is not in fact consenting to such intercourse. The *mens rea* is knowledge that the woman is not consenting or recklessness as to whether she is consenting or not."¹¹³

In recent years, the debate as to what level of *mens rea* is required for the offence of rape has largely centered on the availability of the defense of mistake of fact. In the controversial British case of *D.P.P. v. Morgan*¹¹⁴ and later in the Canadian case of *R. v. Pappajohn*¹¹⁵ the issue arose as to whether the defendant's belief in the woman's consent had to be reasonable as well as honest. By a three to two margin, the House of Lords held that the belief need not be reasonable, but merely honest.¹¹⁶ The reasonableness of the belief, however, served as objective evidence of whether subjectively the belief was actually held.¹¹⁷ Lord Hailsham de-

¹¹⁰ *Id.*

¹¹¹ *Fowler v. Padget*, 101 Eng. Rep. 163 (1978).

¹¹² *R. v. Tolson*, 23 Q.B.D. 168, 185 (1889).

¹¹³ *D.P.P. v. Morgan* [1975] 2 All E.R. 347, 365 (H.L.) per Lord Simon.

¹¹⁴ *Id.*

¹¹⁵ 32 N.R. 104 (Sup. Ct. Can. 1980).

¹¹⁶ *Morgan* met three men in a bar and took them back to his home, telling them that they could have intercourse with his wife. The three claimed that *Morgan* also told them that his wife's resistance would be a mere charade to stimulate sexual excitement. She struggled and screamed and was held down by three of the men while they took turns having intercourse with her. After they left she drove herself to the hospital where she complained of being raped. All four accused confessed in their original statements to the police but at trial asserted that Mrs. *Morgan* had consented. They were convicted but were given leave to appeal to the House of Lords.

¹¹⁷ [1975] 2All E.R. 347, 361.

scribed the mental element required as "the intention to [have intercourse without the consent of the victim], or the equivalent intention of having intercourse willy-nilly not caring whether the victim consents or not."¹¹⁸ Lord Fraser and Lord Cross both agreed with Lord Hailsham that the belief in consent need not be reasonable. Lord Cross further contended that as a matter of policy it was unfair to hold a man to the duty of reasonable care in determining whether his partner consented to intercourse.¹¹⁹ The two dissenting judges held that an honest but unreasonable belief of consent did not negative a rape charge. Both relied primarily on *R. v. Tolson*,¹²⁰ a 19th century bigamy case, in which the court stated: "At common law an honest and reasonable belief in the existence of circumstances, which if true, would make the act for which a prisoner is indicted an innocent act has always been held to be a good defence."¹²¹

Lord Edmund Davies concluded that the introduction of an objective element into *mens rea* was neither a novel nor an unwelcome development.¹²² All five judges agreed that the appeals should be dismissed on the basis that no reasonable jury would have convicted even if directed properly. They concluded that no miscarriage of justice had occurred. The appeal was dismissed.

Even though the appellants were convicted, the public response was highly critical. As a result, in July 1975, the Home Secretary appointed The Advisory Group on The Law of Rape, chaired by the Honourable Madame Helibron. The Advisory Group reconsidered the law of rape with particular reference to the judgment in *Morgan*, and made recommendations for possible reform. The Advisory Group's conclusion supported the majority decision in *Morgan* that a genuine belief in consent would exonerate an accused. They rejected the additional requirement of reasonableness as untenable and in conflict with the basic principles of law that "a man should not be found guilty of a grave offence unless he has the requisite guilty mind, and that a genuine mistake negates such *mens rea*."¹²³ In addition, the report noted that *Morgan* contained the first un-

¹¹⁸ *Id.* at 362.

¹¹⁹ *Id.* at 351-52. It is evident from Lord Cross's judgment that had the *Sexual Offences Act* been worded differently he would have favoured requiring reasonable grounds for belief in consent. Section 1(1) of the *Sexual Offences Act 1956* stated that it was an offence "for a man to rape a woman." Lord Cross then looked to the common-law and concluded that rape was not an "absolute offence" but required "at least indifference" to consent. If the offence had been described in the Act as "having intercourse with a woman who was not consenting to it" (basically the Canadian statutory definition), Lord Cross would have supported the application of the reasonableness requirement. Had *Morgan* been decided in Canada, it is quite likely that the decision would have been different. *R. v. Pappajohn*, [1979] 1 W.W.R. 562, 576 per Lambert, J.A.

¹²⁰ 23 Q.B.D. 168 (1889).

¹²¹ *Id.* at 181.

¹²² [1975] 2 All E.R. 347, 378 per Lord Edmund Davies quoting from *Sweet v. Parsley*, [1970] A.C. 132.

¹²³ REPORT OF THE ADVISORY GROUP ON THE LAW OF RAPE, 10 (1975).

ambiguous statement that recklessness as to consent was sufficient *mens rea*.¹²⁴ The Group concluded that this would have wide implications affecting not only rape law but also other crimes of physical violence.¹²⁵ As a result of the report, amendments to the *Sexual Offences Act* were adopted.¹²⁶ These amendments were modeled closely after the Group's recommendations. On the issue of mistaken belief in consent the new section reads:

[I]f at a trial for a rape offence the jury has to consider whether a man believed that a woman was consenting to sexual intercourse, the presence or absence of reasonable grounds for such a belief is a matter to which the jury is to have regard in conjunction with any other relevant matters, in considering whether he so believed.¹²⁷ (emphasis added)

The new section clearly indicates that a belief in consent need not be based on reasonable grounds. At the same time however, it emphasizes that the reasonableness of the belief is a relevant matter which the jury must consider in determining whether the belief was actually held. Reasonableness therefore has become a more important factor since the *Morgan* decision.

In 1980, the issue addressed in *Morgan* confronted the Supreme Court of Canada in *R. v. Pappajohn*.¹²⁸ Five of the seven judges held that the appeal should be dismissed on the ground that the evidence was insufficient to support a defense of mistake of fact. The two dissenting judges held that the defense would have been put to the jury. Although it was unnecessary to deal with the issue, six of the seven judges held, on the authority of *Morgan* and *Beaver v. The Queen*,¹²⁹ that a mistaken belief in consent need only be honest, not reasonable. The majority judgment on this point, given by McIntyre J., relies entirely on a paragraph from the judgment of Cartwright J. in *R. v. Rees*¹³⁰ which was adopted one year later in *Beaver*¹³¹: ". . . the essential question is whether the belief entertained by the accused is an honest one and . . . the existence or non-existence of reasonable grounds for such belief is merely relevant evidence to be weighed by the tribunal of fact in determining such essential question."¹³²

Dickson and Estey J.J. dissented on the issue of whether there was sufficient evidence to go to the jury as to mistake of fact. They were in the majority, however, in deciding that a mistaken belief in consent need

¹²⁴ *Id.* at 13.

¹²⁵ *Id.*

¹²⁶ The *Sexual Offences Act*, *supra* note 94.

¹²⁷ *Id.* at § 1(2).

¹²⁸ 32 N.R. 104 (Sup. Ct. Can. 1980).

¹²⁹ [1952] S.C.R. 531.

¹³⁰ [1956] S.C.R. 640.

¹³¹ [1957] S.C.R. 531, 538.

¹³² [1956] S.C.R. 640, 651.

not be reasonable. In his judgment, Dickson J. reviewed the *Morgan* decision, and concluded that *R. v. Tolson*¹³³ (the basis of the minority view in *Morgan*) had been overruled in Canada by Mr. Justice Cartwright in *Rees* and also *Beaver*. Mr. Justice Martland, who disagreed with this notion, concluded that the reasonableness of the belief of the accused was not at issue in that case. He distinguished the *Beaver* case on its facts. Despite the doubts expressed by Mr. Justice Martland, the decision of the Supreme Court in *Pappajohn* clearly indicates that in Canada, as in Britain, an honest but unreasonable belief of consent is sufficient to exonerate an accused rapist.

The enactment in Canada of a provision similar to the Heilbron amendment to the Sexual Offences Act is proposed in bill C-53.¹³⁴ Section 244(5) of the bill provides that the jury shall be instructed to consider the presence or absence of reasonable grounds when determining the honesty of the accused's belief in the complainant's consent. Reasonableness, although not crucial, would thus be considered a relevant factor.

In the United States the standard is more rigorous and is objective in nature.¹³⁵ The mistaken belief of the accused must be both honest and reasonable.¹³⁶ This objective standard has a common law foundation and is applicable in the majority of American states.¹³⁷ Three cases are generally cited as authority for the proposition that reasonableness is required. In *McQuirk v. State*,¹³⁸ Mr. Justice Somerville outlined the requirements for the defence of mistake in rape:

The consent given by the prosecutrix may have been implied as well as expressed, and the defendant would be justified in assuming the existence of such consent if the conduct of the prosecutrix towards him at the time of the occurrence was of such a nature as to create in his mind the honest and reasonable belief that she had consented by yielding her will freely to the commission of the act.¹³⁹

This principle was followed in *United States v. Short*¹⁴⁰ and in *State v. Dizon*.¹⁴¹ In the *Dizon* case, Chief Justice Tsukiyama concluded that an honest belief in consent based on the accused's own "negligence, fault or carelessness" was not a defense to a rape charge.¹⁴²

¹³³ 23 Q.B.D. 168 (1889).

¹³⁴ See Bill C-53, *supra* note 69 § 244, at 8.

¹³⁵ Berger, *Man's Trial, Woman's Tribulation: Rape Cases in the Courtroom* 77 COLUM. L. REV. 1, 61 (1977).

¹³⁶ Note, *Recent Developments in the Definition of Forcible Rape* 61 VA. L. REV. 1500, 1534 (1975).

¹³⁷ Lewis, *Recent Proposals in the Criminal Law of Rape: Significant Reform or Semantic Change?* 17 OSGOODE HALL L.J. 445, 451 (1979).

¹³⁸ 85 Ala. 435; 4 So. 775 (S. Ct. Ala. 1888) per Somerville, J.

¹³⁹ *Id.* at 776.

¹⁴⁰ 4 U.S.C.M.A. 437; k16 C.M.R. 11 (1954).

¹⁴¹ 47 Hawaii 44; 390 P.2d 759 S.Ct. Hawaii (1954).

¹⁴² *Id.* at 769.

The trend in U.S. courts may have moved away from an objective and towards a subjective standard. Revisions of statutory definitions of rape place increased emphasis on the conduct and intentions of the accused.¹⁴³ The Model Penal Code, drafted in 1962 by the American Law Institute, recommended that a mistaken belief in consent should be a "defence" to a charge of rape as long as that mistake was not made recklessly.¹⁴⁴ This Code has been described as having "substantial impact" on rape reform throughout the United States.¹⁴⁵ Hawaii, Montana, and New Mexico have adopted the recommended "mens rea requirement of intention for forcible rape" but it is not clear that this change has affected the defence of mistake.¹⁴⁶ Therefore, the American position, in contrast to the Britain and Canadian positions, remains that a mistaken belief in consent must be based on reasonable grounds. Regardless, of whether the Canadian or the test is applied, it is practically impossible to determine the mental state or intent of the defendant without regard to external factors such as force and resistance. Where there is evidence of considerable physical violence, the court has had little difficulty in finding lack of intent.¹⁴⁷ Without such evidence, however, "determining the intentions and understanding of the two persons becomes the crucial, and frequently intractable, problem."¹⁴⁸ The court's task becomes extremely difficult where the evidence indicates that only moderate force was used. One commentator argued that in this situation, the consent standard is "virtually useless" and "fosters meaningless fictions."¹⁴⁹

The theory, the subjective standard focuses on the state of mind of the accused. Where little violence has occurred this state of mind must be determined largely on evidence of the woman's resistance. The practical result of the *mens rea* requirement is that the woman must manifest her lack of consent to the degree necessary to convince the man that she is not consenting.¹⁵⁰ Reasonable resistance may not be sufficient. As *Morgan*

¹⁴³ Lewis, *supra* note 137.

¹⁴⁴ A.L.I., MODEL PENAL CODE (Proposed Draft, 1962) at 24.

¹⁴⁵ Lewis, *supra* note 137.

¹⁴⁶ Note, *supra* note 136, at 1536-1537.

¹⁴⁷ Lewis, *supra* note 137, at 456.

¹⁴⁸ *Id.*

¹⁴⁹ Dworkin, *The Resistance Standard in Rape Legislation*, 18 STAN. L. REV. 683 (1966).

¹⁵⁰ Vivian Berger has concluded that the development of the resistance standard has resulted in a shift in focus from the woman's subjective state of mind to the woman's behavior in response to the man's actions. Berger, *supra* note 133, at 8. In Canada, the adoption (in a practical sense) of the resistance standard, combined with the mens rea requirement, shifts the focus again, this time to the man's subjective assessment of the woman's behavior.

Force and resistance are perhaps the best indicators available to the court of the victim's lack of consent and the assailant's knowledge of that lack of consent. The use of the force and resistance standard in the United States, and implicitly in Canada as well, "reflects an urge toward administrative simplicity, a search for an external standard by which to measure the subjective element." Reed Harris, *supra* note 98, at 619. An external stan-

and *Pappajohn* made clear, the accused's mistaken belief in consent may be totally unreasonable as long as it is *bona fide* and not recklessly made. While in Canada and Britain, the issue to be addressed is consent, not force or resistance, the victim may be required to resist beyond the degree that would persuade a "reasonable man" that she did not consent. In that sense, the resistance standard in Canada and Britain may in fact be more onerous than the standard used in the United States.

IV. THE ADMISSIBILITY OF EVIDENCE OF THE COMPLAINANT'S PRIOR SEXUAL CONDUCT

Evidence of the complainant's sexual history has been admissible traditionally either on the issue of consent, or for the purpose of impeaching the complainant's credibility as a witness. Evidence of specific sexual acts with the accused or with persons other than the accused and general reputation evidence have been assessed as having varying degrees of probative value with respect to the issues of consent and credibility. The Canadian and American positions differ as to what type of evidence is admissible and the purpose for which it may be admitted. The reform movements in both countries have limited the admissibility of evidence of sexual history, although recent statutory provisions vary widely as to the degree of limitation.

In Canada, the traditional position is that the complainant may be questioned in cross examination about her prior sexual activity but she is not compelled to answer. Her replies as well as evidence of her general reputation are admissible on both the issues of consent and credibility. The leading Canadian case in this area is *Baliberte v. The Queen*¹⁵¹ which was decided by the Supreme Court of Canada in 1877. Chief Justice Richards concluded that the authority in England indicated that questions about the complainant's sexual activities with persons other than the accused could be asked of the complainant in the course of cross-examination and could not be objected to by the prosecuting officer although the witness herself could object.¹⁵² The judge must then rule on the objection to determine whether the complainant is obliged to answer.¹⁵³ If the complainant does answer the question, the answer according to Mr. Justice Ritchie, "must be accepted, and is not open to be contradicted by the evidence on the part of the prisoner."¹⁵⁴

A distinction between evidence of specific sexual acts and evidence of general reputation for chastity was clearly discerned early in the develop-

dard may be easier to apply, but it may, in some situations lead to inappropriate legal characterizations. At best, the force and resistance standards are based on probabilities of consent and intent. *Id.*

¹⁵¹ 1 S.C.R. 117 (1877).

¹⁵² *Id.* at 131.

¹⁵³ *Id.* at 139.

¹⁵⁴ *Id.*

ment of case law. The Ontario Court of Appeal in *R. v. Finnessey*¹⁵⁵ held that this distinction was crucial. In that case, the complainant was required to answer questions about her general reputation for chastity and about whether she had previously had intercourse with the accused. Evidence which contradicted her testimony could be presented by defence counsel, since such evidence was considered relevant to the consent issue.¹⁵⁶ In contrast, the court held that the complainant could not be compelled to answer questions about specific sexual acts with persons other than the accused. Such evidence was considered to be "strictly to her credit" rather than to the issue of consent. Even if the complainant answered, such questioning could not be pursued because it merely raised collateral issues.¹⁵⁷ Sexual activities of the victim with other men did not provide a defense to a rape charge.¹⁵⁸

The American position is similar but not identical to the Canadian position. Reputation evidence is preferred over evidence of specific sexual acts, but in most states neither type of evidence is admissible on the issue of credibility. An unchaste reputation is relevant and admissible, however, to show the victim's consent.¹⁵⁹ Evidence of specific sexual acts with a person other than the accused was excluded in the 1895 Florida case of *Rice v. State*.¹⁶⁰ Mr. Justice Liddon stated that the connection between illicit intercourse with one man and intercourse with another was too slight and uncertain to draw conclusions as to consent with the second man. Most judges across the United States followed *Rice* and concluded that evidence of sexual acts with a specific person raised collateral issues which would "divert the jury's attention from the real issue."¹⁶¹

Whether evidence of particular sexual acts or general reputation is admissible to aid in determining the credibility of the complainant is another controversial issue. The logic behind admitting such evidence to determine credibility was first questioned in a 19th century California case.¹⁶² The complainant was under the age of consent and therefore, consent was not at issue. The defence attempted to present evidence of her prior sexual behavior, but the Court refused to admit it on the ground that it was immaterial since it related only to consent. The Judge criticized the attempt to use evidence of that type to attack the complainant's credibility by noting the inconsistency using prior sexual conduct evidence to determine the credibility of a complainant in a rape case but not the veracity of a female witness in any other type of case. More recently a Missouri court concluded that the credibility of a witness could not be

¹⁵⁵ 10 C.C.C. 347 (Ont. C.A. 1906).

¹⁵⁶ *Id.* at 351.

¹⁵⁷ *Id.*

¹⁵⁸ *Gross v. Bodrecht*, 24 O.A.R. 689, per Osler, J.A. (Ont. C.A. 1897).

¹⁵⁹ *Berger*, *supra* note 135, at 17.

¹⁶⁰ 35 Fla. 236, 17 So. 286 (1895).

¹⁶¹ *Wynne v. Commonwealth*, 216 Va. 355, 218 S.E.2d 445 (1975).

¹⁶² *People v. Hohnson*, 106 Cal. 289, 39 P.622 (1895).

impeached in forcible rape cases by evidence of a bad moral reputation.¹⁶³ The court concluded that it already had sufficient latitude to deal with false accusations and that attacks on the complainant's credibility using evidence of unchastity were unnecessary and should be prevented.

The growing trend toward evidentiary reform of rape law has led to a reassessment of the traditional arguments favoring the admissibility of evidence of the complainant's sexual history. The primary argument for admissibility is that such evidence is relevant on the issue of consent because an unchaste woman is thought to be more likely to consent to intercourse in any given situation than a "chaste" or "virtuous" woman.¹⁶⁴ The classic articulation of this view can be found in *People v. Abbott*¹⁶⁵ where Judge Cowan made the distinction between a woman "who has already submitted herself to the lewd embraces of another, and the coy and modest female severely chaste and instinctively shuddering at the thought of impurity."¹⁶⁶ He then asked "and will you not more readily infer assent in the practised Messalina, in loose attire, than in the reserved and virtuous Lucretia?"¹⁶⁷ The same view was expressed more directly in a recent American law journal article: "Knowledge of the complaining witness's prior sexual history increases the trier of fact's predictive ability to determine what her propensity to consent to intercourse was at the time of the alleged rape."¹⁶⁸

The link between chastity and general credibility is less clear. The chief American proponent of the theory that promiscuity imparts dishonesty has been Dean John Henry Wigmore.¹⁶⁹ Wigmore supported the general evidentiary rule, adopted in the majority of U.S. jurisdictions, that evidence of bad general character or specific qualities other than veracity should not be admitted.¹⁷⁰ He made a crucial distinction, however, where a woman accused a man of a sexual offence. Wigmore contended that the credibility of a complainant in a sex offense case could only be determined if evidence of her chastity was admissible and assessable by a psychiatrist. This view has been rejected by most American courts. Only a few jurisdictions admitting such evidence.¹⁷¹

As noted earlier, reform in this area has been directed towards limiting, rather than expanding, the admissibility of evidence. A number of commentators have shown support in recent years for this development.

¹⁶³ *State v. Kain*, 330 S.W.2d 842, 845 (Sup. Ct. Mo. 1960).

¹⁶⁴ *People v. Collins*, 25 Ill. 2d 605, 611, 186 N.E. 2d 30, 33 (1962).

¹⁶⁵ 19 Wend. 192, (N.Y. 1838) quoted in Berger, *supra* note 133, at 16.

¹⁶⁶ 19 Wend. 192, 195-96 (N.Y. 1838).

¹⁶⁷ *Id.*

¹⁶⁸ Eisenbud, *Limitations on The Right to Introduce Evidence Pertaining to the Prior Sexual History of the Complaining Witness in Cases of Forcible Rape: Reflection of Reality or Denial of Due Process?*, 3 HOFSTRA L. REV. 403, 417 (1975).

¹⁶⁹ Berger, *supra* note 135, at 16.

¹⁷⁰ WIGMORE, 3A EVIDENCE IN TRIALS OF COMMON LAW, 734 (1970).

¹⁷¹ Berger, *supra* note 135, at 22.

Mr. Justice E.L. Haines of the Supreme Court of Ontario described the problem:

At the outset it must be realized that a jury is very selective in enforcing the law. Defence lawyers know this and if they can demean the victim they increase their client's chances of acquittal. In the guise of enquiring into consent they engage in character assassination which can be absolutely devastating to the female.¹⁷³

Other critics contend that evidence of prior sexual conduct is only remotely related to the issue of the complainant's credibility,¹⁷³ and that admission of such evidence will introduce collateral issues, needlessly confusing the jury.¹⁷⁴ Testimony regarding the specific sexual acts of the complainant may well be fabricated, particularly if the witnesses are friends of the accused.¹⁷⁵ Evidence of her "unchaste reputation" may be based on rumor and innuendo rather than fact.¹⁷⁶ The exclusion of evidence of sexual conduct protects the privacy of the rape victim, reduces the trauma and embarrassment she experiences, and perhaps increases the proportion of rapes which are reported as well as the number of convictions obtained.¹⁷⁷

In the early 1970's, pressure for reform of U.S. rape laws centered around the courts' use of evidence of prior sexual conduct. The relationship between the woman's chastity and whether a crime had been committed was too attenuated to warrant receiving such evidence.¹⁷⁸ By 1979, 45 American states had enacted "rape-shield laws" which are designed to limit the use of evidence of the complainant's prior sexual conduct.¹⁷⁹ These statutes ranged from the highly restrictive; including those enacted in Michigan and Louisiana, to the highly permissive; including Texas, New Mexico, Alaska, New York, and Nevada statutes.¹⁸⁰ Permissive rape-shield laws have been criticized as ineffective in altering the broad discretion to exclude evidence already possessed by trial judges. Conversely, re-

¹⁷³ Justice Haines, *The Character of the Rape Victim*, 23 *CHITTY'S L.J.* 57 (1975).

¹⁷³ Le Grand, *Rape and Rape Laws: Sexism in Society and Law*, 61 *CALIF. L. REV.* 919, 939 (1973).

¹⁷⁴ *Wynne v. Commonwealth*, 216 Va. 355, 218 S.E.2d 445 (1975); *Rice v. State*, 35 Fla. 236, 17 So. 286 (1895).

¹⁷⁵ Ellis Mathiasen, *The Rape Victim: A Victim of Society and the Law*, 11 *WILLIAMETTE L.J.* 36, 40 (1964). See *State v. Ogden* 39 Or. 195, 65 P. 449, 454 (1901) per Moor J. "[W]hile a prosecutrix is expected to defend her general reputation for chastity, she cannot anticipate the charges of specific acts of illicit intercourse which may be made by men who perhaps have been suborned to testify that they have had such connection with her, so as to secure the acquittal of the accused . . ."

¹⁷⁶ *People v. Benson*, 6 Cal. 221, 223 (1856).

¹⁷⁷ Sykora, *Louisiana's Protection for Rape Victims: Too Much of a Good Thing?*, 40 *LA. L. REV.* 268, 269 (1979).

¹⁷⁸ LeGrand, *supra* note 173, at 939.

¹⁷⁹ Tanford and Bocchino, *Rape Victim Shield Laws and the Sixth Amendment*, 128 *U. PA. L. REV.* 544 (1980).

¹⁸⁰ Berger, *supra* note 135, at 33.

strictive rape-shield laws are said to "sacrifice legitimate rights of the accused person on the altar of Women's Liberation."¹⁸¹ The constitutionality of these restrictive laws, particularly regarding the Sixth Amendment right of the accused to confront the witnesses against him, has been questioned in numerous articles.¹⁸³

The Michigan statute was among the first of the rape-shield laws to be enacted. It has since been used as a model for other restrictive statutes.¹⁸³ In Michigan, evidence of sexual conduct with the defendant is admissible as well as evidence of sexual activity with others, if such evidence shows the source of "semen, pregnancy or disease." Such evidence must, however, be material to a fact at issue and its prejudicial nature cannot exceed its probative value.¹⁸⁴ All other evidence of the victim's prior sexual conduct or reputation for chastity is inadmissible. The enact-

¹⁸¹ *Id.* at 32.

¹⁸³ Sroufe, *Evidence—Admissibility of the Victim's Past Sexual Behavior Under Washington's Rape Evidence Law—Wash. Rev. Code § 9.79.150* (1976), 52 WASH. L. REV. 1011, 1017 (1977); Berger, *supra* note 133; Burnim, *Massachusetts Rape-Shield Law—An Overstep in the Right Direction*, 64 MASS. L. REV. 61 (1979). Eisenbud, *supra* note 168; Nicoll, *Idaho Code 18-6105: A Limitation on the Use of Evidence Relating to the Prior Sexual Conduct of the Prosecutrix in Idaho Rape Trials* 40 LA. L. REV. 268 (1979); Whittmore, *Evidence of Prosecutrix' Sexual Relations with Persons Other than Defendant in Rape Prosecutions*, 29 OKLA. L. REV. 742 (1976).

The constitutional validity of the Michigan statute was challenged unsuccessfully in 1977. In *People v. Thompson* 257 N.W. 2d 368 (Mich. App. 1977), the court held that the criminal sexual conduct statute did not violate the accused's sixth amendment right of confrontation. Judge Burns concluded that there was no fundamental right to ask a witness irrelevant questions. He stated: "The rape victim's sexual activity with third persons is in no way probative of the victim's credibility or veracity. If it were, the relevancy would be so minimal it would not meet the test of prejudice." *Id.* at 727.

¹⁸⁴ For discussion see: Scutt, *Reforming the Law of Rape: The Michigan Example*, 50 AUSTRALIAN L.J. 615 (1976); Rob, *Forcible Rape—Institutionalized Sexism in the Criminal Justice System*, 23 CRIME & DELINQ. 136 (1977); Note, *If She Consented Once, She Consented Again—A Legal Fallacy in Forcible Rape Cases*, 10 VAL. U.L. REV. 127 (1975); Bienen, *Rape III 6 WOMEN'S RTS. L. REP.* 170 (1981).

Louisiana's rape shield statute has also been classified as "highly restrictive." Berger, *supra* note 133, at 33. Evidence of the complainant's prior sexual conduct or reputation is inadmissible unless it relates to incidents "arising out of the victim's relationship with the accused." LA. REV. STAT. ANN. § 15: 498 (West)(Cum. Supp. 1977). Evidence of specific sexual acts with third parties was already inadmissible and evidence of prior sexual history or reputation was inadmissible for the purpose of impeaching the credibility of the complainant prior to reform. Sykora, *supra* note 175, at 27. Like the Michigan provisions, the Louisiana statute has been harshly criticized. *Id.* at 281. One commentator has called it "an inflexible, overly-protective rule which is not attuned to the legitimate needs of the accused." *Id.* She argues that evidence of sexual history now excluded should be admissible under some circumstances. These circumstances include where the complainant has engaged in established patterns of indiscriminate sex which resembles the defendant's version of the alleged encounter, where the complainant has misrepresented her past sexual history or where the evidence supports a psychiatrist's opinion that she has fantasized the act. *Id.* at 276, 278. As with the Michigan statute, it is argued that it may be unconstitutional to the extent that "important, relevant and trustworthy" evidence is excluded. *Id.* at 281.

¹⁸⁴ MICH. COMP. LAWS ANN. § 750.520; (Cum. Supp. 1976-77).

ment of such rape-shield provisions has been cited as a major factor contributing to the substantial increase in the conviction rate for sexual assault in Michigan.¹⁸⁵ The increase in the number of rapes reported and the reduction in victim trauma have also been closely linked with the prohibition of evidence of the complainant's past sexual conduct.¹⁸⁶

Other states have enacted provisions which fall between the highly permissive and highly restrictive.¹⁸⁷ Typically these statutes provide that "evidence of a rape victim's prior sexual activities is inadmissible" but a number of specific exceptions are given.¹⁸⁸ The most common exceptions to the general rule of inadmissibility are the two found in the Michigan statute: evidence of prior sexual activity with the accused and evidence of sexual activity with a third party when used to explain a physical condition such as pregnancy or venereal disease.¹⁸⁹ Less common exceptions to the general rule of inadmissibility include evidence used to "impeach credibility," to show a "motive for fabrication," or to show a "pattern of consensual activity closely related to the defendant's version of the events."¹⁹⁰ Some of the statutes differentiate between evidence introduced on the issue of consent and evidence introduced for the purpose of impeaching credibility.¹⁹¹ Other statutes distinguish evidence of specific sexual acts from evidence of "reputation for chastity."¹⁹² Some statutes impose time limits in an attempt to prevent the admission of "stale" evidence.¹⁹³ The various statutes also require notice to the prosecution of the evidence sought to be admitted or a prerequisite that the judge rule on the admissibility of such evidence an *in camera* hearing. Most statutes incorporate the balancing test which requires that the probative value of the evidence be weighed against its potential prejudicial effect.¹⁹⁴

In the states with highly permissive rape-shield laws, evidence of prior sexual conduct and reputation is admissible if the judge decides in an *in camera* hearing that the evidence is material to a fact at issue in the case and its probative value exceeds the prejudicial nature of the evidence.¹⁹⁵ With the exception of the New York statute,¹⁹⁶ very few guide-

¹⁸⁵ ALISON GEIST, LAW REFORM IN THE PREVENTION AND TREATMENT OF RAPE: PRELIMINARY REPORT (1980).

¹⁸⁶ *Id.*; Interview with Judy Price, Education Co-Ordinator of the Assault Crisis Centre in Ann Arbor, Michigan, on June 27, 1980.

¹⁸⁷ Tanford and Bocchino, *supra* note 179, at 557.

¹⁸⁸ *Id.* at 552.

¹⁸⁹ *Id.*

¹⁹⁰ *Id.*

¹⁹¹ Berger, *supra* note 135, at 35.

¹⁹² *Id.* at 36.

¹⁹³ *Id.*

¹⁹⁴ TEX. PENAL CODE ANN. § 21.13(a) (Vernon 1981) New Mexico. N.M. STAT. ANN. § 30-9-16 (1978). ALASKA STAT. § 12.45.045(a) NEV. REV. STAT. § 48.069, 50.090 (1979).

¹⁹⁵ Johnson, *Evidence—Rape Trials—Victim's Prior Sexual History*, 27 BAYLOR L. REV. 362 (1975).

lines on admissibility are given. Since judges already have the power to exclude evidence on collateral issues, or evidence which would tend to "confuse, delay or unfairly prejudice the proceedings," the impact of these reforms is minimal.¹⁹⁷

The recently added section 142 of the Canadian Criminal Code¹⁹⁸ is similar to those American statutes which are classified as somewhat permissive because the judge is given broad discretion to admit or exclude evidence. Section 142 was introduced in 1975 as part of bill C-71 in response to pressure from women's organizations across Canada. When introducing the bill, the Honorable Ron Basford, Minister of Justice, noted that formerly the victim of rape appeared to be on trial rather than the accused. The purpose of the proposed amendments was to reduce the embarrassment felt by the victim. It was also hoped that this would, in turn, encourage more victims to report rapes.¹⁹⁹

The amended section 142 specifically states, "no question shall be asked or on behalf of the accused as to the sexual conduct of the complainant with a person other than the accused" unless two conditions are met:²⁰⁰ 1) the accused must give reasonable written notice to the prosecutor of his intention to ask such questions and provide particulars of the evidence he is seeking to adduce;²⁰¹ and 2) the judge must hold an *in camera* hearing and be satisfied "that the weight of the evidence is such that to exclude it would prevent the making of a just determination of an issue of fact in the proceedings, including the credibility of the complainant."²⁰²

At first heralded by women's organizations, as a reform which would encourage rape prosecution by reducing the victim's humiliation at the trial, the amendment has since been interpreted to give the accused broader powers to cross-examine the complainant about her prior sexual conduct. Previously, as a general rule, the complainant's prior sexual conduct was considered a collateral issue. With the amendment, however, such evidence, if found by the judge to be sufficiently weighty, may be admitted on the issue of the complainant's consent or credibility.

In the first series of cases following the enactment of the amendment, the courts held that the complainant could not be contradicted once she had responded to questioning concerning her sexual activity.²⁰³ The

¹⁹⁸ The New York statute sets forth a general exclusionary rule, followed by a number of specific exceptions. The general exclusion allows evidence to be admitted which is "determined by the court . . . to be relevant and admissible in the interests of justice." N.Y. CRIM. PROC. LAW § 60.42.5 (Consol. 1971).

¹⁹⁷ Berger, *supra* note 135, at 34.

¹⁹⁸ Criminal Code, CAN. REV. STAT., ch. C-34, § 142 (1970).

¹⁹⁹ — PARL. DEB., H.C., 9204 (1975).

²⁰⁰ Criminal Code, CAN. REV. STAT. ch. C-34, § 142 (as amended).

²⁰¹ *Id.*

²⁰² *Id.*

²⁰³ R. v. McKenna, McKinnon and Nolan, 32 C.C.C.2d 210 (Ont. Dist. Ct. 1976).

amendment was viewed by the courts as a codification of the procedure used in the past, with the additional requirement of notice.²⁰⁴ In one case the judge commented in *obiter* that to make the complainant compellable at an *in camera* hearing would largely defeat the purpose of the amendment.²⁰⁵ These cases were subsequently overruled, however,²⁰⁶ and not until the appeal of *R. v. Forsythe*²⁰⁷ to the Supreme Court of Canada in 1980 was the effect of the enactment of section 142 clarified. Chief Justice Laskin, speaking on behalf of the Court, noted that the purpose of the section was to alleviate the trauma felt by the victim as a result of the Court's inquiry into her past sexual behavior.²⁰⁸ The Chief Justice wrote, "the provision also appears to balance the interests of an accused because, under the prior law, a denial of sexual misconduct with others precluded any further inquiry into what was considered to be a collateral issue."²⁰⁹ Confirming *R. v. Morris*²¹⁰ and *R. v. MacIntyre*²¹¹ the Chief Justice concluded that the complainant was a compellable witness at the *in camera* hearing and that other witnesses who had testified at the *in camera* hearing could be "put forward to impugn the credibility of the complainant."²¹² He commented: "If this cannot be done, [section] 142 becomes almost a dead letter".²¹³

Five years after the enactment of section 142, the Supreme Court of Canada confirmed that despite the formal requirements of notice and the *in camera* hearing, the ability of defense counsel to focus on the prior sexual conduct of the complainant has actually expanded. Evidence which before was considered collateral, can now be presented as evidence of a fact at issue through the *in camera* hearing. The complainant may be compelled to answer questions about the prior sexual activities and her answers can be contradicted by other witnesses. Chief Justice Laskin spoke of section 142 as "balancing the interests of the complainant and the accused,"²¹⁴ the section has had the effect of tipping the scales even further in favor of the accused. In the House of Commons, the Honorable Mr. Eldon Williams of Calgary North in calling for further reform of rape laws stated that the former amendment did more harm than good since it was now "working against the victim."²¹⁵

²⁰⁴ *R. v. Lloyd*, 22 N.S.R. 2d 277 (Nfld. Dist. Ct. 1977).

²⁰⁵ *R. v. O'Brien*, 31 C.C.C.2d 396, 406 (Nfld. Dist. Ct. 1977).

²⁰⁶ *R. v. Morris*, 39 C.C.C.2d 123 (B.C. Sup. Ct. 1977). *R. v. MacIntyre*, 42 C.C.C.2d 217 (Ont. Dist. Ct. 1979). *R. v. Moulton*, 1 W.W.R. 711 (Alb. C.A. 1980).

²⁰⁷ *R. v. Forsythe*, N.R. 520 (Sup. Ct. Can. 1980).

²⁰⁸ *Id.* at 525.

²⁰⁹ *Id.*

²¹⁰ *R. v. Morris*, *supra* note 206.

²¹¹ *R. v. MacIntyre*, *supra* note 206.

²¹² *R. v. Forsythe*, *supra* note 207, at 526.

²¹³ *Id.*

²¹⁴ *Id.* at 527.

²¹⁵ — PARL. DEB., H.C. 2832, 2837 (1979).

The evidentiary provisions of bill C-53, if enacted, would shift Canada from the highly permissive end of the spectrum on the issue of admissibility of sexual conduct to a more moderate position. Section 246.5 of the bill provides as a general rule that the complainant shall not be asked questions concerning her sexual activity with persons other than the accused.²¹⁶ Two exceptions to the rule are included however. The first exception would allow such evidence to be admitted if it tended to show that the accused believed that the complainant had consented. This exception, relating to the defense of mistake of fact,²¹⁷ was probably intended to limit such admissibility of evidence of the complainant's sexual history to information which the accused was aware of at the time of the alleged rape, and which may have affected his subjective assessment of whether she was consenting. It is feared, however, that the broad language of the provision might permit evidence of the complainant's sexual history in virtually any case where her consent was at issue. The second exception provides for the admissibility of evidence which rebuts the prosecution's evidence relating to the complainant's previous sexual activity. "Sexual activity" has not been clear or defined. It may include only evidence of specific sexual acts with specific persons, or it may refer to "reputation for chastity". Additional sections include provisions for notice, an *in camera* hearing, and the prohibition of publication. Subsection 3 in part reverses the *Forsythe* decision by stating that the complainant is not a compellable witness at the *in camera* hearing.

Overall recent Canadian reforms have not been effective in restricting the admissibility of evidence of prior sexual history. Even the latest round of amendments, Bill C-53, may not be effective in limiting admissibility. Historically, American jurisprudence on the admissibility of prior sexual conduct evidence has been far more restrictive than the Canadian law and recent reforms also illustrate a greater willingness on the part of American legislators to exclude this type of evidence.

V. CORROBORATION

Corroborative evidence can be most simply described as evidence from a source other than the complainant which tends to support or confirm her testimony.²¹⁸ In *D.P.P. v. Kilbourne*, Lord Hailsham stated that "corroboration is not a technical term of art, but a dictionary word bearing its ordinary meaning."²¹⁹ The case law does not entirely support this liberal interpretation of the meaning of corroboration, but rather, tends to demonstrate that a number of technical requirements and distinctions have developed.

²¹⁶ See Bill C-53, *supra* note 67A, at 8.

²¹⁷ See text accompanying notes 109-132.

²¹⁸ *D.P.P. v. Hester*, [1972] 3 All E.R. 1056, 1070, 1073.

²¹⁹ [1973] 1 All E.R. 440, 447.

R. v. Baskerville,²²⁰ a 1916 House of Lords case, provides the classic definition of corroboration:

We hold that evidence in corroboration must be independent testimony which affects the accused by connecting or tending to connect him with the crime. In other words, it must be evidence which implicates him, that is, which confirms in some materials particular not only the evidence that the crime has been committed, but also that the prisoner committed it.²²¹

The definition in *Baskerville* was developed in an effort to solve the problem of determining the credibility of an accomplice. It was approved several years later by the Supreme Court of Canada, and has been treated by Canadian courts since that time "as if it had the force of statute."²²² In 1925, England, deemed a special jury instruction based on *Baskerville* as necessary to consider the testimony of complainants in sexual offense cases. The court stated in *Rex v. Jones*:²²³ "the proper direction in such a case is that it is not safe to convict upon the uncorroborated testimony of the prosecutrix, but that the jury, if they are satisfied of the truth of her evidence, may, after paying attention to the warning, nevertheless convict."²²⁴ Two years later this view was affirmed by the Supreme Court of Canada in *Hubin v. The King*.²²⁵ As the cases developed, the jury instruction became necessary in any sexual offense case, including those involving adult male victims.²²⁶ However, when the provision for a mandatory warning was added to the Canadian Criminal Code in 1954, it only applied to testimony given by female victims. The offenses listed in the provision were, by definition, sexual offenses committed by males against females.²²⁷

A number of key words in *Baskerville*²²⁸ have been interpreted differently over the years. This has caused difficulty in determining: 1) whether testimony is "independent"; 2) whether testimony relates to a "material particular"; and 3) whether testimony sufficiently "implicates" the ac-

²²⁰ 2 K.B. 658 (H.L.) (1916).

²²¹ *Id.* at 667.

²²² STANLEY SCHIFF, EVIDENCE IN THE LITIGATION PROCESS 591 (1978).

²²³ 19 Cr. App. R. 40 (1925).

²²⁴ *Id.* at 41.

²²⁵ 48 C.C.C. 172 (S.C.C.) (1927).

²²⁶ SCHIFF, *supra* note 222, at 600.

²²⁷ Criminal Code, 2 & 3 Elizabeth II [1954], c. 51 [Canada], § 134. Instruction to jury: Notwithstanding anything in this Act or any other Act of the Parliament of Canada, where an accused is charged with an offence under section 136, 137, subsection (1) or (2) of section 138 or subsection (1) of section 141, the judge shall, if the only evidence that implicates the accused is the evidence, given under oath, of the female person in respect of whom the offence is alleged to have been committed and that evidence is not corroborated in a material particular by evidence that implicates the accused, instruct the jury that it not safe to find the accused guilty in the absence of such corroboration, but that they are entitled to find the accused guilty if they are satisfied beyond a reasonable doubt that her evidence is true.

²²⁸ 2 K.B. 658 (1916).

cused. Subsequent cases have added further requirements and distinctions. Perhaps the most important one was developed by Cartwright J. in *Thomas v. The Queen*.²²⁹ "Facts, though independently established, cannot amount to corroboration if, in the view of the jury, they are equally consistent with the truth as with the falsity of her story on this point."²³⁰

Numerous facts have been held to operate as corroborative evidence. The distraught emotional condition of the complainant, if observed shortly after the alleged assault by other witnesses, is capable of corroborating the complainant's testimony. The jury, however, must believe her condition was genuine, and it must be reasonably inferred that her emotional condition is connected with the incident.²³¹ The physical condition of the complainant is often capable of corroborating her testimony. The condition of her clothing,²³² bruises, scratches and other injuries, and medical evidence²³³ are usually considered corroborative if the fact of intercourse, or lack of consent are at issue. Evidence of the complainant's emotional condition is capable of corroborating her story, but evidence of the complaint itself, although often admissible, cannot be corroborative since it is not independent.²³⁴ The combination of "opportunity" and "suspicious circumstances" has been held to be corroborative,²³⁵ as well as a false statement made by the accused.²³⁶

A series of Canadian cases has severely the use of some types of evidence to corroborate. In *R. v. Ethier*,²³⁷ Morden J.A. stated that when the issues of whether the complainant was raped and whether she was raped by the accused exist, it is necessary that the complainant's testimony be corroborated by independent evidence on both issues. Despite a wealth of evidence supporting the complainant's credibility and relating to the issues of consent and identity, the court held that there was no corroboration because the evidence was not independent of her story. The court based its independent evidence requirement on the 1927 case of *Hubin v. The King*.²³⁸ This case held that evidence which is admissible only by reason of the complainant's story connecting it with the crime, lacks the essential quality of independence. Independent evidence in the context of corroboration has been interpreted to mean not only evidence which comes from a source other than the complainant, but, more strictly, evidence which does not depend on the complainant's story for its relevance,

²²⁹ [1952] 2 S.C.R. 344.

²³⁰ *Id.* at 354.

²³¹ *R. v. Boyd*, 17 C.C.C. (2d) 6 (Ont. C.A. 1974).

²³² *R. v. Kysella et. al.*, 133 C.C.C. 103, 104 (Ont. C.A. 1962); *R. v. Price and Hansen* [1969], 1 O.R. 24.

²³³ *R. v. Bear*, 13 C.C.C. (2d) 570 (Sask. C.A. 1973).

²³⁴ *Thomas v. The Queen*, [1952] 2 S.C.R. 344.

²³⁵ *Childs v. The Queen*, 122 C.C.C. 126, 130 (N.B.C.A. 1958).

²³⁶ *White v. The Queen*, 115 C.C.C. 97 (Sup. Ct. Can. 1956).

²³⁷ 124 C.C.C. 332 (Ont. C.A. 1969).

²³⁸ 48 C.C.C. 172 (1927).

and which is capable of implicating the accused in and of itself.²³⁹ In view of the quantity and quality of evidence rejected in *Ethier*, it is quite conceivable that in many situations corroborative evidence would be impossible to obtain.

The difficulty with the definition of independence articulated in *Hubin* and confirmed in *Ethier* was dealt with in 1976 by the Supreme Court of Canada in the case of *Warkentin v. The Queen*.²⁴⁰ De Grandpre J., on behalf of the majority, refused to give a narrow legalistic meaning to the term corroboration. He concluded that corroborative evidence need not be pigeonholed into the three slots of intercourse, nonconsent, and identity. Rather, "[i]t is the entire picture that must be looked at, [and] not a portion thereof".²⁴¹ Although the dissenting judges found no corroborative evidence linking the four accused with the crime, the majority held that five pieces of evidence taken as a whole were capable of corroborating the complainant's story. The decision departed from previous cases which had followed the artificially limited conception of corroboration. Even Dickson J., speaking for the dissent, acknowledged that the corroboration rule was, to some degree, unworkable.²⁴²

In the majority of American states, corroboration of a complainant's testimony of rape is not necessary in order to obtain a conviction.²⁴³ In the states where some form of corroboration is required, there is "wide variation both as to the elements of the crime which must be corroborated and as to the evidence considered material for purposes of corroboration."²⁴⁴ For example, in the District of Columbia, corroboration is required of force, penetration and identity.²⁴⁵ Prior to 1975, corroboration was required of all three elements in New York as well.²⁴⁶ In Nebraska (and in Georgia and Idaho prior to statutory reform)²⁴⁷ corroboration is not required of the actual offense but of the facts and circumstances surrounding it.²⁴⁸ In three other states a complaint to authorities within a certain period of time is considered corroborative.²⁴⁹ Marks of violence on the complainant,²⁵⁰ the condition of her clothing,²⁵¹ and her emotional

²³⁹ *Id.*

²⁴⁰ 30 C.C.C. (2d) 1 Sup. Ct. Can. 1976).

²⁴¹ *Id.* at 20.

²⁴² *Id.* at 4. "There are few problems more troublesome and difficult for a trial Judge than that of deciding what evidence is in law susceptible of corroborative effect and what evidence is not."

²⁴³ Annot., 60 A.L.R. 1125 (1929).

²⁴⁴ Note, *The Rape Corroboration Requirement: Repeal Not Reform*, 81 YALE. L.J. 1365, 1368 (1972).

²⁴⁵ *United States v. Jenkins*, 436 F.2d 140 (D.C. Cir. 1970).

²⁴⁶ Note, *supra* note 244, at 1368.

²⁴⁷ Annot., 60 A.L.R. 1139, 1140 (1929).

²⁴⁸ Note, *supra* note 244, at 1369.

²⁴⁹ S.C. CODE ANN. § 16-71 (1962)(Supp. 1974); TEX. PENAL CODE (1974) (Supp. 1975); Code of Criminal Procedure, art. 38.07 Vt. STAT. ANN. tit. 13 (1974).

²⁵⁰ *State v. Mitchell*, 68 Iowa 116, 26 N.W. 44 (1885).

condition²⁵² have been held to be corroborative as have admissions by the accused.²⁵³ Authorities differ, however, as to whether the woman's prompt complaint,²⁵⁴ a subsequent pregnancy,²⁵⁵ or the presence of the accused on the scene²⁵⁶ constitute corroboration.

Some form of corroboration is also required by statute in the following states and territories: Arizona,²⁵⁷ Idaho,²⁵⁸ Illinois,²⁵⁹ Massachusetts,²⁶⁰ Mississippi,²⁶¹ New York,²⁶² Puerto Rico,²⁶³ Ohio,²⁶⁴ and the Virgin Islands.²⁶⁵ In Hawaii,²⁶⁶ Nebraska,²⁶⁷ New Mexico,²⁶⁸ and the District of Columbia,²⁶⁹ a corroboration requirement developed in the case law.

Pressure for reform in recent years has led to a reassessment of the traditional arguments used to support the corroboration requirement, and the mandatory jury instruction. In the 17th century, Lord Matthew Hale stated "it must be remembered that it [rape] is an accusation easily to be made and hard to be proved, and harder to be defended by the party accused, tho never so innocent."²⁷⁰ In the 20th century, this statement has been cited as the primary rationale for the corroboration requirement in sexual offense cases. Quoted again and again in articles, books, and countless decisions, the phrase has only recently been criticized as both inappropriate and inaccurate.²⁷¹

²⁵¹ *Hamilton v. State*, 169 Ga. 826, 151 S.E. 805 (1930), overruled on other grounds) 233 Ga. 187, 210 S.E.2d 657 (1974).

²⁵² *Harper v. State*, 201 Ga. 10, 39 S.E.2d 45 (1946).

²⁵³ *State v. West*, 197 Iowa 789, 198 N.W. 103 (1924).

²⁵⁴ *Stevens v. State*, 222 Ga. 603, 151 S.E.2d 127 (1927) (corroborative); *People v. Carey*, 223 N.Y. 519, 119 N.E. 83 (1918)(not corroborative).

²⁵⁵ *People v. Haischer*, 81 App. Div. 79 (1903)(not corroborative).

²⁵⁶ *Ewing v. United States*, 135 F.d 633, 636 (D.C. Cir. 1942) (corroborative); *State v. Chapman*, 88 Iowa 254, 55 N.W. 489 (1893)(not corroborative).

²⁵⁷ ARIZ. REV. STAT. ANN. (1956)(Supp. 1975-6)(Corroboration required if conflict in evidence of victim's intimidation).

²⁵⁸ IDAHO PENAL AND CORR. CODE § 18-907(4)(Supp. 1971) (corroboration may be required if victim's character impeached).

²⁵⁹ ILL. ANN. STAT. (Smith-Hurd)(Supp. 1975).

²⁶⁰ MASS. GEN. LAWS ch. 265 (Supp. 1975).

²⁶¹ MISS. CODE ANN. § 97-3-69 (Supp. 1975)(female victim's testimony must be corroborated).

²⁶² N.Y. PENAL LAW § 130.16 (McKinney)(corroboration always required).

²⁶³ P.R. LAWS ANN. tit. 33 (1969).

²⁶⁴ OHIO REV. CODE ANN. § 2907 (Anderson 1975)(corroboration required for offense of sexual imposition).

²⁶⁵ V.I. CODE ANN. tit. 14 § 1706 (1964)(Supp. 1974) (corroboration of every element required).

²⁶⁶ *Territory v. Hayes*, 43 Hawaii 58, 62 (1958).

²⁶⁷ *State v. Garza*, 187 Neb. 407, 191 N.W.2d 454, 457 (1971).

²⁶⁸ *State v. Baba*, 56 N.M. 236, 242 P.2d 1002 (1952).

²⁶⁹ *United States v. Jenkins*, 436 F.2d 140, 142 (D.C. Cir. 1970).

²⁷⁰ SIR. MATTHEW HALE, *HISTORIA PLACITORUM CORONAE*, 635 (1736).

²⁷¹ *La Grand*, *supra* note 171, at 931; Geis, *Lord Hale, Witches and Rape*, 5 BRIT. J.L. & Soc'y 26 (1978); S. BROWNMILLER, *supra* note 1, at 413, 414; *People v. Rincon-Pineda*, 14

Rape is thought to be the most under-reported of all violent crimes with estimated reporting rates ranging from 20 to 40 percent.²⁷² Those who do report must be prepared to withstand the stigma, and humiliation associated with being a rape victim. They must be prepared to undergo physical examinations by unfamiliar doctors, and intense questioning by police, crown or district attorneys, defense lawyers and judges. Under-reporting, designation of reported cases as unfounded,²⁷³ and a lack of physical evidence (often characteristic of the crime of rape)²⁷⁴ are all factors which reduce the number of fully presented rape cases. Rape is clearly not "an accusation easily to be made" both in terms of the emotional effects on the complainant, and in terms of the likelihood that charges will be brought. As Susan Brownmiller commented, rape, in contrast to other crimes, "leaves no corpus delicti, leaves no recoverable physical goods, and may leave no sight of physical damage."²⁷⁵

Lord Hale accurately described rape as a crime that was "hard to be proved." The proof required is often intangible, and there are rarely witnesses to the offense.²⁷⁶ Whether the act is criminal may depend more on the intent of the parties than the "nature of the act itself."²⁷⁷ Lord Hale's belief is further supported by statistics which show that rape is one of the easiest charges to defend against. The fear that innocent men will be convicted of rape has led the legal system to develop a number of safeguards, including the requirement of corroboration. The result has been that rape has the lowest conviction rate of any violent crime.²⁷⁸

In addition to Lord Hale, two 20th century legal scholars have been widely quoted in support of the corroboration requirement. Both Glanville Williams and John Henry Wigmore advocate that the psychology of women supports the need for a corroboration requirement. Glanville Williams, in a 1962 article, stated that "sexual cases are particularly subject to the danger of deliberately false charges, resulting from sexual neurosis, phantasy, jealousy, spite, or simply a girl's refusal to admit

Cal. 3d 864, 538 P.2d 247 (Calif. S. Ct. 1975).

²⁷² Le Grand, *supra* note 173, at 921; L. CLARK & D. LEWIS, *supra* note 1, at 57.

²⁷³ "It is important to understand, however, that police classification of a case as unfounded does not always mean that the police do not believe that a rape has occurred. More frequently, the police use the "unfounded" classification screen out cases which will be difficult to prosecute." L. CLARK & D. LEWIS, *supra* note 1, at 58.

In 1977, of the 2,987 reported rapes in Canada, 1,101 were classified as unfounded. In the same year only 579 of the 5,857 indecent assaults against females were classified as unfounded.

²⁷⁴ S. BROWNMILLER, *supra* note 1, at 412-413.

²⁷⁵ *Id.*

²⁷⁶ COMPLAINT CREDIBILITY IN SEXUAL OFFENSE CASES: A SURVEY CHARACTER TESTIMONY AND PSYCHIATRIC EXPERTS, 64 J. CRIM. L. & CRIMINOLOGY 67, 68 (1973).

²⁷⁷ *Id.*

²⁷⁸ 15 F.B.I. UNIFORM CRIME REP. 116 (1973).

that she consented to an act of which she is now ashamed."²⁷⁹ Dean Wigmore also feared that women with psychological problems would bring false charges against men, and that in turn the jury, because of its bias, would not recognize their falsity. He based his conclusions on the opinions of a number of doctors whom he quoted extensively in his treatise on evidence. One such physician, Dr. Karl A. Menninger, wrote that rape fantasies were universal among women. He concluded that rape fantasies were universal among women. He concluded that although normal women would not confuse fantasy and reality, "it is so easy for some neurotic individuals to translate their fantasies into actual beliefs and memory falsifications that a safeguard should certainly be placed upon this type of criminal charge."²⁸⁰ Both Wigmore and Williams argued, however, that the corroboration requirement was a fairly crude response to the problem, and that a more scientific approach would be superior. Wigmore went so far as to suggest that "no judge should ever let a sex-offense charge go to the jury unless the female complainant's social history and mental make-up have been examined and testified by a qualified physician."²⁸¹ As an alternative, Williams suggested that complainants be subjected to a polygraph or lie detector test.²⁸² The importance of corroboration has been

Conviction Rate for the U.S. — 1973.

All Crimes	58.8%
Murder-Manslaughter	39.7%
Aggravated Assault	33.6%
Robbery	29.6%
Rape	28.5%

Statistics of Criminal and Other Offenses (1973) Table 1 at 230 (Statistics Canada, 1978)

Conviction Rates for Canada in 1973

All Crimes Against Person	7,035	4,691	66.7%
Rape	206	82	39.3%
	charges convictions		

(above figures do not include crimes committed in Quebec or Alberta)

As Loreene Clark and Debra Lewis concluded in their Toronto study, "the progress of rape case through the criminal justice system reflects a highly selective process of elimination." "Only a fraction of all rapes are reported; only a fraction of reported rapes are classified as founded; only a fraction of founded cases lead to an arrest; and only a fraction of suspects arrested are convicted." Using Metropolitan Toronto crime statistics for 1970, Clark and Lewis estimated that only seven per cent of all rapists are likely to be convicted. The conclusions of the study were based on an estimated reporting rate of 40%, a founding rate of 36%, and arrest rate of 75%, and a conviction rate of 51%. L. CLARK & D. LEWIS, *supra* note 1, at 57.

²⁷⁹ Williams, *Corroboration—Sexual Cases*, 1962, CRIM. L. REV. 662.

²⁸⁰ WIGMORE, 3A WIGMORE ON EVIDENCE § 924(a), at 744. (J. Chadbourn 1970), quoting a 1933 letter authored by Dr. Karl A. Menninger of the Menninger Clinic of Psychiatry and Neurology, Topeka, Kan.

²⁸¹ *Id.* at 737.

²⁸² Williams, *supra* note 278, at 664.

declining, however, without a corresponding increase in the use of alternative such as those suggested by Williams and Wigmore.

A proponent of the corroboration requirement commented in a Columbia Law Review article that where no other evidence exists besides the complainant's and the accused's testimony, the corroboration requirement automatically resolves the conflict in favor of the accused.²⁸³ The author supported this automatic resolution arguing that while the legislature could deal with the issues in their proper perspective, the judge and jury would be unfairly influenced by their emotional involvement in the case.²⁸⁴ Like other proponents of the corroboration requirement, the author placed little confidence in the ability of judges and juries to assess the credibility of witnesses, and to assess the probative value of other evidence in rape cases. A major study done on jury behavior by Harry Kalven and Hans Zeisel indicates, however, that it is unlikely the accused will be convicted "capriciously by an inflamed jury."²⁸⁵ In view of the results of this study it would appear that the traditional safeguards of the criminal trial are more than adequate to protect against such abuses.

In Lord Hale's time, the accused had neither the right to counsel, nor the right to compel witnesses in his defense. Innocence was not presumed and guilt was not required to be proven beyond a reasonable doubt. A cautious approach may have been reasonable in the 17th century, but 300 years of changes in criminal procedure have "sapped the instruction of its contemporary validity."²⁸⁶

Opponents of the corroboration requirement argue that the use of Lord Hale's words²⁸⁷ as a rationale for either the corroboration requirement, or for the mandatory jury instruction is no longer justifiable. Hale's statement has not been supported factually, has placed an undue burden on rape victims; and has resulted in unrealistically low conviction rates.

The view that the corroboration requirement is unnecessary, and discriminatory against rape victims has gained prominence, and has led to both Canadian and U.S. reform in recent years. In Canada, the mandatory warning provision (then section 142 of the Criminal Code)²⁸⁸ was repealed in 1975. The Honorable Ron Basford, Justice Minister, explained that the repeal of the section was intended to end what had been perceived as discriminatory treatment of female victims of rape and at-

²⁸³ Note, *Corroborating Charges of Rape*, 67 COLUM. L. REV. 1137, 1139 (1967).

²⁸⁴ *Id.*

²⁸⁵ Note, *People v. Rincon-Pineda: Rape Trials Depart the Seventeenth Century*, 11 TULSA L.J. 279, 283 (1975) referring to the study H. KALVEN AND H. ZEISEL, *THE AMERICAN JURY* (1966).

²⁸⁶ F.B.I. UNIFORM CRIME REP. (1973).

²⁸⁷ Criminal charges involving sexual conduct are no more easily made or harder to defend against than many other classes of charges, and those who make such accusations should be deemed no more suspect in credibility than any other class of complainants. *People v. Rincon-Pineda*, *supra* note 271.

²⁸⁸ Criminal Code, CAN. REV. STAT. ch. C-34, § 142 (1970).

tempted rape.²⁸⁹ Despite reservations expressed by a number of members of the House, the amendment passed.

In the 1976 case of *R. v. P.*,²⁹⁰ the court held that the common law doctrine requiring a jury warning in any sexual offense case was revived by the repeal of the statutory provision. Mr. Justice Hughes concluded that it was his duty to consider what evidence was capable of corroborating the complainant's testimony.²⁹¹ This position was contradicted in a British Columbia Court of Appeal case decided a year later. That court concluded that Parliament had clearly stated its intention to remove the corroboration warning requirement when it repealed section 142. Thus, judicial resurrection of the old common law rule would effectively frustrate Parliament's intent.²⁹² This holding was confirmed in the Ontario Court of Appeals in *R. v. Camp*,²⁹³ but the court made clear that although the common law doctrine was not revived, the judge's discretion to comment on the evidence was not restricted by the amendment²⁹⁴

The repeal of section 142 should result in less reliance on the artificial and needlessly complex tests which have developed since *R. v. Baskerville*.²⁹⁵ The comments of Mr. Justice Dubin in *Camp* indicate, however, that the repeal has not affected the judge's wide discretion to outline the risks of relying on the complainant's unsupported testimony, and the reasons why the jury should exercise caution before convicting the accused. Therefore, as long as the testimony of the rape victim is seen by judges in Canada as less credible than the testimony of victims of other crimes, the repeal of section 142 will be to some degree ineffectual. Bill C-53 provisions do little to change this situation.²⁹⁶

S.246.3(1) When an accused is charged . . . with an offense under section 246.1 (sexual assault) or 246.2 (aggravated sexual assault), no corroboration is required for a conviction and the judge shall not instruct the jury that it is unsafe to find the accused guilty in the absence of corroboration.

(2) Nothing in subsection (1) prevents a judge from commenting on the credibility of a witness in his charge to the jury.

The recent trend in the United States toward reform has resulted in the repeal of the statutory corroboration requirement in Iowa,²⁹⁷ and in Georgia.²⁹⁸ A number of other states have passed enactments which spe-

²⁸⁹ PARL. DEB., *supra* note 199.

²⁹⁰ *R. v. P.*, 32 C.C.C.(2d) 400 (1976).

²⁹¹ *Id.* at 407.

²⁹² *R. v. Firkins*, 37 C.C.C.(2d) 227, 233 (B.C.C.A. 1977).

²⁹³ *R. v. Camp*, 17 Ont. 2d 99, 108 (1977).

²⁹⁴ *Id.* at 109. While the warning is no longer mandatory, similar comments be made at the judge's discretion.

²⁹⁵ 2 K.B. 658 (1916).

²⁹⁶ Bill C-53, *supra* note 69.

²⁹⁷ IOWA CODE ANN. § 782.4 (West 1975) repealed by § 709.6 (West 1978).

²⁹⁸ GA. CODE ANN. § 26-2001 (1975) as amended by Acts 1978 (Supp. 1981).

cifically state that corroboration is not required.²⁹⁹ In Hawaii³⁰⁰ and New Mexico,³⁰¹ these enactments overruled the existing case law. In the District of Columbia, the judicial corroboration requirement was overruled in a 1977 case.³⁰²

Reform groups were not entirely successful in the State of New York, which until 1975 had the most strict corroboration requirement in the United States.³⁰³ Corroboration was required of "every material fact essential to constitute the crime,"³⁰⁴ specifically force, penetration, and the identity of the accused.³⁰⁵ Not surprisingly, New York's conviction rate for rape was extremely low. In 1969, for example, of the 1085 men charged with rape in New York, eighteen were convicted,³⁰⁶ a 1.7 percent conviction rate; the national conviction rate for rape at that time was 36 percent.³⁰⁷ Rather than abolish the requirement entirely, the New York state legislature compromised in 1975. The requirement of corroboration of force was retained but the requirement for the elements of penetration and identity was repealed. A requirement of "some other evidence pending . . . to establish that an attempt was made to engage the alleged victim in sexual intercourse . . . at the time of the alleged occurrence" was added.³⁰⁸ Corroboration is therefore required of the fact that the assault was of a sexual nature.³⁰⁹

In a small number of states, and in Canada, jury instructions based on the classic words of Lord Hale have been used. Since 1976, however, the use of the warning has been prohibited by statute in Minnesota, Pennsylvania, and Colorado.³¹⁰ In California prior to 1975, the following jury instruction was mandatory in sex offense cases:

A charge such as that made against the defendant in this case is one which is easily made and once made, difficult to defend against, even if

²⁹⁹ FLA. STAT. ANN. § 794.022(1)(West 1976). MICH. COMP. LAWS ANN. § 750.520h (1980 Supp.). MINN. STAT. ANN. § 609.347 (West. Supp. 1981). N.H. REV. STAT. ANN. § 632-A:6 (Supp. 1981). WASH. REV. CODE ANN. § 9A.44.020 (Supp. 1980).

³⁰⁰ HAWAII REV. STAT. § 707-742 (1976).

³⁰¹ N.M. STAT. ANN. § 30-9-15 (1978).

³⁰² U.S. v. Sheppard, 569 F.2d 114 (1977).

³⁰³ Bienen, *Rape II*, 3 WOMEN'S RTS. L. REP. 90, 137 (1977).

³⁰⁴ People v. Radunovic, 21 N.Y.2d 186, 190, 234 N.E.2d 212, 214, 287 N.Y.S.2d 33, 35 (1976).

³⁰⁵ Note, *supra* note 244, at 1368.

³⁰⁶ N.Y. Times, May 14, 1972, § 4 at 5, col. 5, *quoted in* Note, *supra* note 244 at 1370, n.38.

³⁰⁷ F.B.I. Statistics *quoted in* Note, *supra* note 244, at 1370 n.38.

³⁰⁸ Note, *supra* note 244, at 1368.

³⁰⁹ *Id.* at n.20.

³¹⁰ Bienen, *supra* note 302, at 100, 112, 125. COLO. REV. STAT. § 18-3-408 (1978)(Lord Hale's instruction prohibited); MINN. STAT. ANN. § 607, 347(5)(c)(d)(West Supp. 1981)(corroboration requirement and Lord Hale's warning prohibited); 18 PA. CONS. STAT. ANN. § 3106 (Purdon 1973) revised repealing compulsory Lord Hale's instruction (Purdon Supp. 1980).

the person accused is innocent. Therefore, the law requires that you examine the testimony of the female person named in the information with caution.³¹¹

In *People v. Rincon-Peneda*,³¹² the California Supreme Court studied FBI statistics relating to under-reporting, designation of claims as unfounded, and conviction rates;³¹³ as well as the classic jury study done by Kalven and Zeisel³¹⁴ and concluded that the requirement of a cautionary instruction was a "rule without reason."³¹⁵

In summary, the corroboration requirement in the United States and Canada evolved from common law and statutory enactment. The distinction between the two countries is that in the United States there was no uniformity on the issue of corroboration. A number of American states required corroboration, while others did not, or had a much broader interpretation concerning what qualified as corroborating evidence. Both countries have recently moved toward the elimination of the corroboration doctrine. However, until courts across Canada and the United States reject entirely the traditional views espoused by Lord Hale, the effect of these reforms may be more cosmetic than substantive. (Footnote³¹⁶ missing)

VII. REDEFINITION OF RAPE

Another significant aspect of recent rape law reform in Canada and the United States involves a major restructuring of the offense's definition. This change first surfaced in the United States in the 1975 criminal-sexual-conduct legislation of Michigan. The Michigan statute adopted an expanded definition of penetration, made the offense "sex-neutral", and provided for a "stair-casing" structure.³¹⁷ Rape and other sexual offenses were grouped into four degrees under the newly-named offense of "criminal sexual conduct". Force is required for all four degrees. The factors distinguishing the four degrees include bodily injury, multiplicity of offenders, use of weapon, age and physical and mental capabilities of the victim, relationship of the victim and actor, circumstances involving the commission of another felony, and penetration as opposed to mere sexual contact.³¹⁸

The Michigan legislation has served as an important model for much of the subsequent American rape legislation. Approximately 25 states

³¹¹ CAL. JURY INSTRS., Crim. No. 10.22 (3d ed. 1970) quoted in *People v. Rincon-Pineda*, *supra* note 271.

³¹² *People v. Rincon-Pineda*, *supra* note 270.

³¹³ F.B.I. UNIFORM CRIME REP. (1973).

³¹⁴ H. KALVEN AND H. ZEISEL, *THE AMERICAN JURY* (1966).

³¹⁵ 14 Cal. 3d at 822, 538 P.2d at 259, 123 Cal. Rptr. at 131.

³¹⁶ Note, *supra* note 285.

³¹⁷ MICH. COMP. LAWS ANN. §§ 750.520a-.5201 (Supp. 1980).

³¹⁸ *Id.*

have adopted a form of stair-casing, ranging from a two degree offense in Alabama and Delaware, to four in Connecticut, and six in Washington (three degrees of rape and three of statutory rape).³¹⁹ Other states, such as Utah, have retained the single offense, but provided for increased penalties under certain circumstances.³²⁰ Many reform states have also reduced sex offense penalties on the theory that the reduction will cause an increased conviction rate.³²¹ In some states the definition of the offense is sex-neutral, and includes oral and anal penetration, coerced fellatio and cunnilingus, and penetration by a foreign object. Particularly in these states, there has been a trend towards renaming the offense. Minnesota, Tennessee and South Carolina, renamed the offense "criminal sexual conduct" following the Michigan example.³²² Twelve states have adopted the term "sexual assault",³²³ while two other use the term "sexual battery"³²⁴ However, the majority of states, including states where wideranging reforms have resulted in a significant expansion of the definition of the offense,³²⁵ have retained the name "rape".

³¹⁹ ALA. CODE §§ 13A-6-61 to -64, -66, -67 (1978); ALASKA STAT. 11.41.510 to .430 (Supp. 1978); ARK. STAT. ANN. §§ 41-1804 to -1806, -1808, -1809 (1977); COLO. REV. STAT. § 18-3-402 to 404 (1978); CONN. GEN. STAT. ANN. §§ 53a-70, -71, -72a, -73a (West Supp. 1980); DEL. CODE ANN. tit. 11 §§ 763 to 766 (1979); HAWAII REV. STAT. §§ 707-730 to -732, -736, -737 (1976 & Supp. 1981); IOWA CODE ANN. §§ 709.2 to .4 (West 1979); KY. REV. STAT. ANN. §§ 510.040 to .060 (Baldwin 1975); MD. CRIM. LAW CODE ANN. §§ 462 to 464c (Supp. 1981); MICH. COMP. LAWS ANN. §§ 750.520b to .520e (Supp. 1980); MINN. STAT. ANN. §§ 609.342 to .345 (West Supp. 1981); MO. ANN. STAT. §§ 566.040, .050, .070, .080, .100, .110, .120 (Vernon 1979); NEB. REV. STAT. §§ 28-319, -320 (1979); N.Y. PENAL LAW §§ 130.25, .30, .35, .35, .55, .60, .65 (McKinney 1975); N.C. GEN. STAT. §§ 14-27.2 to .6 (Adv. Leg. Service 1979); TENN. CODE ANN. §§ 39-3703 to -3706 (Supp. 1981); V.I. CODE ANN. tit. 14, §§ 1701 to 1703 (1964 & Supp. 1980). WASH. REV. CODE ANN. §§ 9A.44.010 to .090 (Supp. 1980). W. VA. CODE §§ 61-8B-3 to -8 (1977); WIS. STAT. ANN. §§ 940.225(1), (2), (3), (3m) (West Supp. 1981); WYO. STAT. § 6-4-302 to -306 (1977).

³²⁰ UTAH CODE ANN. §§ 76-5-402, -405 (1978 & Supp. 1981).

³²¹ Bienen, *supra* note 183, at 173.

³²² MINN. STAT. ANN. §§ 609.341 to .345 (West Supp. 1981); S.C. CODE ANN. §§ 16-3-651 to -655 (Law Co-op. Supp. 1981); TENN. CODE ANN. §§ 39.3701 to 3710 (Supp. 1981).

³²³ ALASKA STAT. §§ 11.51.410 to .430 (Supp. 1978); ARIZ. REV. § 13-1406 (1978); COLO. REV. STAT. §§ 18-3-4-2 to 404 (1978); NEB. REV. STAT. §§ 28-319, -320 (1979); NEW REV. STAT. § 200.366 (1979); N.H. REV. STAT. ANN. §§ 632-A:2 to A:4 (Supp. 1981); N.J. STAT. ANN. § 2C:14-2 (West Pamph. 1981); VT. STAT. ANN. tit. 13 §§ 3252, 3253 (Supp. 1981); W. VA. CODE §§ 61-8B-# to -5 (1977); WIS. STAT. ANN. § 940.225(1) to (3m) (West Supp. 1981); WYO. STAT. §§ 6-4-302 to -305 (1977).

³²⁴ FLA. STAT. ANN. § 794.011 (West. 1976); S.C. CODE ANN. § 16-3-651(h) (Law. Co-op. Supp. 1981).

³²⁵ ALA. CODE §§ 13A-6-61, -62 (1978); ARK. STAT. ANN. CAL. PENAL CODE § 261 (West 1970 & Supp. 1979); DEL. CODE tit. 11, §§ 763, 764 (1979); D.C. CODE ENCYCL. § 22-2801 (West 1967); GA. CODE ANN. § 26-2001, -2018 (1978 & Supp. 1981); HAWAII REV. STAT. §§ 707-730 to 732 (1976 & Supp. 1981); IDAHO CODE § 18-6101 (1979); ILL. ANN. STAT. ch. 38, § 11-1 (Smith-Hurd 1979); IND. CODE ANN. § 35-42-5-1 (West 1978); KAN. STAT. ANN. § 21-3502 (1974 & Supp. 1978); LA. REV. STAT. ANN. §§ 14:4 to :43 (West Supp. 1981); ME. REV. STAT. ANN. tit. 17A § 252 (Pamph. 1981); MD. CRIM. LAW CODE ANN. §§ 462, 463 (1976 & Supp. 1981); MASS. GEN. LAWS ANN. ch. 265 §§ 22, 23 (West Supp. 1980); MISS. CODE ANN.

In Canada, the provisions of proposed bill C-53³²⁶ follow the Michigan lead to a limited degree. The bill's enactment will replace the offenses of rape and indecent assault with the offenses of sexual assault and aggravated sexual assault. The degree of physical harm sustained by the victim and the use of a weapon by the accused will be the only distinguishing factors. Both offenses will be sex-neutral and penetration will no longer be required. Although the maximum penalty for aggravated sexual assault will remain life imprisonment, the penalty for sexual assault will be reduced to ten years. The offense of sexual assault will encompass criminal activity currently defined as: rape with a maximum penalty of life; indecent assault against a female with a maximum penalty of five years.

The legislative intent behind restructuring and renaming the offense is to secure more convictions, and reduce the stigma suffered by victims of rape. It is thought that the stair-casing feature will result in more convictions, while renaming the offense will remove some of the guilt and humiliation that society has traditionally associated with the crime of rape. Preliminary indications, based on an examination of the Michigan experience, are that rape reporting, and the number of convictions have in fact increased.³²⁷ It is difficult to know, however, whether there is a real causal relationship between the amendments and these results.

Some observers have suggested that the stair-casing and expanded definition of penetration have been the important factors contributing to the increase in reporting and convictions, whereas the renaming of the offense has been largely irrelevant.³²⁸ The proposed Canadian legislation is unlikely to have such a significant impact since its stair-casing feature is much less developed than Michigan's; the name change is seen as the prominent area of reform. Although, it is premature, to predict what impact these structural and definitional changes will have, the future will allow a full comparative legal analysis of these various American amendments and the Canadian experience.

§§ 97-3-65, -67 (Supp. 1981); Mo. ANN. STAT. §§ 566.030 (Vernon 1979); N.Y. PENAL LAW §§ 130.25, .30, .35 (McKinney 1975); N.C. GEN. STAT. §§ 14-27.2, .3 (Adv. Leg. Service 1979); OR. REV. STAT. §§ 163.355 to .375 (1979); PA. CONS. STAT. ANN. §§ 3121, 3122 (Purdon 1973 & Supp. 1980); P.R. LAWS ANN. tit. 33, §§ 4061 (Supp. 1981); S.D. CODIFIED LAWS ANN. § 22-22-1 (Supp. 1981); TEX. PENAL CODE ANN. §§ 21.02, .03 (Vernon 1974 & Supp. 1981); UTAH CODE ANN. §§ 75-5-402, -405 (1978 & Supp. 1981); V.I. CODE ANN. tit. 14 §§ 1701 to 1703 (1964 & Supp. 1980); VA. CODE § 18.2-61 (Supp. 1981); WASH. REV. CODE ANN. §§ 9A.44.040 to .090 (Supp. 1980).

³²⁶ See bill C-53, *supra* note 69.

³²⁷ INSTITUTE FOR SOCIAL RESEARCH, LAW REFORM IN THE PREVENTION AND TREATMENT OF RAPE: PRELIMINARY REPORT (University of Michigan 1979).

³²⁸ Interviews with Virginia Nordby, former Professor of Law, University of Michigan, Ann Arbor Michigan, August 8, 1980; and William F. Delhey, District Attorney, Ann Arbor, Michigan, July 1980.

VII. CONCLUSION

A comparative study of Canadian and American rape law indicates many historical and present-day similarities and dissimilarities. Relying upon the early English jurisprudence, both countries codified a spousal exemption in the 19th century, and have only recently begun to remove this immunity through statutory reform. Although historically, marked differences exist between the countries in the adoption of the force and resistance standards in the United States and the consent standard in Canada, recent reforms have moved the countries closer together on these issues. The disparate legal positions on the defense of mistake of fact may have eliminated this distinction in practice.

The doctrine of corroboration also illustrates many similarities, although corroboration requirements have always been less uniform in the United States than in Canada, with some states abandoning the requirement and others broadening the definition of corroborative evidence. In Canada, while corroborative evidence has not been required, the mandatory jury instruction has had the same practical effect.

The position of the two countries on the admissibility of evidence of the prior sexual history of the complainant has been, and continues to be, somewhat different. Traditionally the American courts are more reluctant to admit such evidence than their Canadian counterparts, and the direction of recent legislative reforms have continued this pattern. Both countries, however, are experiencing a recent round of legislative reform to redefine and to restructure the offense of rape, as demonstrated by the Michigan legislation, and by the proposed Canadian bill C-53. Certainly the directions for reform are similar in both countries, and continued comparative analysis of the effects of this reform will provide a fruitful source of information for the future development of the law of rape in both countries.