

The Rape Corroboration Requirement: Repeal Not Reform

Yielding to sustained criticism from feminists¹ and prosecutors,² New York State recently adopted legislation modifying the requirement that the testimony of a rape victim must be supported by additional evidence to sustain a conviction.³ Critics had attacked this so-called corroboration requirement⁴ as imposing a sexually discriminatory rule which severely inhibited convictions for the offense of rape.⁵ Although these groups had pressed for complete repeal of the requirement, the new measure was a compromise which retained significant portions of the old corroboration rule.⁶

The retention of a modified rule in New York, and the recent adoption of similar statutes by other states,⁷ are signs of the continuing vitality of the corroboration requirement. In these jurisdictions, the word of a rape victim must be supplemented by the testimony of other witnesses or by circumstantial evidence to sustain the prosecution's case. In these same jurisdictions, and throughout the country, the word of the victim of a robbery, assault, or any other crime may alone constitute sufficient evidence to sustain a conviction.

Criticism and discussion of the corroboration rule have been common both in the popular and legal press.⁸ None of these articles, however,

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

2. See, e.g., Ludwig, *The Case for Repeal of the Sex Corroboration Requirement in New York*, 36 BROOKLYN L. REV. 378 (1970).

3. N.Y. Times, May 25, 1972, at 39, col. 2.

4. Corroboration of rape may be defined as evidence which adds greater credence to the victim's own testimony regarding the criminal act. Although the statutory language varies from state to state, the crime of forcible rape is generally defined as the sexual penetration by a male of a female, not his wife, without her consent. See, e.g., MODEL PENAL CODE § 213.1(1) (Proposed Official Draft 1962). The elements of the offense, then, are penetration, force (or absence of consent), and identity of the accused. The crime of child rape (or so-called statutory rape) is defined similarly except that force is not an element. See, e.g., N.Y. PEN. CODE §§ 130.25, 130.30, 130.35(3) (McKinney 1967).

5. See note 38 *infra*.

6. Burton B. Roberts, president of the New York state District Attorneys Association, which had pushed for reform of the corroboration law, described the new act as a compromise between the earlier law, said to be the strictest in the country, and total abolition. 167 N.Y.L.J., May 10, 1972, at 1, col. 3. See p. 1368 *infra* for comparison of the new law with its predecessor.

7. See p. 1372 and note 52 *infra*.

8. See, e.g., notes 1-2 *supra*; Younger, *The Requirement of Corroboration in Prosecutions for Sex Offenses in New York*, 40 FORDHAM L. REV. 263 (1971); Note, *Corroborating Charges of Rape*, 67 COLUM. L. REV. 1137 (1967).

Some women have gone beyond recommending repeal of the corroboration requirement to advocate redefinition of the crime of rape itself. Arguing that rape and other

has dealt at any length with the justifications for the corroboration requirement—factors that are thought to make a rape charge different enough from an ordinary criminal case to warrant a special rule of evidence.

This Note will argue that such factors do not justify the corroboration rule, or other categorical rules of evidence establishing special requirements for rape prosecutions. It will suggest that the credibility of testimony from rape victims be left to juries, subject to the discretion of trial judges to intervene through directed verdicts or comments on the evidence. The Note will first summarize the history of the rule and its prevalence, substance, and effect in American jurisdictions. Second, it will systematically examine the premises which are considered justifications for the corroboration rule. Third, it will evaluate the need for the corroboration requirement in view of the traditional legal safeguards against false convictions. Fourth, it will critique possible alternatives to and modifications of the corroboration rule.

I. The Corroboration Requirement—Its History, Substance and Effect

A. *History and Prevalence*

Statements in the case law to the contrary,⁹ Wigmore's research has made it clear that the corroboration requirement for charges of rape did not exist in the common law.¹⁰ The common law made but one exception to the doctrine that the evidence of one witness may sustain a conviction, namely, the rule that the testimony of one witness, without corroborating circumstances, is insufficient to sustain a conviction for perjury.¹¹ In prosecutions for rape and, in fact, for all sexual offenses committed upon women, the common law did not require corroboration.¹²

sexual offenses are enshrouded in sexual myths, they contend that these crimes should be recognized for what they are: aggravated physical assaults. Forcible rape, for example, would be defined as sexual intercourse without the consent of one of the parties and made, under New York law, an assault in the first degree, comparable to causing serious physical injury by means of a deadly weapon. *See* Letter to the Editor from Clinical Program in Women's Rights, N.Y.U. School of Law, N.Y. Times, Feb. 27, 1972, § 6 (Magazine), at 26.

9. *See, e.g.*, *People v. Friedman*, 139 App. Div. 795, 796, 124 N.Y.S. 521, 522 (2d Dep't 1910).

10. *See* 7 J. WIGMORE, EVIDENCE § 2061, at 342 (3d ed. 1940).

11. *Id.* § 2040(a), at 273. The rule requiring two witnesses to prove a charge of treason was not a common-law rule. Its beginnings may be traced to English statutes of the 1500's. *Id.* § 2036(a), at 263.

12. *Id.* § 2061, at 342.

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Nonetheless, seven jurisdictions have adopted the rule—five by statute¹³ and two by judicial decision¹⁴—that the testimony of a female complainant must be corroborated in order to sustain a conviction for rape.¹⁵ On the other hand, thirty-five states have no such requirement,¹⁶ and eight have taken an intermediate position, requiring only

13. GA. CODE ANN. § 26-2001 (rev. ed. 1971); IDAHO PEN. AND CORR. CODE § 18-907(4) (Supp. 1971); IOWA CODE ANN. § 782.4 (1950); Law of May 22, 1972, ch. 373, § 1, N.Y. Sess. Law News 195th Sess., June 10, 1972, at 811. V.I. CODE ANN. tit. 14, § 1706 (1964).

14. Only two jurisdictions, the District of Columbia and Nebraska, appear to apply a full corroboration requirement in the absence of legislation. See p. 1369 *infra*.

15. The historical bases of the statutory and case law rules vary among American jurisdictions imposing a corroboration requirement. New York's statutory rule may be traced back as far as 1886, Law of June 15, 1886, ch. 663 § 1 [1886], N.Y. Laws 109th Sess. 953, and it has its roots in earlier statutes requiring corroboration of the female's testimony in charges of seduction under promise of marriage. See, e.g., Law of Mar. 22, 1848, ch. 111, § 1 [1848] N.Y. Laws 71st Sess. 148. Georgia's earlier common-law rule, the precursor of its present statutory rule, see note 13 *supra*, appears to have been adopted in the mistaken belief that it had been the prevailing rule in England. See *Davis v. State*, 120 Ga. 433, 435, 48 S.E. 180, 181 (1904). In other states the imposition of the requirement may be linked to the reversal of the common-law rule excluding parties to a lawsuit from testifying. See, e.g., *Mathews v. State*, 19 Neb. 320, 337, 27 N.W. 234, 237 (1886). Following this reversal, the courts could hear the defendant expressly deny the allegations of the complainant. At this time they adopted the rule that an accusation must be corroborated where the defendant denies the accusation of the complaining witness in a charge of rape. In still other states the requirement developed from the application to rape cases of the requirement that any conviction must be based upon sufficient evidence; this requirement became formalized over the course of decisions into a rule of law. In the District of Columbia, for example, *Kidwell v. United States*, 38 App. D.C. 566, 573 (1912), which noted that those decisions affirming a conviction on the testimony of the complainant all involved cases in which there was corroborating circumstantial evidence, later became cited for the proposition that corroboration of the testimony of the complainant was required in every case as a matter of law. See, e.g., *Calhoun v. United States*, 399 F.2d 999, 1001 (D.C. Cir. 1968).

16. Twenty-five of these states flatly reject the corroboration requirement. See *Boddie v. State*, 52 Ala. 395, 398 (1875); *Bakken v. State*, 489 P.2d 120, 127 (Alas. 1971); *Hodges v. State*, 210 Ark. 672, 673, 197 S.W.2d 52, 53 (1946); *People v. Stevenson*, 275 Cal. App. 2d 645, 650, 80 Cal. Rptr. 392, 395 (2d Dist., 5th Div. 1969), *cert. denied*, 397 U.S. 1014 (1970); *McQueary v. People*, 48 Colo. 214, 218-20, 110 P. 210, 212-13 (1910); *State v. Chuchelow*, 131 Conn. 82, 83, 37 A.2d 689 (1944) (*dictum*); *Wilson v. State*, 49 Del. 37, 58-59, 109 A.2d 381, 393 (1954) (*dictum*); *State v. Smith*, 249 So. 2d 16, 17 (Fla. 1971); *Yeary v. State*, — Ind. —, 273 N.E.2d 96, 97-98 (1971); *State v. Brown*, 85 Kns. 418, 421, 116 P. 508, 509 (1911); *Green v. State*, 243 Md. 75, 80, 220 A.2d 131, 135 (1966); *Commonwealth v. Bemis*, 242 Mass. 582, 585-86, 136 N.E. 597, 598 (1922); *People v. Inman*, 315 Mich. 456, 471-72, 24 N.W.2d 176, 182 (1946) (*dictum*); *Blade v. State*, 240 Miss. 183, 188, 126 So. 2d 278, 280 (1961) (*dictum*); *State v. Bouldin*, 153 Mont. 276, 284, 456 P.2d 830, 834 (1969); *State v. Diamond*, 50 Nev. 433, 437, 264 P. 697, 698 (1928); *State v. Garcia*, 83 N.J. Super. 345, 349-50, 199 A.2d 860, 862 (App. Div. 1964); *State v. Johnson*, 58 N.D. 832, 841, 227 N.W. 560, 564 (1929); *State v. Fitzmaurice*, — Ore. —, 475 P.2d 426, 428 (1970); *State v. Wiggin*, 106 R.I. 69, 73-74, 256 A.2d 219, 221-22 (1969); *State v. Gatlin*, 208 S.C. 414, 418, 38 S.E.2d 238, 240 (1946) (*dictum*); *King v. State*, 210 Tenn. 150, 158-59, 357 S.W.2d 42, 45-46 (1962); *State v. Hodges*, 14 Utah 2d 197, 198-99, 381 P.2d 81, 82 (1963); *State v. Thomas*, 52 Wash. 2d 255, 256-57, 324 P.2d 821, 822 (1958) (*dictum*); *Tway v. State*, 7 Wyo. 74, 79, 50 P. 188, 189 (1897) (*dictum*).

The courts of ten other states, while often using the language of a corroboration requirement, seem to demand only that a conviction for rape be based upon sufficient evidence. See *Reidhead v. State*, 31 Ariz. 70, 71-72, 250 P. 366 (1926) (no corroboration necessary if testimony is reasonable, consistent and not inherently impossible or incredible); *People v. White*, 26 Ill. 2d 199, 202, 186 N.E.2d 351, 352 (1962) (same, if clear and convincing); *Robinson v. Commonwealth*, 459 S.W.2d 147, 150 (Ky. 1970) (same, if testimony is not contradictory, incredible or inherently improbable); *State v. Field*, 157 Me. 71, 76, 170 A.2d 167, 169 (1961) (same, if testimony is not contradictory, unreasonable or incredible); *Bryant v. State*, 478 P.2d 907, 909 (Okla. Cr. 1970) (same, if

limited corroboration¹⁷ or corroboration only under certain circumstances.¹⁸

B. Substance

Among the fifteen states with some form of requirement, 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. Under New York's earlier law, corroboration was required for each material element of the offense—force, penetration, and identity of the accused.¹⁹ The revised New York law removes the need for corroboration of identity, except for statutory rape, and leaves intact the requirement of corroboration of force. Corroboration of penetration is no longer required, but in its place is added a requirement of some "other evidence tending to . . . [e]stablish that an attempt was made to engage the alleged victim in sexual intercourse . . . at the time of the alleged occurrence"²⁰ The Dis-

testimony is clear and convincing and not inconsistent, incredible or contradictory); *Commonwealth v. Kretzitis*, 111 Pa. Super. 5, 9, 169 A. 417, 418 (1933) (assault with intent to commit rape; same, if testimony is not so indefinite, contradictory or unbelievable as to make it unsafe to rest conviction thereon); *State v. Dachtler*, 43 S.D. 407, 410-11, 179 N.W. 653 (1920) (same, if testimony is not unreliable or improbable and if complainant has not been fairly impeached); *Fogg v. Commonwealth*, 208 Va. 541, 546, 159 S.E.2d 616, 620 (1968) (same, if testimony is credible and if accused's guilt is believed by a jury beyond a reasonable doubt); *State v. Beacraft*, 126 W. Va. 895, 899-90, 30 S.E.2d 541, 544 (1944) (same, if testimony is not inherently incredible); *Gauthier v. State*, 28 Wis. 2d 412, 418, 137 N.W.2d 101, 105 (1965), *cert. denied*, 383 U.S. 916 (1966) (same, if testimony is convincing and not inherently impossible). In many of these states, courts have indicated that the uncorroborated testimony of the complainant, though sufficient to justify a conviction, will be scrutinized with great care. *See, e.g., State v. Field, supra* at 76, 170 A.2d at 169.

17. Two states require limited corroboration in the sense of facts and circumstances which coincide with and tend to establish the truth of the complainant's testimony. *See Territory v. Hayes*, 43 Hawaii 58, 62 (1958); *State v. Baca*, 56 N.M. 236, 241-42, 242 P.2d 1002, 1006 (1952).

18. Six states, through statutes or judicial decisions, have limited the application of the corroboration requirement to specific factual circumstances. *See MASS. GEN. LAWS* ch. 272, § 11 (1968) (applies to, *inter alia*, certain specified non-forcible rapes); *State v. Artez*, 286 Minn. 545, 546, 176 N.W.2d 81, 82 (1970) (corroboration important when complainant is minor); *MISS. CODE ANN.* § 2360 (1956) (applies only to specific statutory rape); *State v. Thomas*, 351 Mo. 804, 818, 174 S.W.2d 337, 345 (1943) (corroboration required in those cases where complainant is mature woman and case is weak); *TENN. CODE ANN.* § 39-3706 (Supp. 1971) (applies only to specific statutory rape); *Wright v. State*, 364 S.W.2d 384, 387 (Tex. Cr. App. 1963) (corroboration required only in those cases where a belated complaint was made).

19. *People v. Masse*, 5 N.Y.2d 217, 219, 156 N.E.2d 452, 453, 182 N.Y.S.2d 821, 822 (1959).

The Virgin Islands enforces a statutory corroboration requirement very similar to an earlier New York rule which also had required corroboration of each material element of the offense. *See Virgin Islands v. Carr*, 451 F.2d 652, 655-56 (3d Cir. 1971).

20. Law of May 22, 1972, ch. 373, § 1, N.Y. Sess. Law News 195th Sess., June 10, 1972, at 811. Apparently, then, there still must be some corroboration of the sexual nature of the assault; torn underwear, for example, probably would be sufficient, but facial

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trict of Columbia requires corroboration both of the *corpus delicti* (force and penetration) and of the identity of the accused, but the standard by which the adequacy of identifying evidence is determined is not as stringent as that required for proof of the offense itself.²¹ Nebraska requires corroboration, not necessarily of the particular act constituting rape, but of material facts and circumstances which tend to support the testimony of the complainant.²² Other states require only the most minimal corroboration of any particular aspect of the complainant's testimony.²³

No state requires direct eyewitness testimony to corroborate any element of the offense.²⁴ Force can be corroborated by physical signs of recent violent intercourse,²⁵ abandonment of articles of clothing by the victim,²⁶ the condition of her clothing,²⁷ her hysteria,²⁸ and in some states her prompt complaint to legal authorities.²⁹ Penetration is commonly corroborated by medical testimony based on a physical examination of the complainant,³⁰ but it also can be corroborated by pregnancy³¹ or the subsequent birth of a child.³² Identity of the accused can be corroborated by such evidence as his presence at the

bruises would not. It is not difficult to imagine many instances in which corroboration sufficient to meet this statutory standard simply will not be available.

Early newspaper accounts of the new law erroneously minimized the extent of the corroboration requirement retained. *See, e.g.,* N.Y. Times, May 14, 1972, § 4, at 5, col. 5.

21. *United States v. Jenkins*, 436 F.2d 140, 142 (D.C. Cir. 1970); *Allison v. United States*, 409 F.2d 445, 448 (D.C. Cir. 1969).

Illinois, in cases in which the victim's testimony is not "clear and convincing," *People v. White*, 26 Ill. 2d 199, 202, 186 N.E.2d 351, 352 (1962), requires corroboration solely of the *corpus delicti* and not of the identity of the accused. *People v. Price*, 96 Ill. App. 2d 86, 94, 238 N.E.2d 881, 884-85 (4th Dist. 1968). Iowa requires precisely the opposite—corroboration of identity but not of the *corpus delicti*. IOWA CODE ANN. § 782.4 (1950).

22. *State v. Garza*, 187 Neb. 407, 191 N.W.2d 454, 457 (1971). *But cf. Yancey v. State*, 202 Miss. 662, 668, 32 So. 2d 151, 152 (1947): "[C]orroboration must be, not merely of incidental details, but of the commission of the prohibited act."

23. *See, e.g., State v. Armijo*, 25 N.M. 666, 671, 187 P. 553, 555 (1920).

24. *See, e.g., Ewing v. United States*, 135 F.2d 633, 636 (D.C. Cir. 1942), *cert. denied*, 318 U.S. 776 (1942); *Fager v. State*, 22 Neb. 332, 333, 35 N.W. 195, 196 (1887).

25. *See, e.g., Prokop v. State*, 148 Neb. 582, 588, 28 N.W.2d 200, 203-04 (1947).

26. *See, e.g., United States v. Green*, 429 F.2d 754, 757 (D.C. Cir. 1970).

27. *See, e.g., id.*: *Hamilton v. State*, 169 Ga. 826, 826-27, 151 S.E. 805 (1930).

28. *See, e.g., Harper v. State*, 201 Ga. 10, 19, 39 S.E.2d 45 (1946); *In re F.*, 327 N.Y.S.2d 237, 239 (Fam. Ct., City of N.Y. 1971).

29. *See, e.g., Stevens v. State*, 222 Ga. 603, 604, 151 S.E.2d 127, 128 (1966); *People v. Chambers*, 127 Ill. App. 2d 215, 222, 262 N.E.2d 170, 174 (1st Dist., 2d Div. 1970). *Contra* *People v. Carey*, 223 N.Y. 519, 520, 119 N.E. 83 (1918).

30. *See, e.g., People v. Masse*, 5 N.Y.2d 217, 219, 156 N.E.2d 452, 453, 182 N.Y.S.2d 821, 823 (1959); *Ewing v. United States*, 135 F.2d 633, 636 (D.C. Cir. 1942), *cert. denied*, 318 U.S. 776 (1942).

31. *See, e.g., People v. Haischer*, 81 App. Div. 559, 561, 81 N.Y.S. 79, 81 (4th Dep't 1903).

32. *See, e.g., State v. Mason*, 41 Idaho 506, 510, 239 P. 733, 734 (1925).

scene of the crime,³³ his opportunity to commit the crime,³⁴ or the victim's verifiable recollection of his possessions at the scene of the crime.³⁵ Any one or all of these three elements of a forcible rape offense also can be corroborated by admissions of the defendant.³⁶ Because of the multiplicity of legal rules among states, any attempt to generalize extensively is, to quote Wigmore, a "waste of . . . time."³⁷

C. Effect

In those states where a corroboration requirement has been enforced strictly, there has been at least one obvious effect—a comparatively low rate of conviction for rape.³⁸ The reasons for this phenomenon are clear. "The nature of the crime is such . . . that eyewitnesses seldom are available."³⁹ In many instances of so-called "dark-alley" rapes, even

33. See, e.g., *Ewing v. United States*, 135 F.2d 633, 636 (D.C. Cir. 1942), cert. denied, 318 U.S. 776 (1942).

34. See, e.g., *State v. Fehr*, 45 S.D. 634, 638-39, 189 N.W. 942, 944 (1922). *Contra State v. Kelly*, 249 Iowa 1219, 1224-25, 91 N.W.2d 562, 564-66 (1958).

35. See, e.g., *Carter v. United States*, 427 F.2d 619, 621-22, 624 (D.C. Cir. 1970); *People v. Linzy*, 327 N.Y.S.2d 267, 268 (Sup. Ct. App. Div. 3d Dep't 1971).

36. See, e.g., *People v. Yannucci*, 283 N.Y. 546, 550, 29 N.E.2d 185, 186 (1940).

37. 7 J. WIGMORE, *supra* note 10, § 2062, at 356.

38. Under New York's earlier corroboration statute, for example, there were 1085 arrests for rape in New York City in 1969 and a mere 18 convictions. *N.Y. Times*, May 14, 1972, § 4, at 5, col. 5. The corroboration rule in New York would appear to have had an enormously negative effect upon the conviction rate. See Ludwig, *supra* note 2, at 378, 386.

However, empirical data furnished by the Federal Bureau of Investigation suggests that the corroboration requirement, as enforced in three states, has a much smaller effect upon the conviction rate. The table below compares for 1970 the United States as a whole with the three states which enforce a corroboration requirement in terms of the number of rape offenses, the number of adults prosecuted per 100 offenses and the outcome of the trials. (Information was not available for the District of Columbia, New York or the Virgin Islands. Idaho's statutory requirement did not take effect until January 1, 1972.)

	Number of offenses	Adults prosecuted per 100 offenses	Guilty of rape per 100 trials	Guilty of lesser offense per 100 trials	Acquittals or dismissals per 100 trials
Total U.S.	37,273	28.8	36.1	18.4	46.5
Georgia	740	55.3	52.2	7.3	40.5
Iowa	175	53.9	43.6	22.3	34.1
Nebraska	138	23.1	28.1	18.7	53.2

Data derived from information contained in letter from Federal Bureau of Investigation to *Yale Law Journal*, May 15, 1972.

Curiously, the percentage of adult prosecutions and the percentage of rape convictions were actually well above the national average in Georgia and Iowa, though they were below it in Nebraska. The higher conviction rates, relative to total offenses as well as to trials, in Georgia and Iowa cannot be explained by their enforcement of a corroboration requirement. It may be that these states have a conviction rate above the national average in similar crimes; or they may place greater emphasis by police and prosecutors on rape cases. Such explanations, however, are purely conjectural. In any event, repeal of the corroboration rule in these two states would probably not affect the conviction rate in a manner as dramatic as would elimination of it in New York.

39. *Stapleman v. State*, 150 Neb. 460, 464, 34 N.W.2d 907, 910 (1948). This statement is borne out by an exhaustive empirical study of American jury trials which found that the prosecution had eye-witness testimony, in addition to that of the victim, in only four per cent of the rape cases. H. KALVEN & H. ZEISEL, *THE AMERICAN JURY* 142 (1966).

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circumstantial evidence corroborating the complainant's identification of the accused is not likely to be available.⁴⁰ Such outdoor rapes also lack the broken furniture that often serves as corroboration of force in indoor rapes.⁴¹ Frequently there is no circumstantial physical corroboration for the simple reason that no physical force was employed in the rape.⁴² Menachem Amir's recent study of 646 forcible rapes reveals that many women, when confronted with a weapon-wielding assailant, make the sensible decision not to resist physically.⁴³ These women will lack the bruises and torn clothing that would otherwise corroborate the assailant's use of force.⁴⁴ Likewise, most women douche after assault.⁴⁵ As a result, medical examination will rarely reveal the presence of sperm in the victim's vaginal secretions, and the possibility of medical corroboration of penetration diminishes.⁴⁶ For all these reasons the corroboration requirement will often virtually bar successful prosecution.

The corroboration requirement thus has an obvious potential for discriminatory effect. The crime of rape is unique among criminal offenses because it always involves a female complainant and a male defendant.⁴⁷ For this reason it has been suggested that the extra burden of corroboration may be an instance of the law's unequal treatment of women.⁴⁸ In rebuttal, others have argued that the corroboration requirement is not antifeminist since it applies also to sodomy cases,

40. See, e.g., *In re F.*, 327 N.Y.S.2d 237, 238-39 (Fam. Ct., City of N.Y. 1971) in which charges of attempted rape and oral sodomy were dismissed for lack of corroboration of identification.

41. See, e.g., *United States v. Huff*, 442 F.2d 885, 888 (D.C. Cir. 1971), in which the court held that evidence that the apartment door had been forced open and that the furniture had been disarranged corroborated the complainant's testimony that she had been raped.

42. M. AMIR, *PATTERNS IN FORCIBLE RAPE* 155 (1971), notes that there was an absence of use of physical force by the assailant in nearly fifteen per cent of the rapes studied.

43. *Id.* at 169.

44. See p. 1369 *supra*.

45. Graves & Francisco, *Medicolegal Aspects of Rape*, 4 *MED. ASPECTS OF HUMAN SEXUALITY*, April 1970, at 109, 116.

46. *Id.* However, since ejaculation is not a necessary element in a rape offense, see, e.g., ILL. STAT. ANN. ch. 38, § 11-1(b) (1972), medical testimony concerning signs of violent sexual intercourse still can corroborate penetration. See, e.g., *People v. Masse*, 5 N.Y.2d 217, 219, 156 N.E.2d 452, 453, 182 N.Y.S.2d 821, 823 (1959).

47. The sexual element of a rape also gives it a distinctive characteristic. Some victims, however, are more upset over the beating that accompanied the rape, *The Story of Maxwell Kent—Rapist*, *Washington Post*, June 18, 1967, § C, at 1, col. 4, or even over the theft of a purse or other personal property, J. MACDONALD, *RAPE: OFFENDERS AND THEIR VICTIMS* 96 (1971), than over the rape itself.

48. Younger, *supra* note 8, at 276 n.105. This sexist aspect may even raise constitutional issues. New York's revised corroboration law is thought by some to be a denial to women of equal protection of the laws; the contention is that women are not getting the same deterrent effect from the law as men. See *N.Y. Times*, May 14, 1972, § 4, at 5, col. 5.

which may involve male victims, as well as to rape cases.⁴⁰ Nonetheless, the overwhelming majority of such "sex crimes" involve female victims and male assailants⁵⁰ so the abstract consistency of treatment by no means establishes sexual impartiality of a corroboration rule in practice.

As a result of its negative effect on successful prosecutions for rape, as well as its implied mistrust of one form of female testimony, the corroboration requirement has been criticized by some courts.⁵¹ Yet, within the past four years at least two states have adopted or substantially broadened statutes preventing a man from being convicted for rape on the uncorroborated testimony of a woman.⁵² The recent statutory revision in New York,⁵³ rather than representing a counter trend, should be viewed as a tactical retreat from an extreme form of the corroboration requirement which had made convictions for rape virtually unobtainable.⁵⁴

49. See Letter to the Editor from J.F. Lisa, N.Y. State Assemblyman, N.Y. Times, Feb. 27, 1972, § 6 (Magazine), at 24.

Most states do apply the same corroboration requirement to sodomy charges as to rape charges. Statutory corroboration requirements for rape also apply to sodomy in Idaho and New York, but they do not in Georgia, Iowa, Massachusetts, Mississippi and Tennessee. See note 13 *supra*. Both jurisdictions imposing a broad corroboration requirement in the absence of legislation (Nebraska and the District of Columbia) also apply it to sodomy charges. *Coltrane v. United States*, 418 F.2d 1131, 1134-35 (D.C. Cir. 1969); *State v. Narcisse*, 187 Neb. 209, 188 N.W.2d 715, 717 (1971). Of the remaining jurisdictions that impose a lesser corroboration requirement in cases of rape, most impose a similar one in cases of sodomy. See, e.g., *Hopper v. State*, 302 P.2d 162, 164-65 (Okla. Cr. App. 1956). *Contra Oliva v. State*, 459 S.W.2d 824, 825-26 (Tex. Cr. App. 1970).

50. H. KALVEN & H. ZEISEL, *supra* note 39, at 197, state that all 176 of the defendants in rape cases, all forty-eight of the incest defendants, and forty-five of the forty-six sodomy defendants involved in the study were male.

51. See, e.g., *Conoway v. State*, 171 Ga. 782, 785, 156 S.E. 664, 666 (1931); *In re F.*, 327 N.Y.S.2d 237, 239-43 (Fam. Ct., City of N.Y. 1971). See also 7 J. WIGMORE, *supra* note 10, § 2061, at 354-55.

52. Prior to 1969 Georgia had a statutory corroboration requirement for sexual intercourse with a female under the age of fourteen, Law of July 31, 1918, § 2 [1918] Ga. Acts 259-60, and a very similar common-law corroboration requirement for forcible rape. *Wright v. State*, 184 Ga. 62, 68-69, 190 S.E. 663, 667 (1937). In 1968 it adopted a new penal code, effective July 1, 1969, with a provision requiring corroboration in all rape cases, both statutory and forcible. GA. CODE ANN. § 26-2001 (rev. ed. 1971).

Prior to 1972 Idaho had a common-law rule permitting conviction of rape upon the uncorroborated testimony of the complainant only when the reputation of the complainant for chastity and truth was unimpeached and where the circumstances surrounding the commission of the offense were clearly corroborative of her statements. See, e.g., cases cited in *State v. Elsen*, 68 Idaho 50, 53-54, 187 P.2d 976, 977-78 (1947). Effective January 1, 1972, it adopted a new penal and correctional code incorporating the Model Penal Code's provision on corroboration, MODEL PENAL CODE § 213.6(6) (Proposed Official Draft 1962), into the new code, IDAHO PEN. AND CORR. CODE § 18-907(4) (1971).

A third state, Washington, is presently considering the adoption of a revised criminal code which includes a corroboration requirement. See REVISED WASHINGTON CRIMINAL CODE § 9A.44.010 (Proposed Draft, Dec. 3, 1970).

53. See p. 1368 *supra*.

54. See note 38 *supra*.

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II. Justifications for a Corroboration Requirement

The justifications propounded in favor of an exceptional corroboration requirement in charges of rape are threefold: first, the frequency of false charges of rape; second, the emotion raised in a jury by a charge of rape; and, third, the difficulty in disproving an accusation of rape.

A. Frequency of False Rape Charges

It is generally believed that false accusations of sex crimes in general, and rape in particular, are much more common than untrue charges of other crimes.⁵⁵ A number of different motives may prompt a deliberately falsified accusation of rape. A woman may consent to sexual intercourse with a man, then feel ashamed of herself and bitter at her partner, and bring charges of rape against him.⁵⁶ Or, she may have become pregnant and accuse an entirely innocent party for the purpose of shielding the man who actually caused her pregnancy.⁵⁷ A woman may falsify charges for the purpose of blackmail.⁵⁸ Or she may do so solely out of hatred or revenge,⁵⁹ or for notoriety.⁶⁰

55. Note, *Corroborating Charges of Rape*, *supra* note 8, at 1138. See Ploscowe, *Sex Offenses: The American Legal Context*, 25 LAW & CONTEMP. PROB. 217, 222-23 (1960), which advocates a requirement of corroboration in all sex offense charges because of the purported frequency of unfounded complaints.

56. "[Y]oung girls, like older females, sometimes concoct an untruthful story to conceal a lapse from virtue." *State v. Connelly*, 57 Minn. 482, 486, 59 N.W. 479, 481 (1894); Williams, *Corroboration—Sexual Cases*, 1962 CRIM. L. REV. 662.

57. A. HERZOG, *MEDICAL JURISPRUDENCE* 827 (1931); J. MACDONALD, *supra* note 47, at 211.

58. See, e.g., *Dunn v. State*, 127 Tenn. 267, 281, 154 S.W. 969, 972 (1913), in which the complainant testified:

that what she swore on the former trial was false; that she had already become a girl of bad character at the time the plaintiff in error had relations with her, and that she was induced to make false statements by her mother to enable the latter to force money from plaintiff in error, and also to break up the criminal relations existing between him and her sister Maggie; that is to separate them, so that her mother could obtain money by using Maggie as a lure for other men.

In *Martinez v. State*, 123 Tex. Cr. 572, 573, 59 S.W.2d 410 (1933), there was evidence introduced that the mother of the complainant had attempted to negotiate a settlement with the defendant in return for the dropping of charges.

Medical personnel are thought to be particularly vulnerable to such blackmail: Many accusations of rape have been made against physicians and dentists. Most of these are deliberate false charges for purposes of blackmail or collecting money by suit or settlement

A. HERZOG, *supra* note 57, at 845-46.

59. "The adage, 'Hell hath no fury like a woman scorned,' is frequently encountered in rape prosecutions." M. PLOSCOWE, *SEX AND THE LAW* 187 (1951). See also J. MACDONALD, *supra* note 47, at 210-11. See, e.g., *Shock v. State*, 200 Ind. 469, 469-70, 164 N.E. 625, 625-26 (1929); *State v. Anderson*, 272 Minn. 384, 385, 137 N.E.2d 781, 782 (1965).

60. Psychiatrists are inclined to relate this phenomenon [relating a rape which never took place] as a bit of testimony to the fact that for some women it is better to be raped than ignored. Geis, *Group Sexual Assaults*, 5 MED. ASPECTS OF HUMAN SEXUALITY, May, 1971, at 101, 109. See generally J. MACDONALD, *supra* note 47, at 209-31 for an exhaustive list of conscious motivations for false claims of rape.

There are several factors, however, which discourage accusations of rape, whatever their motive. For example, there are the stigma that attach to the victim of an incident culturally defined as sordid,⁶¹ and the humiliation caused by some forms of publicity associated with such charges.⁶² Also to be considered are the necessity of confronting the assailant⁶³ and the reluctance to face the barbs and insinuations of the defense attorney.⁶⁴ There is, in addition, the fear of retaliation from the accused rapist or his friends.⁶⁵ Finally, there is the deterrent effect of the existence of the corroboration requirement itself, at least to the extent that a potential complainant may be aware of it.

These disincentives are so powerful that many real victims of rape avoid reporting incidents. Statistics indicate that rape is "one of the most under-reported crimes . . ." ⁶⁶ The President's Commission on Law Enforcement and the Administration of Justice in 1967 estimated that forcible rapes exceeded by more than three and a half times the

61. Rape seems to arouse in most people a feeling of disgust, perhaps generated by the repressions surrounding aggressive sex; and the disgust may spread to the body of the victim who is somehow thought to be contaminated by the experience.

Note, *Forcible and Statutory Rape: An Exploration of the Operation and Objective of the Consent Standard*, 62 YALE L.J. 55, 73 (1952). See K. MILLET, *SEXUAL POLITICS* 44 (1970).

62. K. MILLET, *supra* note 61, at 44. See Toll, *Rape: Reliving the Horror Eases the Pain*, Chicago Tribune, Apr. 16, 1972, § 5, 2, col. 4, for a report of a forum on rape in Chicago. The humiliation of the rape experience was reflected in one woman's statement:

I would never say I was raped. I would always say I was attacked . . . Even talking about it now. I feel ashamed, as if I admit I did something wrong.

In some states this publicity is reduced by criminal statutes prohibiting the naming or identification of a victim of a rape or a similar sexual assault. See, e.g., FLA. STAT. ANN. § 794.03 (1965); GA. CODE ANN. § 26-9901 (rev. ed. 1971); WIS. STAT. ANN. § 942.02 (1958).

Women's descriptions of their rape experiences related at a "Speak-Out on Rape" organized by New York City women's groups in 1970 illustrated the humiliation which comes from simply reporting a rape to the police:

Police reactions described at the meeting were a sorry lot. Disbelief. Ridicule. Questioning along voyeuristic lines. Or just plain lack of interest.

Sheehy, *Nice Girls Don't Get Into Trouble*, 4 NEW YORK, Feb. 15, 1971, at 26, 28.

For an account of a typical rape situation as told by the victim to a journalist, see *The Story of Maxwell Kent—Rapist*, *supra* note 47, at 1, col. 1. Perhaps the most striking feature of this account is the callousness of the police toward the victim.

63. The embarrassment of the victim in relating the details of her assault in a public trial may be reduced with no harm to the accused by conducting the trial with less publicity than cases ordinarily are. For example, the trial may be held in the petit jury room rather than the larger court room. For discussion of this possibility, see *Dutton v. State*, 123 Md. 373, 387, 91 A. 417, 422-23 (1913).

64. See, e.g., Griffin, *Rape: The All-American Crime*, 10 RAMPARTS, Sept. 1971, at 26, 31-32, for a description of a particularly brutal defense examination of the sexual mores of the complainant in a rape case. But see Wigmore's suggestion that there be wide-open admissibility of evidence bearing on the complainant's moral and mental qualities. 3A J. WIGMORE, *EVIDENCE* § 924(b), at 747-48 (Chadbourn rev. ed. 1970). Such a rule would make testifying to a rape even more unpleasant than it is at present.

65. J. MACDONALD, *supra* note 47, at 27, 72-73.

66. FEDERAL BUREAU OF INVESTIGATION, *UNIFORM CRIME REPORTS* 1970 14 (1971).

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reported rate.⁶⁷ Other estimates of the percentage of rapes actually reported run as low as five per cent⁶⁸ or even lower.⁶⁹ Even if she reports the offense, a complaining witness may refuse to prosecute, in large part to avoid having to relive a traumatic and humiliating experience for the benefit of the judge and jury. A study in Detroit, for example, showed that in nearly thirty-three per cent of the rape offenses reported to the police, the complainant subsequently refused to prosecute her assailant, and charges had to be dropped.⁷⁰

It might be thought that the disincentives which cause such gross under-reporting do not deter those motivated to make false accusations. Perhaps motives such as blackmail or revenge are stronger than the desire to see one's assailant brought to justice and are more likely to overcome a woman's reluctance to face the humiliation and publicity that follow a report of rape. Such conjecture is impossible to disprove. On balance, however, there is strong reason to doubt that a large number of women will use a rape charge as a vehicle for blackmail or revenge.⁷¹ The number will almost certainly be so small that modern techniques of criminal investigation⁷² and traditional legal rules, other than the corroboration requirement, will effectively protect innocent defendants.⁷³ There is, moreover, no requirement for corroboration of other crimes, including physical assaults, which are equally subject to intentional falsification and lack many of the disincentives which discourage rape accusations. The possibility of deliberate falsification, alone, cannot justify the corroboration requirement as a special rule of evidence in rape cases.

67. PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND THE ADMINISTRATION OF JUSTICE: THE CHALLENGE OF CRIME IN A FREE SOCIETY 21 (1967).

68. W. Haines, quoted in Wittels, *What Can We Do About Sex Crimes*, 221 SATURDAY EVENING POST, Dec. 11, 1948, at 30, 31.

69. Cf. Kanin, *Sex Aggression by College Men*, 4 MED. ASPECTS OF HUMAN SEXUALITY, at 25, 29 (1970).

70. L. Laughlin, *The Disposition of Sex Complaints at the Level of Police Investigation* 6, 58 (unpublished master's thesis in Wayne State University Library 1950). See also J. MACDONALD, *supra* note 47, at 94-96.

71. A woman bent on blackmail or revenge also may choose a rape charge because of its relative ease of fabrication. Even if she stands a slim chance of success, in the sense of obtaining a conviction, the typically severe punishment for rape makes the stakes high, see p. 1381 *infra*, and an unsuccessful rape prosecution probably still exacts a greater toll in embarrassment from the defendant than would a trial for another criminal charge.

In estimating the frequency of these deliberate falsifications of rape, the "advantages" of a rape accusation must be balanced against its "disadvantages"—the embarrassment and publicity incident to a report of rape, see p. 1374 *supra*, and the difficulty in obtaining a conviction. See p. 1379 *infra*. Although weighing these imponderables is highly conjectural, it seems likely that a woman bent upon blackmail or revenge would be inclined to choose a more effective and less embarrassing tactic.

72. See generally J. MACDONALD, *supra* note 47 at 276-94.

73. See p. 1385 *infra*.

But false rape charges need not be deliberate. A false rape charge can be provoked "by a woman's honest and understandable confusion over what was done to her, or by whom."⁷⁴ Even if it be conceded that the reliability of a rape victim's testimony may be reduced by the shock of her experience, is her credibility so much more suspect than that of any other victim of a violent physical assault as to warrant a distinctive rule of evidence? Street crimes of all types can raise serious problems of identification; yet the law does not demand corroboration of the victim's testimony to sustain a conviction for them.

A more serious problem, however, is raised by the false rape charge rooted in pure fantasy.⁷⁵ A woman may convincingly represent a fantasized attack as an actual event.⁷⁶ Such charges may be relatively invulnerable to ordinary law enforcement investigation and to impeachment through cross-examination.⁷⁷

Many psychiatrists and physicians once considered fantasies of rape to be extremely common among women.⁷⁸ Dr. Karl A. Menninger has said that such fantasies are so common that they may be considered universal.⁷⁹ The most frequent explanation for these fantasies is that they represent "an unrealized wish or unconscious, deeply suppressed sex-longing or thwarting."⁸⁰ According to this theory, "the normal woman who has such a fantasy does not confuse it with reality, but it is . . . easy for some neurotic individuals to translate their fantasies into actual beliefs and memory falsifications"⁸¹

Perhaps the most carefully considered theory that purports to explain these fantasies has been propounded by the psychoanalyst Helene Deutsch. She assimilated rape fantasies to a theory of female masochism,⁸² a corollary to Freud's concept of "penis envy."⁸³ She contended that fantasies of violent sexual intercourse without consent are

74. Note, *Corroborating Charges of Rape*, *supra* note 8, at 1143.

75. See Note, *Forcible and Statutory Rape*, *supra* note 61, at 69; Williams, *supra* note 56, at 662. For accounts of rape charges based in fantasy, see sources quoted in 3A J. WIGMORE, *supra* note 64, § 924(a), at 736-46.

76. See 1 H. DEUTSCH, *THE PSYCHOLOGY OF WOMEN* 123-24, 255-56 (1944).

77. See Note, *Forcible and Statutory Rape*, *supra* note 61, at 69.

78. See, e.g., sources cited in 3A J. WIGMORE, *supra* note 64, § 924(a), at 736-46; M. GUTTMACHER & H. WEIHOFFEN, *PSYCHIATRY AND THE LAW* 375 (1952); W. OVERHOLSER, *THE PSYCHIATRIST AND THE LAW* 53 (1953).

79. K. Menninger, quoted in 3A J. WIGMORE, *supra* note 64, § 924(a), at 744.

80. W. Lorenz, quoted in *id.* 745-46. See also W. White, quoted in *id.* 745.

81. K. Menninger, quoted in *id.* 744.

82. See 1 H. DEUTSCH, *supra* note 76, at 239-78.

83. See generally S. FREUD, *Femininity*, in 22 *THE STANDARD EDITION OF THE COMPLETE PSYCHOLOGICAL WORKS OF SIGMUND FREUD* 112-35 (J. Strachey ed. & transl. 1964); *Female Sexuality*, in 21 *THE STANDARD EDITION OF THE COMPLETE PSYCHOLOGICAL WORKS OF SIGMUND FREUD* 225-43 (J. Strachey ed. and transl. 1961); *Some Psychological Consequences of the Anatomical Distinction Between the Sexes*, in 19 *id.* 248-58.

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a manifestation of the "attraction of suffering [that] is incomparably stronger for women than for men."⁸⁴ Because the theories of penis envy and female masochism are rooted in the physiology of women and hence are considered characteristic of "normal" female psychology, Deutsch's theory predicts a high frequency of rape fantasies, many of which become public accusations.⁸⁵

Deutsch's theory, however, has been largely discredited in recent years.⁸⁶ Some have criticized her, as well as Freud, for using clinical experience with abnormal patients to derive theories of normal female psychology.⁸⁷ Others have criticized her for failing to consider the social context in which women live.⁸⁸ The effect of any biological characteristic is very strongly conditioned, perhaps even dominated,⁸⁹ by the culture-complex in which the particular woman has developed. If these cultural factors are considered, and if today's culture is compared with that in which Freud and even Deutsch developed their theories, the incidence of female masochism very likely will be far less than it may ever have been in the past.⁹⁰

84. I H. DEUTSCH, *supra* note 76, at 274 (emphasis removed from original).

85. *See id.* 256.

86. For a thorough review of the literature regarding psychoanalytic theories of female development see S. Weisskopf, *The Psychoanalytic Theory of Female Development* (unpublished Ph.D. thesis in Harvard University Library 1972). Weisskopf concludes that the Freudian theory of female development is inadequate; it is based on critical assumptions which are not valid and employs certain important constructs for which there is no evidence. *Id.* 133, 150.

87. *See, e.g.,* K. HORNEY, *FEMININE PSYCHOLOGY* 215-17 (1967); K. MILLET, *supra* note 61, at 179; Weisstein, "*Kinder, Kuche, Kirche*" as *Scientific Law: Psychology Constructs the Female*, in *SISTERHOOD IS POWERFUL* 205, 209-13 (R. Morgan ed. 1970).

88. *See, e.g.,* K. HORNEY, *supra* note 87, at 229-33; K. MILLET, *supra* note 61, at 179, 187; C. THOMPSON, *PSYCHOANALYSIS: EVOLUTION AND DEVELOPMENT* 131 (1950); Weisstein, *supra* note 87, at 208-09, 213-18.

89. *See* Weisstein, *supra* note 87, at 209:

Compared to the influence of the social context within which a person lives, his or her history or "traits," as well as biological makeup may simply be random variations, "noise" superimposed on the true signal which can predict behavior.

90. Karen Horney, a neo-Freudian psychoanalyst, suggests several social factors which predispose to the appearance of female masochism:

1. Blocking of outlets for expansiveness and sexuality;
2. Restriction in the number of children, inasmuch as having and rearing children supplies the woman with various gratifying outlets (tenderness, achievement, self-esteem), and this becomes all the more important when having and rearing children is the measuring rod of social evaluation;
3. Estimation of women as beings who are, on the whole, inferior to men (insofar as it leads to a deterioration of female self-confidence);
4. Economic dependence of women on men or on family, inasmuch as it fosters an emotional adaptation in the way of emotional dependence;
5. Restriction of women to spheres of life that are built chiefly upon emotional bonds, such as family life, religion, or charity work;
6. Surplus of marriageable women, particularly when marriage offers the principal opportunity for sexual gratification, children, security, and social recognition.

K. HORNEY, *supra* note 87, at 230.

An analysis of these factors suggests that the frequency of occurrence of female masochism will decline as inhibitions on female sexual expression are lifted, as women

Thus, whatever may have been the former validity of the theory that female masochism will lead women to fantasize rape incidents, its currency today has been largely eroded, and will be increasingly eroded as women acquire social, legal and economic equality with men. Insofar as the corroboration requirement in rape cases has been justified by the danger of false rape charges brought by fantasizing women, it is linked to a psychological theory that fails to take into account the changing role of women in American society.

No doubt, a small number of women may fantasize rapes; but this fact alone is an insufficient basis for a rigid corroboration rule. Rather than create a general rule of evidence to protect potential defendants from a few psychotic complainants, such a problem can best be handled on an ad hoc basis by trial judges and reviewing courts as it is for other criminal charges.⁹¹

B. *Emotion Raised by a Charge of Rape*

The second explicit justification for a corroboration requirement in rape cases is the suspicion that in such cases the presumption of innocence to which a defendant is legally entitled is likely to give way to "the respect and sympathy naturally felt by any tribunal for a wronged female"⁹² This alleged danger of unfair prejudice against the defendant in a rape case has two elements. It is believed that "the heinousness of the offense" may transport "the judge and the jury with so much indignation that they are hastily carried to the conviction of the person accused"⁹³ Also, juries are thought to be "preinclined to believe a man guilty of any illicit sexual offense he may be charged with, and it seems to matter little what his previous reputation has been."⁹⁴

acquire legal, economic and educational equality with men, as the economic dependence of women on men and the family is lifted, as restrictions upon female employment and community involvement disappear, and as marriage and the family cease to be the exclusive foci of female life. Clara Thompson, another neo-Freudian psychoanalyst, argues further that many of these cultural changes have occurred and that, as a result, "a new type of woman is emerging, a woman . . . whose characteristics differ from those described by Freud." C. THOMPSON, *INTERPERSONAL PSYCHOANALYSIS* 238 (1964).

91. See pp. 1384-86 *infra*.

92. 3A J. WIGMORE, *supra* note 64, § 924(a), at 736.

93. 1 M. HALE, *PLEAS OF THE CROWN* 636 (1680). See *Davis v. State*, 120 Ga. 433, 435, 48 S.E. 180, 182 (1904):

When a charge of this sort [rape] is made, the people, and the jurors likewise, are apt to let their indignation get the better of their judgment and convict upon evidence which does not authorize it.

94. *Roberts v. State*, 106 Neb. 362, 367, 183 N.W. 555, 557 (1921). See *State v. Connelly*, 57 Minn. 482, 486, 59 N.W. 479, 481 (1894): "The crime [rape] is so abhorrent that, to some minds, to charge a person with it, raises a presumption of guilt."

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This second justification can be evaluated on the basis of existing empirical evidence. Are rape convictions, in fact, easier to obtain than convictions for other offenses? Do juries get swept away in a fit of passion and hastily convict men on the likely-sounding testimony of women who allege sexual assaults?

Kalven and Zeisel's exhaustive empirical study of criminal juries in America reveals that convictions for "non-aggravated rape"⁹⁵ are extraordinarily rare.⁹⁶ This same study shows that juries, in their efforts to acquit defendants of rape charges, have created a special extra-legal defense—contributory behavior on the part of the complainant.⁹⁷ When the jury perceives that the complainant somehow assumed the risk of rape,⁹⁸ it will attempt to find the defendant guilty of some lesser crime or, if this option is not available, acquit him totally.⁹⁹

The finding that rape convictions are difficult to obtain should be no surprise to experienced criminal attorneys. Rape trials are often heard before largely male juries¹⁰⁰ which are considered to be unsympathetic to the prosecution, especially in cases where the complainant and the defendant knew each other prior to the alleged rape.¹⁰¹ Thus, the existing evidence indicates that juries view rape charges

95. "Aggravated rape," a generic term of art used by Kalven and Zeisel, includes all cases in which there is evidence of extrinsic violence or in which there are several assailants or in which the defendant and the victim were complete strangers at the time of the event. "Simple rape" (which for purposes of clarity will be referred to as "non-aggravated rape" in this Note) includes all other rapes. H. KALVEN & H. ZEISEL, *supra* note 39, at 252.

96. The jury convicted defendants of rape in just three of the forty-two cases of non-aggravated rape studied by Kalven and Zeisel, whereas the judge would have convicted in twenty-two of these. *Id.* 253-54. The conviction rate is too low to be attributable to the corroboration requirement itself. *See* p. 1383 and note 124 *infra*.

97. *Id.* 249-54.

98. Assumption of risk took the form of such behavior as accompanying the defendant to his house or allowing him to accompany her to hers, joining the defendant at a beer-drinking party, or merely having given birth to an illegitimate child in the past. *Id.* 249-51.

99. *Id.* 254.

100. *See* statement by N.Y.C. District Attorney J. Litman, quoted in Lear, *supra* note 1, at 11. Some jurisdictions even allow women an absolute exemption which they must affirmatively request from jury service, based solely on sex. *See, e.g.,* GA. CODE ANN. § 59-124 (1965); KAN. GEN. STAT. §§ 43-116, 117 (1949); MO. CONST., Art. I, § 22(b); MCKINNEY'S CONSOL. N.Y. LAWS, c. 30, Judiciary Law § 507(7) (Supp. 1968); R.I. GEN. LAWS § 9-9-11 (1956); TENN. CODE ANN. §§ 22-101, 108 (1955).

No state prohibits women from service on juries altogether, Alabama's prohibition having been found unconstitutional in *White v. Crook*, 251 F. Supp. 401 (M.D. Ala. 1966). The issue of a statutory exclusion of women who do not volunteer for grand jury service recently was before the Supreme Court in *Alexander v. Louisiana*, 92 S. Ct. 1221 (1972), but the Court did not reach it, upsetting the conviction on other grounds. In a concurring opinion Justice Douglas did reach this issue; he would have held this exclusion to be a denial of the petitioner's right to a trial by an impartial jury drawn from a cross-section of the community. *Id.* at 1227-32.

101. *See* statement by N.Y.C. District Attorney J. Litman, quoted in Lear, *supra* note 1, at 11.

with extraordinary suspicion and rarely return convictions in the absence of aggravating circumstances, such as extrinsic violence.¹⁰²

In one instance, however, the danger of extreme emotions cannot be dismissed. This is the situation in which a black man has been accused of raping a white woman, and the case is heard before a predominately white jury. In such circumstances, several hundred black men have been convicted and executed,¹⁰³ particularly in the South.¹⁰⁴

Here, perhaps, there is some merit to the contention that the presumption of innocence may crumble under the rage of the jury. There are means more appropriate and effective¹⁰⁵ than the corroboration requirement, however, for dealing with these relatively infrequent cases.¹⁰⁶ Congress has long provided a criminal sanction for excluding blacks from jury service because of their race;¹⁰⁷ and a criminal conviction of a black cannot stand under the equal protection clause of the Fourteenth Amendment if it is based on an indictment of a grand jury¹⁰⁸ or a conviction by a petit jury¹⁰⁹ from which blacks were excluded by reason of their race. If the prejudice against the defendant

102. Rape defendants and their attorneys appear to be aware of this suspicion of juries toward accusations of rape. Kalven and Zeisel's study indicates that waivers of the right to a jury trial are relatively infrequent in rape cases. H. KALVEN & H. ZEISEL, *supra* note 39, at 29.

103. Of the 455 men executed for rape since 1930, 405 (89 per cent) were black. BUREAU OF PRISONS, NATIONAL PRISONER STATISTICS No. 45, CAPITAL PUNISHMENT 1930-1968, at 10-11 (1969).

104. See generally J. DOLLARD, *CASTE AND CLASS IN A SOUTHERN TOWN* 162-72 (3d ed. 1957), which discusses the attitudes of Southerners toward sexual relations between black men and white women.

Rape is, of course, an atrocious act to everyone in our society; to a [white?] southern man, when it is committed by a Negro on a white woman, it is in a class by itself and justifies the severest punishment.

Id. 164.

105. See H. LEE, *TO KILL A MOCKINGBIRD* 173-226 (1960), one of the best known fictional representations of a false rape charge brought by a white woman against a black man in a southern town. A corroboration requirement would not have aided the innocent defendant in this case since the alleged victim's testimony was substantially corroborated by that of her father, both as to the *corpus delicti* and as to the identity of the accused.

106. M. AMIR, *supra* note 42, at 44, reports that in the 646 rape events studied, seventy-seven per cent involved a black victim and a black offender; eighteen per cent, a white victim and a white offender; four per cent, a black victim and a white offender; and a mere three per cent, a white victim and a black offender.

107. No citizen possessing all other qualifications which are or may be prescribed by law shall be disqualified for service as grand or petit juror in any court of the United States, or of any State on account of race, color or previous condition of servitude; and whoever, being an officer or other person charged with any duty in the selection or summoning of jurors, excludes or fails to summon any citizen for such cause, shall be fined not more than \$5,000.

18 U.S.C. § 243 (1970).

108. See, e.g., *Alexander v. Louisiana*, 92 S. Ct. 1221, 1224-26 (1972).

109. See, e.g., *Avery v. Georgia*, 345 U.S. 559, 560-61 (1953).

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is localized, he may be entitled to a change of venue.¹¹⁰ Where an obviously biased jury has failed to believe strong evidence of innocence, the presiding judge or the appellate court can and must set aside the verdict.¹¹¹ Thus, the corroboration requirement is neither the only nor the best means for dealing with the problem of a racially inflamed jury.

The apparent suspicion of juries toward non-aggravated rape charges, at least in the absence of racial factors, may be buttressed by their recognition that very severe penalties accompany a conviction for rape. Sixteen states still prescribe capital punishment for rape.¹¹² In the remainder, long prison sentences are the rule, frequently with lengthy minimum terms.¹¹³ When England in the early nineteenth century had a list of some 230 capital offenses, juries felt that the death penalty was so disproportionate for most crimes that they refused to convict.¹¹⁴ Likewise, today, juries may find the penalty for rape (in the absence of excessive violence) or for statutory rape¹¹⁵ so excessive that they refuse to return a conviction for rape¹¹⁶ although they find the defendant's conduct reprehensible. Insofar as this balancing of the offense against the penalty occurs in jury deliberations over rape cases, it constitutes additional evidence to refute the notion that juries are

110. See, e.g., *Sanchez v. State*, 147 Tex. Cr. 436, 440, 181 S.W.2d 87, 89 (1944) (*dictum*). But see *Irvin v. State*, 66 So. 2d 288, 290-93 (Fla. 1953), *cert. denied*, 346 U.S. 927 (1954), in which a request for a change of venue from the county in which the rape was committed was granted, but a second request was denied in spite of defendant's allegation that he still would not be able to get a fair trial.

111. See *In re F.*, 327 N.Y.S.2d 237, 241 (Fam. Ct., City of N.Y. 1971), for one judge's prediction of how New York courts would deal with this type of verdict.

112. ALA. CODE tit. 14 § 395 (1958); ARK. STAT. § 41-3403 (Supp. 1969); FLA. STAT. ANN. § 794.01 (1965); GA. CODE ANN. § 26-2001 (rev. ed. 1971); KY. REV. STAT. § 435.030 (1960); LA. REV. STAT. § 14-42 (1951); MD. CODE ANN. art. 27, § 461 (1971); MISS. CODE ANN. § 2358 (1956); MO. STAT. ANN. § 559.260 (1953); NEV. REV. STAT. § 200.363 (1968) (only where offense results in substantial bodily harm to victim); N.C. GEN. STAT. § 14-21 (1969); OKLA. REV. STAT. ANN. tit. 21, § 1115 (Supp. 1971); S.C. CODE ANN. § 16-72 (1962); TENN. CODE ANN. § 39-3702 (1955); TEX. PEN. CODE art. 1189 (1961); VA. CODE ANN. § 18.1-44 (1960).

113. See, e.g., PA. STAT. ANN. tit. 18, § 4721 (Supp. 1971), which calls for a minimum term of fifteen years if the convicted inflicted serious bodily harm upon anyone.

114. H. KALVEN & H. ZEISEL, *supra* note 39, at 310-11.

115. The crime of statutory rape appears to be particularly inconsistent with popular attitudes. When confronted with the facts of a typical statutory rape situation in a questionnaire submitted to 165 New Haven residents in 1952, few laymen labelled the episode "rape." Note, *Forcible and Statutory Rape*, *supra* note 61, at 75. See also, Slovenko, *Statutory Rape*, 5 MED. ASPECTS OF HUMAN SEXUALITY 154 (1971), who recommends fundamental reevaluation of the law of statutory rape.

116. H. KALVEN & H. ZEISEL, *supra* note 39, at 311-12.

This tendency of juries to refuse to convict a man of rape if they feel that the punishment is too severe is a strong argument against lengthy minimum sentences for rape, particularly because these sentences do not seem to have a deterrent effect upon the commission of rapes. See Schwartz, *The Effect in Philadelphia of Pennsylvania's Increased Penalties for Rape and Attempted Rape*, 39 J. CRIM. L.C. & P.S. 509 (1968).

swept away emotionally by the cry of a woman that she has been sexually assaulted.

C. *Difficulty in Defending Against an Accusation of Rape*

The third explicit justification for a corroboration requirement in rape cases is the imagined difficulty encountered by an innocent man in defending himself from an accusation of rape. In the famous words of Lord Chief Justice Hale, 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."¹¹⁷ The problem has been most precisely stated by a student Note writer:

If the defendant was never alone with the prosecutrix at all, he may be fortunate enough to have an alibi. But if he has not, or if the prosecution can show that he was with her when the crime allegedly occurred, how is he to establish that he never achieved penetration, or that she consented?¹¹⁸

Rape charges are peculiar, though not unique, in this respect—the issue of whether or not a crime was even committed may turn solely on the conflicting testimony of the complainant and the defendant.¹¹⁹ The corroboration requirement, in effect, is a prior determination that if the prosecution's case stands solely on the testimony of the complainant, the defendant shall win.

In order to evaluate the effect of such a determination, two questions must be answered: first, how many rape cases rely upon the uncorroborated testimony of the complainant and, second, how do juries customarily resolve these cases in the absence of a corroboration requirement?

As to the first question, Kalven and Zeisel's study shows that in not one of the seventy-two rape cases encountered in their sample did the prosecution rely only on the testimony of the complainant.¹²⁰ Although eyewitnesses were rare,¹²¹ police testified in the majority of

117. 1 M. HALE, *supra* note 93, at 635.

118. Note, *Corroborating Charges of Rape*, *supra* note 8, at 1139.

119. Conviction on a perjury charge, for which the common law did require corroboration, *see* p. 1366 *supra*, also may turn solely on the conflicting testimony of two witnesses. There are, of course, other crimes that may rely solely upon the testimony of the victim for which corroboration is not required. *See, e.g.*, *Duncan v. Louisiana*, 391 U.S. 145, 147 (1968) in which the appellant, a black man, was convicted of simple battery committed upon a white man. In this case the testimony of the victim was corroborated by his companions, but such corroboration was not a legal necessity for conviction.

120. H. KALVEN & H. ZEISEL, *supra* note 39, at 141.

121. *See* note 39 *supra*.

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trials, and there was testimony of family and friends of the complainant or of experts in many.¹²² Overall, the average number of prosecution witnesses was 6.3.¹²³ Although the study does not describe the content of each witness's testimony, and, thus, we do not know whether this testimony corroborated the victim's, these statistics suggest that uncorroborated testimony of the complainant is rare indeed. To some degree this apparent paucity of non-corroborated rape cases may be a product of the corroboration rule itself; but because Kalven and Zeisel's cases were drawn from the entire nation and because only a handful of jurisdictions impose a rigorous corroboration requirement, the existence of such rules probably did not significantly affect their findings.¹²⁴ Also, these findings are consistent with recent articles which have shown the reluctance of police to proceed further with rape accusations that will stand on the uncorroborated testimony of the victim, even in jurisdictions without a corroboration requirement.¹²⁵

The answer to the second question—how do juries decide those rape charges based on the unsupported testimony of the victim?—is also suggested by Kalven and Zeisel's findings. As noted earlier, juries overwhelmingly acquit men accused of rape in the absence of aggravating circumstances.¹²⁶ Those rape cases in which there is an absence of aggravating circumstances are more likely to be those cases in which corroboration is either minimal or absent entirely.¹²⁷ To the extent this is so, juries would seem less likely to convict a man on the basis of a woman's *ipse dixit* claim of rape.¹²⁸

Thus, the available empirical evidence suggests that the difficulty of defending against an uncorroborated rape accusation, is far less than the difficulty in prosecuting one successfully. The female victim of a

122. H. KALVEN & H. ZEISEL, *supra* note 39, at 142.

123. *Id.* at 141.

124. The following jurisdictions which imposed substantial corroboration requirements at the time of the study were represented in the 3576 trials as indicated:

District of Columbia	0.1%
Georgia	0.9%
Iowa	2.4%
Nebraska	1.3%
New York	1.6%
Virgin Islands	0%

If these jurisdictions were fairly represented in the seventy-two rape cases, then only 6.3 per cent (or approximately five) were tried in one of the six of them. *Id.* at 37-38.

125. See, e.g., Note, *Police Discretion and the Judgment that a Crime Has Been Committed—Rape in Philadelphia*, 117 U. PA. L. REV. 277, 282-89 (1968).

126. See p. 1379 *supra*.

127. Evidence of extrinsic violence, for example, would be corroborative of the element of force. See note 25 *supra*. However, there still might be corroboration in such forms as medical evidence of penetration or police testimony as to the prompt complaint or hysteria of the victim. See p. 1369 *supra*.

128. See Younger, *supra* note 8, at 276.

sexual assault who lacks evidence to corroborate her story is unlikely to persuade the police and prosecuting attorney to prosecute her assailant. And even if the man is prosecuted, the jury is extremely unlikely to convict him of rape.

III. The Argument for Reform

The available evidence indicates that relatively few uncorroborated rape accusations result in a trial, much less a conviction, even in the absence of a formal corroboration requirement. The issue thus focuses on the disposition of those relatively few rape cases in which the complainant's testimony is uncorroborated but a jury would still convict if permitted to do so. Does the danger of false convictions in these cases warrant the imposition of a corroboration rule? On balance, it does not. In a particular case the absence of corroboration may call for an ad hoc judicial determination that there is insufficient evidence upon which a jury could find the defendant guilty beyond a reasonable doubt. But a prior legislative or judicial determination that corroboration is mandatory in all rape cases is a blunderbuss approach.¹²⁹ It depends upon the assumption that *every* uncorroborated rape charge is sufficiently different from uncorroborated charges of other crimes to warrant a distinctive rule of evidence.

A rape charge does have some distinctive characteristics. The penalties upon conviction are inordinately severe.¹³⁰ The mere accusation, even if the prosecution is unsuccessful, may damage a defendant's reputation and livelihood far more deeply than would prosecution for another crime. Yet, the gravity of the offense alone cannot justify the requirement in view of the severity of penalty for other crimes for which no corroboration is required.¹³¹ Neither the supposed distinctiveness of rape as a crime, nor the explicit justifications for the corroboration requirement, are sufficient reason for a categorical rule of evidence precluding conviction on the unsupported testimony of a complainant. The explicit justifications—the possibility of falsification,¹³² the emotion raised by the rape charge,¹³³ and the difficulty

129. To quote Justice Frankfurter writing in another context, "Surely, this is to burn the house to roast the pig." *Butler v. Michigan*, 352 U.S. 380, 383 (1957).

130. See p. 1381 *supra*.

131. In New York, for example, no corroboration is required for conviction of murder or kidnapping in the first degree which are punishable by mandatory life imprisonment. N.Y. PEN. LAW §§ 125.25, 135.25, 70.00(2)(A) (McKinney 1967).

132. See pp. 1373-78 *supra*.

133. See pp. 1378-82 *supra*.

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of defending against the accusation¹³⁴—are largely without merit. The serious defects in the rule's rationale, coupled with its negative effect upon successful prosecutions,¹³⁵ would seem to warrant repeal of the requirement in any form.¹³⁶

Repeal will not leave the innocent defendant without protection against the false charges of a lying or deluded complainant. In large part the goals and purposes of the corroboration requirement are served by two ordinary safeguards in our criminal law—the jury trial and the judge's power to set aside or direct a verdict based on insufficient evidence.¹³⁷

First, “[j]uries are not ignorant; they look with suspicion on *ipse dixit* complaints of sexual misconduct”¹³⁸ Wigmore argues that “a rule of law requiring corroboration has probably little actual influence upon the jurors’ minds over and above that ordinary caution and suspicion which would naturally suggest itself for such charges”¹³⁹ Kalven and Zeisel’s findings suggest that the “ordinary caution and suspicion” of the jury is heightened in cases of non-aggravated rape.¹⁴⁰ The jury trial thus remains a potent screen against the success of any rape charge.¹⁴¹

Second, the purposes of the rule of corroboration are further served by the judge's power to set aside or direct a verdict based on insubstantial evidence.¹⁴² Judges frequently set aside verdicts in jurisdictions having no statutory rule upon the same kind of evidence which would be insufficient under the corroboration rule in other jurisdictions.¹⁴³

The difference in effect between the substantial evidence rule and a corroboration requirement varies with the content and interpretation of the particular requirement. New York's earlier statutory corrob-

134. See pp. 1382-84 *supra*.

135. See note 38 *supra*.

136. For an argument in favor of complete repeal, see Ludwig, *supra* note 2.

137. 7 J. WIGMORE, *supra* note 10, § 2061, at 354.

138. Younger, *supra* note 8, at 276.

139. 7 J. WIGMORE, *supra* note 10, § 2061, at 354.

140. See p. 1379 *supra*.

141. The corroboration requirement operates, of course, as a means of taking some cases away from the jury for fear that it will return an inappropriate verdict. Such mistrust of the jury is inconsistent with recent Supreme Court decisions which have stressed the fundamental role of the jury in the American system of justice. See, e.g., *Duncan v. Louisiana*, 391 U.S. 145, 156-57 (1968) which cited *H. KALVEN & H. ZEISEL, supra* note 39, for the proposition that juries do understand the evidence and come to sound conclusions in most cases; when they differ with the judge, the reason is usually that they are serving some of the very purposes for which they were created.

142. 7 J. WIGMORE, *supra* note 10, § 2061, at 354. See *Ginter v. State*, 189 Ind. 672, 677, 128 N.E. 834, 835 (1920).

143. See, e.g., *Smith v. State*, 239 So. 2d 284, 286 (Fla. App. 1970), *rev'd*, 249 So. 2d 16 (Fla. 1971).

oration rule went far beyond the substantial evidence rule, making rape convictions nearly unobtainable.¹⁴⁴ However, corroboration rules in Georgia and Iowa do not seem to have had a significant effect upon the conviction rate. Nebraska's rule has had only a moderate effect.¹⁴⁵ Hence, the number of guilty men "freed" by corroboration rules may be large in some states yet small in others, varying with the form of the corroboration rule imposed.

Conceding that the corroboration requirement permits some guilty men to escape punishment where corroboration is unavailable, some commentators have argued that this effect is consistent with one of the main thrusts of Anglo-American criminal law—the protection of the innocent.¹⁴⁶ However, the balance between convicting the guilty and safeguarding the rights of the innocent—a balance which our criminal jurisprudence traditionally has struck in favor of protecting the innocent¹⁴⁷—seems to be set so far in favor of acquittal in rape cases (even in the absence of a formal corroboration rule) that its removal will still leave the innocent well protected.¹⁴⁸

IV. Alternatives and Modifications to the Corroboration Rule

A. *Alternatives*

Legal commentators, courts, and legislatures have considered a number of measures designed to replace the corroboration requirement and protect men from the danger of a conviction based on an unfounded charge of rape. Perhaps the most common suggestion has been that the complainant in a rape case be subjected to a mandatory

144. See note 38 *supra*. See, e.g., *In re F.*, 327 N.Y.S.2d 237, 238, 243 (Fam. Ct., City of N.Y. 1971), a juvenile proceeding in which the judge found that the attempted forcible rape and forcible sodomy were proven beyond a reasonable doubt, yet dismissed the charges because of the lack of technical corroboration of identification required by statute. However, he found both defendants guilty of armed robbery of the same victim.

145. See note 38 *supra*.

146. See, e.g., M. PLOSCOWE, *supra* note 59, at 194.

147. See 4 W. BLACKSTONE, COMMENTARIES 358:

[F]or the law holds it better that ten guilty persons escape than that one innocent party suffer.

148. See Goldstein, *The State and the Accused: Balance of Advantage in the Criminal Process*, in CRIME, LAW & SOCIETY 173 (A. Goldstein & J. Goldstein eds. 1971). In effect, the argument of this Note is that the nature of rape charges does not warrant giving the accused in such a case any "special advantage" not enjoyed by defendants charged with other crimes. The corroboration requirement dramatically shifts the balance of advantage in favor of the defendant and against the state in prosecution of rape charges. The balance should be seen as one involving the accused and the state, not the accused and the complainant.

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examination by a competent psychiatrist.¹⁴⁹ Less common has been the recommendation that a physical examination of the complainant be compulsory in order to reveal fabricated accusations of rape.¹⁵⁰ Other commentators have suggested that all complainants in rape cases undergo a lie detector interrogation.¹⁵¹ The Model Penal Code proposed that American courts follow the rule existing in England and Canada whereby, in any prosecutions of a sex felony before a jury, the jury is given a special instruction, cautioning it to evaluate the testimony of the victim with special care in view of his or her emotional involvement and the difficulty in determining the truth with respect to alleged sexual activities carried out in private.¹⁵² The Model Penal Code also proposed a requirement that, in order for a prosecution for a sex offense to be instituted or maintained, notice of the alleged illegal offense must be brought to the attention of the police within three months after its occurrence.¹⁵³

All of these suggestions, however, are like the corroboration requirement itself in depending on the premise that an accusation of

149. Wigmore is the leading proponent of a rule whereby no sex offense charge could go to the jury unless the female complainant's social history and mental makeup has been examined and testified to by a qualified physician. 3A J. WIGMORE, *supra* note 64, § 924(b), at 736-47. Although, as Wigmore notes, such an examination is favored by most psychiatrists, it would have serious shortcomings. Note, *Corroborating Charges of Rape*, *supra* note 8, at 1142-43, argues that a psychiatric examination would be a grave invasion of the privacy of the complainant and, more importantly, that it is not the function of psychiatry to distinguish truth from falsehood. See generally Juvilier, *Psychiatric Opinions as to the Credibility of Witnesses*, 48 CALIF. L. REV. 648, 675-76 (1960) for a discussion of the problems inherent in the use of psychiatric testimony in a rape case. For the most exhaustive judicial consideration of Wigmore's proposal see *Ballard v. Superior Court*, 64 Cal. 2d 159, 171-77, 410 P.2d 838, 846-50, 49 Cal. Rptr. 302, 310-14 (1966).

150. Cf. Note, *Corroboration Held Necessary to Prove Sexual Abuse in the Third Degree Where the Underlying Act is Rape*, 44 N.Y.U.L. REV. 1025, 1032-33 (1969). But such physical examinations are hardly foolproof.

It must be remembered that it is very easy for a woman—whether for spite or revenge—to make a physician believe rape occurred. Graves & Francisco, *supra* note 45, at 109.

151. See Williams, *supra* note 56, at 664. However, lie detectors may not be able to detect the pathological liars. Floch, *Limitations on the Lie Detector*, 40 J. CRIM. L. & C. 651, 652 (1950).

152. MODEL PENAL CODE § 213.6(6) (Proposed Official Draft 1962). For the operation of this rule in England and Canada, see Williams, *supra* note 56; Savage, *Corroboration in Sexual Offenses*, 6 CRIM. L.Q. 282 (1964).

153. MODEL PENAL CODE § 213.6(5) (Proposed Official Draft 1962). Texas does not require prompt complaint in order for a rape charge to be prosecuted, but in the absence of such timely complaint, its courts require corroboration otherwise not demanded. See, e.g., *Wright v. State*, 364 S.W.2d 384, 387 (Tex. Cr. App. 1963). Illinois reaches a similar result by holding that evidence of a prompt complaint to third persons is complete corroboration. See, e.g., *People v. DeFrates*, 395 Ill. 439, 444, 70 N.E.2d 591, 594 (1946), cert. denied, 331 U.S. 811 (1947).

The notion that the victim's failure to report the offense promptly reflects upon the substance of the accusation can be traced back at least as far as Lord Hale: Failure of the party ravished to make "fresh discovery and pursuit of the offense . . . carries [with it] a presumption that her suit is but malicious and feigned . . ." 1 M. HALE, *supra* note 93, at 632.

rape is so different from any other accusation as to warrant a categorical rule of evidence rather than reliance on the discretion of the trial judge and the common sense of the jury. As this Note has suggested, the three major justifications for distinguishing between rapes and other crimes (for evidentiary purposes) are strongly suspect; consequently there seems little reason for trading one peculiar rule for another.¹⁵⁴ As with corroboration, in an individual case a judge may find that the nature of the charge and the characteristics of the complainant require that a psychiatric examination of her should be directed before prosecution can proceed.¹⁵⁵ Or he may hold that her failure to report the rape promptly to the police renders her testimony insufficiently reliable to sustain a conviction. But rape cases as a class do not warrant a hard-and-fast rule requiring psychiatric examination of the complainant or prompt complaint or any other uniquely applicable practice.

B. *Child Complainants*

Even if the corroboration requirement should be abolished in its application to adult complainants, some have proposed that it be retained in its application to charges of statutory rape.¹⁵⁶ It has been thought by many that the dangers of unfounded rape charges are particularly common and dangerous when made by children.¹⁵⁷ This contention has several elements. The mystery and fascination of sexual activity, combined with children's greater imagination, makes them more likely to fabricate an accusation of rape.¹⁵⁸ Also, a child's charge

154. Insofar as some alternatives to the corroboration rule have independent justification, they may have greater validity. For example, the prompt complaint requirement, *see* p. 1387 *supra*, rests on the premise that one who has been subjected to an act of violence is unlikely to delay reporting the offense. To the extent that this premise is accurate, the rule may be a sound one, although logically it should be extended to require prompt complaint by victims of all physical assaults.

155. *See* *Ballard v. Superior Court*, 64 Cal. 2d 159, 176, 410 P.2d 838, 849, 49 Cal. Rptr. 302, 313 (1966), in which the court held that discretion should repose in the trial judge to order a psychiatric examination of the complaining witness in a case involving a sex violation if the defendant presents a compelling reason for such an examination.

Standards the court laid down for establishing whether or not a reason was compelling were: (1) little or no evidence in support of the charge, and (2) indication that the complainant's mental or emotional condition might affect her veracity.

156. For charges of statutory rape where lack of consent results from the victim's age alone, New York's revised corroboration law has a separate provision requiring corroboration of the identity of the assailant. Law of May 22, 1972, ch. 373, § 1, N.Y. Sess. Law News, 195th Sess., June 10, 1972, at 811-12.

157. "Unfounded accusations of rape are particularly apt to come from young children." M. Ploscowe, *supra* note 59, at 187.

158. It is well recognized that children are more highly suggestive than adults. Sexual activity, with the aura of mystery that adults create about it, confuses and

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of rape is likely to incorporate the hostilities of both mother and child;¹⁵⁹ this process may be quite unintentional on the part of the mother,¹⁶⁰ or it may be intentional, the mother using her child as a tool for blackmail¹⁶¹ or revenge.¹⁶² Finally, jurors are thought to be particularly prone to believe and sympathize with an infant victim,¹⁶³ just as they are considered predisposed to believe the claims of an allegedly sexually attacked woman.¹⁶⁴ For these reasons, many jurisdictions apply the corroboration requirement solely or with special rigor when the complainant is a child,¹⁶⁵ though this reaction is by no means universal.¹⁶⁶

Even if it be conceded that there is a greater danger of a child fabricating a charge of rape and of a jury believing it, imposing a rule of law that all such testimony be corroborated in order to sustain a conviction is a crude response.¹⁶⁷ In most states, there are general common law or statutory provisions dealing with the testimony of children. If examination of the child reveals an insufficient capacity

fascinates them. Moreover, they have, of course, no real understanding of the serious consequences of the charges they make.

M. GUTTMACHER & H. WEIHOFEN, *supra* note 78, at 374. See O. Monkmoller, *Psychology and Psychopathy of Testimony*, in 3A J. WIGMORE, *supra* note 64, § 924(a), at 743-44.

159. Orenstein, *Examination of the Complaining Witness in a Criminal Court*, 107 AM. J. PSYCHIATRY 684 (1951).

160. There are cases in which a mother discovers that her little girl has a vaginal discharge or bleeds from the vagina at an age when the first menstruation is not yet expected. She may suspect a sexual assault on her child and interrogate the little girl and by either frightening her or by awakening the child's pseudologia phantastica, start the child to romancing and confessing a sexual assault on her, which story is without foundation.

A. HERZOG, *supra* note 57, at 845. See also J. MACDONALD, *supra* note 47, at 221.

161. See, e.g., *Dunn v. State*, 127 Tenn. 267, 281, 154 S.W. 959, 972 (1913).

162. See, e.g., *People v. Inman*, 315 Mich. 456, 470, 24 N.W.2d 176, 182 (1946), in which the court noted the hostility of the defendant's wife, the mother of the complainant, toward the defendant, although it did not upset the conviction.

163. [T]here is always a tendency in sexual cases for the proceedings to start with a prejudice against the defendant, if the complainant is a girl of tender years, whose appearance makes a strong appeal to the sympathy and protective feelings of the jury.

Williams, *supra* note 56, at 663.

164. See p. 1378 *supra*.

165. See, e.g., *State v. Artez*, 286 Minn. 545, 546, 176 N.W.2d 81, 82 (1970); *Allison v. United States*, 409 F.2d 445, 449 (D.C. Cir. 1969).

166. See, e.g., *State v. Sailbold*, 213 La. 415, 428, 34 So. 2d 909, 913 (1948), in which the court said:

[I]t is rather difficult to conceive that a child of her age would concoct such a disgusting tale for the purpose of injuring an elderly man.

Missouri seems to apply the corroboration requirement only to rape cases involving mature female complainants. See, e.g., *State v. Thomas*, 351 Mo. 804, 818, 174 S.W.2d 337, 345 (1943).

In *State v. Trujillo*, 60 N.M. 277, 283-84, 291 P.2d 315, 319-20 (1955), the court emphasized that corroboration of the testimony of an infant complainant should not be required in charges of sexual misconduct since such testimony is frequently the only evidence obtainable.

167. Wigmore argued that the rule of corroboration in its entirety is a "crude and childish measure . . ." 7 J. WIGMORE, *supra* note 10, § 2061, at 354.

to observe, remember and recount, he may be disqualified from testifying,¹⁶⁸ his unsworn statement may be taken,¹⁶⁹ or his testimony may be admitted with a cautionary instruction to the jury.¹⁷⁰ The specific danger of a woman using her child's perjured testimony as a weapon against a man is not unique to sex crimes¹⁷¹ and is detectable through conventional police and defense investigations.¹⁷² Also, evidence is lacking that juries have a distinctive tendency to believe a child complainant in sex crimes.¹⁷³ Furthermore, there are unique problems encountered in attempting to corroborate a charge of statutory rape. Since children "may not know to resist," there often is not corroborating evidence of the criminal act.¹⁷⁴ Also, corroborating a charge of statutory rape may be especially difficult in courts reluctant to accept mere opportunity to commit the crime as sufficient corroboration of identity.¹⁷⁵

The problem of false testimony from a child complainant, like that of false testimony from an adult, is best met by a thorough exploration of the witness's credibility—the ability to observe, to recollect, to narrate, and to do so with veracity.¹⁷⁶ This process is certainly more difficult than resort to a categorical rule, but it is, nonetheless, a particularly appropriate means of dealing with the mix of truth and fantasy that may comprise the testimony of a child.

V. Conclusion

Legislatively or judicially created rules requiring that the testimony of a complainant must be corroborated in order to sustain a conviction for rape should be abandoned. None of the justifications for treating rape cases differently from other criminal charges stands on solid

168. *See, e.g.*, *State v. Segerberg*, 131 Conn. 546, 547-48, 41 A.2d 101, 102 (1945).

169. *See, e.g.*, N.Y. CRIM. PROC. LAW ANN. § 60.20(2) (McKinney 1967).

170. *See* C. McCORMICK, HANDBOOK OF THE LAW OF EVIDENCE § 62, at 140-41 (1954).

171. *Cf.* Ludwig, *supra* note 2, at 383.

172. *See generally* J. MACDONALD, *supra* note 47, at 276-94 for discussion of the criminal investigation of rape charges.

173. There seems to be no distinctive jury response to child complainants in sex crimes. H. KALVEN & H. ZEISEL, *supra* note 39, at 170.

174. Graves & Francisco, *supra* note 45, at 116. *See also* *State v. Shults*, 43 N.M. 71, 75-76, 85 P.2d 591, 594 (1938).

175. *See, e.g.*, *State v. Kelly*, 249 Iowa 1219, 1224-25, 91 N.W.2d 562, 564-66 (1958), in which there was little doubt that a sexual assault had been committed and the defendant admitted being with the complainant near the time the offense was committed, yet the court refused to accept his opportunity to commit the crime as sufficient corroboration of the identity of the accused and reversed the conviction. Other courts have accepted opportunity as corroboration of identity. *See, e.g.*, *People v. Masse*, 5 N.Y.2d 217, 219-22, 156 N.E.2d 452, 453-55, 182 N.Y.S.2d 821, 823-25 (1959); *State v. Fehr*, 45 S.D. 634, 638-39, 189 N.W. 942, 944 (1922).

176. *See* Ludwig, *supra* note 2, at 383.

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empirical or theoretical footing. Replacing the corroboration requirement with an alternative rule—requiring psychiatric or physical examination of the complainant, for example, or a report of the alleged rape to the police within a certain period of time—is equally unjustified in the absence of an independent reason for treating rape accusations distinctively. Limiting the application of the corroboration rule to rape charges involving child complainants, although arguably more justified than a broad corroboration rule, is still less desirable than a thorough evaluation of a particular child's credibility.

The absence of corroboration in an *individual* case—perhaps even in *most* cases—may well call for a holding that there is insufficient evidence upon which a jury could find the defendant guilty beyond a reasonable doubt. But this is a decision properly made on an ad hoc basis by the trial judge, weighing all the facts and inferences of the evidence introduced in a particular case. The corroboration rule may be based plausibly on the laudable purpose of protecting the innocent against false accusations; but this is a purpose of criminal procedure to be fulfilled in all cases. If the traditional safeguards are not functioning properly to fulfill that purpose, the solution lies in reform of criminal procedure as a whole, not in a special rule for cases involving the crime of rape.