

The notion of submission resulting from the use or threatened use of force expands the previous notion of the 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."<sup>111</sup> 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.<sup>112</sup> No definition of mens rea exists, but rather, each crime may require a different mental element. In the case of rape, Judge Stephen stated that "an intention to have forcible connection with a woman without her consent" was required.<sup>113</sup> The modern view seems to be that knowledge by 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."<sup>114</sup>

In recent years, the debate as to what level of mens rea the accused must possess in order to be convicted 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*<sup>115</sup> and later in the Canadian case of *R. v. Pappajohn*<sup>116</sup> the issue arose as to whether the defendant's belief in the woman's consent had to be reasonable as well as honest in order to avoid conviction. By a three to two margin, the House of Lords held that the belief need not be reasonable, but merely honest.<sup>117</sup> The reasonableness of the belief, however, served as objective evidence of whether the belief was

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<sup>111</sup> *Id.*

<sup>112</sup> *Fowler v. Padget*, 101 Eng. Rep. 163 (1978).

<sup>113</sup> *R. v. Tolson*, 23 Q.B.D. 168, 185 (1889).

<sup>114</sup> *D.P.P. v. Morgan*, [1975] 2 All E.R. 347, 365 H.L. (per Lord Simon.)

<sup>115</sup> *Id.*

<sup>116</sup> 32 N.R. 104 (Can. 1980).

<sup>117</sup> *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.

actually held.<sup>118</sup> Lord Hailsham described 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."<sup>119</sup> Lord Fraser and Lord Cross both agreed with Lord Hailsham that the belief in consent need not be reasonable. Lord Cross, however, contended that as a matter of policy it was not unfair to hold a man to the duty of reasonable care in determining whether his partner consented to intercourse.<sup>120</sup>

The two dissenting judges held that the belief of the accused in the victim's consent must be reasonable as well as honest. Both relied primarily on *R. v. Tolson*,<sup>121</sup> 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."<sup>122</sup> Lord Edmund Davies concluded that the introduction of an objective element into mens rea was neither a novel nor an unwelcome development.<sup>123</sup> All five judges agreed that the appeals should be dismissed on the basis that no reasonable jury would have acquitted the accused even if directed that the belief of the accused need only be honest.

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 Heilbron. 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."<sup>124</sup> In

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<sup>118</sup> [1975] 2 All E.R. 347, 361.

<sup>119</sup> *Id.* at 362.

<sup>120</sup> *Id.* at 351-52. It is evident from Lord Cross' judgment that had the Sexual Offences Act been worded differently he would have favored requiring reasonable grounds for belief in consent. Section 1(1) of the Sexual Offences Act 1956 stated that it was an offense "for a man to rape a woman." Lord Cross then looked to the common law and concluded that rape was not an "absolute offense" but required "at least indifference" to consent. If the offense 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.).

<sup>121</sup> 23 Q.B.D. 168 (1889).

<sup>122</sup> *Id.* at 181.

<sup>123</sup> [1975] 2 All E.R. 347, 378 (per Lord Edmund Davies), quoting from *Sweet v. Parsley*, 1970 A.C. 132.

<sup>124</sup> REPORT OF THE ADVISORY GROUP ON THE LAW OF RAPE 10 (1975).

addition, the report noted that *Morgan* contained the first unambiguous statement that recklessness as to consent was sufficient mens rea<sup>125</sup> to support a conviction. The Group concluded that this would have wide implications affecting not only rape law but also other crimes of physical violence.<sup>126</sup> As a result of the report, amendments to the Sexual Offences Act were adopted.<sup>127</sup> 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.<sup>128</sup>

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 an important factor although not an essential factor since the *Morgan* decision.

In 1980, the issue addressed in *Morgan* confronted the Supreme Court of Canada. Five of the seven judges in *R. v. Pappajohn*<sup>129</sup> 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 should 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*,<sup>130</sup> that a mistaken belief in consent need only be honest, not reasonable, in order to exonerate the accused. The majority judgment on this point, given by Mr. Justice McIntyre, relies entirely on a paragraph from the judgment of Mr. Justice Cartwright in *R. v. Rees*<sup>131</sup> which was adopted one year later in *Beaver*:<sup>132</sup> "[T]he 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."<sup>133</sup>

Mr. Justice Dickson and Mr. Justice Estey dissented on the issue of whether there was sufficient evidence to go to the jury as to mistake of

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<sup>125</sup> *Id.* at 13.

<sup>126</sup> *Id.*

<sup>127</sup> Sexual Offences Act, 1976, ch. 82.

<sup>128</sup> *Id.* § 1(2).

<sup>129</sup> 32 N.R. 104 (Can. 1980).

<sup>130</sup> 1952 S.C.R. 531.

<sup>131</sup> 1956 S.C.R. 640.

<sup>132</sup> 1957 S.C.R. 531, 538.

<sup>133</sup> 1956 S.C.R. 640, 651.

fact. They were in the majority, however, in deciding that a mistaken belief in consent need not be reasonable. In his judgment, Mr. Justice Dickson reviewed the *Morgan* decision, and concluded that *R. v. Tolson*<sup>134</sup> (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 in 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.<sup>135</sup> Section 224(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.<sup>136</sup> The mistaken belief of the accused must be both honest and reasonable.<sup>137</sup> This objective standard has a common law foundation and is applicable in the majority of American states.<sup>138</sup> Three cases are generally cited as authority for the proposition that reasonableness is required. In *McQuirk v. State*,<sup>139</sup> Judge Somerville outlined the requirements for the defense 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.<sup>140</sup>

This principle was followed in *United States v. Short*<sup>141</sup> and in *State v. Dizon*.<sup>142</sup> In the *Dizon* case, Chief Justice Tsukiyama concluded that an honest belief in consent based on the accused's own "negligence, fault or

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<sup>134</sup> 23 Q.B.D. 168 (1889).

<sup>135</sup> See Bill C-53, *supra* note 70, § 244, at 8.

<sup>136</sup> Berger, *Man's Trial, Woman's Tribulation: Rape Cases in the Courtroom*, 77 COLUM. L. REV. 1, 61 (1977).

<sup>137</sup> Note, *Recent Developments in the Definition of Forcible Rape*, 61 VA. L. REV. 1500, 1534 (1975).

<sup>138</sup> Lewis, *Recent Proposals in the Criminal Law of Rape: Significant Reform or Semantic Change?*, 17 OSGOODE HALL L.J. 445, 451 (1979).

<sup>139</sup> 85 Ala. 435, 4 So. 775 (1888).

<sup>140</sup> 4 So. at 776.

<sup>141</sup> 4 U.S.C.M.A. 437, 16 C.M.R. 11 (1954).

<sup>142</sup> 47 Hawaii 44, 390 P.2d 759 (1954).

carelessness" was not a defense to a rape charge.<sup>143</sup>

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.<sup>144</sup> The Model Penal Code, drafted in 1962 by the American Law Institute, recommended that a mistaken belief in consent should be a "defense" to a charge of rape as long as that mistake was not made recklessly.<sup>145</sup> This Code has been described as having "substantial impact" on rape reform throughout the United States.<sup>146</sup> 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 defense of mistake.<sup>147</sup> Therefore, the American position, in contrast to the British and Canadian positions, remains that a mistaken belief in consent must be based on reasonable grounds. Regardless of whether the Canadian or the American 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 consent.<sup>148</sup> Without such evidence, however, "determining the intentions and understanding of the two persons becomes the crucial, and frequently intractable, problem."<sup>149</sup> The court's task becomes extremely difficult where the evidence indicates that only moderate force was used. One commentator has argued that in this situation, the consent standard is "virtually useless" and "fosters meaningless fictions."<sup>150</sup>

In 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.<sup>151</sup> Reasonable resistance may not be sufficient. As *Morgan*

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<sup>143</sup> 390 P.2d at 769.

<sup>144</sup> Lewis, *supra* note 138.

<sup>145</sup> MODEL PENAL CODE (Proposed Official Draft 1962) at 24.

<sup>146</sup> Lewis, *supra* note 138.

<sup>147</sup> Note, *supra* note 137, at 1536-37.

<sup>148</sup> Lewis, *supra* note 138, at 456.

<sup>149</sup> *Id.*

<sup>150</sup> Dworkin, *The Resistance Standard in Rape Legislation*, 18 STAN. L. REV. 683 (1966).

<sup>151</sup> 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 136, 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, "re-

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 applied 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 in connection with 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 trend in both countries has been to limit 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 in connection with both the issues of consent and credibility. The leading Canadian case in this area is *Laliberté v. The Queen*<sup>152</sup> which was decided by the Supreme Court of Canada in 1877. Chief Justice Richards held that questions about the complainant's sexual activities with persons other than the accused can be asked of the complainant in the course of cross-examination and cannot be objected to by the prosecuting officer although the witness herself can object.<sup>153</sup> The judge is then required to rule on the objection to determine whether the complainant is obliged to answer.<sup>154</sup> If the complainant does answer the question, the answer according to Justice Ritchie, "must be accepted, and is not open to be contradicted by the evidence on the part of the prisoner."<sup>155</sup>

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flects an urge toward administrative simplicity, a search for an external standard by which to measure the subjective element." Harris, *supra* note 101, at 619. An external standard 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.*

<sup>152</sup> 1 S.C.R. 117 (1877).

<sup>153</sup> *Id.* at 131.

<sup>154</sup> *Id.* at 139.

<sup>155</sup> *Id.*

A distinction developed between evidence of specific sexual acts and evidence of general reputation for chastity, a distinction which was held to be crucial by the Ontario Court of Appeal in *R. v. Finessey*.<sup>156</sup> 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 defense counsel, since such evidence was considered relevant to the consent issue.<sup>157</sup> 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.<sup>158</sup> Sexual activities of the victim with other men did not provide a defense to a rape charge.<sup>159</sup>

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 in connection with the issue of credibility. An unchaste reputation is relevant and admissible, however, to show the victim's consent.<sup>160</sup> Evidence of specific sexual acts with a person other than the accused was excluded in the 1895 Florida case of *Rice v. State*.<sup>161</sup> Judge Liddon stated that the connection between illicit intercourse with one man and intercourse with another was too slight and uncertain to allow the court 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."<sup>162</sup>

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.<sup>163</sup> The complainant was under the age of consent and therefore consent was not at issue. The defense 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 in using prior sexual conduct evidence to determine the credibility of a complainant in a rape case but not

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<sup>156</sup> 10 C.C.C. 347 (Ont. Ct. App. 1906).

<sup>157</sup> *Id.* at 351.

<sup>158</sup> *Id.*

<sup>159</sup> *Gross v. Bodrecht*, 24 O.A.R. 689 (Ont. Ct. App. 1897).

<sup>160</sup> *Berger*, *supra* note 136, at 17.

<sup>161</sup> 35 Fla. 236, 17 So. 286 (1895).

<sup>162</sup> *Wynne v. Commonwealth*, 216 Va. 355, 218 S.E.2d 445 (1975).

<sup>163</sup> *People v. Johnson*, 106 Cal. 289, 39 P. 622 (1895).

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 impeached in forcible rape cases by evidence of a bad moral reputation.<sup>164</sup> 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 in connection with 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.<sup>165</sup> The classic articulation of this view can be found in *People v. Abbott*<sup>166</sup> 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."<sup>167</sup> He then asked, "[W]ill you not more readily infer assent in the practised Messalina, in loose attire, than in the reserved and virtuous Lucretia?"<sup>168</sup> 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."<sup>169</sup>

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.<sup>170</sup> 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.<sup>171</sup> He made a crucial distinction, however, where a woman accused a man of a sexual offense. 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 and only a few jurisdictions continue to admit such evidence.<sup>172</sup>

As noted earlier, reform in this area has been directed towards limit-

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<sup>164</sup> *State v. Kain*, 330 S.W.2d 842, 845 (Mo. 1960).

<sup>165</sup> *People v. Collins*, 25 Ill. 2d 605, 611, 186 N.E.2d 30, 33 (1962).

<sup>166</sup> 19 Wend. 192 (N.Y. 1838), *quoted in* Berger, *supra* note 136, at 16.

<sup>167</sup> 19 Wend. 192, 195-96 (N.Y. 1838).

<sup>168</sup> *Id.*

<sup>169</sup> Eisenbud, *Limitations on The Right to Introduce Evidence Pertaining to the Prior Sexual History of the Complaining Witness in Cases of Forcible Rape: Reflections of Reality or Denial of Due Process?*, 3 HOFSTRA L. REV. 403, 417 (1975).

<sup>170</sup> Berger, *supra* note 136, at 16.

<sup>171</sup> WIGMORE, 3A EVIDENCE IN TRIALS OF COMMON LAW 734 (1970).

<sup>172</sup> Berger, *supra* note 136, at 22.



ing, rather than expanding, the admissibility of evidence. A number of commentators have shown support in recent years for this development. Mr. Justice 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.<sup>173</sup>

Other critics contend that evidence of prior sexual conduct is only remotely related to the issue of the complainant's credibility,<sup>174</sup> and that admission of such evidence will introduce collateral issues, needlessly confusing the jury.<sup>175</sup> Testimony regarding the specific sexual acts of the complainant may well be fabricated, particularly if the witnesses are friends of the accused.<sup>176</sup> Evidence of the complainant's "unchaste reputation" may be based on rumor and innuendo rather than fact.<sup>177</sup> The exclusion of evidence of prior sexual conduct would protect the privacy of the rape victim, reduce the trauma and embarrassment she experiences, increase the proportion of rapes which are reported and increase the number of convictions obtained.<sup>178</sup>

In the early 1970's, pressure for reform of U.S. rape laws centered around the use of evidence of prior sexual conduct and the attenuated relationship between the complainant's chastity and the crime itself.<sup>179</sup> By 1979, 45 American states had enacted "rape-shield laws" designed to limit the use of evidence of the complainant's prior sexual conduct.<sup>180</sup> These statutes ranged from the highly restrictive, including those enacted in Michigan and Louisiana, to the highly permissive, including those enacted in Texas, New Mexico, Alaska, New York and Nevada.<sup>181</sup> Permissive rape-shield laws have been criticized as ineffective in altering the

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

<sup>174</sup> LeGrand, *Rape and Rape Laws: Sexism in Society and Law*, 61 CALIF. L. REV. 919, 939 (1973).

<sup>175</sup> *Wynne v. Commonwealth*, 216 Va. 355, 218 S.E.2d 445 (1975); *Rice v. State*, 35 Fla. 236, 17 So. 286 (1895).

<sup>176</sup> 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) ("while 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 subpoenaed to testify that they have had such connection with her, so as to secure the acquittal of the accused").

<sup>177</sup> *People v. Benson*, 6 Cal. 221, 223 (1856).

<sup>178</sup> Sykora, *Louisiana's Protection for Rape Victims: Too Much of a Good Thing?*, 40 LA. L. REV. 268, 269 (1979).

<sup>179</sup> LeGrand, *supra* note 174, at 939.

<sup>180</sup> Tanford & Bocchino, *Rape Victim Shield Laws and the Sixth Amendment*, 128 U. PA. L. REV. 544 (1980).

<sup>181</sup> Berger, *supra* note 136, at 33.

broad discretion already possessed by trial judges to exclude evidence. Conversely, restrictive rape-shield laws are said to "sacrifice legitimate rights of the accused person on the altar of Women's Liberation."<sup>182</sup> Some commentators have taken the position that the Sixth Amendment right of the accused to confront the witnesses against him has been violated and that restrictive rape-shield laws are unconstitutional.<sup>183</sup>

The Michigan statute was among the first of the rape-shield laws to be enacted and has since been used as a model for other restrictive statutes.<sup>184</sup> In Michigan, evidence of sexual conduct with the defendant and persons other than the defendant is admissible if such evidence shows the source of "semen, pregnancy or disease." Such evidence must, however, be material to a fact in issue and its prejudicial nature cannot exceed its probative value.<sup>185</sup> All other evidence of the victim's prior sexual conduct

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<sup>182</sup> *Id.* at 32.

<sup>183</sup> 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 136; Burnim, *Massachusetts Rape-Shield Law—An Overstep in the Right Direction*, 64 MASS. L. REV. 61 (1979); Eisenbud, *supra* note 169; 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: 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.

<sup>184</sup> 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 136, 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 178, 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.

<sup>185</sup> MICH. COMP. LAWS ANN. § 750.520 (Cum. Supp. 1976-77).

or reputation for chastity is inadmissible. The enactment of rape-shield provisions has been cited as a major factor contributing to the substantial increase in the conviction rate for sexual assault in Michigan.<sup>186</sup> 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.<sup>187</sup>

Other states have enacted provisions which fall between the highly permissive and highly restrictive.<sup>188</sup> Typically these statutes provide that "evidence of a rape victim's prior sexual activities is inadmissible," but a number of specific exceptions are given.<sup>189</sup> 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.<sup>190</sup> Less common exceptions to the general rule of inadmissibility include evidence used to "impeach credibility," to show a "motive of fabrication," or to show a "pattern of consensual activity closely related to the defendant's version of the events."<sup>191</sup> Some of the statutes differentiate between evidence introduced on the issue of consent and evidence introduced for the purpose of impeaching credibility.<sup>192</sup> Other statutes distinguish evidence of specific sexual acts from evidence of "reputation for chastity."<sup>193</sup> Some statutes impose time limits in an attempt to prevent the admission of "stale" evidence.<sup>194</sup> Many of the statutes 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 at 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.<sup>195</sup>

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 the probative value of the evidence exceeds its prejudicial nature.<sup>196</sup> With the exception of the New York statute,<sup>197</sup> very few guide-

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<sup>186</sup> A. GEIST, LAW REFORM IN THE PREVENTION AND TREATMENT OF RAPE: PRELIMINARY REPORT (1980).

<sup>187</sup> *Id.*; Interview with Judy Price, Education Co-ordinator of the Assault Crisis Center in Ann Arbor, Michigan, on June 27, 1980.

<sup>188</sup> Tanford and Bocchino, *supra* note 180, at 557.

<sup>189</sup> *Id.* at 552.

<sup>190</sup> *Id.*

<sup>191</sup> *Id.*

<sup>192</sup> Berger, *supra* note 136, at 35.

<sup>193</sup> *Id.* at 36.

<sup>194</sup> *Id.*

<sup>195</sup> ALASKA STAT. § 12.45045(a) (1962); NEV. REV. STAT. § 48.069, 50.090 (1979); N.M. STAT. ANN. § 30-9-16 (1978); TEX. PENAL CODE ANN. § 21.13(a) (Vernon 1981).

<sup>196</sup> 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.<sup>198</sup>

Section 142 of the Canadian Criminal Code<sup>199</sup> contains provisions which are similar to the provisions contained in many American statutes as 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 thereby encouraging more victims to report rapes.<sup>200</sup>

The amended section 142 specifically states, "No question shall be asked 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:<sup>201</sup> 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;<sup>202</sup> 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."<sup>203</sup>

At first heralded by women's organizations as a reform which would reduce 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.<sup>204</sup> The amendment was viewed by the courts as a codification of the procedure

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<sup>197</sup> 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).

<sup>198</sup> Berger, *supra* note 136, at 34.

<sup>199</sup> Criminal Code, CAN. REV. STAT., ch. C-34, § 142 (1970).

<sup>200</sup> HANSARD'S PARL. DEB., H.C., 9204 (1975).

<sup>201</sup> Criminal Code, CAN. REV. STAT., ch. C-34, § 142 (1970) (as amended).

<sup>202</sup> *Id.*

<sup>203</sup> *Id.*

<sup>204</sup> R. v. McKenna, 32 C.C.C.2d 210 (Ont. Dist. Ct. 1976).

used in the past, with the additional requirements of notice.<sup>205</sup> 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.<sup>206</sup> These cases were subsequently overruled, however,<sup>207</sup> and the effect of the enactment was not clarified until the appeal of *R. v. Forsythe*<sup>208</sup> to the Supreme Court of Canada in 1980. 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.<sup>209</sup> The Chief Justice wrote, "[T]he 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."<sup>210</sup> Confirming *R. v. Morris*<sup>211</sup> and *R. v. MacIntyre*<sup>212</sup> 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."<sup>213</sup> He commented: "If this cannot be done, [section] 142 becomes almost a dead letter."<sup>214</sup>

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 her prior sexual activities and her answers can be contradicted by other witnesses. Although Chief Justice Laskin spoke of section 142 as "balancing the interests of the complainant and the accused,"<sup>215</sup> 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."<sup>216</sup>

The evidentiary provisions of bill C-53, if enacted, would shift Ca-

<sup>205</sup> *R. v. Lloyd*, 22 N.S.R.2d 277 (Nfld. Dist. Ct. 1977).

<sup>206</sup> *R. v. O'Brien*, 31 C.C.C.2d 396, 406 (Nfld. Dist. Ct. 1977).

<sup>207</sup> *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).

<sup>208</sup> *R. v. Forsythe*, 32 N.R. 520 (Can. 1980).

<sup>209</sup> *Id.* at 525.

<sup>210</sup> *Id.*

<sup>211</sup> *Morris*, 39 C.C.C.2d at 123.

<sup>212</sup> *MacIntyre*, 42 C.C.C.2d at 217.

<sup>213</sup> *Forsythe*, 32 N.R. at 526.

<sup>214</sup> *Id.*

<sup>215</sup> *Id.* at 527.

<sup>216</sup> HANSARD'S PARL. DEB., H.C. 2832, 2837 (1979).

nada 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.<sup>217</sup> Two exceptions to the rule are included however. The first exception would allow such evidence to be admitted if it tends to show that the accused believed that the complainant had consented. This exception, relating to the defense of mistake of fact,<sup>218</sup> was probably intended to limit 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 would permit the admission of evidence of the complainant's sexual history in virtually any case where her consent was at issue. The second exception would permit the admission of evidence to rebut the prosecution's evidence relating to the complainant's previous sexual activity. "Sexual activity" has not been clearly defined. It may include only evidence of specific sexual acts with specific persons, or it may include evidence relating to the complainant's "reputation for chastity." Notice provisions as well as provisions requiring an *in camera* hearing and prohibiting publication are included in the bill. 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 courts have imposed more restrictions on the admissibility of prior sexual conduct evidence than have Canadian courts 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.<sup>219</sup> 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."<sup>220</sup> The case law does not entirely support this liberal interpretation of the meaning of corroboration but tends to demonstrate the development of a number of technical requirements and distinctions.

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<sup>217</sup> See Bill C-53, *supra* note 70, at § 244.

<sup>218</sup> See *supra* text accompanying notes 110-33.

<sup>219</sup> *D.P.P. v. Hester*, [1972] 3 All E.R. 1056, 1070, 1073.

<sup>220</sup> [1973] 1 All E.R. 440, 447.