R. v. Baskerville,[221] a 1916 House of Lords case, provides the classic definition of corroboration:

> We hold that evidence in corroboration must be independent testimony which affects the accused by connecting or tending to connect him with the crime. In other words, it must be evidence which implicates him, that is, which confirms in some material particular not only the evidence that the crime has been committed, but also that the prisoner committed it.[222]

The *Baskerville* definition of corroboration was approved several years later by the Supreme Court of Canada, and has been treated by Canadian courts since that time "as if it had the force of statute."[223] In 1925, English courts decided that special jury instruction based on *Baskerville* was necessary before the jury could consider the testimony of complainants in sexual offense cases. The court stated in *Rex v. Jones*:[224] "[T]he proper direction in such a case is that it is not safe to convict upon the uncorroborated testimony of the prosecutrix, but that the jury, if they are satisfied of the truth of her evidence, may, after paying attention to the warning, nevertheless convict."[225] Two years later this view was affirmed by the Supreme Court of Canada in *Hubin v. The King*.[226] As the cases developed, the jury instruction became necessary in any sexual offense case, including those involving adult male victims.[227] However, when the provision for a mandatory warning was added to the Canadian Criminal Code in 1954, it only applied to testimony given by female victims. The offenses listed in the provision were, by definition, sexual offenses committed by males against females.[228]

A number of key words in *Baskerville*[229] have been interpreted differently over the years. This has caused difficulty in determining: 1) whether testimony is "independent"; 2) whether testimony relates to a "material particular"; and 3) whether testimony sufficiently "implicates" the ac-

---

[221] 2 K.B. 658 (H.L.) (1916).

[222] *Id.* at 667.

[223] S. SCHIFF, EVIDENCE IN THE LITIGATION PROCESS 591 (1978).

[224] 19 Cr. App. R. 40 (1925).

[225] *Id.* at 41.

[226] 48 C.C.C. 172 (Can. 1927).

[227] S. SCHIFF, *supra* note 223, at 600.

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

[229] 2 K.B. 658 (1916).

cused. A further requirement was added by Judge Cartwright in *Thomas v. The Queen*:[230] "Facts, though independently established, cannot amount to corroboration if, in the view of the jury, they are equally consistent with the truth as with the falsity of her story on this point."[231]

Numerous facts have been held to operate as corroborative evidence. The distraught emotional condition of the complainant, if observed shortly after the alleged assault by other witnesses, is capable of corroborating the complainant's testimony. The jury, however, must believe her emotional condition is genuine and connected with the incident.[232] The physical condition of the complainant is often capable of corroborating her testimony. The condition of the clothing,[233] bruises, scratches and other injuries, and medical evidence[234] are usually considered corroborative if the fact of intercourse, or lack of consent are at issue. While evidence of the complainant's emotional condition is capable of corroborating her story, evidence of the complaint itself, although often admissible, cannot be corroborative since it is not independent.[235] The combination of "opportunity" and "suspicious circumstances" has been held to be corroborative,[236] as well as a false statement made by the accused.[237]

A series of Canadian cases has severely limited the use of some types of evidence to corroborate. In *R. v. Ethier*,[238] Mr. Justice Morden stated that it is necessary that the complainant's testimony be corroborated by independent evidence on both the issues of consent and identity of the accused. Despite a wealth of evidence supporting the complainant's credibility and relating to the issues of consent and identity, the court held that there was no corroboration because the evidence was not independent of her story. The court based its independent evidence requirement on the 1927 case of *Hubin v. The King*.[239] In that case independent evidence was interpreted to mean not only evidence which comes from a source other than the complainant, but more strictly, evidence which does not depend on the complainant's story for its relevance, and which is capable of implicating the accused in and of itself.[240] In view of the quantity and quality of evidence rejected in *Ethier*, it is quite conceivable that in many situations corroborative evidence would be impossible to obtain.

The difficulty with the definition of independence articulated in *Hubin* and confirmed in *Ethier* was dealt with in 1976 by the Supreme

---

[230] [1952] 2 S.C.R. 344.

[231] *Id.* at 354.

[232] R. v. Boyd, 17 C.C.C.2d 6 (Ont. Ct. App. 1974).

[233] R. v. Kyselka, 133 C.C.C. 103, 104 (Ont. Ct. App. 1962); R. v. Price, [1969] 1 Ont. 24.

[234] R. v. Bear, 13 C.C.C.2d 570 (Sask. Ct. App. 1973).

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

[236] Childs v. The Queen, 122 C.C.C. 126, 130 (N.B. Ct. App. 1958).

[237] White v. The Queen, 115 C.C.C. 97 (Can. 1956).

[238] 124 C.C.C. 332 (Ont. Ct. App. 1969).

[239] 48 C.C.C. 172 (1927).

[240] *Id.*

Court of Canada in the case of *Warkentin v. The Queen.*[241] Mr. Justice De Grandpre, on behalf of the majority, refused to give a narrow legalistic meaning to the term corroboration. He concluded that corroborative evidence need not be pigeonholed into the three slots of intercourse, nonconsent and identity. Rather, "[i]t is the entire picture that must be looked at, [and] not a portion thereof."[242] Although the dissenting judges found no corroborative evidence linking the four accused with the crime, the majority held that five pieces of evidence taken as a whole were capable of corroborating the complainant's story. The decision departed from previous cases which had followed the artificially limited conception of corroboration. Even Mr. Justice Dickson, speaking for the dissenting minority, acknowledged that the corroboration rule was, to some degree, unworkable.[243]

In the majority of American states, corroboration of a complainant's testimony of rape is not necessary in order to obtain a conviction.[244] In the states where some form of corroboration is required, there is "wide variation both as to the elements of the crime which must be corroborated and as to the evidence considered material for purposes of corroboration."[245] For example, in the District of Columbia, corroboration is required of force, penetration and identity.[246] Prior to 1975, corroboration was required of all three elements in New York as well.[247] In Nebraska (and in Georgia and Idaho prior to statutory reform)[248] corroboration is not required of the actual offense but of the facts and circumstances surrounding it.[249] In three other states a complaint to authorities within a certain period of time is considered corroborative.[250] Marks of violence on the complainant,[251] the condition of her clothing,[252] and her emotional condition[253] have been held to be corroborative as have admissions by the accused.[254] Authorities differ, however, as to whether the woman's prompt

---

[241] 30 C.C.C.2d 1 (Can. 1976).

[242] *Id.* at 20.

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

[244] Annot., 60 A.L.R. 1125 (1929).

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

[246] United States v. Jenkins, 436 F.2d 140 (D.C. Cir. 1970).

[247] Note, *supra* note 245, at 1368.

[248] Annot., 60 A.L.R. 1139, 1140 (1929).

[249] Note, *supra* note 245, at 1369.

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

[251] State v. Mitchell, 68 Iowa 116, 26 N.W. 44 (1885).

[252] Hamilton v. State, 169 Ga. 826, 151 S.E. 805 (1930), *rev'd on other grounds*, 233 Ga. 187, 210 S.E.2d 657 (1974).

[253] Harper v. State, 201 Ga. 10, 39 S.E.2d 45 (1946).

[254] State v. West, 197 Iowa 789, 198 N.W. 103 (1924).

complaint,[255] a subsequent pregnancy,[256] or the presence of the accused on the scene[257] constitute corroboration.

Some form of corroboration is also required by statute in the following states and territories: Arizona,[258] Idaho,[259] Illinois,[260] Massachusetts,[261] Mississippi,[262] New York,[263] Puerto Rico,[264] Ohio[265] and the Virgin Islands.[266] In Hawaii,[267] Nebraska,[268] New Mexico[269] and the District of Columbia,[270] a corroboration requirement developed in the case law.

Pressure for reform in recent years has led to a reassessment of the traditional arguments used to support the corroboration requirement, and the mandatory jury instruction. In the 17th century, Lord Matthew Hale stated: "It must be remembered that it [rape] is an accusation easily to be made and hard to be proved, and harder to be defended by the party accused, tho never so innocent."[271] In the 20th century, this statement has been cited as the primary rationale for the corroboration requirement in sexual offense cases. Quoted again and again in articles, books, and countless decisions, the phrase has only recently been criticized as both inappropriate and inaccurate.[272]

Rape is thought to be the most under-reported of all violent crimes with estimated reporting rates ranging from 20 to 40 percent.[273] Those who do report must be prepared to withstand the stigma and humiliation associated with being a rape victim. They must be prepared to undergo

---

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

[256] People v. Haischer, 81 App. Div. 79 (1903) (not corroborative).

[257] Ewing v. United States, 135 F.2d 636 (D.C. Cir. 1942) (corroborative); State v. Chapman, 88 Iowa 254, 55 N.W. 489 (1893) (not corroborative).

[258] ARIZ. REV. STAT. ANN. (1956) (Supp. 1975-6) (corroboration required if conflict in evidence of victim's intimidation).

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

[260] ILL. ANN. STAT. (Smith-Hurd Supp. 1975).

[261] MASS. GEN. LAWS ch. 265 (Supp. 1975).

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

[263] N.Y. PENAL LAW § 130.16 (McKinney) (corroboration always required).

[264] P.R. LAWS ANN. tit. 33 (1969).

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

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

[267] Territory v. Hayes, 43 Hawaii 58, 62 (1958).

[268] State v. Garza, 187 Neb. 407, 191 N.W.2d 454, 457 (1971).

[269] State v. Baba, 56 N.M. 236, 242 P.2d 1002 (1952).

[270] United States v. Jenkins, 436 F.2d 140, 142 (D.C. Cir. 1970).

[271] M. HALE, HISTORIA PLACITORUM CORONAE 635 (1736).

[272] LeGrand, *supra* note 174, at 931; Geis, *Lord Hale, Witches and Rape*, 5 BRIT. J.L. & SOC'Y 26 (1978); S. BROWNMILLER, *supra* note 1, at 413, 414; People v. Rincon-Pineda, 14 Cal. 3d 864, 538 P.2d 247 (Calif. Sup. Ct. 1975).

[273] LeGrand, *supra* note 174, at 921; L. CLARK & D. LEWIS, *supra* note 1, at 57.

physical examinations by unfamiliar doctors and intense questioning by police, crown or district attorneys, defense lawyers and judges. Underreporting, designation of reported cases as unfounded[274] and a lack of physical evidence (often characteristic of the crime of rape)[275] are all factors which reduce the number of fully presented rape cases. Rape is clearly not "an accusation easily to be made" both in terms of the emotional effects on the complainant, and in terms of the likelihood that charges will be brought.

Lord Hale accurately described rape as a crime that was "hard to be proved." As Susan Brownmiller commented, rape, in contrast to other crimes, "leaves no corpus delecti, leaves no recoverable physical goods, and may leave no sign of physical damage."[276] The proof required is often intangible, and there are rarely witnesses to the offense.[277] Whether the act is criminal may depend more on the intent of the parties than the "nature of the act itself."[278] Lord Hale's belief is further supported by statistics which show that rape is one of the easiest charges to defend against. The fear that innocent men will be convicted of rape has led the legal system to develop a number of safeguards, including the requirement of corroboration. The result has been that rape has the lowest conviction rate of any violent crime.[279]

---

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

In 1977, of the 2987 reported rapes in Canada, 1101 were classified as unfounded. In the same year only 579 of the 5857 indecent assaults against females were classified as unfounded.

[275] S. Brownmiller, *supra* note 1, at 412-413.

[276] *Id.*

[277] *Complaint Credibility in Sexual Offense Cases: A Survey of Character Testimony and Psychiatric Experts*, 64 J. Crim. L. & Criminology 67, 68 (1973).

[278] *Id.*

[279] 15 F.B.I. Uniform Crime Rep. 116 (1973).

Conviction Rate for the U.S.—1973

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

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

Conviction Rates for Canada in 1973

	Charges	Convictions	Percentage
All Crimes Against Person	7,035	4,691	66.7%
Rape	206	82	39.3%

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

In addition to Lord Hale, two 20th century legal scholars have been widely quoted in support of the corroboration requirement. Both Glanville Williams and John Henry Wigmore advocate that the psychology of women supports the need for a corroborative requirement. Glanville Williams, in a 1962 article, stated that "sexual cases are particularly subject to the danger of deliberately false charges, resulting from sexual neurosis, phantasy, jealousy, spite, or simply a girl's refusal to admit that she consented to an act of which she is now ashamed."[280] Dean Wigmore also feared that women with psychological problems would bring false charges against men, and that in turn the jury, because of its bias, would not recognize their falsity. He based his conclusions on the opinions of a number of doctors whom he quoted extensively in his treatise on evidence. One such physician, Dr. Karl A. Menninger, wrote that rape fantasies were universal among women. He concluded that although normal women would not confuse fantasy and reality, "it is so easy for some neurotic individuals to translate their fantasies into actual beliefs and memory falsifications that a safeguard should certainly be placed upon this type of criminal charge."[281] Both Wigmore and Williams argued, however, that the corroboration requirement was a fairly crude response to the problem, and that a more scientific approach would be superior. Wigmore went so far as to suggest that "no judge should ever let a sex-offense charge go to the jury unless the female complainant's social history and mental make-up have been examined and testified to by a qualified physician."[282] As an alternative, Williams suggested that complainants be subjected to a polygraph or lie detector test.[283] The importance of corroboration has been declining, however, without a corresponding increase in the use of alternatives such as those suggested by Williams and Wigmore.

A proponent of the corroboration requirement commented in a Columbia Law Review article that where no other evidence exists besides the complainant's and the accused's testimony, the corroboration require-

---

As Lorenne Clark and Debra Lewis concluded in their Toronto study:

> The progress of rape case through the criminal justice system reflects a highly selective process of elimination. Only a fraction of all rapes are reported; only a fraction of reported rapes are classified as founded; only a fraction of founded cases lead to an arrest; and only a fraction of suspects arrested are convicted.

Using Metropolitan Toronto crime statistics for 1970, Clark and Lewis estimated that only seven percent of all rapists are likely to be convicted. The conclusions of the study were based on an estimated reporting rate of 40%, a founding rate of 36%, an arrest rate of 75% and a conviction rate of 51%. L. Clark & D. Lewis, *supra* note 1, at 57.

[280] Williams, *Corroboration—Sexual Cases*, 1962 Crim. L. Rev. 662.

[281] Wigmore, 3A Wigmore on Evidence § 924(a), at 744 (J. Chadbourne 1970), quoting a 1933 letter authored by Dr. Karl A. Menninger of the Menninger Clinic of Psychiatry and Neurology, Topeka, Kan.

[282] *Id.* at 737.

[283] Williams, *supra* note 280, at 664.

ment automatically resolves the conflict in favor of the accused.[284] The author supported this automatic resolution arguing that while the legislature could deal with the issues in their proper perspective, the judge and jury would be unfairly influenced by their emotional involvement in the case.[285] Like other proponents of the corroboration requirement, the author placed little confidence in the ability of judges and juries to assess the credibility of witnesses, and to assess the probative value of other evidence in rape cases. A major study done on jury behavior by Harry Kalven and Hans Zeisel indicates, however, that it is unlikely the accused will be convicted "capriciously by an inflamed jury."[286] In view of the results of this study it would appear that the traditional safeguards of the criminal trial are more than adequate to protect against such abuses.

In Lord Hale's time, the accused had neither the right to counsel, nor the right to compel witnesses in his defense. Innocence was not presumed and guilt was not required to be proven beyond a reasonable doubt. A cautious approach may have been reasonable in the 17th century, but 300 years of changes in criminal procedure have "sapped the instruction of its contemporary validity."[287]

Opponents of the corroboration requirement argue that the use of Lord Hale's words[288] as a rationale for either the corroboration requirement, or for the mandatory jury instruction is no longer justifiable. Hale's statement has not been supported factually, has placed an undue burden on rape victims and has resulted in unrealistically low conviction rates.

The view that the corroboration requirement is unnecessary and discriminatory against rape victims has gained prominence, and has led to both Canadian and U.S. reform in recent years. In Canada, the mandatory warning provision (then section 142 of the Criminal Code)[289] was repealed in 1975. The Honorable Ron Basford, Justice Minister, explained that the repeal of the section was intended to end what had been perceived as discriminatory treatment of female victims of rape and attempted rape.[290] Despite reservations expressed by a number of members of the House, the amendment was passed.

In the 1976 case of *R. v. P.*,[291] the court held that the common law

---

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

[285] *Id.*

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

[287] F.B.I. UNIFORM CRIME REP. (1973).

[288] Criminal charges involving sexual conduct are no more easily made or harder to defend against than many other classes of charges and those who make such accusations should be deemed no more suspect in credibility than any other class of complaintants. People v. Rincon-Pineda, 14 Cal. 3d at 864.

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

[290] HANSARD'S PARL. DEB., *supra* note 200.

[291] R. v. P., 32 C.C.C.2d 400 (1976).

doctrine requiring a jury warning in any sexual offense case was revived by the repeal of the statutory provision. Mr. Justice Hughes concluded that it was his duty to consider what evidence was capable of corroborating the complainant's testimony.[292] This position was contradicted in a British Columbia Court of Appeal case decided a year later. That court concluded that Parliament had clearly stated its intention to remove the corroboration warning requirement when it repealed section 142. Thus, judicial resurrection of the old common law rule would effectively frustrate Parliament's intent.[293] This holding was confirmed in the Ontario Court of Appeals in *R. v. Camp*,[294] but the court made clear that although the common law doctrine was not revived, the judge's discretion to comment on the evidence was not restricted by the amendment.[295]

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

> (1) When an accused is charged . . . with an offense under section 246.1 (sexual assault) or 246.2 (aggravated sexual assault), no corroboration is required for a conviction and the judge shall not instruct the jury that it is unsafe to find the accused guilty in the absence of corroboration.
>
> (2) Nothing in subsection (1) prevents a judge from commenting on the credibility of a witness in his charge to the jury.[297]

The recent trend in the United States toward reform has resulted in the repeal of the statutory corroboration requirement in Iowa[298] and in Georgia.[299] A number of other states have passed enactments which specifically state that corroboration is not required.[300] In Hawaii[301] and New

---

[292] *Id.* at 407.

[293] R. v. Firkins, 37 C.C.C.2d 277, 233 (B.C.C.A. 1977).

[294] R. v. Camp, 17 Ont. 2d 99, 108 (1977).

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

[296] 2 K.B. 658 (1916).

[297] Bill C-53, *supra* note 70, at § 244.

[298] IOWA CODE ANN. § 782.4 (West 1975), *repealed by* § 709.6 (West 1978).

[299] GA. CODE ANN. § 26-2001 (1975), *as amended by* Acts 1978 (Supp. 1981).

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

[301] HAWAII REV. STAT. § 707-742 (1976).

Mexico,[302] these enactments overruled the existing case law. In the District of Columbia, the judicial corroboration requirement was overruled in a 1977 case.[303]

Reform groups were not entirely successful in the state of New York, which until 1975 had the strictest corroboration requirement in the United States.[304] Corroboration was required of "every material fact essential to constitute the crime,"[305] specifically force, penetration and the identity of the accused.[306] Not suprisingly, New York's conviction rate for rape was extremely low. In 1969, for example, of the 1085 men charged with rape in New York, eighteen were convicted,[307] a 1.7 percent conviction rate; the national conviction rate for rape at that time was 36 percent.[308] Rather than abolish the requirement entirely, the New York state legislature compromised in 1975. The requirement of corroboration of force was retained but the requirement for the elements of penetration and identity was repealed. A requirement of "some other evidence tending . . . to establish that an attempt was made to engage the alleged victim in sexual intercourse . . . at the time of the alleged occurrence" was added.[309] Corroboration is therefore required of the fact that the assault was of a sexual nature.[310]

In a small number of states, and in Canada, jury instructions based on the classic words of Lord Hale have been used. Since 1976, however, the use of the warning has been prohibited by statute in Minnesota, Pennsylvania and Colorado.[311] In California prior to 1975, the following jury instruction was mandatory in sex offense cases:

> A charge such as that made against the defendant in this case is one which is easily made and once made, difficult to defend against, even if the person accused is innocent. Therefore, the law requires that you examine the testimony of the female person named in the information with caution.[312]

---

[302] N.M. STAT. ANN. § 30-9-15 (1978).

[303] United States v. Sheppard, 569 F.2d 114 (1977).

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

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

[306] Note, *supra* note 245, at 1368.

[307] N.Y. Times, May 14, 1972, § 4 at 5, col. 5, *quoted in* Note, *supra* note 245, at 1370 n.38.

[308] F.B.I. Statistics, *quoted in* Note, *supra* note 245, at 1370 n.38.

[309] Note, *supra* note 245, at 1368.

[310] *Id.* at n.20.

[311] Bienen, *supra* note 304, at 100, 112, 125. COLO. REV. STAT. § 18-3-408 (1978) (Lord Hale's instruction prohibited); MINN. STAT. ANN. § 607, 347(5)(c)(d) (West Supp. 1981) (corroboration requirement and Lord Hale's warning prohibited); 18 PA. CONS. STAT. ANN. § 3106 (Purdon 1973) revised repealing compulsory Lord Hale's instruction (Purdon Supp. 1980).

[312] CAL. JURY INSTR., CRIM. No. 10.22 (3d ed. 1970), *quoted in* People v. Rincon-Pineda, 14 Cal. 3d 864, 538 P.2d 247 (1975).

In *People v. Rincon-Pineda*,[313] the California Supreme Court studied FBI statistics relating to under-reporting, designation of claims as unfounded and conviction rates,[314] as well as the classic jury study done by Kalven and Zeisel,[315] and concluded that the requirement of a cautionary instruction was a "rule without reason."[316]

In summary, the corroboration requirement in the United States and Canada evolved from common law and statutory enactment. The distinction between the two countries is that in the United States there was no uniformity on the issue of corroboration. A number of American states required corroboration, while others did not, or had a much broader interpretation concerning what qualified as corroborating evidence. Both countries have recently moved toward the elimination of the corroboration doctrine. However, until courts across Canada and the United States reject entirely the traditional views espoused by Lord Hale, the effect of these reforms may be more cosmetic than substantive.[317]

VI. Redefinition of Rape

Another significant aspect of recent rape law reform in Canada and the United States involves a major restructuring of the offense's definition. This change first surfaced in the United States in 1975 criminal-sexual-conduct legislation of Michigan. The Michigan statute adopted an expanded definition of penetration, made the offense "sex-neutral" and provided for a "stair-casing" structure.[318] Rape and other sexual offenses were grouped into four degrees under the newly-named offense of "criminal sexual conduct." Force is required for all four degrees. The factors distinguishing the four degrees include bodily injury, multiplicity of offenders, use of weapon, age and physical and mental capabilities of the victim, relationship of the victim and actor, circumstances involving the commission of another felony and penetration as opposed to mere sexual contact.[319]

The Michigan legislation has served as an important model for much of the subsequent American rape legislation. Appromimately 25 states have adopted a form of stair-casing, ranging from a two degree offense in Alabama and Delaware, to four in Connecticut, and six in Washington (three degrees of rape and three of statutory rape).[320] Other states, such

---

[313] *Id.*

[314] F.B.I. Uniform Crime Rep. (1973).

[315] H. Kalven & H. Zeisel, The American Jury (1966).

[316] 14 Cal. 3d at 822, 123 Cal. Rptr. at 131, 538 P.2d at 259.

[317] Note, *supra* note 286.

[318] Mich. Comp. Laws Ann. §§ 750.520a-.5201 (Supp. 1980).

[319] *Id.*

[320] Ala. Code §§ 13A-6-61 to -64, -66, -67 (1978); Alaska Stat. 11.41.510 to .420 (Supp. 1978); Ark. Stat. Ann. §§ 41-1804 to -1806, -1808, -1809 (1977); Colo. Rev. Stat. § 18-3-402 to 404 (1978); Conn. Gen. Stat. Ann. §§ 53a-70, -71, -72a, -73a (West. Supp. 1980); Del. Code Ann. tit. 11 §§ 763 to 766 (1979); Hawaii Rev. Stat. §§ 707-730 to -732, -736, -737

as Utah, have retained the single offense, but provided for increased penalties under certain circumstances.[321] Many reform states have also reduced sex offense penalties on the theory that the reduction will cause an increased conviction rate.[322] In some states the definition of the offense is sex-neutral, and includes oral and anal penetration, coerced fellatio and cunnilingus and penetration by a foreign object. Particularly in these states, there has been a trend towards renaming the offense. Minnesota, Tennessee and South Carolina renamed the offense "criminal sexual conduct" following the Michigan example.[323] Twelve states have adopted the term "sexual assault,"[324] while two others use the term "sexual battery."[325] However, the majority of states, including states where wide ranging reforms have resulted in a significant expansion of the definition of the offense,[326] have retained the name "rape."

(1976 & Supp. 1981); Iowa Code Ann. §§ 709.2 to .4 (West 1979); Ky. Rev. Stat. Ann. §§ 510.040 to .060 (Baldwin 1975); Md. Crim. Law Code Ann. §§ 462 to 464c (Supp. 1981); Mich. Comp. Laws Ann. §§ 750.520b to .520e (Supp. 1980); Minn. Stat. Ann. §§ 609.342 to .345 (West. Supp. 1981); Mo. Ann. Stat. §§ 566.040, .050, .070, .080, .100, .110, .120 (Vernon 1979); Neb. Rev. Stat. §§ 28-319, -320 (1979); N.Y. Penal Law §§ 130. 25, .30, .35, .35, .55, .60, .65 (McKinney 1975); N.C. Gen. Stat. §§ 14-27.2 to .6 (Adv. Leg. Service 1979); Tenn. Code Ann. §§ 39-3703 to -3706 (Supp. 1981); V.I. Code Ann. tit. 14, §§ 1701 to 1703 (1964 & Supp. 1980). Wash. Rev. Code Ann. §§ 9A.44.010 to .090 (Supp. 1980); W. Va. Code §§ 61-8B-3 to -8 (1977); Wis. Stat. Ann. §§ 940.225(1), (2), (3m) (West Supp. 1981); Wyo. Stat. § 6-4-302 to -306 (1977).

[321] Utah Code Ann. §§ 765-402, -405 (1978 & Supp. 1981).

[322] Bienen, *supra* note 304, at 173.

[323] Minn. Stat. Ann. §§ 609.341 to .345 (West Supp. 1981); S.C. Code Ann. §§ 16-3-651 to -655 (Law Co-op. Supp. 1981); Tenn. Code Ann. §§ 39.3701 to 3710 (Supp. 1981).

[324] Alaska Stat. §§ 11.51.410 to .430 (Supp. 1978); Ariz. Rev. § 13-1406 (1978); Colo. Rev. Stat. §§ 18-3-402 to 404 (1978); Neb. Rev. Stat. §§ 280319, -320 (1979); Nev. Rev. Stat. § 200.366 (1979); N.H. Rev. Stat. Ann. §§ 632-A:2 to A:4 (Supp. 1981); N.J. Stat. Ann. § 2C:14-2 (West Pamph. 1981); Vt. Stat. Ann. tit. 13 §§ 3252, 3253 (Supp. 1981); W. Va. Code §§ 61-8B-# to -5 (1977); Wis. Stat. Ann. § 940.225(1) to (3m) (West Supp. 1981); Wyo. Stat. §§ 6-4-302 to -305 (1977).

[325] Fla. Stat. Ann. § 794.011 (West. 1976); S.C. Code Ann. § 16-3-651(h) (Law. Co-op. Supp. 1981).

[326] Ala. Code §§ 13A-6-61, -62 (1978); Cal. Penal Code § 261 (West 1970 & Supp. 1979); Del. Code tit. 11, §§ 763, 764 (1979); D.C. Code Encycl. § 22-2801 (West 1967); Ga. Code Ann. § 26-2001, -2018 (1978 & Supp. 1981); Hawaii Rev. Stat. §§ 707-730 to 732 (1976 & Supp. 1981); Idaho Code § 18-6101 (1979); Ill. Ann. Stat. ch. 38, § 11-1 (Smith-Hurd 1979); Ind. Code Ann. § 35-42-5-1 (West 1978); Kan. Stat. Ann. § 21-3502 (1974 & Supp. 1978); La. Rev. Stat. Ann. §§ 14:4 to :43 (West Supp. 1981); Me. Rev. Stat. Ann. tit. 17A § 252 (Pamph. 1981); Md. Crim. Law Code Ann. §§ 462, 463 (1976 & Supp. 1981); Mass. Gen. Laws Ann. ch. 265, §§ 22, 23 (West Supp. 1980); Miss Code Ann. §§ 97-3-65, -67 (Supp. 1981); Mo. Ann. Stat. § 566.030 (Vernon 1979); N.Y. Penal Law §§ 130.25, .30, .35 (McKinney 1975); N.C. Gen. Stat. §§ 14-27.2, .3 (Adv. Leg. Service 1979); Or. Rev. Stat. §§ 163.355 to .375 (1979); Pa. Cons. Stat. Ann. §§ 3121, 3122 (Purdon 1973 & Supp. 1980); P.R. Laws Ann. tit. 33, § 4061 (Supp. 1981); S.D. Codified Laws Ann. § 22-22-1 (Supp. 1981); Tex. Penal Code Ann. §§ 21.02, .03 (Vernon 1974 & Supp. 1981); Utah Code Ann. §§ 75-5-402, -405 (1978 & Supp. 1981); V.I. Code Ann. tit. 14, §§ 1701 to 1703 (1964 & Supp. 1980); Va. Code § 18.2-61 (Supp. 1981); Wash. Rev. Code Ann. §§ 9A.44.040 to .090 (Supp. 1980).

In Canada, the provisions of proposed bill C-53[327] follow the Michigan lead to a limited degree. The bill's enactment will replace the offenses of rape and indecent assault with the offenses of sexual assault and aggravated sexual assault. The degree of physical harm sustained by the victim and the use of a weapon by the accused will be the only distinguishing factors. Both offenses will be sex-neutral and penetration will no longer be required. Although the maximum penalty for aggravated sexual assault will remain life imprisonment, the penalty for sexual assault will be reduced to ten years. The offense of sexual assault will encompass criminal activity currently defined as rape with a maximum penalty of life, indecent assault against a male with a maximum penalty of ten years, and indecent assault against a female with a maximum penalty of five years.

The legislative intent behind restructuring and renaming the offense is to secure more convictions and reduce the stigma suffered by victims of rape. It is thought that the stair-casing feature will result in more convictions, while renaming the offense will remove some of the guilt and humiliation that society has traditionally associated with the crime of rape. Preliminary indications, based on an examination of the Michigan experience, are that rape reporting, and the number of convictions have in fact increased.[328] It is difficult to know, however, whether there is a real causal relationship between the amendments and these results.

Some observers have suggested that the stair-casing and expanded definition of penetration have been the important factors contributing to the increase in reporting and convictions, whereas the renaming of the offense has been largely irrelevant.[329] The proposed Canadian legislation is unlikely to have such a significant impact since its stair-casing feature is much less developed than Michigan's; renaming the offense is seen as the prominent area of reform. Although it is premature to predict what impact these structural and definitional changes will have, the future will allow a full comparative legal analysis of the American and the Canadian experience.

VII. Conclusion

A comparative study of Canadian and American rape law indicates many historical and present-day similarities and dissimilarities. Relying upon the early English jurisprudence, both countries codified a spousal exemption in the 19th century, and have only recently begun to remove this immunity through statutory reform. Although historically marked differences existed between the countries with the United States adopting

---

[327] *See* Bill C-53, *supra* note 70, at § 244.

[328] Institute for Social Research, Law Reform in the Prevention and Treatment of Rape: Preliminary Report (University of Michigan 1979).

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

the force and resistance standards and Canada adopting the consent standard, recent reforms have moved the countries closer together on these issues. The defense of mistake of fact which has been accepted in Canada may also have eliminated the distinction in practice.

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

Traditionally American courts are more reluctant to admit evidence of the prior sexual history of the complainant than their Canadian counterparts, and recent legislative reforms have continued this pattern. Both countries, are redefining and moving towards restructuring the offense of rape, as demonstrated by the Michigan legislation and by the proposed Canadian bill C-53. The directions for reform are similar in both the United States and Canada and continued comparative analysis of the effects of this reform will provide a fruitful source of information for the future development of the law of rape in both countries.