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Legislative Note: Micigan's Criminal Sexual Assault Law

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LEGISLATIVE NOTE:

MICHIGAN'S CRIMINAL SEXUAL ASSAULT LAW*

Under increasing pressure from women's rights groups and other reform organizations, the Michigan legislature has re-evaluated its centenarian rape statute,[1] found it inadequate for the realities of the mid-twentieth century,[2] and enacted a new sexual assault act.[3] While people may refer to the act as "the new rape law," it should be noted at the outset that the statute is intended to prohibit a variety of sexual acts which involve criminal assault.

Michigan's new criminal sexual assault law was formulated to distinguish among degrees of violence as motivated by hostility rather than passion; rape, like other crimes, is more heinous in certain contexts than others. The new law acknowledges that criminal sexual conduct is generally a premeditated crime of violence rather than a crime provoked by the victim's behavior. The victim is no longer required to resist. Where force is used, it is now presumed that the victim did not consent. Similarly, evidence is limited to that which applies to the specific crime rather than evidence concerning the victim's past sexual behavior. This note will analyze the specific provisions of the new bill and discuss the policies behind the evidentiary changes.

I. LEGISLATIVE HISTORY

The new rape law could almost be described as "vic-

*[The official name of the new statute is the Criminal Sexual Conduct Act. Law enforcement agencies will probably refer to it by its acronym, CSC. The official name has been avoided in this note because the element of assault is common to all acts prohibited under the new law. Additionally, nonassaultive criminal sexual behavior remains the subject of other Michigan statutes; therefore, the new statute is referred to herein as the Sexual Assault Act to emphasize its scope and purpose.]

[1] MICH. COMP. LAWS § 750.520 (1967). This law was originally enacted in 1846. While it has been periodically amended, it is still substantially the same law as that on the books 100 years ago.

[2] *See* 1973 UNIFORM CRIME REPORTS FOR THE U.S., issued by Clarence M. Kelley, Director, FBI, [hereinafter cited as "FBI REPORTS"]. Since 1968, the volume of reported offenses has increased 42 percent for murder and non-negligent manslaughter, 47 percent for aggravated assault, and 62 percent for forcible rape. For 1973 murder and non-negligent manslaughter increased 5 percent, aggravated assault 7 percent, and forcible rape 10 percent.

[3] No. 226 Mich. Public Acts [1974], 77th Sess. (effective April 1, 1975), *amending* No. 328 Mich. Public Acts [1931], MICH. COMP. LAWS §§ 750.1.568 (1970) [hereinafter cited as "Sexual Assault Act"].

tim-initiated." In the last two or three years several rape counseling centers have been founded in various cities throughout the state.[4] The primary purpose of these centers is to provide some psychological backup and reassurance for the ever-increasing number of rape victims. However, at a conference attended by counselors of rape victims in June 1973, attention was drawn to the fact that their efforts to help rape victims were seriously hampered by the rape laws then in effect.[5] After a meeting with the Michigan House Judiciary Committee in October 1973, it was evident that any drive for new rape legislation would have to be catalyzed by outside interest groups.[6] This prompted efforts to enlist the aid of the legal community of Ann Arbor, Michigan.[7] These groups assisted in drafting the bill which its initial sponsors[8] introduced in the Michigan Senate on February 28, 1974.[9] Despite objections to the evidentiary provisions in the bill,[10] a new statute closely resembling the submitted bill was signed into law on August 12, 1974.

II. ANALYSIS OF THE LAW

A. Clarification of Terms

The new law for the first time has codified definitions which may be determinative of the defendant's guilt or innocence—such as what constitutes "intimate parts" of the body, when a person is "mentally defective" or "physically helpless," what type of "personal injury" may be grounds for a higher charge under the statute, and what "sexual contact" and "sexual penetration" entail.[11] Some of these terms were alluded to under prior statutes, but it was left to the courts to construe such terms. It is not clear that the courts have interpreted them consistently over the

[4] Interview with Jan Ben Dor, Coordinator, Michigan Women's Task Force on Rape, in Ann Arbor, Michigan, October 13, 1974.

[5] *Id.* Jan Ben Dor organized two conferences for rape counselors throughout the state. She said, "The rape counselors would counsel a victim only to see her 'raped' again in court."

[6] *Id.* In response to Jan Ben Dor's request for assistance, the Committee said they had a full calendar but would look at whatever the women's group could present.

[7] Virginia Nordby, Lecturer in Law, University of Michigan Law School, and several women law students worked on the legislative drafting effort.

[8] Legislators especially instrumental in sponsoring this bill and taking effective action to see that it was passed include Senator Gary Byker, R-Hudsonville, and Representative Earl Nelson, D-Lansing.

[9] *See Generally* Michigan Women's Task Force on Rape Newsletter, July 22, 1974, available from Jan Ben Dor, 508 Packard, Ann Arbor, Michigan 48104.

[10] Interview with Virginia Nordby, Lecturer in Law, University of Michigan, in Ann Arbor, Michigan, September 16, 1974.

[11] Sexual Assault Act, § 520a.

years.[12] While the newly codified definitions may be open to charges of "ambiguity" under certain circumstances, the definitions are nonetheless needed to delineate the contours and fringe areas of the prohibited acts. Certainly they are a preferable alternative to the vague concept of "carnal knowledge," which was the prevailing standard under the old law.[13]

B. Consolidation

In passing the Sexual Assault Act, the legislature has incidentally effected a much needed consolidation and simplification of widely dispersed statutory provisions covering the problem. Nine existing statutes have been repealed and substantially incorporated in the new Act: the statutory formulations of common law rape ("unlawful carnal knowledge"),[14] assault with intent to commit rape[15] or sodomy or gross indecency,[16] attempted rape,[17] indecent liberties,[18] carnal knowledge of a female ward by guardian,[19] incest,[20] debauchery of youth,[21] and ravishment of a female patient in an institution for the insane.[22] Many of the latter provisions have been removed from the statutory section on indecency and immorality[23] and, in recognition of the fact that they are more closely linked to acts of assault than to acts of public indecency, are now covered by the new criminal provisions. Left intact are

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[12] *Compare* People v. Crosswell, 13 Mich. 427 (1865) (sexual intercourse with a woman shown to be in a state of dementia—a mental state approaching idiocy—held not to constitute rape) *with* Hirdes v. Ottawa Circuit Judge, 180 Mich. 321, 146 N.W. 646 (1914) (defendant, who gave a woman whiskey causing her to be intoxicated, and then had intercourse with her, found guilty of rape).

[13] MICH. COMP. LAWS § 750.520 (1967):

> any person who shall ravish and carnally know any female of the age of 16 years or more by force and against her will . . . shall be guilty of a felony. . . .

[14] *Id.*

[15] *Id.* § 750.85.

[16] *Id.* Consensual sodomy is still a crime. MICH. COMP. LAWS §§ 750.158-.159 (1967).

[17] *Id.* § 767.82.

[18] *Id.* § 750.336.

[19] *Id.* § 750.342.

[20] *Id.* § 750.333. Some aspects of the existing unrepealed law and the new sexual assault act remain irreconcilable. Under § 551.3 and § 551.4, which were not repealed, a marriage is void if the couple has enough consanguinity for the relationship to amount to incest. Yet, if the marriage is solemnized outside the state, the marriage will be recognized when the couple returns. Toth v. Toth, 50 Mich. App. 150, 212 N.W.2d 812 (1973). However, under the new Sexual Assault Act, sexual intercourse between people with the requisite degree of consanguity is prohibited only if one or both parties is less than sixteen years old. Sexual Assault Act, § 520b(1)(b). In that case, the act is punished as an aggravated offense under § 520b, even if no force or coercion is used. One might question the wisdom of legislation which decriminalizes the sexual act in an "incestuous relationship" but which invalidates the marriages of such couples.

[21] MICH. COMP. LAWS § 750.339 (1967).

[22] *Id.* 750.341.

[23] *Id.* §§ 750.335-.347.

those activities more aptly described as acts of public immorality or indecency such as self-exposure or the vending of obscene materials.[24]

It should also be noted that the new law can be described as "sex-neutral"—extending protection to men as well as to women.[25] If the Equal Rights Amendment becomes part of the Constitution, the Sexual Assault Act should not be affected.

C. Degrees of Offenses

The new statute includes a hierarchy of degrees which relate to the severity of the criminal act involved. The advantage of this hierarchy is that it allows a jury to find a defendant guilty of an appropriate lesser offense in non-aggravated rape or sexual contact cases.[26] Under prior Michigan law, the "minor" rape offenses included assault, assault and battery, and assault with intent to commit rape.[27] Only the latter was a felony.[28] This framework left large gaps between the highest charge and the less severe offenses. Thus, where a prosecutor plea-bargained or a jury declined to convict a defendant of rape, the less severe offenses often bore little relationship to the crime committed.[29] The result was that juries often refused to convict a defendant of rape unless aggravating circumstances were present.[30]

The new degree structure offers the courts objective guidelines for matching the crime with the offensiveness of the actor's conduct; the lower level offenses in the new law constitute an appro-

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[24] *Id.*

[25] MICH. COMP. LAWS § 750.520 (rape) defined the crime only in terms of carnal knowledge of a female. Sexual Assault Act § 520b.(1) implies that the actor may be either male or female and that the victim may be any person.

[26] *See* Note, *The Resistance Standard in Rape Legislation*, 18 STAN. L. REV. 680, 681 (1966):

> In a carefully drawn code, types of conduct which differ materially from each other should not be susceptible of being treated as one offense. Different conduct should be treated differently.

[27] People v. Phillips, 385 Mich. 30, 187 N.W.2d 211 (1971); People v. Pary, 14 Mich. App. 281, 165 N.W.2d 336 (1968).

[28] MICH. COMP. LAWS § 750.81, 750.85 (1970).

[29] If the defense asks for a jury instruction on lesser included offenses, it is error for the court to refuse to so charge. People v. Jones, 273 Mich. 430, 263 N.W. 417 (1935). The defense does ask for such a charge in the overwhelming majority of cases. Telephone interview with John Hensel, Prosecutor, Washtenaw County, Michigan, in Ann Arbor, Michigan, September 30, 1974.

[30] H. KALVEN & H. ZEISEL, THE AMERICAN JURY 253 (1966). "The result is startling. The jury convicts of rape in just 3 of 42 cases of simple rape." The authors also observed that

> The jury's stance is not so much that involuntary intercourse under these [non-aggravated] circumstances is no crime at all, but rather does not have the gravity of rape.

Id. at 250.

priate mid-point between the old extremes of rape and mere assault.

1. Penetration-Contact Distinction—The four degrees of criminal sexual conduct set out in the new law are distinguished on two general grounds: (1) whether sexual penetration, as opposed to contact, occurred;[31] and (2) whether certain forceful elements were present in the commission of the crime.[32] Penetration[33] is required for first and third degree criminal sexual conduct, whereas the second and fourth degree provisions apply only to sexual contact.[34] The new statute reflects traditional notions of blameworthiness; sexual penetration is deemed to be a more serious crime than sexual contact. The statute applies to an actor who engages in penetration, and therefore would include situations in which the victim was forced to penetrate the actor in some manner.

2. Aggravating Circumstances—The statute further separates penetration and sexual contact into higher and lower offenses, depending upon whether certain aggravating circumstances are present. The fourth degree offense,[35] the only misdemeanor classification, includes engaging in sexual contact with any person through the use of force or coercion or where the actor has reason to know that the victim is mentally or physically incapable of refusing consent. An offense is categorized as third degree criminal sexual conduct if the actor engages in penetration and either force is used or the victim is helpless.[36] It is also third degree conduct to engage in penetration with a victim who is between the ages of thirteen and sixteen, whether force is used or not.[37]

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[31] *Compare* the Sexual Assault Act §§ 520b and 520d *with* MICH. COMP. LAWS ANN. §§ 520c and 520e.

[32] *See* notes 35-44 and accompanying text *infra*.

[33] Sexual Assault Act § 520a(h):

> "Sexual penetration" means sexual intercourse, cunniligus, fellatio, anal intercourse, or any other intrusion, however slight, of any part of a person's body or of any object into the genital or anal openings of another person's body, but emission of semen is not required.

[34] Sexual Assault Act § 520a(g):

> "Sexual contact" includes the intentional touching of the victim's or actor's intimate parts or the intentional touching of the clothing covering the immediate area of the victim's or actor's intimate parts, if that intentional touching can reasonably be construed as being for the purpose of sexual arousal or gratification.

[35] Sexual Assault Act § 520e. "Force" is defined to include (1) the application of physical force, (2) coercion of the victim by threats of violence, (3) coercion by threats of future retaliation, (4) fraudulent medical treatment or examination of the victim, or (5) overcoming the victim through concealment or surprise. *Id.*, § 520b(1)(f)(i)-(v).

[36] *Id.* § 520d.

[37] *Id.* § 520d(1)(a). The treatment of statutory age relationships under the new law may be inconsistent with the concept of grading each offense according to the blameworthiness

It is the existence of certain aggravating circumstances that will raise an offensive sexual act – otherwise a third degree offense – to first degree and which can raise the fourth degree misdemeanor to a second degree felony. For purposes of discussion these first and second degree provisions will be referred to as "aggravated offenses." The actor is guilty of the charged aggravated offense if any of the following listed elements is present.

Statutory age or relationship.[38] There are two situations in which the age of the victim is the aggravating factor. The first is any circumstance in which the victim was under the age of thirteen years, and the second is the case in which the actor either lives with, is related to, or is in a postition of authority over a victim who is between the ages of thirteen and sixteen years.

Other felonies.[39] If the actor commits any other felony in connection with the sexual conduct or shortly before or after the sexual act, the offense is of the higher degree. Thus, an armed robber who commits rape is subject to first degree penalties. More questionable might be the situation where an unrelated felony is committed shortly after a rape.

Use of weapons.[40] The attendant use of a weapon likewise raises the charge to the aggravated offense. It is important to note that the assailant does not have to employ an actual weapon; it is sufficient if the victim reasonably believes it to be a dangerous weapon.

Aiders and abetters.[41]The presence of aiders or abetters will also result in the higher penalty. Absent any indication to the contrary, aiders and abetters will be defined in light of prior common law decisions.[42] Evidently this category includes all gang-rape situations.

Personal injury.[43] The further aggravating factor is the infliction of "personal injury" during the sexual act. This term is defined in the statute as "bodily injury, disfigurement, mental anguish,

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of the actor's conduct. For example, a fifteen-year-old female who represents that she is older will expose her unknowing eighteen-year-old companion to a possible fifteen-year prison sentence if they have intercourse, but a thirty-year-old man who has intercourse with a sixteen-year-old is guilty of no crime under the statute.

[38] *Id.* §§ 520b(1)(a) and (b) and §§ 520c(1)(a) and (b).

[39] *Id.* § 520b(1)(c) and § 520c(1)(c).

[40] *Id.* § 520b(1)(e) and § 520c(1)(e).

[41] *Id.* § 520b(1)(d) and § 520c(1)(d).

[42] *See, e.g.*, People v. Burrel, 253 Mich. 321, 235 N.W. 170 (1931); People v. Chapman, 62 Mich. 280, 28 N.W.89 (1886); Strang v. People, 24 Mich. 1 (1871).

[43] Sexual Assault Act § 520b(1)(g) and § 520c(1)(g).

chronic pain, pregnancy, disease, or loss or impairment of a sexual or reproductive organ."[44]

D. Penalties

The penalties in the new law were intended to match the gravity of the offense committed. First degree conduct carries a maximum of life in prison,[45] second and third degree offenses are punishable with a maximum of fifteen years,[46] and fourth degree conduct is a misdemeanor carrying a maximum two-year sentence or a fine not exceeding $500.[47]

However, because the law specifies no graded minimum sentences, it will be possible for some lesser offenders to receive longer sentences than some higher degree offenders. While this arguably undermines the intent of the new degree structure, it might be justified in certain cases.[48]

III. THE EVIDENTIARY PROVISIONS

Perhaps the most significant aspect of the Sexual Assault Act will be the new evidentiary provisions and the shifted burdens of proof therein. The new law does not require the victim to resist the actor[49] nor does it require the victim's testimony to be corroborated.[50] The prosecution is required to prove that force was used,[51] but it does not have to prove the victim's nonconsent.[52] Consent is now an affirmative defense in certain situations,[53] but the use of the victim's past sexual conduct to prove consent is severely limited.[54]

The following sections will investigate the possible bases for

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[44] *Id.* § 520a(f). Given the legislature's apparent intent to distinguish aggravated situations from the simpler cases (i.e., forcible rape *per se*) it may be assumed that something more than a slight injury would be necessary to elevate a penetration offense to the first degree, but this is not specified in the statute. Interview with Virginia Nordby, Lecturer in Law, University of Michigan Law School, in Ann Arbor, Michigan, September 16, 1974.

[45] Sexual Assault Act § 520b(2).

[46] *Id.* § 520c(2), § 520d(2).

[47] *Id.* § 520e(2).

[48] For example, sexual conduct by a third-time offender might warrant a longer sentence than penetration by a first-time offender. And a case of sexual contact with infliction of injury might be deemed more heinous in some contexts than a case of penetration at gunpoint with no injury.

[49] Sexual Assault Act § 520i.

[50] *Id.* § 520h.

[51] *Id.* § 520b(1)(f).

[52] *Id.* § 520j.

[53] *See* note 73 *infra*. Obviously the defense of consent is precluded where the victim is under the statutory age or is mentally incapacitated.

[54] *Id.* § 520j(1)(a), (b), and § 520j(2).

former evidentiary provisions and the reasons for the changes noted above.

A. Evidentiary Policy and the Mythology of Rape

The manner in which burdens of proof are allocated between the prosecution and the defense in criminal trials is based largely on generally accepted policy considerations. Likewise, the need for and creation of presumptions is also based on policy choices. These policy choices are, in turn, based on the perception, both of the judiciary and the public at large, of what is fair, what is expected, what is normal, or what is likely. These machinations established the presumptions and allocated the burdens of proof under the old rape laws.

Unfortunately it now appears that the perceptions of the judiciary and the public on which these presumptions were based were themselves grounded to some extent on the mythology rather than the reality of rape.

1. Rape as a crime of passion or lust.—Recent studies make it clear that rape is a crime of violence.[55] It is committed by actors who are *not* primarily moved by passion or even lust; rather, the actors are primarily motivated by hostility and the urge to brutalize and humiliate their victims.[56] A major study of forcible rape showed that in 85 percent of all reported rapes there was some form of overt violence such as beating or choking.[57]

2. Rape as a provoked reaction to victim's behavior.—Rape is not a crime in which a person's passion is provoked uncontrollably by a woman who subtly consents to intercourse through her manner ("body language") or dress. Eighty-two percent of all rapes are planned or partly planned in advance with regard to either the intended victim or the intent to perpetrate a rape.[58]

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[55] *See* FBI REPORTS, *supra* note 2 at 13.

[56] MICHIGAN TASK FORCE ON RAPE, BACKGROUND MATERIAL FOR A PROPOSAL FOR CRIMINAL CODE REFORM TO RESPOND TO MICHIGAN'S RAPE CRISIS, 1973, at 2.

[57] M. AMIR, PATTERNS IN FORCIBLE RAPE, at 152-53 (1971) [hereinafter cited as Amir]. The data in Amir's study is derived from Philadelphia police reports from 1958 and 1968. In his study elements of force are broken down into component factors: roughness, 28.5 percent; brutal beating, (slugging, kicking, using fists), 20.4 percent; nonbrutal beating (slapping), 24.7 percent; choking or gagging, 11.5 percent. Nonphysical violence or force consisting of coercion (victim threatened with bodily harm), 24.9 percent; intimidation (physical gestures and verbal threats), 41.2 percent; intimidation with a weapon or object, 21.1 percent.

[58] *Id.* at 141-42. The study generalizes that in a planned rape, the place was arranged, enticement was employed or the victim was deliberately sought, and a plan was made to coerce her into sexual relations. In a partially planned rape, vague plans were made hastily, after the offender had encountered the victim and the situation seemed "ripe."

Forty-three percent of all rapes are gang rapes involving two or more attackers with a single victim.[59] The Federal Commission on Crimes of Violence reports that only a low percentage of rapes involve any precipitative behavior on the part of the woman, such as gestures or style of dress.[60] Yet studies indicated that juries are strongly influenced by the behavior of the victim. Despite instructions by the judge, juries often respond as though they were applying the legal theory of assumption of risk.[61]

3. Rape as a pleasurable experience.[62]—That such an assertion could be believed is incredible; however, such a representation or belief may be a key part of the defense strategy. That there is a vast physiological difference between the concept of normal intercourse and rape is perhaps best understood by the studies of Masters and Johnson.[63] Certainly, in light of the percentages of cases involving beating or choking,[64] the belief that rape is pleasurable is unreasonable.

As medical, sociological, and psychological studies progressed, the foundation of the presumptions in the old rape laws became less firm. The following sections explore four particular provisions in detail.

B. Force and Resistance

Under the old statute a defendant could be convicted of rape

[59] *Id.* at 193. In gang rapes, Amir suggests there are two types of victims: (1) "loose" women, who are raped by actors who may be motivated by the assumption that the victim's reputation will render her complaint ineffective; and (2) "accidental" victims of unknown reputation who merely happen to be in the wrong place at the wrong time. However, 95 percent of gang rapes are planned or partially planned, a statistic which is probably accounted for by the fact that a secure place must be found and a victim sought and agreed upon. *Id.* at 143.

[60] *See* Curtis, *Victim Participation and Violent Crime*, 21 SOCIAL PROBLEMS, 600 (1974). The National Commission on Causes and Prevention of Violence reported that only 4 percent of all rapes in 1967 involved such conduct. In Amir's study 18 percent of the victim precipitated the rape (*e.g.*, the victim consented and then retracted her consent, did not resist strongly enough when a suggestion of intercourse was made, or used indecent language or gestures that could be taken as an invitation to sexual relations). Amir, *supra* note 57 at 266. *Id.* at 929 n.95 (suggesting that a bias in judging the existence of precipitative behavior may be inherent to the predominately male population of police, prosecutors, and judges).

[61] H. KALVEN & H. ZEISEL, THE AMERICAN JURY, at 249-257 (1966). The jury often weighs the woman's behavior in determining the defendant's guilt, especially of the victim has been hitchhiking, drinking, divorced, or had illegitimate children; this is so even when the victim is seriously hurt or gang-raped.

[62] *See* S. FREUD, NEW INTRODUCTORY LECTURES ON PSYCHOANALYSIS 158 (Sprount's trans. 1933). *But see* Note, *Rape Corroboration Requirement: Repeal Not Reform*, 81 YALE L.J. 1376-1378 (1972).

[63] Masters, *The Sexual Response of the Human Female*, WESTERN JOURNAL OF SURGERY, OBSTETRICS AND GYNECOLOGY, Vol. 68, 1960, at 57-72. The author found that an excitement phase, at least several minutes in duration and caused by physical stimulation, was almost always a necessary prerequisite to orgasm in the female.

[64] *See* note 57 and accompanying text, *supra*.

only if the prosecution proved the use of force by the assailant and the unwillingness of the victim.[65] This requirement was construed by Michigan courts to mean that the victim had to resist the actor "from the inception to the close,"[66] and such resistance had "to be to the utmost."[67] The resistance standard was developed as an objective test of whether the carnal knowledge was "against the will" of the victim,[68] but the standard has been attacked on several grounds. Rape has been the only violent crime which required any level of resistance by the victim.[69] Thus, the victim was called upon to risk his or her life in order to make conviction possible. This requirement contradicts the advice of police, who counsel victims of sexual assault to avoid resisting the actors where such resistance would not be to the victim's advantage in attempting to escape.[70]

Perhaps the most compelling argument is that nonconsent usually accompanies the use of force;[71] therefore, nonconsent should be presumed in cases of forcible sexual conduct.

The new statute codifies this view—resistance by the victim is not an element of the prosecutor's case.[72] Rather, the new law regards the coercion used by the actor, not the victim's state of mind, as determinative. While consent may be raised as an affirmative defense in certain situations,[73] under the new law it is clearly no longer necessary for the prosecution to prove nonconsent.

The new law also presumes nonconsent in the absence of force when the victim is under the age of sixteen or when the victim is physically or mentally helpless.[74] The "helpless victim" cases had

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[65] MICH. COMP. LAWS § 750.520 (1970).

[66] People v. Murphy, 145 Mich. 524, 528, 108 N.W. 1009, 1011 (1906).

[67] People v. Geddes, 301 Mich. 258, 261, 3 N.W.2d 266, 267 (1942).

[68] *See* Note, *The Resistance Standard in Rape Legislation*, *supra* note 26 at 682: "[the courts] have seized upon resistance, the outward manifestation of nonconsent, as the device for determining whether the woman actually gave consent."

[69] Nonconsent is not an element of the crimes of assault (MICH. COMP. LAWS § 750.81–90 (1970)), larceny from a person (*Id.* § 750.357), or homicide (*Id.* § 750.316-.326). Accordingly, courts have not required victim resistance.

[70] Interview with Katherine Lesney, Executive Lieutenant, Women and Children's Section, Detroit, Michigan Police Department, in Detroit, Nov. 20, 1974. The department recommends resistance as affording the victim a chance to escape, except where she is confronted with a weapon or other hopeless odds.

[71] Nonconsent would not accompany force in the exceptionally aberrant case of a sado-masochistic relationship.

[72] Sexual Assault Act § 520i.

[73] *Id.*, §§ 520j(1), (a), (b), and (2). The word "consent" does not appear in the new law at all. However, the clear implication of § 520j, *inter alia*, is that sexual acts accomplished by force or coercion are the antithesis of voluntary sexual acts; for a sexual act to be voluntary, there must be conscious consent by both participants.

[74] *Id.* § 520d.

presented a problem under the prior statute which required proof of both force and nonconsent,[75] but Michigan courts evolved tests that achieved roughly the same result as the new law,[76] holding the actor liable if he knew or had reason to know of the victim's condition.

In recent years the Michigan courts have relaxed the resistance requirement. The early judicial stance was that there could be no conviction for rape if the prosecutrix ceased to resist at any point before consummation of intercourse.[77] However, more recent cases have excused nonresistance if the victim "was overcome by fear of the defendant."[78] This rationale has been used most often in cases of gang rapes[79] and rapes at gunpoint,[80] but has also been applied recently where the actor had no weapon and was acting alone.[81] Thus, the new provision regarding resistance may reflect the current judicial view.

C. The Victim's Sexual Conduct

The Sexual Assault Act now limits the admissibility of evidence to the specific circumstances of the charged criminal act and excludes evidence of the victim's chastity, sexual reputation, and sexual conduct.[82] There are only two exceptions: evidence of prior sexual activity with the actor and evidence of specific instances of sexual activity to show the origin of pregnancy, disease, or semen.[83] However, this evidence will only be admitted after the defense has filed a written motion and offer of proof within ten days after arraignment,[84] and the judge has determined that the evidence is material and that its probative value outweighs its inflammatory nature.[85]

In the past, such evidence was allowed either to impeach the victim's credibility or to show the probability that she consented.

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[75] MICH. COMP. LAWS § 750.341 (1970).

[76] People v. Don Moran, 25 Mich. 356, 363, 12 Am. Rep. 283 (1872) stating that overcoming a victim's resistance through the use of drugs was equivalent to the use of physical force).

[77] People v. Ayres, 195 Mich. 274, 161 N.W. 870 (1917); People v. Marrs, 125 Mich. 376, 84 N.W. 284 (1900) (dictum).

[78] People v. Myers, 306 Mich. 100, 103, 10 N.W.2d 323, 324 (1943).

[79] People v. Jackson, 42 Mich. App. 468, 202 N.W.2d 463 (1972); People v. Dockery, 20 Mich. App. 201, 173 N.W.2d 726 (1969).

[80] People v. Myers, 306 Mich. 100, 10 N.W.2d 323 (1943).

[81] People v. Palmer, 47 Mich. App. 512, 209 N.W.2d 710 (1973).

[82] Sexual Assault Act § 520j.

[83] *Id.* §§ 520j(1)(a) and (b).

[84] *Id.* § 520j(2).

[85] *Id.* § 520j(1).

These two purposes are quite separate, although their effects may merge. Where the premise is accepted that women who have consented in the past will probably consent in the future, the defense can cross-examine the victim on her past sexual history and present witnesses to show the probability that she consented. Similarly, impeachment is used to suggest that the victim is lying, and not to be believed.[86] With regard to that hypothesis, general evidence of a bad reputation or specific sexual activities have been allowed, but evidence of specific acts with third parties have not been admissable except to show the origin of a pregnancy.[87]

The new act attempts to focus the attention of the court on the criminal act and its circumstances. In the past it was believed that the protection of the defendant from untrue accusations required that all means be put at his disposal to determine the veracity of the accusations, including evidence of the prosecutrix's past history.[88] However, this evidence served as a strong deterrent to reporting and prosecuting rapes,[89] victims being reluctant to submit to a harrowing trial.[90] Since this deterrent effect could pose a large problem, an exception was created, limited by the judge's discretion, to allow the admission of evidence of prior relations between the actor and the victim.[91] The exception, while more limited than in the past, is still open to abuse. The court must protect the defendant from false accusations and simultaneously protect the victim from having mere acquaintanceship or physical proximity construed as consent to sexual conduct.[92] The second exception, allowing evidence of specific instances of sexual activity to show the source of semen, pregnancy, or disease, also

[86] People v. McClean, 71 Mich. 309, 38 N.W. 917 (1888) (evidence that prosecutrix's character for chastity is bad held admissable, and particular acts of unchastity or sexual intercourse with the defendant allowed to be shown, but evidence of such acts with a third person held not admissible). *Cf.* People v. Travis, 246 Mich. 514, 516, 224 N.W. 329, 330 (1929) (admission of evidence that a third person had not had sexual relations with his wife for four years and would be more inclined to commit rape than one whose sexual desires had regularly been satisfied held reversible error).

[87] People v. Russell, 241 Mich. 125, 126-27, 216 N.W. 441, 442 (1927) (Where the prosecutrix is pregnant, the defendant should be permitted to establish either by direct or circumstantial evidence that someone other than himself may be responsible for that condition.). *See also* People v. Mitchel, 44 Mich. App. 679, 685, 689-90, 205 N.W.2d 876, 879, 881 (1973).

[88] Landau, *Rape: The Victim as Defendant,* TRIALS, July-Aug. 1974 at 19:

> [O]ur rape laws express both our deep revulsion at this crime and our equally deep distrust of those women who accuse another human being of having committed it.

[89] *See* FBI REPORTS, *supra* note 2, at 13.

[90] *See* notes 4-5 *supra.*

[91] Sexual Assault Act §§ 520j(1)(a), and (b).

[92] Sexual Assault Act § 520j(1).

appears vulnerable to abuse, but it is designed to protect the defendant's rights. If the identity of the actor is at issue, the defendant must be permitted to admit evidence showing that a third party was the source of the semen. Likewise, since pregnancy and venereal disease are types of "personal injury" that would elevate a simple offense to the aggravated level, the defendant must be allowed to admit such evidence to show his innocence as to the pregnancy or disease.

It has been argued that the evidentiary limitations provided for in the new law (*i.e.*, total exclusion of any testimony of prior sexual relations between the victim and third parties) abridge the defendant's constitutional right to due process and to confrontation. Admitting such evidence may be *logically* relevant, (*i.e.*, that the existence of A makes it more likely that B has occurred), the legislature has, in the new law, determined that this testimony is not *legally* relevant.

Courts have in numerous circumstances, where overriding policy considerations were at stake, totally excluded evidence which may be logically relevant but which is held as a matter of law not to be legally relevant. An example is the case of subsequent repairs made to a facility which may have caused an injury.[93] Presently, in many jurisdictions, it is clear error for a trial court judge to admit such evidence.[94] The analogy of this example to the statutory rule excluding evidence of a victim's prior sexual conduct with third parties is compelling. In cases involving evidence of subsequent repair, the courts evolved a fixed rule of law through "policy-balancing" in individual cases: in the Sexual Assault Act, the legislature enacted a fixed rule of law after it balanced the countervailing policies for and against admission of such evidence. The distinction between the two law-making processes is probably too slight to support a finding that one is constitutionally valid and the other is not.

[93] Although such repairs may logically be relevant to the issue of prior defective condition and negligence, the courts have uniformly excluded such evidence. *See* Advisory Committee's Note to Rule 407, Subsequent Remedial Measures, F. R. EVID. (1973). Apparently this was initially a discretionary judgment of the court which, in each case, weighed the policy for encouraging such repairs against the probative value of the evidence. As similar cases arose and the courts relied more heavily on past decisions holding against admission of the evidence, the issue became less discretionary and more a formal common-law rule. *See* Falknor, *Extrinsic Policies Affecting Admissibility*, 10 RUTGERS L.REV. 574 (1956).

[94] Falknor, *supra*, note 93.

D. Corroboration

Although some states require that the victim's testimony be corroborated by other evidence of one or more of the elements of nonconsent, penetration, or identity of the assailant,[95] neither the Michigan common law nor the existing statutes have required corroboration of the victim's testimony.[96] The law relies completely on the jury to weigh the credibility of each witness, and this rule is continued under the new law.[97]

However, even in Michigan, where corroboration never has been officially required, few defendants have been convicted without some corroborative evidence.[98] An unofficial corroboration rule may exist in practice where overloaded police departments and prosecutors' offices refuse to press a case without some independent evidentiary support for the victim's testimony.[99] In doubtful cases the complaining party is often required to take a polygraph test.[100]

There are several reasons advanced in favor of the corroboration requirement. One is the theory that rape is more likely to be falsely charged than other crimes. Coupled with this are the beliefs that juries are prejudiced in favor of the victim and that defendants need extra protection in rape cases because there is seldom an eyewitness available to refute the victim's testimony.[101]

Empirical data on the relative veracity of rape reports, as opposed to reports of other crimes, has not been compiled,[102] but there is evidence that only a small percentage of rapes are report-

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

[96] People v. Miller, 96 Mich. 119, 55 N.W. 675 (1893); People v. Lawson, 34 Mich. App. 620, 192 N.W.2d 60 (1971).

[97] Sexual Assault Act § 520h.

[98] Many of the Michigan opinions enunciating the no-corroboration rule must be taken only as dicta: while espousing the rule, they have gone on to cite the corroborating evidence. *See e.g.*, People v. Borowski, 330 Mich. 120, 47 N.W.2d 42 (1951); People v. Inman, 315 Mich. 456, 24 N.W.2d 176 (1946); People v. Coffman, 45 Mich. App. 480, 206 N.W.2d 795 (1973).

[99] Note, *The Rape Corroboration Requirement: Repeal Not Reform*, 81 YALE L.J. 1365, 1382:

> In not one of the seventy-two rape cases encountered in their [Kalven and Zeisel] sample did prosecution rely only on the testimony of the complainant.

[100] Interview with Mrs. Diana Davis, Washtenaw County Sheriff's Department in Ann Arbor, Michigan, August 30, 1974.

[101] *See* Note, *supra* note 95, at 1139.

[102] Note, *Rape and Rape Laws: Sexism in Society and Law*, 61 CAL. L. REV. 919, 928 (1973):

> In California, one fifth of the rape complaints are "unfounded," as far as the police are concerned. This does not mean that the rapes did not occur. The police "unfind" a complaint when they feel the evidence is not strong enough to obtain a conviction.

ed.[103] It has been noted that the many disincentives for reporting a rape tend to discourage frivolous reports.[104] Also, the studies conducted by Kalven and Zeisel[105] indicate that juries are not prejudiced against the defendant; indeed, there is great reluctance on their part to convict if the parties had previously known each other.

There is some validity to the argument that identification should be corroborated,[106] but the identification problem exists in all facets of criminal law and arguably can best be handled by the traditional "beyond a reasonable doubt" standard. There is reason to believe that modern criminal investigation techniques, traditional legal rules, and disincentives to reporting are sufficient in weeding out false complaints,[107] whereas strict corroboration requirements allow many guilty parties to go free.[108] The rule also presents a constitutional problem of equal protection for women, since corroboration is required only in rape cases.[109]

For these reasons, the Michigan legislature quite properly excluded any corroboration requirement from the statute. It remains to be seen whether the bill will have any effect on law enforcement agencies which tend to require independent supporting evidence before proceeding with a case.

IV. OTHER REFORM FEATURES

A. Suppression of Names and Evidence

Under the new law, the names of the victim and the actor as well as details of the offense can be suppressed at the request of counsel, the actor, or the victim until the actor is arraigned on information, the charge is dismissed, or the case is otherwise concluded.[110] Similar protection is afforded to juveniles; the juvenile court in Michigan can not disclose court records unless there

[103] *Id.* at 921: "Various studies have estimated that only 20 percent of all forcible rapes are reported to police." (Footnotes omitted.)

[104] *See* Note, *supra* note 99. Complaintants face an often embarrassing police interrogation, grueling cross-examination from defense counsel, and poor odds for a conviction.

[105] *See* H. Kalven and H. Zeisel, *supra* note 61, at 253.

[106] *See* 11 AMER. CRIM. LAW REV. 309, 313 (1973).

[107] *See* Note, *supra* note 99, at 1375.

[108] *Id.* at 1370. Although the judicial rule was well settled in Michigan, codification was necessary to make it clear that the legislature did not intend any change in this area. Interview with Virginia Nordby, Lecturer in Law, University of Michigan Law School, in Ann Arbor, Michigan, September 1, 1974.

[109] *Supra*, note 99 at 1371.

[110] Sexual Assault Act § 520k.

is a "legitimate interest."[111] Although newspapers are not prohibited from publishing the names of juvenile offenders if they can obtain the names through other sources such as police records, they generally do not do so.[112] Newspapers have also established a policy of not publishing the names of rape victims.[113] These policies suggest the obvious: that there is a stigma attached to juvenile offenders and to rape victims as well, since they are treated in a similar manner. Consistent with these policies, the Sexual Assault Act appears to be a preliminary device to protect the parties from unnecessary distress through the publishing or broadcasting of their identities.

However, "suppression" may imply that no one, not even the defendant, will have access to information prior to arraignment. If this is the legislative intent, this section may face constitutional challenges for depriving defendants of their constitutional rights. A similar Georgia statute[114] presently under attack only prohibits the name of the victim from ever being published or broadcast but does not withhold the evidence from the defendant. Under the first interpretation where only publishing or broadcasting is prohibited, the new Michigan law is apt to be viewed uncritically, but the latter interpretation involving suppression of names and evidence may face serious challenge.[115]

B. Husband and Wife

The common law definition of rape required unlawful carnal knowledge.[116] A husband could not be guilty of raping his wife, since the marital relationship was sanctioned by the law. This still would be true under the Sexual Assault Act unless the spouses

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[111] MICH. COMP. LAWS § 712A.28 (1968). *See* People v. Smallwood, 306 Mich. 49, 10 N.W.2d 303 (1943); Aetna Casualty and Surety Co. v. Oakland Co. Probate Judges, 50 Mich. App. 31 (1973).

[112] Interview with David Bishop, Managing Editor, Ann Arbor News in Ann Arbor, Michigan, September 30, 1974. The policy of the News, like that of many other newspapers, is not to publish names of juvenile offenders.

[113] *Id.*

[114] GA. CODE ANN. § 26-9901 (1968). This statute was upheld by the Georgia Supreme Court in Cox Broadcasting Corp. v. Cohn, 231 Ga. 60, 200 S.E.2d 127 (1973), *appeal pending*, 415 U.S. 912 (No. 73-938 1974).

[115] *See generally* Coleman v. Alabama, 399 U.S. 1 (1970).

[116] 1 M. HALE, PLEAS OF THE CROWN 628 (1847). *See also* Note, *Rape and Battery Between Husband and Wife*, 6 STAN. L. REV. 719, 720 (1954). Under the old Michigan statute, a husband can be charged as a principal in the rape of his wife for aiding and abetting the rape. There has never been a case in Michigan where the husband was charged directly with raping his wife. *See* People v. Chapman, 62 Mich. 280, 28 N.W. 896 (1886); Strang v. People, 24 Mich. 1 (1871) (dictum).

were living apart and one had filed for separate maintenance or divorce.[117]

A person has always been protected against murder and manslaughter by his or her spouse, and the new Act seeks to extend the protection of the law to a limited group of married but separated people.[118] The new law, however, still does not protect spouses with continuing marriages, thus presenting a possible denial of equal protection[119] in that only married couples who are living apart are protected.

There are several considerations that led to the limitation of the Act's coverage to couples living apart. Acts between a married couple may provide difficult evidentiary problems.[120] There is a belief that the situation of spouses living together is susceptible to misinterpretation and likely to allow either spouse to use the law to obtain a better property settlement or child custody.[121] It also might act as an obstacle to reconciliation.[122] In balance, therefore, the legislature decided to avoid bringing this difficult evidentiary and social problem within the scope of the Act.

V. COMPARISONS WITH THE MODEL PENAL CODE

The Model Penal Code (MPC) was promulgated nearly two decades ago[123] and may be considered obsolete in some areas.[124] It is presented here as an intermediate stage of legal development on the road from the common law rape offense to the new Michigan law.

Both statutes arrange the offenses into a hierarchy of degrees according to the seriousness of the act, and both provisions equate a threat of force with actual force.[125] Neither statute requires resistance by the victim, although the MPC requires threats to be such as "would prevent the resistance by a woman

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[117] Sexual Assault Act § 5201.

[118] *Id.*

[119] U.S. Const. amend. XIV.

[120] *See* Note, *supra* note 116, at 725. It may be argued, however, that difficult evidentiary problems do not justify withholding the protection of the law from married persons.

[121] *Id.*

[122] *Id.*

[123] The Sexual Provisions of Model Penal Code Proposed Official Draft (1962) were originally presented as § 206 Tent. Draft No. 4 (1955).

[124] The MPC defines rape in the traditional manner. *See* Stone and Hall, The Model Penal Code in Idaho?, 8 IDAHO L. REV. 237 (1972):

> The basic change brought about by the Code is not so much with regard to definition as it is to grade the offense into felonies of three categories.

[125] MODEL PENAL CODE § 213.1(1)(a) (Proposed Official Draft, 1962); Sexual Assault Act § 529b(1)(f)(i), (ii).

of ordinary resolution."[126] Both laws deal with intercourse by deceit or with mentally defective victims.[127]

The MPC is not sex-neutral and offers no protection to spouses. Rape may only be committed by a male having intercourse with a female who is not his wife.[128] The MPC also treats an unmarried couple as man and wife if they are living together; under that circumstance an unmarried woman would not be protected under the Act.[129] The MPC also requires corroboration of the victim's testimony and calls for a jury instruction which implies that the victim's emotional involvement makes her testimony suspect.[130]

The MPC first degree statutory rape age is ten, as opposed to thirteen in Michigan, and the MPC lesser offense of corruption of minors applies to women under sixteen provided that the actor is at least four years older than his victim.[131] The requirement that the actor be older was not included in the Michigan law because it was argued that age differential alone does not constitute coercion.[132]

Under the MPC the actor would be guilty of a first degree rape only where he inflicted serious injury on the victim. Nevertheless, the felony would be reduced to second degree if the actor were a social companion of the victim at the time of the crime or if the victim had previously been intimate with the actor.[133] It would appear that the MPC has codified the notions of assumption of risk and relevance of the victim's past sexual history, both of which should be irrelevant where severe injury is inflicted. The Michigan degree concept is superior because it reflects the conduct of the actor, not of the victim.

The MPC treats a threat of personal injury as an element of second degree rape, but sexual intercourse through the use of other "reasonable" threats is only a third degree rape.[134] Mich-

[126] MODEL PENAL CODE § 213.1(2) (Proposed Official Draft, 1962). *But see* Sexual Assault Act § 520i.

[127] MODEL PENAL CODE § 213.1(2) (Proposed Official Draft, 1962); Sexual Assault Act § 520d.

[128] MODEL PENAL CODE § 213.1(1) (Proposed Official Draft, 1962).

[129] Aside from the inequity suffered by unmarried women in this situation, the MPC formulation is open to numerous interpretative problems. In this age of diverse consensual relationships between consenting adults, when are couples "living together?"

[130] MODEL PENAL CODE § 213.6(6) (Proposed Official Draft, 1962).

[131] MODEL PENAL CODE §§ 213.1, 213.3(1)(a) (Proposed Official Draft, 1962). The age of statutory rape was ten in Michigan in 1857. *See* Crosswell v. People, 13 Mich. 427 (1865).

[132] Interview with Virginia Nordby, Lecturer in Law, University of Michigan Law School, in Ann Arbor, Michigan, September 1, 1974.

[133] MODEL PENAL CODE § 213.1(1) (Proposed Official Draft, 1962).

[134] MODEL PENAL CODE §§ 213.1(1), (2) (Proposed Official Draft, 1962).

igan distinguishes between present and future threats but assigns the same penalty to both.

Instead of grouping all crimes of penetration into one statute, as Michigan has done, the MPC divided them into "Rape" (between a man and a woman) and a crime called "Deviate Intercourse" (between any people).[135] However, the two MPC provisions contain identical elements.

In Michigan it is not an offense for a guardian to have sexual relations with his ward aged sixteen to twenty-one, but such conduct would be a misdemeanor under the MPC.[136] Also, the MPC would make it a misdemeanor for actors to have sexual intercourse with any person detained in a hospital or institution.[137] In Michigan such conduct would not be a crime unless the victim were under the age of sixteen, in which case it would constitute a first degree felony.[138] The MPC would deem sexual contact to be merely a misdemeanor,[139] while the Michigan Act recognizes that sexual contact accompanied by aggravating factors is more egregious than some penetration acts. Thus, Michigan deems some sexual contact to constitute felonious second degree conduct.[140]

Reasonable mistake as to the victim's age is a defense to statutory rape under the MPC, except when the victim is less than ten years old.[141] Michigan does not allow the defense of mistaken age allowed under the old rape statute.[142]

Perhaps the best feature of the MPC is that the hierarchy of offenses is defined in terms of penalties, with the implication that a major offense would always receive a greater penalty than a minor offense. As was noted above, the Michigan Act grades the offenses but allows the penalties to overlap.[143]

VII. CONCLUSION

The Michigan Sexual Assault Act reflects a major rethinking of the common assumptions about rape. Legislation cannot eliminate

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[135] MODEL PENAL CODE §§ 213.1, 213.2 (Proposed Official Draft, 1962).

[136] MODEL PENAL CODE § 213.3(1)(b) (Proposed Official Draft, 1962).

[137] MODEL PENAL CODE § 213.3(1)(e) (Proposed Official Draft, 1962).

[138] Sexual Assault Act § 520b(1)(b).

[139] MODEL PENAL CODE § 213.4 (Proposed Official Draft, 1962).

[140] Sexual Assault Act § 520c(1).

[141] MODEL PENAL CODE § 213.6(1) (Proposed Official Draft, 1962).

[142] People v. Gengels, 218 Mich. 632, 188 N.W. 398 (1922). On the other hand, mistaken age was a defense to the crime of "debauching." MICH. COMP. LAWS, § 750.339 (1967). *See also* People v. Bailey, 341 Mich. 592, 67 N.W.2d 785 (1954).

[143] *See* Part II-A *supra*.

the various myths that are apparently held by many jurors but the Act properly directs the court's attention to the level of violence used, rather than to the victim's prior sexual activity. The legislation reflects the fact that the motives of the rapist are not primarily sexual and, therefore, traditional ideas about sex do not apply to the rape situation.

Hopefully, the new Act will encourage the reporting of rapes, since women will no longer be required to testify about past relationships. Prosecutors may be less reluctant to handle rape cases. Also, convictions for nonaggravated rape may increase because there are now lesser offenses which are matched to less violent acts. An added advantage of the bill is that rape of a separated spouse is now a crime, although it could be argued that spouses should not have to be living apart in order to be covered by the Act.

The bill may be criticized because it does not limit the felony status of the aggravated offenses to forcible felonies. The absence of minimum sentences and the ambiguity concerning the terms "mental anguish" and "bodily injury" may tend to undercut the degree structure of the statute. These and other difficulties must await judicial interpretation before it will be possible to determine the ultimate effects of the Sexual Assault Act.

—Kenneth A. Cobb
—Nancy R. Schauer