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AN ARGUMENT FOR THE ELIMINATION OF THE RESISTANCE REQUIREMENT FROM THE DEFINITION OF FORCIBLE RAPE

*by Susan Schwartz**

I. INTRODUCTION

Rape laws have traditionally required the victim's resistance as an element of the crime. This article addresses the resistance requirement and argues for its elimination. Further, it traces the requirement from its early embodiment in the common law, through its codification in many states and statutes in the Model Penal Code.

This article also evaluates two recent statutory enactments which are designed to shift the focus from whether or not a victim has resisted her assailant to whether or not she has consented to the act of intercourse. Michigan's "criminal circumstances" approach and California's "robbery model" definitions of rape will be examined. The focal point of the article is that these approaches will not eliminate the resistance requirement from the law of rape. A model statute which will eliminate the resistance requirement from the law of rape is proposed.

II. THE RESISTANCE REQUIREMENT IN RAPE

A rape statute must, in its essence, define those situations in which an act of intercourse is a criminal act: A common formulation is that the act is criminal¹ if it is "against the will of the victim."² In a statutory enactment, a problem arises in defining those acts which are against the victim's will.³

Traditionally, a woman has been required to demonstrate resistance to her assailant in order to establish that she did not consent to a

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1. This article will argue that only those acts of intercourse which occur without the consent of one of the parties should be treated as criminal acts under a forcible rape statute.

2. *Brown v. State*, 127 Wis. 193, 206, 106 N.W. 536 (1906). See *People v. Dohring*, 59 N.Y. 374 (1874).

3. See generally Berger, *Man's Trial, Woman's Tribulation: Rape Cases in the Courtroom*, 77 COLUM. L. REV. 1, 32-39 (1977) [hereinafter cited as Berger, *Man's Trial, Woman's Tribulation*].

sexual encounter;⁴ bruises and broken bones can provide objective evidence of nonconsent when a woman's motive in reporting a rape is considered suspect.⁵ The resistance requirement originated in the common law.⁶ While one recent statutory revision has eliminated the requirement that a rape victim resist her assailant,⁷ many rape statutes still explicitly require victim resistance.⁸ Other statutes which appear on their face not to require resistance have been interpreted by the courts to require victim resistance.⁹

A. *The Common Law*

The common law defined rape as the carnal knowledge of a woman, "by force" and "against her will."¹⁰ While this language does not explicitly require resistance, courts have universally interpreted this language as requiring that a victim resist her assailant.¹¹ The required degree of resistance has changed somewhat through the years.¹² Older

4. See Comment, *Towards a Consent Standard in the Law of Rape*, 43 U. CHI. L. REV. 613, 626 (1976) [hereinafter cited as Comment, *Towards a Consent Standard*].

A third premise of traditional rape law is that unchaste women are untruthful in general and often bring false charges of rape. Wigmore, who believed that unchaste women are pathological liars, proposed that no judge let a sex offense go to the jury unless the complainant's social history and mental makeup had been examined and testified to by a physician. Though modern courts do not take so distrustful an approach, they nonetheless instruct juries that unchastity has a bearing on credibility, at least where consent to an alleged rape is at issue. It is still commonly supposed that a woman who has engaged in illicit sexual intercourse will bring a false rape charge for reasons of guilt, revenge or self-protection. In light of the time, trauma and humiliation involved in a rape trial, common sense alone would cast doubt on the validity of these suppositions. Empirical data supports this hypothesis, demonstrating that only a minute percentage of rape reports made to police are in fact false.

Id. at 626.

5. "Distrust of the complainant's credibility has led to an exaggerated insistence on evidence of resistance." *Id.* at 626.

6. See *infra* note 18.

7. See N.M. STAT. ANN. § 30-9-10(A)(4) (Supp. 1979). New Mexico's statute specifies that resistance is not required.

8. CAL. PENAL CODE § 261 (West Supp. 1980).

9. Those statutes which follow the common law approach have uniformly been interpreted as requiring resistance. Furthermore, those statutes which follow the "criminal circumstances" approach also require victim resistance. The following language from *Goldberg v. State*, 41 Md. App. 58, 65, 395 A.2d 1213, 1218 (1979) is instructive: Because "[t]he terms 'force,' 'threat of force,' 'against the will' and 'without the consent' are not defined . . . [T]he judicially determined meaning of these elements of the common law crime of rape [are retained]."

10. Note, *Recent Statutory Developments in the Definition of Forcible Rape*, 61 VA. L. REV. 1500, 1503-04 (1975) [hereinafter cited as Note, *Recent Statutory Developments*].

11. See *supra* note 9 and accompanying text.

12. See Comment, *Towards a Consent Standard*, *supra* note 4, at 618-20.

cases,¹³ reflecting the "death before dishonor"¹⁴ credo that existed in the age of chivalry and chastity,¹⁵ required that a victim resist her assailant "to the utmost."¹⁶

This formulation required a woman to resist her assailant to the full extent of her abilities:¹⁷ first she must have resisted intercourse to the utmost of her physical capacity,¹⁸ and her resistance must not have abated during the struggle.¹⁹ Voluntary submission to the act of intercourse, although yielded after assault and attempt to accomplish the act by force, negated an essential element of the crime of rape.²⁰

In *People v. Dohring*,²¹ a New York court defined the limits of the "utmost resistance" requirements. Although the court recognized that "utmost resistance" is a relative term, depending on the strength of the particular victim, it nevertheless concluded that the victim must resist until exhausted or overpowered, unless overcome by the number of assailants or the threat of death.²² Later cases²³ construed severe beatings or the threat of death to be sufficiently "coercive" to undermine a woman's resistance.

The requirement that a woman resist her assailant grew out of the law's suspicion of the credibility of unchaste²⁴ or vengeful women.²⁵

13. See *infra* note 16.

14. S. BROWNMILLER, *AGAINST OUR WILL* 17-18 (1975) [hereinafter cited as Brownmiller].

15. *Id.*

16. For the classic example of the utmost resistance standard, see *Reynolds v. State*, 27 Neb. 90, 91, 42 N.W. 903, 904 (1889). See also *State v. Hoffman*, 228 Wis. 235, 280 N.W. 357 (1938) (the utmost resistance requirement is overcome if the prosecution can prove the defendant frightened the victim so as to render her insensible and therefore incapable of resistance).

17. See Hibey, *The Trial of a Rape Case: an Advocate's Analysis of Corroboration, Consent, and Character*, 11 AM. CRIM. L. REV. 309, 328-33 (1973) [hereinafter cited as Hibey, *The Trial of a Rape Case*].

18. See Note, *Recent Statutory Developments, supra* note 10, at 1506. *Forcible Rape*, 61 VA. L. REV. 1500, 1510-16 (1975).

19. *Id.*

20. *Id.* (citing *Starr v. State*, 205 Wis. 310, 311-12, 237 N.W. 96, 97 (1931)).

21. *People v. Dohring*, 59 N.Y. 374 (1874).

22. *Id.* at 382. See also *Cascio v. State*, 147 Neb. 1075, 1078-79, 25 N.W.2d 897, 900 (1947); *Perez v. State*, 50 Tex. Crim. 34, 37, 94 S.W. 1036, 1038 (1906).

23. See *supra* notes 18-19 and accompanying text.

24. Wigmore states:

Modern psychiatrists have amply studied the behavior of errant young girls and women coming before the courts in all sorts of cases. Their psychic complexes are multifarious, distorted partly by inherent defects, partly by diseased derangements or abnormal instincts, partly by bad social environment, partly by temporary physiological or emotional conditions. One form taken by these complexes is that of contriving false charges of sexual offenses by men. The unchaste (let us call it) mentality finds incidental but direct expression in the narration of imaginary sex

Scars of struggle provided visible corroboration of a woman's word, which was suspect.²⁶ In Lord Hale's words, rape was "an accusation easily to be made . . . and harder to be defended by the party accused, tho never so innocent."²⁷ Utmost resistance provided the factfinder with support for the victim's "easily made accusation."²⁸

Rape is a crime that has been defined by nineteenth century notions of women and the female role in society.²⁹ As notions of "a woman's place" have changed,³⁰ the law has been slow to follow.³¹

These negative perceptions³² of women were expressed in three separate requirements of proof in rape cases: corroboration,³³ character evidence,³⁴ and the resistance requirement.³⁵

Corroboration was required at common law,³⁶ as proof that a wo-

incidents of which the narrator is the heroine or the victim. On the surface the narration is straightforward and convincing. The real victim, however, too often in such cases is the innocent man; for the respect and sympathy naturally felt by any tribunal for a wronged female helps to give easy credit to such a plausible tale.

3A J. WIGMORE, EVIDENCE 736 (1970) [hereinafter cited as 3A J. WIGMORE].

25. See Note, *The Victim in a Forcible Rape Case: A Feminist View*, 11 AM. CRIM. L. REV. 335, 336 (1973) [hereinafter cited as Note, *The Victim in a Forcible Rape Case*]. "It is assumed by some writers, that men are often unjustly imprisoned because of accusations brought by malicious women who all too often are afflicted with sexual and emotional problems These assumptions are at best questionable." *Id.* at 336 (citing S. ROSENBLATT, JUSTICE DENIED 37 (1971); 3A J. WIGMORE, *supra* note 24, at 736).

26. The "danger of an erroneous identification in a rape case is not of the same magnitude as the danger of a fabricated rape." *Franklin v. United States*, 330 F.2d 205, 208 (D.C. Cir. 1964).

27. It is true rape is a most detestable crime, and therefore ought severely and impartially to be punished with death; but it must be remembered [sic], that it 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.

1 M. HALE, THE HISTORY OF THE PLEAS OF THE CROWN 635 (1971).

28. See NATIONAL INSTITUTE OF LAW ENFORCEMENT AND CRIMINAL JUSTICE, FORCIBLE RAPE, AN ANALYSIS OF LEGAL ISSUES, 5 (1978) [hereinafter cited as FORCIBLE RAPE, Legal Issues].

29. See, e.g., Note, *The Victim in a Forcible Rape Case*, *supra* note 25, at 336-37.

30. See Berger, *Man's Trial, Woman's Tribulation*, *supra* note 3, at 3.

31. *Id.* at 2-7.

32. See *supra* notes 24-27 and accompanying text.

33. See *infra* notes 36-41 and accompanying text.

34. See *infra* notes 42-49 and accompanying text.

35. See *supra/infra* notes 10-58 and accompanying text.

36. See Hibey, *The Trial of a Rape Case*, *supra* note 17. See also *Allison v. United States*, 409 F.2d 445, 448 n.8 (D.C. Cir. 1969), in which the court noted the following circumstances which would corroborate the victim's story:

(1) medical evidence and testimony, (2) evidence of breaking and entering the prosecutrix' apartment, (3) condition of clothing, (4) bruises and scratches, (5) emotional condition of prosecutrix, (6) opportunity of accused, (7) conduct of accused at time of arrest, (8) presence of semen or blood on clothing of accused or victim, (9) promptness of complaints to friends and police, (10) lack of motive to

man had not fabricated a claim of rape to "trick" a man and ruin his reputation.³⁷ This distorted view of women, in which a woman's word was considered less credible than a man's,³⁸ necessitated that objective evidence or eye-witness reports provide support for a woman's story.³⁹ The corroboration requirement turned the old saw, "rape is a charge easily made and hard to disprove,"⁴⁰ on its head. When eye-witness corroboration is required, rape becomes extremely difficult to prove.⁴¹

Character evidence was used at common law to impeach the credibility of a rape victim.⁴² Under the common law, a rape victim was on trial just as much as her assailant.⁴³ Rape trials were often lurid inquisitions into victims' past sexual encounters.⁴⁴ The introduction of character evidence against rape victims⁴⁵ made it extremely difficult for a woman who was "unchaste" to appear as a witness against her assail-

falsify. This list, of course, is not exhaustive, and the corroboration in each case "must be evaluated on its own merits."

Id. (citing *Bailey & Humphries v. United States*, 405 F.2d 1362, 1358 (D.C. Cir. 1968)).

37. W. RYAN, *BLAMING THE VICTIM* 3 (1979). Ryan explains this phenomenon of "blaming the victim" as follows:

Twenty years ago, Zero Mostel used to do a sketch in which he impersonated a Dixiecrat Senator conducting an investigation of the origins of World War II. At the climax of the sketch, the Senator boomed out, in an excruciating mixture of triumph and suspicion, "What was Pearl Harbor *doing* in the Pacific?" This is an extreme example of Blaming the Victim.

38. *See supra* notes 16-27 and accompanying text.

39. *Id.*

40. *See supra* note 27 and accompanying text.

41. *See* D. CARROW, *NATIONAL INSTITUTE OF LAW ENFORCEMENT AND CRIMINAL JUSTICE, RAPE: GUIDELINES FOR A COMMUNITY RESPONSE*, 174-75 (1980).

42. At trial, evidence of bad reputation or unchastity was generally admissible as substantive evidence bearing on the contest of the prosecutrix. In a few jurisdictions, the moral character of the complainant could be a defense to the crime under the theory that an unchaste female or one with a bad reputation was likely to have consented. Even when unchastity was not considered a defense, evidence of the parties having engaged in prior sexual relations—or even evidence of prior acquaintance or dating of the parties—could be used to infer a "continuous state of mind" or the "unlikelihood of a serious attitude of opposition." *See generally* *FORCIBLE RAPE, LEGAL ISSUES, supra* note 28, at 21-27; M. AMIR, *PATTERNS IN FORCIBLE RAPE* 255-56 (1971).

43. *See* Berger, *Man's Trial, Woman's Tribulation, supra* note 3, at 12-39.

44. C. SCHURR, *RAPE: VICTIM AS CRIMINAL* 4, 5 *KNOW, INC.* (1971).

45. The police, and the courts

have fashioned a stereotype, which contains the attributes assumed to be part of the true victim's character. Like negligence's reasonable man, the true victim of rape exercises due care and caution for her own safety. She possesses a reputation for chastity in her community. Additionally, she copes well with aggression, usually meeting force with force. Should she fail to overpower her aggressor and rape occurs, she will make an immediate complaint in a hysterical state.

Comment, *Rape in Illinois: A Denial of Equal Protection*, 8 *J. MAR. J. PRAC. & PROC.* 457, 469 (1975). The victim who fails to live up to this stereotype will often find her complaint dismissed as unfounded.

ant.⁴⁶ At common law, rape was a unique crime in that the victim was treated as a "prosecutrix,"⁴⁷ rather than as a complaining witness.⁴⁸ The term "prosecutrix" is a malignant one, bearing the dark implications of personal vengeance which were attributed to women who complained of having been raped.⁴⁹

As the role of women in society has changed,⁵⁰ and the credibility of a woman's word has come to be generally accepted as equal to that of a man's,⁵¹ the requirements of proof in rape have changed.⁵² Most states have discarded the common law's strict corroboration requirements,⁵³ and have strictly limited the use of character evidence in rape cases.⁵⁴ The common law requirement of resistance, however, has not been eliminated from the law of rape,⁵⁵ but it is still as anachronistic as the corroboration requirement and the use of character evidence.

While many state statutes are modeled on the common law definition of the crime of rape,⁵⁶ other states have abandoned the common law definition in favor of the approach proposed by the Model Penal Code.⁵⁷

B. *The Model Penal Code*

Creation of the Model Penal Code⁵⁸ was an important attempt to

46. See H. KALVEN & H. ZEISEL, *THE AMERICAN JURY* 249-57 (1966).

47. See Brownmiller, *supra* note 13, at 327.

48. See Berger, *Man's Trial, Woman's Tribulation*, *supra* note 3, at 7-12.

49. The myth of the "malicious woman" is discussed in Note, *The Victim in a Forcible Rape Case*, *supra* note 25, at 336-38.

50. See *supra* notes 4-25 and accompanying text.

51. See *supra* note 25 and accompanying text.

52. Thirty-seven states have made substantive changes in their rape laws in the last five years. See *infra* APPENDIX "B." These changes are more substantive because they affect the nature of the proof necessary for a finding of culpability under rape statutes. Many "sex-neutral" statutes have not made substantive changes in the definition of the crime of rape, but have merely changed the language which describes the sex of the victim. See CAL. PENAL CODE § 261 (West Supp. 1980). "Sex neutral" statutes change the definition of rape by substituting the term "a person" for the term "a woman." See, e.g., CAL. PENAL CODE § 261 (West Supp. 1980).

53. Only nine states still require corroboration.

54. Twenty-two states have enacted laws which control the admissibility of evidence of rape victims' prior sexual conduct. FORCIBLE RAPE, *Legal Issues*, *supra* note 28, at 25.

55. See Note, *The Resistance Standard in Rape Legislation*, 18 STAN. L. REV. 680 (1966).

56. See *supra* notes 10-55 and accompanying text.

57. See *infra* notes 58-88 and accompanying text.

58. The MPC has also been the catalyst for recent efforts by the majority of states to codify their criminal statutes into one integrated whole. See, e.g., Baldwin, *Criminal Law Revision in Delaware and Hawaii*, 4 U. MICH. J.L. REF. 476, 479 (1971); Cohen, *Criminal Law Legislation and Legal Scholarship*, 16 J. LEGAL EDUC. 253, 254 (1964); Fox, *Reflections on the Law Reforming Process*, 4 U. MICH. J.L. REF. 443, 444, 459 (1971); Keeton & Reid,

analyze and recommend changes in the area of criminal law.⁵⁹ The code focuses on the actor's conduct,⁶⁰ as well as the victim's conduct.⁶¹ Concerning the actor's conduct, the code requires that the actor "compel" the victim to submit,⁶² and that he act "for the purposes of preventing resistance."⁶³ Under some circumstances, rape victims are required to evidence non-consent through resistance.⁶⁴

1. The Model Penal Code's focus on the actor's conduct in prosecuting rape

Although the Model Penal Code focuses upon the victim's behavior⁶⁵ as do the common law⁶⁶ and California's rape statute,⁶⁷ the Model

Proposed Revision of the Model Penal Code, 45 TEX. L. REV. 399, 404, 405 (1967). See also *Note, Justification: The Impact of the Model Penal Code on Statutory Reform*, 75 COLUM. L. REV. 914, 915 (1975).

59. The Model Penal Code official draft was published by the American Law Institute in 1962, but the sections dealing with sexual assault were substantially developed as early as 1955 in Tentative Draft No. 4. The MPC was a massive effort to codify the entire criminal law, including both general principles of criminal liability and definitions of specific offenses. The Code built on the common law but incorporated the perspective of modern theories about the kinds of behavior that constitute danger to society and to individuals. In the sections governing rape, the drafters were concerned primarily with specifying the minimum amount of coercion or deception necessary and then devising a rational grading system to classify all culpable conduct.

Note, *Recent Statutory Developments*, *supra* note 10, at 1501.

60. MODEL PENAL CODE § 207.4 comment at 241-43 (Tent. Draft No. 4, 1955); MODEL PENAL CODE § 213.1 comment at 303, 313-14 (1980).

61. MODEL PENAL CODE § 213.1 comment at 306 (1980).

62. MODEL PENAL CODE § 213.1(1) provides: "A male who has sexual intercourse with a female not his wife is guilty of rape if: (a) he compels her to submit by force or by threat of imminent death, serious bodily injury, extreme pain or kidnapping, to be inflicted on anyone"

63. MODEL PENAL CODE § 213.1(1)(b) provides that a male who has sexual intercourse with a female not his wife is guilty of rape if: "he has substantially impaired her power to appraise or control her conduct by administering or employing without her knowledge drugs, intoxicants or other means for the purpose of preventing resistance"

64. The comments to Tentative Draft Four of the Model Penal Code indicate that a victim is required to resist her attacker. "[S]ometimes, in order to make it perfectly clear that a token initial resistance is not enough, existing law specifies that the woman must resist 'to the utmost.' We believe that the text requirement that she be 'compelled to submit' is adequate for this purpose." MODEL PENAL CODE § 207.4 comment at 246 (Tent. Draft No. 4, 1955).

The Model Penal Code, however, does not require the victim to resist in order to obtain a rape conviction. "[T]he lack of resistance on a particular occasion will not preclude a conviction of rape if the jury can be convinced by the context and the degree of force employed by the actor that the submission was by compulsion." MODEL PENAL CODE § 213.1 comment at 306-07 (1980).

65. See *supra* note 61.

66. See *supra* notes 10-55 and accompanying text.

67. See *infra* notes 89-94 and accompanying text.

Penal Code also concentrates on the assailant's behavior. Under California's rape statute⁶⁸ and the common law,⁶⁹ rape is a general intent crime.⁷⁰ The Model Penal Code,⁷¹ and those statutes which follow the Model Penal Code,⁷² however, focus upon the actor's intent: he must "compel" the victim to submit by force or threat or administer drugs or intoxicants "for the purpose" of preventing resistance. Only if a victim is unconscious or under ten years old is the actor's thought process left unexamined.⁷³ Focusing on the actor's intent, however, may lead to some bizarre results. For example, in *Director of Public Prosecutions v. Morgan*,⁷⁴ three of the defendants asserted that they were told by the fourth defendant that his wife would welcome intercourse with each of them and that they should not be surprised if she struggled a bit, since she was "kinky." The wife's testimony recounted brutality and humiliation. The defendants testified, however, that she had consented willingly and had enjoyed the experience. On the issue of intent, the trial judge instructed the jury that a person would not be guilty of rape if he believed that the woman consented, so long as his belief was reasonable. And in *Regina v. Cogan & Leak*,⁷⁵ defendant Cogan admitted having had intercourse with Mrs. Leak at the urging of her husband. Although the victim was sobbing, and terrified of her husband, who had beaten her the night before, the defendant testified that he had believed she had consented. The jury found that although he had believed she had consented, he had no reasonable ground for this belief. The Court of Appeal quashed Cogan's conviction on the basis of the *Morgan* rule.⁷⁶

2. Resistance may be required under the Model Penal Code as corroborative evidence

Under the Model Penal Code, a rape victim must, under certain circumstances, evidence resistance.⁷⁷ While the language of the Code

68. *Id.*

69. *See supra* notes 10-55 and accompanying text.

70. *Id.*

71. *See supra* note 62.

72. *See supra* note 55.

73. *See supra* notes 62 and 63. MODEL PENAL CODE § 213.1(1)(c)-(d) provide that a male who has sexual intercourse with a female not his wife is guilty of rape if: "(c) the female is unconscious; or (d) the female is less than ten years old." *See* MODEL PENAL CODE § 213.1 comment at 303, 313-14.

74. 2 W.L.R. 913 (1975).

75. *The Times* (London), June 10, 1975, at 11, col. 6.

76. *See supra* note 74.

77. *See supra* note 64 and accompanying text.

is neutral in requiring that a victim be "compelled to submit,"⁷⁸ the commentary to the Code implies that a rape victim must actively resist her assailant under most circumstances. The Model Penal Code carries on the common law tradition of distrusting the rape victim's account of the crime, and questioning her psychological motives for reporting the rape.⁷⁹ Comments to the Code indicate that, rather than focusing on the question of consent,⁸⁰ the Code attempts to examine more objective criteria.

The Model Penal Code provides that a man is guilty of rape if he has sexual intercourse with a woman and if "with intent to compel her to submit, he compels her to submit to the act by the use or threat of force upon her or another person."⁸¹ The Comment to this section of the Code indicates that a victim is required to resist her assailant: "[s]ometimes, in order to make it perfectly clear that a token initial resistance is not enough, existing law specifies that the woman must resist 'to the utmost.' We believe that the text requirement that she be 'compelled to submit' is adequate for this purpose."⁸² The Model Penal Code also requires that the rape victim's testimony be corroborated if the assailant is convicted of a felony.⁸³

While many jurisdictions have followed the Model Penal Code ap-

78. See *supra* note 61 and accompanying text.

79. Searching for consent in a particular case . . . may reveal depths of ambiguity and contradiction that are scarcely suspected when the question is put in the abstract. Often the woman's attitude may be deeply ambivalent. She may not want intercourse, may fear it, or may desire it but feel compelled to say "no." Her confusion at the time of the act may later resolve into non-consent. Some have expressed the fear that a woman who subconsciously wanted to have sexual intercourse will later feel guilty and "cry rape."

MODEL PENAL CODE § 213.1 comment at 302-03 (1980) (footnote omitted).

80. There are a number of problems that arise if too much emphasis is placed upon the non-consent of the victim as opposed to the overreaching of the actor. In the first place, overemphasis on non-consent tends to obscure differences among the various circumstances covered by the law of rape. An exclusive focus on non-consent would collect under one label the wholly uninvited and forceful attack by a total stranger, the excessive zeal of a sometime boyfriend, and the clever seducer who dupes his victim into believing that they are husband and wife. In the words of one commentator, such an approach would compress into a single statute a diversity of conduct ranging from "brutal attacks . . . to half won arguments . . . in parked cars."

MODEL PENAL CODE § 213.1 comment at 302 (1980) (quoting Comment, *Forcible and Statutory Rape: An Exploration of the Operation and Objectives of the Consent Standard*, 62 *YALE L.J.* 55, 55-56 (1952)).

81. See *supra* note 60 and accompanying text.

82. See *supra* note 64 and accompanying text.

83. MODEL PENAL CODE § 213.6(5) (1980). See also MODEL PENAL CODE § 213.1 comment at 308: "the fact of serious bodily injury to the victim . . . provides substantial objective corroboration of the dangerousness of the actor and thus contributes to the Model Penal Code objective of reducing the subjectivity of the imposition-consent inquiry."

proach to the definition of rape,⁸⁴ a large number of states⁸⁵ have adopted another approach similar to California's pre-1981 statute.⁸⁶

C. California's Pre-1981 Rape Statute

Prior to 1981, California's rape statute required almost as much victim resistance, as the common law and Model Penal Code definitions of rape.⁸⁷ The California statute did not require that a rape victim resist her assailant "to the utmost"⁸⁸ as the common law approach did, but required that a woman resist her assailant and her resistance be "overcome by force or violence."⁸⁹ In some very limited circumstances, the California statute provided a woman need not resist her assailant where she may be "prevented from resisting by threats of great and immediate bodily harm, accompanied by apparent power of execution"⁹⁰

There is a wide variation in what California courts have held to be a sufficient "threat of great and immediate bodily harm" to obviate the need for victim resistance. In *People v. Crosby*,⁹¹ the assailant's threat to slap the victim, and to shoot her at some time in the future, was held not to be a sufficient threat. However, in *People v. Kinne*,⁹² where an assailant jumped from a stand of shrubs stark naked, grabbed a woman who was walking down the street and told her "You had better not scream," the court found that the victim had been subjected to a threat so severe that resistance was not required.⁹³

III. CRITICISM OF THE RESISTANCE REQUIREMENT IN RAPE

Recent studies⁹⁴ have shown that active, demonstrable resistance of the type required by the common law, the Model Penal Code, and the pre-1981 California statute, is an atypical response to rape. Researchers have discovered that victims who resist their assailants have a greater chance of suffering serious bodily injury than those victims who

84. See *supra* note 58 and accompanying text.

85. See *infra* notes 89-94 and accompanying text.

86. CAL. PENAL CODE § 261 (West 1970).

87. See *supra* notes 10-84 and accompanying text.

88. *Id.*

89. CAL. PENAL CODE § 261(3) (West 1970).

90. CAL. PENAL CODE § 261(4) (West 1970).

91. *People v. Crosby*, 17 Cal. App. 518, 522, 120 P. 441, 442 (1911).

92. *People v. Kinne*, 25 Cal. App. 2d 112, 76 P.2d 714 (1938).

93. *Id.* at 113-14, 76 P.2d at 715.

94. See *infra* notes 97-98 and accompanying text.

do not resist.⁹⁵ Additionally, the majority of women faced with violent assaults, such as rape, will not resist their assailants, but instead will "freeze" in a state of shock, and may appear to cooperate with their assailants. For these reasons, the resistance requirement should be eliminated from rape law because it is unrealistic and may threaten the rape victim's life.

A. The Resistance Requirement May Threaten Rape Victims' Lives

Rape victims respond to their assailants in a number of ways.⁹⁶ Some, in the minority, demonstrate active resistance⁹⁷ by fighting or screaming while others try to talk their assailants out of committing the crime,⁹⁸ through reason or guilt. The majority of rape victims, however, "freeze."⁹⁹ A rationalization process goes on, in which the threat of rape is contrasted with the threat of death or disfigurement.¹⁰⁰ Very often, rape victims may appear to "go along" with their assailants because they are afraid to do anything else;¹⁰¹ no resistance may be demonstrated, but it would be difficult to find that the victim had truly

95. See *infra* notes 96-117 and accompanying text.

96. Symonds, *The Rape Victim: Psychological Patterns of Response*, 26 AM. J. PSYCHOANALYSIS 27, 29-33 (1976) [hereinafter cited as Symonds].

97. See *id.* at 32:

Active, physical, aggressive behavior is culturally and socially disapproved of, and this disapproval is so imprinted on women's behavior that one woman said to me: "I just attended a seminar on how to prevent rape. They told me how to fight back. Squeeze his testicles, scratch his eyes. Jab him in the groin and try to kill him." She then stopped and said: "I can't do it—I'd rather be raped."

98. Verbal responses were the most common form of resistance among both rape and attempted rape victims (70%). This resistance ranged from pleas and meek appeals to strong refusal. Other verbal methods included:

Moral appeal ("this isn't right" or "what if someone were doing this to your sister");

Efforts to make herself seem less attractive (by reference to virginity, venereal disease, or cancer);

Establishing interpersonal liason by relating to the attacker on a personal level as if trying to make friends;

Interjection of external factors ("my husband will be home soon");

Stalling ("I have to go to the bathroom first").

QUEEN'S BENCH FOUNDATION, RAPE PREVENTION AND RESISTANCE 20 (1976) [hereinafter cited as QUEEN'S BENCH FOUNDATION].

99. QUEEN'S BENCH FOUNDATION, *supra* note 98, at 18. "Women in the study were asked about their primary feelings during the attack and the intensity of these feelings." While some women said that their primary feeling was terror, most "rape victims (75%) . . . reported being in a state of panic or numbing fear: 'When I saw the knife, I froze It was like one of those bad dreams where you want to run, but your legs turn to cement.' 'They could do anything; I was just helpless.'"

100. *Id.*

101. *Id.*

consented to intercourse under the circumstances.¹⁰²

The Queen's Bench Foundation,¹⁰³ in a 1976 study, showed that victim resistance¹⁰⁴ (especially screaming,¹⁰⁵ but also physical resistance¹⁰⁶) tends to precede an increase or intensification of assailants'

102. Symonds notes the following differences between passive and active resistance: Passive patterns of resistance, verbal or physical, attempt to stop the rapist's behavior by trying to induce guilt or appeal to the rapist's conscience. These patterns of resistance, which essentially are reluctant acts of submission, are wholly dependent on the rapist's sense of relatedness to the victim's need to inhibit his behavior. While there have been reports of incidents in which these responses have worked, generally they fail to stop the rape, and instead of making the rapist feel guilty, they often make him angry.

Active patterns of resistance are directed to produce fear in the rapist, that is, fear of being hurt, caught, or exposed if he persists in his attack on the victim. This may stop the attack if done early in the rapist-victim contact. Verbal active resistance usually consists of screaming something like, "Get the hell out of here," "I'll call the cops." Physical patterns of active resistance are fighting, kicking, scratching, biting, running, fleeing, jumping out of a car, and the use of weapons. The danger is often that insufficient or delayed physical resistance may be overcome by more force from the rapist. In active patterns of resistance there is no appeal to the rapist's inner feeling of conscience. . . . It is a fight for survival with a predator.

Symonds, *supra* note 96, at 32.

103. See *supra* note 98.

104. QUEEN'S BENCH FOUNDATION, *supra* note 98, at 85-86.

105. *Id.*

106. Correlations in the previous sections show that victim resistance (especially screaming, but also physical resistance), feelings of fright on the part of some assailants after they had initiated their assaults, fears of being caught if their victims "blew it" either during the assault or afterwards, victim anger, victim calmness or appearance of control during the attack instead of fright, and sometimes victim passiveness tended to precede an increase and/or an intensification of assailants' violence, ranging from wielding a weapon to actual infliction of injury. In approximately 7% of the cases studied, offenders recalled becoming extremely angry and sometimes more violent when they could not get an erection to consummate the rape.

The study also indicated that the rapes which were motivated by the *desire for revenge* upon certain individual women were often more violent than the others. In what was clearly the most excessively violent of all the sexual assaults described in the study, a 24 year old participant recalled the following experiences:

I asked her to go to the party . . . [S]he started calling me a son-of-a-bitch, etc., and accused me of robbing her house . . . This was five days after I had gotten out of the County Jail . . . I was getting really paranoid as she said she was going to call the police . . . (Later that night around 11:30 p.m.) I saw her standing there in a negligee drinking a beer . . . Then I thought, "this nasty bitch is no good for anything but to be used. I'm going to fix her now so she doesn't screw anybody else."

Armed with a butcher's knife, this offender entered this woman's house, and beat her continuously until daylight, dragging her all over the house, kicking her repeatedly, cutting her (she sustained several lacerations in her vagina), and eventually stabbing her through one hand to the floor. He left her thinking he had killed her.

Id.

violence.¹⁰⁷ The response of assailants to victim resistance in this study showed some variation.¹⁰⁸ A large percentage¹⁰⁹ (54.8%) of the assailants in the study reported getting more violent, sometimes losing control,¹¹⁰ when their victims resisted.

107. Typically, participants said they increased their violence when their expectations for the rape were not being met by the victim; 68.5% wanted their victims to comply with their expectations.

How does the assailant respond to victim resistance?

The responses of assailants to victim resistance in this study showed some variation. A large percentage (54.8%) reported getting more violent, sometimes losing control. Often the response was anger (47.9%). On the other hand, 34.2% felt powerful, dominant or good; 30.1% felt scared; and 27.4% felt excited.

Id. at 85.

108. Bard & Elleson, *Crisis Intervention and Investigation of Forcible Rape*, reprinted in L. ENFORCEMENT ASSISTANCE ADMIN., RAPE AND ITS VICTIMS 163, 168 (1977). "Recent research on rape suggests that the intent of the offender is more often aggressive than sexual to prove his own masculinity and invulnerability by scapegoating and degrading the victim."

109. QUEEN'S BENCH FOUNDATION, *supra* note 98, at 80.

1. What is a man looking for when he rapes?

According to most of the respondents in this study, 50.7% (37), *power* or *dominance* over their victims was their primary goal: "to overpower and control" them. This theme was expressed in a variety of forms:

A 24 year old who had raped a 28 year old woman recounted a story characteristic of others related in the course of the study:

I walked off from a County farm; I had rape on my mind. I intended to rape this chick I know . . . but some people came . . . I went over to this lady's house . . . I was talking to her, stalling time, really planning how to rip her off . . . By "rape," I don't just mean intercourse. I mean to go through all the changes—me getting what I wanted. If she had agreed to give me a head job, I would have said, "No" and not raped her. If she had said, "yeah, let's go to bed," I would have said "No," as she would have been in control.

A 34 year old offender defined rape as *misdirected violence* aimed at the achievement of dominance and power, which he believed most people achieve through communication and love. A 33 year old man who raped a 19 year old hitchhiker explained his rape as a means of expressing a *power-fantasy*: "My fantasy was—before I stopped—that she was teasing me. So I had an attitude of 'I'll show you' . . . I wanted power over her . . . power to overcome my fear of women."

Another 20 year old who raped a 40 year old woman explained:

She was cooperating. It was fulfilling my fantasy (from before I woke her up). She was doing it just like it was nothing. My fantasy was she would give me what I wanted because I had the knife and she was scared. I wanted her to be scared to keep me in control.

110. For many of the offenders, exertion of dominance and power included elements of revenge and humiliation. Often it was not sufficient to control the victim, but the offender wished to "put her down" as well. For example, a 21 year old who raped a 42 year old woman said that initially he was seeking sex, but his account suggests more:

I asked her to go out; she said "another time." . . . I was interested in sex. I continued to tell her I wanted to take her out. She got even more upset . . . She slapped me and called me a punk. I got upset, so I knocked the shit out of her. "I'll show you; you just don't do that to me." I degraded the shit out of her. I was just getting even dealing with myself

The Department of Justice, in a 1979 study of rape victimization,¹¹¹ compared the use of resistance¹¹² by rape victims and the incidence of additional injuries incurred by these victims,¹¹³ and found that rape victims who resisted their assailants were more likely to be injured than those who did not.¹¹⁴ Sixty-six percent¹¹⁵ of those who resisted were injured,¹¹⁶ as compared to only thirty-four percent of those who did not resist.¹¹⁷

B. Active Resistance is an Atypical Response to Rape

Another argument for the elimination of the resistance requirement lies in the findings of recent studies¹¹⁸ which indicate that active resistance to rape is an atypical victim response.¹¹⁹ A study of rape victims¹²⁰ noted that the first response of all individuals to sudden, unexpected violence¹²¹ is shock and disbelief.¹²² When realization sets in, the vast majority of victims experience fright bordering on panic.¹²³ This fright-panic response is especially true when the individual feels that her life is in imminent danger.¹²⁴

The behavior of the vast majority of women¹²⁵ during their con-

Id. at 80.

111. M. McDermott, Law Enforcement Assistance Administration, National Criminal Justice Information and Statistics Service, RAPE VICTIMIZATION IN 26 AMERICAN CITIES (1979) [hereinafter cited as RAPE VICTIMIZATION].

112. *Id.* at 40.

113. *Id.* at 41.

114. *Id.*

115. *Id.*

116. Or suffered greater injuries than those victims who did not resist suffered. *Id.*

117. *Id.*

118. QUEEN'S BENCH FOUNDATION, *supra* note 98, at 21; RAPE VICTIMIZATION, *supra* note 111, at 35; Symonds, *supra* note 96.

119. QUEEN'S BENCH FOUNDATION, *supra* note 98, at 19-21. See also *supra* notes 95-117.

120. Symonds, *supra* note 96, at 27.

121. *Id.*

122. *Id.*

123. *Id.*

124. *Id.* at 30.

125. Symonds gives several examples of victim behavior: a young woman who was raped described her reaction as follows: "I was just that scared. I would have done anything he asked. I felt he was capable of anything, including killing me. He reminded me of my father, his looks and the violence. It seemed to reinforce my fear of him."

After she was raped, she went quietly with him to his car and he drove her to a bus stop. She thanked him and he left.

.....
A rapist blamed a girl of eighteen for his having torn her clothing. He said she had not cooperated with him. She started to cry and said, "I'm sorry I was bad."
Symonds, *supra* note 96, at 30.

tact with rapists demonstrates that victims not only submit to their assailants¹²⁶ but also demonstrate a response known as "psychological infantilism"¹²⁷ which makes it appear to the outsider that they are friendly and cooperative.¹²⁸

The frozen fright response¹²⁹ of "psychological infantilism" is confusing to the rapist, the victim¹³⁰ and the police alike. The victim may appear relaxed and calm, but she is actually in terror. Frozen fright has its roots in profound primal terror.¹³¹

Rape victims may make submissive signs to the rapist in order to inhibit his aggressive action.¹³² Sometimes, the suspense of the threat to life is so painful that the victim wants the ordeal over in order to obtain relief.¹³³ These victims close their eyes and try to leave their bodies with the rapist.¹³⁴ They say to the rapist, "Get it over with."¹³⁵

In another study,¹³⁶ rape victims were asked about their primary feelings¹³⁷ and the intensity of those feelings during the attack. Most said their primary feeling was terror,¹³⁸ and seventy-five percent of the victims reported being in a state of panic or fear.¹³⁹

The fears of rape victims centered around injury and death. One noted, "I could get killed. They might beat me to a bloody pulp and leave me in a field someplace,"¹⁴⁰ and another reported, "I knew right away he knows how to kill because he was holding the two arteries that bring blood to your brain. He choked me so hard I knew it was a

126. *Id.*

127. *Id.*

128. *Id.*

129. *Id.*

130. *Id.* Symonds notes that terror and rage may coexist in rape victims, and in some cases may lead to resistance by the victim:

In the light of the traumatic psychological infantilism (frozen-fright response) that most victims of violent crime undergo, it is surprising we see any resistance patterns at all. Yet resistance to violent crimes does occur. Many victims experience anger as well as fright. However, fright and anger occurring at the same time is an explosive amalgam and is dangerous to the victim, especially if the criminal is still present, threatening imminent violence for noncompliance.

Id. at 31.

131. *Id.*

132. *Id.*

133. *Id.*

134. *Id.*

135. *Id.*

136. See QUEEN'S BENCH FOUNDATION, *supra* note 98, at 1-27.

137. *Id.* at 7-11.

138. *Id.* at 18-19.

139. *Id.* at 18.

140. *Id.*

matter of seconds before you can die."¹⁴¹ Most of the women in this study reported that they feared they would be killed.¹⁴²

*C. The Resistance Requirement Should Be
Eliminated from Rape Statutes*

The resistance requirement should be eliminated from the definition of rape because it reflects an unfortunate compendium of misconceptions¹⁴³ about men, women and rape. This requirement establishes an unrealistic standard by creating the presumption that a woman who has not actively resisted her assailant has consented to the rape,¹⁴⁴ and the act is, therefore, not criminal. Studies of rapist behavior and rape victims' injuries have shown that often resistance will prompt a more violent assault.¹⁴⁵ Studies of victims' responses to rapists' assaults show that "frozen fright" (the victim's complete inability to respond to, or to resist, her assailant) is a more common reaction to rape than active resistance.¹⁴⁶ Increasingly, the professional literature¹⁴⁷ indicates that there are many situations in which resistance is not a valid measure of lack of consent by rape victims.¹⁴⁸

IV. PROPOSALS FOR ELIMINATING THE RESISTANCE REQUIREMENT

The California and Michigan legislatures have attempted to redefine rape and the resistance requirement, but due to ambiguous language and poor definition of terms, neither have succeeded in eliminating the resistance requirement from the law of rape.

A. The California Levine Bill's Robbery Model

The Los Angeles County Bar Association's (LACBA) Rape Legislation Committee recently reviewed a number of proposals for changing California's rape law.¹⁴⁹ In April, 1980, a bill reflecting the Committee's approach was introduced in the California Assembly by Assemblyman Mel Levine.¹⁵⁰ The bill was enacted into law in Janu-

141. *Id.*

142. *Id.*

143. *See supra* notes 10-55 and accompanying text.

144. *Id.*

145. *See supra* notes 96-118 and accompanying text.

146. *See supra* notes 119-42 and accompanying text.

147. *Id.*

148. *Id.*

149. Interview with Aileen Adams, Recording Secretary of the LACBA Rape Legislation Committee, in Los Angeles (March 1980).

150. A.B. 2899, introduced March 6, 1980, amended April 7, 1980.

ary, 1981.¹⁵¹

The LACBA Committee determined that California's rape statute should be revised to reflect the language used in California's robbery statute for several reasons:¹⁵² the language of the robbery statute is simple, clear and has been tested and defined in the California courts;¹⁵³ the language of the robbery statute has been interpreted through a large body of case law to require less physical violence than is required under the rape statute;¹⁵⁴ and there are similarities between assailant behavior and victim response in rape and robbery.¹⁵⁵

1. Similarities between the crimes of rape and robbery

The Law Enforcement Assistance Administration (LEAA) has classified rape,¹⁵⁶ along with personal robbery and assault,¹⁵⁷ as a personal crime of violence. According to the LEAA, "all bring the victim into direct contact with the offender."¹⁵⁸ In rape, physical harm is much more than a threat; it is a reality because violence is an integral part of the act. Body contact and physical intrusion are the purpose of the crime, not appropriation of a removable item like money. Yet the nature of the crime of rape, as it is committed, bears a close resemblance to robbery. The sexual goal of the rapist resembles the monetary goal of the robber.¹⁵⁹ Victim response in rape also resembles victim response to robbery more closely than to other crimes in that people who find themselves in an assaultive situation usually defend themselves by fighting back, while rape and robbery victims usually do not.¹⁶⁰

Our legal codes and court procedures, nevertheless, continue to uphold the unrealistic and unsafe expectation that victims of rape should fight back. Rape is the only violent crime in which the victim's resistance is a crucial issue in the successful prosecution of the offender.¹⁶¹ The inconsistencies in our social learning are striking. Soci-

151. The bill was signed on September 17, 1980.

152. *See supra* note 149.

153. *See infra* note 165 and accompanying text.

154. *See infra* notes 166-94 and accompanying text.

155. *See infra* notes 159-61 and accompanying text.

156. *See* CRIMINAL VICTIMIZATION IN THE UNITED STATES, 2.

157. *Id.* at 26.

158. *Id.* at 33.

159. BROWNMILLER, *supra* note 13, at 384.

160. *Id.* at 385.

161. [R]obbery and assault, like rape, are crimes which are defined to include both force and nonconsent as elements. Although these definitions reflect a recognition that most transfers of property and most touchings are consensual and that a per-

ety teaches that when confronted with a violent person in threatening situations other than rape, the safest strategy is to cooperate and comply with his demands.¹⁶² Victims of robbery who respond with "take my money, take anything, just don't hurt me" are certainly not suspect because of their non-resistance and, in fact, are commended for acting correctly.¹⁶³ These attitudes and beliefs about sexual versus other assaults, though inconsistent, are deeply ingrained in our culture, and the courts impose them upon rape victims.¹⁶⁴

2. Evidence of non-consent in robbery cases

California's robbery statute requires that the crime be committed "against the will"¹⁶⁵ of the victim, and that the victim be compelled to submit to the robbery by "force or fear."¹⁶⁶ Fear is defined as either "the fear of unlawful injury to the person or property of the person robbed, or of any relative of his or member of his family,"¹⁶⁷ or as "the fear of an immediate and unlawful injury to the person or property of anyone in the company of the person robbed at the time of the robbery."¹⁶⁸ Such fear may arise from the use, or threat of use, of physical violence by the actor, or from the actor's threatening the victim with a deadly weapon.¹⁶⁹

The minimum amount of "force or fear" necessary for a taking to be considered a robbery is perhaps best defined by the "purse snatch-

son needs the freedom to engage in these activities, this recognition does not expand into a legal expectation that one who charges commission of these crimes does so falsely. Instead, the law interprets consent so as to further the policy of physical protection by focusing on the behavior of one who inflicts harm rather than on the actions of one who receives it. In robbery cases the courts set a low standard of force to prove victim fear and hence non consent, applying a reasonable man test. This policy is consistent with the advice of law enforcement officers to give up property when confronted by a thief, and to run or at least protect vital organs when assaulted. The law does not expect a person to risk serious injury or death in defense of self or property.

Comment, *Towards a Consent Standard*, *supra* note 4, at 637-38.

162. *Id.*

163. R. GREEN, HUMAN SEXUALITY: A HEALTH PRACTITIONER'S TEXT (1979) [hereinafter cited as R. GREEN, HUMAN SEXUALITY].

164. *Id.*

165. "Robbery is the felonious taking of personal property in the possession of another, from his person or immediate presence, and against his will, accomplished by means of force or fear." CAL. PENAL CODE § 211 (West 1970). While not specified in the statutory language, robbery has been held to be a specific intent crime (*see* Use Note to CALJIC No. 9.10 (1982 Revision) which states: "Though not stated in the code definition, robbery is a specific intent crime, and the jury must be so instructed sua sponte.")

166. CAL. PENAL CODE § 212 (West 1970).

167. *Id.*

168. *Id.*

169. *Id.*

ing" cases.¹⁷⁰ In *People v. Welch*,¹⁷¹ the court held that a purse snatching had met the "force or fear" standard; although the victim had not been threatened, the force used was enough to have broken the victim's purse-strap.¹⁷² In *People v. Morales*,¹⁷³ however, the court held that where the victim of a purse-snatching had not been threatened prior to the snatching, and it was unclear that force was used to accomplish the snatching, "the jury might have entertained a reasonable doubt as to whether defendant used sufficient force in his snatching of the purse for the theft to constitute robbery."¹⁷⁴ The *Morales* court found that the trial court had erred in failing to instruct on the lesser included offense of grand theft. The court noted that "something more is required [under the robbery statute] than just that quantum of force which is necessary to accomplish the mere seizing of the property."¹⁷⁵

Perhaps *People v. Renteria*¹⁷⁶ represents the lower limits of the "force or fear" standard. In *Renteria*, the court inferred from the circumstances surrounding the robbery that the victim must have acted from fear,¹⁷⁷ even though he specifically denied this motivation.¹⁷⁸ The court in *Renteria* noted:

The People are not "bound" by the clerk's testimony that he was not in fear, since there is other evidence which will support the conclusion that he acted in fear and would not have disgorged the contents of his employer's till except in fear of the harm which might come to him or his employer if he failed to comply with the defendant's demands.¹⁷⁹

3. Evidence of non-consent in rape cases

Although the *Renteria* court was willing to infer that the victim was motivated by fear, no court has yet inferred this motivation in interpreting the language of California's rape statute.¹⁸⁰ One of the circumstances under which sexual intercourse is defined as rape is

170. Purse snatching requires very little force, and often the victim is not aware of the theft until the moment it occurs—arguably, in that situation, there is also not much fear.

171. 218 Cal. App. 2d 422, 31 Cal. Rptr. 926 (1963).

172. *Id.* at 423, 31 Cal. Rptr. at 927.

173. 49 Cal. App. 3d 134, 122 Cal. Rptr. 157 (1975).

174. *Id.* at 138, 122 Cal. Rptr. at 159.

175. *Id.* at 139, 122 Cal. Rptr. at 160.

176. 61 Cal. 2d 497, 393 P.2d 413, 39 Cal. Rptr. 214 (1964).

177. *Id.* at 499, 393 P.2d at 414, 39 Cal. Rptr. at 214.

178. *Id.* at 498, 393 P.2d at 414, 39 Cal. Rptr. at 214.

179. *Id.* at 499, 393 P.2d at 414, 39 Cal. Rptr. at 214.

180. CAL. PENAL CODE § 261 (West Supp. 1983).

Section 261 of the California Penal Code was originally enacted in 1872. The section

“[w]here it is accomplished against a person’s will by means of force or fear of immediate and unlawful bodily injury on the person or another.”¹⁸¹ A second circumstance is “[w]here the act is accomplished against the victim’s will by threatening to retaliate in the future against the victim or any other person, and there is a reasonable possibility that the perpetrator will execute the threat.”¹⁸² Under former sections of the law, it has been held that the rape victim must make manifest her unwillingness to yield to an attack,¹⁸³ though the extent to which she must resist her assailant is for the victim to decide.¹⁸⁴ The victim need not resist beyond the point at which she feels her life and safety endangered.¹⁸⁵ The trial court will determine whether her fears were reasonably grounded.¹⁸⁶ In determining the degree of resistance required to establish the offense of rape, among the factors the court will consider are the relative strengths of the parties, and the uselessness of the victim’s resistance.¹⁸⁷

The following cases illustrate the level of force or violence used by the assailant which the courts have held to be high enough to justify non-resistance on the part of the victim. In *People v. Adkins*,¹⁸⁸ the defendant held the blade of a knife to the victim’s throat, talked of having killed a man in the army, and of killing her, and stated he would stick the knife into her throat if she did not submit. In *People v. Frye*,¹⁸⁹ the victim was threatened by an assailant armed with a knife; she managed to disarm him. He then pressed something against her back, and told her to walk or he would shoot her; he had no gun.

Threats of great and immediate bodily harm used to overcome the victim’s resistance need not be verbal.¹⁹⁰ Where a nude man grabbed a woman who was walking down the street, struck her in the mouth and

was amended three times (1889, 1897, 1913) to increase the age of consent (for statutory rape) from ten years to eighteen years.

Subsection three of section 261 was amended in 1897 (at that time it was subsection four) to change the language threats of “immediate and great” bodily harm to the present “great and immediate” language.

In 1970, former subsection one, relating to sexual intercourse with a female under 18 (statutory rape) was deleted from this section; it became CAL. PENAL CODE § 261.5.

181. CAL. PENAL CODE § 261 (West Supp. 1982).

182. *Id.*

183. *People v. Peckham*, 232 Cal. App. 2d 163, 167, 42 Cal. Rptr. 673, 675 (1965).

184. *Id.*

185. *People v. Harris*, 108 Cal. App. 2d 84, 89, 238 P.2d 158, 161 (1951).

186. *Id.*

187. *People v. Nash*, 261 Cal. App. 2d 216, 67 Cal. Rptr. 621 (1968).

188. 165 Cal. App. 2d 29, 331 P.2d 195 (1958).

189. 117 Cal. App. 2d 101, 255 P.2d 105 (1953).

190. *People v. Kinne*, 25 Cal. App. 2d 112, 76 P.2d 714 (1938).

said, "You had better not scream," the man's conduct was held to have amounted to a threat of great and immediate bodily harm.¹⁹¹

Two recent cases illustrate the minimum amount of force, or threat of bodily harm, that the courts have found sufficient to support a conviction of rape. In *People v. Hunt*,¹⁹² the defendant did not utter any threats to the victim. The victim, a hitchhiker, entered the defendant's campertruck. Several miles before her intended destination, the defendant pulled off the freeway and onto a deserted road. The victim, remembering that a friend had been killed in similar circumstances, offered to perform oral copulation with the defendant. The defendant agreed; he and the victim also engaged in sexual intercourse in the back of the campertruck. The People's theory in prosecuting the case was that the threat of harm could be inferred from the circumstances. The court of appeal found no implied threat of harm, though the court did state that the case was "a very close one indeed,"¹⁹³ and overturned the defendant's conviction based on an error in the trial court's instructions to the jury.¹⁹⁴

In *People v. King*,¹⁹⁵ the court found that the victim had been prevented from resisting her attacker by threats sufficient to satisfy the statutory requirements. The two defendants took the victim into an isolated park and they escorted her, one on each arm, into a secluded area. The court found that "[t]he fact that there were two men of considerable size and obvious strength, and the . . . area to which she [the victim] had been taken against her wishes [supplied] the elements of reasonable expectation of great danger. Compliance with the orders of the men reasonably comports with the suppression of resistance."¹⁹⁶

4. Summary: a comparison of rape and robbery

Rape is a crime of violence; however, unlike other crimes of violence, such as robbery, the onus of proving that a rape has been committed is placed on the victim of the crime. The rape victim's conduct

191. *Id.* at 113, 76 P.2d at 715.

192. 72 Cal. App. 3d 190, 198, 139 Cal. Rptr. 675 (1977).

193. *Id.* at 199, 139 Cal. Rptr. at 679.

194. *Id.*, 139 Cal. Rptr. at 679. The court did note:

Even the most subjectively determined rapist cannot be convicted of rape if without any use of threat or force he persuades a female to consent, and on the other hand, even the most subjectively frightened female cannot consent to intercourse and then claim to have been raped when that fear does not have a reasonable basis in the overt actions of the alleged rapist.

Id. at 200, 139 Cal. Rptr. at 680.

195. 94 Cal. App. 3d 696, 156 Cal. Rptr. 268 (1979).

196. *Id.* at 701, 156 Cal. Rptr. at 272.

is scrutinized in a way that the conduct of other victims of violent crimes is not. Traditional rape statutes require that the victim act in a manner which clearly demonstrates her nonacquiescence to the act of intercourse.¹⁹⁷ A victim of an assault with a deadly weapon,¹⁹⁸ or of an armed robbery,¹⁹⁹ is presumed not to have consented to the crime. Under traditional rape statutes the presence of a deadly weapon in the rapist's possession does not obviate the need for a victim to manifest non-consent to the crime.²⁰⁰

The law presumes that one will not give away that which is his to a robber,²⁰¹ but makes no similar presumption as to the conduct of women and rapists.²⁰² While both rape and robbery statutes provide that only non-consensual acts are criminal,²⁰³ only rape statutes have required that a victim manifest her non-consent through resistance.²⁰⁴ California's Levine Bill was designed to eliminate the resistance requirement from the law of rape by using the language of robbery to define rape.²⁰⁵

5. The Levine Bill

The drafters of the Levine Bill intended that the "force and fear" language (which requires much less of victims of robbery than the language of the California rape statute requires of rape victims²⁰⁶) be applied to rape cases. The Levine Bill was signed into law by Governor Brown in September, 1980.²⁰⁷ As redrafted, the relevant language of the Levine Bill states: "Rape is an act of sexual intercourse accomplished with a person . . . under any of the following circumstances: Where it is accomplished against a person's will by means of force or

197. See *supra* notes 10-94 and accompanying text.

198. See B. WITKIN, CALIFORNIA CRIMES § 264 (1972).

199. See B. WITKIN, CALIFORNIA CRIMES §§ 430-40 (1972).

200. See Comment, *Towards a Consent Standard*, *supra* note 4, at 640-42. See also *People v. Crosby*, 17 Cal. App. 518, 521-22, 120 P. 441, 442 (1911), in which the assailant's threat to slap the victim, and to shoot her at some time in the future, was held not to be sufficient to convict the assailant under California law, which requires that the victim be "prevented from resisting by threats of great and immediate bodily harm, accompanied by apparent power of execution." CAL. PENAL CODE § 211(4) (West 1970) (current version at CAL. PENAL CODE § 261(2) (West Supp. 1983)).

201. See *supra* notes 161-63 and accompanying text.

202. See *supra* notes 165-94 and accompanying text.

203. See *supra* notes 180-94 and accompanying text.

204. See *supra* notes 161-63 and accompanying text.

205. See *supra* notes 165-94 and accompanying text.

206. See *supra* notes 157, 161-94 and accompanying text.

207. See *supra* note 151.

fear.”²⁰⁸ While this language eliminates the victim resistance standard *from the face* of California’s rape law, it may be interpreted to continue to require victim resistance. The language of the robbery statute, upon which this Bill is based, is identical to the language of the common law definition of rape.²⁰⁹ Under the common law, courts required that rape victims resist to the utmost.²¹⁰

The Levine Bill provides no legislative history,²¹¹ definitions or other indications²¹² that the intent of the drafters was to eliminate the resistance requirement from California’s rape law. Maryland’s rape statute was revised in a manner similar to California’s.²¹³ The Maryland Court of Appeals,²¹⁴ in interpreting the revised statute, found that because the terms “force” and “against the will” were not defined in the Maryland statute, “the judicially determined meaning of these elements of the common law crime of rape are retained.”²¹⁵ It is not difficult to imagine the California courts reaching a similar result.

The Levine Bill has removed the victim resistance standard from California’s rape statute. It will not remove the resistance requirement from the law. By returning to the common law definition of rape, this bill will call up hobgoblins of hundreds of years of common law.²¹⁶ It is not clear whether a court would find the analogy to California’s robbery law when there is the much more ready analogy to the common law.²¹⁷ The courts may still imply resistance as a way of proving that the victim acted “against her will.”

A carefully drafted rape statute must define all terms in a clear and unambiguous manner. The language of such a statute must not echo the language of the common law, for if it does, the danger exists that courts might require even more victim resistance than courts presently do.

B. The Michigan Statute

Whereas California attempted to eliminate the resistance standard from its rape law by grafting the language of robbery onto rape, Michi-

208. CAL. PENAL CODE § 261. *See supra* notes 10-55 and accompanying text.

209. *See supra* notes 10-55 and accompanying text.

210. *Id.*

211. *See infra* APPENDIX “C.”

212. *Id.*

213. *See supra* note 9 and accompanying text.

214. *Id.*

215. *Id.*

216. *See supra* notes 10-55 and accompanying text.

217. *Id.*

gan approached redefinition of consent in the law of rape in a different manner.²¹⁸ Rather than require that a woman evidence non-consent to rape²¹⁹ by resisting her assailant,²²⁰ Michigan's statute categorizes those situations in which it is extremely unlikely that a woman would have consented to intercourse.²²¹

The Michigan statute does not mention consent, but instead states that "[a] person is guilty of criminal sexual conduct . . . if he or she engages in sexual penetration with another person and if any of the following circumstances exists"²²² A long list of the criminal circumstances follow.²²³

In the last several years, nineteen states have adopted "criminal

218. The Michigan statute obviates the problem by focusing on the circumstances of the crime, rather than on the consent of the victim. MICH. COMP. LAWS ANN. §§ 750.520b-g (Supp. 1979).

219. There are many statistically common situations in which it can be presumed that consent to intercourse has not been given. Statistics show that a large number of rapes occur in victims' homes (38% of the incidents occurred in or near the victim's home; RAPE VICTIMIZATION, *supra* note 111, at 18), where entry has been gained by the assailant through stealth (18% of the cases, QUEEN'S BENCH FOUNDATION, *supra* note 98, at 14). It is unlikely that a victim would consent in such a situation. It is also highly unlikely that a woman would consent to being beaten, threatened with a weapon, or gang-raped. A large number of rape victims are hitchhikers; rather than blaming the victim when a rape occurs while the victim is hitchhiking, the legal presumption should be one of non-consent—asking for a ride is not the same as "asking for it." See, e.g., S. NELSON & M. AMIR, THE HITCHHIKE VICTIM OF RAPE, A RESEARCH REPORT, reprinted in D. CHAPPELL, FORCIBLE RAPE 272 (1977).

Less common situations also arise in which it is unlikely that a woman would consent to intercourse; when a woman has been bound, or kidnapped, it is improbable that she freely consented to an act of intercourse. See, e.g., J. BENDOR, *Justice after Rape: Legal Reform in Michigan* in M. WALKER, S. BROADSKY, SEXUAL ASSAULT 149, 155 (1976).

220. See *supra* notes 10-94 and accompanying text.

221. See MICH. COMP. LAWS ANN. §§ 750.520b-g (Supp. 1983).

222. MICH. COMP. LAWS ANN. § 750.520b (1982).

223. The following circumstances are first degree crimes under MICH. COMP. LAWS ANN. § 750.520b:

- (a) That other person is under 13 years of age.
- (b) The other person is at least 13 but less than 16 years of age and the actor is a member of the same household as the victim, the actor is related to the victim by blood or affinity to the fourth degree to the victim, or the actor is in a position of authority over the victim and used this authority to coerce the victim to submit.
- (c) Sexual penetration occurs under circumstances involving the commission of any other felony.
- (d) The actor is aided and abetted by 1 or more other persons and either of the following circumstances exists:
 - (i) The actor knows or has reason to know that the victim is mentally defective, mentally incapacitated or physically helpless.
 - (ii) The actor uses force or coercion to accomplish the sexual penetration. Force or coercion includes but is not limited to any of the circumstances listed in subdivision (f)(i) to (v).
- (e) The actor is armed with a weapon or any article used or fashioned in a manner to lead the victim to reasonably believe it to be a weapon.
- (f) The actor causes personal injury to the victim and force or coercion is used to

circumstances" rape statutes.²²⁴ Of these, only two statutes explicitly remove the resistance requirement from the law.²²⁵ Nine statutes explicitly require victim resistance.²²⁶ The remaining eight statutes use language which is sufficiently ambiguous to allow the courts to imply the resistance requirement.²²⁷

accomplish sexual penetration. Force or coercion includes but is not limited to any of the following circumstances:

(i) When the actor overcomes the victim through the actual application of physical force or physical violence.

(ii) When the actor coerces the victim to submit by threatening to use force or violence on the victim, and the victim believes that the actor has the present ability to execute these threats.

(iii) When the actor coerces the victim to submit by threatening to retaliate in the future against the victim, or any other person, and the victim believes that the actor has the ability to execute this threat. As used in this subdivision, "to retaliate" includes threats of physical punishment, kidnapping, or extortion.

...

224. COLO. REV. STAT. §§ 18-3-401 to -403 (1978); DEL. CODE ANN. tit. 11 §§ 763, 764, 767 (1979); IOWA CODE ANN. §§ 709.1-5 (West 1979); KY. REV. STAT. ANN. §§ 510.010-.060 (Baldwin 1976); ME. REV. STAT. ANN. tit. 17-A §§ 251-255 (1983); MINN. STAT. ANN. §§ 609.341-.345 (West Supp. 1983); MONT. CODE ANN. § 45-5-503 (1981); NEB. REV. STAT. §§ 28-317 to -320 (Supp. 1979); NEV. REV. STAT. § 200.364 (1980); N.H. REV. STAT. ANN. §§ 632-A:1 - A:4 (Supp. 1981); N.M. STAT. ANN. §§ 30-9-10 to -9-12 (Supp. 1982); OHIO REV. CODE ANN. §§ 2907.01-.12 (Baldwin 1982); S.C. CODE ANN. §§ 16-3-651 to -3-654 (Law. Co-op. Supp. 1982); TENN. CODE ANN. § 39-2-602 (Supp. 1982); VT. STAT. ANN. tit. 13 §§ 3251-3253 (Supp. 1982); WASH. REV. CODE §§ 9A.44.010-.100 (1983); W. VA. CODE §§ 61-8B-1 to -8B-9 (1977); WIS. STAT. ANN. § 940.225 (West 1982 & Supp. 1983); WYO. STAT. §§ 6-2-301 to -306 (1977).

225. MICH. COMP. LAWS ANN. § 750.520i: "A victim need not resist the actor in prosecution under sections 520b to 520g." N.M. STAT. ANN. §§ 30-9-10 to -9-12 (Supp. 1979). The New Mexico statute is quite vague. The statute uses "force" to define "force or coercion": "A. 'Force or coercion' means: (1) the use of physical *force* or physical violence." (emphasis added). N.M. STAT. ANN. § 30-9-10A(1) (Supp. 1982).

In *State v. Jiminez*, 89 N.J. 652, 556 P.2d 60 (Ct. App. 1976), the statute was found not unconstitutionally vague by the court, which used the following tortured language in explaining its holding: "[T]he language 'perpetrated by the use of force or coercion' is vague . . ." since "[t]he crime is defined in terms of a result that defendant causes. If a defendant causes such a result by the use of force or coercion, force or coercion was the method which caused the result (the crime)."

Id. at 657-58, 556 P.2d at 65-66.

226. IOWA CODE ANN. §§ 709.1-5 (West 1979); KY. REV. STAT. ANN. §§ 510.010-.060 (Baldwin 1975); ME. REV. STAT. ANN. tit. 17-A §§ 251-255 (1983); NEB. REV. STAT. §§ 28-317 to -320 (Supp. 1978); NEV. REV. STAT. § 200.364 (1980); OHIO REV. CODE ANN. §§ 2907.01-.12 (Baldwin 1979); WASH. REV. CODE §§ 9A.44.010-.12 (West Supp. 1983); W. VA. CODE §§ 61-8B-1 to -8B-9 (1977); WYO. STAT. §§ 6-2-301 to -306 (1983).

227. COLO. REV. STAT. §§ 18-3-401 to -403 (1978); DEL. CODE ANN. tit. 11 §§ 763, 764, 767 (1979); MINN. STAT. ANN. §§ 609.341-.345 (West Supp. 1980); MONT. CODE ANN. § 45-5-503 (1979); N.H. REV. STAT. ANN. §§ 632-A:1 to -A:4 (Supp. 1981); S.C. CODE ANN. §§ 16-3-651 to -3-654 (Law. Co-op. Supp. 1982); VT. STAT. ANN. tit. 13 §§ 3251-3253 (Supp. 1979); WIS. STAT. ANN. § 940.225 (West 1982 & Supp. 1983). See also *supra* note 9 and accompanying text.

1. Problems in the construction of the Michigan statute

The Michigan statute divides the crime of rape into four degrees. The degree of the crime determines the severity of the punishment.²²⁸ In its definition of first degree rape alone, the Michigan statute sets forth fourteen different circumstances in which intercourse is presumed to have occurred without the victim's consent.²²⁹

The Michigan statute, in providing a long and complex "laundry list" of criminal circumstances, runs the risk of being restrictively applied by courts applying the rule of construction that everything which is not included in an extensive list is deemed to have been purposely excluded.²³⁰ It is quite possible that a rape case will "fall between the cracks" of the statute's list of criminal circumstances, and thus go unpunished.

In fact, the language used in defining the "criminal circumstances" in statutes similar to the Michigan statute has been interpreted by one court as requiring victim resistance.²³¹ While the Michigan statute states that no resistance is required, the internal conflict (in listing the criminal circumstances) may result in an outcome contrary to that which its drafters intended.²³² Only a carefully drawn statute which explicitly states that no resistance is required of a rape victim will insure that the resistance will be eliminated from the law of rape.

A more flexible approach to the definition of rape, in which a "reasonable person" test is used, would eliminate the problem posed by the Michigan statute, and would make it unlikely that a rape case would go unpunished because it failed to conform to the rigid list of "criminal circumstances" provided by the Michigan statute.

V. A PROPOSED MODEL RAPE STATUTE

The following proposed model rape statute is designed to eliminate the resistance requirement from the law of rape. The statute is

228. MICH. COMP. LAWS ANN. § 750.520b (West Supp. 1979).

The comments to § 213.1 of the Model Penal Code discuss Michigan's grading of the crime as follows: "[T]he grading judgments are in some cases highly debatable, in some cases much more questionable, and in some cases simply bizarre." MODEL PENAL CODE § 213.1 comment at 298 (1980).

229. *See supra* note 224.

230. *Id.*

231. *Goldberg v. State*, 41 Md. App. 58, 65, 395 A.2d 1213, 1218 (1979) (construing MD. CRIM. LAW CODE ANN. § 462 (1976)).

232. In criticizing the Michigan statute, the Model Penal Code stated: "[T]he actor must 'overcome' the victim by physical force, yet section 520i provides that the victim 'need not resist.'" MODEL PENAL CODE § 213.1 comment at 296 (1980).

designed to be clear and unambiguous in its intention in order to eliminate the possibility that a court will imply the resistance requirement.

The pitfalls of the Michigan and California approaches have been circumvented. Unlike Michigan's statute,²³³ the proposed model statute is short and concise. The "criminal circumstances"²³⁴ approach is abandoned in favor of the "reasonable person" test, which is flexible enough to cover all rape situations.²³⁵

The intention of the drafters of the statute, to eliminate the resistance requirement from the law of rape, is clearly set forth, both in the definition of the crime and in the body of the statute.²³⁶

The statute does not follow the Levine Bill's²³⁷ approach of using terms such as "against the will of the victim" or "force or fear" in the definition of the crime of rape.²³⁸ When statutory language is closely linked to common law interpretations of the crime of rape, it is inevitable that courts will look to common law standards and will require that rape victims evidence non-consent through resistance.²³⁹ Thus, the proposed model statute carefully avoids reliance on any of the above terms.²⁴⁰

A. Definitions

A clear definition of consent, however, must be provided for in a forcible rape statute designed to eliminate the resistance requirement.²⁴¹ Resistance was originally required as a means of proving non-

233. See *supra* notes 219-28 and accompanying text.

234. *Id.*

235. See *infra* note 228.

236. *Id.*

237. See *supra* notes 205-18 and accompanying text.

238. *Id.*

239. *Id.*

240. *Definitions for Forcible Rape*

Consent: Consent is the freely given assent to an act of intercourse. Resistance is not required as a means of showing non-consent.

Forcible Rape: Forcible rape is the act of sexual intercourse committed under the following circumstances: Where a reasonable person, were he or she in the victim's place, would not have consented to the act of intercourse, in the light of the perpetrator's actions and all of the surrounding circumstances. A victim need not resist his or her assailant under this statute.

241. Like robbery and assault, rape is a nonconsensual and forcible version of an ordinary human interaction. Yet only the law of rape makes unjustified adverse assumptions about the general sincerity of alleged victims, which lead to requirements of much higher levels of proof of force and resistance. Such requirements leave the physical safety of women correspondingly less protected in cases of rape than in cases of robbery or simple assault. At a time when police and public interest groups advise women to submit to rapists in order to minimize physical injury, courts should apply the reasonable man standard developed in robbery cases to

consent in rape,²⁴² yet once resistance is eliminated as a means of proving that intercourse occurred without the victim's consent, the statutory definition of consent becomes crucial.²⁴³

The proposed model statute defines consent as "the freely given assent to an act of intercourse." This language implies that such assent is given without the victim being subjected to force or coercion.²⁴⁴

B. *The Criminal Standard*

The proposed model rape statute employs the "reasonable person" standard as a test for determining whether forcible rape has occurred.²⁴⁵ The factfinder is asked to determine whether or not a reasonable person in the victim's place would have consented to the act of intercourse, in light of the perpetrator's actions and all of the surrounding circumstances.²⁴⁶

This "reasonable person" test is much more flexible than the "criminal circumstances" test of the Michigan statute, and thus lessens the chance that rapes occurring under certain circumstances will go unpunished because they fall outside of rigid statutory categories.²⁴⁷ The reasonable person test avoids the pitfalls of California's Levine Bill by using language unlike that of the common law, the Model Penal Code, or any other statutory definition of rape which has been interpreted as requiring victim resistance.²⁴⁸

The proposed model statute makes explicit that which was the unrealized hope of the Levine Bill and the Michigan statute: that resistance is no longer required in the crime of rape.

It is hoped that a clear, concise and explicit statute, such as the proposed model statute, will succeed where the Levine Bill and Michigan statute have failed, and that the resistance requirement will be, once and for all, retired from the law of rape.

determine consent and allow juries to evaluate available evidence of force, fear and resistance as indicia of consent, rather than holding particular levels of these criteria to be absolute prerequisites for convictions.

Comment, *Towards a Consent Standard*, *supra* note 4, at 638.

242. *See supra* notes 10-55 and accompanying text.

243. *See supra* note 242.

244. *Id.*

245. *Id.*

246. *See supra* note 242 and accompanying text.

247. *See supra* notes 219-28 and accompanying text.

248. *See supra* notes 205-18 and accompanying text.

VI. CONCLUSION

The resistance requirement evolved early in common law and was codified in the Model Penal Code and in the California rape statute. This requirement, however, should be eliminated from the law of rape because the standard does not reflect the reality of rape situations. The majority of victims do not resist their assailants and victim resistance encourages more violent assaults.

The attempts of two jurisdictions to eliminate the resistance requirement from their rape laws have been largely ineffective. The California Levine Bill inadvertently adopts the language of common law rape in redefining the crime, and may thus require more resistance on the part of victims than did the old California rape statute. The Michigan "criminal circumstances" test should be rejected because its rigid definition will lead to certain rapes "falling between the cracks" of the statute's definitions, and going unpunished for that reason.

The proposed model statute is clear, concise and explicit. It will eliminate the resistance requirement from the law of rape, and will instead define rape in terms that are relevant and nonprejudicial, by recognizing that rape is an act of intercourse performed without one party's consent.

APPENDIX "A"

FORCIBLE RAPE

Definitions

Consent: Consent is the freely given assent to an act of intercourse. Resistance is not required as a means of showing non-consent.

Forcible rape is the act of sexual intercourse committed under the following circumstances:

Where a reasonable person, were he or she in the victim's place, would not have consented to the act of intercourse, in the light of the perpetrator's actions and all of the surrounding circumstances. A victim need not resist his or her assailant under this statute.

“APPENDIX B” [X] = LEGISLATION PROPOSED; X = LEGISLATION PASSED] SUMMARY OF LEGISLATIVE ISSUES (1973 TO 1976)

JURISDICTION	NEW LEGISLATION	RE-DEFINITION OF THE CRIME						REVISION OF PROOF REQUIREMENTS				OTHER ISSUES		
		PASSED/ PROPOSED	SEX NEUTRAL	ORAL/ ANAL	DEGREES	SEXUAL CONTACT	HUSBAND/ WIFE EXCLUS.	CHASTITY EVID. STAND.	CHASTITY EVID. PROC.	CORROB- ORATION	CAUTION- ARY INST.	VICTIM ¹ COMP.	C.J.S. TRAINING	PRIVACY
ALABAMA	(X)	(X)	(X)	(X)	(X)	(X)	(X)	(X)	(X)	(X)				(X)
ALASKA	X		X		X			X			(X)		X	
ARIZONA	(X)	(X)	(X)	(X)	(X)	(X)		(X)						
ARKANSAS	X	X	X		X			(X)					(X)	
CALIFORNIA	X							X	X		X	X	X	(X)
COLORADO	X	X	X	X	X			X	X		X		(X)	
CONNECTICUT	X	X	X	X	X	X		(X)	X	X				
DELAWARE	X					X			X	X			X	
DISTRICT OF COLUMBIA									X					
FLORIDA	X	X	X					X	X		X		(X)	X
GEORGIA	X			(X)	(X)	(X)		X	X	(X)				X ²
HAWAII	X				X	X			X				X	
IDAHO	(X)		(X)	(X)	(X)			(X)	(X)	(X)				

JURISDICTION	NEW LEGISLATION	RE-DEFINITION OF THE CRIME					REVISION OF PROOF REQUIREMENTS					OTHER ISSUES			
		PASSED/ PROPOSED	SEX NEUTRAL	ORAL/ ANAL	DEGREES	SEXUAL CONTACT	HUSBAND/ WIFE EXCLUS.	CHASTITY EVID. STAND.	CHASTITY EVID. PROC.	CORROB- ORATION	CAUTION- ARY INST.	VICTIM ¹ COMP.	C.J.S. TRAINING	PRIVACY	
NEW JERSEY	X				(X)			(X)	(X)				X	(X)	(X)
NEW MEXICO	X	X	X		X	X		X	X						
NEW YORK	X					X ³		X	X				X		
NORTH CAROLINA	(X)	(X)	(X)		(X)			(X)						(X)	X
NORTH DAKOTA	X	X	X	X	X	X		X	X				X		
OHIO	X	X	X	X	X	X		X	X				X	X ⁴	X
OKLAHOMA	X							X	X						
OREGON	X							X	X						
PENNSYLVANIA	X	X						X	X	X				(X)	
RHODE ISLAND	(X)	(X)	(X)	(X)	(X)			X ⁵	X ⁵						(X)
SOUTH CAROLINA	(X)	(X)	(X)	(X)	(X)	(X)		(X)	(X)				(X)		X
SOUTH DAKOTA	X	X	X					X	X						X
TENNESSEE	(X)	(X)	(X)	(X)	(X)	(X)		X	X	(X)					
TEXAS	X	X	X	X	X			X	X	X			X		X
UTAH	(X)							(X)	(X)				(X)		
VERMONT	(X)	(X)	(X)	(X)	(X)	(X)		(X)	(X)	(X)					(X)

JURISDICTION	NEW LEGISLATION	RE-DEFINITION OF THE CRIME					REVISION OF PROOF REQUIREMENTS				OTHER ISSUES		
		SEX NEUTRAL	ORAL/ANAL	DEGREES	SEXUAL CONTACT	HUSBAND/WIFE EXCLUS.	CHASTITY EVID. STAND.	CHASTITY EVID. PROC.	CORROBORATION	CAUTIONARY INST.	VICTIM ¹ COMP.	C.J.S. TRAINING	PRIVACY
VIRGINIA	(X)						(X)						X
WASHINGTON	X	X	X	X			X	X	X		X		
WEST VIRGINIA	X	X	X	X	X		X						
WISCONSIN	X	X	X	X	X		X	X	X	X		X	
WYOMING	(X)	(X)	(X)	(X)	(X)	(X)	(X)	(X)	(X)	(X)	(X)		(X)

Reprinted from FORCIBLE RAPE, Legal Issues, *supra* note 5, at 71

- ¹ This category encompasses victim payments under traditional victim compensation statutes as well as special medical services provided through local facilities.
- ² The Georgia privacy statute was declared unconstitutional.
- ³ Rape charges between spouses are referred to Family Court.
- ⁴ Ohio statute requires standard hospital protocol for evidence gathering.
- ⁵ Restrictions promulgated by State Supreme Court in 1975.

APPENDIX "C"

CALIFORNIA LEGISLATURE—1979-80 REGULAR SESSION

ASSEMBLY BILL**No. 2899****Introduced by Assemblyman Levine**

March 6, 1980

REFERRED TO COMMITTEE ON CRIMINAL JUSTICE

An act to amend Sections 261 and 262 of the Penal Code, relating to rape.

LEGISLATIVE COUNSEL'S DIGEST

AB 2899, as introduced, Levine (Crim.J.). Rape.

Existing law provides two definitions of rape. First, rape is defined as an act of sexual intercourse accomplished under any of specified circumstances with a person not the spouse of the perpetrator. Second, rape is defined to include an act of sexual intercourse with the spouse of the perpetrator accomplished under force, violence or specified threat. Under either definition the use of force must overcome resistance, or threats must be used to prevent resistance.

This bill would delete the element of resistance and provide for rape accomplished against the will by force or fear.

Under existing law, Sections 2231 and 2234 of the Revenue and Taxation Code require the state to reimburse local agencies and school districts for certain costs mandated by the state. Other provisions require the Department of Finance to review statutes disclaiming these costs and provide in certain cases, for making claims to the State Board of Control for reimbursement. These statutory provisions will be supplemented by a constitu-

tional requirement of reimbursement effective for statutes enacted on or after July 1, 1980.

AB 2899

—2—

This bill provides that no appropriation is made and no reimbursement is required by this act for a specified reason.

Vote: majority. Appropriation: no. Fiscal committee: yes. State-mandated local program: yes.

The people of the State of California do enact as follows:

1 SECTION 1. Section 261 of the Penal Code is
2 amended to read:

3 261. Rape is an act of sexual intercourse,
4 accomplished with a person not the spouse of the
5 perpetrator, under any of the following circumstances:

6 1. Where a person is incapable, through lunacy or
7 other unsoundness of mind, whether temporary or
8 permanent, of giving legal consent;

9 ~~2. Where a person resists, but the person's resistance~~
10 ~~is overcome by force or violence;~~

11 ~~3. Where a person is prevented from resisting by~~
12 ~~threats of great and immediate bodily harm;~~
13 ~~accompanied by apparent power of execution~~ *Where it is*
14 *accomplished against a person's will by means of force or*
15 *fear, or by any intoxicating, narcotic, or anaesthetic*
16 *substance, administered by or with the privity of the*
17 *accused;*

18 4.

19 3. Where a person is at the time unconscious of the
20 nature of the act, and this is known to the accused;

21 5.

22 4. Where a person submits under the belief that the
23 person committing the act is the victim's spouse, and this
24 belief is induced by any artifice, pretense, or
25 concealment practiced by the accused, with intent to
26 induce such belief.

27 SEC. 2. Section 262 of the Penal Code is amended to
28 read:

29 262. (a) Rape of a person who is the spouse of a
30 perpetrator is an act of sexual intercourse accomplished

31 ~~under either of the following circumstances; against the~~
32 ~~will of~~
33 (1) ~~Where a spouse resists, but the spouse's resistance~~

—3—

AB 2899

1 ~~is overcome by means of force or fear violence.~~

2 ~~(2) Where the spouse is prevented from resisting by~~
3 ~~threats of great and immediate bodily harm,~~
4 ~~accompanied by apparent power of execution.~~

5 (b) The provisions of Section 800 shall apply to this
6 section; however, there shall be no arrest or prosecution
7 under this section unless the violation of this section is
8 reported to a peace officer having the power to arrest for
9 a violation of this section or to the district attorney of the
10 county in which the violation occurred within 30 days
11 after the day of the violation.

12 SEC. 3. No appropriation is made by this act pursuant
13 to Section 2231 or 2234 of the Revenue and Taxation Code
14 or Section 6 of Article XIII B of the California
15 Constitution because the only costs which may be
16 incurred by a local agency or school district will be
17 because this act creates a new crime or infraction,
18 changes the definition of a crime or infraction, or
19 eliminates a crime or infraction. Furthermore, this act
20 does not create any present or future obligation to
21 reimburse any local agency or school district for any costs
22 incurred because of this act.