

## REPEAL OF THE CORROBORATION REQUIREMENT: WILL IT TIP THE SCALES OF JUSTICE?

### I. INTRODUCTION

Rape, as Lord Hale observed three centuries ago, "is an accusation easily to be made, and hard to be proved, and harder to be defended by the party accused, though ever so innocent."<sup>1</sup> This basic concept, coupled with the assumption that jurors are likely to feel deep sympathy for the victim and may therefore convict an innocent man without adequate proof, has led many states to establish special evidentiary rules particularly pertaining to the crime of rape. These rules are typically in two forms: (1) as special corroboration requirements pertaining to the victim's testimony; and (2) as special rules relating to the admissibility of character evidence.

Corroboration rules generally require that the testimony of the complainant in a trial for rape must be corroborated<sup>2</sup> by other evidence in order to sustain a conviction.<sup>3</sup> In effect, this requirement represents a prior legislative determination that if the prosecution's case stands solely on the testimony of the victim, the defendant will prevail.<sup>4</sup>

As a corollary to this requirement, many jurisdictions also have more liberal evidentiary rules concerning the admissibility of evidence of the victim's character.<sup>5</sup> Generally, these rules come into play either to admit evidence of a character predisposed to consenting to intercourse or for impeachment purposes in attacking the victim's character. This inquiry usually concerns evidence of the prosecutrix's reputation for moral character or chastity.

Recently, the Iowa legislature repealed the state's corroboration requirement and established strict rules pertaining to the introduction of character evidence.<sup>6</sup> The purpose of this Note is to examine each of these unique rules of evidence in light of the new statutory provisions.

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1. M. HALE, *PLEAS OF THE CROWN* 635 (1847).

2. Generally, "evidence is in its nature corroborating if it tends to strengthen and confirm the testimony of the prosecutrix in connecting the accused with the commission of the offense charged." *State v. O'Meara*, 190 Iowa 613, 623, 177 N.W. 563, 568 (1920).

3. See, e.g., GA. CODE ANN. § 26-2001 (rev. ed. 1971) which reads: "No conviction shall be had for rape on the unsupported testimony of the female."

4. In *State v. Lahmon*, 231 Iowa 448, 1 N.W.2d 629 (1942), the Iowa court stated: The legislative enactment involved is salutary and wise. Men and women are so closely and extensively associated in so many necessary and proper relations in business, social, and other varied activities, that if one accused might be convicted upon the testimony of the complainant alone, injustice might often result. It is true that it may allow a guilty one to escape, but the scales of justice tip strongly in favor of the rule.

*Id.* at 449, 1 N.W.2d at 630.

5. See, e.g., *People v. Hurlburt*, 166 Cal. App. 2d 334, 333 P.2d 82 (Dist. Ct. App. 1958).

6. IOWA CODE § 782.4 (1975) reads:

In prosecutions for the crime of rape, evidence of the prosecuting witness' previous sexual conduct shall not be admitted, nor reference made thereto in the presence

## II. THE CORROBORATION REQUIREMENT

### A. *The Nature of the Offense*

The requirement that the testimony of the complainant must be corroborated in order to sustain a conviction for rape did not exist at common law. "The testimony of the prosecutrix or injured person, in the trial of all offenses against the chastity of a woman, was alone sufficient evidence to support a conviction . . . ."<sup>7</sup> The common law made but one exception to the basic doctrine that the evidence of one witness may sustain a conviction; namely, the rule that the testimony of one witness without corroboration is insufficient to sustain a conviction for perjury.<sup>8</sup>

Basically, this common law view arose due to the inherent nature of the crime. Rape seldom, if ever, takes place in broad daylight, in public places, or in plain view of numerous spectators and potential witnesses.<sup>9</sup> Instead, the assailant usually manages to lure or force his victim into some obscure place so that he will not be seen or interrupted. Frequently, there is no circumstantial physical evidence for the simple reason that no physical force was employed in the attack.<sup>10</sup> Thus, there are generally no eyewitnesses to the crime and the victims often lack the bruises and torn clothing that would otherwise corroborate their testimony.

Under these circumstances, there is usually little evidence which can be presented in order to support the testimony of the victim. If the prosecution was not able to rely upon this testimony, there would be little chance of presenting sufficient evidence to convict offenders of this crime.<sup>11</sup> For these reasons, the majority of the courts today continue to adhere to the common law view.<sup>12</sup>

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of the jury, except as provided herein. Evidence of the prosecuting witness' previous sexual conduct shall be admissible if the defendant shall make application to the court before or during the trial.

The court shall conduct a hearing in camera as to the relevancy of such evidence of previous sexual conduct, and shall limit the questioning and control the admission and exclusion of evidence upon trial.

In no event shall such evidence of previous sexual conduct of the prosecuting witness committed more than one year prior to the date of the alleged crime be admissible upon the trial, except previous sexual conduct with the defendant. Nothing in this section shall limit the right of either the state or the accused to impeach credibility by the showing of prior felony convictions.

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

8. *Id.* § 2040(a), at 273.

9. "The nature of the crime is such that eyewitnesses are seldom available." *Stapleman v. State*, 150 Neb. 460, 464, 34 N.W.2d 907, 910 (1948).

10. One study notes that there was an absence of use of physical force by the assailant in nearly 15% of the rapes studied. Many women, when confronted by a weapon wielding assailant, decided not to resist physically. Thus, they lacked the bruises and torn clothing that would otherwise corroborate the use of force. M. AMIR, PATTERNS IN FORCIBLE RAPE 155 (1971).

11. See *Grim v. State*, 258 N.E.2d 407 (Ind. 1970) (public policy aspect commented on). See also Note, *The Rape Corroboration Requirement: Repeal Not Reform*, 81 YALE L.J. 1365, 1370 (1972) [hereinafter cited as *Repeal Not Reform*]. The author there maintains that the effect of the corroboration requirement is a comparatively lower rate of conviction for rape.

12. See, e.g., *Bakken v. State*, 489 P.2d 120 (Alas. 1971); *State v. Verdugo*, 109 Ariz. 391, 510 P.2d 37 (1973); *Ballard v. People*, 49 Cal. Rptr. 302, 410 P.2d 838 (1966); *State*

### B. *Justification for a Corroboration Requirement*

The major argument raised by commentators to justify a more stringent proof requirement for charges of rape is that the inherent nature of the crime raises the potential danger that an innocent man might be wrongly convicted. Basically, this possibility is seen as arising from three factors: (1) the frequency of false charges of rape; (2) the difficulty in defending such an accusation; and (3) the amount of sympathy which is naturally felt for the victim.<sup>13</sup>

It is generally believed that false accusations of sex crimes in general, and rape in particular, are much more common than untrue charges of other crimes. Psychiatrists have warned of a form of mental abnormality occasionally found in female complainants in sex offense cases which consists of a disposition to fabricate sex charges against innocent men.<sup>14</sup> Because the crime is usually committed under clandestine circumstances,<sup>15</sup> such false accusations can be made with relative ease. Furthermore, such testimony may be put forth in remarkably convincing detail.<sup>16</sup> Aside from psychological considerations, false accusations may arise from a variety of other sources. For example, fabricated stories of rape have been brought in order to seek revenge,<sup>17</sup> for blackmail purposes,<sup>18</sup> or to provide an excuse for an unwanted pregnancy while shielding the man who actually caused it.<sup>19</sup>

These same considerations make the defense against accusations of rape very difficult.<sup>20</sup> If a defendant is unable to provide an alibi, he may be forced to rely completely upon his own word in order to establish his innocence in the matter. When this situation exists, an absence of corroborating evidence may work to the disadvantage of the accused in that such evidence might have confirmed his innocence. Thus, the ultimate determination of guilt is dependent

v. Chuchelow, 131 Conn. 82, 37 A.2d 689 (1954); State v. Smith, 249 So. 2d 16 (Fla. 1971); People v. Rossillilli, 24 Ill. 2d 31, 181 N.E.2d 114 (1962); Yeary v. State, 273 N.E.2d 96 (Ind. 1971); People v. Coffman, 45 Mich. App. 480, 206 N.W.2d 795 (1973); State v. Klein, 200 N.W.2d 288 (N.D. 1972); Commonwealth v. Oyler, 130 Pa. Super. 405, 197 A. 508 (1938); State v. Gatlin, 208 S.C. 414, 38 S.E.2d 238 (1946); King v. State, 310 Tenn. 150, 357 S.W.2d 42 (1962); Wright v. State, 364 S.W.2d 384 (Tex. Crim. App. 1960); State v. Thomas, 52 Wash. 2d 255, 324 P.2d 821 (1958); Guathier v. State, 28 Wis. 2d 412, 137 N.W.2d 101 (1965).

13. It has been said that the reason for requiring corroboration in prosecutions for sex offenses lies in the fact "that crimes of this nature are easily charged and very difficult to disprove, in view of the instinctive horror with which mankind regards them." People v. Friedman, 139 App. Div. 795, 796, 124 N.Y.S. 521, 522 (1910).

14. "Pseudologia phantastica is a mixture of lies with imagination. Not infrequently, this is the basis of alleged sexual assault. Girls assert they have been raped, sometimes recounting as true a story they have heard, falsely naming individuals or describing them." 1 R. GRAY, ATTORNEY'S TEXTBOOK OF MEDICINE § 96.16 at 940 (3d ed. 1950). For an example of this, see State v. Connelly, 57 Minn. 482, 59 N.W. 479 (1894). See also 3A J. WIGMORE, EVIDENCE § 924a, at 736 (Chadbourn rev. ed. 1970).

15. Stapleman v. State, 150 Neb. 460, 464, 34 N.W.2d 907, 910 (1948).

16. 3A J. WIGMORE, EVIDENCE § 924a, at 736 (Chadbourn rev. ed. 1970).

17. See, e.g., Shock v. State, 200 Ind. 469, 164 N.E. 625 (1929); State v. Anderson, 272 Minn. 384, 137 N.W.2d 781 (1965).

18. See, e.g., Dunn v. State, 127 Tenn. 267, 154 S.W. 969 (1913). In this bizarre case, a teen-age girl was induced by her mother to make false accusations of rape to enable the latter to force money out of the accused.

19. W. HERZOG, MEDICAL JURISPRUDENCE 827 (1931).

20. 1 M. HALE, *supra* note 1.

solely upon the resolution of two contradictory statements of fact—the accusations of the prosecutrix and the disavowal of the defendant.<sup>21</sup>

Traditionally, the courts rely upon the jury to weigh the evidence presented. Although false accusations may occur, it is generally assumed that the trier of fact will not be misled and ultimately the truth will prevail. In a rape case, however, the individual temperament of each juror is an inescapable ingredient which must also be considered. The commission of this offense is generally so repugnant to the mores of society that to some individuals, "to charge a person with it raises a presumption of guilt."<sup>22</sup> Furthermore, the sympathy naturally felt by the jury for a wronged female helps to give easy credit to the victim's side of the story.<sup>23</sup> Thus, the disposition of the case is likely to be influenced more by prejudice inspired by aroused emotions than by a considered view of the evidence.<sup>24</sup> When the morally reprehensible nature of the crime is considered along with the ease with which innocent persons may be falsely accused, the danger arises that an innocent man might be wrongly convicted.<sup>25</sup>

### C. Prevalence and Substance of the Rule

Because of this danger, several jurisdictions have adopted the rule that the testimony of a female complainant must be corroborated in order to sustain a conviction of rape. Until July 1, 1974, Iowa was in this group.<sup>26</sup> Georgia, New York, and the Virgin Islands all generally require that a person shall not be convicted of rape on the unsupported testimony of the alleged victim.<sup>27</sup> Mississippi and Tennessee also have corroboration requirements, but they apply only in the case of statutory rape.<sup>28</sup> In both Nebraska and the District of Columbia, this requirement has developed from court-made law.<sup>29</sup> Several other states

21. In *State v. Atkins*, 40 Mo. App. 344, 292 S.W. 422 (1926), the prosecutrix was allegedly raped by an optometrist in the privacy of his office. At the trial, the doctor denied any knowledge of the alleged offense and claimed the prosecutrix was trying to frame him. Neither party was able to supply additional evidence to support either his or her story. Thus, the jury was forced to base its decision solely on these two contradictory testimonies.

22. *State v. Connelly*, 57 Minn. 482, 484, 59 N.W. 479, 481 (1894).

23. 3A J. WIGMORE, *supra* note 16.

24. "Public sentiment seems preinclined to believe a man guilty of any illicit sexual offense he may be charged with." *Roberts v. State*, 106 Neb. 362, 365, 183 N.W. 555, 557 (1921).

25. "When a charge of rape is made, the jurors are apt to let their indignation get the better of their judgment and convict on evidence that does not authorize it." *Davis v. State*, 120 Ga. 433, 437, 48 S.E. 180, 183 (1904).

26. IOWA CODE § 782.4 (1973). This statute reads: "The defendant in a prosecution for rape . . . cannot be convicted upon the testimony of the person injured, unless she be corroborated by other evidence tending to connect the defendant with the commission of the offense."

27. GA. CODE ANN. § 26-2001 (rev. ed. 1972); N.Y. PEN. LAW § 130.16 (McKinney Supp. 1974); V.I. CODE ANN. tit. 14, § 1706 (1964).

28. Corroboration is required by statute in the case of a statutory rape where the act was accomplished with the female's consent. Corroboration is not needed for statutory rape accomplished without the victim's consent. MISS. CODE ANN. § 2360 (Supp. 1972); TENN. CODE ANN. § 39-3706 (Supp. 1971).

29. See, e.g., *Washington v. United States*, 419 F.2d 636 (D.C. Cir. 1969); *Ewing v. United States*, 135 F.2d 633 (D.C. Cir. 1942); *State v. Garza*, 187 Neb. 407, 191 N.W.2d 154 (1972); *Hughes v. State*, 154 Neb. 86, 46 N.W.2d 904 (1951).

have taken an intermediate position, requiring corroboration only under certain circumstances.<sup>30</sup>

Evidence is in its nature corroborating if it tends to strengthen and confirm the testimony of the prosecutrix.<sup>31</sup> Among the thirteen states with some form of requirement, there is a wide variation in the kinds of evidence considered material for purposes of corroboration. In *Allison v. United States*,<sup>32</sup> the United States Court of Appeals for the District of Columbia noted several types of corroborative proof which may tend to support a prosecutrix' story. These included:

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, and 10) lack of motive to falsify.<sup>33</sup>

The materiality of each type of corroborative evidence depends on which elements of the crime are required to be corroborated under the law of the particular jurisdiction. The District of Columbia, for example, requires corroboration of each material element of the offense—force, penetration, and identity;<sup>34</sup> while Illinois requires corroboration solely of the corpus delicti (force and penetration) of the crime.<sup>35</sup> On the other hand, the earlier Iowa law required corroborative evidence only to substantiate the identity of the assailant.<sup>36</sup> These distinctions become crucial when considering the relevancy, materiality, and ultimately the admissibility of corroborative evidence. Bruises, torn clothing, and other physical evidence of assault upon the victim, though corroborative evidence as to the use of force upon the prosecutrix,<sup>37</sup> are not material in establishing the identity of the assailant.<sup>38</sup> Pregnancy or the subsequent birth of a child

30. *Territory v. Hayes*, 43 Hawaii 58, 62 (1958) (requiring limited corroboration in the form of facts and circumstances which coincide with and tend to establish the truth of the complainant's testimony); *Commonwealth v. Williams*, 353 Mass. 233, 230 N.E.2d 645 (1967) (requiring corroboration in a material particular); *State v. Artez*, 286 Minn. 545, 546, 176 N.W.2d 81, 82 (1970) (requiring corroboration where complainant is a minor); *State v. Thomas*, 351 Mo. 804, 818, 174 S.W.2d 337, 345 (1943) (requiring corroboration where complainant is a mature woman and case is weak); *State v. Baca*, 56 N.M. 236, 241-42, 242 P.2d 1002, 1006 (1952) (requiring facts and circumstances which tend to coincide and to establish the truth of the complainant's story); *Wright v. State*, 364 S.W.2d 384, 387 (Tex. 1963) (required where a belated complaint is made).

31. For a good discussion of what constitutes corroboration in Iowa, see *State v. Lahmon*, 231 Iowa 448, 1 N.W.2d 629 (1942).

32. 409 F.2d 445 (D.C. Cir. 1969).

33. *Id.* at 448 n.8. See also *State v. Polson*, 205 N.W.2d 740 (Iowa 1973). The Iowa court took a different approach in holding that corroboration was established by the entire "combination of circumstances."

34. See, e.g., *United States v. Jenkins*, 436 F.2d 140, 142 (D.C. Cir. 1970).

35. See, e.g., *People v. Price*, 96 Ill. App. 2d 86, 94, 238 N.E.2d 881, 884-85 (1968).

36. See, e.g., *State v. Polson*, 205 N.W.2d 740 (Iowa 1973); *State v. Young*, 172 N.W.2d 128 (Iowa 1969); *State v. Lahmon*, 231 Iowa 448, 1 N.W.2d 629 (1942); *State v. O'Meara*, 190 Iowa 613, 177 N.W. 563 (1920).

37. See, e.g., *Hamilton v. State*, 169 Ga. 826, 151 S.W. 805 (1930); *Prokcap v. State*, 148 Neb. 582, 28 N.W.2d 200 (1947).

38. See, e.g., *State v. Taylor*, 222 N.W.2d 439, 443 (Iowa 1974); *State v. Lahmon*, 231 Iowa 448, 451, 1 N.W.2d 629, 631 (1942).



are corroborative of penetration, but they do not necessarily establish that the act was accomplished against the will of the complainant.<sup>39</sup>

### III. EVIDENCE OF THE COMPLAINANT'S CHARACTER

Generally, questions of admissibility of character evidence as probative of a disposition to act center on the character traits of the defendant in a criminal trial. In a prosecution for rape, however, the focus often dramatically shifts to the character of the prosecutrix, almost as if she were the one whose guilt or innocence was to be determined. In only one other area of the criminal law is evidence of the victim's character generally admitted: namely, evidence of the character of the deceased in a homicide case on the issue of aggression, where the plea is self-defense.<sup>40</sup> Consent, as an affirmative defense to rape, generally concedes the commission of the act but attempts to legitimize or excuse it. When the defendant raises this issue, evidence of the victim's character may have a crucial bearing on the fact-finders' assessment of the probability of her resistance. Generally, this type of evidence takes one of three forms: (1) evidence of the complainant's moral character; (2) evidence of particular acts of unchastity between her and other men; and (3) evidence of the complainant's reputation for truth and veracity.

#### A. Evidence of the Complainant's Moral Character

In the majority of jurisdictions which have considered the question, evidence of the complainant's general moral character or reputation for chastity is admissible for the purpose of tending to show that she is more likely to consent to intercourse than chaste women,<sup>41</sup> "for it is certainly more probable that a woman who has done these things voluntarily in the past would be much more likely to consent than one whose reputation was without blemish, and whose personal conduct could not truthfully be assailed."<sup>42</sup> Apparently, most courts reason that a reputation for loose moral character probably has a basis in fact and that such proof tends to show that the prosecutrix would not be as likely to resist as would a chaste woman.<sup>43</sup> Generally, this inquiry must relate to and be confined to her reputation prior to the alleged crime.<sup>44</sup>

39. See, e.g., *State v. Mason*, 41 Idaho 506, 239 P. 733 (1925); *People v. Masse*, 5 N.Y.2d 217, 156 N.E.2d 452, 182 N.Y.S.2d 821 (1959).

40. C. McCORMICK, *LAW OF EVIDENCE* § 193 (2d ed. Cleary 1972).

41. See, e.g., *Packineau v. United States*, 202 F.2d 681 (8th Cir. 1953); *Hicks v. Hiatt*, 64 F. Supp. 238 (M.D. Pa. 1946); *State v. Finley*, 85 Ariz. 322, 338 P.2d 790 (1959); *People v. Walker*, 150 Cal. App. 2d 594, 310 P.2d 110 (Dist. Ct. App. 1957); *Teague v. State*, 208 Ga. 459, 67 S.E.2d 467 (1951); *Alexander v. State*, 4 Md. App. 214, 242 A.2d 180 (1968); *State v. Aven*, 284 Minn. 194, 169 N.W.2d 749 (1969); *Wilson v. State*, 264 So. 2d 828 (Miss. 1972); *Redmon v. State*, 150 Neb. 62, 33 N.W.2d 349 (1948); *Commonwealth v. Dulacy*, 204 Pa. Super. 475, 205 A.2d 706 (1964); *Guy v. State*, 443 S.W.2d 520 (Tenn. 1969); *Campos v. State*, 172 Tex. Crim. 179, 356 S.W.2d 317 (1962); 1 J. WIGMORE, *EVIDENCE* § 62 (3d ed. 1940).

42. *People v. Johnson*, 106 Cal. 289, 293, 39 P. 622, 623 (1895).

43. *People v. Cox*, 383 Ill. 617, 622, 50 N.E.2d 758, 760 (1943).

44. See, e.g., *People v. Allen*, 289 Ill. 218, 124 N.E. 329 (1919); *Holland v. Commonwealth*, 272 S.W.2d 458 (Ky. 1954); *State v. Taylor*, 57 S.C. 483, 35 S.E. 729 (1900).

A minority of the courts maintain that probative value in this instance is low. These courts reason that the fact that a woman has consented to sexual relations in the past does not prove that she has consented with the defendant on this particular occasion. Furthermore, the probative value, if any, of evidence of this nature is outweighed by its prejudicial effect. Consequently, this type of evidence is excluded.<sup>45</sup>

### B. *Particular Acts of Unchastity*

While the admissibility of the complainant's reputation for chastity is generally conceded, there appears to be a conflict in the decisions over the relevancy and admissibility of evidence of specific acts of unchastity between the prosecutrix and other men as a means of evidencing her character. On the one hand, it is argued that evidence of prior particular acts is irrelevant and should not be admitted because it fails to evidence a disposition on the part of the complainant to consent to intercourse.<sup>46</sup> In other words, "[t]he fact that a woman may have been guilty of illicit intercourse with one man is too slight and uncertain an indication to warrant the conclusion that she would probably be guilty with any other man."<sup>47</sup> On the other hand, some assert that any previous act of consensual intercourse should be admitted to aid the jury in evaluating the actions of the prosecutrix for the act in question, which is claimed by the defendant to be consensual.<sup>48</sup>

Generally, the majority view is that evidence of prior particular acts of immorality or unchastity between the prosecutrix and other men (not the defendant) is not admissible on the grounds that it is irrelevant and immaterial,<sup>49</sup> or that its prejudicial effect and tendency to confuse the main issue would clearly outweigh any probative value.<sup>50</sup> However, a minority of courts have held this evidence admissible<sup>51</sup> based on the rationale that a woman who has previously consented to an act of sexual intercourse would be more likely to consent again

45. See, e.g., *State v. Dowell*, 47 Idaho 457, 276 P. 39 (1929); *State v. Morse*, 67 Me. 429 (1877); *State v. Pearson*, 49 R.I. 386, 143 A. 413 (1928); *State v. Borde*, 209 La. 905, 25 So. 2d 736 (1946).

46. Hibe, *The Trial of A Rape Case: An Advocates Analysis of Corroboration, Consent, and Character*, 11 AM. CRIM. L. REV. 309, 317 (1973).

47. *Rice v. State*, 35 Fla. 236, 237, 17 So. 286, 287 (1895).

48. Hibe, *supra* note 46.

49. See, e.g., *People v. Battilana*, 52 Cal. App. 2d 685, 126 P.2d 923 (Dist. Ct. App. 1942); *State v. Borde*, 209 La. 905, 25 So. 2d 736 (1946); *Roper v. State*, 375 S.W.2d 454 (Tex. 1964).

50. See, e.g., *Stone v. State*, 243 Ala. 605, 11 So. 2d 386 (1943); *People v. Collins*, 25 Ill. 2d 605, 186 N.E.2d 30 (1962); *Commonwealth v. Gardner*, 350 Mass. 664, 216 N.E.2d 558 (1966); *State v. Kain*, 330 S.W.2d 842 (Mo. 1960); *State v. Reid*, 127 Mont. 552, 267 P.2d 986 (1954); *State v. Grundler*, 251 N.C. 177, 111 S.E.2d 1 (1959); *Commonwealth v. Wink*, 170 Pa. Super. 96, 84 A.2d 398 (1951); *State v. Severns*, 13 Wash. 2d 542, 125 P.2d 659 (1942).

51. See, e.g., *State v. Martinez*, 67 Ariz. 389, 198 P.2d 115 (1948); *People v. Walker*, 150 Cal. App. 2d 594, 310 P.2d 110 (Dist. Ct. App. 1957); *Holland v. Commonwealth*, 272 S.W.2d 458 (Ky. 1954); *State v. Wolf*, 194 Minn. 271, 260 N.W. 515 (1935); *People v. Hornbeck*, 277 App. Div. 1136, 101 N.Y.S.2d 182 (App. Div. 1950); *Lee v. State*, 132 Tenn. 655, 179 S.W. 145 (1915).

to such an act, thereby negating the charge that force and violence were used against her.<sup>52</sup>

In one area of this issue there seems to be more uniformity of opinion. It is generally accepted that evidence of the complainant's consent to previous sexual relations with the *defendant* may be admitted for the purpose of raising an implication of consent to the act in question.<sup>53</sup> This rule is based upon the theory that having yielded once to the sexual embraces of the defendant, the prosecutrix is more likely than not to yield again to the same person.<sup>54</sup> It is generally agreed that this evidence is not intended to show general immoral character or a disposition to commit acts of unchastity. It is probative in that it evidences an emotional feeling of the prosecutrix toward the particular defendant tending to show "an inclination on her part to consent to his embraces, and thus negating an essential element of the crime charged."<sup>55</sup>

Where consent is not an issue, as where the defendant denies the charge or in the case of statutory rape, prior specific acts of unchastity seem to be irrelevant as to the question of whether the defendant committed the crime. Thus, it is generally held in such cases that this type of evidence is not admissible.<sup>56</sup>

### C. Impeachment of the Complainant's Credibility

In a prosecution for rape, "the credibility of the complaining witness is of utmost importance."<sup>57</sup> The fact that the offense generally takes place in secluded surroundings generates the distinct possibility that the facts and circumstances of the attack will be known only by the victim and her assailant. Thus, the jury's impression of the credibility of the parties will have a crucial bearing on its decision.

Traditionally, the majority of the courts have limited character impeachments by proof of reputation to evidence of the witness' reputation in the community for truth and veracity.<sup>58</sup> However, in prosecutions for rape, several jurisdictions have extended this inquiry to include evidence of the complainant's

52. *People v. Walker*, 150 Cal. App. 2d 594, 310 P.2d 110 (Dist. Ct. App. 1957).

53. See, e.g., *Smiloff v. State*, 439 P.2d 772 (Alas. 1968); *State v. Martinez*, 67 Ariz. 389, 198 P.2d 115 (1948); *People v. Mangum*, 31 Cal. App. 2d 374, 88 P.2d 207 (Dist. Ct. App. 1939); *People v. Greeley*, 14 Ill. 2d 428, 152 N.E.2d 825 (1958); *State v. Henderson*, 153 Me. 364, 139 A.2d 515 (1958); *Lewis v. State*, 217 Miss. 488, 64 So. 2d 634 (1953); *Radke v. State*, 107 Ohio 399, 140 N.E. 586 (1923); *Wilkerson v. State*, 208 Tenn. 666, 348 S.W.2d 314 (1961); *Roper v. State*, 375 S.W.2d 454 (Tex. 1964).

54. *Rice v. State*, 35 Fla. 236, 237, 17 So. 286, 287 (1895).

55. 2 J. WIGMORE, EVIDENCE § 402, at 369 (3d ed. 1940).

56. See, e.g., *People v. Byers*, 10 Cal. App. 2d 410, 88 Cal. Rptr. 886 (Dist. Ct. App. 1970); *People v. Gabler*, 110 Ill. App. 2d 121, 249 N.E.2d 340 (1969); *Fite v. State*, 140 S.W.2d 848 (Tex. Crim. App. 1960); *Powell v. Commonwealth*, 179 Va. 703, 20 S.E.2d 536 (1942).

57. *People v. Tashman*, 233 N.Y.S.2d 744, 745 (1962).

58. See, e.g., *McHargue v. Perkins*, 295 S.W.2d 301 (Ky. 1956); *Hoffman v. State*, 93 Md. 388, 49 A. 658 (1901); *State v. Kahner*, 217 Minn. 574, 15 N.W.2d 105 (1944); *Schueler v. Lynam*, 80 Ohio App. 325, 75 N.E.2d 464 (1947); 3A J. WIGMORE, EVIDENCE § 923 (Chadbourn rev. ed. 1970).



reputation for general moral character in order to discredit her as a witness.<sup>59</sup> Still others have allowed such evidence for the dual purpose of attacking credibility and showing a probability of consent.<sup>60</sup>

The courts, however, are by no means in agreement as to the admissibility of this type of evidence. The argument in favor of admissibility rests upon the assumption that bad moral character necessarily involves impairment of one's ability to tell the truth. In other words, "to show general moral degeneration is to show an inevitable degeneration in veracity . . . ."<sup>61</sup> Thus, it is argued that the jury should be allowed to hear reputation evidence of the complainant's moral character so that they can weigh and credit her testimony in light of the person she is reputed to be.<sup>62</sup>

Opponents of this position maintain that as a matter of human nature, bad moral character does not necessarily entail a corresponding lack of veracity and therefore its probative value is low.<sup>63</sup> Furthermore, one witness' estimate of another's moral character is apt to be based on uncertain data and rest in large part on opinion colored by personal prejudice.<sup>64</sup> The danger of undue prejudice is also a serious objection to evidence of this nature. For these reasons, the great majority of the courts limit this inquiry to reputation for truth and veracity<sup>65</sup> while only a few jurisdictions open the door to evidence of general moral character.<sup>66</sup>

In the minority of jurisdictions which allow impeachment by proof of moral character, there is virtually no disagreement as to what type of evidence may be used. Impeachment is strictly limited to evidence of the complainant's general reputation in the community for moral character or chastity.<sup>67</sup> Evidence of prior particular acts of misconduct may not be introduced by extrinsic testimony.<sup>68</sup> The theory behind this view is that any probative value which such

59. See, e.g., *McGehee v. State*, 162 Ark. 560, 258 S.W. 358 (1924); *Seals v. State*, 114 Ga. 518, 40 S.E. 731 (1902); *Diblee v. State*, 202 Ind. 571, 177 N.E. 261 (1931); *Jones v. Commonwealth*, 154 Ky. 640, 157 S.W. 1079 (1913); *Giles v. State*, 229 Md. 370, 183 A.2d 359 (1962); *Frank v. State*, 150 Neb. 745, 35 N.W.2d 816 (1949); *Commonwealth v. Eberhardt*, 164 Pa. Super. 591, 67 A.2d 613 (1949); *Cleveland v. State*, 211 Wis. 565, 248 N.W. 408 (1933); see also Iowa Code § 622.18 (1975).

60. See, e.g., *Frank v. State*, 150 Neb. 745, 35 N.W.2d 816 (1949); *State v. Smith*, 90 Utah 482, 62 P.2d 1110 (1936).

61. 3A J. WIGMORE, EVIDENCE § 922, at 726 (Chadbourn rev. ed. 1970).

62. *Id.* § 924a.

63. *State v. Wolf*, 40 Wash. 2d 648, 245 P.2d 1009 (1952).

64. *Carter v. Cavanaugh*, 1 Iowa (Greene) 171, 173 (1848).

65. C. McCORMICK, LAW OF EVIDENCE § 44, at 91 (2d ed. Cleary 1972); see, e.g., *Gandy v. State*, 269 So. 2d 141 (Ala. 1972); *State v. Romero*, 117 La. 1003, 42 So. 482 (1906); *People v. O'Hare*, 124 Mich. 515, 83 N.W. 279 (1900); *State v. Pearson*, 49 R.I. 386, 143 A. 413 (1928); *Hays v. State*, 90 Tex. Crim. 355, 234 S.W. 898 (1921).

66. E.g., *McGehee v. State*, 162 Ark. 560, 258 S.W. 358 (1924); *Diblee v. State*, 202 Ind. 571, 177 N.E. 261 (1931); *Frank v. State*, 150 Neb. 745, 35 N.W.2d 816 (1949); *Commonwealth v. Eberhardt*, 164 Pa. Super. 591, 67 A.2d 613 (1949); *Cleveland v. State*, 211 Wis. 565, 248 N.W. 408 (1933).

67. E.g., *Giles v. State*, 229 Md. 370, 183 A.2d 359 (1962); *Foreman v. State*, 203 Ind. 324, 180 N.E. 291 (1932); *Jones v. Commonwealth*, 154 Ky. 640, 157 S.W. 1079 (1913); *Redmon v. State*, 150 Neb. 62, 33 N.W.2d 349 (1948); *Seals v. State*, 114 Ga. 518, 40 S.E. 731 (1902).

68. See, e.g., *Plunket v. State*, 72 Ark. 409, 82 S.W. 845 (1904); *People v. Hurlburt*, 166 Cal. App. 2d 334, 333 P.2d 82 (Dist. Ct. App. 1958); *Rau v. State*, 133 Md. 613, 105

evidence may have is clearly outweighed by its prejudicial nature and tendency to confuse the issues.

The majority of the courts also hold that the prosecutrix generally cannot be cross-examined as to prior acts of intercourse with other men for the purpose of impeaching her credibility.<sup>69</sup> A small number of courts will permit counsel on cross-examination to question the prosecutrix as to prior unchaste conduct with the defendant.<sup>70</sup> The dangers of victimizing the witness and of undue prejudice to the parties, however, have led most courts to recognize that cross-examination is subject to the discretionary control of the trial judge.<sup>71</sup> Furthermore, the minority of the courts which allow this type of cross-examination generally hold that counsel must "take the answer" given; in other words, if the complainant denies the alleged misconduct, counsel may not call on other witnesses or introduce extrinsic evidence to prove the discrediting acts.<sup>72</sup>

#### IV. THE ARGUMENT FOR REFORM

##### A. *The Repeal of the Corroboration Requirement*

In the final analysis, lawmakers are faced with a balancing problem. On the one hand, the ease with which one can be accused of rape and the inherent emotional prejudice which society holds against one so charged accentuate the need to adequately protect the accused from a conviction based on fabricated charges. On the other hand, the clandestine nature of the crime demands that courts and legislatures do not require such a degree of corroborative proof which for all practical purposes might prevent the prosecution from being able to establish its case.<sup>73</sup>

In many cases, there will be circumstances surrounding the alleged commission of the offense which may either verify or discredit the prosecutrix' testimony.<sup>74</sup> For example, in *State v. McElhaney*,<sup>75</sup> the prosecutrix testified that after she had been picked up by the accused, she was forcibly raped in the back

A. 867 (1919); *People v. Abbott*, 97 Mich. 484, 56 N.W. 862 (1893); *Dolson v. Commonwealth*, 170 Va. 630, 196 S.E. 63 (1938).

69. See, e.g., *State v. McLain*, 74 Ariz. 132, 245 P.2d 278 (1952); *People v. Burrows*, 27 Cal. App. 428, 150 P. 382 (Dist. Ct. App. 1915); *State v. Armijo*, 64 N.M. 431, 329 P.2d 785 (1958); *State v. Nab*, 245 Ore. 454, 421 P.2d 388 (1966).

70. See, e.g., *McQuirk v. State*, 84 Ala. 435, 4 So. 775 (1888); *Williams v. State*, 175 Ark. 752, 2 S.W.2d 36 (1928); *State v. Rivers*, 82 Conn. 454, 74 A. 757 (1909); *Redmon v. State*, 150 Neb. 62, 33 N.W.2d 349 (1948); *State v. Ogden*, 39 Ore. 195, 65 P. 449 (1901).

71. See, e.g., *Lehr v. Rogers*, 16 Mich. App. 585, 168 N.W.2d 636 (1969); *People v. Sorge*, 301 N.Y. 198, 93 N.E.2d 637 (1950); *State v. Neal*, 222 N.C. 546, 23 S.E.2d 911 (1943).

72. See, e.g., *State v. Bowman*, 232 N.C. 374, 61 S.E.2d 107 (1950).

73. See, e.g., *Lear, Q. If you rape a woman and steal her TV, what can they get you for in New York?* A. *Stealing her TV*, N.Y. Times, January 30, 1972, § 6 (Magazine), at 11.

74. For cases finding sufficient corroboration see *State v. Stevenson*, 195 N.W.2d 358 (Iowa 1972); *State v. Escamilla*, 182 N.W.2d 923 (Iowa 1970); *State v. McElhaney*, 261 Iowa 199, 153 N.W.2d 715 (1967); and *State v. Ladehoff*, 255 Iowa 659, 122 N.W.2d 829 (1963).

75. 261 Iowa 199, 153 N.W.2d 715 (1967).

seat of his car. Her testimony was corroborated by the fact that the police found her eyebrow pencil and identification bracelet in the car of the accused. In addition, her clothes were torn and her body was badly bruised. In this situation, a rule which requires corroboration may serve its laudable purpose of protecting the innocent against false accusations while still enabling the victim to substantiate her claim.

The situation is reversed in the absence of proper evidence and the prosecution is forced to base its entire case solely on the testimony of the complaining witness.<sup>76</sup> In *State v. Taylor*,<sup>77</sup> the defendant picked up the prosecutrix at a self-service laundry on the pretense that they would go riding around the town. Instead, he drove to the end of a country road and allegedly attempted to rape her. Although the police were able to find the discarded clothing of the prosecutrix on the side of the road where she testified the attack took place, there was no corroborating evidence left in the defendant's car, as in *McElhaney*, which would tend to connect the defendant with the commission of the offense. Thus, the prosecution was unable to secure sufficient evidence in order to corroborate the victim's testimony, and the court was powerless to deal with the defendant who might have been guilty.

Recently, the corroboration requirement has come under continual attack.<sup>78</sup> The explicit justifications for the rule—the frequency of fabrications, the difficulty of defending the charge, and the emotional sympathy felt by the jury—have been severely criticized as being largely without merit<sup>79</sup> or questionable at best.<sup>80</sup> Kalvin and Zeisel's recent study on jury behavior indicates that the fear that juries may be swept away in a sudden rage of passion and hastily convict a man of an alleged assault is largely unfounded.<sup>81</sup> This exhaustive survey of criminal juries in America reveals that juries view rape charges with extraordinary suspicion and rarely return convictions in the absence of aggravating circumstances such as extrinsic violence.<sup>82</sup>

No one can insure, of course, that fabricated charges of rape will never occur. Thus, the problem becomes one of formulating some method or test of proof which will not impede efforts to deal with offenders while still being flex-

76. For decisions finding insufficient corroboration see *State v. Taylor*, 222 N.W.2d 439 (Iowa 1974); *State v. Grady*, 183 N.W.2d 707 (Iowa 1971); *State v. Kelly*, 249 Iowa 1219, 91 N.W.2d 562 (1958) and *State v. Seales*, 245 Iowa 1074, 65 N.W.2d 448 (1954).

77. 222 N.W.2d 439 (Iowa 1974).

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

79. Note, *Repeal Not Reform*, *supra* note 11, at 1384-85.

80. Note, *The Victim in a Forcible Rape Case: A Feminist View*, 11 AM. CRIM. L. REV. 335, 336 (1973).

81. H. KALVIN & H. ZEISEL, *THE AMERICAN JURY* 249 (1966).

82. This exhaustive empirical study covered 3576 trials. The authors broke up the rape cases in the study into two groups—1) aggravated rape—when there was extrinsic violence, more than one assailant, or no prior acquaintance of the defendant and the victim; and 2) simple rape—all other cases. In 60 percent of the simple rape charges the jury acquitted while the judge would have convicted. In 9 out of 10 cases of simple rape in which the jury was given the opportunity to convict of a lesser charge, they did so. *Id.* at 253.

ible enough to protect the innocent. However, does every uncorroborated charge of rape present significantly different legal problems from uncorroborated charges of other crimes (such as robbery or assault where the victim's testimony alone may be sufficient to sustain a conviction) to such a degree to merit a special proof requirement? The Iowa Legislature no longer thinks it does.

### B. *Effect of the Repeal*

The repeal of the corroboration requirement will not leave innocent defendants without protection against false charges. The goals and purposes of the rule are adequately served by two ordinary safeguards in our criminal law: the jury system, and the trial judge's power to set aside or direct a verdict on the ground of insufficient evidence. First, today's juries are not ignorant.

[T]he most recent and exhaustive study of the jury in criminal cases concluded that juries do understand the evidence and come to sound conclusions in most of the cases presented to them and that when juries differ with the result at which the judge would have arrived, it is usually because they are serving some of the very purposes for which they were created . . . .<sup>83</sup>

Wigmore suggests that "a rule of law requiring corroboration has probably little actual influence upon the jurors' minds" over and above the ordinary caution and suspicion which would naturally suggest itself for such charges . . . ."<sup>84</sup> Furthermore, there is no reason to conclude that jurors are less able to deal with fabrications in rape than they are in any other type of case. Thus, the "beyond a reasonable doubt" standard should be adequate to safeguard against unjust convictions.

Secondly, the trial judge's power to set aside or direct a verdict on the ground of insufficient evidence further serves the goal of protecting the innocent. In a particular case, the absence of corroboration may well call for a judicial determination that there is insufficient evidence upon which the jury could find the defendant guilty beyond a reasonable doubt. If so, the judge may direct an acquittal.<sup>85</sup> But if there is substantial evidence reasonably supporting the charge, the trial judge will submit the case to the jury. This is a decision which can be properly made only by the trial judge, weighing all the facts and inferences of the evidence of the particular case, and not by a prior legislative rule of evidence.

### C. *A Further Safeguard*

In conjunction with the repeal of the corroboration requirement, the Iowa Legislature added a new section to the criminal code relating to the introduction

83. *Duncan v. Louisiana*, 391 U.S. 145, 157 (1968).

84. 7 J. WIGMORE, EVIDENCE § 2061, at 354 (3d ed. 1940).

85. Judges frequently set aside verdicts in jurisdictions having no statutory rule requiring corroboration upon the same kind of evidence which would be insufficient under a corroboration rule in other jurisdictions. See, e.g., *Smith v. State*, 239 So. 2d 284, 286 (Fla. Ct. App. 1970), *rev'd*, 249 So. 2d 16 (Fla. 1971).

of evidence of the complainant's previous sexual conduct.<sup>86</sup> Under the new Iowa rule,<sup>87</sup> the defendant must first make application to the court, either before or during the trial, before any evidence of this nature is admissible. The rule provides that the court shall conduct a hearing *in camera* as to the relevancy of the evidence. The ultimate decision as to the admissibility of this evidence is left in the court's discretion, subject to one exception: in no event is evidence of previous sexual conduct committed more than one year prior to the date of the alleged crime admissible except previous conduct with the defendant.<sup>88</sup>

In effect, this rule represents a third safeguard providing protection for the innocent against unjust convictions. The major argument in favor of the corroboration requirement is the danger of innocent defendants being falsely convicted.<sup>89</sup> Under the statute, the defendant may be able to introduce evidence tending to show that the complainant's character raises a substantial probability that the story is fabricated.

This is arguably the fairest and most expedient approach as the court is given a chance to weigh the prejudicial impact of such evidence against its probative value in the context of the circumstances of the particular case. In applying this balancing formula, the court should weigh such factors as the time, place, persons involved, and circumstances of the act in order to determine 1) the possible prejudicial effect of the offered evidence; 2) the nearness or remoteness of the conduct to the time of trial; 3) whether the matter inquired into is such as to lead to time consuming and distracting explanations on rebuttal; and 4) whether the conduct is so dissimilar to the circumstances of the present case as to lose probative value or otherwise confuse the jury.

Since the offer of proof is made out of the presence of the jury, the jurors hear only that evidence which the trial judge has admitted. If the evidence demonstrates a lack of good moral character or strong indications of consent raising the distinct possibility of fabrication, the court could rule accordingly and admit the evidence, along with appropriate instructions to the jury as to the limitations of proof.<sup>90</sup>

## V. CONCLUSION

Conceding that the corroboration requirement permits some guilty men to escape punishment where corroboration is unavailable, some commentators have

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86. IOWA CODE § 782.4 (1975); see note 6 *supra*.

87. The prior Iowa case law on this issue is inconsistent. The general rule seems to be that evidence of immoral character was admissible to show an unlikelihood that the act was committed by force and against the will of the complainant. Evidence of specific acts of previous sexual conduct was usually excluded. However, exceptions were made to these general principles which do not seem to follow any logical pattern. Compare *State v. Kraemer*, 252 Iowa 916, 109 N.W.2d 18 (1961); *State v. Speck*, 202 Iowa 732, 210 N.W. 913 (1926); *State v. McDonough*, 104 Iowa 6, 73 N.W. 357 (1897) with *State v. McDaniel*, 204 N.W.2d 627 (Iowa 1973); *State v. Alberts*, 199 Iowa 815, 202 N.W. 519 (1925).

88. IOWA CODE § 782.4 (1975).

89. See text accompanying note 13 *supra*.

90. See *Michelson v. United States*, 335 U.S. 469 (1948).



argued that this effect is consistent with one of the main thrusts of our criminal jurisprudence—the protection of the innocent.<sup>91</sup> However, the corroboration requirement seems to have dramatically shifted the balance of justice in favor of the defendant in a prosecution for rape, giving the accused a special advantage not enjoyed by defendants charged with other crimes and which often hinders the prosecution's attempt to establish its case.

The question becomes clear: does the danger of false convictions warrant the imposition of a special corroboration rule? On the balance, it does not. The ordinary safeguards in our criminal law will adequately serve the goal of protecting the innocent from unjust convictions. Furthermore, the new rule relating to the court's exercise of discretion in ruling on evidentiary problems promotes a flexible standard which takes into consideration all the aspects of the case and provides for a balance in the deliberative process that is fair to all adversary interests involved.

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91. "[F]or the law holds it better that ten guilty persons escape, than that one innocent party suffer." W. BLACKSTONE, *COMMENTARIES ON THE LAW* 909 (Gavit ed. 1941).