CORROBORATING CHARGES OF RAPE

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, tho never so innocent."[1] Because of the inordinate danger that innocent men will be convicted of rape, some states have adopted the rule that the unsupported testimony of the complaining witness is not sufficient evidence to support a rape conviction.[2] Only in New York, however, are there enough reported cases applying the requirement to make profitable an extended examination of the law.[3] This Note will undertake such an examination, in the hope of shedding light not on New York's problems alone, but on the problems inherent in any attempt to assure effective and just enforcement of laws against rape and related crimes.

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1. 1 M. HALE, PLEAS OF THE CROWN *635.

2. There was no such rule at common law. 7 J. WIGMORE, EVIDENCE § 2061, at 342 (3d ed. 1940). *But see* People v. Friedman, 139 App. Div. 795, 796, 124 N.Y.S. 521, 522 (2d Dep't 1910), where it is said that the New York statutory rule derives from the common law.

3. Nebraska appears to be the only state that applies a full corroboration requirement in all rape prosecutions in the absence of legislation. *See* Stapleman v. State, 150 Neb. 460, 464, 34 N.W.2d 907, 909-10 (1948); Mathews v. State, 19 Neb. 330, 336-38, 27 N.W. 234, 236-37 (1886). The Nebraska rule, however, is more easily satisfied than that of states whose requirement stems from the legislature. *Compare* Stapleman v. State, 150 Neb. 460, 465, 34 N.W.2d 907, 910 (1948) (evidence that defendant showed lewd pictures and exposed himself to young people accepted as corroboration) *with* the New York rules discussed in text accompanying notes 13-28 *infra*.

Iowa, like New York, imposes a substantial statutory requirement. "The defendant in a prosecution for rape, or assault with intent to commit 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." IOWA CODE ANN. § 782.4 (1950). Two other states have statutory corroboration rules, but they apply only to specific statutory rape crimes. *See* GA. CODE ANN. § 26-1304 (1935); MISS. CODE ANN. § 2360 (1942).

Three separate procedures operate in those states which have no legislation on corroboration for rape. Several states require corroboration under no circumstances. *See, e.g.*, Herndon v. State, 2 Ala. App. 118, 127, 56 So. 85, 87 (1911); People v. Gump, 17 Cal. App. 2d 221, 223, 61 P.2d 970, 971 (1936); McQueary v. People, 48 Colo. 214, 218-20, 110 P. 210, 212-13 (1910). Courts in many of these jurisdictions nevertheless prefer to find corroboration. *See, e.g.*, People v. Gidney, 10 Cal. 2d 138, 143, 73 P.2d 1186, 1190 (1937). A few states require corroboration in special situations, to be determined at the trial. *See, e.g.*, State v. Elsen, 68 Idaho 50, 53, 187 P.2d 976, 977 (1947) (no corroboration needed where the girl's reputation for chastity and truth is unimpeached and the circumstances surrounding the commission of the crime are clearly corroborative of the alleged victim's story); Armstrong v. State, 136 Texas Crim. 333, 335, 125 S.W.2d 578, 579 (1939) (corroboration needed only when the prosecutrix has failed to make prompt outcry or complaint when reasonable opportunity to do so was afforded). The Texas rule probably does not apply where the charge is statutory rape, for lack of consent is not an element of that crime. Hence the victim's outrage is not likely to be such as would lead to prompt complaint. *See* State v. Trocke, 127 Minn. 485, 488, 149 N.W. 944, 945 (1914). Other jurisdictions, while mouthing adherence to some sort of corroboration requirement of limited applicability, appear to be asking no more than that a conviction for rape be supported by sufficient evidence. *See, e.g.*, Day v. State, 29 Okla. Crim. 49, 232 P. 122 (1925) (no corroboration needed if testimony is clear cut, not materially contradictory and not unreasonable or inherently improbable); State v. Haston, 64 Ariz. 72, 77 166 P.2d 141, 144 (1946) (same if story is not physically impossible or so incredible that no reasonable man could believe it). A Virginia court went so far as to say that no corroboration is needed "if the guilt of the accused is believed by the jury beyond a reasonable doubt." Young v. Commonwealth, 185 Va. 1032, 1033, 40 S.E.2d 805 (1947).

Rape is the sexual penetration of a female not the wife of the accused without her consent.[4] The aim and effect of New York's corroboration statute[5] is to make it more difficult for the prosecution to prove that the woman complaining was raped by the man she complains of. The imposition of this special burden on the prosecution raises two basic questions. First, how can the burden be met? Second, should it ever be imposed when the accused is charged with some crime other than rape? These questions can only be answered when it is understood why a corroboration requirement is needed at all.

I. Reasons for a Corroboration Requirement

Surely the simplest, and perhaps the most important, reason not to permit conviction for rape on the uncorroborated word of the prosecutrix is that that word is very often false.[6] False accusations of sex crimes in general, and rape in particular, are generally believed to be much more frequent than untrue charges of other crimes. A woman may accuse an innocent man of raping her because she is mentally sick and given to delusions; or because, having consented to intercourse, she is ashamed of herself and bitter at her partner; or because she is pregnant, and prefers a false explanation to the true one; or simply because she hates the man whom she accuses.[7] Since stories of rape are frequently lies or fantasies, it is reasonable to provide that such a story, in itself, should not be enough evidence to convict a man of crime.

This, however, is not the only justification for requiring corroboration. Were it not for the peculiar characteristics of the crime of rape, the prevalence of false accusations might cause no great concern. Normally, our law relies on a jury to distinguish truth from falsehood, after hearing evidence on both sides and giving due weight to the rule that a man must be considered innocent unless proven guilty beyond a reasonable doubt. It is normally assumed, not that false accusations never occur, but that they will not mislead a jury into convicting. When the crime charged is rape, it is unsafe to rely on this assumption.

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4. *See, e.g.*, N.Y. Penal Law § 2010 (McKinney Supp. 1966). It is not clear whether rape can be committed by a female. Note, *Forcible and Statutory Rape: An Exploration of the Operation of Objectives of the Consent Standard*, 62 Yale L.J. 55, 55 n.2 (1952). For purposes of this Note, however, it will be assumed that the act alleged is committed by a male.

5. N.Y. Penal Law § 2013 (McKinney 1944).

6. One recent decision suggests that the possibility of a fabricated story is the only reason to require corroboration. *See* Thomas v. United States, No. 20287 (D.C. Cir., May 4, 1967). The court held that when the fact of rape is beyond question, the prosecutrix' identification of the defendant as the perpetrator does not need to be corroborated.

7. *See generally* Wedmore v. State, 237 Ind. 212, 227-39, 143 N.E.2d 649, 656-62 (1957) (dissenting opinion), for a collection of examples from medical literature. For an example of spiteful untruth, *see* People v. Smallwood, 306 Mich. 49, 10 N.W.2d 303 (1943), where the court found a motive for a false charge of rape against the prosecutrix' father in the girl's anger at his treatment of her and her desire for freedom from his control.

An untrue charge of rape—which may be put forth in remarkably convincing detail[8]—is uniquely difficult to disprove. "The nature of the crime is such . . . that eyewitnesses seldom are available."[9] If the defendant was never alone with the prosecutrix at all, he may be fortunate enough to have an alibi. But if he has not, or if the prosecution can show that he was with her when the crime allegedly occurred, how is he to establish that he never achieved penetration, or that she consented? The adversary trial on which our law relies so heavily to expose untruth is likely to produce, in rape cases, nothing more than two conflicting stories, both told under oath. The effect of a corroboration requirement is to resolve this conflict automatically in the defendant's favor.

It is important that the conflict be resolved automatically because a jury—or even a judge—cannot always be trusted to resolve it fairly. The presumption of innocence to which a defendant is entitled may give way to "the respect and sympathy naturally felt by any tribunal for a wronged female,"[10] or to the unreasoning rage which many feel toward one accused of both violence and indecency.[11] A legislature, which can confront the problem in perspective, free from the emotional impact of a particular case, may well conclude that the fate of an accused rapist should not be left to people less likely to be dispassionate.

In rape cases, because false accusations are common, the presumption of innocence is peculiarly likely to be justified; because reliable evidence is so hard to obtain, the presumption is particularly likely to be important; and because the crime of rape arouses emotions as do few others, the presumption is unusually likely to be ignored by judge or jury. To ensure that the presumption of innocence would function properly, the New York legislature enacted that "[n]o conviction can be had for rape or defilement upon the testimony of the female defiled, unsupported by other evidence."[12]

II. The Nature of the Corroboration Required

A. *Accepted Means of Corroboration*

The "other evidence" required by the statute, as interpreted by the New York courts, includes evidence both that a woman has been raped—penetrated sexually without her consent—and that the accused was the person responsible.[13] While the corroborating evidence need not be sufficient in itself to justify

8. *See* 3 J. Wigmore, *supra* note 2, at § 924a.

9. Stapleman v. State, 150 Neb. 460, 464, 34 N.W.2d 907, 910 (1948). *See* Commonwealth v. Ebert, 146 Pa. Super. 362, 22 A.2d 610 (1941).

10. 3 J. Wigmore, *supra* note 2, § 924a at 459.

11. "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, 367, 183 N.W. 555, 557 (1921).

12. N.Y. Penal Law § 2013 (McKinney 1944).

13. People v. Masse, 5 N.Y.2d 217, 219, 156 N.E.2d 452, 453, 182 N.Y.S.2d 821, 822 (1959). Compare the rule that prevails in Iowa, note 3 *supra*, which requires no corroboration of the fact that a crime was committed on the prosecutrix. *See* State v. Lah-

a conviction,[14] some evidence is considered too insubstantial to count as corroboration. The fact that the prosecutrix complained promptly,[15] for example, or that the defendant has been convicted for rape before,[16] is not the sort of "other evidence" demanded by the statute. On the other hand, some evidence is obviously sufficient to corroborate at least one element of the offense charged. The victim's pregnancy leaves no doubt that there was penetration;[17] physical signs of struggle may corroborate the allegation that there was no consent.[18] The fact of coition, and even of lack of consent, may be established by the evidence of a competent physician.[19]

Frequently, the defendant is claimed to have provided corroboration by admitting one or more elements of the prosecution's case.[20] New York courts have been reluctant, however, to treat any but the most unequivocal statements or conduct as admissions.[21] Thus an admission that defendant had intercourse with the complainant at a time other than that specified in the indictment does not corroborate any element of the crime[22]—even where the charge is statutory rape.[23]

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mon, 231 Iowa 448, 451, 1 N.W.2d 629, 631 (1942). The District of Columbia, on the other hand, appears to require no more than that the fact of rape upon the prosecutrix be corroborated; identfication of the actual rapist can rest solely on the victim's testimony. *See* Thomas v. United States, No. 20287 (D.C. Cir., May 4, 1967).

14. People v. Imperiale, 14 Misc. 2d 887, 890, 180 N.Y.S.2d 814, 818 (Kings County Ct. Spec. Sess. 1957). Of course, when the alleged victim does not testify to the completed act, other evidence must itself be capable of sustaining a verdict. *Cf.* People v. Tench, 167 N.Y. 520, 60 N.E. 737 (1901), where the girl was in a stupor, having been drugged by the defendant.

15. *See, e.g.*, People v. Carey, 223 N.Y. 519, 119 N.E. 83 (1918); People v. Murray, 183 App. Div. 468, 170 N.Y.S. 873 (2d Dep't 1918). *But see* People v. Yannucci, 283 N.Y. 546, 550, 29 N.E.2d 185, 186 (1940) where a prompt complaint was one of many elements accepted as corroborating the story of the prosecuting witness. Illinois accepts a prompt complaint as complete corroboration. People v. DeFrates, 395 Ill. 439, 444, 70 N.E.2d 591, 594 (1946), *cert. denied*, 331 U.S. 811 (1947).

16. *See* People v. Bills, 129 App. Div. 798, 114 N.Y.S. 587 (4th Dep't 1909).

17. *See* People v. Haischer, 81 App. Div. 559, 561, 81 N.Y.S. 79, 81 (4th Dep't 1903); People v. Doyle, 158 App. Div. 37, 40-41, 142 N.Y.S. 884, 886-87 (3d Dep't 1913).

18. *See* People v. Marshall, 5 App. Div. 2d 352, 172 N.Y.S.2d 237 (3d Dep't 1958), *aff'd mem.*, 6 N.Y.2d 823, 159 N.E.2d 698, 188 N.Y.S.2d 213 (1959).

19. *See* People v. Yannucci, 283 N.Y. 546, 29 N.E.2d 185 (1940); People v. Deitsch, 237 N.Y. 300, 142 N.E. 670 (1923) (dictum). People v. Chumley, 24 App. Div. 2d 805 (3d Dep't 1965), found support for the finding of lack of consent in medical testimony that the victim at the time was incapable of giving it. Apparently no New York court has yet held that observations of the alleged victim by third parties can themselves support the assertion that a crime has been committed, but some note the corroborative value of such evidence when coupled with medical testimony on the fact of penetration. *See, e.g.*, People v. Speeks, 173 App. Div. 440, 441, 159 N.Y.S. 308, 309 (2d Dep't 1916) (dictum) (testimony on the condition of her clothing and her gait); People v. Shaw, 158 App. Div. 146, 142 N.Y.S. 782 (3d Dep't 1913) (dictum) (evidence of her disheveled appearance coupled with medical evidence that she had gonorrhea).

20. *See* People v. Yannucci, 283 N.Y. 546, 29 N.E.2d 185 (1940); People v. Czyz, 262 App. Div. 1027, 30 N.Y.S.2d 299 (2d Dep't 1941).

21. *See, e.g.*, People v. Downs, 236 N.Y. 306, 140 N.E. 706 (1923) (no corroboration in defendant's saying that he had "fooled with her" but had not raped her); People v. Page, 162 N.Y. 272, 56 N.E. 750 (1900) (defendant's silence upon confrontation with an accusation by a third party provides no corroboration). *But see* People v. Imperiale, 14 Misc. 2d 887, 180 N.Y.S.2d 814 (Kings County Ct. Spec. Sess. 1957).

22. *See* People v. Cressenzo, 33 N.Y.S.2d 136 (Kings County Ct. 1942); People v. Patrone, 140 Misc. 720, 250 N.Y.S. 253 (Ct. Gen. Sess. 1931).

23. *See* People v. Perez, 25 App. Div. 2d 859, 269 N.Y.S.2d 768 (2d Dep't 1966).

Where the prosecution cannot rely on an admission, there may be great difficulty in corroborating the victim's story as to the identity of the man who raped her. Sometimes defendant will be implicated by specific details such as his accosting of other women,[24] or the prosecutrix' verifiable recollection of items at the place of the crime.[25] But often, the prosecution can show at most that defendant had an opportunity to commit the crime—that he was with or near the prosecutrix around the time the rape took place.[26] The law of New York seems to be that evidence of opportunity is sufficient corroboration of the rapist's identity to support a conviction;[27] the fact of rape, of course, must still be independently corroborated.[28] The opportunity doctrine is probably necessary to avoid making rape convictions too difficult to obtain.

Whether particular evidence satisfies a corroboration requirement should depend on whether it serves the purpose of that requirement: to eliminate or make negligible the otherwise considerable danger that innocent men will be convicted of rape. It is hard to prescribe or criticize more specific rules for determining the adequacy of corroboration; opinions will inevitably differ over what facts do or do not justify a sufficiently strong inference of guilt. If any tendency is discernible in New York cases, it is toward a stringent requirement—toward resolving close questions in favor of the accused. This tendency can be carried too far, but it is consistent with the best traditions of Anglo-American law.

B. *The Possibility of Psychiatric Corroboration*

Like many devices for the protection of the innocent, New York's corroboration rule incidentally protects many who are guilty. The fact that a charge of rape cannot be corroborated does not make it false. The disturbing certainty that one effect of the law as presently interpreted is to immunize a number of rapists from conviction has led some to advocate a new kind of corroboration—corroboration by psychiatrist.[29] The theory is that the problem of a prosecutrix' credibility can be attacked directly by subjecting her to a

24. *See* People v. Chumley, 24 App. Div. 2d 805 (3d Dep't 1965).

25. *See* People v. Marshall, 5 App. Div. 2d 352, 172 N.Y.S.2d 237 (3d Dep't 1958), *aff'd mem.*, 6 N.Y.2d 823, 159 N.E.2d 698, 188 N.Y.S.2d 213 (1959).

26. *See, e.g.*, People v. Cole, 134 App. Div. 759, 119 N.Y.S. 259 (3d Dep't 1909).

27. *See* People v. Masse, 5 N.Y.2d 217, 156 N.E.2d 452, 182 N.Y.S.2d 821 (1959); People v. Deitsch, 237 N.Y. 300, 142 N.E. 670 (1923) (dictum).

28. *See* People v. Croes, 285 N.Y. 279, 34 N.E.2d 320 (1941); People v. Kingsley, 166 App. Div. 320, 151 N.Y.S. 980 (3d Dep't 1915).

The Court of Appeals in *Croes* distinguished People v. Deitsch, 237 N.Y. 300, 142 N.E. 670 (1923) (dictum). In *Deitsch* corroboration of defendant's opportunity was coupled with medical testimony as to commission of a crime. In *Croes*, there being no corroboration as to the fact of crime, a conviction for statutory rape was reversed, even though defendant's opportunity had been established. Iowa courts, on the other hand, will apparently convict on corroboration showing only opportunity, if it is seen that defendant specially created the opportunity. *See* State v. Lahmon, 231 Iowa 448, 1 N.W.2d 629 (1942). The *Lahmon* court, however, did find abundant corroboration as to the fact of crime.

29. *See generally* 26 IND. L.J. 98 (1950).

psychiatric examination; the examiner would be appointed by the court.[30] If he found nothing in the complainant's mental make-up to suggest that she would falsely accuse someone of rape, he could so testify, and the testimony could be accepted as corroboration of her story. Thus it would be possible to obtain convictions for rape even in the absence of the more conventional corroborative evidence now required.[31]

The suggested means of corroboration would be highly unsatisfactory—even assuming the state found enough competent[32] and willing[33] psychiatrists, and could afford to pay them. It would inevitably result in a shocking invasion of the prosecutrix' privacy. If a psychiatrist testifies that the complaining witness is not the sort who would invent or imagine a rape, he can be made to explain why he thinks so. He can be asked on cross-examination to discuss every quirk in the complainant's psyche that might cast doubt on his conclusions. And the defendant's attorney can call psychiatrists of his own, in an effort to prove that the prosecutrix is mentally sick and unworthy of belief. It is cruel to compel a woman to suffer through such a battle of experts. Some might find rape itself hardly more traumatic.[34]

It is hard to see how the complainant's privacy could be protected if psychiatrists are permitted to furnish the "other evidence" required by the New York statute. If the statute were amended to require "other evidence" only where a pretrial psychiatric examination showed reason to doubt the prosecutrix' story, then the invasion of privacy would be less. But there is a

30. Compare the suggestion in Williams, *Corroboration—Sexual Cases*, 1962 CRIM. L. REV. 662, that the general problem be solved by the prosecutrix' submission to a polygraph. This method of establishing credibility or lack of it has not been accepted in this country. *See* Slovenko, *Witnesses, Psychiatry and the Credibility of Testimony*, 19 U. FLA. L. REV. 1, 13 (1966). Neither has the use of "truth serum" been accepted. *See* Lindsey v. United States, 237 F.2d 893 (9th Cir. 1956). Apparently, no prosecutor has yet attempted to use either means of corroborating charges of sexual crime.

31. Many cases have admitted psychiatric testimony tending to attack the credibility of the key witnesses in cases alleging sexual misconduct. *See, e.g.*, People v. Cowels, 246 Mich. 429, 431, 224 N.W. 387, 388 (1929) (error to exclude medical testimony that the girl was a "pathological falsifier, a nymphomaniac, and a sexual pervert"); State v. Wesler, 137 N.J.L. 311, 313, 59 A.2d 834, 835-36 (Sup. Ct.), *aff'd per curiam*, 1 N.J. 58, 61 A.2d 746 (1948) (conviction affirmed despite medical testimony that the alleged victims were psychopathic and immoral and that psychopaths are given to lying); State v. Pryor, 74 Wash. 121, 132 P. 874 (1913) (error to exclude medical evidence that the girl was suffering from hysteria); Rice v. State, 195 Wis. 181, 185, 217 N.W. 697, 698 (1928) (testimony that the girl had a "perverted mind" and a "depraved mental condition"). Where the evidence offered does not relate specifically to the challenged witness it is more likely to be excluded. *See, e.g.*, Mell v. State, 133 Ark. 197, 202 S.W. 33 (1918) (dictum) (no error to refuse to accept evidence as to the insanity of the prosecutrix' mother and sister); Abbott v. State, 113 Neb. 517, 522, 204 N.W. 74, 76, *rev'd on other grounds on rehearing*, 113 Neb. 524, 206 N.W. 153 (1925) (no error to refuse to admit a psychologist's testimony as to the power of parental suggestion on the imagination of a six-year old).

32. *See* 26 IND. L.J. 98, 103 (1950).

33. *See* Diamond, *Criminal Responsibility of the Mentally Ill*, 14 STAN. L. REV. 59, 63 (1961).

34. Even under present law, the prosecutrix' mental stability can become an issue in a rape trial. *See* note 31 *supra*. The proposal for psychiatric corroboration would make this distasteful sort of dispute far more common.

more fundamental reason why psychiatry cannot be used to corroborate charges of rape: it is not the function of psychiatry to distinguish truth from falsehood.

Those psychiatrists and others who favor a role for the profession in rape prosecutions seem to be troubled not by the number of true charges which go uncorroborated, but by the number of false ones which go undetected.[35] The statement that "psychiatric examination . . . is imperative in every case where sexual assault is charged"[36] was apparently intended only to suggest a means of uncovering some very questionable claims. How far psychiatry can accomplish even this is debatable; it has been suggested that a good psychiatrist will often accept his patient's distorted picture of reality, in order to better understand the patient's mental state. A good poker player, it is said, could give a better assessment than a psychiatrist of a complainant's credibility.[37]

Presumably a psychiatrist can tell if his patient is prone to delusions; but the fact that she suffers delusions does not prove she has not been raped.[38] More important, a false accusation need not be the product of delusion: it can be provoked by hatred or by shame—or by a woman's honest and understandable confusion over what was done to her, or by whom. It seems improbable that a psychiatrist would be peculiarly qualified to expose the falsity of charges brought by women not mentally diseased. The psychiatric examination may have a place in rape prosecutions, but that place should be as a tool of prosecutorial discretion—an added safeguard against stories of imagined indignities. It cannot serve as a litmus test that will make old-fashioned corroboration unnecessary; in this area as in others, there is no sure way to protect the innocent without protecting some guilty men as well.

III. The Scope of the Requirement

The present New York corroboration statute provides that where the prosecutrix' story is uncorroborated "[n]o conviction can be had for rape or defilement . . . ."[39] A superficial reading of the quoted language permits a prosecuting attorney to undermine the purpose of the law: when he has no evidence against the defendant but the prosecutrix' story, he can simply seek a

35. See the psychiatric opinion quoted in 3 J. Wigmore, *supra* note 2, § 924a at 460-66. *See generally* Comment, *Pre-Trial Psychiatric Examination as Proposed Means for Testing the Complainant's Competency to Allege a Sex Offense*, 1957 U. Ill. L.F. 651; Comment, *Psychiatric Testimony for the Impeachment of Witnesses in Sex Cases*, 39 J. Crim. L. & Criminology 750 (1949).

36. Letter from Dr. W. F. Lorenz, Director of the Psychiatric Institute, University of Wisconsin, Sept. 19, 1933, quoted in 3 J. Wigmore, *supra* note 2, § 924a at 465. *See also* ABA, Report of Committee on the Improvement of the Law of Evidence (1937-38), quoted in 3 J. Wigmore, *supra* note 2, § 924a at 466: "Today it is *unanimously* held . . . by experienced psychiatrists that the complainant woman in a sex offense should *always* be examined by competent experts . . . ."

37. *See* Slovenko, *supra* note 30, at 21.

38. *See* Slovenko, *supra* note 30, at 16.

39. N.Y. Penal Law § 2013 (McKinney 1944).

conviction for a lesser offense included within the crime of rape—attempted rape, for example, or assault. He will then argue that he is not seeking a "conviction . . . for rape or defilement," and the statute has no application; the argument seems entirely consistent with the statutory language.

It is not consistent, however, with the policies behind the statute. A woman's story of rape does not become more likely to be true, or easier to disprove, when it is made the basis for a lesser charge. And a prejudiced tribunal will probably be, if anything, less inhibited in acting on its prejudices when the prosecution seeks a milder sentence. All that can be said in favor of dispensing with the corroboration requirement when the prosecutor reduces the charge is that those who are convicted by false testimony will have less time to serve than they would if convicted of rape. Surely the corroboration requirement was meant to prevent conviction on unreliable evidence—not just to make the punishment less severe.

The loophole in the law may be closed, without undue strain on the statutory language, by considering any conviction for a lesser included offense to be a "conviction . . . for rape or defilement" when rape is shown by the prosecution's evidence. The New York courts, after tolerating for years resort by prosecutors to the tactic just described,[40] have now accepted this interpretation. The Court of Appeals first moved in this direction in *People v. LoVerde*,[41] where the minor complainant testified that the defendant had had intercourse with her—that is, had committed statutory rape. Defendant's conviction for endangering the health and morals of a minor was reversed. "The law," the court said, "may not be . . . circumvented" by manipulation of nomenclature.[42]

Lower courts subsequently undertook to limit *LoVerde* to cases in which proof of a consummated rape was an essential element of the crime charged—and thus to permit convictions for attempted rape or assault though the victim's uncorroborated testimony alleged penetration.[43] This dubious reading of *LoVerde* was rejected in *People v. English*,[44] where the Court of Appeals reversed, on the authority of *LoVerde*, convictions for attempted rape and assault with intent to rape. The corroboration requirement now clearly protects

40. For a view of the problem as presented in New York in 1958, see Note, *Corroboration in the New York Criminal Law*, 24 BROOKLYN L. REV. 324 (1958). *See also* People v. DeGroat, 5 App. Div. 2d 1045, 173 N.Y.S.2d 169 (3d Dep't 1958), *aff'd*, 5 N.Y.2d 947, 156 N.E.2d 921, 183 N.Y.S.2d 565 (1959), *cert. denied*, 368 U.S. 863 (1961); People v. Phillips, 204 App. Div. 112, 197 N.Y.S. 567 (2d Dep't 1922), *aff'd*, 235 N.Y. 579, 139 N.E. 742 (1923). Courts of other states have similarly passed over the problem without a consideration of its complexity. *See, e.g.*, State v. Elsen, 68 Idaho 50, 54, 187 P.2d 976, 978 (1947).

41. 7 N.Y.2d 114, 164 N.E.2d 102, 195 N.Y.S.2d 835 (1959).

42. *Id.* at 116, 164 N.E.2d at 103, 195 N.Y.S.2d at 836.

43. *See, e.g.*, People v. Dixon, 36 Misc. 2d 1068, 234 N.Y.S.2d 415 (Sup. Ct. 1962) (conviction for attempted rape).

44. 16 N.Y.2d 719, 209 N.E.2d 722, 262 N.Y.S.2d 104 (1965).

anyone who is in fact accused of rape, though the charge against him may recite some lesser included offense.

The problem posed by tactical resort to lesser offenses is not too difficult, but its solution suggests some new problems. Some of these may be readily disposed of. Presumably, where defendant is charged with a lesser offense than rape, only that lesser offense need be corroborated. That is, in a trial for attempted rape where the victim alleges penetration, the prosecution need not provide independent evidence of penetration as long as it can support the claim of attempt. Nor should the corroboration requirement be extended to crimes unrelated to rape merely because the victim claims to have been raped as well. In *English*, convictions for robbery and grand larceny, though apparently based on the victim's uncorroborated testimony, were affirmed.[45] These charges are neither so hard to refute as rape, nor so likely to prejudice a jury against the defendant. To require corroboration for such charges whenever they are linked with a rape accusation would be to extend the scope of the corroboration law far beyond the policies which support it; the accusation of rape is irrelevant to the other charges, and should of course be excluded from evidence.

A more difficult question is raised when the accusation is bona fide attempted rape or assault—that is, where the prosecutrix does not claim the rape was completed. It seems clear that New York's corroboration statute does not apply to such cases; it covers only convictions "for rape or defilement."[46] Yet the reasons for requiring corroboration are not entirely absent when an unsuccessful sexual attack is charged. Certainly such a charge is no easier than a charge of rape for the defendant to disprove.[47] On the other hand, it is at least arguable that a jury's prejudice will be less against one charged with a mere attempt than against an alleged rapist;[48] and it seems likely that mendacious or deluded women are less likely to claim an unsuccessful than a success-

45. *Id. Cf.* People v. Rea, 50 Misc. 2d 721, 271 N.Y.S.2d 410 (Crim. Ct. 1966). A conviction for assault with intent to rape was sustained, although the prosecutrix testified to a consummated rape and was not corroborated, on the grounds that the assault took place subsequent to the alleged rape and hence did not rely on the unsupported allegations as to rape. The result is questionable. It seems the rationale of the corroboration requirement is applicable to such a case. See text accompanying notes 6-12 *supra*.

46. The term "defilement" has not yet been defined by the courts. It seems highly doubtful that it could serve as a vehicle for requiring corroboration in the class of cases now under consideration. In 1945, Governor Dewey vetoed Assembly Int. No. 171, Pr. No. 916 (1945), which would have extended the statutory corroboration requirement to convictions for attempted rape.

47. In fact, his difficulty in presenting affirmative evidence is probably greater than it is when he is being tried for rape. Here, a prompt medical examination which failed to disclose evidence corroborating the girl's story would be of no help to the defendant, as violence of a sort that takes place in an assault may not leave marks.

48. But some courts seem to have believed that even assault or attempt charges arouse great emotions in the jury. One court has referred to "the just indignation felt by all right-thinking persons when a bestial assault has been made upon a girl . . . ." State v. Egbert, 125 Iowa 443, 447, 101 N.W. 191, 192 (1904).

ful assault—though psychiatric evidence leaves this question in doubt.[49] Perhaps the most important consideration is that to require corroboration of attempts at rape might frequently put an impossible burden on the prosecution.[50] A successful rapist often leaves behind evidence that proves the crime; an unsuccessful rapist does not.

It seems on balance unwise to extend the requirement of corroboration to sexual assaults not resulting in rape. If there is to be an extension, it should be accomplished by the legislature after careful consideration of the relevant evidence. New York's highest court apparently agrees. In *People v. Colon*,[51] the Court of Appeals took the view that "[i]f the jury found an unconsummated attempt, it could convict without corroboration."[52] But this approach seems to favor the assailant who accomplishes the rape, and the apparent anomaly has not escaped criticism.[53] Theoretically, to require corroboration only where penetration is alleged may offer rapists an incentive to succeed; but it is hard to become concerned about the possibility that criminals will be inspired by a corroboration requirement to successes otherwise beyond their powers. The real objection to the differing treatment of rape and attempts at rape is doubtless a vague feeling that big crimes should not be governed by more lenient rules than little crimes. This feeling should disappear when the policy behind the distinction is understood.

Though the corroboration requirement should not be extended in full force to lesser crimes than rape, it seems that corroboration as to the identity of the accused—at least to the extent of proof that he had an opportunity to commit the crime[54]—might reasonably be required when a woman claims to have been assaulted by a would-be rapist. Such a requirement will ordinarily be no more burdensome for the prosecution in attempt and assault cases than in rape cases, and it would fill a similar, though less compelling, need to protect the accused.

The foregoing discussion has assumed that a prosecutrix will not change her story—and that a prosecutor will not encourage her to do so—in order to avoid a corroboration requirement. Of course, a woman who falsely denies the consummation of a rape in order to make conviction easier is guilty of perjury —the sort of perjury that might well be exposed on cross-examination. In any event, most prosecutrixes are unlikely to be sophisticated enough to tell this

49. *See* 3 J. WIGMORE, *supra* note 2, at § 924a, collecting letters from psychiatrists. They do not make it clear whether they intend to refer to completed or inchoate sex crimes, or both.

50. "[I]t has been argued that a rigid requirement of corroboration would virtually preclude prosecutions in typical cases of minor sexual assault in dark theaters and crowded subways." MODEL PENAL CODE § 213.6, Comment (Proposed Official Draft, 1962).

51. 16 N.Y.2d 988, 212 N.E.2d 891, 265 N.Y.S.2d 653 (1965).

52. *Id.* at 989, 212 N.E.2d at 891, 265 N.Y.S.2d at 654 (dictum).

53. *See, e.g.*, People v. Sigismondi, 49 Misc. 2d 1, 266 N.Y.S.2d 724 (Sup. Ct. 1966).

54. See, text accompanying notes 26-27 *supra*.

sort of lie without coaching. And it may be hoped and believed that there are few prosecutors unscrupulous enough to coach them.

Except that no proof of opportunity is required when defendant is not accused of consummated rape, the scope of the corroboration requirement in New York is precisely that approved herein. On September 1, 1967, however, the state's new penal law will take effect; the wording of the corroboration requirement, and perhaps its substance, will be changed. Section 130.15 of the new law provides:

> Sex offenses; corroboration—A person shall not be convicted of any offense defined in this article, or of an attempt to commit the same, solely on the uncorroborated testimony of the alleged victim.[55]

Courts should have little difficulty in interpreting the new statute to perpetuate the rule of the *LoVerde* and *English* cases—that the corroboration requirement applies when, in a prosecution for a lesser offense included in rape, the complaining witness testifies to the consummated crime. It is far from clear, however, that the rule stated in the *Colon* case—that where the evidence shows an unconsummated attempt, corroboration is not required—will survive. On its face, the statute seems to obliterate any distinction between rape and attempt; yet the comments of the draftsmen reflect no detailed examination of the reasons for and against such a change in the law. Indeed, the draftsmen say only that a broad formulation has been adopted pending attempts to establish more precise standards.[56] Perhaps it would be best to read the statute as preserving for the time being prior case law;[57] or perhaps the reference to attempt can be read as introducing the one change needed in New York—requiring corroboration as to the identity of a man accused only of attempting rape.[58] The larger lesson of New York's new statute, however, is that legislators ought not to tinker with the language of corroboration statutes without carefully considering the problems these statutes raise. Future statutes might well address themselves explicitly to the questions just discussed regarding the scope of the requirement.[59]

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55. N.Y. REV. PEN. LAW § 130.15 (McKinney Special Pamphlet 1965).

56. STUDY BILL OF THE REVISED NEW YORK PENAL LAW 342 (1964).

57. *English* and *Colon*, though not *LoVerde*, were decided after legislative consideration of the new penal law in 1964. But if the legislature meant to make no change in the law, *English* and *Colon* are as valid under the new statute as under the old. On the other hand, a literal reading of the statute would suggest that convictions for assault caused by defendant's disposition toward rape need not be supported by corroboration.

58. See text accompanying notes 26-27, 54 *supra*.

59. Compare the corroboration requirement in MODEL PENAL CODE § 213.6(6) (Proposed Official Draft, 1962): "No person shall be convicted of any felony under this Article upon the uncorroborated testimony of the alleged victim." What will satisfy this requirement is not clear; the comments shed no light on the question. The Code does not appear to require corroboration where the conviction is for assault with intent to rape or attempted rape, even where the consummated act is alleged; but the Code formulation, like New York's, could be interpreted to frustrate tactics by prosecutors to avoid the requirement.

The Code adds an original provision which forbids prosecution for rape where

IV. Conclusion

In interpreting their state's corroboration statute, the courts of New York have done themselves credit. In defining the corroboration required, they have demanded some substantial proof of each element of the crime, without reading the law so stringently as to make it a universal shield for the guilty; while doubtful questions are usually resolved in the accused's favor, the doctrine of opportunity shows that the courts are aware of the prosecutor's problems. The courts have thwarted attempts to circumvent the law by prosecutions for lesser included offenses, but have not extended the corroboration requirement to unconsummated attempts at rape—which the statute does not purport to, and probably should not, cover. There have been mistakes, and there is room for improvement, but it is to be hoped that the broad approach of the New York courts will be continued under the new penal law—and will be imitated by other states.

But however successful the courts have been, a corroboration requirement is only a crude response to the peculiar problems posed by rape prosecutions.[60] The requirement does not make inevitable the escape of the innocent, and it makes less likely the punishment of the guilty. Yet a crude response is probably the only kind possible. Psychiatry, as has been seen, can provide no panacea. The inefficiency of a corroboration requirement only reflects the inefficiency inherent in the law's search for truth.

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the prosecutrix has not made complaint within the time specified. *See* § 213.6(5). The comments indicate that the risk of the victim's being threatened into silence is negligible and that the truly wronged female will protest as soon as she is given a chance. Clearly then, the fact of a prompt complaint will not satisfy the corroboration rules; prompt complaint must be made to enable the prosecution to procced at all.

As an additional safeguard for the defendant, the Code adopts the so-called "English rule" in all cases charging sexual misconduct. "[T]he jury shall be instructed to evaluate the testimony of a victim or complaining witness with special care in view of the emotional involvement of the witness and the difficulty of determining the truth with respect to alleged sexual activities carried out in private." Section 213.6(6). The effect of such an instruction is highly questionable. See generally on the English practice incorporated here, Williams, 1962 Crim. L. Rev. 662. Use of the cautionary instruction in this country has not been widespread. A few cases have approved them, *see, e.g.*, State v. Trocke, 127 Minn. 485, 149 N.W. 944 (1914), but no court has held that failure to give one was error. Other courts have even indicated that they disapprove, at least in some situations. *See* People v. Rangod, 112 Cal. 669, 44 P. 1071 (1896); State v. Rutledge, 63 Utah 546, 227 P. 479 (1922).

60. *See* 7 J. Wigmore, Evidence § 2061 (3d ed. 1940): "[The requirement] seems but a crude and childish measure, if it be relied upon as an adequate means for determining the credibility of the complaining witness in such charges. . . . This statutory rule . . . tends to produce reliance upon a rule of thumb." For a case clearly illustrating the compulsion put on a reluctant but conscientious trial court by the laws on corroboration, see People v. Sigismondi, 49 Misc. 2d 1, 266 N.Y.S.2d 724 (Sup. Ct. 1966). Other trial courts have perhaps let their prejudice show through in finding a tortured escape from the mandate of the requirement. *See* People v. Smith, 51 Misc. 2d 866, 274 N.Y.S.2d 221 (Rensselaer County Ct. 1966).