

DISTINGUISHING RAPE: A DEFINITIVE APPROACH TO SEXUAL ASSAULT

INTRODUCTION

The dramatic escalation of sexual assaults in this country¹ and the unwillingness of victims to report the crime of rape can be attributed in large part to antiquated beliefs prevalent in the eighteenth century. English common law was expressed by Lord Hale who proclaimed that "rape was a crime easily charged and difficult to prove."² A major misconception about rape is that it is a sexual act rather than a crime of violence.³ Today, the laws which criminalize sexual offenses reflect these tired notions. The inadequacy of many contemporary sexual assault laws contributes to the alarmingly low conviction rates of sexual offenders.⁴ This note suggests several major statutory changes to properly criminalize sexual offenses. The suggested statutes include the following:

1. A definition of force, threat, and coercion.
2. A redefinition of consent.
3. A lesser included offense of criminal sexual contact.
4. An elimination of any evidence of the complaining witness' past sexual conduct with the defendant.
5. A provision allowing relevant evidence of rape trauma syndrome.

I. BACKGROUND

Criminal statutes typically focus on the actions of the defendant.⁵ Sexual assault statutes, however, also consider the victim's reactions to the criminal conduct. Shifting the focus in this manner

1. FBI UNIFORM CRIME REPORTS FOR THE UNITED STATES 15 Oct. 24, 1979.

2. M. HALE, HISTORY OF THE PLEAS OF THE CROWN 628, 629 (Emling ed. 1736).

3. See *infra* note 31 and accompanying text.

4. See generally, H. KALVEN & H. ZIESEL, THE AMERICAN JURY, 242, 250-51 (1966).

5. See VT. STAT. ANN. tit. 13, § 2401 (1974 & Supp. 1985). See also, *State v. French*, 139 Vt. 320, 428 A.2d 1087 (1981). The defendant and a companion offered the complaining witness a ride to school. She entered the car voluntarily, but was driven to a remote wooded area and sexually assaulted by both men. The defendant was charged with both kidnapping and sexual assault, but convicted only of kidnapping. On appeal, the Vermont Supreme Court held that the defendant could be found guilty of only the kidnapping offense if every element of the crime was proven. The court noted that unanimity of jurors as to the victim's being held against her will would not prevent them from doubting that she did not consent to the intercourse.

often produces the illogical result of suggesting to the jury that some victims encourage the violent crimes which are committed against them.⁶ In effect, sexual assault statutes which focus on the victim's behavior contribute significantly to high acquittal rates in jury trials of forcible rape.⁷

Attempts to identify and define the elements of sexual assault have not produced clear standards about exactly what behavior constitutes forcible rape.⁸ Typical statutes proscribing rape require evidence of medically demonstrable physical injury to show evidence of force. However, in many instances of sexual assault where no actual physical injury occurs, the victim is psychologically traumatized.⁹ This emotional injury suffered by the victim may be more severe and long term than any physical injury.¹⁰ Sexual assault statutes have traditionally failed to recognize the victim's psychological injuries as proof that the alleged crime occurred. For example, a victim may be forced to submit to a sexual assault when faced with threats of economic, emotional, or physical coercion. In those instances, although the force employed by the attacker may be as overwhelming as a physical assault and battery, there may be no actual physical injury to the victim. Therefore, these types of conduct may not fall within a statutory definition of sexual assault.¹¹

Due to the widely perceived ineffectiveness of older rape laws, a nationwide legislative effort in the early 1970s sought to reform sexual assault statutes.¹² Vermont's efforts began in 1977 when the legislature enacted substantial revisions of the state's sexual assault law.¹³ These revisions changed the statute's title from "rape" to "sexual assault," removed the corroboration requirement, revised the definition of lack of consent, and barred the use of direct and opinion evidence of the victim's past sexual conduct.¹⁴

6. See generally O'Neale, *Court Ordered Psychiatric Examination of a Rape Victim in a Criminal Rape Prosecution or How Many Times Must A Woman Be Raped?* 18 SANTA CLARA L. REV. 119, 143-44 (1978).

7. See *supra* note 4 and accompanying text.

8. See generally, Note, *Recent Statutory Developments in the Definition of Forcible Rape*, 61 VA. L. REV. 1500 (1975).

9. See generally, Burgess and Holstrom, *Rape Trauma Syndrome*, 131 AM. J. PSYCHIATRY 981 (1974).

10. *Id.*

11. VT. STAT. ANN. tit. 13, §§ 3252-3253 (Supp. 1985).

12. See Note, *supra* note 8.

13. VT. STAT. ANN. tit. 13, §§ 3201-3202; §§ 3251-3255 (1974 & Supp. 1985).

14. VT. STAT. ANN. tit. 13, § 3255(2) (1974 & Supp. 1985). By removing the corrobora-

Supporters of Vermont's revised sexual assault law hoped that victims of rape would be more likely to report the crime if prosecution was made less humiliating and degrading to the victim.¹⁵ The legislative intent behind the 1977 revisions was to encourage more effective prosecution of sexual offenders.¹⁶ Although these revisions effected substantial improvements over the former laws, problems with the statutes continue to present difficulties to prosecutors, jurors, and victims.

First, provisions contained within the 1977 revised statutes prevented prosecutors from bringing criminal charges of sexual assault under certain circumstances; these provisions included the marital rape exemption¹⁷ and a so-called fingers exemption which excluded instances of digital penetration from criminal prosecution.¹⁸ The 1985 legislative amendments¹⁹ alleviated this problem somewhat by deleting the marital rape exemption and the fingers exemption from the statutes. However, simply striking the exemptions does not ensure effective prosecution of sexual offenses in Vermont; other problems remain to impede successful prosecution of sexual offenders in Vermont.

One problem is the current statute's definition of lack of consent.²⁰ It mandates the use at trial of a subjective measure of the defendant's actual knowledge to determine whether consent of the victim was present. This standard allows the accused to easily assert the affirmative defenses of mistake or consent.²¹

The existing statute creates problems for jurors as well. Juries may hesitate to convict a defendant because the statute lacks any definition of force and coercion.²² Further, the division of rape into only two categories, sexual assault and aggravated sexual assault,²³

tion requirement, the victim's testimony regarding the rape no longer had to be substantiated by a third party or other facts. Removing this requirement and disallowing the use of evidence relating to the victim's sexual conduct afforded greater protection of the victim at trial.

15. 1977 VT. HOUSE J., 547 (Adj. Sess.).

16. *Id.*

17. VT. STAT. ANN. tit. 13, § 3252 (Supp. 1984).

18. *Id.* § 3251(1).

19. VT. STAT. ANN. tit. 13, §§ 3251(1)-3252 (Supp. 1985).

20. *Id.* § 3254(2)(A)-(C).

21. *State v. French*, 139 Vt. 320, 428 A.2d 1087 (1981).

22. VT. STAT. ANN. tit. 13, § 3252(1)(B) (Supp. 1985).

23. *Id.* § 3252 (sexual assault); § 3253 (aggravated sexual assault). Both of these require penetration. See *infra* note 44 and accompanying text.

prevent the jury from convicting a defendant of a lesser included offense, for example, when penetration does not occur. This may result in a jury acquitting a defendant of any wrongdoing.²⁴

Finally, the recently enacted statute continues to focus on the victim's reaction to the sexual assault. Therefore, victims may be unwilling to report sexual assaults, because of a reluctance to endure courtroom scrutiny of their own behavior during the attack. The focus of Vermont's sexual assault laws should be shifted away from the victim with a comprehensive, definitive statute that clarifies the elements of the crime for jurors and protects the rights of victims.

II. DEFINITIONAL PROBLEMS WITHIN THE VERMONT SEXUAL ASSAULT STATUTE

Effective prosecution of sexual offenses in Vermont requires several changes in the statutory definitions of the elements of sexual crimes. The application of these definitions would affect the recent abolition of the fingers exemption and marital rape exemption, which will be discussed later in detail. What immediately follows are recommended definitions of force, threat, and coercion; together with a more workable definition of consent. A lesser included offense of criminal sexual contact will also be suggested.

A. *Adapting Michigan's Definition of Threat, Force, and Coercion*

The Vermont statutes divide sexual assault into two categories: sexual assault and aggravated sexual assault.²⁵ Aggravated sexual assault requires evidence of serious bodily injury.²⁶ Prior to the 1985 revisions, both sexual assault and aggravated sexual assault required that contact occur either "between the penis and the vulva, penis and anus, mouth and penis, mouth and vulva, or any intrusion, however slight, by any part of a person's body, other than the fingers, or any object into the genital or anal opening."²⁷ One amendment to the statute, passed in 1985, removed the language "other than the fingers."²⁸

24. See *infra* notes 130-136 and accompanying text.

25. See *supra* note 21 and accompanying text.

26. VT. STAT. ANN. tit. 13, § 3253 (Supp. 1985).

27. VT. STAT. ANN. tit. 13, § 3251(1) (Supp. 1984). See *supra* note 21.

28. See *supra* note 19; VT. STAT. ANN. tit. 13, § 3251(1) (Supp. 1985).

The current statute further defines sexual assault as compelling another person "to participate in a sexual act" without their consent, or by threatening, coercing, or "placing that person in imminent fear of being harmed."²⁹ Although consent as it is used above is defined in the statute,³⁰ there are no provisions in the law defining threat, force, or coercion. The absence of statutory definition leaves the task of defining these important elements to the courts, a prolonged procedure which can lead to inconsistent results.

In comparison, the Michigan statute contains specific definitions of force and coercion. An adaptation of this definition should be incorporated in the Vermont statute:

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 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 his threat. As used in this subdivision, "to retaliate" includes, but is not limited to threats of *physical injury*, kidnapping, or extortion.

(iv) when the actor engages in the medical treatment or examination of the victim in a manner or for purposes which are medically recognized as unethical or unacceptable.³¹

Incorporating this definition would provide a clear standard for courts and juries to apply in deciding exactly what behavior constitutes force, threat, or coercion. This provision also addresses unethical medical examination procedures,³² which are not specifically addressed in any Vermont statute.

29. VT. STAT. ANN. tit. 13, §§ 3252(1)(A)-(C) (Supp. 1985).

30. *Id.* §§ 3251(3)-3254(1)(2)(A)-(C).

31. MICH. STAT. ANN. § 28.788(2)(f)(i)-(v) (Callaghan Supp. 1985) (emphasis added). Force and coercion includes but is not limited to any of the five circumstances which the Michigan statute sets out. For purposes of the suggested statute the five circumstances have been condensed into four circumstances to avoid redundancy. However, force and coercion is not limited solely to these four circumstances.

32. *Id.* § 28.788(2)(f)(iv).

B. *Redefining Consent to Exclude Coerced Submission*

Most sexual assault statutes require the use of force or coercion and the lack of consent by the victim for a rape to occur.³³ While these elements appear to be distinct, consent is usually measured by the amount of force and coercion used in the attack. For example, the consent standard in forcible rape statutes formerly required that the victim substantially resist the attack to prove nonconsent.³⁴ The utmost resistance requirement has been abolished in Vermont.³⁵ However, when an accused raises a consent defense, there is a danger that a jury will determine the defendant's culpability based solely on the degree of force and coercion.³⁶ A clearer definition of consent, coupled with the precise definition of force and coercion outlined above, can eliminate the ambiguities of the Vermont consent standard.

In 1977, the Vermont legislature enacted section 3254(1) of title 13, which explicitly provides that "lack of consent may be shown without proof of resistance."³⁷ This section sets out the conditions under which a person shall be deemed to have acted without consent:

- (1) when the actor *knows* that the other person is mentally incapable of understanding the nature of the sexual act;
- (2) when the actor *knows* that the other person is not physically capable of resisting, or of declining consent to the sexual act;
- (3) when the actor *knows* that the other person is unaware that a sexual act is being committed.³⁸

This subjective standard provides a significant advantage to defendants because it requires the defendant's *actual* knowledge that the victim did not consent. Accused rapists commonly assert the affirmative defense of consent or mistake, claiming lack of *actual knowledge* that the victim, through actions or words, refused consent.³⁹

33. See, e.g., VT. STAT. ANN. tit. 13, § 3252(1)(A)-(C) (Supp. 1985).

34. See S. KADISH, S. SCHULHOFFER, M. PAULSEN, *CRIMINAL LAW AND ITS PROCESSES*, 383 (4th ed. 1983).

35. See *supra* note 14 and accompanying text.

36. See *supra* note 5 and accompanying text.

37. VT. STAT. ANN. tit. 13, § 3254(1) (Supp. 1985).

38. *Id.* § 3254(2)(A)-(C) (emphasis added).

39. See generally, Note, *Culpable Mistakes in Rape: Eliminating the Defense of Unreasonable Mistake of Fact as to Victim Consent*, 89 DICK. L. REV. 473 (1985).

An objective standard governing lack of consent would limit the defendant's use of mistake or lack of actual knowledge as an affirmative defense. A statute requiring that the defendant knew, or should have known, that the victim did not consent would allow consideration of this defense based on a reasonable person standard. The court could clearly instruct the jury in cases where consent is raised as a defense. In addition to this objective standard of lack of consent, a redefinition of consent itself would increase protection for rape victims at trial.

The Vermont statute defines consent to mean "words or actions by a person indicating a voluntary agreement to engage in a sexual act."⁴⁰ Because the Vermont statute does not explicitly define force or coercion, the rape victim may be unfairly disadvantaged. Violent or coercive threats may compel the victim to submit through actions or words. To illustrate, a victim may be threatened with a weapon and told to remove her clothing. If she removes her clothing or remains silent in fear of imminent harm, these actions may be considered as evidence of consent.⁴¹ Under the present law, the jury may find consent because there may appear to be a "voluntary agreement." Excluding coerced submission from the definition of consent can eliminate this dangerous shortcoming in the Vermont sexual assault statute.

The Florida sexual battery statute defines consent as an "intelligent, knowing, and voluntary consent and *shall not be construed to include coerced submission.*"⁴² This definition provides greater protection for the victim because consent is narrowly defined and, more importantly, excludes coerced submission. A sexual assault in which consent in action or words is the result of threats, force, or coercion would then fall within the statutory definition of sexual assault. This would dispel juror confusion when consent is raised as a defense and there is no evidence that the victim attempted to resist the attack. This suggested redefinition of consent along with an objective standard of the defendant's knowledge would afford additional protections to the victim at trial, thus treating sexual assault like other violent crimes.⁴³

40. VT. STAT. ANN. tit. 13, § 3251(3) (Supp. 1985).

41. See *infra* notes 133-39 and accompanying text.

42. FLA. STAT. ANN. § 794-011(1)(a) (West Supp. 1985) (emphasis added).

43. See *The Legal Bias Against Rape Victims*, 61 A.B.A.J. 464 (1975). The discriminatory treatment of rape victims is well illustrated in this example of a hypothetical cross-examination of a robbery victim similar to that of which a rape victim must usually

C. *Defining a Lesser Included Offense of Criminal Sexual Contact*

As discussed earlier, sexual assault and aggravated sexual assault require penetration of the victim's body.⁴⁴ A lesser included

undergo:

- Q. Mr. Smith, you were held up at gunpoint on the corner of First and Main?
- A. Yes.
- Q. Did you struggle with the robber?
- A. No.
- Q. Why not?
- A. He was armed.
- Q. Then you made a conscious decision to comply with his demands rather than resist?
- A. Yes.
- Q. Did you scream? Cry out?
- A. No, I was afraid.
- Q. I see. Have you ever been held up before?
- A. No.
- Q. Have you ever given money away?
- A. Yes, of course.
- Q. And you did so willingly?
- A. What are you getting at?
- Q. Well let's put it like this, Mr. Smith. You've given money away in the past. In fact, you have quite a reputation for philanthropy. How can we be sure that you weren't contriving to have your money taken away from you by force?
- A. Listen, if I wanted . . .
- Q. Never mind. What time did this hold up take place, Mr. Smith?
- A. About 11:00 P.M.
- Q. You were out on the street at 11:00 P.M.? Doing what?
- A. Just walking.
- Q. Just walking? You know that it's dangerous being out on the street that late at night. Weren't you aware that you could have been held up?
- A. I hadn't thought about it.
- Q. What were you wearing at the time, Mr. Smith?
- A. Let's see . . . a suit. Yes, a suit.
- Q. An expensive suit?
- A. Well—yes. I'm a successful lawyer, you know.
- Q. In other words, Mr. Smith, you were walking around the streets late at night in a suit that practically advertised the fact that you might be a good target for some easy money, isn't that so? I mean, if we didn't know better, Mr. Smith, we might even think that you were asking for this to happen, mightn't we?

Connie K. Borkenhagen of Albuquerque, New Mexico presented this hypothetical to urge the New Mexico House of Delegates to pass a resolution calling for a redefinition of rape. *Id.*

44. See *supra* notes 25-26 and accompanying text. Although the language of the statute does not explicitly state that penetration is a necessary element, the Vermont courts construe the language embodied in section 3251(A) of title 13 as requiring penetration. See *State v. Machunsky*, 129 Vt. 195, 274 A.2d 513 (1971); *State v. Eaton*, 134 Vt. 205, 356 A.2d 504 (1976).

offense of criminal sexual contact would allow judges and jurors to convict a defendant in the absence of penetration. In instances where the sexual assault does not involve penetration, jurors may be less likely to acquit the sexual offender of any wrongdoing if a lesser included offense is available.

The Vermont sexual assault statute does not address the problem of non-penetrating sexual assault. Currently, this kind of sexual abuse is charged under the lewd and lascivious conduct statute or simple assault.⁴⁵ Incestuous non-penetrating sexual abuse is also brought under a statute entitled Intermarriage of or Fornication by Persons Prohibited to Marry.⁴⁶ These offenses are misdemeanors carrying minimal sentences or probation.

Non-penetrating sexual abuse is specifically addressed in the Michigan criminal sexual conduct statute.⁴⁷ The statute defines second degree sexual conduct as sexual contact other than actual penetration.⁴⁸ Criminal sexual contact is defined as the intentional touching of the victim's or actor's intimate parts and the intentional touching of the clothing over the victim's or actor's intimate parts.⁴⁹ Intimate parts include the primary genital area, groin, inner thigh, buttock, or breast of a human being.⁵⁰ Because sexual assaults often involve the mouth, it should be included in the definition of intimate parts. The Michigan provision also criminalizes incestuous sexual contact. Moreover, the provision codifies the more common kind of child sexual abuse involving fondling and touching, rather than actual penile penetration.⁵¹ The necessity of a non-penetration provision is more evident in the context of the recently abolished fingers exemption.

III. ABOLISHING THE FINGERS EXEMPTION

Instances of brutal rapes involving digital penetration led to the elimination of the Vermont statute's fingers exemption in the 1985 legislative session.⁵² In this section, the purpose of the fingers

45. VT. STAT. ANN. tit. 13, §§ 2601-2602 (Supp. 1985); VT. STAT. ANN. tit. 13, § 1023 (1974 & Supp. 1985).

46. VT. STAT. ANN. tit. 13, § 205 (Supp. 1985).

47. MICH. STAT. ANN. §§ 28.788(2)(iv) (Callaghan Supp. 1985).

48. *Id.* § 28.788(3).

49. *Id.* § 28.788(1)(k).

50. *Id.* § 28.788(1)(C).

51. *Id.* See also *infra* notes 61-63 and accompanying text.

52. See *supra* note 19.

exemption will be discussed. In addition, the potential problems arising from the elimination of the exemption without further statutory change will be discussed through an application of the previously proposed definitional changes of force and coercion, consent, and criminal sexual contact.

A. *Purpose and Effect of the Recently Abolished Fingers Exemption*

Before the passage of Senate Bill 18,⁵³ which eliminated both the fingers and marital exemptions, any kind of digital penetration was specifically excluded from the statutory definition of sexual assault and aggravated sexual assault.⁵⁴ The purpose of the fingers exemption was based on concerns that teenagers engaging in sexual petting could be charged with sexual assault.⁵⁵ Another justification for the exclusion was that gynecologists and obstetricians administering routine vaginal and rectal examinations using the fingers could be charged with sexual assault.⁵⁶ If these actions did constitute a sexual assault it would be prosecuted under the lewd and lascivious conduct statute. This statute provided a less stringent penalty than sexual assault.⁵⁷

Numerous cases in which victims sustained serious internal injuries from forcible digital penetration justified the elimination of the fingers exemption. Although a bill to eliminate the fingers and marital exemptions was introduced in the 1983 legislative session,⁵⁸ it was not until 1985 that such a measure was passed. Testimony during the 1983 legislative session concerning the fingers exemption revealed that a Vermont woman was hospitalized for nine months to reconstruct her uterus because her husband had torn out pieces of her uterus using his hands.⁵⁹ The woman was unable

53. *Id.*

54. *Id.*

55. Interview with Rita Edwards, Director of Governor's Commission on the Status of Women, in Montpelier, Vermont (Sept. 28, 1984).

56. *Id.* This concern was unsubstantiated. The genuine concern of a patient's vulnerability to unethical medical practitioners is more realistically addressed by the proposed definitional changes. See *infra* note 65 and accompanying text.

57. Compare VT. STAT. ANN. tit. 13, §§ 2601-2602 (1974) (penalty for lewd and lascivious conduct not less than one year or more than five years) with VT. STAT. ANN. tit. 13, §§ 3252-3253 (Supp. 1985) (penalty for sexual assault not more than twenty years; penalty for aggravated sexual assault not more than twenty-five years).

58. 1983 VT. HOUSE BILL 398 (Adj. Sess.).

59. *Hearings on H. Bill 398 Before the Vermont Senate Judiciary Comm.*, Adj. Sess., Mar. 9, 1983, at 11.

to bring sexual assault charges against her husband because the law did not recognize the penetration of the hands into the bodily openings as constituting sexual assault, nor did it criminalize spousal rape. A misdemeanor charge of simple assault or lewd and lascivious conduct⁶⁰ did not adequately punish this type of violent assault.

B. *The Need For More Complete Reform*

The sexual abuse of children most often involves the fondling of a child's genitals and private areas with the fingers.⁶¹ In 1982, the Vermont State Department of Corrections conducted a study of Vermont sexual offenders.⁶² The study indicated that in March of 1981, there were one hundred and eighty nine known sexual offenders incarcerated in Vermont. Almost half of the sexual offenses in Vermont involved children as victims. Twenty-five percent were labeled child molesters and twenty-five percent incest offenders. Forty-five percent were categorized as sexually assaultive offenders. The child molesters and incest offenders were typically charged with lewd and lascivious conduct and served substantially lower sentences than the sexual assault offenders.⁶³ These problems are indicative of the need for more complete reform.

Eliminating the fingers exemption from the statute effectively criminalized digital penetration. However, non-penetrating sexual abuse is still not included within the definition of sexual assault. These offenses must be brought under the lewd and lascivious conduct statute. A lesser included offense of criminal sexual contact and a definition of force and coercion (discussed earlier) should be included within the statute.

The adoption of these provisions would criminalize instances of non-penetrating sexual abuse. Prosecutors would have the discretion of charging particularly egregious sexual offenses under the sexual assault or aggravated sexual assault provisions based on the severity of injury to the victim. Non-penetrating sexual contact

60. VT. STAT. ANN. tit. 13, § 1023 (1974 & Supp. 1985). The penalty for simple assault is not more than one year in jail or a fine of not more than \$1,000.00, or both.

61. See J. CHAPMAN & M. GATES, *THE VICTIMIZATION OF WOMEN*, 83-8 (1978).

62. See generally, Young, Vermont Dept. of Corrections Study of Sexual Offenders, (April 1981).

63. *Id.* at 1. Child molesters and incest offenders served on the average two or three year minimum sentences, while sexual assault offenders served an average minimum sentence of four and one half years.

would be prosecuted under the criminal sexual contact statute. One potential danger of including an offense of criminal sexual contact is that a jury may use the lesser offense to avoid conviction for the more serious sexual offense. However, the potential of the jury acquitting a defendant of any wrongdoing is even more distressing.⁶⁴

The inclusion of the proposed definition of force and coercion would aid in the proper prosecution of these different types of sexual offenses. The following example, in the context of medical treatment, illustrates how the lesser included offense of criminal sexual contact works in conjunction with the force and coercion provision: If a dentist renders his patient unconscious and penetrates the victim's vagina with his fingers, the charge would be sexual assault because penetration occurred. In contrast, if the dentist renders the patient unconscious and fondles her breasts, penetration is absent and the charge would be criminal sexual contact. Such unethical medical practices are specifically included in the proposed definition of force and coercion.⁶⁵

While the elimination of the fingers exemption was instrumental in ensuring greater protection to victims of sexual assault, continued statutory reform is necessary to protect victims and to convict those persons guilty of sexual offenses. The elimination of the fingers and marital exemptions combined with the suggested definition of force and coercion and lesser included offense of criminal sexual contact would better accomplish the legislative goal of proper prosecution of sexual offenders in Vermont.

IV. ELIMINATING THE MARITAL RAPE EXEMPTION

Marital rape encompasses a broad spectrum of cases involving couples living together and living apart. These rapes range from

64. See Kalven, *supra* note 4 and accompanying text.

65. See *supra*, note 32. Cf., Boston Globe, Sept. 1, 1985, at 1 and 20. A Massachusetts physician was convicted of raping one patient and assaulting three others in October, 1985. In May 1978, after one hour of deliberation a jury acquitted this same physician of raping a 15 year old patient who was recovering from knee surgery. *Id.* at 1. What is startling is that in the 13 years of his troubled medical career he eluded prosecution, despite the fact that over a dozen women in Maryland, Massachusetts, New Hampshire, and Vermont complained of being sexually abused by the physician. A Vermont woman complained that after being moved to an isolated hospital room with no roommate, this physician entered her room, exposed himself and said, "If you take care of this I'll see what I can do to get you out of here." *Id.* at 20, col. 2. Sex abuse by health care providers remains a hidden problem. These incidents illustrate the necessity for statutory recognition of this crime.

savage brutal attacks to non-physical injury rapes.⁶⁶ Successful prosecution of spousal rape in jurisdictions which have criminalized marital rape led to the recent abolition of the spousal exemption in Vermont's sexual assault statute.⁶⁷ While this legislative action was an affirmative recognition of the problem of marital rape in Vermont, the existing language of the statute will continue to impede proper prosecution of sexual assault. This section will examine the tenuous rationales which underlie marital rape exemptions. In addition, Vermont's legislative efforts will be discussed. Further statutory reform will be suggested to provide more substantial safeguards for sexually battered spouses.

A. *History of Marital Rape Exemptions*

Prior to the 1970 nationwide legislative reform efforts,⁶⁸ every state in the Union exonerated husbands from criminal prosecution of forcible rape upon their wives.⁶⁹ Currently, twenty-four states and the District of Columbia have either legislatively or judicially abolished their spousal rape exemptions.⁷⁰ Three states have retained such exemptions.⁷¹ The remaining twenty-three states have limited allowances of marital rape prosecution, only when the couple has either separated or initiated a divorce action.⁷²

Marital rape exemptions were based on archaic common law doctrines that wives are chattels of their husbands, or that husbands and wives are one person, and one cannot rape oneself.⁷³ It

66. D. FINKELHOR & K. YLLO, *THE PROSECUTION OF MARITAL RAPE; THE CALIFORNIA EXPERIENCE* (June 1984). These cases include a wife being raped with a crowbar and tire iron; another wife being forced by her husband to have sex with other men and dogs.

67. See *supra* note 18.

68. See *supra* note 8.

69. Schwartz, *The Spousal Exemption for Criminal Rape Prosecution*, 7 VT. L. REV. 33 (1982).

70. National Clearinghouse on Marital Rape, *State Law Chart* (July 1984). These states are Arkansas, California, Connecticut, Delaware, Florida, Georgia, Illinois, Iowa, Kansas, Louisiana, Massachusetts, Minnesota, Mississippi, Nebraska, New Hampshire, New Jersey, New York, North Dakota, Oregon, Pennsylvania, Washington, Wisconsin, Wyoming, and Vermont. The District of Columbia also permits prosecution of all instances of marital rape.

71. *Id.* These states are Alabama, South Dakota, and West Virginia.

72. *Id.* These states are Alaska, Arizona, Colorado, Hawaii, Idaho, Indiana, Kentucky, Maine, Maryland, Michigan, Missouri, Montana, Nevada, New Mexico, North Carolina, Ohio, Oklahoma, Rhode Island, South Carolina, Tennessee, Texas, Virginia, and Utah. *Cf. People v. Liberta*, 64 N.Y.2d 152, 474 N.E.2d 567, 485 N.Y.S.2d 207 (1984). The court held that the marital rape exemption violated an individual's right to privacy and the equal protection clause because it limited prosecution of spousal rape to only couples living apart.

73. See Schwartz, *supra* note 69, at 35-37.

is difficult to understand how this antiquated notion of "marital property" would allow a husband, in this century, to sexually batter his wife with impunity. A more contemporary argument against criminalizing marital rape is the supposition that the elimination of spousal exemptions will lead to innocent husbands having rape charges filed against them by vengeful wives seeking large divorce settlements.⁷⁴ It is also believed that other forms of prosecution such as assault, battery, and lewd and lascivious conduct provide adequate recourse for the sexually battered spouse.⁷⁵

States which have abolished the marital rape exemption do not report a flood of frivolous claims.⁷⁶ Nationwide statistics of marital rape prosecutions since 1982 show an eighty-eight percent conviction rate in cases where the couple is separated, and an eighty-one percent conviction rate when the couple is living together.⁷⁷ In particular, a California study which monitored marital rape prosecutions since 1970, when California ratified a spousal rape statute,⁷⁸ indicated that marital rape prosecution resulted in a *higher* conviction rate than did non-marital forcible rape prosecutions.⁷⁹ These statistics indicate that marital rape can be successfully prosecuted once it is made a crime. The reluctance of women to report physical abuse by husbands,⁸⁰ coupled with the general reluctance to report rape, further obstructs accurate nationwide monitoring of these crimes. The scope of marital rape in Vermont is pitifully underestimated because, until passage of the 1985 amendments, husbands could legally rape their wives in Vermont.

B. *Abolition of the Vermont Marital Rape Exemption*

The 1977 revised sexual assault statute totally barred prosecution of spousal rape in Vermont.⁸¹ A sexual assault could only oc-

74. *Id.* at 51-53.

75. *Id.* at 54.

76. Letter from Connie Epstein, Research Attorney, Connecticut Office of Legislative Research (Feb. 24, 1981). Since Oregon and New Jersey have abolished the marital exemption, there has been no abuse of the statute. *Accord* Finkelhor, *supra* note 66 at 1-10 (June 1984).

77. National Clearinghouse on Marital Rape, Marital Rape Case Prosecution Since 1978 (Sept. 15, 1984).

78. CAL. PENAL CODE § 262 (West 1985) (entitled Rape of Spouse).

79. *See* Finkelhor, *supra* note 66, at 6.

80. *See* Chapman, *supra* note 61, at 112. According to F.B.I. Reports, marital violence is ten times more underreported than rape.

81. VT. STAT. ANN. tit. 13, §§ 3251(1)-3252 (Supp. 1985).

cur between a person and someone "other than a spouse."⁸² This language resulted in an absurd common law requirement that the prosecution establish as an element of forcible rape that the defendant and victim were not married to each other.⁸³ After several years of legislative debate, the Vermont legislature deleted the language "other than a spouse."⁸⁴

The current sexual assault statute allows prosecution of all instances of marital rape regardless of whether the couple is living together or apart.⁸⁵ Providing serious criminal sanctions for sexually abusive spouses was a necessary step toward protecting their victims. However, to more fully protect sexually battered spouses, two aspects of the statute, the statutory rape provision and the use of evidence of past sexual conduct with the defendant, should be further addressed by the legislature.

The first concern, addressed in part by Senate Bill 18, is the statutory rape provision in the existing sexual assault statute. The 1977 revised statute contained language which prohibited a sexual act with a person under the age of sixteen if the actor and victim were not married to each other.⁸⁶ Because of the criminalization of marital rape, the legislature found it necessary to delete the existing language pertaining to married individuals and inserted the language "except where the persons are married to each other and the sexual act is consensual."⁸⁷ Proof of lack of consent may be more difficult for a battered spouse who has engaged in consensual sexual acts with the defendant prior to the rape. Inquiries by counsel into "consensual sexual acts" may give rise to more debilitating treatment of the victim at trial. The need for a clear definition of "consensual" sexual acts, addressed earlier in this note,⁸⁸ is even more apparent in the context of marital rape.

The difficulty of dealing with prior consensual acts between married individuals may be compounded by an existing evidentiary provision which allows for the admission of evidence of the

82. VT. STAT. ANN. tit. 13, § 3252 (Supp. 1984).

83. *State v. LaRose*, 137 Vt. 531, 408 A.2d 651 (1979).

84. *See supra* notes 19 and 58. Despite strong efforts by the Governor's Commission on the Status of Women, the legislative proposal which sought abolition of the marital and fingers exemptions died in the Senate Committee. The bill was reintroduced in the 1985 legislative session and was subsequently passed by both the House and the Senate.

85. VT. STAT. ANN. tit. 13, § 3252(3) (Supp. 1984).

86. *Id.*

87. VT. STAT. ANN. tit. 13, § 3252(3) (Supp. 1985).

88. *See supra* notes 33-43 and accompanying text.

complaining witness' past sexual conduct with the defendant under certain circumstances.⁸⁹ The current statute states that prior sexual conduct of the complaining witness shall not be admitted;⁹⁰ however, in certain situations this evidence is allowed if its probative value outweighs its private character. These exceptions include: evidence of the complaining witness' past sexual conduct with the defendant; evidence of specific instances of the complaining witness' sexual conduct showing the source of semen, pregnancy, or disease; or evidence of specific instances of the complaining witness' past false allegations of sexual assault.⁹¹ A written notice must be filed with the court if a defendant proposes to offer this type of evidence at trial.⁹² The court must then hold an *in camera* hearing to determine admissibility.⁹³ Although this *in camera* provision provides a stricter standard for admissibility, it remains within the purview of the trial court to admit specific instances of the complaining witness' past sexual conduct with the defendant.

This "past sexual conduct" provision is especially troublesome for the sexually battered spouse when consent is raised as a defense. Allowing evidence of past sexual conduct may result in the victim's entire sexual past with the defendant being graphically depicted in open court. Because married couples engage in consensual sexual acts, the problem of proving the absence of consent to a specific act is more acute for the sexually battered spouse. Furthermore, these spouses may suffer more severe long-term psychological injuries as a result of being raped by someone whom they trust and love. Rape is unusual because in one instance sexual intercourse constitutes a pleasurable act, and in another instance it constitutes a violent criminal act. Although the "private character" test embodied in the provision is synonymous with the general test of legal relevancy in criminal and civil cases,⁹⁴ the sexually battered spouse remains unfairly disadvantaged by the provision. Past sexual conduct, which is universally present in the marital situation, is simply irrelevant to a forcible rape.

The Vermont legislature expressly stated that this evidentiary

89. VT. STAT. ANN. tit. 13, § 3255(a)(3)(A)-(C) (Supp. 1985).

90. *Id.* § 3255(a)(1).

91. *Id.* § 3255(a)(3).

92. *Id.* § 3255(b).

93. *Id.*

94. *Id.* § 3255 (Note on legislative history).

provision was enacted to protect victims from demeaning inquiry into their past sexual conduct and to treat past conduct evidence uniformly, whether in rape cases or in the law generally.⁹⁵ However, past conduct provisions in other criminal statutes focus on the past conduct of the defendant, not the complaining witness. Focusing on the past conduct of the victim is entirely inconsistent with traditional notions of criminal law.⁹⁶ Because excluding evidence of the victim's past sexual conduct would further the legislative goal of treating rape like other violent crime, the evidentiary provision allowing the admission of this evidence should be eliminated from the statute.

Married persons in Vermont are no longer a class of individuals who can be legally raped by their spouses. The outlawing of marital rape is a major victory for all those victimized by this particularly debilitating crime.

V. ALLOWING RELEVANT RAPE TRAUMA SYNDROME EVIDENCE

Sexual assault statutes typically contain special evidentiary principles not found in other criminal statutes. These special provisions are necessary because frequently the only witnesses to the crime are the victim and the defendant; their testimony is most often diametrically opposed. The defendant, therefore, often asserts the defense that the victim consented.

The 1977 reform legislation in Vermont included a provision which explicitly stated that all evidence of the victim's past sexual conduct is inadmissible unless it pertains to past sexual conduct with the defendant or with third persons, as a means of showing the source of semen, pregnancy, or disease.⁹⁷ The resistance and corroborating testimony requirements were expressly repealed by the 1977 revised statute.⁹⁸ The legislative purpose of the revision was to reduce the trauma of the victim at trial.⁹⁹

95. *Id.*

96. *See supra* note 5 and accompanying text.

97. VT. STAT. ANN. tit. 13, § 3255(a)(3)(A)-(C) (Supp. 1985). For past sexual conduct relating to the defendant *see supra* notes 93-95 and accompanying text. *See also supra* notes 81-89 and accompanying text.

98. VT. STAT. ANN. tit. 13, § 3255(a)(1)-(2) (Supp. 1985).

99. *State v. Patnaude*, 140 Vt. 361, 438 A.2d 402, 407 (1981). In holding that the trial court properly excluded evidence of the complaining witness' past sexual conduct, the court stated the legislative intent behind Vermont's rape shield law was "[t]he rape victim shield provision . . . represents an explicit legislative decision to eliminate trial practices under our

In theory, this provision appears to take the focus away from the victim by excluding evidence of past sexual history. Despite these limitations on the admissibility of the victim's character evidence, however, juries continue to disbelieve victim testimony.¹⁰⁰ A jury often believes that the victim encouraged the rape.¹⁰¹ This misconception underlies the startlingly high acquittal rate in rape trials.¹⁰² Allowing relevant evidence of the psychological damage suffered by victims may dispel illogical beliefs that a victim would encourage such an attack.

A. *Rape Trauma Syndrome Defined*

Rape trauma syndrome is a mental health concept which identifies the victim's psychological and emotional responses to rape.¹⁰³ The psychiatric community has categorized rape trauma syndrome as a post-traumatic stress disorder.¹⁰⁴ Other kinds of post-traumatic stress disorders have been diagnosed in battered children, battered wives, and war veterans.¹⁰⁵ Like these other concepts, specific diagnostic criteria are used to describe a rape victim's psychological injury.

A victim's reaction to rape has both short-term and long-term effects.¹⁰⁶ Symptoms of the short-term phase include a severe loss of control over the victim's everyday activities, evidenced by an inability to eat or sleep, intestinal disorders, and fears of physical injury and death.¹⁰⁷ During this phase a victim has vivid recollections of the attack and many experience intense feelings of degradation, humiliation, guilt, shame, anger, and revenge.¹⁰⁸ The sec-

former rape law that had effectively frustrated society's vital interest in the prosecution of sex crimes The notion that an unchaste woman cannot be raped has been wholly rejected."

100. See Kalven, *supra* note 4, at 249. "[J]uries do not limit themselves to [the consent issue.] [Rather, the jury] weighs the woman's conduct in the prior history of the affair. [The jury] closely, and harshly, scrutinizes the female complainant and . . . is lenient with the defendant whenever there are suggestions of contributing behavior on her part."

101. *Id.* at 249-57.

102. *Id.*

103. See Burgess, *supra* note 9, at 982.

104. See Wilk, *Expert Testimony on Rape Trauma Syndrome: Admissibility and Effective Use in Criminal Rape Prosecution*, 33 AM. L. REV. 2, 417, at 424-28 (1984).

105. See generally Note, *Posttraumatic Stress Disorder—Opening Pandora's Box?*, 17 NEW ENG. L. REV. 91, 102-14 (1981).

106. See Burgess, *supra* note 9, at 982-84.

107. *Id.* at 982-83.

108. *Id.* at 982.

ond phase involves long-term sleep disorders, depression, and a development of phobias based on the circumstances of the attack. These phobias include fear of being indoors or outdoors, of being alone or in crowd, and of sexual activity.¹⁰⁹

Medical testimony regarding these symptoms should be available as competent evidence to corroborate the rape victim's testimony in cases in which consent is a defense.¹¹⁰ This evidence could supplement the prosecution's physical evidence of the victim's injuries and may explain the victim's demeanor and mental condition at trial.¹¹¹

B. *Judicial Precedent on the Use of Rape Trauma Syndrome Evidence*

While the legal community has been receptive to the admissibility of battered child syndrome¹¹² and battered wife syndrome,¹¹³ it has not readily accepted the concept of rape trauma syndrome. One argument against admissibility of rape trauma syndrome evidence is that it does not meet the requirement of expert scientific testimony established in *Frye v. United States*.¹¹⁴ This standard requires that expert scientific testimony be generally accepted by the relevant scientific community.¹¹⁵ The inclusion of rape trauma syndrome in the official psychiatric diagnostic manual as a post-traumatic stress disorder, as well as in other scientific and legal literature, should satisfy the *Frye* standard.¹¹⁶ While seventeen

109. *Id.* at 984.

110. See Wilk, *supra* note 104, at 419-20.

111. See Wilk, *supra* note 104, at 427-28. The trial may be six months to a year after the assault and each victim's reaction to the rape varies in duration and severity.

112. See, e.g., *State v. Wilkerson*, 295 N.C. 559, 570, 247 S.E.2d 905, 912 (1978). The defendant in *Wilkerson* was found guilty of second degree murder of his two year old son. The Supreme Court held that the doctor's testimony that the child sustained injuries typical of battered child syndrome was properly admitted to aid the jury.

113. See, e.g., *Smith v. State*, 647 Ga. 612, 617-20, 247 S.E.2d 678, 682-83 (1981). The defendant was charged with murder of her live-in boyfriend. She claimed self defense. The Supreme Court of Georgia held that expert opinion of battered woman syndrome was improperly excluded from the jury's consideration. The court stated that the expert's testimony explaining why a person suffering from battered woman's syndrome would not leave her mate, would not inform police or friends, and would fear increased aggression against herself, would be conclusions that jurors ordinarily were not able to draw for themselves and should therefore not have been excluded evidence.

114. 293 F. 1013 (D.C. Cir. 1913).

115. *Id.* at 1014.

116. See, e.g., *State v. Marks*, 231 Kan. 645, 647 P.2d 1292 (1982).

sexual assault cases¹¹⁷ have referred to rape trauma syndrome, only four appellate courts have actually decided on the admissibility of this evidence to refute a consent defense in a criminal trial.¹¹⁸

In *People v. Bledsoe*,¹¹⁹ the California Court of Appeals held that rape trauma syndrome evidence was relevant as to whether a forcible rape had occurred. The California Supreme Court reversed and held that this evidence was not admissible.¹²⁰ The supreme court distinguished this type of evidence from that of battered child syndrome, stating that rape trauma syndrome is an "umbrella" concept, involving many variables, whereas battered child syndrome has a narrow set of criteria.¹²¹

While this decision reflected the idea that expert testimony of rape trauma syndrome evidence would mislead the jury, this problem is not insurmountable. Cross-examination of the witness and the use of opposing expert testimony could alleviate juror confusion.¹²² Unfortunately, when psychiatric testimony is to be used to identify the victim's injuries and to prove lack of consent, some courts regard it as irrelevant and highly prejudicial to the defendant.¹²³

117. See, e.g., *People v. Mathews*, 91 Cal. App. 3d 1018, 154 Cal. Rptr. 628 (Ct. App. 1979); *People v. Bledsoe*, 140 Cal. App. 3d 267, 189 Cal. Rptr. 726 (Ct. App. 1983); *Division of Corrections v. Wynn*, 438 So.2d 446 (Fla. Dist. Ct. App. 1983); *State v. Marks*, 231 Kan. 645, 647 P.2d 1292 (1982); *Alphonso v. Charity Hosp.*, 413 So.2d 982 (La. Ct. App.), cert. denied, 415 So.2d 952 (La. 1982); *Terrio v. McDonough*, 16 Mass. App. Ct. 163 (1983); *State v. McGee*, 324 N.W.2d 232 (Minn. 1982); *State v. Saldana*, 324 N.W.2d 227 (Minn. 1982); *State v. Mackie*, 622 P.2d 673 (Mont. 1981); *State v. Walker*, 639 S.W.2d 854 (Mo. Ct. App. 1982); *White v. Violent Crime Compensation Bd.*, 76 N.J. 368, 388 A.2d 206 (1978); *State v. Jackson*, 97 N.M. 467, 641 P.2d 498 (1982); *State v. Middleton*, 294 Or. 427, 657 P.2d 1215 (1983); *In re Pittsburgh Action Against Rape*, 494 Pa. 15, 428 A.2d 126 (1981) (Larson, J., dissenting); *Delia S. v. Torres*, 134 Cal. App. 3d 471, 184 Cal. Rptr. 787 (1982); *Perez v. State*, ___ Tx. ___, 653 S.W.2d 878, 882 (Tex. Ct. App. 1983); *People v. Stanley*, 203 Cal. Rptr. 461, 36 Cal. 3d 253, 681 P.2d 302 (Cal. 1984).

118. See, e.g., *People v. Bledsoe*, 140 Cal. App. 3d 267, 189 Cal. Rptr. 726 (Ct. App. 1983); *State v. McGee*, 324 N.W.2d 232 (Minn. 1982); *State v. Saldana*, 324 N.W.2d 227 (Minn. 1982); *State v. Marks*, 231 Kan. 645, 647 P.2d 1292 (1982); *State v. Middleton*, 294 Or. 427, 657 P.2d 1215 (1983).

119. *People v. Bledsoe*, 140 Cal. App. 3d 267, 189 Cal. Rptr. 726 (Ct. App. 1983).

120. *People v. Bledsoe*, 203 Cal. Rptr. 450, 36 Cal. 3d 236, 681 P.2d 291 (Cal. 1984). The court held that the lower court erred in allowing evidence of rape trauma syndrome. However, the admissibility of this evidence did not constitute a reversible error because the prosecution's case against the defendant was so strong.

121. *Id.* at 459-60.

122. See *Wilk*, *supra* note 104, at 453-56.

123. See *Wigmore*, 3a EVIDENCE § 924a (1970). *Wigmore* suggested that in sexual assault cases where the consent defense is raised, the complaining witness should be required to submit to a psychiatric examination if her testimony is uncorroborated. "No judge should

The Minnesota Supreme Court, in *State v. Saldana*¹²⁴ and in *State v. McGee*,¹²⁵ reversed rape convictions because of improperly admitted rape trauma syndrome evidence. In both cases the court held that it was reversible error to allow a counselor for rape victims to testify concerning typical post-rape symptoms.¹²⁶ The court reasoned that this testimony was sufficiently prejudicial to the defendants to require new trials.¹²⁷

The arguments that rape trauma syndrome evidence may be unduly prejudicial to the defendant, and that it does not prove that the defendant committed the assault, are vulnerable to the same reasoning that supports the admissibility of battered child syndrome. All courts which have considered evidence of battered child syndrome have reasoned that such evidence is *not* prejudicial to the defendant because it does not identify the defendant as the batterer,¹²⁸ and because it merely describes the victim's injuries. Evidence of the psychological injuries of the victim are no more prejudicial to the defendant than evidence of physical injury sustained by the victim. Courts in other jurisdictions have accepted these premises and allowed the admissibility of rape trauma syndrome evidence.

The Kansas Supreme Court has upheld the admissibility of rape trauma syndrome evidence, stating that such evidence is pro-

ever let a sex offense charge go to the jury unless the female complainant's social history and makeup have been examined and testified to by a qualified physician." *Id.* at 737. According to Wigmore, this evidence should be used for the limited purpose of impeaching the complaining witness. Wigmore's theory seems to illustrate yet another historical legal bias against rape victims because he based his theory in "pseudologia-phantastica" which he described as a medical condition involving a mixture of lies with imagination, "not infrequently, this is the basis of the alleged sexual assault. Girls assert that they have been raped sometimes recounting as true a story they have heard, falsely naming individuals or describing them." *Id.* at 736.

124. 324 N.W.2d 227 (Minn. 1982). The defendant, a personal friend of the victim's husband, was convicted of first degree sexual assault. His defense was consent. The court held it was reversible error to allow a rape crisis counselor to testify concerning typical post-rape symptoms and that the victim did not fantasize the rape.

125. 324 N.W.2d 323 (Minn. 1982). The defendant was convicted of third degree criminal sexual conduct. The court held inadmissible a physician's testimony that the victim's post-rape reactions—anxiety, nightmares, sleep disorders, and fear of being followed—were consistent with rape trauma syndrome.

126. *Id.* at 232.

127. *Id.*

128. See Burgess, *supra* note 9, at 912. See also *State v. Periman*, 32 N.C. App. 33, 23 S.E.2d 802 (1977); *State v. Loss*, 295 Minn. 271, 204 N.W.2d 404 (1973); *People v. Henson*, 33 N.Y.2d 63, 304 N.E.2d 358, 349 N.Y.S.2d 657 (1973); *State v. Best*, 232 N.W.2d 447 (S.D. 1975).

bative of lack of consent and generally accepted as reliable within the expert's particular field.¹²⁹ The court concluded that this evidence is relevant and admissible when consent is raised as a defense.¹³⁰

In Oregon, the supreme court also held that rape trauma syndrome evidence is admissible.¹³¹ The court was considering a case in which a qualified expert had given testimony concerning the behavior of a child victim of familial sexual abuse. The expert had testified that the child's prior inconsistent statement that the rape did not occur was a typical reaction of a sexually abused child.¹³² Without this information, the jury would have drawn the mistaken inference that the child was lying. The court, in upholding the admissibility of this testimony, recognized that this type of evidence can play a useful role in educating the jury and judge about rape and rape victims.¹³³

C. *Using Rape Trauma Syndrome Evidence in Vermont*

The need to educate jurors and dispel widely held misconceptions about rape victims is illustrated in a Vermont sexual assault case, *State v. Jarvis*.¹³⁴ In *Jarvis*, the victim testified that the defendant forced his way into her car and drove her to an isolated wooded area. He then threatened to kill her and forced her to commit perverse sexual acts. At trial, a medical expert stated that the victim suffered the worst vaginal trauma she had ever seen in a sexual assault case.¹³⁵ The victim's vaginal injuries required three stitches and medical treatment of a hole in her rectal wall. Choke marks and bruises on the victim's neck indicated that she had

129. *State v. Marks*, 231 Kan. 645, 647 P.2d 1292 (1982). The defendant appealed his jury conviction of rape and aggravated sodomy, charging that one point of error was the admission of expert testimony regarding the existence of rape trauma syndrome evidence. The Supreme Court held that this reliable expert testimony was relevant and admissible when consent is a defense.

130. *Id.*

131. *State v. Middleton*, 294 Or. 427, 657 P.2d 1215 (1983). A fourteen year old child had made prior inconsistent statements about instances of sexual abuse involving her father. A qualified expert gave testimony stating this behavior was typical of a child victim of familial sexual abuse.

132. *Id.* at 1221.

133. *Id.* at 1220.

134. Complainant's Affidavit, *State v. Jarvis*, Washington Circuit District Court, Vermont (Dec. 6, 1982).

135. See *Times Argus*, Dec. 9, 1983, at 1, col. 2.

been strangled.¹³⁶ The defendant's defense was that the victim had consented.

The jury acquitted the defendant of rape and kidnapping charges, claiming that the state failed to prove its case. A female juror's statement hinted at the arcane attitudes which color jury consideration of the evidence: "[I] for one, did not feel sorry for the defendant or his family. In the first place, he had no business even being with the other woman, but that wasn't what I was there for. I was not confused or sympathetic. The evidence of the state was nil."¹³⁷ Another juror stated that the victim was simply unconvincing: "The boy looked us in the eye and the girl didn't."¹³⁸ The acquittal of this defendant spurred public outrage when one month later he abducted another woman in her car, and pled guilty to kidnapping charges.¹³⁹

Evidence of rape trauma syndrome was not used in the *Jarvis* case. A state's attorney pointed out the limitations of the prosecution, stating, "Doctors can't repeat hearsay statements which preclude them from testifying that a woman was raped. All they could do was describe the injuries, which also included choke marks to her neck."¹⁴⁰

Because all sexual assault victims suffer an acute stress reaction,¹⁴¹ the psychiatric diagnosis of rape trauma syndrome can be a useful prosecutorial device in sexual assault cases where consent is raised as a defense. It is not clear that psychiatric testimony of rape trauma syndrome would have changed the verdict in *Jarvis*, given the jury's disregard of the victim's extensive physical injuries. At the very least, this type of evidence could have justified the victim's post-rape reactions and explained her inability to look at the jurors during the trial.¹⁴² The evidence could have supplemented the prosecution's physical injury evidence to establish that a sexual assault had occurred.

Evidence of rape trauma syndrome was admitted in one Ver-

136. *Id.*

137. See Times Argus, Jan. 18, 1984, at 1, col. 3.

138. *Id.*

139. *Id.* at 1, col. 1.

140. *Id.* at 1, col. 3.

141. See Wilk, *supra* note 104, at 428.

142. See *Delia S. v. Torres*, 134 Cal. App. 3d 471, 184 Cal. Rptr. 787 (1982) (victim's delay in reporting the assault); *State v. Middleton*, 294 Or. 427, 657 P.2d 1215 (1983) (inconsistent post-incident statements by fourteen year old incest victim).

mont sexual assault case, *State v. Knight*.¹⁴³ The jury convicted the defendant of sexual assault after hearing testimony that the victim and the defendant knew each other and had been drinking and smoking marijuana throughout the day of the assault.¹⁴⁴ The victim had not reported the assault until six months later. The defendant's wife testified at trial that she was sleeping directly above where the alleged rape occurred and heard giggling, but no indication of a struggle.¹⁴⁵ No physical evidence of injury was introduced at trial. A psychiatrist testified about the traumatization the victim had suffered as a result of the assault.¹⁴⁶ The prosecution in *Knight* stated that because the facts were unfavorable to the victim, the evidence of rape trauma syndrome was indispensable in securing a jury conviction.¹⁴⁷

A victim's post-rape psychological reactions are relevant and can be extremely helpful to a jury that does not understand the victim's stress-based reactions to rape. Using this type of evidence at trial would educate jurors and judges by providing competent expert testimony of the victim's trauma, and behavior during the trial. Rape trauma syndrome may be particularly useful in cases involving marital rape where the historical bias against victims is more deeply ingrained.¹⁴⁸ A provision in the Vermont sexual assault statute expressly allowing relevant rape trauma syndrome evidence would lessen evidentiary problems presented in sexual assault cases, and further the legislative goal of effective prosecution.

VI. THE SUGGESTED SEXUAL ASSAULT STATUTE

The proposed statutory changes set forth in this note fit neatly into the basic framework of the current Vermont sexual assault statute. The suggested statute would read as follows:

(1) A "sexual act" means conduct between persons consisting of contact between the penis and the vulva, the penis and the anus, the mouth and the penis, the mouth and the vulva, or any

143. Trial Transcript at 21, *State v. Newton Knight, Jr.*, No. 380-80. (D. Vt., Caledonia Circuit, filed Dec. 5, 1980).

144. *Id.* at 166-67.

145. *Id.* at 178-80.

146. *Id.* at 125. The expert testified that the victim suffered intense nightmares and a breakdown of her personal and familial relationships.

147. Telephone interview with Dale O. Gray, State's Attorney for Caledonia County (Oct. 6, 1984).

148. See *supra* notes 68-94 and accompanying text.

intrusion, however slight, by any part of a person's body or any object into the genital or anal opening of another.¹⁴⁹

(2) "Sexual Conduct" means any conduct or behavior relating to sexual activities of the complaining witness, including but not limited to prior experiences of sexual acts, use of contraceptives, living arrangement and mode of living.¹⁵⁰

(3) "Consent" is an intelligent, knowing, and voluntary consent which shall not be construed to include coerced submission by the victim.¹⁵¹

(4) "Serious Bodily Injury" means bodily injury which creates a substantial risk of death or which causes serious, permanent disfigurement, or protracted loss or impairment of the function of any bodily member or organ.¹⁵²

(5) "Sexual Contact" includes the intentional touching of the victim's or actor's intimate parts, or the intentional touching of the clothing covering the immediate area of the victim's or actor's intimate parts.¹⁵³ Intimate parts include the primary genital area, groin, inner thigh, buttock, breasts, or mouth.¹⁵⁴

(6) Threatening or coercing the victim 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,

149. VT. STAT. ANN. tit. 13, § 3251(1) (Supp. 1985).

150. *Id.* § 3251(2).

151. FLA. STAT. ANN. § 794.011(1)(a) (West Supp. 1985). See also, *supra* notes 33-39 and accompanying text.

152. VT. STAT. ANN. tit. 13, § 3251(4) (Supp. 1985).

153. MICH. STAT. ANN. § 28.788(1)(K) (Callaghan Supp. 1985).

154. *Id.* § 28.788(1)(C). One failure of the Michigan statute definition of intimate parts is that the provision does not include the mouth. I have added mouth to be included as an intimate part for purposes of the suggested statute.

"to retaliate" includes threats of physical punishment, kidnapping, or extortion.

(iv) when the actor engages in the medical treatment or examination of the victim in a manner or for the purposes which are medically recognized as unethical or unacceptable.

(v) when the actor, through concealment or by the element of surprise, is able to overcome the victim.¹⁵⁵

§ 3251A. Criminal Sexual Contact.

A person is guilty of criminal sexual contact when that person engages in sexual contact with another person, and

(1) Compels the other person to participate in a sexual contact:

- (A) Without the consent of the other person, or*
- (B) By threatening or coercing the other person, or*
- (C) By placing the other person in fear that any person will be harmed imminently, or*

(2) Has impaired substantially the ability of the other person to appraise or control conduct by administering or employing drugs or intoxicants, or

(3) The other person is under the age of sixteen. A person violating this section shall be imprisoned for not more than ten years, or fined not more than \$5,000.00, or both.¹⁵⁶

§ 3252. Sexual Assault.

A person who engages in a sexual act with another person, and

(1) Compels the other person to participate in a sexual act:

- (A) Without the consent of the other person; or*
- (B) By threatening or coercing the other person; or*
- (C) By placing the other person in fear that any person will be harmed imminently, or*

(2) Has impaired substantially the ability of the other person to appraise or control conduct by administering or employing

155. *Id.* § 28.788(2)(f)(i)-(v).

156. *See supra* notes 40-47 and accompanying text. *See also*, VT. STAT. ANN. tit. 13, § 3252 (Supp. 1985) for basic framework of setting up a lesser included offense of sexual assault.

drugs or intoxicants without the knowledge or against the will of the other person; or

(3) The other person is under the age of sixteen, except where the persons are married to each other and the sexual act is consensual. A person violating this section shall be imprisoned for not more than twenty years, or fined not more than \$10,000.00, or both.¹⁵⁷

§ 3253. Aggravated Sexual Assault.

A person who violates section 3252 of this statute and causes the other person serious bodily injury shall be imprisoned for not more than twenty-five years, or fined not more than \$15,000.00, or both.¹⁵⁸

§ 3254. Trial Procedure.

In a prosecution for a crime defined in this chapter:

- (1) Lack of consent may be shown without proof of resistance;
- (2) A person shall be deemed to have acted without the consent of the other person where the actor:

(A) knows, *or has reason to know*, that the other person is mentally incapable of understanding the nature of the sexual act; or

(B) knows, *or has reason to know*, that the other person is not physically capable of resisting the sexual act; or

(C) knows, *or has reason to know*, that the other person is unaware that a sexual act is being committed.¹⁵⁹

§ 3255. Evidence.

(a) In a prosecution for a crime defined in this chapter:

- (1) Neither opinion evidence of, nor evidence of the reputation of the complaining witness' past sexual conduct shall be admitted;
- (2) Evidence shall be required as it is for all other criminal

157. VT. STAT. ANN. tit. 13, § 3252 (Supp. 1985).

158. *Id.* § 3253.

159. *Id.* § 3254. *See also, supra* notes 35-39 and accompanying text.

offenses and an additional corroborative evidence requirement set forth by prior case law regarding rape shall no longer be required;

(3) Evidence of prior sexual conduct of the complaining witness shall not be admitted; provided where it bears on the credibility of the complaining witness or it is material to a fact at issue and its probative value outweighs its private character, the court may admit:

(A) Evidence of specific instances of the complaining witness' sexual conduct showing the source of origin of semen, pregnancy, or disease;

(B) Evidence of specific instances of the complaining witness' past false allegations of violations of this chapter.¹⁶⁰

(b) In a prosecution for a crime defined in this chapter, if a defendant proposes to offer evidence described in subsection (a)(3) of this section, the defendant shall prior to the introduction of such evidence file written notice of intent to introduce that evidence, and the court shall order an *in camera* hearing to determine its admissibility. All objections to materiality, credibility and probative value shall be stated on the record by the prosecutor at the *in camera* hearing, and the court shall rule on the objections forthwith, and prior to taking of any other evidence.¹⁶¹

(c) *Relevant expert testimony of evidence of rape trauma syndrome is admissible in a prosecution for a crime defined in this chapter.*¹⁶²

CONCLUSION

Criminal rape laws which focus on the victim's behavior have too often resulted in exoneration of defendants legitimately accused of rape. There remains an urgent need to properly shift the statutory focus from the actions of the victim to those of the defendant. This shift in focus can only be accomplished by a legal profession and legislature committed to greater legal protections for rape victims. The general community has a responsibility to

160. VT. STAT. ANN. tit. 13, § 3255(a)(1)-(3)(B)(C). See also, *supra* notes 81-89.

161. VT. STAT. ANN. tit. 13, § 3255(b) (Supp. 1985).

162. See *supra* notes 97-148 and accompanying text.

educate themselves in order to eradicate age-old myths concerning rape and domestic violence.

Vermont has seen slow progress in the reform of rape legislation. In 1977, the Vermont legislature articulated an intention to reform the rape statute to ensure effective prosecution of criminal defendants. In 1985, piecemeal legislation led to the elimination of the fingers and marital rape exemptions. The current statute remains inadequate. The proposed statute goes further than simply eliminating the fingers and marital rape exemptions. To effect real legal protection for sexual assault victims, the suggested statute includes a lesser offense of criminal sexual contact, redefines consent, incorporates a detailed definition of threat and coercion, excludes evidence of the victim's past sexual conduct with the defendant, and provides for the admissibility of relevant rape trauma syndrome evidence at trial. This statutory reform proposal would more effectively criminalize sexual assault in Vermont. The shift in focus away from the rape victim is long overdue.

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