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The Resistance Standard in Rape Legislation

The significant contribution of the framers of the Model Penal Code should teach those interested in improving the substantive criminal law one lesson so important as to be almost a command: Legislate only with a principle in mind. A body of laws drawn with goals in mind has at least a chance of being a coherent whole; pragmatic codification is doomed to confusion and failure.

The logical deduction from this position is that any subgroups within the whole should also be purposive, goal-oriented, principled. Without claiming any universal merit for the following, this Note will attempt to lay out a principled approach to one specific area of the law, rape legislation, and will suggest that conscious advertence to principle would lead to a result more satisfactory than that found in the Model Penal Code and its progeny and certainly more satisfactory than existing rape law in states which have not yet revised their penal codes.

For reasons which will become obvious later, the misnamed offense of "statutory rape"—consensual intercourse with a girl below a statutorily determined age of consent—is considered here only insofar as it necessarily relates to the main topic at hand.

I. THE NATURE OF THE PROBLEM

One student has observed that the term "rape" embraces conduct "ranging from brutal attacks . . . to half won arguments . . . in parked cars."¹ Indeed, the spectrum of types of conduct called "rape" is extremely broad. Statutory rape aside, rape penalties can be assessed for sexual intercourse resulting from conduct running the gamut from brutal and forcible impositions to actively or passively deceiving a woman into believing that her bedmate is her husband.² California, for example, provides for an indeterminate sentence of three years to life³ for sexual intercourse with a female other than one's wife (1) where the female "is incapable, through lunacy or other unsoundness of mind . . . of giving legal consent"; (2) where her resistance is overcome by force or violence; (3) "where she is prevented from resisting by threats of great and immediate bodily harm, accompanied by apparent power of execution"; (4) where she is prevented from resisting by a narcotic or anesthetic "administered by or with the privity of the accused"; (5) where the defendant knows the female was unconscious of the nature of the act; and (6) where the defendant induces a belief that he is the woman's husband and thereby gains her submission.⁴

This catalogue of offenses does not exhaust the possibilities for rape penalties. Threats which do not meet the bodily injury requirement may nonetheless suffice

1. Comment, *Forcible and Statutory Rape: An Exploration of the Operation and Objectives of the Consent Standard*, 62 YALE L.J. 55-56 (1952) [hereinafter cited as *Consent Standard*].

2. E.g., *State v. Navarro*, 90 Ariz. 185, 367 P.2d 227 (1961).

3. CAL. PEN. CODE § 264.

4. CAL. PEN. CODE § 261.

to make the threatener a rapist.⁵ Other possibilities such as physical helplessness of the victim are omitted from the California statute, but included elsewhere.⁶

Other rape statutes vary in specificity. Perhaps the least helpful is that of Connecticut, which declares without elaboration that "any person who commits the crime of rape upon any female shall be imprisoned in the State Prison not more than thirty years. . . ."⁷ While one cannot know what this statute embraces, one thing is clear: it does not include carnal knowledge of an imbecile or feeble-minded woman under the age of forty-five. This separate offense is punishable by imprisonment for not more than three years.⁸

The absence of distinctions among different types of conduct can lead to undue harshness of penalty. A sentence of three years to life, or even capital punishment, may be appropriate for a man who leaps from the bushes and rapes a woman at knifepoint and yet be an overly stern fate for the clever seducer who convinces a lady that he is her spouse.

Furthermore, the failure to differentiate has caused the courts difficulty. The California experience illustrates the problem. Several cases have held or suggested that a conviction would be affirmed if the prosecution proved violation of any subdivision of section 261, no matter what subdivision was alleged in the indictment to have been violated.⁹ This approach was finally disapproved by the California Supreme Court in *People v. Collins*.¹⁰ There, defendants charged with forcible rape were convicted of statutory rape. The court expressed concern over surprising a defendant at trial and specifically disapproved the tactic and the earlier cases which allowed it. The convictions were affirmed, however, because the court found no prejudice. Even the *Collins* court said that "the subdivisions of section 261 do not state different offenses but merely refine the different circumstances under which an act of intercourse constitutes the crime of rape."¹¹ In a carefully drawn code, types of conduct which differ materially from each other should not be susceptible of being treated as one offense. Different conduct should be treated differently.

Examination of various rape statutes and their applications can lead one to think that the reason for the lack of conduct differentiation is the absence of a unifying principle running through the law of rape. To the extent that any principle which would make the current law of rape a coherent whole can be discerned, that principle is the "consent standard."¹² If a female consented to intercourse, she has not been raped; if she did not consent but was involved in intercourse anyway, she has been raped.

Simple on its face, in practice the consent standard does not work well. Being

5. See *People v. Cassandras*, 83 Cal. App. 2d 272, 188 P.2d 546 (1st Dist. 1948) (threat to report woman as prostitute and have her children taken from her).

6. See, e.g., N.Y. REV. PEN. LAW § 130.35 (eff. Sept. 1, 1967).

7. CONN. GEN. STAT. REV. § 53-238 (1958).

8. CONN. GEN. STAT. REV. § 53-225 (1958).

9. E.g., *People v. Blankenship*, 103 Cal. App. 2d 60, 68-69, 228 P.2d 835, 840-41 (2d Dist. 1951); *People v. Cassandras*, 83 Cal. App. 2d 272, 276, 188 P.2d 546, 549 (1st Dist. 1948); *People v. Tollack*, 105 Cal. App. 2d 169, 172, 233 P.2d 121, 122 (2d Dist. 1951) (dictum).

10. 54 Cal. 2d 57, 4 Cal. Rptr. 158, 351 P.2d 326 (1960).

11. *Id.* at 59, 4 Cal. Rptr. at 160, 351 P.2d at 328.

12. See generally *Consent Standard*.

a subjective standard requiring examination of the victim's state of mind, it is too uncertain a standard for branding intercourse a crime as serious as forcible rape.¹³ It has proved almost impossible to apply. "The major problem in regard to sexual intercourse with the use of force is to determine the degree of victim participation."¹⁴ "Although a woman may desire sexual intercourse, it is customary for her to say, 'no, no, no' (although meaning 'yes, yes, yes') and to expect the male to be the aggressor. . . . It is always difficult in rape cases to determine whether the female really meant 'no'. . . ."¹⁵

The problem of determining what the female "really meant" is compounded when, in fact, the female had no clearly determined attitude—that is, her attitude was one of ambivalence.¹⁶ Slovenko explains that often a woman faces a "trilemma"; she is faced with a choice among being a prude, a tease, or an "easy lay."¹⁷ Furthermore a woman may note a man's brutal nature and be attracted to him rather than repulsed.¹⁸ Masochistic tendencies seem to lead many women to seek men who will ill-treat them sexually.¹⁹

The problem becomes even greater when one recognizes the existence of a so-called "riddance mechanism." This is a phenomenon whereby a woman who fears rape unconsciously sets up the rape to rid herself of the fear and to "get it over with."²⁰

The consent standard makes no provision for moralistic denial of willingness, for ambivalence, or for unconscious complicity. The courts, who must apply the standard, have groped unsuccessfully for a way to decide whether a woman in fact consented. They have seized upon resistance, the outward manifestation of nonconsent, as the device for deciding whether the woman actually gave consent.²¹

As might be expected, the use of the outward manifestation of the subjective state of mind of the victim has proved an unsure index to the conduct of rapists. How much resistance indicates nonconsent? Some states require resistance to the utmost,²² an unenlightened attitude that has been repudiated elsewhere.²³

13. *Id.* at 56.

14. Gray & Mohr, *Follow-Up of Male Sexual Offenders*, in *SEXUAL BEHAVIOR AND THE LAW* 742, 746 (Slovenko ed. 1965).

15. Slovenko, *A Panoramic Overview: Sexual Behavior and the Law*, in *SEXUAL BEHAVIOR AND THE LAW* 5, 51 (Slovenko ed. 1965).

16. See *Consent Standard* 66-68.

17. Slovenko, *supra* note 15, at 52.

18. "The 'cold blooded bastard' . . . fits into common female pathology. And, when a woman calls a man a 'bastard,' it may perhaps be a projection of ideas of self onto others, but it may also be an expression of sexual interest, a way of saying, 'I'd like to tangle with him,' an expression of interest in being subordinated by, or in subordinating, the male involved—in any event a wish to tangle." *Id.* at 54.

19. *Id.* at 53-54.

20. See *id.* at 52-53.

21. See, e.g., *People v. Nazworth*, 152 Cal. App. 2d 790, 313 P.2d 113 (4th Dist. 1957); *State v. Esposito*, 122 Conn. 604, 191 Atl. 341 (1937); *State v. Shields*, 45 Conn. 256, 264 (1877); *Prokop v. State*, 148 Neb. 582, 587, 28 N.W.2d 200, 203 (1947); *Cascio v. State*, 147 Neb. 1075, 1078-79, 25 N.W.2d 897, 900 (1947); *Perez v. State*, 50 Tex. Crim. 34, 94 S.W. 1036 (1906). The important point to notice here is the courts' indirection. The focus is on consent; resistance is taken to show nonconsent, and the inverse proposition—nonresistance shows consent—is assumed. The courts do not examine resistance for its own sake, as they should. See part II *infra*.

22. See, e.g., *State v. Hunt*, 178 Neb. 783, 135 N.W.2d 475 (1965); *Prokop v. State*, 148 Neb. 582, 587, 28 N.W.2d 200, 203 (1947); *Cascio v. State*, 147 Neb. 1075, 1078-79, 25 N.W.2d 897, 900 (1947); *Killingsworth v. State*, 154 Tex. Crim. 223, 226 S.W.2d 456 (1950); *Perez v. State*, 50 Tex. Crim. 34, 38, 94 S.W.2d 1036, 1038 (1906).

23. E.g., *People v. Ford*, 81 Cal. App. 2d 580, 184 P.2d 524 (1st Dist. 1947); *People v. Cline*, 117 Cal. App. 181, 3 P.2d 575 (3d Dist. 1931).

Where utmost resistance is not required, great confusion exists. Some cases seem to impose a reasonableness standard,²⁴ while others emphasize decision by the woman without requiring that her fears be reasonable.²⁵ In one California case the court specifically stated that the woman may make a free choice between what she considers to be the lesser of two evils.²⁶ Still other cases require sufficient resistance to make nonconsent reasonably manifest. The amount of resistance required depends on all the circumstances of the case.²⁷

All this suggests that even in the most obvious case, that of forcible rape, the elements of the offense are not clearly spelled out. In view of the severe penalties involved this is inexcusable. Furthermore, when current psychological evidence indicates the unreliability of a woman's report of the incident, nothing should be left to the conceivably unreasonable opinion of the alleged victim.

As conduct becomes further and further removed from force and violence, the consent standard becomes virtually useless. It fosters meaningless fictions. The most obvious of these is that a healthy, normal girl of seventeen cannot consent to intercourse no matter what her background.²⁸ Other examples assume the nonconsent of a physically helpless or intoxicated woman although in fact she may be a willing participant.

A standard of criminality which requires resort to such patent fictions to make criminal otherwise noncriminal conduct is obviously unsatisfactory. Use of fiction to impute nonconsent to a consenting or ambivalent female suggests that rape legislation, properly viewed, seeks to protect some interest (such as bodily integrity or prevention of violence) other than preservation of the woman's right to withhold consent.

Finally, as noted above, the consent standard has not provided a useful tool for distinguishing among different types of male conduct. Neither the male's conduct nor the possible reasons for the female's consent or lack of it have been examined to provide a scale of penalties for offenses which differ materially in danger to the woman, danger to the community, and heinousness of the defendant's act. Statutes drawn under the influence of the consent standard seem to ignore traditional ends of the criminal law, such as deterrence and rehabilitation,

24. "It is for neither the aggressor in such a crime nor for the courts who try him to determine the exact point to which the prosecutrix could with safety have carried her resistance. When she determines that her opposition had been carried to the limits of safety and that she could have ventured no further without peril to her life or safety, it is then for the trial court to determine only whether her fears were reasonably grounded." *People v. Harris*, 108 Cal. App. 2d 84, 89, 238 P.2d 158, 161 (2d Dist. 1951); *accord*, *Shephard v. State*, 224 Ind. 356, 67 N.E.2d 534 (1946); see *People v. Hinton*, 166 Cal. App. 2d 743, 749, 333 P.2d 822, 825-26 (2d Dist. 1959).

25. "It is primarily for the woman who is attacked to decide to what extent, if at all, she can safely resist." *People v. Blankenship*, 103 Cal. App. 2d 60, 66-67, 228 P.2d 835, 839 (2d Dist. 1951). "The extent to which she must resist his advances is for the victim only to determine." *People v. Stewart*, 109 Cal. App. 2d 334, 343, 240 P.2d 704, 709 (2d Dist. 1952).

26. *People v. Lay*, 66 Cal. App. 2d 889, 893, 153 P.2d 379, 381 (2d Dist. 1944).

27. See, e.g., *People v. Nazworth*, 152 Cal. App. 2d 790, 313 P.2d 113 (4th Dist. 1957); *People v. Ford*, 81 Cal. App. 2d 580, 184 P.2d 524 (1st Dist. 1947). Even where some formulation other than that requiring nonconsent to be reasonably manifest is used, there is much talk in the opinions about attention being given to the surrounding circumstances. See, e.g., *Shephard v. State*, 224 Ind. 356, 67 N.E.2d 534, 535 (1946); *Cascio v. State*, 147 Neb. 1075, 1078, 25 N.W.2d 897, 900 (1947); *Lewis v. State*, 154 Tex. Crim. 329, 333-35, 226 S.W.2d 861, 863-65 (1950); *Perez v. State*, 50 Tex. Crim. 34, 38, 94 S.W. 1036, 1038 (1906).

28. See criticism of this and a proposal for reform in *Consent Standard* 76-82.

and to focus only on getting "violators" of women off the streets without regard to the nature of the violations.

Such a standard should be discarded; yet it remains, a memorial to tradition and a totally unhelpful feature of the criminal law. It is at least implicit in the rape statutes of the states not yet touched by the reforms recommended by the Model Penal Code;²⁹ it is the standard found in the statutes of the states which have recently revised their penal codes;³⁰ and it is apparently embraced at least partially by the Model Penal Code.³¹

The remarkable staying power of the consent standard can only be justified on policy grounds. One observer suggests the standard is required by important policy goals. It preserves the social mores of women; fosters and bolsters masculine pride; and turns the male's aggression, based on fear of losing his sexual partner, against rapists rather than against innocent people.³² Assuming the importance of these ends and assuming also that the consent standard does serve them well,³³ it is somewhat surprising that the "resistance standard," which serves the same ends equally well and cures the serious defects in the present consent-oriented law of rape, has not been adopted implicitly or explicitly, even by those states which have undertaken a reform of their criminal law. The remaining portion of this Note examines the resistance standard, advocates its acceptance, and recommends the adoption of a rape statute based on resistance rather than on consent.

II. THE RESISTANCE STANDARD

As its name implies, the resistance standard focuses not on the consent of the woman involved but on her actual conduct, her resistance or lack of it. Rather than using resistance to see whether the female has consented, the resistance standard uses resistance itself as the test of whether a protected interest has been violated. The shift in emphasis from an inquiry into whether a woman consented to whether she resisted is more than a mere verbal reformulation. Focusing on resistance (active conduct) permits formulation of an objective standard and goes

29. See, e.g., CAL. PEN. CODE § 261 (explicit in subdivision 2 and implicit throughout as shown above); COLO. REV. STAT. ANN. § 40-2-25 (1963) (similar to California statute); CONN. GEN. STAT. REV. § 53-238 (1958); IND. ANN. STAT. § 10-4201 (1956) ("against her will"); MISS. CODE ANN. § 2358 (1942) ("without her consent"); NEB. REV. STAT. §§ 28-407 to -408 (1964) ("against her will"); TEX. PEN. CODE ANN. art. 1183 (1961) ("without her consent"). Of these states, California, Colorado, and Connecticut have undertaken revisions of their penal codes.

30. ILL. REV. STAT. ch. 38, § 11-1 (1964) ("against her will"); LA. REV. STAT. § 14:41 (1950) ("without her lawful consent"); MINN. STAT. § 617.01 (1964) ("against her will or without her consent"); N.Y. REV. PEN. LAW §§ 130.05, .20, .30, .35 (eff. Sept. 1, 1967) (all these sections except § 130.30 refer specifically to consent, and § 130.05 says, "It is an element of every offense defined in this article . . . that the sexual act was committed without consent of the victim."); WIS. STAT. §§ 944.01 ("against her will"), .02 ("sexual intercourse without consent") (1958). See also MINN. STAT. ANN. §§ 609.29, .295 (1964) ("without that person's consent" or "with the female person's consent obtained under any of the following circumstances . . .") (statutes proposed by advisory committee on penal code revision but not enacted by legislature); Colo. Legislative Council, PRELIMINARY REVISION OF COLORADO CRIMINAL LAWS § 40-10-1, comment at 39 (1964) (it must be "clear that she has not consented . . .").

31. See MODEL PENAL CODE § 207.4, comment at 242 (Tent. Draft No. 4, 1955).

32. See *Consent Standard* 56, 71-73.

33. The present writer is not trained in the field of psychology; however, a search has revealed nothing which would lead him to doubt the validity of the psychological observations set out in *Consent Standard*.

far toward removing conjecture, uncertainty, and the woman's often distorted opinion from the law of forcible rape. By emphasizing conduct, it replaces the facile all-or-nothing approach of the consent standard with a more sophisticated series of inquiries into possible reasons for nonresistance. From these inquiries emerges a catalogue of offenses arranged according to their seriousness both to the woman involved and to society generally, and according to the need to deter given types of male conduct. Finally, the resistance standard eliminates fictions from the law of rape.

A. *Resistance and Forcible Rape*

The first level of inquiry in the application of the resistance standard concerns the question of whether the woman did in fact resist. If she did, she was forcibly raped, for forcible rape means at least that force has been used. Proof of resistance that was unsuccessful is proof of force sufficient to overcome the resistance.

At this point the problem that has plagued courts trying to apply the consent standard arises: How much resistance is enough? The standard must be high enough to assure that the resistance is unfeigned and to indicate with some degree of certainty that the woman's attitude was not one of ambivalence or unconscious compliance and that her complaints do not result from moralistic afterthoughts. It must be low enough to make death or serious bodily injury an unlikely outcome of the event. To demand that a woman sacrifice her life to protect her virtue not only would represent a misplaced sense of values but would also unjustly raise an inference and an eyebrow whenever a raped woman lived to tell the tale.

The present suggestion is that forcible rape is accomplished when the male "uses force to overcome resistance at least as great as the maximum resistance a female could reasonably offer to prevent penetration while avoiding serious risk of death or serious bodily injury."³⁴

This test requires that the male use force. It then tests the sufficiency of his force by setting a standard of resistance which must be overcome. The resistance must be such as might be expected from "a" woman in the victim's circumstances. This plus the reasonableness required removes the victim's opinion from the case. The concern is not with what she thought was necessary but what would reasonably appear necessary to a woman in her position. The reasonable-under-the-circumstances approach, with language to make clear that the woman need not incur serious risk of death or serious bodily injury is as low as the standard can be set and remain consistent with fair treatment of defendants.

The resistance standard solves the problem of the ambivalent female. If her resistance fails to meet the standard, she has not suffered the most severely punished type of rape. This does not mean that her attacker will go free. The resistance standard differentiates among different types of aggressor and victim conduct. The ambivalent female will quite probably and quite properly fall into a class of less-victimized females, and her attacker will fall into a less severe punishment category.

34. Suggested Rape Statute § 1(1) in text following note 41 *infra*.

B. *Resistance and a Catalogue of Offenses*

Perhaps the most serious indictment of the present law of rape based on the consent standard is its failure to differentiate among different types of conduct. After asking whether a woman consented, all inquiry ceases. This is not surprising, for the difficulty of determining consent at all is certainly not conducive to a desire to prolong the inquiry.

If, however, resistance is the standard, a second question is in order. If the woman did not resist, it is relevant to ask why. In keeping with the tone set by the standard, this second inquiry does not become a hypothetical examination of the woman's state of mind. Rather it continues to focus on the conduct of the male and adverts for assistance to the condition and conduct of the female.

Among the several possible reasons for failure of a woman to resist, the most probable is that the male threatened her. Clearly it would be misguided to allow men to go free who prey on the fears of women in order to achieve sexual gratification.

Not all threats, however, are alike. There is little if any distinction between actual violence and threats of serious bodily injury or death to be inflicted on the victim or anyone else (such as, "submit or I'll shoot your boy friend") if the victim reasonably believes the threats will be carried out. In either case violence is the danger and bodily safety the end to be protected, and in either case the punishment should be the same.

Other threats, however, are of a different order. For example, a threat to tell police that the intended victim is a prostitute and to have her children taken from her,³⁵ if believed, is a most compelling threat. To allow a man to resort to such methods would be unwise to say the least. Yet it is obvious that if consent is the standard, the woman so threatened does consent. Therefore, under the consent standard, the only way to convict the defendant is to adopt a fiction.³⁶ The resistance standard, however, permits looking beyond the lack of resistance for an explanation of its absence. Here, where the male induces nonresistance by intentionally preying on a fear of the woman, he should be punished. The same degree of punishment reserved for violent offenders is not needed, however. There has been no threat to life; the interests threatened come perceptibly closer to the interests threatened by the rape itself (bodily integrity and a sense of "virtue"). Presumably, less is needed to deter this type of male conduct than is necessary to deter violence. Therefore, the rational disposition of the offender who adopts this mode of operation is to subject him to felony punishment not quite as severe as that reserved for the violent offender.

A situation similar to threats of a nonviolent nature is present when the man prevents the woman's resistance by administering drugs or intoxicants to her. Here again, he is preventing resistance by nonviolent means. Rather than impute nonconsent to the woman, her failure to resist is explained and the man is punished for denying her the opportunity to resist. Again, the small danger of further harm calls for less severe penalties than in the case of violence, and the crafti-

35. *People v. Cassandras*, 83 Cal. App. 2d 272, 188 P.2d 546 (1st Dist. 1948).

36. See *ibid.*, convicting the defendant under a section punishing threats of bodily harm.

ness required for this type of offense suggests the defendant here is a wary individual, capable of being deterred by moderately severe penalties.

Three types of closely related situations seem to belong in the same class with nonviolent threats and impairment of ability to resist, even though they are rationally distinguishable. These are the situations where the man knows the female cannot resist either because she is (1) physically powerless to resist, (2) suffering from a mental disease or defect, or (3) unaware that a sexual act is being committed. Here, although the male is not responsible for the female's disability, he is aware that she is incapable of resistance and still he takes advantage of the situation. The need to deter knowing intercourse with paralytics and mentally ill or deficient women should be obvious. Less obvious perhaps is the need to deter those who through a special position of trust or the extreme naïveté of the victim gratify their desires upon an unknowing female. The case most often arises between doctor and patient.³⁷ The Model Penal Code framers point out that this type of conduct is merely "an aggravated form of intercourse by trick or deception, *i.e.*, seduction, a kind of activity that most women can prevent, and that can be deterred by lesser sanctions."³⁸ Nonetheless, the Code framers place intercourse with an unaware woman in the same category as intercourse with mentally ill victims,³⁹ and the classification seems appropriate. In both cases the woman lacks the requisite state of mind to resist, and the man takes advantage of the situation. In these cases, as well as those of physical helplessness, there is no violence and no danger to life or limb.

The last category is sexual intercourse by deceit. Here the woman not only does not resist, she consents. She knows the nature of the act and willingly participates. In this instance only mild penalties are in order, for there is little difference between the conduct of the male and that of an ordinary Don Juan. Furthermore, one must doubt the female's will to resist, for it requires some stretch of the imagination to picture a woman in possession of all her faculties who could be deceived into submission by husband-impersonation or other deceptions. In this situation it is absolutely impossible for the female to suffer harm (presumably she receives normal enjoyment from the experience), and the male's conduct is not reprehensible enough to require severe sanctions as a strong deterrent.

Thus, by focusing simultaneously on the male's conduct and the woman's resistance or lack of resistance, it is possible to distinguish among different types of conduct and treat them differently. Use of the resistance standard yields identical categories whether the focus is on harm or danger to the woman or need to deter the man. Focus on male conduct is required because the male is the actor and the one being punished. The more antisocial his conduct is, the greater is the need to deter it. Focus on the woman is required because sexual intercourse becomes rape only when the woman manifests or is unable to manifest her unwillingness to participate and the male has intercourse with her by taking advantage of her inability or by overcoming her resistance. The fact that one arrives at the same ordering of offenses whether he emphasizes the man's conduct or the wom-

37. See, *e.g.*, *People v. Minkowski*, 204 Cal. App. 2d 832, 23 Cal. Rptr. 92 (1st Dist. 1962).

38. MODEL PENAL CODE § 207.4, comment at 255 (Tent. Draft No. 4, 1955).

39. MODEL PENAL CODE §§ 213.1(2)(b), (c) (Official Draft 1962).

an's resistance suggests the appropriateness of the resistance standard as an ordering device in cases of rape.

The final advantage of the resistance standard is that it avoids the necessity of fictions. Where the female did not resist, resistance is not imputed to her. Rather, inquiry is made into why she did not resist and what the male did to cause her not to resist. Thus only situations where resistance is thought to be appropriate or where some factor makes it impossible are properly included within the scope of "rape." Other offenses, like "statutory rape," are to be more properly dealt with elsewhere, for in statutory rape resistance is irrelevant, and the interests being protected are different from those protected by regular rape legislation.

The resistance standard provides the most useful tool for treatment of the offenses subsumed under the heading of rape. A statute such as that suggested below ought to be adopted to define the relevant offenses and to distinguish among them for their proper correctional treatment.

III. SUGGESTED RAPE STATUTE

§ 1. Rape in the First Degree

A male who has sexual intercourse⁴⁰ with a female other than his wife⁴¹ is guilty of rape in the first degree if

(1) he uses force to overcome resistance at least as great as the maximum resistance a female in the circumstances of the alleged victim could reasonably offer to prevent penetration while avoiding serious risk of death or serious bodily injury; or

(2) he threatens her with imminent death or imminent serious bodily injury to be inflicted on herself or another, and she refrains from resisting because of a reasonable belief that he will carry out his threats.

Rape in the first degree is a class B felony.⁴²

40. "Sexual intercourse" has its ordinary meaning and occurs upon any penetration, no matter how slight." N.Y. REV. PEN. LAW § 130.00(1) (eff. Sept. 1, 1967). This is the meaning uniformly given to "sexual intercourse." Difficulties of proof require the "any penetration, no matter how slight" rule.

41. "Wife" should be defined to include any female living together with the actor as his wife, regardless of the legal status of their relationship. It should not include a wife living apart from her husband under a decree of judicial separation. See MODEL PENAL CODE § 213.6(2) (Official Draft 1962). The rape statutes are to protect those whom the actor cannot justly expect to permit him intercourse. A separated wife is such a person. A resident mistress is not.

42. Presumably a new penal code will systematize its gradations of offenses. First degree rape must be punished severely, but not as severely as murder, which presumably would be the only "class A" felony. If forcible rape and murder are treated alike, a rapist is given an incentive to kill his victim, for murdering her will improve his chances of escape while not increasing his penalty if caught.

Sexual intercourse with a very young (*i.e.*, under ten years old) child is a fit crime for first degree rape penalties, but presumably will be dealt with in a graduated statutory rape statute.

The MODEL PENAL CODE § 213.1(1) (Official Draft 1962) provides two principles of aggravation rejected here. One is the actual infliction of serious bodily injury; the other is that the victim was not a voluntary social companion of the actor and had not previously permitted him sexual liberties. Both appear irrelevant. If the other rather stringent criteria proposed are met, the fortuitous injury or lack of injury to the victim ought neither to aggravate nor mitigate the punishment. By definition, the female only stopped resisting to prevent injury. Therefore, her attacker's conduct was of the type

§ 2. Rape in the Second Degree

A male who has sexual intercourse with a female other than his wife is guilty of rape in the second degree if

(1) he compels her to submit by any threat that would prevent resistance by a woman of ordinary resolution; or

(2) he has substantially impaired her power to appraise or control her conduct by administering or employing drugs, intoxicants, or other means for the purpose of preventing resistance; or

(3) she is physically powerless to resist, and he knows of her condition; or

(4) she suffers from a mental disease or defect which renders her incapable of appraising the nature of her conduct, and he knows of her condition; or

(5) she does not know that a sexual act is being committed, and he knows that she does not know that a sexual act is being committed.

Rape in the second degree is a class C felony.

§ 3. Sexual Intercourse by Deceit.

A male who has sexual intercourse with a female other than his wife is guilty of sexual intercourse by deceit if

(1) she does not resist because she mistakenly believes that he is her husband, and he has purposely induced that belief, or knowing of the belief, he purposely refrains from disabusing her of it; or

(2) she mistakenly believes that she will substantially benefit thereby,⁴³ and he has purposely induced that belief, or, knowing of the belief, he purposely refrains from disabusing her of it.

Sexual intercourse by deceit is a class A misdemeanor.⁴⁴

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that leads to injury and should be punished accordingly. This is not like a case of attempt, because here the actor has achieved his ends; the injury is purely collateral.

Social companionship and previous permission are likewise irrelevant. The standard of resistance is sufficiently high so that the actor will be clearly apprised of the woman's attitude. Previous relationship does not justify violence.

43. Compare, e.g., *Rex v. Williams*, [1923] 1 K.B. 340 (sexual intercourse represented as necessary to success of singing lessons).

44. In a well-drawn penal code some chastity requirement for victims of certain sex offenses is necessary. See, e.g., MODEL PENAL CODE § 213.6(4) (Official Draft 1962). A substantial discussion of chastity requirements is beyond the scope of this Note, but clearly "sexual intercourse by deceit" is an appropriate offense in which to require chastity of the alleged victim. The likelihood of feigned complaints, the relative lack of depravity of the actor, and the absence of any real interest in protecting an unchaste woman in these cases call for giving the accused a defense if the woman was unchaste at the time of the alleged offense.

A statutory formulation of the defense might read as follows: It is a defense to a prosecution for sexual intercourse by deceit for the actor to prove by a preponderance of the evidence that the alleged victim had, prior to the offense charged, and while not his wife, engaged in sexual relations with the actor in a manner not violative of any provision of this article, or had, prior to the offense charged, engaged promiscuously in sexual relations with others.