

WILL RAPE EVER BE A CRIME OF THE PAST?: A FEMINIST VIEW OF SOCIETAL FACTORS & RAPE LAW REFORMS

By Kathleen Quenneville*

By day I lived in terror
By night I lived in fright
For as long as I can remember
A lady don't go out alone at night . . .
But I don't accept the verdict
It's an old one anyway
Cause now a days a woman
Can't even go out in the middle of the day.¹

A rallying point of the women's movement has been the increasingly vocal demand to be free from the fear of rape.² Women move about freely in this society only at their peril; yet man walk the streets or enter a woman's apartment after a date, or hitchhike without fear of being attacked by a woman. The existence of rape, and the way society has dealt with the problem, keep women in their "place," in the same way that lynchings and

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1. Near, Holly, "Fight Back," copyright 1978 by Hereford Music. All rights reserved/used by permission of the author.

2. CAL. PENAL CODE § 261 (West Supp. 1979) defines rape as:
an act of sexual intercourse, accomplished with a female not
the wife of the perpetrator, under either of the following circumstances:
1. Where she is incapable, through lunacy or other unsoundness of mind, whether temporary or permanent, of giving legal consent;
2. Where she resists, but 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, or by any intoxicating narcotic, or anaesthetic substance, administered by or with the privity of the accused;
4. Where she is at the time unconscious of the nature of the act, and this is known to the accused;
5. Where she submits under the belief that the person committing the act is her husband, and this belief is induced by any artifice, pretense, or concealment practiced by the accused, with intent to induce such belief.

KKK cross burnings kept blacks in a subservient position.³ Rape must become a crime of the past if women are to cease being second-class citizens.

The women's movement has heightened the public's awareness of the problem of rape. In California, this awareness was manifested in the public outcry over the California Supreme Court decision in *People v. Caudillo*.⁴ This article will analyze the sociological aspects of rape, and the reaction to the *Caudillo* decision as an example of the criminal justice system's failure to deal effectively with this crime.

I. INCIDENCE AND SOCIOLOGICAL CONTEXT OF RAPE

A. INCIDENCE

Rape is a widespread, serious problem. In California alone, almost 11,000 completed or attempted rapes were reported in 1977.⁵ However, because victims are frequently reluctant to come forward and report rapes, the official statistics do not reflect the actual incidence of rape.⁶ To accurately reflect the incidence of rape, it is estimated that the reported figure should be multiplied by anywhere from two to twenty times.⁷ If the number of reported rapes were multiplied by ten to correct for underreporting, forci-

3. D. RUSSELL, *THE POLITICS OF RAPE* 231 (1974).

4. 21 Cal. 3d 562, 580 P.2d 274, 146 Cal. Rptr. 859 (1978).

5. 7,028 completed rapes and 3,687 attempted rapes were reported in 1977. BUREAU OF CRIMINAL STATISTICS, DIVISION OF LAW ENFORCEMENT, DEPARTMENT OF JUSTICE, *CRIME AND DELINQUENCY IN CALIFORNIA 1977*, pt. I, 7 (1977) [hereinafter *CRIME AND DELINQUENCY*]. Of the "seven major offenses" (willful homicide, forcible rape, aggravated assault, robbery, burglary, theft (\$200 and over), and motor vehicle theft), rape increased by the largest percentage from 1976 to 1977. *Id.* at 3. In 1977, 10,715 forcible rapes were reported—a 12.2% increase over the 1976 figure of 9,552. *Id.* at 4. In contrast, 1977 robberies increased 5.2% over robberies reported in 1976, while 1977 burglaries decreased 0.6% from the previous year. *Id.*

6. QUEEN'S BENCH FOUNDATION, *RAPE—PREVENTION AND RESISTANCE* 11 (1976) [hereinafter *QUEEN'S BENCH STUDY*]; Comment, *Rape and Rape Laws: Sexism in Society and Law*, 61 CAL. L. REV. 919, 921 (1973) [hereinafter *Sexism in Society*]; *CRIME AND DELINQUENCY*, supra note 5, pt. 1, at 7.

7. "Fifty to eighty percent of such crimes may never enter statistical rolls. . . . Estimates of the actual incidence of rape, however, range from three and one half to twenty times the reported figure;" Berger, *Man's Trial, Woman's Tribulation*, 77 COLUM. five rapes are reported. Greer, *Seduction is a Four-Letter Word*, in *RAPE VICTIMOLOGY*, 374, 380 (L. Schultz ed. 1975). The FBI and independent criminologists would multiply reported rapes by "at least a factor of ten to compensate for the fact that most rapes are not reported." Griffin, *Rape: the All-American Crime*, in *RAPE VICTIMOLOGY* 19, 20 (L. Schultz ed. 1975).

ble rape would then appear in criminal statistics as the most frequent "crime against the person"⁸ in California.

The phenomenal number of rapes committed each year gains further significance in light of the grim likelihood that the rapist will be neither apprehended nor convicted. Most rapists escape punishment because the victim does not report the rape.⁹ Even where the rape is reported, the rapist still faces an extremely inconsequential risk of being convicted of rape. In California, arrests were made for only sixteen percent of the forcible rape crimes reported in 1977.¹⁰ Ultimately, convictions of rape or a lesser offense were obtained for less than seven percent of the forcible rape crimes reported.¹¹ This is particularly grave since the

8. There were 10,715 reported rape crimes in 1977. CRIME AND DELINQUENCY, *supra* note 5, pt. I, at 7. Multiplying reported rapes by ten to correct for underreporting, the result—107,150—would make rape the most frequent crime against the person in California. "Crimes against the person" include homicide, forcible rape, robbery, and aggravated assault. CRIME AND DELINQUENCY, *supra* note 5, pt. I, at 3. In 1977, the following statistics were reported in California for crimes against the person: willful homicide: 2,481; aggravated assault: 77,424; robbery: 62,207; forcible rape: 10,715. *Id.* at 4.

It could be argued that other crimes are similarly underreported. However, several factors make it less likely that a rape would be reported, where an assault, homicide or robbery would be. Rape victims often fear that reporting the rape will damage their reputations. Victims are also frequently "convinced that if they told their friends, their colleagues, or the police, they would not be believed, since the victims expected others to subscribe to the myth (that women cannot be raped) as unquestioningly as they had done (before the rapes)." D. RUSSELL, *supra* note 3, at 259. Victims of other crimes do not usually encounter a myth that they can't be assaulted, robbed or murdered. Furthermore, allegations of rape are handled in an atmosphere heavily biased toward the rapist—a phenomenon which occurs in few, if any, other crimes. See notes 82-143, *infra*, and accompanying text.

9. See notes 6 and 7 *supra* and accompanying text.

10. CRIME AND DELINQUENCY, *supra* note 5, pt. II at 8. Of those 1,717 arrests, a legal complaint was filed in 1,098 cases; the police dropped charges in 216 cases; and the prosecutor decided not to file a complaint in 403 instances. *Id.* Even after complaints were filed, the prosecutors dismissed the actions in 323 instances. *Id.*

11. *Id.* The seven percent figure represented 723 convictions. The authority fails to designate the offenses for which the defendants were finally convicted.

This conviction rate may be inflated. A recent study revealed wide disparities between actual and reported figures concerning the rate of arrest, actions filed against, and conviction of rapists. Researchers examined 1975 police department records from two major jurisdictions and found an actual conviction rate of less than two percent for rape. The FBI national statistic, however, which is derived from reports which the police file with the FBI, represented that 42% of those arrested for rape had been convicted of the substantive offense. C. LeGRAND, J. REICH, AND D. CHAPPELL, FORCIBLE RAPE: AN ANALYSIS OF LEGAL ISSUES, 4 (published by Battelle Law and Justice Study Center 1977). California's apprehension and conviction statistics may also be overstated, since California statistics are derived from similar, if not identical, sources. CRIME AND DELINQUENCY, *supra* note 5, pt. I at 1.

number of reported rapes is only a small indication of the actual number of rapes which occur.¹²

Even though an accused rapist is "convicted," the man who has left his victim with permanent emotional and physical scars¹³ is often inadequately punished. Until recently, California law allowed a convicted rapist merely to be fined or placed on probation in lieu of imprisonment.¹⁴ However, recent legal changes mandate that they receive prison terms.¹⁵ Nonetheless, the plea bargaining

12. See notes 6-8 *supra* and accompanying text.

13. For example:

Margaret Campbell, at the age of 50, was at the height of a teaching career in a university when she was kidnapped . . . and repeatedly raped and beaten (by about 12 men, she thinks). . . . Since the rape, she has undergone numerous hospitalizations for irreparable damage to her kidneys which doctors tell her has shortened her life span; damage to her teeth which she continues to lose, and the profound trauma and amnesia which still affect her. Her university career is over; most of her former possessions are gone since . . . her torturers burglarized her house while she was still hospitalized; and she lost her house, due to the devastation of her finances. At the trial, her chief attacker was sentenced to four years to life on a bargained plea of forcible rape and assault with a deadly weapon, but to her dismay Ms. Campbell learned last year he was out on the streets.

Will the System Catch Up With Their Rage? S. F. Chronicle, Dec. 31, 1974, at 13, col. 1.

"How much psychological damage does rape do to a victim? The reaction may take place soon afterwards and be violent, like that of a seventy-five year-old Baltimore woman who threw herself out of a window to her death after being raped and robbed of \$1.39 on her way to church. Or it may take a hundred subtler forms, hurtful to both the woman and those around her: trust replaced by suspicion, a once free and optimistic spirit replaced by withdrawal, anxiety, and hostility." J. MacKellar, *RAPE: THE BAIT AND THE TRAP* at 150-51 (1975).

14. In 1977, for instance, 4.2% of convicted rapists received straight probation in California. *CRIME AND DELINQUENCY*, *supra* note 5 pt. II at 9. Moreover, 4.8% of convicted rapists were sentenced to a combination of probation and jail. *Id.*

15. In 1978 the Legislature enacted § 264.2 of the CAL. PENAL CODE, which states that "Probation shall not be granted to, nor shall the execution or imposition of sentence be suspended for, any person convicted of violating subdivision (2) or (3) of Section 261, or Section 264.1." CAL. PENAL CODE § 264.2 (West Supp. 1979). See note 2 *supra* for text of §§ 261 (2) and (3). CAL. PENAL CODE § 264.1 (West 1979) states:

The provisions of Section 264 notwithstanding, in any case in which defendant, voluntarily acting in concert with another person, by force or violence and against the will of the victim, committed the rape, either personally or by aiding and abetting such other other (*sic*) person, such fact shall be charged in the indictment or information and if found to be true by the jury, upon a jury trial, or if found to be true by the court, upon a court trial, or if admitted by the defendant, defendant shall

process allows rapists to plead guilty to lesser charges such as simple assault or disorderly conduct, and thereby circumvent the mandatory prison term for rape.¹⁶

In any event, it may be concluded that a rapist stands a strong chance of being neither caught, prosecuted, nor convicted. Even if he is convicted, the punishment imposed may be trivial.

Because of this, many women spend their lives in apprehension of rape¹⁷ and curtail their lifestyle in a way that men rarely, if ever, experience.¹⁸

B. SOCIOLOGICAL CONTEXT

The existence of rape can be traced to social patterns in this country. "There are constant pressures for sexual gratification and experience among all males and . . . some aggression is an expected part of the male role in sexual encounters."¹⁹

suffer confinement in the state prison for five, seven, or nine years.

16. "Plea bargaining is common practice in the simplest to the most complex criminal case." L. A. Daily Journal, April 26, 1979, at 4, Practical Law Courses advertisement. Moreover, regardless of whether the rapist is convicted of rape or instead pleads guilty to simple assault, the disposition would appear as a "conviction" in the official statistics under the rape crimes column. (The official statistics are only reported according to the crime for which the offender is initially arrested, and no further differentiation is made regarding the crime of which he is finally convicted.) CRIME AND DELINQUENCY, *supra* note 5, pt. II, at 8. Therefore, where it would appear that the rapist had been convicted of rape, and accordingly sentenced to prison, this often would not be the case. *See also* notes 109-118 *infra* and accompanying text.

17. "The harm caused by the crime is not merely the harm to the individual victim, but the harm to members of the community generally who are apprehensive with respect to the crime." B. MOROSCO, *THE PROSECUTION AND DEFENSE OF SEX CRIMES* at 4-237 (1976). "A world without rapists would be a world in which women moved freely without fear of men. That *some* men rape provides a sufficient threat to keep all women in a constant state of intimidation." S. BROWNMILLER, *AGAINST OUR WILL: MEN, WOMEN AND RAPE* at 209 (1975).

18. *Sexism and Society*, *supra* note 6, at 919. "When people say, 'Well, you asked for it by traveling,' you know, well, that's like saying, 'As a woman you're very limited. You cannot travel, you cannot be friendly with men, you can never go to a man's house, you can never go anywhere.' We don't ask for it. We just want freedom to live." NEW YORK RADICAL FEMINISTS, *RAPE: THE FIRST SOURCEBOOK FOR WOMEN* at 54 (N. Connell & C. Wilson eds. 1974) [hereinafter *FIRST SOURCEBOOK FOR WOMEN*].

19. M. AMIR, *PATTERNS IN FORCIBLE RAPE* at 130 (1971). Amir's work is widely cited as an authority on the subject of rape. *See, e.g., Sexism in Society*, *supra* note 6, at 921 n. 12; M. Amir, *Forcible Rape* in *RAPE VICTIMOLOGY* 43-58 (Schultz ed. 1975); Weis and Borges, *Victimology and Rape* in *THE RAPE VICTIM*, 55 (Nass ed. 1977); Chappell and Singer, *Rape in New York City*, in *FORCIBLE RAPE: THE CRIME, THE VICTIM, AND THE OFFENDER* at 262 (Chappell, Geis and Geis eds. 1977).

Women, however are taught from the time they are children to be docile and submissive.²⁰ Women are programmed to adorn and display themselves, yet remain vulnerable to attack because they perform these functions.²¹ It is deeply ingrained in them that

to esteem herself as feminine and pleasing, a woman must respond amiably to men when they show themselves disposed to be friendly to her. . . . Unless he becomes an outright boor—physically aggressive—she is likely to interpret his behavior with a maximum leeway of grace In playing the part for which she has been groomed, she is at her most vulnerable. The truth is, she is not so much provocative as responsive—responsive to the flattery of interest, responsive to the role she has learned. In so reacting, she often fails to heed signals which would warn her that the man's understanding of the ritual may not be the same as hers, and that he may not agree to let her dictate the rules and limits.²²

Men therefore easily mistake or ignore women's resistance to their unwanted sexual advances, since that resistance may lack the forcefulness which a man would express.²³

Rape is the ultimate individual expression of men's contemptuous attitude toward women. The subordination and degradation of women as sexual objects is accepted and condoned — in the media, in literature, in fashion, in advertising, in the very definition of "femininity."²⁴ The rapist's primary goal is not sexual gratification, but asserting power and dominance over his

Readers of Amir should be forewarned that although the statistics he cites are valid, some of the conclusions are tainted by his underlying beliefs. For instance, he states without support that the "dominant motive for sexual offense is usually a strong sexual emotion." M. AMIR, *supra*, at 131. However, research has shown that his assumption is totally unwarranted. See note 25 *infra* and accompanying text. See also D. RUSSELL, *supra* note 3, at 257-265.

20. D. RUSSELL, *supra* note 3, at 268-275; Myrdal, *Women, Servants, Mules and Other Property*, in MASCULINE/FEMININE 68-76 (B. Roszak & T. Roszak eds. 1969); M. Reich and T. Weisskopf, *The Economic Exploitation of Women*, in THE CAPITALIST SYSTEM 341, 342 (M. Reich and T. Weisskopf eds. 1972).

21. Melani & Fodaski, *The Psychology of the Rapist and His Victim*, in FIRST SOURCEBOOK FOR WOMEN, *supra* note 18, at 92.

22. J. MacKELLAR, *supra* note 13, at 29.

23. Melani & Fodaski, *supra* note 21, at 82-93.

24. M. Reich and T. Weisskopf *supra* note 20, at 324. See also Melani & Fodaski, *supra* note 21, at 92.

victim.²⁵ Convicted rapists, when asked for suggestions to lower the rape rate, frequently said that men need to learn about and accept women as equal human beings instead of as sex objects.²⁶ The elimination of rape will require

a massive reconsideration and restructuring of social values as well as a reorientation of the relations between the sexes. . . . [W]hen the sex roles of both men and women are defined by individual needs and talents rather than by stereotypic expectations based on sex and power motives, only then will there be an end to rape.²⁷

II. THE CAUDILLO CASE AND SENTENCING REFORMS

If rape is to become a crime of the past, extensive reforms are needed. The sporadic and piecemeal nature of reform to date²⁸ has made it ineffective in curbing the rising number of rapes.²⁹ The Legislature's response to the California Supreme Court decision, *People v. Caudillo*,³⁰ is a paradigm of legislative reaction to pressures of the moment without comprehensively addressing the underlying causes of the problem.

In *People v. Caudillo*,³¹ the jury found the defendant guilty of first degree robbery, first degree burglary, forcible rape, so-

25. The Queen's Bench Foundation conducted interviews with convicted sex offenders, and found that "[a]ccording to most of the respondents in this study, . . . power or dominance over their victims was their primary goal. . . . For many of the offenders, exertion of dominance and power included elements of revenge and humiliation." QUEEN'S BENCH STUDY, *supra* note 6, at 80.

26. *Id.* at 75.

27. E. HILBERMAN, *THE RAPE VICTIM* 62 (1976).

28. "[O]ne of the by-products of the spate of legislative activity has been the creation of substantial confusion and uncertainty regarding the scope and value of many new rape laws. This confusion and uncertainty can be partly attributed to the speed with which many new laws have been passed." LE GRAND, REICH AND CHAPPELL, *supra* note 11, at 8.

29. See note 5 *supra*.

30. 21 Cal. 3d 562, 580 P.2d 274, 146 Cal. Rptr. 859 (1978). The Supreme Court's decision was met with a considerable amount of public indignation, some of which characterized the opinion as "a decision that has scandalized both law-and-order hardliners and militant feminists. . . . The most shocking detail of the case is the Supreme Court's ruling that Maria's two hours of suffering did not amount to what lawyers casually refer to as 'great bodily injury.'" *Rose Bird and the Politics of Rape*, *New West*, July 31, 1978, at 28. Much of the public's outrage eventually focused on a campaign to unseat Chief Justice Rose Elizabeth Bird from the Supreme Court. *Id.*

31. 21 Cal. 3d 562, 580 P.2d 274, 146 Cal. Rptr. 859 (1978).

domy, and oral copulation.³² The jury concluded that the defendant had inflicted great bodily injury,³³ which automatically increased the burglary sentence from "five years to life" to "fifteen years to life."³⁴ The trial judge allowed Caudillo to serve the sentences for rape, sodomy, oral copulation, and robbery concurrently³⁵ with the burglary sentences.³⁶ The defendant appealed the finding of "great bodily injury."³⁷

The California Supreme Court reversed the decision based on its conclusion that the Legislature had not intended that a rape occurring during a burglary would automatically meet the requirements for great bodily injury.³⁸ Only severe and/or pro-

32. *Id.* at 566, 580 P.2d at 276, 146 Cal. Rptr. at 860-61. The applicable CAL. PENAL CODE (West Supp. 1979) sections are as follows: § 261(2), forcible rape; § 286, sodomy; § 288a, oral copulation; § 460, first degree burglary; and § 211, first degree robbery. The defendant was also found guilty of other offenses not relevant to this discussion. The jury also found that Caudillo was armed with a knife, defined by the Penal Code as a deadly weapon. 21 Cal. 3d at 566, 580 P.2d at 276, 146 Cal. Rptr. at 861.

33. *Id.* at 566-67, 580 P.2d at 276, 146 Cal. Rptr. at 861.

34. At the date of the offenses committed by Caudillo, three levels of punishment for burglary existed under the indeterminate method of sentencing: county jail not exceeding one year or state prison 1-15 years for second degree burglary; five years to life for first degree burglary; and 15 years to life where the burglar intentionally inflicted great bodily injury on an occupant. Former CAL. PENAL CODE § 461, ch. 150, § 1, 1976 Cal. Stats. 1216 (West Supp. 1979) (current version at CAL. PENAL CODE § 461). Former CAL. PENAL CODE § 461 in pertinent part read: "in any case in which the defendant committed burglary and in the course of the commission of the burglary, with the intent to inflict such injury, inflicted great bodily injury on any occupant of the premises burglarized, . . . defendant shall suffer confinement in the state prison from 15 years to life." *Id.* When the Uniform Determinate Sentencing Act became law, indeterminate sentences were dropped in favor of specific terms of imprisonment for each offense. See note 38, *infra*. For an overview of determinate sentencing, see Casou and Taugher, *Determinate Sentencing in California: The New Numbers Game*, 9 PACIFIC L.J. 1 (1978); Oppenheimer, *Computing a Determinate Sentence—New Math Hits the Courts*, 51 CAL. STATE B.J. 604 (1976).

35. The trial judge has discretion to impose consecutive or concurrent sentences. CAL. PENAL CODE §§ 669 and 1170.3 (West Supp. 1979). Under a concurrent sentence, each year Caudillo serves for the burglary counts as a year served for each other offense of which he was convicted. Under a consecutive sentence, Caudillo would have been required to serve the full term for each offense. See notes 55-81 *infra* and accompanying text.

36. 21 Cal. 3d at 567, 580 P.2d at 277, 146 Cal. Rptr. at 861.

37. *Id.*

38. *Id.* at 580-87, 580 P.2d at 281-89, 146 Cal. Rptr. at 864-74. After Caudillo committed the offenses of which he was convicted, but before his appeal was decided, the Uniform Determinate Sentencing Act of 1976 became law. CAL. PENAL CODE § 1170-1170.6 (West Supp. 1979) (added by ch. 1139, § 273, 1976 Cal. Stats. 5140). The "great bodily injury" provision was removed from the Penal Code section defining burglary and placed in a new section on sentence enhancements. CAL. PENAL CODE § 12022.7 (West Supp. 1979) (added by ch. 1139, § 306, 1976 Cal. Stats. 5162). CAL. PENAL CODE § 669.5 (West, 1979) defines an "enhancement" as a crime which merits special consideration when imposing sentence, "to display society's condemnation for such extraordinary crimes of violence against the person." Enhancement sentences run consecutive to other sentences imposed.

tracted physical injury could be considered great bodily injury under existing law.³⁹

A. THE LEGISLATURE'S "REMEDY"

The Legislature moved swiftly in its attempt to correct the seemingly unfair result left by the *Caudillo* decision. Two bills were considered.⁴⁰ Assemblymember Gualco introduced the first bill which directly remedied *Caudillo*-type situations by specifically designating forcible rape or sodomy as great bodily injury when committed in the course of another felony.⁴¹ However, this bill was withdrawn because it conflicted with other legislation likely to be enacted.⁴²

The definition of "great bodily injury" as amended reads as follows: "As used in this section, great bodily injury means a significant or substantial physical injury." CAL. PENAL CODE § 12022.7 (West Supp. 1979) (amended by ch. 165, § 94, 1977 Cal. Stats. 679). Although these changes did not affect *Caudillo*'s punishment, the California Supreme Court analyzed the Legislature's comments regarding the new section on great bodily injury to assist it in reaching a decision in *Caudillo*'s appeal. 21 Cal. 3d at 580-87, 580 P.2d at 281-289, 146 Cal. Rptr. at 864-74.

39. *Id.* at 588, 580 P.2d at 290, 146 Cal. Rptr. at 875. The court felt that because the cuts suffered by *Caudillo*'s victim were "superficial," the injury was not severe enough to be classified as great bodily injury. *Id.* The court further opined that the commission of sodomy, oral copulation, and rape were not sufficient in themselves to constitute great bodily injury for purposes of enhanced punishment under the burglary statute. *Id.* at 587, 580 P.2d at 289, 146 Cal. Rptr. at 874.

40. Cal. A.B. 2802 (1978) (amended 1978); Cal. S.B. 709 (1977).

41. Cal. A.B. 2802 (1978) (amended 1978). The significance of designating rape *per se* as great bodily injury is that when great bodily injury is proven at trial, the judge is compelled, in the absence of mitigating circumstances, to impose a three-year sentence *consecutive* to the sentences for the other offenses of which the defendant is convicted. CAL. PENAL CODE § 12022.7 (West Supp. 1979). This bill would have directly overridden *People v. Caudillo* by providing that "commission of a forcible rape or forcible sodomy during the perpetration or attempted perpetration of a felony which is not sexually asaultive in nature constitutes great bodily injury for the purposes of such additional punishment." Cal. A. B. 2802 (1978) (amended 1978).

42. When the enactment of Cal. S.B. 709 became a certainty, Cal. A.B. 2802 was withdrawn, since the two bills together would have allowed a prosecuting option resulting in shorter terms for rapists:

Bills which will likely become law this year would eliminate the advantage to charging the rape enhancement. S.B. 709, presently before the Assembly Ways and Means Committee, would increase the penalty for burglary to 2, 4 or 6 years, but it would increase the rape penalty to 3, 6 or 8 years. Under these provisions the defendant would serve more time if convicted of the separate crimes of burglary and rape, rather than of burglary with a rape enhancement. In addition, S.B. 1479 (Deukmejian), now before the Senate for concurrence of Assembly amendments, would prohibit the granting of probation to a person convicted of rape. However, probation would still be available to one convicted of burglary with a rape enhancement.

The approach of the second bill was that "[t]he true problem in dealing with the crime of rape is not the question of Great Bodily Injury, but that our present penalties for rape are much too low."⁴³ Accordingly, it proposed that rape sentences be increased. The legislation was signed into law by Governor Brown in late 1978; in final form, it raised rape penalties from three, four, or five years to three, six, or eight years.⁴⁴

Both approaches illustrate the legislature's piecemeal method of addressing the problem of rape. Possibly, designating forcible rape as great bodily injury was a hasty response to outrage of a citizenry which failed to comprehend the legal meaning of great bodily injury.⁴⁵ Fortunately, the bill's author later recognized that nothing would deter the rapist from inflicting additional physical injury on his victim if rape per se legally constituted great bodily injury.⁴⁶ Furthermore, increased rape penalties may be of dubious value. Far from ensuring that rapists are deterred or punished more severely, high sentences may actually prove counterproductive. "We have on one hand harsh penalties for rape; on the other, we have few convictions and a myriad of laws and attitudes that protect men from conviction."⁴⁷

Pennsylvania's experience with longer sentences may foretell the effect, if any, that California's new rape laws will have.⁴⁸ Pennsylvania sentences for rape and rape-related offenses formerly ranged from five to fifteen years.⁴⁹ Upon revision, the sentences spanned from seven years to life imprisonment, plus fines.⁵⁰

CAL. SENATE COMMITTEE ON JUDICIARY, RAPE AND SODOMY—ENHANCEMENT OF PENALTIES, REP. ON A.B. 2802 (AS AMENDED AUGUST 11, 1977-78 REGULAR SESSION, 3-4).

43. Letter to the Editor from Assemblymember Kenneth Maddy, L.A. TIMES, Aug. 15, 1978 (copy on file at Golden Gate U. L. Rev. Office). This assumes that one views penalties as deterring individuals from criminal actions.

44. CAL. PENAL CODE § 264 (West Supp. 1979) (amended by ch. 579, § 14, 1978 Cal. Legis. Serv. (West Supp. 1978)). Each offense under California law carries three possible sentences: a minimum, a maximum, and a middle term. CAL. PENAL CODE § 1170(b) (West Supp. 1979) requires the judge to impose the middle term in the absence of aggravating or mitigating circumstances. See notes 70 and 71 *infra* and accompanying text.

45. For an illustration of the public's reaction, see note 30 *supra*.

46. See note 43 *supra*.

47. *Sexism and Society*, *supra* note 6, at 938.

48. A study of Pennsylvania's experience with increased sentences is found in Schwartz, *The Effect in Philadelphia of Pennsylvania's Increased Penalties for Rape and Attempted Rape*, 59 J. CRIM. L. C. & P.S. 509 (1968).

49. 18 PA. CONS. STAT. ANN. § 4721 (Purdon).

50. Schwartz, *supra* note 48, at 509.

After studying the results in Philadelphia, it was concluded that "Pennsylvania's new deterrent strategy was a failure as far as Philadelphia is concerned. The inefficacy of the new legislation should create much disappointment among those in Philadelphia who had taken for granted the deterrent impact of increased penalties."⁵¹ Other research has shown that "severity [of sentence] only has a deterrent impact when the certainty level [of sentence] is high enough to make severity salient."⁵² A more appropriate criminal justice policy would endeavor to reduce crime by increasing the probability of apprehension and prosecution.⁵³ Unfortunately, the recent California law increasing penalties for rapists made no provision for companion measures to increase apprehension and prosecution. Without such changes, the effectiveness of increased penalties will be impaired.⁵⁴

B. CONCURRENT SENTENCES

While trying to remedy the result of the holding, the Legislature ignored another problem found in the *Caudillo*⁵⁵ case: that of concurrent sentencing. The jury found Caudillo guilty of rape, robbery, burglary, sodomy, and oral copulation.⁵⁶ Although California law defines and prescribes punishment for each offense, the trial judge, in effect, allowed Caudillo to serve time only on the robbery conviction by giving him concurrent sentences.⁵⁷ Because California law grants a judge the discretion to sentence as if numerous charges had never been alleged and proven, the other crimes were "free."⁵⁸

Concurrent sentences are an issue in many rape convictions, since rape is frequently committed in conjunction with other offenses. Approximately one quarter of all rape victims are also

51. *Id.* at 514.

52. Antunes and Hunt, *The Impact of Certainty and Severity of Punishment on Levels of Crime in American States: An Extended Analysis*, 64 J. CRIM. L. C. & P.S. 486, 489 (1973).

53. *Id.* at 492-93.

54. See notes 82-144 *infra* and accompanying text.

55. 21 Cal. 3d 562, 580 P.2d 274, 146 Cal. Rptr. 859, see also note 32, *supra* and accompanying text.

56. *Id.* at 566, 580 P.2d at 276, 146 Cal. Rptr. at 860-61. See also note 32 *supra* and accompanying text.

57. *Id.* at 567, 580 P.2d at 276, 146 Cal. Rptr. at 861. See also note 36 *supra* and accompanying text.

58. See note 35 *supra*.

forcibly orally copulated or sodomized,⁵⁹ and twenty percent are robbed.⁶⁰

The California Penal Code states that "the purposes of imprisonment is punishment. This purpose is best served by terms proportionate to the seriousness of the offense."⁶¹ Permitting a judge to impose concurrent sentences in a *Caudillo*-type circumstance contravenes the Legislature's expressed intention; it conveys that burlarizing, robbing, and participating in multiple sexual assaults is no more serious than simply robbing. Although the effectiveness of the entire penal system has been questioned,⁶² prison sentences can be a

just and lawful societal solution to the problem of criminal activity, the best solution we have at this time, a civilized retribution and . . . a deterrent against the commission of future crimes. Whether or not a term in jail is truly "rehabilitative" matters less . . . than whether or not a guilty offender is given the penalty his crime deserves.⁶³

It seems unreasonable to expect that a rapist would refrain from committing further crimes on his victim, if under a concurrent sentence he would be punished no more severely than if his only crime were the rape.

California Penal Code section 669 states that the "judgment shall direct whether the terms of imprisonment . . . shall run concurrently, or whether the imprisonment to which he is or has been sentenced . . . shall commence at the termination of the first term of imprisonment . . ."⁶⁴ Further, California Penal Code section 1170.3 specifies that judges will use the rules of the California Judicial Council⁶⁵ when deciding whether to impose concurrent or consecutive sentences.⁶⁶ However, the Judicial Council rules merely provide vague criteria.⁶⁷ The rules are so subjective

59. M. AMIR, *supra* note 19, at 159.

60. *Id.* at 141 citing GLUECK, NEW YORK FINAL REPORT ON DEVIATED SEX OFFENDERS 46 (1956).

61. CAL. PENAL CODE § 1170(a)(1) (West Supp. 1979).

62. S. BROWN MILLER, *supra* note 17, at 379-380.

63. *Id.*

64. CAL. PENAL CODE § 669 (West Supp. 1979).

65. See CAL. R. CT. 425 (West, 1979).

66. CAL. PENAL CODE § 1170.3 (West Supp. 1979).

67. Rule 425 reads as follows:

Criteria affecting the decision to impose consecutive rather

in nature that sentencing is the one area in which the judge's discretion remains least circumscribed.⁶⁸ Indeed, the only practical limitation placed on judges' discretion is the minimal requirement that they state the reasons for their sentencing choices at the times of sentencing.⁶⁹

This is in marked contrast to the sentencing procedure for any single offense, under which the judge must follow specific guidelines. Each crime carries three possible sentences,⁷⁰ and the Penal Code prescribes that "the court shall order imposition of the middle term, unless there are circumstances in aggravation or mitigation."⁷¹ It additionally requires either party requesting imposition of the upper or lower term to justify its request with a statement setting forth the aggravating or mitigating circumstances.⁷² Finally, the court must record its rationale for sentencing the defendant to the upper or lower term.⁷³

However, in the case of multiple offenses, no presumption exists that the sentences will be concurrent or consecutive. It is unclear whether mitigating circumstances must exist to justify concurrent sentencing, or whether aggravating circumstances must be present to support consecutive sentencing. The choice is totally given to a judge who has neither meaningful guidance in

than concurrent sentences include: (a) Facts relating to the crimes, including whether or not: (1) The crimes and their objectives were predominantly independent of each other. (2) The crimes involved separate acts of violence or threats of violence. (3) The crimes were committed at different times or separate places, rather than being committed so closely in time and place as to indicate a single period of aberrant behavior. (4) Any of the crimes involved multiple victims. (5) The convictions for which sentences are to be imposed are numerous. (b) Any circumstances in aggravation or mitigation.

CAL. R. CT. 425 (West, 1979). Although criteria are given, the judge is given no guidance concerning what a given response to a particular criterion should indicate. For instance, Rule 425 does not indicate whether the fact that the convictions for which sentences are to be imposed are numerous should weigh in favor of or against concurrent sentencing.

68. Cassou & Taugher, *supra* note 34, at 56.

69. CAL. PENAL CODE § 1170(c) (West Supp. 1979).

70. CAL. PENAL CODE § 1170(a)(2) (West Supp. 1979).

71. CAL. PENAL CODE § 1170(b) (West Supp. 1979).

72. *Id.* Furthermore, a fact used to impose a specific statutory enhancement (*e.g.*, inflicting great bodily injury (CAL. PENAL CODE § 12022.7 (West, 1979)); the taking or destruction of property valued over \$100,000 (CAL. PENAL CODE § 12022.6 (West, 1979)); etc.) cannot again be used for imposing the upper term.

73. CAL. PENAL CODE § 1170(b) (West Supp. 1979).

making the choice nor a defined procedure by which the parties may request one or the other. The result of this confusion is that a rapist risks little in committing further crimes against the same victim; if he is caught, the judge will likely order the sentences to run concurrently, so the rapist will, in effect, be punished solely for the rape.⁷⁴

Even if the judge's discretion were exercised in favor of consecutive sentences, the multiple offender's punishment would only be the middle term sentence of the most serious offense plus one-third of the middle term sentences⁷⁵ of the additional crimes. The use of consecutive sentences, where the offender serves the full term for the first crime, then the full term for each additional offense would be more in keeping with the legislature's stated intent.⁷⁶ This approach, however, was rejected by the Legislature.⁷⁷

Because punishment for each additional offense is reduced when sentences run consecutively, a person convicted of rape, sodomy, oral copulation, burglary, and robbery (the same crimes as Caudillo) would serve a 12 1/3-year sentence,⁷⁸ rather than the

74. The minimums, mid-points and maximums under current law are: rape, sodomy, oral copulation—3, 6 or 8 years (respectively CAL. PENAL CODE § 264, 286(c), 288(c) (West Supp. 1979)); burglary—2, 4 or 6 years (CAL. PENAL CODE § 461, (West Supp. 1979)); robbery—2, 3 or 5 years (CAL. PENAL CODE § 213, (West Supp. 1979)). A man whose sole offense was rape would, in the absence of aggravating or mitigating circumstances, be sentenced to 6 years imprisonment. If he also either sodomized and orally copulated his victim, or burglarized or robbed his victim, and no aggravating or mitigating circumstances existed, his maximum sentence, under a concurrent sentence, would remain at six years.

75. "When any person is convicted of two or more felonies . . . the aggregate term of imprisonment for all such convicted of two or more felonies . . . the aggregate term of imprisonment for all such convictions shall be the greatest term of imprisonment imposed by the court for any of the crimes, including any enhancements . . . [plus] one-third of the middle term sentence for such consecutive terms." CAL. PENAL CODE § 1170.1(a) (West Supp. 1979).

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

77. It appears that the Legislature never seriously considered having the offender serve the full term for each offense. When a provision for consecutive sentences was added to the Uniform Determinate Sentencing Act, it originally imposed a one year sentence for each conviction beyond the first one, if the offenses were committed independently of each other. S.B. 42, 1975-76 Regular Session, as amended March 4, 1975, § 273 at 128. That was modified to require "one-half of the middle term of imprisonment prescribed for each of the other consecutive felony convictions without such enhancements." S.B. 42, 1975-76 Regular Session, as amended 4/22/76, § 273 at 128. Finally, "one-half" was revised to "one-third," and enacted into law as CAL. PENAL CODE § 1170.1(a) (West Supp. 1979).

78. Computed by using a six year base term (for rape, "the greatest term of imprison-

25-year sentence obtained by adding together the middle terms of the individual offenses.⁷⁹ Possibly the Legislature believed that where multiple offenses were involved, running the full terms in tandem was overly harsh. It is incongruous, though, that six years is an appropriate penalty for sodomy committed by itself,⁸⁰ yet only a two-year sentence is necessary to punish sodomy which is committed in conjunction with another crime of equal magnitude.⁸¹

A presumption should exist that multiple sentences will run consecutively, with the *full* terms imposed in tandem, especially where crimes against the person are involved. Concurrent sentences should be considered a mitigation of punishment, such that judges would be compelled to impose consecutive sentences in the absence of mitigating circumstances.

Unfortunately, the Legislature failed to address the inequities of concurrent and consecutive sentencing when it attempted to rectify the result of the *Caudillo* decision. Yet the action it did take—arbitrarily increasing the punishment for rape, with little thought to the root of the problem—seems likely to be ineffective.

III. SOCIOLOGICAL AND LEGAL REFORMS

Ultimately, social attitudes toward women must change if rape is to become a crime of the past.⁸² In the meantime, reforms are needed at each step of the legal process to ensure that rapists will be apprehended, prosecuted, convicted and punished.

ment") and adding 1/3 of the middle term for sodomy (6 years), oral copulation (6 years), robbery (3 years), and burglary (4 years). For purposes of simplicity, no enhancements were added to any offense.

79. Computed by adding together the middle terms for rape (six years), sodomy (six years), oral copulation (six years), robbery (three years), and burglary (four years). Again, to keep the illustration simple, no enhancements were taken into account.

80. Reference is made to the middle term for sodomy under CAL. PENAL CODE § 286(c) (West Supp. 1979).

81. For instance, if sodomy is committed along with forcible rape, the perpetrator would serve six years for the rape (the middle term), and two years (1/3 times 6 years) for the sodomy, a total of eight years. If sodomy is committed in conjunction with a crime carrying lesser penalties, the result would vary somewhat.

82. "The public has been led to expect too much from the criminal justice system, and certainly too much from sentencing . . . Crime and delinquency respond to deeper social, cultural, economic and political currents beyond the substantial influence of the criminal justice system." Morris, *Conceptual Overview and Commentary on the Movement Toward Determinacy*, in DETERMINATE SENTENCING: REFORM OR REGRESSION? 5 (Proceedings of the California Special Conference on Determinate Sentencing, California, June 1977).

As noted above, reporting the rape is the threshold of the legal process. If the victim fails to do so, the rapist faces no possibility of apprehension and punishment.⁸³ "Every unreported, unprosecuted rape only adds to the confidence of the offenders and thus to the pool of potential pain and violence awaiting other victims."⁸⁴ It is therefore essential that as much rape as possible be reported.⁸⁵

The victim's reaction to the rape is usually one of shock, disbelief, emotional breakdown, guilt, shame, degradation, humiliation, or embarrassment.⁸⁶ "She is unable to talk about what has happened, and is uncertain about telling significant others, much less reporting to the hospital or police."⁸⁷ Yet she is probably the only person who possesses the information necessary to punish the offender. This is the time when the victim needs comfort the most, and, although retelling the facts about the rape may cause the victim to "relieve" the experience, she must be encouraged to report it. Police, family, friends, or hospital staff⁸⁸ could supply the needed encouragement, but often don't. Instead, embarrassed family members discourage the victim from reporting the rape;⁸⁹ police believe there's no such thing as rape;⁹⁰ medi-

83. The criminal justice system punishes rapists by conviction and imprisonment. Some rapists can also be punished by the victim through a civil action for money damages. See LeGrand & Leonard, *Civil Suits for Sexual Assault: Compensating Rape Victims*, 8 GOLDEN GATE U. L. REV. 479 (1979).

84. J. MACKELLAR, *supra* note 13, at 92.

85. Rape victims face a dilemma when considering whether to report the rape. They risk facing the ridicule of disbelieving police, medical personnel, attorneys, judges and juries. See notes 94-144 *infra* and accompanying text. Yet, unless victims dare to report the rapes, the attitudes of those persons will not change.

86. E. HILBERMAN, *supra* note 27 at 35-36. See also note 6-8, *supra* and accompanying text.

87. E. HILBERMAN, *supra* note 27, at 35.

88. The attitude of hospital staff is important not only so far as encouraging a victim to report the crime but also in gathering medical evidence which can later be introduced at trial. Emergency rooms in Chicago, Illinois are presently experimenting with kits which "standardize and protect evidence" taken from the victim. 12 NATIONAL NOW TIMES 2 (Dec. 1978). However, even where such formal procedure for collecting evidence is established it may be bypassed. E. HILBERMAN, *supra* note 27, at 22.

89. FIRST SOURCEBOOK FOR WOMEN, *supra* note 18, at 46.

90. "[The police attitude toward a woman who comes in is that] there's no such thing [as rape] and that a woman is asking for it subconsciously: she's probably being seductive or enticing in some way." *Id.* at 9-10.

There are four kinds of women who commonly cannot achieve recognition as rape victims because the police are unwilling to accord them the same legal rights as the rest of society. They are: the minority group woman (the black woman, the Puerto

cal personnel view rape as an insignificant physical injury,⁹¹ or hesitate to become involved in a situation which might require them to testify in court.⁹²

The victim who has previously dated or had sexual relations with the rapist will receive even less support.⁹³ Certain social situations are assumed to imply a willingness for a sexual encounter.⁹⁴ While dramatically underreported, rapes of this type are estimated to constitute eighty to ninety percent of all rapes.⁹⁵ If

Rican, Chicano (*sic*), or Oriental), the woman with a bad reputation, the hippy, and the prostitute.

J. MACKELLAR, *supra* note 13, at 59.

91. As one victim recounted,

When I went to the hospital after being raped, two nurses came in; both of them bullied me, two female nurses, because there had been a barroom brawl in my approximate neighborhood at the same time. A man was knocked down and his head was beaten up; he was brought into emergency at the same time I was, and the nurses were very upset with me because I was hysterical and taking their attention away from this man *who really needed help*.

FIRST SOURCEBOOK FOR WOMEN, *supra* note 18, at 11 (emphasis in original). See generally *id.* at 39, 40, 51, 88-89.

92. The report of the District of Columbia Task Force on Rape . . . suggests that 'many doctors do not want to examine a rape victim because they do not wish to be called to testify. Some doctors who examine victims falsify medical records for court, minimizing or neglecting entirely signs of trauma in an attempt to avoid being called in to testify.

E. HILBERMAN, *supra* note 27, at 22.

93. J. MACKELLAR, *supra* note 13 at 87.

94. Notman and Nadelson, *The Rape Victim: Psychodynamic Considerations*, 133 AM. J. OF PSYCH. 408-13 (1976).

In the case of sexual assault, however, the more closely acquainted the victim is with her attacker, the less likely are the police and the courts to believe the charge of rape. The implication is that the woman who agrees to the company of a man is, automatically, making herself sexually accessible. This illogicality is carried to its ultimate conclusion in the legal fact that (in most states) there can be no rape in marriage, the wife having given her permanent consent to her husband.

Melani & Fodaski, *supra* note 21, at 88. Some states have removed the marital exemption to rape. OR. REV. STAT. 163.355-163.375 (1977). California has recently followed Oregon's example. 1979 Cal. Stats., ch. 994 (effective Jan. 1, 1980) provides that spousal rape, when accomplished under force, violence, or specified threat, is punishable by up to eight years in prison. Arrest and prosecution are prohibited unless the spouse reports the rape within thirty days. *Id.* This act defines rape in sex-neutral terms.

95. "[A] large percentage of unreported rapes are likely to be by offenders known to the victims, since there is less to deter a victim raped by a complete stranger from reporting. This would raise the total of known offenders enormously, perhaps to 80 to 90 percent of all rapes." J. MACKELLAR, *supra* note 13, at 27. A civil action against the rapist

these victims are to come forward and report this type of rape, it must be understood that whenever a man forces a woman to have sexual intercourse, it is rape—no matter what their prior relationship.⁹⁶

In recent years, rape crisis centers have been established throughout the United States,⁹⁷ to help victims in whatever way possible.⁹⁸ These centers have been credited with contributing to the increased willingness of victims to report rapes,⁹⁹ as well as with helping the police and public understand that women who are raped are victims of one of society's violent crimes.¹⁰⁰ Until recently, crisis centers had to exist largely on donations and volunteer staff;¹⁰¹ however state funds are now available for many existing and proposed centers in California.¹⁰² Public funding will ensure their continued existence and an expansion of their vital support to victims.

Reported rapes must be diligently and impartially investigated. In California during 1977, arrests were made in less than twenty percent of the reported rapes.¹⁰³ This low arrest rate may be partially explained by the victim's inability to provide an accurate and reliable description of her assailant.¹⁰⁴ However, it may also indicate a failure in this step of the criminal justice system. Police regard rape victims with skepticism,¹⁰⁵ preventing them from eliciting sufficient details from the victim, or impeding an impartial investigation.¹⁰⁶

may be an effective method of punishment when the identity of the rapist is known to the victim. See note 82 *supra*.

96. See note 94 and 95 *supra* and accompanying text.

97. Rape crisis centers have been established everywhere from Berkeley, California, to Raleigh, North Carolina. Even towns such as Carrollton, Georgia and Moscow, Idaho now have their own rape hotlines. Hotchkiss, *The Realities of Rape*, S.F. Chronicle & Examiner, December 3, 1978 (World) at 28-29.

98. D. RUSSELL, *supra* note 3, at 287.

99. CRIME AND DELINQUENCY, *supra* note 5, pt. I, at 7.

100. Craven, *A Rape Victim Strikes Back*, 33 EBONY 160 (September 1978).

101. Conversation with Liz Schellberg, Bay Area Women Against Rape (May 10, 1979).

102. S.B. 1714 gives the State Dept. of Social Services the power to administer grants to such centers for up to half of their operating costs. Ch. 1312, § 1, 1978 Cal. Stats., codified as CAL. HEALTH & SAFETY CODE § 1598 *et seq.*

103. See text accompanying note 10 *supra*.

104. The victim's reaction may inhibit her ability to describe her assailant in sufficient detail to lead to his arrest. See notes 86-87 *supra* and accompanying text.

105. E. HILBERMAN, *supra* note 27, at 2-3.

106. [Police] questions can be inane ("What was he doing

Law enforcement personnel are aware that false charges of crime do occur, but it is only in rape that it is assumed that the usual safeguards in the system are inadequate to protect the innocent from a lying witness. Contrast a charge of rape with that of robbery, where it is understood that property is taken from the victim without his/her consent, and there is no need to prove that fear of death or grave bodily harm was at issue.¹⁰⁷

Such attitudes cause unwarranted dismissal of cases.¹⁰⁸ Therefore, a change in police attitudes is critical.¹⁰⁹

Another weak link in the law enforcement process is prosecutorial attitudes,¹¹⁰ which may result in non-prosecution of charges or plea bargaining for lesser charges.¹¹¹ Even though plea bargaining has been severely criticized,¹¹² it does allow the prosecutor to

with his left hand?"), voyeuristic ("Did he have a big cock?"), cynical ("Are you sure you didn't smile at him?"), censorious ("Were you wearing a bra?"), or derisive ("Why didn't you keep your legs together?"). Some of the more important ones, like "In which direction did he leave?" or "Do you have anything that might have his fingerprints?" often get overlooked in a fine-tooth combing of the erotic elements.

J. MacKELLAR, *supra* note 13, at 83.

107. E. HILBERMAN, *supra* note 27, at 2-3. As late as 1975, the F.B.I. Uniform Crime Reports calculated an "unfounded" rate for forcible rape—the only crime for which such a figure was calculated. FEDERAL BUREAU OF INVESTIGATION, DEPT. OF JUSTICE, UNIFORM CRIME REPORTS FOR THE UNITED STATES 22-24 (1977).

108. Instances of unwarranted dismissal include cases where "there is a slight suspicion of false accusation by a Negro victim, or . . . when the victim is suspected of being promiscuous." M. AMIR, *supra* note 19, at 11. See also text accompanying note 90 *supra*.

109. Several valuable studies concerning the police's role in investigating rape have been published by the Battelle Law and Justice Study Center, Seattle, Washington: FORCIBLE RAPE: A NATIONAL STUDY OF THE RESPONSE OF POLICE (1975); FORCIBLE RAPE: A MANUAL FOR PATROL OFFICERS (Police—Volume II)(1978); FORCIBLE RAPE: A MANUAL FOR SEX CRIMES INVESTIGATORS (Police—Volume III)(1978); FORCIBLE RAPE: POLICE ADMINISTRATIVE AND POLICY ISSUES (Police—Volume IV)(1978).

110. "If a district attorney is a male chauvinist who dislikes women on the one hand and doesn't think that forcing a woman sexually is really a crime on the other, a county can acquire an astonishingly clean record for nonrape." J. MacKELLAR, *supra* note 13, at 93.

111. In 1977 in California, the prosecutor did not file a complaint against 23-25% of those arrested. See text accompanying note 10 *supra*.

112. "Prosecutors retain an unchecked power to substitute one charge for another in the bargaining process." At the same time, however, "Offenses have been defined in great detail and . . . the legislature has attached a single fixed sentence to each offense" in an attempt to remove most discretion from trial judges and parole boards. Morris, *supra* note 82, at 71.

file *some* charge where the victim is unable to go to trial,¹¹³ or the evidence is too weak to support a conviction for rape.¹¹⁴ It also permits the punishment to be tailored to the individual, thereby avoiding mandatory, harsh penalties which seem inappropriate in individual circumstances.¹¹⁵ Unfortunately, plea bargaining is frequently abused.

The prosecutor may offer significant reductions of all charges to reduce the amount of effort required by him and his staff in the processing of cases, or is wholly concerned with the numbers game and "dispositions" without any concern at all with regard to the quality of those dispositions . . . or for cosmetic purposes of his record takes reduced pleas on all "difficult" cases however serious, and however inadequate the pleas are, and goes to trial only on the "safe" cases.¹¹⁶

Such abuses are made possible because there is no public record of cases the district attorney rejects¹¹⁷ or cases in which the charges are reduced through plea bargaining. A district attorney would undoubtedly be more responsive to the public's growing concern with rape if his decision to drop a rape charge or accept a plea bargain were subject to public scrutiny.¹¹⁸

113. See L. BRODYAGA, M. GATES, S. SINGER, M. TUCKER, R. WHITE, *RAPE AND ITS VICTIMS* 113 (1976).

114. Alaska Attorney General Avrum M. Gross noted that "If you had a bad police investigation and they brought a bad case to the district attorney, the district attorney could always bail out the situation by plea bargaining." Endicott, *Ban on Plea Bargaining: Justice Done?*, L.A. Times, April 5, 1979, at 20, col. 1. Plea bargaining may become rarer as the quality of police investigation increases. Nonetheless, situations will remain where despite the diligence of police investigators, sufficient evidence to convict is unobtainable, and the rapist may only be punishable through plea bargaining.

115. For an articulation of the purposes of plea bargaining, see *People v. Selikoff*, 35 N.Y.2d 227, 318 N.E. 784 (1974), *cert. denied*, 419 U.S. 1086 (1975).

116. B. MOROSCO, *THE PROSECUTION AND DEFENSE OF SEX CRIMES* at 4-50 (1976).

117. Testimony of George Porter (President of Cal. Attorneys for Criminal Justice), before California Assembly Committee on Criminal Justice, *Exercise of Judicial Discretion* 161 (1976).

118. The prosecutor's abuse of discretion could be curbed either formally or informally. Rape crisis centers could informally monitor the disposition of cases involving victims who had initially contacted them for assistance, and publicize the results. A formal means would be establishing committees (with access to all records) to review and report on the prosecutors' exercise of discretion.

Under either system, prosecutors' abuse of discretion would be checked. This might result in less plea bargaining. The ramifications of less plea bargaining are illustrated by Alaska, where plea bargaining is totally banned, but "defendants still plead guilty in about the same numbers as before the ban . . . and judges are handing down stiffer sentences than they did when prosecutors used to 'recommend' sentences after plea bar-

District attorneys frequently overlook the fact that the victim, as the prosecuting witness, is indispensable in the trial. Without her testimony and cooperation, it is virtually impossible to obtain a conviction. Yet,

[o]ften the hearing is scheduled for nine in the morning, and the woman meets her lawyer for the first time at eight o'clock. That she may be clammy with fright, that she may have no idea of what to expect in court, that she might like the single comfort of seeing the face of the person who is going to represent her, or that she might have new facts or additional details to communicate since she gave her story to the police inspector — all of this seems to be of no interest to the D.A.'s office, even though its record for success will depend on her performance as a witness.¹¹⁹

To overcome the natural tendency of the victim to describe her ordeal as briefly as possible,¹²⁰ the district attorney must counsel and encourage her to give comprehensive testimony which will make her account of the rape credible to the jury.¹²¹

When the rape has been reported, the assailant apprehended, and charges pressed, the rapist is then tried in an atmosphere which is biased toward his acquittal.¹²² As noted by the California Supreme Court, juror prejudices are the major source of this bias: "the jury chooses to redefine the crime of rape in terms of its notions of assumption of risk' such that juries will frequently acquit a rapist or convict him of a lesser offense, notwithstanding clear evidence of guilt."¹²³ Preconceived notions in-

gaining." Endicott, *supra* note 114 at col. 1. This may have a very positive result. "Effective sentences not only deter, rehabilitate and isolate, they also assure the community that their protection is being achieved, and this very assurance improves the quality of life by eliminating the oppression of fear." B. MOROSCO, *supra* note 116, at 4-52.

119. J. MACKELLAR, *supra* note 13, at 85.

120. B. MOROSCO, *supra* note 116, at 4-95.

121. This essential role could be easily fulfilled by the use of volunteer law students or similar paralegal staff.

122. "The woman is suspect while the man is protected. Society asserts he is ill, marginal, or falsely accused. Men protect his rights and worry that the accusation may be false or the evidence contrived. The rapist is protected because he is themselves." Metzger, *It is Always the Woman Who is Raped* in *THE RAPE VICTIM* 7 (D. Nass ed. 1977). See also *People v. Rincon-Pineda*, 14 Cal. 3d 864, 880, 538 P.2d 247, 258, 123 Cal. Rptr. 119, 130 (1975).

123. *Id.* quoting H. KALVEN & H. ZEISEL, *THE AMERICAN JURY* 254 (1966). Another commentator noted:

terfere with jurors' ability to impartially decide issues of fact, such as whether there was penetration or lack of consent.¹²⁴ Recent research revealing juror prejudices found that jurors generally agreed that a rape had clearly occurred when

[a] woman with an acceptable reason for being out alone at night is attacked with a weapon by a stranger who leaves her unconscious in an alley. But change any of the facts—remove the weapon and the injury, make the woman a prostitute or the man her husband or someone she met in a bar—and the agreement weakens.¹²⁵

A related stereotype is that "nice girls don't get raped and bad girls shouldn't complain."¹²⁶

Juror bias is sex-linked. The average male juror had been described as "more sympathetic to the defendant in a rape case where a credible defense of consent can be raised, than in any other circumstances."¹²⁷ Even where a believable consent defense cannot be raised, male jurors may still feel that the accused rapist is "just trying to give a girl a good time."¹²⁸

[the] jury's assessment of the credibility of the witnesses and their evidence is not always rational. This phenomenon stems in large part from certain ideas jurors have about the crime of rape, some of which are believed with such ferocity that jury verdicts are often examples of outright nullification — the ultimate and extreme exercise of the fact-finder's prerogative.

Hilbey, *The Trial of a Rape Case: An Advocate's Analysis of Corroboration, Consent, and Character*, 11 AM. CRIM. L. REV. 309, 309-10 (1973). For an example of a blatantly erroneous jury decision, see Note, *The Victim in a Forcible Rape Case: A Feminist View*, 11 AM. CRIM. L. REV. 335, 346 (1973).

124. Irrelevant issues which may distract the jury's attention and cause them to vote for acquittal in the face of convincing evidence of guilt are: did the victim know the rapist; did she go up to his apartment voluntarily; did she invite him into her house; had she been drinking; what was the victim's reputation; etc. The issues which a jury should properly weigh are set forth in the legal definition of rape, which appears in note 2 *supra*.

125. Hotchkiss, *The Realities of Rape*, S.F. Examiner and Chronicle, Dec. 3, 1978 (World) at 29 (reporting a study by the U. of Minnesota's Center for Social Research). One assumption underlying this prejudice, which operates against a woman's credibility in court, is that "no healthy adult female resisting vigorously can be raped by one unarmed man. This belief is asserted universally, though it has never actually been proved." Melani & Fodaski, *supra* note 21, at 88-89.

126. *Report of the District of Columbia Task Force on Rape* (July 1973) cited in E. HILBERMAN, *supra* note 27, at 2.

127. B. MOROSCO, *supra* note 116, at 5-108.

128. Holloway, *The Focus in Rape Shifts, but the Myths Still Exist*, 1 SEXUAL L. REP. 31 (1976) quoting a juror in the Inez Garcia case (People v. Garcia, 54 Cal. App. 3d 61, 126 Cal. Rptr. 275 (1975), cert. denied, 426 U.S. 911 (1976)). Another one of the "jurors referred to the defendant as 'scum' in the jury room." *Id.*

On the other hand, female potential jurors often interpret any sympathy they may feel for the victim as an indication that they couldn't be "objective."¹²⁹ Because women are generally excused from jury duty more readily than men,¹³⁰ women styling themselves as "biased" probably will not sit on rape trial juries, even though in fact they may have been objective. Those women who do serve on the jury may view the case from the same perspective as their male colleagues.¹³¹ The end result is a jury heavily biased against the victim, and necessarily favorable to the defendant.¹³²

Only long-term changes in societal attitudes will finally eradicate juror bias against rape victims.¹³³ In the meantime, the prosecutor must use the voir dire process¹³⁴ to expose prospective jurors' subjectivity and thereby establish a basis for challenging their participation on the jury.¹³⁵ An equally important use of voir dire is to educate the jury to the issues which it should properly weigh and to ask jury members to examine their attitudes vis-a-vis the issues.¹³⁶

129. "Manhattan Assistant D.A. Jack T. Litman says that every case he has tried has been before all-male juries; the women all ask to be excused on the grounds that they couldn't be objective." Lear, *Q. If You Rape a Woman and Steal Her T.V., What Can They Get You For in New York? A. Stealing Her T.V.*, N.Y. Times, Jan. 30, 1972 (Sunday Supp.), at 11.

130. KANOWITZ, *WOMEN AND THE LAW* 28-31 (1969); M. MEAD & F. KAPLAN, *AMERICAN WOMEN* 242 (1965); Taylor v. Louisiana, 419 U.S. 522 (1975).

131. "Women are less likely to be sympathetic to the female victim." B. MOROSCO, *supra* note 116, at 4-84. One explanation for this is that "[W]omen tend to scorn each other, judging each other on men's terms." M. Reich & T. Weisskopf, *supra* note 20, at 357.

132. At trial, the victim must not only prove that her assailant is guilty, but also that she is innocent. J. MACKELLAR, *supra* note 13, at 79.

133. See notes 19-27 *supra* and accompanying text.

134. Voir dire is the "preliminary examination concerning the competence of a prospective . . . juror." *American Heritage Dictionary of the English Language* 1435 (W. Morris ed. 1976). In voir dire, the prosecuting and defense attorneys have a chance to ask potential jurors questions designed to uncover juror bias. Each attorney may challenge an unlimited number of potential jurors for cause and a limited number without cause (peremptories).

135. In California, particularly because sex is a suspect classification, the prosecutor has the right to ask voir dire questions regarding sexist attitudes. M. Soler, "A Woman's Place . . .": *Combatting Sex Based Prejudices in Jury Trials Through Voir Dire*, 15 SANTA CLARA LAWYER 535, 577-81 (1976). Yet, "Even when sexist attitudes are elicited on voir dire, it is likely that such attitudes will not be recognized as prejudicial by the predominantly male judiciary." *Id.* at 557. Because some judges will refuse to permit the prosecuting attorney to challenge sex-biased jurors "for cause," it may be necessary to remove those persons with peremptory challenges.

136. Educating the jury is important, because "[m]any people are simply not aware

Another means of minimizing the impact of jury bias is the use of expert testimony. Jurors frequently suspect, for instance, that a "proper" person should have absorbed substantial physical brutality to evidence lack of consent.¹³⁷ Thus, where the victim received no visible cuts or bruises, the jury may be reluctant to believe that a rape occurred. In this situation, the police officer who initially took the report, or the examining physician, could counterbalance jury biases by testifying that rape victims frequently exhibit no discernable physical injuries in addition to penetration.

A final means of checking jury bias would be a special jury instruction at the conclusion of the trial, which reiterated the jury's responsibility to decide issues of fact impartially.¹³⁸

of the prejudices they harbor, and those who are aware of such prejudices will seldom admit them in open court." *Id.* at 557. The District Attorney of San Francisco stated that persons who say that they don't believe a woman can be raped under any circumstance "are not accepted for jury duty, but I suspect that there are others that serve who believe this but might not say it." Sullivan, *Rape and Its Neglected Victims*, S.F. Examiner and Chronicle, April 9, 1972 (California Living) at 9.

When jurors claimed they couldn't be impartial, the judge or prosecutor could reiterate the issues which the jury should properly weigh, and ask such persons to reexamine their attitudes in that light. For instance, CALJIC instruction 10.00 (West, 1979) could be adapted for use in voir dire by varying it as follows:

If selected as a juror in this case, you would be charged with deciding: whether the defendant engaged in sexual intercourse with a female; whether the female was not his wife; whether she did not consent to such act of intercourse; and whether she resisted such act or her resistance was overcome by force or violence. In doing so, you should attempt to set aside any sex-based stereotypes you may have, and decide these issues solely on the facts introduced during the trial. Based on the foregoing, do you believe you would be able to impartially serve as a juror?

Id. Even if those jurors were not persuaded to serve on the jury, the entire jury's consciousness would have been improved.

137. E. HILBERMAN, *supra* note 27, at 2.

138. CALJIC instruction 1.00 (West, 1979) fulfills this function to some extent, but does not go far enough:

As jurors, you must not be influenced by pity for a defendant or by prejudice against him. You must not be biased against the defendant because he has been arrested for this offense, or because he has been charged with a crime, or because he has been brought to trial. None of these circumstances is evidence of his guilt and you must not infer or assume from any or all of them that he is more likely to be guilty than innocent. You must not be swayed by mere sentiment, conjecture, sympathy, passion, prejudice, public opinion or public feeling. Both the People and the defendant have a right to expect that you will conscientiously consider and weigh the evidence and apply the law of

The trial judge may exhibit the same biases as jurors.¹³⁹ The performance of American judges in the area of sex discrimination has been described as "ranging from poor to abominable."¹⁴⁰ One example of this prejudice is found in a California Court of Appeal judge's comments in overturning the conviction of a businessman who raped a female hitchhiker. The judge was quoted as saying that "a woman who enters a stranger's car 'advertises that she has less concern for the consequences than the average female.'"¹⁴¹ Similarly, Wisconsin Judge Archie Simonson gained nationwide repute when he sentenced a convicted fifteen-year old rapist to probation only, and suggested that the youth had reacted "normally" in a sexually permissive community.¹⁴² Judge Simonson was quickly removed from the bench, in the first judicial recall in Wisconsin's history.¹⁴³

The judge in American society occupies a position of unique esteem in the eyes of his fellow citizens. In return for this particular honor, the judge assumes a special burden of personal responsibility for the fairness, objectivity and disinterestedness of his approach to the legal issues presented to him for resolution.¹⁴⁴

Should a judge fail to live up to this responsibility, it is the public's duty, at the very least, to voice its dissatisfaction—and to organize a recall if necessary. The problem of rape will not be

the case, and that you will reach a just verdict regardless of what the consequences of such verdict may be.

Id. A special instruction is needed, concerning not just "pity for a *defendant* or . . . prejudice against him," but also pity for or prejudice against his *victim*, since the rape victim is also "on trial," in that she must not only prove her assailant's guilt, but her own innocence as well. J. MACKELLAR, *supra* note 12, at 79.

139. "[T]he police, the witnesses, and the court may, in their interpretation of the victim's behavior and the situation of her encounter with the offender, be close to the offender's interpretation. This is so because they are bound to the same socio-cultural orientations." D. AMIR, *supra* note 19, at 263-64 (emphasis added).

140. Johnston, *Sex Discrimination by Law: A Study in Judicial Perspective*, 46 N.Y.U.L. Rev. 675, 676 (1971).

141. Justice Lynn Compton's comments in *People v. Hunt*, 72 Cal. App. 3d 190, 139 Cal. Rptr. 675 (1977), *hearing denied*, Sept. 15, 1977, were reported in *Rape and Culture*, 110 TIME 41 (September 12, 1977).

142. *Id.* See also *Strong Convictions*, NEWSWEEK 14 (Sept. 11, 1978).

143. *Id.* Another example of judicial bias arose in *People v. Garcia*, 54 Cal. App. 3d 61, 126 Cal. Rptr. 275 (1975), *cert. denied*, 426 U.S. 911 (1976) where Inez Garcia was tried for murdering the man she alleged helped another man rape her. Although rape was the basis for her self-defense, the trial judge was "visibly annoyed that the issue of rape kept complicating the trial." Holloway, *supra* note 128, at 31.

144. Johnston, *supra* note 140, at 747 (1971).

finally alleviated without changes in the attitudes of those persons charged with upholding and enforcing the law. Hopefully, short-term measures, such as rape crisis centers, judicial recalls and special jury instructions will both increase the apprehension, prosecution and conviction of rapists and, at the same time, help change the attitudes of persons in charge of the criminal justice system.

IV. CONCLUSION

A comprehensive approach to the crime of rape is needed. Because some men will continue to rape despite penal sanctions, the Legislature must avoid a piecemeal approach and instead overhaul the Penal Code¹⁴⁵ so that rapists are effectively punished. The new provisions should be drafted with deterrence in mind. Providing for consecutive sentences where multiple offenses are concerned may deter some men from robbing *and* raping. Those men who were not deterred would be punished for each offense. Such reforms will not be forthcoming, however, without prodding from the feminist community.

Legislative reform must be accompanied by changes in attitude and behavior of both men and women. Because the omnipresence of rape directly affects women, and because few men have taken the initiative to change their own behavior or the attitudes of others, women must press those changes on men and our male-dominated society. Women need to monitor each step of the legal process—police, medical personnel, prosecutors, judges, and juries. When the legal system ineffectively responds to the problem of rape, strong objections should be voiced—whether it be voting judges out of office, bringing public pressure on prosecutors and police or leafletting outside courtrooms where trials are being conducted in a sexist manner. Extra-legal solutions should also be considered.¹⁴⁶ Ultimately, the an-

145. The Battelle Law and Justice Study Center sponsored an analysis of all 50 states' rape laws, which resulted in wide-reaching proposals for rape law revision. See LEGRAND, REICH AND CHAPPELL, *supra* note 11. Their suggestions include: removing the marital exemption from rape; revising rape laws to be sex-neutral; expanding the definition of rape to include forcible oral copulation and sodomy; and redefining rape to focus on the rapist's conduct (use of force), rather than the victim's behavior (resistance). *Id.*

146. One extra-legal solution suggested is: "Women's groups and advocacy groups . . . should join the campaign to de-emphasize the exploitation of female bodies and the use of violence against women in the mass media." National Women's Conference, National Plan of Action, Media Plan at 19 (Nov. 18-21, 1977) (available through U.S. Gov't.

swer lies in fighting back, against rape and against sexism, in every way possible:

Women all around the world
Every color religion and age
One thing we've got in common
We can all be battered and raped . . .

Some have an easy answer
Buy a lock and live in a cage
But my fear is turning to anger
And my anger is turning to rage
And I won't live my life in a cage—no!

And so we've got to fight back!
In large numbers . . .
Together we can make a safe home.¹⁴⁷

Printing Office, 1978).

Several feminist groups are presently engaged in boycotts, pickets and other educational activity aimed at eliminating violent, exploitative images of women in mass media. Women Against Violence in Pornography and Media, P. O. Box 14614, San Francisco, California, 94114; and Women Against Violence Against Women, 1727 North Spring St., Los Angeles, California, 90012.

Numerous extra-legal remedies have been proposed: *see* D. RUSSELL, *supra* note 3, at 276-304; S. BROWNMILLER, *supra* note 17, at 375-404; FIRST SOURCEBOOK FOR WOMEN, *supra* note 18, at 173-250, and J. MACKELLAR, *supra* note 13, at 134-42.

147. "Fight Back," *supra* note 1.