CONSENT VERSUS SUBMISSION: THREATS AND THE ELEMENT OF FEAR IN RAPE

INTRODUCTION

The rule in rape law is that force or fear oust consent.[1] It should then be for the jury to decide, as a factual issue, whether in a particular instance the woman's consent was real. Questions as to the *legal* dimensions of fear and threats have nevertheless arisen in various common law jurisdictions. Problems concern the nature of the harm: is fear limited to a threat of physical danger, or are threats of financial harm, loss of job, verbal harm—perhaps threats of aspersions being cast upon reputation if the girl does not submit—or 'sexual blackmail' relevant? Further, do threats of harm to persons other than the complainant operate to oust consent? Are threats made by others than the accused relevant? Additionally how immediate ought the threat to be?

THREATS OF PHYSICAL HARM

In *Vanderford v State*[2] it was considered that where submission is gained by fear of bodily harm or personal violence it will not be consent; and though no direct physical force is used—by laying of hands upon the woman and so on—if by a showing of physical force the man overpowers the woman's mind so that she dares not resist, he will be guilty of rape. The court accepted that the phrase 'by force' does not necessarily imply positive exertion of actual physical force in the act of compelling submission:[3]

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1 Where the crime of rape has been codified, the usual formulation is that where consent is extorted by force or fear consent is abrogated. Eg. the Queensland Criminal Code s 347 and the Western Australian Criminal Code s 325 provide: 'Any person who has carnal knowledge of a woman . . . without her consent, or with her consent if a consent is obtained by force, or by means of threats or intimidation of any kind, or by fear of bodily harm . . . is guilty of a crime which is called rape.'

2 (1906) 126 Ga 753, 55 SE 1025.

3 Id 55 SE at 1027 (emphasis added).

> [B]ut that force or violence threatened as a result of noncompliance, and for the purpose of preventing resistance or extorting consent, if it be such as to create *a real apprehension of dangeorus consequences, or great bodily harm, or to overpower the mind of the woman so that she dare not resist,* is equivalent to force actually exerted . . . and that the jury must be satisfied, if she failed to resist, that her failure was due to threats of violence which had the effect to overpower her will to resist, and that she failed to resist through fear of such threats.

It was further considered that there must be 'fear of *immediate* bodily harm'.[4]

Similarly in *Green v State* there is an emphasis upon the gravity of force or violence threatened which induces consent:[5]

> 'Consent by a woman . . . induced or obtained through *well grounded fear of death or great personal violence* is void: and if you believe . . . that though the defendant . . . laid no hands on the prosecutrix . . . yet that by such fear induced by threats and by an array of physical force he so overpowered and paralyzed her mind that she dared not and did not resist him . . . then his act would be rape. . . .'

In *People v Flores* the words 'by threats of great and immediate bodily harm, accompanied by apparent power of execution'[6] were construed as including threatening words in addition to acts and other conduct:[7]

> We are unable to agree with the view that there can be no threat within the meaning of this statute unless it is expressed in words or through the exhibition of a gun, knife or other deadly weapon. A threat may be expressed by acts and conduct as well as by words. If one were met in a lonely place by four big men and told to hold up his hands or to do anything else, he would be doing the reasonable thing if he obeyed, even if they did not say what they would do to him if he refused. Their actions and manner might well

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4 Id 55 SE at 1027-1028 (emphasis added). The words are from a definition in Rapalje and Lawrence, LAW DICTIONARY; note the similarity to the definition in J Stephen, A DIGEST OF THE CRIMINAL LAW (9th ed, L Sturge ed 1950) art 318 [hereinafter cited as Stephen].

5 (1938) 135 Fla 17, 184 So 504, 508 (emphasis added; quoting from the charge to the jury).

6 Penal Code of California, s 261 subd 4.

7 (1944) 62 Cal App 2d 700, 145 P2d 318, 320.

> indicate their purpose and intention and it would be a mere play on words to say that these actions and circumstances did not constitute and were not the expression of a threat. In fact, it would be a very compelling one. We think similar considerations are applicable here.

These cases, generally representative of the legal viewpoint in the United States on the threat and duress issue in rape,[8] are in concert with the English common law.[9] Hale stated that where the woman 'consented upon menace of death, if she consented not, this is not a consent to excuse a rape'.[10] Hawkins provided: 'Offences of this Nature are not any way mitigated, by shewing that the Woman at last yielded to the Violence, if such her Consent was forced by Fear of Death, or of Duress. . . .'[11] East similarly states: 'It is not mitigation of this offence that the woman at last yielded to the violence, if such her consent were forced by fear of death or by duress.'[12] Later Stephens defined rape as 'the act of having carnal knowledge of a woman without her conscious permission, such permission not being extorted by force or fear of immediate bodily harm. . . .'[13] Threat of physical injury to the complainant as ousting consent was also upheld in *Reg v Jones*[14] where it was considered that where a woman yielded when faced with threat of such bodily injury to herself as she did not dare resist, the act would be rape.[15] Similarly more recent authorities uphold

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8 See for example 75 CJS *Rape* (1952): 'This Title includes sexual intercourse with a female without her consent, or where her consent is extorted by fear. . . .' and s 1 at 462: 'Rape has also been defined generally as the act of having carnal knowledge, by a man, of a woman, forcibly and against her will, or without her conscious permission, or where permission has been extorted by force or fear of immediate bodily harm.' Evans v State (1942) 67 Ga App 631, 21 SE2d 336, 337.

9 Note, however, that at least one English case has not extended threats in rape ousting consent to the degrèe stated in People v Flores (1944) 62 Cal App 2d 700, 145 P2d 318, 320 as stated above: 'if one were met in a lonely place by four big men. . . .' In R v Hallet (1841) 9 Car & P 748, 173 ER 1036 where the prosecutrix was alleged to have been put upon by eight men, yet because she did not resist after the initial attack it was said that the jury ought to acquit the prisoners of the [rape] charge, and convict them of an assault only.'

10 1 M Hale, THE HISTORY OF THE PLEAS OF THE CROWN (1800) 631.

11 1 W Hawkins, A TREATISE OF THE PLEAS OF THE CROWN (1716) c 41 s 2 at 108.

12 1 E East, A TREATISE OF THE PLEAS OF THE CROWN (1803) c 10 s 7 at 444.

13 Stephen, supra note 4 at art 318.

14 (1861) 4 LT (NS) 154.

15 See comments in KENNY'S OUTLINES OF CRIMINAL LAW (19th ed, J Turner ed 1966) 200 [hereinafter cited as Kenny].

a comparable standard[16] considering that the threat should be both severe and immediate.[17]

THREAT OF HARM TO OTHERS

The standing of threats to others than the complainant has not so often been canvassed by the courts. Early common law authorities do not go beyond the mere enunciation of the fear and threat principle. Current writers appear to favour the view that threats must be directed at the complainant herself, and that it must be fear for herself that is operative,[18] or that where threats are made to another, that other must be one with whom the complainant has a very close personal relationship. Smith and Hogan suggest that threats of immediate violence to the child of the complainant may be such as to fall within the principle;[19] Howard is bolder in approach, contending that there can be, on principle, little doubt that if relevant threats or force are directed at a person for whom the complainant 'has or is presumed to have strong affections' consent will be negatived.[20]

In the United States the emphasis appears to be upon threat of harm to the woman herself. Thus in *Vanderford v State* the court said '[I]t must be a consent not controlled and dominated by fear. . . . A consent induced by fear of bodily harm or personal violence is no consent. . . .'[21] Similarly in *Allison v State* although there was

16 See R Cross & P Jones, AN INTRODUCTION TO CRIMINAL LAW (7th ed 1972) 173 [hereinafter cited as Cross & Jones]: 'The consent of the woman is a complete defence to a prosecution for rape, but it is essential that the consent should not be obtained by means of intimidation. . . .'
J Smith and B Hogan, CRIMINAL LAW (3d ed 1974) 29 [hereinafter cited as Smith & Hogan]: 'It is probable that only threats of immediate personal violence . . . will negative consent for the purposes of rape. . . .' Under Scots law: 'Rape, like robbery, may be committed by threats of imminent harm . . . it may not be rape to wear a woman's resistance down by persuasion, or even perhaps by ill-treatment, such as kidnapping and imprisoning her, if in the end she consents to intercourse, provided that that consent was obtained "without any use of threats or violence at the time or recently before".' Gordon, THE CRIMINAL LAW OF SCOTLAND (1967) 830.

17 See however the various criminal codes: eg Criminal Code (Tas) s 1: consent is not freely given when procured by 'threats of whatever nature'; Criminal Code (WA) s 325: consent is vitiated by 'threats or intimidation of any kind'; and see text accompanying notes 61-66 infra.

18 See Cross & Jones, supra note 16 at 173; Kenny, supra note 15 at 200; R v Jones, (1861) 4 LT (NS) 154.

19 Smith and Hogan, supra note 16 at 331.

20 C Howard, AUSTRALIAN CRIMINAL LAW (2d ed 1970) 168; eg a fiance, close relative, or someone whom she has a duty to protect such as her child.

21 (1906) 126 Ga 753, 55 SE 1025, 1027-28 citing Rapalje and Lawrence's LAW DICTIONARY.

some evidence of fear on the part of the woman for her nephew, of whom she had continuing care,[22] the relevant issue was that she was personally threatened and feared for her own safety.[23] In *Darrell v Commonwealth* threats made as to the safety of the girl's father were said not to justify a summing up that '[F]orce . . . does not mean exclusively physical force applied to the person of the prosecutrix; but that force was used, if the prosecutrix was made to yield through fear caused by threats of violence and injury then made.'[24]

The latter case could, however, raise the possibility that threats against others may be capable of being construed by the law to oust consent. The threats to kill her father if she revealed the act to him were made after intercourse; such a threat could not be admitted as having made the prosecutrix yield. On appeal the court said:[25]

> Undoubtedly it is the law that, if the rapist coerces the female into yielding through fear caused by what he threatens or does, her will is as completely subdued by force as if he violently took hold of her and held her against her will.

There being no limitation placed upon the words '. . . yielding through fear caused by *what he threatens or does*', it could be contended that a threat to the girl's father might, had it been made before the act, have resulted in a conviction for rape—or at least have justified a summing up alluding to the effect of threats upon the validity of the consent. Such an interpretation would align an American approach with the Australian and English positions,[26] however there is no direct case support for threats to those connected with the complainant as interfering with ability to consent.[27]

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22 (1942) 204 Ark 609, 164 SW 2d 442, 444-45 n 5; in evidence the complainant said: 'He said I was making too much racket, that I would wake the child up. . . . He said if I didn't make a racket he wouldn't have to shoot me: that he didn't want to have to shoot anybody. . . . I thought I was going to get killed. I had an orphan nephew living there and I thought more of his welfare than I did of anything else.'

23 'I was so scared when I saw him I was paralysed. . . . He had a gun in his right hand. . . . Naturally I was nervous and scared to death. . . .' Ibid.

24 (1905) 88 SW 1060, 1061 (case not officially reported).

25 Ibid.

26 It is interesting to observe that under West German law a reference to 'familiars' (Nahestehenden) appears to include others than simply family members eg friends and so on. See Dreher, STRAFGESETZBUCH MIT NEBENGESETZEN UND VERORDNUNGEN (1975) s 177 2Ab, s 178 3Cb; Schroeder, DAS NEUE SEXUAL-STRAFRECHT (1975) 28.

27 Howard, supra note 20 at 168 cites State v Olsen (1932) 138 Or 666, 7 P2d 792; however this is not particularly apposite, as *both* a friend and the girl herself were threatened—the companion to a beating, the girl to being

FEAR INDUCED BY OTHERS

In some instances it has been held that threats emanating from, or fear caused by, others than the actor in the rape may interfere with the woman's consent. This has, however, been limited to fear of physical harm, or threats of physical interference. In *William v State*[28] where a husband was prosecuted as principal in the second degree to the rape of his wife, testimony of the wife as to statements by him, and his acts and conduct prior to commission of the rape by a third party was held material and admissible as showing that the act was done under duress. Similarly in *People v Damen*[29] it was held that the evidence authorised a finding that the victim, who had been told by her husband previous to the act that he would kill her, and who also had at that time been struck by him, failed actively to resist intercourse with others allegedly paid by the husband as she was suffering from fear and threats such as to make any consent unreal. The court on appeal stated:[30]

> A thorough review of the entire record leads us to the conclusion that the jury was fully justified in believing that complainant was 'deathly afraid' as she testified, and that her lack of active resistance stemmed from her belief that, in her words, 'there was a hope for life the other way'.

There do not appear to be any English or Australian authorities on the issue. Howard declines to allude to the problem; similarly Kenny, Cross and Jones, and Smith and Hogan.[31] Nonetheless it seems that where rape is defined as intercourse 'without consent', and threats so interfering with the ability of the woman as to render an assent no consent at all should be capable of being so interpreted by a jury.[32]

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raped if they did not comply with accused's wish that they perform an act of intercourse together: the threat was not alone directed at the companion.

28 (1949) 206 Ga 107, 55 SE2d 589.

29 (1963) 28 Il12d 464, 193 NE2d 25.

30 Id 193 NE2d at 28. The court continued: 'Defendant had repeatedly threatened her life commencing that morning and continuing throughout the day, telephoned her mother . . . and told her she would not see her daughter again, struck complainant when she tried to escape and tore off her clothing, smashed a chair and threatened her with a part of it, cut up her clothing with a butcher knife, kept his hand on her throat during the sexual act with [one of the defendants]. . . .'

31 Howard, supra note 20 at 157-176; Kenny, supra note 15 at para 143; Cross & Jones, supra note 16 at art 40; Smith & Hogan, supra note 16 at 326-29; Similarly for Scots law no mention is made; Gordon, THE CRIMINAL LAW OF SCOTLAND (1967).

32 Note, however, that here as in the more usual instance of rape the mind of the accused must also be regarded: did he intend intercourse without

Although the cases from the United States deal only with threats and fear of a physical nature, in conjunction with the idea of non-consent it might logically be expected that non-physical threats, too, should be capable of being dealt with by the jury on the basis of interfering with the woman's ability to agree to the act.[33]

NON-PHYSICAL THREATS

Again early authorities fail to elaborate beyond the mere statement of threat ousting validity of consent,[34] or appear to limit threats to physical harm.[35] Current writers doubt that other than threats of serious bodily harm—or perhaps 'harm . . . of a serious nature, damaging enough to occasion fear to any reasonably courageous woman'[36] —can found a charge of rape. Howard contends that threats such as publishing some unpleasant fact about the complainant, or about another whose welfare matters to her, or the threat of economic loss such as foreclosure of a mortgage could not be sufficiently serious to negative consent.[37] The United States position has similarly been limited.[38]

Nevertheless the question of threat of financial loss and loss of job, and its relevance to the extortion of consent arose in *Reg v McCoy*.[39]

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consent or was he reckless thereto? The possibility of lack of intent may be increased where threats come from another source than the actor.

33 It may be contended that situations involving threats by others may be better dealt with under other provisions, eg s 2 of the Sexual Offences Act 1956 (UK). This matter and other possible alternatives arising under statute law will be dealt with under Alternative Statutory Provisions infra.

34 Stephen, supra note 4 at art 318.

35 1 M Hale, THE HISTORY OF THE PLEAS OF THE CROWN (1800) 631; 1 W Hawkins, A TREATISE OF THE PLEAS OF THE CROWN (1716) c 41 s 2 at 108; 1 E East, A TREATISE OF THE PLEAS OF THE CROWN (1803) c 10 s 7 at 444. See text accompanying notes 8-17 supra.

36 Howard, supra note 20 at 168. Smith & Hogan, supra note 16 at 326, deal with the matter in relation to s 2 of the Sexual Offences Act 1956 (UK) considering that the section may apply where threats are 'of less gravity than are required for rape', but do not outline what threats are sufficiently grave for rape, or which are of a nature to qualify only for the s 2 offence.

37 Howard, supra note 20 at 168-69.

38 'Many threats other than direct bodily harm, such as loss of job or suitor, may coerce a girl into submission; and though she may consider herself opposed to the act, the law does not treat these situations as rape.' Note, *Forcible and Statutory Rape: An Exploration of the Operation and Objectives of the Consent Standard* (1952) 62 Yale LJ 55, 57. In Switzerland, the USSR and Yugoslavia economically coerced coitus is defined as rape by statute. Donnelly, *The New Yugoslav Criminal Code* (1952) 61 Yale LJ 510, 527 n 119.

39 [1953] 2 SA 4 (So Rhod).

The charge related to a caning inflicted upon an airline stewardess, the accused being in a position of authority over the complainant. Although on appeal the court held the caning to be *malum in se,* in any event there had not in fact been consent but submission under duress:[40]

> [A] review of the evidence satisfies me that the complainant consented to be caned but that she did so under duress. She was coerced by the fear of being grounded and having her pay reduced or even of being dismissed. . . .
>
> It is quite clear to my mind . . . that complainant's consent was not real in that she did not give it freely and voluntarily.

The court quoted from *R v Taylor*:[41]

> 'Now what does this evidence prove? It seems to me that it establishes submission, but it does not amount to proof of consent. Submission is not sufficient to constitute a defence to a charge of assault, there must be active consent—*Rex* v. *Lock,* L.R., 2 C.C.R. 10. Mere submission is not consent, for there may be submission without consent, and while the feelings are repugnant to the act being done. Mere submission is totally different from consent—*per* Kelly, C.B. in *Rex* v. *Wollaston* 12 Cox 180.'

McCoy thus reiterates the principle of *Reg v Day*[42] that in rape 'submission is no consent'. It is submitted, therefore, that the *McCoy* decision should be extended to rape cases, so that the principles regarding consent, or the lack thereof, are the same whether the act complained of is assault, sexual assault, or rape. It is difficult to see why there should be a different definition of consent (that is, one which is affected only by physical coercion) when the alleged consent relates to an act involving sexual intercourse. Such direct authority as there is favours the view, however, that 'consent' in the instance of rape has a restricted scope which it has not in any other area—apart from that of duress *as a defence to a crime.*[43]

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40 Id at 10.

41 (1927) CPD 16, 20.

42 (1841) 9 Car & P 722, 173 ER 1026.

43 It is interesting to note that in one other area of rape law—that of corroboration—a similarity with a standard applied in the case of criminal activity on the part of those for whom the rule is constructed is evident. Just as the evidence of accomplices is looked upon with a wary eye by the court, and a warning as to acceptance required to be given to the jury, so is a warning to be given as to accepting the uncorroborated evidence of a complainant in rape. Criticisms that the prosecutrix is 'treated as a criminal' may have foundation.

STANDARD OF CONSENT IN THE DEFENCE OF DURESS

Although there is no valid reason for adopting a standard of consent in rape which is equivalent to a standard devised for ousting responsibility for the commission of what would otherwise be a crime, the similarity of wording is worthy of note. In *R v Purdy* the defence of duress where a British prisoner of war was charged with treason was stated:[44]

> 'If you believe, or if you think that it might be true, that [the accused] only did that because *he had the fear of death upon him,* then you will acquit him on that charge, because to act in matters of this sort *under threat of death* is excusable'.

Similarly, in *Reg v Shiartos* the trial judge directed the jury:[45]

> 'If, in all the circumstances of this case, you are satisfied that *what he did he did at pistol point and in fear of his life,* he is entitled to be acquitted. If, although you are not satisfied, you think it might well be that *he was forced at pistol point to do what he had to do,* then again you should acquit him, because the prosecution would not have made you feel sure that what he did he did maliciously.'

Also, it was said in *Reg v Hudson*:[46]

> [I]t is clearly established that duress provides a defence in all offences including perjury . . . *if the will of the accused has been overborne by threats of death or serious personal injury* so that the commission of the alleged offence was no longer the voluntary act of the accused.

In *Attorney-General v Whelan,* often cited as authority on the duress issue, it was said:[47]

> *Threats of immediate death or serious personal violence so great as to overbear the ordinary power of human resistance* should be accepted as a justification for acts which would otherwise be criminal. . . . Where the excuse of duress is applicable it must further be already shown that the overpowering of the will was operative at the time the crime was actually committed, and, if there were reasonable opportunity for the will to re-assert itself, no justification can be found in antecedent threats.

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44 Per Oliver J directing the jury, (1946) 10 JCL 182, 186 (emphasis added).

45 Per Lawton J (emphasis added) Sept 19, 1961 Central Criminal Court (unreported), cited in R v Gill [1963] 2 All ER 688, 691 n 6.

46 [1971] 2 QB 202, 206 (emphasis added).

47 [1934] IR 518, 526 (emphasis added); cited in R v Smyth [1963] VR 737, 738, a case in which threats made by a man armed with a revolver excused the receiving of stolen goods.

When comparing dicta from the rape cases, it can be seen that a standard of consent to the sexual act has been set up within those boundaries set for 'consent' given under duress to the doing of a criminal act. It is questionable whether the standard of submitting to an act of intercourse should conform to that of undertaking to do acts offending the criminal law. Consent in rape would seem to have more logical connection with that under the law of contract.

STANDARD OF CONSENT IN DURESS IN CONTRACT LAW

A contract may be void or voidable where entered into under duress. Duress invalidating consent will include 'compulsion under which a person acts through fear of personal suffering as from injury to the body or from confinement, actual or threatened'.[48] 'Personal suffering' includes suffering of one's self, or suffering of husband, wife or near relative,[49] and is not limited to that arising from threats of a physical nature:[50]

> At common law . . . duress that is said to invalidate gifts, contracts or deeds made or entered into under such duress is either actual or threatened violence to the person, or the threat of illegal imprisonment, or such moral coercion as a threat of dishonour or violence to a husband, or wife or children.

Thus in *Scott v Sebright* it was held that a contract for marriage was not validly entered into due to duress where the woman concerned was threatened with harm to her reputation:[51]

> The claim . . . is based on the allegation that owing to the circumstances in which [the petitioner] was placed by the conduct and acts of the respondent . . . [she] was not a free agent when she went through the ceremony in question, and that there was consequently no valid consent on her part to the contract of marriage. . . . *It has sometimes been said that in order to avoid a contract entered into through fear, the fear must be such as*

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48 9 HALSBURY'S LAWS OF ENGLAND (4th ed) para 297 at 172. It is ironic that confinement is recognized in contract as being capable of interfering with ability to agree freely, whereas there is strong doubt whether kidnapping alone can so interfere where intercourse is in question. See, Gordon, THE CRIMINAL LAW OF SCOTLAND (1967) 830 n 14. The Model Penal Code (1955) has a special provision on this point: s 213.1.

49 9 HALSBURY'S LAWS OF ENGLAND (4th ed) para 297 at 173 citing Williams v Bayley (1866) LR 1 HL 200 (defendant's son); Seear v Cohen (1881) 45 LT 589 (defendants' son and nephew).

50 Hooper, *Larceny by Intimidation* [1965] Crim L Rev 532, 534 (footnotes omitted).

51 (1886) 12 PD 21, 23-24 (emphasis added).

> *would impel a person of ordinary courage and resolution to yield to it. I do not think that is an accurate statement of the law. Whenever from natural weakness of intellect or from fear—whether reasonably entertained or not—either party is actually in a state of mental incompetence to resist pressure improperly brought to bear, there is no more consent than in the case of a person of stronger intellect and more robust courage yielding to a more serious danger.*

The nature of duress in this case compares with that in *McCoy* where through lack of consent due to threats of financial harm acts were held to be assault.[52] It can similarly be asked whether, had the girl in the *Scott* case 'consented' to an act of intercourse rather than to marriage, it would have been considered that there was a case to be put to the jury on the issue of consent. There seems to be no valid reason for holding that a live issue would not exist: if on the facts it appeared that consent had not been real, due to threats, whether or not a reasonable person would have consented, it should be open to the jury so to hold.

In *Kaufman v Gerson* where duress related to a threat of criminal prosecution against the husband of the woman signing the contract, consent was not valid:[53]

> [W]hat does it matter what particular form a coercion is used, so long as the will is coerced? Some persons would be more easily coerced by moral pressure, such as was exercised here, than by the threat of physical violence. It seems to me impossible to say that it is not coercion to threaten a wife with the dishonour of her husband and children.

In a similar vein, Mathew LJ referred to '[E]vidence [which] shews that pressure which amounted to torture was applied in order to coerce the defendant into signing the contract'.[54] Romer LJ said:[55]

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52 See comments on the McCoy case in the text accompanying notes 39-43 supra. In Scott the petitioner alleged in her pleadings that the respondent '[F]requently threatened the petitioner that unless she would marry him he would accuse her to her mother and in every drawing-room in London of having been seduced by him [; that] . . . he would tell her mother . . . of her having given him acceptances to a very large amount, and upon which proceedings were being taken against her, but that if she would marry him he would provide for the bills in due course, and that neither her mother nor any one else would know of the charge of unchastity or of the acceptances.' (1866) 12 PD at 22.

53 [1904] 1 KB 591, 597.

54 Id at 600.

55 Id at 599.

> [T]he plaintiff extorted a contract from a wife by threats of criminal proceedings against her husband, if she did not comply, those proceedings being such that, if taken, they would probably have resulted in the ruin of the husband, and the disgrace of his wife and children.

The authorities suggest that this case concerns the nullification of consent by duress, rather than the unenforceability of a contract under circumstances where 'consent' has formally been obtained.[56] Referring to the use of the term 'pressure', particularly as it was used in *Kaufman v Gerson,* it has been said:[57]

> Whatever the limits of the doctrine of pressure the weight of authority is decidedly against describing it as undue influence and in favour of calling it pressure or coercion. This form of coercion has arisen chiefly where there are threats express or implied of criminal proceedings. . . . [I]t is used in cases where the threats would have amounted to duress at common law.

Later commentary added:[58]

> It is clear that if a court of equity found itself faced with a common law duress, it would regard it as invalidating the contract . . . and hold the contract void on the . . . principle that, since there was no consent, there could be no contract.

Thus where 'pressure' or duress exerted upon a party in terms of threats to others—such as husband, children, or other relations—of not necessarily a physical nature, is admitted to interfere with the giving of free consent, rendering it submission only in the case of contract,[59] it seems that there should be no question that similar threats

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56 Where, rather than being common law duress, the 'pressure' or persuasion used is classifiable as undue influence, an equitable doctrine renders the contract voidable rather than void.

57 Winder, *Undue Influence and Coercion* (1939) 3 MLR 97, 117.

58 Lanham, *Duress and Void Contracts* (1966) 29 MLR 615, 620.

59 See for example Friedeberg-Seeley v Klass, The Times Feb 19th 1957; Cumming v Ince (1847) 11 QB 112, 116 ER 418; Smith v Monteith (1844) 13 M & W 427, 153 ER 178; and see note 49 supra. In 9 HALSBURY'S LAWS OF ENGLAND (4th ed) para 297 it is considered that threats as to others than relatives are not sufficient to interfere with consent under the law of contract, citing: 1 Rolle Abr 687; it is not a good defence to an action on a bond that it was given to secure release of a third person imprisoned by the contractor without reasonable cause and against the law: Huscombe v Standing (1607) Cro Jac 187, 79 ER 163; Butcher v Steuart (1843) 11 M & W 857, 152 ER 1052; consent cannot be upset by threats to a master: 9 HALSBURY'S LAWS OF ENGLAND (4th ed) para 297 nn 14, 17. However it could be contended that the previously cited cases show a way to a less restrictive definition of consent in contract—see particularly Kaufman v Gerson [1904] 1 KB 591, 597:

or pressure should be recognized as capable of interfering with consent to acts of sexual intercourse. A person can consent or not consent; as a factual issue this ability should not be affected by the type of jurisdiction under which the question of consent is dealt.[60]

THREAT AND FEAR UNDER THE CODES

The problem is specifically dealt with in the codes. Both the Queensland and the Western Austrailan Codes refer to 'threats or intimidation of any kind'.[61] It could, therefore, be submitted that these provisions go beyond the limitations in the cases to 'immediate harm', physical harm, violence and so on, thus acknowledging the dimensions of the crime as involving consent as a reality, rather than consent as a legal term based on objective facts which may have little or no relation to the state of mind of the woman concerned.[62]

An added difficulty is, however, that the codes refer first to intercourse 'without consent', and then proceed to declare that the act will be rape where it is performed 'with her consent, if the consent is obtained by force, or by means of threats or intimidation of any kind, or by fear of bodily harm'. This begs the questions of what 'consent' means. Any 'consent' obtained by force, threats, intimidation, or fear of bodily harm is 'not consent in any relevant sense', at least as far

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'[W]hat does it matter what particular form of coercion is used, so long as the will is coerced? Some persons would be more easily coerced by moral pressure, such as was exercised here, than by the threat of physical violence.' Furthermore, that which is capable of interfering with consent in matters of contract law is similar with respect to sexual intercourse. See also comments in text accompanying notes 65-68 infra.

60 See comments infra as to the definition of consent: it may be argued that any setting up of rules as to what is and what is not consent is giving a legal dimension to the term which is not justified, whether in contract or in the case of sexual intercourse.

61 Criminal Code 1913 (WA) s 325; Criminal Code 1899 (Qld) s 347. It is interesting to note that the Stephen's formula of 'permission not being extorted by force or fear of immediate bodily harm' is not used, although Stephen's Digest was used (along with the New York and Italian Codes) as a basis for the Codes. See also Criminal Code (Tas) s 1 which employs the phrase 'threats of whatever nature' in relation to issues involving the term 'consent'.

62 As far as interpretation of the codes is concerned, if the usual rules are applied (G Williams, LEARNING THE LAW (9th ed) 92-100; Bank of England v Vagliano Bros [1891] AC 107 per Lord Halsbury LC at 120-22 and per Lord Herschell at 144, 146, 150) the words should be taken to mean what they say, ie 'threats of *any* kind'. including threats to shatter one's reputation, monetary threats, and so on. Howard labels these as 'extortionary situations'. Howard, supra note 20 at 170.

as the common law is concerned.[63] This is so notwithstanding the contention that there are limitations in the cases as to what is and what is not consent. Perhaps the code drafters might be taken to have meant 'submission' rather than 'consent'.[64]

Apart from this issue, however, in commenting on the construction of the Queensland and Western Australian Code sections on rape Howard suggests that the 'uncertainties in the law are conveniently embodied' therein. He continues:[65]

> Both at common law and under the codes, notwithstanding the literal width of these words, there is room for doubt in four directions: first, whether threats or the actual application of force is limited to [the victim]; secondly, whether threats or intimidation are limited to serious bodily harm; thirdly, whether [the victim's] belief that she is being threatened need be reasonable; and fourthly, whether the threats need be immediate.

These doubts arise both at common law and under the codes, however, only if the definition of rape is misconstrued: if 'consent' is given an artificial meaning, and if the maxim that 'every consent involves a submission; but it by no means follows that a mere submission involves consent'[66] is rendered meaningless.

THE MEANING OF CONSENT

The term 'consent' means 'Voluntary agreement to or acquiescence in what another proposes or desires'.[67] According to THE DICTIONARY OF ENGLISH LAW the term signifies:[68]

> [A]n act of reason accompanied with deliberation, the mind weighing, as in a balance, the good or evil on either side. Consent supposes three things—a physical power, a mental power, and a free and serious use of them.

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63 R Watson & H Purnell, CRIMINAL LAW IN NEW SOUTH WALES (1971) 99; cf Howard, supra note 20 at 169 n 20.

64 If the words of the codes are taken literally, it would seem that an act of intercourse partaken under the threat of 'never being taken to the pictures again' (Howard's example) would qualify as rape—or *could* qualify as rape.

65 Howard, supra note 20 at 167.

66 See May CJ in R v Dee (1884) 15 Cox CC 579, rejecting the line of cases (eg R v Fletcher (1859) Bell CC 63, 169 ER 1168; R v Fletcher (1866) LR 1 CCR 39; R v Barrat (1873) LR 2 CCR 81) in which it was considered that if a girl was ravished without her consent it was rape; but that if she gave her consent, though from an animal instinct, that would prevent the crime of rape from being committed.

67 OXFORD ENGLISH DICTIONARY (1971) 851.

68 E Jowitt, THE DICTIONARY OF ENGLISH LAW (1959) 455.

If the terror or apprehension in a particular person's mind is such that activity undertaken as a result of that terror is not the result of 'an act of reason', if there is no 'free exercise' of the will, then it would seem that there could not be said to be consent. If the idea of consent is applied as a subjective standard—which would seem to be the only intelligible standard which could be applied to the term—then it would seem irrelevant that another person would not have been terrified, or her reason overcome, by a threat of a similar nature. What might validly interfere with one person's ability to consent may be of no moment to another. The definition of rape is *not* that it is 'sexual intercourse without consent of the reasonable man'.

ALTERNATIVE STATUTORY PROVISIONS

The difficulties of determining which threats oust consent may be considered to be largely eliminated by the introduction of alternative offences such as the offence of procurement of a woman by threats. Section 64 of the *Criminal Law Consolidation Act* 1935 (SA) provides:

> Any person who—(a) by threats or intimidation, procures, or endeavours to procure, any person to have unlawful carnal connection with any other person . . . shall be guilty of a misdemeanour and liable to be imprisoned for any term not exceeding seven years.

Similarly the *Sexual Offences Act* 1956 (UK), based on the *Criminal Law Amendment Act* 1885 (UK) contains the provision that it is a misdemeanour 'to procure a woman by threats or intimidation to have unlawful sexual intercourse in any part of the world.'[69] Such provisions, however, simply cloud the issue.

There seems to be no clear indication of what crime or crimes 'procurement of a woman by threats' deals with. As Smith and Hogan point out, apart from the issue of jurisdiction arising under the United Kingdom provision,[70] it could well be argued that such sections cover the common law offence of rape where consent has been gained by means of threats.[71] However on a parallel with the creation of carnal

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69 S 2; it is based on s 3 of the Criminal Law Amendment Act 1885 (UK) which is now repealed.

70 Rape is indictable only if committed within the jurisdiction, whereas s 2 applies to procurement for the act 'in any part of the world'. This problem does not arise in the South Australian provision.

71 Smith & Hogan, supra note 16 at 327.

knowledge provisions[72] (which have been held not to oust the operation of common law rape where a girl is below the statutory age of consent[73]) it would seem that common law rape in relation to threat remains:[74]

> It is most improbable . . . that it was ever intended that the exaction of consent to intercourse by threats of violence should be punishable only with a maximum (under s.2, U.K. Act) of two years' imprisonment; and it is submitted that this is still rape at common law.

On this basis Smith and Hogan surmise: 'It may be that the statutory offence may be committed by threats of less gravity than are required for rape.'[75] Thus one returns to the question of 'how grave' should threats be to qualify an act of intercourse as rape? Or what are 'threats of less gravity' which qualify the act for a charge under the statutory provision? If rape is intercourse without consent, then where the threats, *whatever* their nature, are such as the particular woman cannot be said to consent, then the act will be rape: the statutory crime must then cover acts which are done with a true consent, but which are accompanied by threats which are not sufficient to destroy the woman's ability to reason and thus to agree to the act without coercion. This, which seems to be the inevitable and logical conclusion to be drawn, leads to a nonsensical result: that a man can be punished under the statute for undertaking the sexual act with a willing woman when he has accompanied the act with 'threats' of an insignificant nature.[76] Such acts would not seem to be within the compass of the criminal law. Thus a review of 'procuring by threats' enactments seems in order.

FEAR AND THREATS UNDER THE MODEL PENAL CODE

Taking into consideration problems arising under the common law of rape, the drafters of the Model Penal Code distinguished between the varying degrees of harm involved in forceful intercourse or other

72 Eg Criminal Law Consolidation Act 1935 (SA) s 50: 'Any person who unlawfully and carnally knows any person under the age of twelve years shall be guilty of felony, and liable to be imprisoned for life.'

73 R v Williams [1923] 1 KB 340; R v Harling [1938] 1 All ER 307.

74 Smith & Hogan, supra note 16 at 327.

75 Ibid.

76 Some threats might be interpreted by the woman as jokes and not taken seriously eg saying 'I won't love you any more' or brandishing a weapon which the woman believes is just a toy, or not loaded, etc. Alternatively, the man should be tried for making threats, but not for intercourse improperly procured.

sexual acts. 'Rape' was restructured into three degrees of harm: rape in the first and second degree, and 'gross sexual imposition'. 'Threat' was limited to that of imminent death, serious bodily injury, extreme pain or kidnapping. When such a threat was accompanied by the infliction of serious bodily injury upon anyone, or when the victim 'was not the voluntary social companion of the actor upon the occasion of the crime and had not previously permitted him sexual liberties' the crime would be rape in the first degree; in other circumstances than these, the crime would be rape in the second degree. 'Gross sexual imposition' relates to compulsion to submit under 'any threat that would prevent resistance by a woman of ordinary resolution'.[77]

Thus the Code evades the confusion arising under common law interpretations of 'consent'; nevertheless the approach, although adopted by several American jurisdictions,[78] cannot be said to be satisfactory. It can be questioned whether sexual intercourse with a female by compulsion to submit 'by any threat that would prevent resistance by a woman of ordinary resloution'[79] should be any less heinous than sexual intercourse with an unconscious woman. In the

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77 Model Penal Code, s 213.1. 'Rape and Related Offences (1) Rape. A male who has sexual intercourse with a female not his wife is guilty of rape if: (a) he compels her to submit by force or by threat of imminent death, serious bodily injury, extreme pain or kidnapping, to be inflicted on anyone; or (b) he has substantially impaired her power to appraise or control her conduct by administering or employing without her knowledge drugs, intoxicants or other means for the purpose of preventing resistance; or (c) the female is unconscious; or (d) the female is less than 10 years old.
Rape is a felony of second degree unless (i) in the course thereof the actor inflicts serious bodily injury upon anyone, or (ii) the victim was not a voluntary social companion of the actor upon the occasion of the crime and had not previously permitted him sexual liberties, in which cases the offense is a felony of the first degree. . . .
(2) Gross Sexual Imposition. A male who has sexual intercourse with a female not his wife commits a felony of the third degree if: (a) he compels her to submit by any threat that would prevent resistance by a woman of ordinary resolution; or (b) he knows that she suffers from mental disease or defect which renders her incapable of appraising the nature of her conduct; or (c) he knows that she is unaware that a sexual act is being committed upon her or that she submits because she falsely supposes that he is her hsuband.'

78 See Baldwin, *Criminal Law Revision in Delaware and Hawaii* (1971) 4 JLRef 476; Bartlett, Proceedings of Governor's Conference on Crime (April 21, 1966) 69; Cohen, *Criminal Law Legislation and Legal Scholarship* (1963) 16 J Legal Ed 253; Note, *Justification: The Impact of the Model Penal Code on Statutory Reform* (1975) 75 Col L Rev 914.

79 Note, however that the drafters took into account threats of a varying nature —eg 'to disclose an illicit affair, to foreclose the mortgage on her parent's farm, to cause her to lose her job, or to deprive her of a valued possession':

latter case, sexual intercourse only has been imposed; in the former, the woman has also been placed in trepidation. A man who takes advantage of an unconscious woman may in fact be less harmful to society and less of a threat than one who threatens in any way a conscious person and compels submission. The provision on kidnapping is less than clear also. Do the drafters mean that where a woman submits under *threat of kidnapping* the crime will be rape, but where she is actually kidnapped and then submits to intercourse the crime will not be rape?

Further, the 'voluntary companion' classification may not be an appropriate means of distinguishing first from second degree crimes. In differentiating the crimes, the drafters of the Code found justification in the contention that a '[C]ommunity's sense of insecurity (and consequently the demand for retributive justice) is especially sharp in relation to the character who lurks on the highway or alley to assault whatever woman passes, or who commits rape in the course of burglary.'[80] Certainly the fellow 'lurking in the bushes' is a dangerous threat. However it could also be said that a person who invites another on a social evening, then later overcomes his companion by force or threats and thus causes her to submit to intercourse provides an equally dangerous threat. The first-described actor provides an obvious threat; however the second may well be described as a 'concealed threat' who puts his forcible rape desires into practice with some forethought or subtlety.[81] Further, both 'voluntary companion' and previous permission for the taking of 'sexual liberties' are hard of definition;[82] nor may they necessarily denote dangerousness or lack thereof in relation to the act or the actor, or the harm caused.[83] Voluntary companions ought, it

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Model Penal Code, Tentative Draft No 4 (1955) s 207.4. This would cover the situation in R v McCoy [1953] 2 SA 4 (So Rhod); see text accompanying note 39 supra.

80 Drafter's comment, Model Penal Code, Tentative Draft No 4 (1955) 246.

81 It is certainly not unknown for an accused to have invited a woman to a particular entertainment, and without further encouragement from her in the way of sexual matters for an act of rape to take place. See Newton, *Factors Affecting Sentencing in Rape Cases* (Aust Inst of Criminology, 1976).

82 For example, when does a 'voluntary companion' become an 'involuntary companion', or must one say 'once voluntary, always voluntary' in the particular outing?

83 Notice, however, that it has been shown that more difficulties may be created where the Model Penal Code's 'involuntary companion' factor is eliminated. See Note, *Definition of Forcible Rape* (1975) 61 Va L Rev 1500, 1523 n 125. Nonetheless it would seem that the advantages of retaining such a standard are less than sufficient to justify a standard which has little relation to dangerousness and harm, the standards which the Model Penal Code drafters

could be said, to be equally protected from acts of intercourse which are forcible.[84]

OTHER STATUTES AND DRAFTS

A recent attempt at drafting a law which provides for degrees of seriousness in instances of forced sexual intercourse and acts of a sexual nature which include penetration of organs other than the vagina is that of the Working Party on Territorial Law.[85] Rape is committed where a male person has sexual intercourse with a female person, not his wife, compelling submission[86]

> by the infliction of force upon any person or by a threat to commit against any person an offence against [that person],[87] the threat being one which in all the circumstances of the case, could not reasonably have been withstood.

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contended to be those they used. It would be more useful to find other ways of differentiating truly on the basis of harm and danger.

84 Could it be said, for example, that a female student accepting a lift home from a student whom she has met in class suffers less or that the person giving the lift is less dangerous when instead of driving the girl home he takes her to a lonely place and rapes her? Even the 'sexual liberties' qualification is no very great help, in that it simply raises the question of consent at an earlier stage than at the intercourse stage: did she allow him to hold her hand, or was she afraid of him even at this point? and so on. It can also be questioned whether the fact that a girl allowed a man to hold her hand, place his arm around her, etc is truly relevant in determining whether the forcible act of intercourse was an act less dangerous than the act perpetrated upon a girl who has not previously met the assailant.
In setting up these two items as relevant to a classification of rape as more or less dangerous and more or less harmful to society the Model Penal Code appears simply to be restating in another form (although this form is, of course, less absurd in its conclusion, in that at least in the social companion-sexual liberties form the act may nevertheless be capable of qualifying for punishment) social attitudes of a type with which it would be hoped the law would not concern itself, eg the notion that 'some girls ask for it' and so on. Would a hitch-hiker come within the Model Penal Code's standard of 'social companion' and, if raped, would she be considered the victim of a less dangerous offender than the victim of the lurking-in-the-bushes assailant? The idea of some fault in the hitch-hiker victim (eg 'The general lack of prudence exhibited by some girls . . . was also seen as a factor aggravating pack rape.' Report of the Select Committee on Punishment of Crimes of Violence in Queensland (1974) s 9 at 5) is simply reformulated in the Model Penal Code in that persons who attack and rape 'social companions' allowing 'sexual liberties' pose a lesser threat to society, and their victims require less protection.

85 Report of the Working Party on Territorial Law (1975).

86 Id s 57.

87 The term used is 'offences against this Part', being the Part relating to offences against the person.

Here, the limitation to threats against the person and the standard of reasonableness may be criticised. If the attacker knows that the woman fancies herself to be the first great Australian novelist, and threatens to destroy the sole copy of her just completed 'great Australian novel' unless she submits, should he be subjected to a lesser penalty[88] than one threatening physical harm? The threat may well be just as compelling, or even more compelling to the particular woman. Should the man be permitted to profit from his knowledge of the woman's susceptibilities: a man threatens to destroy a woman's irreplaceable Stradivarius violin, and she is performing in an important event that night? Or, suppose he threatens to mutilate beyond recognition the only photograph of her long lost father; would a lesser penalty be appropriate?

How is 'reasonableness in all the circumstances of the case' to be interpreted? Do 'all the circumstances of the case' include the character of the woman, her particular susceptibilities and fears, so that what might be of no account to one woman can qualify as 'threats' for purposes of the section in the case of another? Or is the standard 'reasonableness in the eyes of the reasonable man or woman'? This problem may be overcome by recognizing that the actor might have been reckless:[89]

> If he threatens a woman in the hope of inducing her to have intercourse with him, or indeed threatens her for any other reason, and takes advantage of her fear, he must be regarded as reckless to the consequence that the law will not accept [his victim's] consent as a defence of his action.

The phrase 'all the circumstances of the case' may be interpreted as it would be in a murder case in which one must accept the victim's susceptibilities as they are. However, there should be clarity on this issue.

A further confusion arises in that in the interpretation section of the *Report* it is provided that 'consent', where required as an element of any offence, does not include any consent obtained by deception or

88 The penalty for rape is a maximum of 15 years imprisonment. Under the Report of the Working Party on Territorial Law (1975) threats in relation to property would possibly come under s 59 (based on s 2 of the Sexual Offences Act 1956 (UK): *'Procurement of sexual intercourse by threats.* It is an offence for a person to procure another person, by threats or intimidation, to have sexual intercourse in any part of the world.' Punishment for this offence is a maximum of five years imprisonment or 2,000 dollars fine. Note, however, that there is some confusion as to what such a section means in the United Kingdom Act, see text accompanying notes 69-76 supra.

89 Howard, supra note 20 at 170.

force, threats or intimidation which, in all the circumstances of the case, could not reasonably have been withstood.[90] Rape, in relation to 'compulsion to submit'; implies lack of consent as an element of the offence. Under the interpretation section, therefore, the common law confusion as to breadth of 'threats or intimidation' is incorporated into the *Report's* formulation. Additionally, it may be questioned why, in the case of compulsion to submit to sexual acts[91] with the actor, with other persons, or with animals varies from the standard of threat as required in the rape case. Section 58(1) provides that where any person *engages* in a sexual act with another, not his spouse, the relevant threat is one against the person. Section 58(3) states:

> Any person who by means of force or by a threat which, in all the circumstances of the case, could not reasonably have been withstood, compels another person to engage in a sexual act with any person or with any animal, commits an offence.

Here the threat is not limited to threats against the person. It could be contended that a person who compels another to have intercourse with himself comes under this section, as well as under section 58(1), so that that section is rendered superfluous and the limitation of threats therein can be evaded. Apart from this, however, it is not clear why threats other than against the person should be relevant to compulsion to submit to other persons and to animals, but not to the threatener himself.

Another legislative attempt to reform the law relating to rape is that of Michigan's new law. First degree sexual assault[92] is committed where a party engages in sexual penetration, and causes serious personal injury to the victim; when the actor '[C]oerces the victim to submit by threatening to use force, violence, or superior physical strength on the victim, and the victim believes that the actor has the present ability to execute these threats'; and when the actor coerces the victim

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90 Report of the Working Party on Territorial Law (1975), s 9 Interpretation. Cf Sexual Offences Act 1967 (UK) s 6.

91 S 9 of the Report defines 'sexual act' as meaning 'an act of sexual contact between any person with another person where the contact is between the penis and the anus, the mouth and the penis, the mouth and the vulva, or the penis and the vulva, and for the purposes of this definition "penis" shall include an artificial substitute'. There seems to be little difference—if any—between the harm and danger of such acts and the act of penetration of the vagina. Why should there be a difference in the type of threats used to subdue the victim?

92 Rape and other offences such as buggery and indecent assault are redefined to come within four degrees of 'sexual assault', denoting different degrees of harm and danger.

to submit '[B]y threatening to retaliate against the victim, or any other person, and the victim believes that the actor has the ability to execute these threats in the future.'[93] 'Retaliation' is said to include threats of future physical or mental punishment, kidnapping, false imprisonment or forcible confinement, extortion, or public humiliation or disgrace. Second degree sexual assault involves 'sexual contact'[94] causing serious personal injury to the victim, and carried out in circumstances including those of such threats as for first degree assault. Third and fourth degree sexual assault involve respectively sexual penetration[95] and sexual contact carried out in like circumstances as for first and second degree assault, but without serious personal injury to the victim.[96]

The value of this approach is that the difficulties of consent are done away with, the dangerousness of the crime and the offender being measured in relation to surrounding circumstances, such circumstances being outlined in an objective manner in order to eliminate those problems which have arisen at common law.

Under the Michigan law, it is the victim herself who determines whether or not the threat might have been carried out, and reasonableness in terms of the ordinary man or woman has no relevance to submission. It is recognized that full justice will be done to the accused in that the requisite intent (including recklessness) must be proved by the prosecution beyond reasonable doubt, so that if the woman submits but the man does not recognize that she has interpreted his actions as threats, or has been coerced by his threats,[97] he will not be guilty. The infelicity of the wording of the Model Penal Code on the issue of kidnapping[98] is done away with, in that the threat of kidnapping is included. Additionally a person will be guilty of sexual assault when the victim submits under circumstances involving forcible

93 Mich Comp Laws Ann s 520 a (1) (C) & (D).

94 'Sexual contact' is defined in s 520A (H) as including the intentional touching of the victim's sexual or intimate parts, the intentional touching of the victim's clothing covering the immediate area of the victim's sexual or intimate parts, or kissing. Sexual contact includes only that aforementioned conduct which can be reasonably construed as being for the purpose of sexual arousal or gratification.

95 That is, under s 520A (I), sexual intercourse in its ordinary meaning, cunnilingus, fellatio, anal intercourse, or any intrusion, however slight, of any part of the actor's body or any object manipulated by the actor into the genital or anal openings of the victim's body. Sexual penetration does not require emission of semen.

96 Ss 520C & 520I.

97 Although this would be a rare case.

98 See text following note 79 supra.

confinement or kidnapping. Thus it is admitted that a submission whilst in confinement, although there is no immediate threat involved, is a submission brought about by what is in itself a coercive situation. Further, the inclusion of factors such as 'public humiliation or disgrace' as being capable of coercing a victim brings the law into line with what appears to be the common law in relation to contract.[99] Thus, simply because a man is more subtle in his ways than one who threatens physical harm, does not mean that he is any less dangerous, or that his crime should be punished less.[100]

Criticisms can be made of the Michigan law. For example, there is no clear direction on the issue of threats to others. Section 520C(C) relates to the threat of physical violence against the victim only. Section 520C(D) relates to threats against others, but mentions 'retaliation' only, which is said to include threats of future physical or mental punishment and so on. Thus it seems that threats of current physical violence on others—for example companions of the victim, a not unusual occurrence[101]—are not dealt with. Further the inclusion of threats of 'mental punishment' has been subject to criticism on the grounds that this may 'be apt to cause evidentiary problems at trial'.[102] Furthermore, '[T]he criminal defendant is not required to "take his victim as he finds him", at least insofar as emotional instability is concerned.'[103] Nonetheless one critic sums up:[104]

> Obviously, defining actor conduct which is condemnable solely for its mental impact is an extremely difficult task which should depend primarily on psychological study. If the standard can be objectively defined, the actor who inflicts [or threatens to inflict] severe mental anguish might fairly receive as harsh a punishment as the actor who inflicts severe physical injury.

The Michigan law is, despite any criticisms, an admirable attempt to review and reform common law problems of consent in rape, and in view of current dilemmas certainly deserves attention at least in common law countries.

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99 See text at notes 48-60 supra.

100 As in contract law, it is recognized that subtle coercion can render apparent consent meaningless just as effectively as can physical threats.

101 See Newton, *Factors Affecting Sentencing in Rape Cases* (Aust Inst of Criminology 1976).

102 Note, *Recent Statutory Developments in the Definition of Forcible Rape* (1975) 61 Va L Rev 1500, 1527.

103 Ibid. But see comments in text accompanying note 89 supra.

104 Id at 1528 (footnote omitted).

CRITICISM OF THE CONSENT STANDARD IN RAPE BY FEAR AND THREAT

Courts have sought to enunciate legal standards for consent with respect to allegations of rape, rather than leaving the issue as a question of fact for the jury. Thus, judges have intruded into an area which in terms of the common law definition of rape should be dealt with by the jury. This appears to suggest that juries are incompetent to do their job, that is, to review the facts as impartially as possible, and to make findings beyond a reasonable doubt without being led astray by prejudices or irrelevancies. The jury is indispensible to the common law justice system.[105] If rape is defined as 'carnal knowledge of a woman without her consent', then it makes nonsense of the proposition that the jury is the trier of fact if the judge takes it upon himself to tell the jury what is or is not consent.

If the purpose of the law is to protect women from acts of sexual intercourse to which they have not in fact consented, whether by reason of force actually applied, physical or other threat, or fear induced by the accused or by others, then the relevant question would appear to be: Did this particular woman, in these particular circumstances, submit to this particular man; or did she in fact freely consent to have intercourse with him? If, on the contrary, the law requires a woman[106] to react in a particular way, that is, by fighting back against her attacker[107] and sustaining a certain degree of damage inflicted by the accused[108] in order to signify the lack of consent, and

105 Of course criticism of the jury system as a whole is often voiced in current times, with agitation for reform of the system or its complete abolition. However this criticism is—and should be—based upon inadvisability of the jury as a general rule. As long as the system is accepted, then the jury should be permitted to do its job, not used as a mask for decision making in both law and fact by the judge.

106 Ie an adult in possession of her faculties. R v Day (1841) 9 Car & P 722, 173 ER 1026, 1027 appears to limit the difference-between-consent-and-submission rule to young victims: 'It would be too much to say that an adult submitting quietly to an outrage of this description, was not consenting: on the other hand, the mere submission of a child when in the power of a strong man, and most probably acted upon by fear, can by no means be taken to be such a consent as will justify the prisoner in point of law.' This seems to indicate that a standard for young victims differs from the standard to be applied to the adult. It cannot, however, be for the judge to say; it is a question for the jury.

107 See Scutt, *The Standard of Consent in Rape* (1976) 20 NZLJ 462.

108 In Note, *Forcible and Statutory Rape: An Exploration of the Operation and Objectives of the Consent Standard* (1952) 62 Yale LJ 55, 58 it is pointed out: 'For the aid of the fact finder, rules of evidence regulate the admission on the merits of material thought to be relevant indicia of the

if the law deems the woman to have consented to the act despite ample evidence of threats which rendered her submissive but non-consenting,[109] then the law cannot be said to be serving its true function of protecting individuals from the imposition of non-consensual sexual intercourse.

Whether the relevant threats do or do not measure up to standards which appear to be set in current rape cases—that the threat be immediate, physical, violent, interpreted on a reasonable-man standard —the accused is amply protected. He cannot be convicted unless the prosecution has proved beyond a reasonable doubt the requisite state of mind: that he intended to have intercourse with the woman without her consent, and did so; or that he was reckless thereto.[110] By imposing an artificial standard of consent, [111] by requiring the woman concerned to resist or at least not simply to suffer the imposition of the act as a lesser evil, the criminal law would seem to require a measure of 'self-help' which it does not require in any other area of criminal law—and indeed which is usually frowned upon by the law.[112]

J A SCUTT*

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complaining witness' subjective state of mind. Objective signs of a physical struggle—such as bruises or scratches on the parties, torn clothing, traces of blood, and screams—are always admissible.' In too many cases, however, they seem to be required so that in their absence consent is assumed. See eg Allford v State (1943) 244 Ala 148, 12 So2d 404 cert den 244 Ala 148, 12 So2d 407; People v Cox (1943) 383 Ill 617, 50 NE2d 758; R v Dimes (1911) 76 JP 47, 7 Cr App Rep 43 CCA.

109 Eg in People v Cavanagh (1916) 30 Cal App 432, 158 P 1053 a man posed as a police officer, threatening to arrest the girl if she refused to submit to the act of intercourse. This was considered irrelevant to the question of whether the girl submitted under fear and threats. Contrast the contract law case of Kaufman v Gerson [1904] KB 591 where a threat to prosecute another was held sufficient to oust consent. See text accompanying notes 53-60 supra.

110 DPP v Morgan (1975) 61 Cr App Rep 136.

111 Ie a legal not a factual standard.

112 Eg the defence of necessity is certainly not looked upon with delight by the courts. The same may be said of self-defence: where more self-defence is used than is considered necessary the actor will be criminally liable. It should not be the case that a woman is placed in the position of possible liability as a matter of law, by being called on to help herself.

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