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Nebraska's Corroboration Rule

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Comment

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I trust we have not reached the point in our criminal law where it is necessary only to accuse in order to convict . . .[1]

I. INTRODUCTION

In *State v. Fisher*[2] the Nebraska Supreme Court held:

> [A]s a matter of law the testimony of the prosecutrix alone and uncorroborated by any other evidence is not sufficient to sustain a conviction for rape or assault with intent to commit rape. That rule is applicable whether the defendant does or does not testify . . . .[3]

The *Fisher* holding significantly modified the Nebraska corroboration rule to comply with the constitutional mandate that "no person shall be compelled in any criminal case to give evidence against himself."[4] Despite this important modification, the Court wisely retained the essence of the corroboration rule, which was first adopted in 1886 in *Matthews v. State*[5] as a departure from the com-

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1. Frank v. State, 150 Neb. 758, 35 N.W.2d 816, 825 (1949) (Simmons, C.J., dissenting).
2. 190 Neb. 742, 212 N.W.2d 568 (1973).
3. *Id.* at 746-47, 212 N.W.2d at 571.
4. NEB. CONST. art. I § 12. The constitutional issue presented in *Fisher* will not be discussed in this Comment. Regarding the constitutionality of the rule, the state argued: "It is only when there is a denial by the accused that corroboration is necessary. He has a right to testify or not and in the case at bar he chose not to which left the victim's testimony undisputed." State v. Fisher, 190 Neb. 742, 212 N.W.2d 568 (1973), Appellee's Brief at 8. The court rejected this contention saying, "It is quite obvious that the application of the corroboration rule cannot be made to depend on whether or not the defendant denies the prosecutrix' testimony. The defendant is entitled to the presumption of innocence." 190 Neb. at 746, 212 N.W.2d at 571.
5. The court's precise holding was:

   > If no marks are left upon the person or clothing (of the prosecutrix), and no complaint is made at the first opportunity, a doubt is thrown upon the whole charge; and unless the testimony of the prosecutrix is corroborated on material points, where the accused testifies as a witness on his own behalf and denies the charge, the testimony of the prosecutrix alone is not sufficient to warrant a conviction.

   Matthews v. State, 19 Neb. 330, 335, 27 N.W. 234, 236 (1886). The rule was made applicable to cases of assault with intent to commit rape in McConnell v. State, 77 Neb. 773, 110 N.W. 666 (1906).

mon law.[6] Because Nebraska decisions have adopted the so-called unqualified corroboration rule in the absence of a legislative mandate,[7] Nebraska occupies a unique position among a small minor-

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6. *See* UNDERHILL, CRIMINAL EVIDENCE § 762 (5th ed. 1957).
7. The positions of the several states may be classified into three groups:
   1. **Corroboration necessary for conviction:**
   United States v. Jenkins, 436 F.2d 140 (D.C. Cir. 1970) (Testimony of the victim must be corroborated both as to corpus delicti *and* the *identity* of the accused—no statutory requirement). The D.C. rule is considerably more stringent than the Nebraska rule; Wesley v. State, 225 Ga. 22, 165 S.E.2d, 719 (1969) (victim's testimony must be corroborated); but there is a statutory requirement, GA. CODE ANN. § 26-2001 (1972); *See also* N.Y. PENAL LAW § 130.16 (McKinney Supp. 1974) (making New York law more stringent); IOWA CODE ANN. § 782.4 (1950).
   2. **Corroboration required in special circumstances:**
   Territory of Hawaii v. Hayes, 43 Hawaii 58 (1958) (victim's testimony must be clear and convincing and supported by surrounding circumstances); State v. Gee, 93 Idaho 636, 470 P.2d 296 (1970) (defendant may be convicted of statutory rape on the uncorroborated testimony of the prosecutrix *if*: (1) the character of the prosecutrix for truthfulness remains unimpeached; (2) the character of the prosecutrix for chastity remains unimpeached; (3) the circumstances surrounding the offense are clearly corroborative of the prosecutrix testimony); People v. White, 26 Ill. 2d 199, 186 N.E.2d 351 (1962) (testimony of prosecutrix must be clear and convincing and supported by surrounding circumstances; Robinson v. Commonwealth, 459 S.W.2d 147 (Ky. App. 1970) (unsupported testimony of prosecutrix *if* not contradictory or incredible, or inherently improbable, *may* be sufficient to sustain conviction of rape); State v. Dipietrantonio, 152 Me. 41, 122 A.2d 414 (1956) (corroboration must be probable and credible); Coward v. State, 10 Md. App. 127, 268 A.2d 508 (1970) (testimony of victim *if* believed, including her positive identification of accused as perpetrator of the crime, is sufficient to support conviction of rape); Goods v. State, 245 Miss. 391, 146 So. 2d 74 (1962) (sufficient, but should be scrutinized with caution); State v. Gray, 423 S.W.2d 776 (Mo. 1968) (corroboration of prosecutrix version of incident is not required, where evidence was not contradictory in nature or unbelievable); Strunk v. State, 450 P.2d 216 (Okla. Crim. App. 1969) (conviction for rape may be had on the uncorroborated testimony of the prosecutrix, or on slight corroboration, where the testimony of the prosecutrix is not inherently improbable or unworthy of credence); Carroll v. State, 212 Tenn. 464, 370 S.W.2d 523 (1963) (corroboration not *required, but* charge of rape must be made out by proof clear and sufficient to satisfy the jury's mind of defendant's guilt beyond a reasonable doubt); Fogg v. Commonwealth, 208 Va. 541, 159 S.E.2d 616 (1968) (corroboration of the prosecutrix in a rape case is not essential and her testimony alone is sufficient to sustain a conviction *if* it is credible); State v. Jennen, 58 Wash. 2d 171, 361 P.2d 739 (1961) (corroboration of prosecutrix testimony as to actual act of intercourse not required).
   3. **No corroboration necessary:**
   Blackmon v. State, 240 So. 2d 696 (Ala. Crim. App.), *cert. denied*, 240 So. 2d 699 (Ala. 1970) (the fact that appellants' convictions rest upon

ity of states.

This Comment will attempt to analyze and justify the Nebraska Supreme Court's retention of the corroboration rule in cases of rape and assault with intent to commit rape.[8] The analysis is based on two broad principles. First, the state's burden of proof in all criminal cases is proof beyond a reasonable doubt. Despite this formulation of the standard of proof, no citation is necessary for the proposition that judicial proof is notoriously imprecise. As an idealistic goal, then, our system should strive to inject ever-increasing degrees of rationality into the criminal law administration. By retaining the corroboration rule, the Nebraska Supreme Court has helped to ensure rational input upon which the fact finder can rely in resolving factual conflicts and in determining issues of credibility. The corroboration rule advances this goal by imposing on the state a slightly higher burden in proving the corpus delicti, if even only symbolically so.

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her uncorroborated testimony is of *no* consequence); Bakken v. State, 489 P.2d 120 (Alaska 1971) (statutory rape has no corroboration requirements); State v. Dutton, 106 Ariz. 463, 478 P.2d 87 (1970) (testimony of prosecuting witness alone is sufficient to support a conviction); Lacy v. State, 240 Ark. 84, 398 S.W.2d 508 (1966) (testimony of prosecutrix need not be corroborated); People v. Stevenson, 275 Cal. App. 2d 645, 80 Cal. Rptr. 392 (1969) (the victim's testimony does not require corroboration); Smith v. State, 239 So. 2d 284 (Fla. 1970) (corroboration of prosecutrix' testimony is not necessary to authorize conviction for rape); Douglas v. State, 254 Ind. 517, 261 N.E.2d 567 (1970) (uncorroborated testimony of the victim is sufficient to sustain the judgment of conviction); State v. Bouldin, 153 Mont. 276, 456 P.2d 830 (1969) (uncorroborated testimony is sufficient); Application of Bennett, 77 Nev. 429, 366 P.2d 343 (1961) (testimony of prosecutrix need not be corroborated); State v. Fitzmaurice, 475 P.2d 426 (Ore. App. 1970) (rape conviction on the uncorroborated testimony of the prosecutrix); State v. Fulks, 83 S.D. 433, 160 N.W.2d 418 (1968) (corroboration of testimony of complaining witness not essential to conviction for statutory rape); Thomas v. State, 466 S.W.2d 783 (Tex. Crim. App. 1971) (prosecutrix testimony in prosecution for assault with intent to rape need not be corroborated); State v. Hodges, 14 Utah 2d 197, 381 P.2d 81 (1963) (testimony of prosecutrix may alone be sufficient for conviction).

8. NEB. REV. STAT. § 28-408 (Cum. Supp. 1974) provides:

> Whoever shall have carnal knowledge of any other woman, or female child, than his daughter or sister, as aforesaid, forcibly and against her will; or if any male person, of the age of eighteen years or upwards, shall carnally know or abuse any female child under the age of eighteen years, with her consent, unless such female child so known or abused is over fifteen years of age and previously unchaste, shall be deemed guilty of rape . . . .

NEB. REV. STAT. § 28-409 (Reissue 1964) provides: "Whoever assaults with intent to commit a . . . rape, . . . upon the person so assaulted, shall be imprisoned . . . ."

Second, because legal doctrines "derive meaning and content from the circumstances that gave rise to them and from the purposes they were designed to serve . . .,"[9] we should not be anxious to change an established legal doctrine, unless experience has shown that the pertinent causative circumstances no longer prevail or that the doctrine no longer serves its intended purpose. Ostensibly, the purpose of the corroboration rule is the prevention of injustice resulting from convictions based upon unreliable evidence. An examination of Nebraska's experience with the corroboration rule reveals that the circumstances which gave rise to the rule are still prevalent and that the rule has been the source of little, if any, demonstrable injustice, but instead has prevented injustice for "it is better that ten guilty persons escape, than that one innocent suffer."[10]

Part II of this Comment will analyze the theory of the corroboration rule. In part III Nebraska's rule is explained and in part IV the *Fisher* case is used to illustrate that the need for a corroboration rule still exists.

II. ANALYSIS AND JUSTIFICATION

A. The Offenses

A threshold question in a case of assault with intent to commit rape seems to be, even assuming arguendo that the corroboration rule should apply in rape cases, why should the rule be applicable to the lesser assault charge?[11] The Nebraska Supreme Court established at an early date that sections 28-408 (defining rape) and 28-409 (proscribing assault with intent to commit rape) of the Nebraska Revised Statutes must be read *in pari materia*.[12]

The result is that "an assault with intent to commit rape includes every essential element of the crime of rape except the accomplishment of that crime."[13] Thus, all the defenses to a rape charge are available to the defendant in an assault case. Further, the crime of assault has its own essential elements: the assault and the requisite intent.

9. Reid v. Covert, 354 U.S. 1, 50 (1957) (Frankfurter, J., concurring).
10. W. BLACKSTONE, COMMENTARIES Book IV, ch. 27 at 358.
11. State v. Fisher, 190 Neb. 742, 212 N.W.2d 568 (1973), is an assault with intent to commit rape case. The Nebraska Supreme Court offered no theoretical justification in *Fisher* for the application of the rule to assault cases, even though it had done so in earlier decisions not cited by the court in *Fisher*.
12. Hall v. State, 40 Neb. 320, 58 N.W. 929 (1894); Davis v. State, 31 Neb. 247, 47 N.W. 854 (1891).
13. Frank v. State, 150 Neb. 745, 754, 35 N.W.2d 816, 823 (1949).

Assault has been defined by the Nebraska Supreme Court as

> an attempt unlawfully to apply any—the least—actual force to the person of another, directly or indirectly, without the consent of the person assaulted . . . [c]onsent on the part of the complainant deprives the act of the character of an assault . . . .[14]

There is, then, in cases where the lack of consent is an issue, special reason to scrutinize the evidence closely, because consent is an absolute defense to both crimes.[15]

The intent element must be an intent not only to have intercourse, but also an intent to use the force necessary to accomplish the intended sexual intrusion.[16] Intent need not be proved by direct evidence, but may be established by evidence of the facts and circumstances surrounding the act. However, intent must be proved beyond a reasonable doubt.[17]

Since the elements of the crimes of rape and assault are nearly identical, it follows that the techniques for proving those elements are similar. Therefore, the same circumstances that gave rise to the corroboration rule in rape cases are also present in the assault cases.

One of the few substantial differences between a rape conviction and a conviction of the lesser offense of assault with intent to commit rape is the severity of the possible penalty.[18] Therefore, the only benefit obtained by dropping the corroboration rule, where the charge is reduced from rape to assault with intent to commit rape, is that persons convicted of the lesser charge may serve a shorter sentence. This is true despite the fact that unreliable evidence might have formed the basis of the conviction of the lesser charge. This result would not serve the purpose of the corroboration rule—the prevention of convictions based upon unreliable evidence, and, therefore, the prevention of injustice.[19] Thus, the conclusion is inescapable; the corroboration rule should apply to both rape and assault cases if it is to apply at all.

B. Factors

One author has taken the following position:

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14. Liebscher v. State, 69 Neb. 395, 397, 95 N.W. 870, 871 (1903).
15. Frank v. State, 150 Neb. 745, 754, 35 N.W.2d 816, 823 (1949).
16. *Id.*
17. Pew v. State, 164 Neb. 735, 743, 83 N.W.2d 377, 382 (1957).
18. The rape penalty is three to fifty years imprisonment, while the penalty for assault with intent to commit rape is two to fifteen years imprisonment. NEB. REV. STAT. § 28-408 (Cum. Supp. 1974); § 28-409 (Reissue 1964).
19. Note, *Corroborating Charges of Rape*, 67 COL. L. REV. 1137, 1144 (1967).

> A rape charge does have some distinctive characterisitics. The penalties upon conviction are inordinately severe. The mere accusation, even if the prosecution is unsuccessful, may damage a defendant's reputation and livelihood far more deeply than would prosecution for another crime. Yet, the gravity of the offense alone cannot justify the requirement in view of the severity of the penalty for other crimes for which no corroboration is required. Neither the supposed distinctiveness of rape as a crime, nor the explicit justifications for the corroboration requirements, are sufficient reason for a categorical rule . . . precluding conviction on the unsupported testimony of a complainant . . .[20]

First, this is a bootstrapping rationale. The assertion that because no formal corroboration rule attaches to the proof of other major crimes punishable by severe penalties corroboration should not be required in rape and assault cases is fallacious. The obvious corollary to the above assertion is that corroboration may be needed in other grave crimes as well. The "comparative gravity" argument cuts both ways.

Of more importance, rape and assault with intent to commit rape are fundamentally distinctive crimes. The distinguishing considerations are not the severe penalties[21] and the damage to the accused's reputation. Rather, at least three factors combine to render such charges unique.

First, the legal concept of corpus delicti is not provable in the same way as in most other crimes. Second, consent is not only a defense, but lack of consent is an element of rape and the lesser assault charge. Finally, there is an isolation factor. There tend to be no witnesses to the act, other than the prosecutrix,[22] and the frequent lack of physical evidence (especially in assault cases), makes credibility especially important in proving or disproving the charge, because of the well-known phenomenon that "the jury's assessment of the credibility of the witnesses and their evidence is not always rational."[23]

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20. Comment, *The Rape Corroboration Requirement: Repeal Not Reform*, 81 YALE L.J. 1365, 1384 (1972) (footnotes omitted). The Yale writer and this writer obviously disagree on most points common to the two articles. However, that writer and this writer do agree that the "explicit justifications" listed and discussed in the Yale article (which are the usually cited justifications for the rule, i.e., (1) frequency of false rape charges, (2) emotional impact on the jury, and (3) the difficulty in disproving the charge) are not alone sufficient to justify the rule. As will be seen in the development of this article, those "explicit justifications" do not represent a complete analysis of the corroboration rule. Rather, they are simply supporting arguments for the justifications propounded in this article.
21. *See* note 18 *supra.*
22. Stapleman v. State, 150 Neb. 460, 464, 34 N.W.2d 907, 910 (1948).
23. Hibey, *The Trial of a Rape Case: An Advocates' Analysis of Corroboration, Consent and Character*, 11 AM. CRIM. L. REV. 309, 310 (1973).

1. The Corpus Delicti

Though not frequently discussed today, proof of the corpus delicti is essential to obtaining a conviction for any crime. Corpus delicti is best understood by dividing it into two parts: first, a specific loss or injury must have occurred, and second, the source of the loss or injury must have been someone's criminality, as opposed to an accidental loss or injury.[24] It is vitally important to the operation of Nebraska's corroboration rule, that the *identity* of the wrongdoer is not a component of the corpus delicti.[25] The corpus delicti must be proved by evidence beyond a reasonable doubt, either by direct or circumstantial evidence.[26]

In cases of murder, a person is dead; in theft, property is missing; in arson, property is burned. But in rape or assault, there may be no tangible proof from which the corpus delicti can be inferred. There may be medically demonstrable evidence of sexual intercourse or penetration, but that alone does not prove the second component of the corpus delicti—that someone's criminality was the source of the sexual invasion. In the true[27] assault cases, there will be no medical proof of the sexual invasion. The court's conclusion that criminality was the source of the injury must be based upon nothing more reliable than the victim's after-the-fact report of her self-perceived attitude toward the act; an attitude which may not have been clear to the victim herself.[28]

Although at least some jurisdictions, notably the District of Columbia, require corroboration of both the corpus delicti and the identity of the accused,[29] Nebraska's corroboration rule applies only to the corpus delicti. The Nebraska Supreme Court made it clear in

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24. Henn v. State, 172 Neb. 597, 601, 111 N.W2d 385, 388 (1961). *See also* W. LaFave & A. Scott, Handbook of Criminal Law, 18, 19 (1972); 7 Wigmore, Evidence § 2072 (3d ed. 1940).
25. *See* note 30 and accompanying text *infra.*
26. *Id.*
27. "True" assault with intent to commit rape is used to mean those cases where the event consisted *solely* of the assault with the requisite intent, as opposed to those cases where the charge is reduced by the prosecution from rape to assault for whatever reason, but where the act was consummated.
28. Comment, *Forcible and Statutory Rape: An Exploration of the Operation and Objectives of the Consent Standard,* 62 Yale L.J. 55, 58, 65 (1952); Amir, Patterns in Forcible Rape, 259-276 (1971).
29. This fact is what makes Nebraska's rule considerably less stringent than the rule followed in the District of Columbia. United States v. Jenkins, 436 F.2d 140 (D.C. Cir. 1970) (testimony of the victim must be corroborated *both* as to corpus delicti and the *identity* of the accused).

Noonan v. State[30] that the prosecutrix' identification of the accused as her attacker need not be corroborated. The *Noonan* court's rationale is instructive.

> [W]here the *corpus delicti* involved in a charge of assault with intent to commit rape, robbery, murder, or with intent to do great bodily harm has been fully established . . . , a woman's evidence is entitled to receive the same consideration from our tribunals as that to which the evidence of a man under like circumstances is entitled. . . . [T]he contention as to the necessity of corroboration of the prosecutrix' evidence . . . connecting the defendant with the offense, is disapproved.[31]

Even under the Nebraska rule, however, the state is required to prove with corroboration, as part of the corpus delicti, that a crime was committed by someone before the case can go to the jury. This is readily inferable from the court's holding in *Fisher*. "[A]s a matter of law the testimony of the prosecutrix alone and uncorroborated by any other evidence is not sufficient to sustain a conviction for rape or assault with intent to commit rape."[32]

The Nebraska Supreme Court has deliberately chosen to require a more rigorous standard of proof concerning the corpus delicti in cases of rape or assault. By raising the state's burden of proof with respect to the corpus delicti, the court has declared its intention to inject greater rationality into such cases. But this alone does not sufficiently justify the corroboration rule.

2. *Consent*

Consent bears directly on the need for a corroboration rule in rape and assault cases in at least two different ways. First, the lack of consent is an element of the corpus delicti of rape or the lesser included assault charge. Further, the consent element of such crimes is one of the most subjective, and therefore, irrational, aspects of the proof of either crime. It is precisely because of the subjectivity involved in the proof of non-consent that a corroboration rule is particularly justifiable.

It should be clear that if the state cannot prove beyond a reasonable doubt that the prosecutrix did not consent, then neither a rape nor an assault charge can be maintained. If the prosecutrix consent ed, an act that would otherwise constitute a rape or an assault loses

30. 117 Neb. 520, 221 N.W. 434 (1928) (assault with intent to commit rape); *cf.* Wade v. Hicks, 191 Neb. 847, 849, — N.W.2d —, — (1974) (reaffirming *Noonan* and applying the rape corroboration rule in a paternity suit).
31. *Id.* at 525, 221 N.W. at 436.
32. 190 Neb. at 746-47, 212 N.W.2d at 571.

that characterization.[33]

Consent must continue to be of primary importance because it is the heart of the proscriptions involved. What is protected through rape and assault laws is not simply a person's integrity from violent or wrongful invasions by other persons, although certainly that is one of the more important effects of such laws. The essence of such criminal (and tort) laws is the protection of the personal, bodily integrity of females—not only from unlawful invasions, but specifically from non-consensual invasions.[34]

The consent standard, however, is a major source of the irrationality surrounding prosecutions of rape or assault charges. The irrationality addressed by this point is not that of the fact finder, but that of the prosecutrix herself. In many cases her irrationality, that is, her subjective evaluation of the event is merely adopted by the fact finder if the fact finder determines the prosecutrix' testimony to be credible. Thus, regardless of the resolution of the consent issue, credibility (because it is the basis for determining consent) is the crux of the problem.[35]

The consent standard is a source of irrationality, because in some cases, from the psychological point of view, the prosecutrix' conscious response to the sexual demands of her alleged attacker may not accurately be labelled as either consensual or non-consensual. In cases of sudden sexual attack by unknown persons, it may be reasonable to assume the victim's response would have been opposition. However, where participants in the alleged rape or assault were previously acquainted, possibly to the point of a dating relationship, then it seems neither reasonable nor fair to assume conclusively that the female's response was one of non-consent and actual opposition.

Because the prosecutrix' self-perceived attitude may not have been clear even to herself, the fact finder must rely on her behavior. Although more reliable than an after-the-fact assertion of a self-perceived attitude, behavior is also unreliable because it may be ambiguous or even inconsistent with the actor's subjective attitude.[36] Adding to the unreliability of behavior as a mani-

33. Liebscher v. State, 69 Neb. 395, 397, 95 N.W. 870, 871 (1903); NEB. REV. STAT. § 28-408 (Cum. Supp. 1974); *cf.* State v. Campbell, 190 Neb. 22, 25, 206 N.W.2d 53, 56 (1973).
34. It is true that in rape and the assault situations, invasion is unlawful because it is non-consensual. Consensual sexual "invasions," however, may also be unlawful. *See, e.g.*, NEB. REV. STAT. §§ 28-902 (adultery), 28-928 (fornication) (Reissue 1964).
35. *Supra* note 23, at 322.
36. Comment, *supra* note 28, at 65-70.

festation of an attitude is the "consent standard" itself. "It is only required that the female make reasonable resistance in good faith under all the circumstances and that the resistance be such as to make non-consent and actual opposition genuine and real."[37]

The potentially prejudicial effects of the prosecutrix' possibly unreliable behavior would be mitigated if the prosecutrix accurately recalls and reports her true attitude. The individual's psychological processes, however, frequently alter the content of one's perceptions. Thus,

> the woman's recall will often be tailored to fit personality needs which become dominant after the act. The stronger these needs and the more ambivalent the original attitude, the greater is the subsequent distortion. . . . Particularly since most reports are made to parents, police, or prosecutors, the woman is likely to recall her attitude as one of opposition.[38]

The problem of unreliable reports is accentuated by the techniques used by untrained interviewers, (a group including most parents and police); particularly when the victim is subject to emotional trauma resulting from a sexual attack.[39]

Just as dangerous to the accused as involuntarily distorted recall is the frequent incidence of deliberate false accusation. Reported cases reveal a substantial number of motives behind false accusations.[40] While in most situations sophisticated investigative methods would probably reveal false accusations,[41] the person accused of assault in cases where he was with the prosecutrix at the time of the alleged crime and, therefore, had the opportunity to commit an assault, usually will not be in a position to benefit from this investigation. Since proof of penetration is not required and frequently physical evidence of an assault is absent, an innocent person may find it difficult to meet the false charge.

Such cases become nothing more than swearing contests,[42] leaving the fact-finder no rational way to resolve the conflict. The corroboration rule automatically resolves the conflict in favor

37. State v. Campbell, 190 Neb. 22, 25, 206 N.W.2d 53, 56 (1973).
38. MACDONALD, RAPE: OFFENDERS' AND THEIR VICTIMS, 236 (1971).
39. *See* KINSEY, *et al.*, SEXUAL BEHAVIOR IN THE HUMAN MALE, 35-62 (1949); *cf.* Note, *The Victim in a Forcible Rape Case: A Feminist View*, 11 AM. CRIM. L. REV. 335 (1973).
40. *See e.g.*, Dunn v. State, 127 Tenn. 267, 154 S.W. 969 (1913); State v. Snow, 252 S.W. 629 (Mo. 1923); Allen v. State, 134 P. 91 (Okla. Crim. App. 1913); Martinez v. State, 59 S.W.2d 410 (Tex. Crim. App. 1933); Shock v. State, 200 Ind. 469, 164 N.E. 625 (1929); State v. Anderson, 272 Minn. 384, 137 N.W.2d 781 (1965); *see also* MACDONALD, *supra*, note 38 at 210-11.
41. *Supra* note 20 at 1375.
42. *Supra* note 19 at 1139.

of the accused.[43] Since it is true that a charge of rape or assault is not necessarily untrue simply because it cannot be corroborated, the social cost of this decision is that some guilty persons are freed.[44] But making convictions easier to obtain enhances the risk of convicting innocent persons. It is submitted that this social cost is too high.

3. The Isolation Factor

The crimes of rape and assault with intent to commit rape are usually committed in an "isolated" setting. That is, the nature of these crimes is such that eyewitnesses, other than the prosecutrix and the accused, are seldom available.[45] This fact, coupled with the frequent lack of physical evidence (especially in assault cases), adds to the crucial importance of credibility in proving or disproving the charges.

Charges of rape and assault are uniquely difficult to defend because of this factor. The truth of this assertion was recognized by Lord Hale in seventeenth century.

> It is true rape is a most detestable crime, and therefore ought severely and impartially be punished with death; but it must be remembered, that it is an accusation easily to be made and hard to be proved, and harder to be defended by the party accused, tho never so innocent . . . .[46]

Lord Hale's observation concerning the difficulty of defending a rape charge is even more applicable to defending an assault charge. At least in rape cases there will usually be some physical evidence of the crime—if nothing more than signs of penetration (discoverable through a medical examination conducted after the alleged invasion) or torn clothing. But in assault cases, there may be no physical evidence.

Thus the difficulty in presenting affirmative evidence in favor of the defendant may be even greater for the man charged with assault than for the man charged with rape. There would, most likely, be no physical evidence, unless the assault was truly an act of violence in the common meaning of the term. But the violence necessary to fulfill that element of an assault may be minimal, leaving no marks whatsoever. Thus, "the adversary trial on which our law relies so heavily to expose untruth is likely to

43. *Id.*
44. *Id.* at 1141.
45. Stapleman v. State, 150 Neb. 460, 464, 34 N.W.2d 907, 910 (1948).
46. M. HALE, PLEAS OF THE CROWN 635 (1680).

produce, in [such] cases, nothing more than two conflicting stories, both told under oath,"[47] if both stories are told at all.[48]

C. The Role of the Court

Finally, it has been argued that a corroboration rule is unnecessary because of the power of the judge "to set aside or direct a verdict based on insubstantial evidence,"[49] thereby serving the same purposes as are served by the corroboration rule. But, at least in Nebraska, the power of the judge to set aside or direct a verdict based on insubstantial evidence would not effectively serve the same purposes.

In Nebraska, the verdict of the jury cannot be set aside, unless the verdict is clearly wrong.[50] In further recognition of the role of the jury as "the judges of the credibility of the witnesses who testify before them and of the weight of their testimony,"[51] not even the Nebraska Supreme Court will " 'interfere with a verdict of guilty, based upon conflicting evidence, unless it is so lacking in probative force that . . . , as a matter of law, it is insufficient to support a finding of guilt beyond a reasonable doubt . . . .' "[52]

The only situations justifying a trial court's direction of a not guilty verdict are "when there is a *total failure of proof* . . . to support a material allegation in the information, *or where the testimony adduced is of so weak or doubtful a character* that a conviction based thereon could not be sustained . . . ."[53]

It should be clear that while the power of the trial judge to set aside or direct a verdict is intended to serve the same purposes as the corroboration rule, the Nebraska trial judge's power in this respect is severely restricted. The corroboration rule is a better vehicle to prevent convictions based upon unreliable evidence. Further, as the *Fisher*[54] case demonstrates, trial judges, as well as juries, may be susceptible to the irrationality which may be injected into cases of rape or asault.[55]

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47. *Supra* note 19 at 1139.
48. In *Fisher* only one story was told. The defense relied on its plea of not guilty, which under Nebraska law is equal to an unequivocal denial. *See* State v. Fisher, 190 Neb. 742, 212 N.W.2d 568, 571 (1973).
49. *See* note 20 *supra* at 1385.
50. Sherrick v. State, 157 Neb. 623, 638, 61 N.W.2d 358, 369 (1953).
51. *Id., quoting* Morrow v. State, 146 Neb. 601, 20 N.W.2d 602 (1945).
52. *Id., quoting* Haines v. State, 135 Neb. 433, 281 N.W. 860 (1938).
53. *Id.* at 638, 61 N.W.2d at 369 (emphasis added), *reaffirmed,* State v. Atkinson, 190 Neb. 473, 476, — N.W.2d —, — (1973).
54. *See* part IV *infra.*
55. *See* note 32 and accompanying text *supra.*

III. THE NEBRASKA EXPERIENCE

Since the ostensible purpose of the Nebraska corroboration rule is the prevention of injustice by precluding convictions based upon unreliable evidence, a brief examination of the Nebraska experience with the corroboration rule is necessary to understand the operation of the rule and to determine whether it should be retained. If it appears that the pertinent causative circumstances still prevail, or that the rule continues to serve its original purpose, then it should be retained. If not, then serious doubt is cast upon the desirability of retaining the rule.

Initially, it must be determined what must be corroborated. The Nebraska Supreme Court has consistently held that

> it is *not* essential . . . that the prosecutrix be corroborated by other evidence *as to the principal act* constituting the offense but it is indispensable that she be corroborated as to material facts and circumstances which tend to support her testimony *as to the principal fact* in issue . . . .[56]

Above all, it should be noted that the Nebraska corroboration rule has never required a witness, other than the prosecutrix, to the principal act.

One year after the corroboration rule was adopted, an attempt was made to construe the rule to require a witness in addition to the prosecutrix as to the prinicipal act. But the Supreme Court held:

> We do not understand the rule in such cases to require corroborating testimony to the positive fact of the rape. If such were required, convictions could seldom be had, even in the most flagrant cases. Men engaged in the commission of offenses of this kind seldom call witnesses to the fact or attack women who are not alone and within their power.[57]

This principle was reaffirmed as recently as 1972 in *State v. Ferguson.*[58]

In *Ferguson,* there was no medical testimony, because the police failed to request a medical examination. The prosecutrix made a prompt complaint and was able to identify the defendant's photograph from a collection of two hundred photographs. The prompt complaint (made almost immediately upon returning

56. Pew v. State, 164 Neb. 735, 742, 83 N.W.2d 377, 381 (1957) (emphasis added). The distinction between the "principal *act* constituting the offense" and the "principal fact in issue" is crucial. The principal act in rape cases is the sexual intrusion, and in assault with intent to commit rape cases, it is the application of force. The principal fact in issue is the commission of the crime by the defendant.

57. Fager v. State, 22 Neb. 332, 333, 35 N.W. 195, 196 (1887) (statutory rape).

58. 188 Neb. 330, 334, 196 N.W.2d 374, 376 (1972) (forcible rape).

home), although not alone sufficient, was held to be a proper subject for the jury's consideration as corroborative evidence.[59]

If the prosecutrix' complaint is to be admissible as effective corroboration, it must be made voluntarily and within a reasonable time after the attack. In *Sherrick v. State*[60] the prosecutrix' complaint was held to be inadmissible because it was not made until after school on the day following the alleged rape and in response to direct questioning by the fourteen year old prosecutrix' mother. But a response to a simple question by a stranger does not render such a complaint involuntary.[61] Complaints made to a stranger minutes after the attack, followed by a complaint to the girl's roommate, and to police officials the same night and again the next morning have been held to be timely[62] for purposes of corroborative effect and admissibility.

In *Larson v. State*[63] the defendant was convicted of statutory rape, even though the prosecutrix testified that the defendant forcibly committed the offense without her consent. The supreme court reversed on the ground that the evidence did not support the conviction. The defendant was a cripple. There were other people in the house at the time of the alleged offense, yet the girl made no outcry, and no complaint was made to the authorities until eight months after the alleged offense, even though the girl allegedly told her mother the day following the attack. Finally, the girl drove the defendant, her brother-in-law, home after the alleged offense. Certainly these facts lead to an inference of less-than-good-faith prosecution.

The *Larson* case provided the court with the vehicle for announcing another important principle. It was argued on appeal that despite all the doubtful aspects of the case, the conviction should stand because the defendant had the opportunity to commit the offense. But the supreme court held, "[A] moment's reflection will convince a reasonable person that *opportunity alone is not corroboration.*"[64] Where the opportunity to commit the crime is clearly established, however, evidence substantially showing an intention or disposition on the part of the defendant to commit the crime is sufficient corroboration.[65]

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59. *Id.*
60. 157 Neb. 623, 630-31, 61 N.W.2d 358, 365 (1953) (statutory rape).
61. State v. Campbell, 190 Neb. 22, 24, 206 N.W.2d 53 (1973) (forcible rape).
62. *Id.* at 24-25, 206 N.W.2d at 56.
63. 110 Neb. 620, 194 N.W. 684 (1923) (statutory rape).
64. *Id.* at 624, 194 N.W. at 685 (emphasis added).
65. Disposition on the part of the defendant to commit the crime has been inferred from: defendant's statements to other persons and to the

The defendant's behavior upon the approach or arrival of law enforcement officers has been recognized as a fact which may be considered as a corroborating circumstance in a particular case. Flight, although ambiguous in itself, may be coupled with other circumstances to constitute corroboration.[66] In *State v. Gero*[67] the defendant was found nude, lying on the prosecutrix' blood-soaked bed, and fled the scene. In *State v. Ferguson*,[68] the police found the defendant hiding under the floor of his home the morning following the offense. Again, there were other identifying factors. It is at least arguable that flight, standing alone, should not be corroborative of anything in particular. But facts do not exist in isolation, and the totality of circumstances of each case will be dispositive.

The prosecutrix' subsequent pregnancy could provide sufficient corroboration. In *Livinghouse v. State*,[69] however, the fact of the pregnancy led to the reversal of the conviction. In *Livinghouse* the prosecutrix testified that defendant committed the act in prosecutrix' bed, while the prosecutrix' sister slept quietly on the other side of the same bed. The sister had no personal knowledge of the activity. Further, the baby was born fifty days short of full term, assuming conception resulted from the alleged offense. There was no evidence of a premature birth, but there was evidence that the prosecutrix had been away from home for two months prior to the date of the alleged offense.[70] The supreme court reversed the jury conviction for lack of corroboration.

In *Richards v. State*[71] the prosecutrix did not bring a complaint to the authorities until she was seven months pregnant. The de-

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prosecutrix at or near the time of the commission of the offense, Dawson v. State, 96 Neb. 777, 779, 148 N.W. 957, 958 (1914) (assault with intent to commit rape); bruises inflicted on the prosecutrix, a torn slip strap, and statements to the prosecutrix, Pew v. State, 164 Neb. 735, 743, 83 N.W.2d 377, 382 (1957) (assault with intent to commit rape); the testimony of persons other than the prosecutrix indicating that the prosecutrix frequented defendant's trailer, he gave her food, loaned her small amounts of money, showed her lewd pictures, made indecent exposures of his body at or near the time of the offense, and bought the prosecutrix some new clothes the day after the alleged offense, Stapleman v. State, 150 Neb. 460, 464, 34 N.W.2d 907, 910 (1948) (statutory rape). It must be emphasized that disposition and opportunity must conjoin in order to serve as corroboration.

66. State v. Gero, 184 Neb. 107, 110, 165 N.W.2d 371, 373 (1969) (forcible rape).
67. *Id.*
68. State v. Ferguson, 188 Neb. 330, 333, 196 N.W.2d 374, 376 (1972).
69. 76 Neb. 491, 107 N.W. 854 (1906 (statutory rape).
70. *Id.* at 495, 107 N.W. at 855.
71. 36 Neb. 17, 53 N.W. 1027 (1893) (forcible rape) (reversed on other grounds—jury misconduct).

fendant admitted sexual intercourse, but denied force. There was nothing in the case to corroborate the prosecutrix' claim of lack of consent, but because defendant admitted intercourse and had driven the girl far out into the country to commit the alleged offense, the court held the question was proper for the jury.

Other factors which have been accepted as sufficient corroboration in Nebraska are: admissions of defendant or co-defendants;[72] injuries to the prosecutrix' body;[73] torn clothing;[74] and shattered nervous condition of the prosecutrix immediately following the alleged attack.[75]

The Nebraska corroboration rule is unqualified in the sense that all charges of assault with intent to commit rape, statutory rape, or forcible rape must be corroborated to sustain a conviction. The Nebraska Supreme Court has deliberately chosen to make its corroboration rule applicable in all such cases. Unvarying across the board applicability seems considerably more desirable than a rule requiring ad hoc determinations such as: whether the prosecutrix' testimony is clear and convincing;[76] or whether the prosecutrix' testimony is not contradictory, incredible, or inherently improbable.[77]

A rule designed to prevent injustice to a class of criminal defendants must operate in favor of all members of the class. Were it otherwise, the rule would tend to contravene its purpose through uneven application. Further, were the corroboration rule not applicable in all cases, then the parties would be compelled to litigate additional issues which would introduce risks ranging from "inducing decision[s] on a purely emotional basis, at one extreme, to nothing more harmful than merely wasting time, at the other extreme,"[78] into trials already inherently fraught with risks not present in other trials.

It should be clear, that while the Nebraska corroboration rule is applied without qualification, it is certainly not a difficult rule to satisfy. A showing of opportunity and inclination is sufficient.[79] Apparently, nothing more than the prosecutrix' assertion of sexual

72. Miller v. State, 169 Neb. 737, 100 N.W.2d 876 (1960); Frank v. State, 150 Neb. 745, 35 N.W.2d 816 (1949).
73. Matthews v. State, 19 Neb. 330, 27 N.W. 234 (1886).
74. Lewis v. State, 115 Neb. 659, 214 N.W. 302 (1927).
75. Wheeler v. State, 106 Neb. 808, 184 N.W. 883 (1921).
76. People v. White, 26 Ill. 2d 199, 186 N.E.2d 351 (1962).
77. Robinson v. Commonwealth, 459 S.W.2d 147 (Ky. Ct. App. 1970). *See also* UNDERHILL, CRIMINAL EVIDENCE 1753 (5th ed. 1957).
78. *See generally* NEB. PROP. RULES EV., Comment to Rule 403 (1973).
79. Pew v. State, 164 Neb. 735, 83 N.W.2d 377 (1957).

intrusion is necessary to prove the intrusion,[80] and the identity of the accused need not be corroborated.[81] Finally, circumstantial evidence is admissible as corroborative evidence. Diligent prosecutors should clearly be able to adduce sufficient evidence to satisfy the Nebraska rule's requirements, in most, if not all, cases.

IV. THE *FISHER* CASE

State v. Fisher[82] demonstrates that the considerations which led to the adoption of the corroboration rule still prevail and that the rule continues to serve its purpose. *Fisher* illustrates the classic situation where mere accusation could be sufficient proof for conviction. The case was tried to the court, sitting without a jury, and the only evidence presented was the prosecutrix' testimony.

The prosecutrix was eighteen years old, single, employed, and lived in a rented room in a private home in Gordon, Nebraska. The girl was alone in her unlocked house, asleep in her bedroom. About 1:30 a.m. she awoke and found the defendant standing in her room. He inquired as to the whereabouts of his wife, a good friend of the prosecutrix, and after she answered his question, they visited for a few minutes. The defendant, who had been drinking, then left the house. The prosecutrix stayed in bed and did not lock the front door, although the other residents of the house had keys.

After fifteen or twenty minutes, the defendant returned to the house, went to the prosecutrix' bedroom, sat down on her bed, and began a conversation with her about "the past." They had known each other for several years, having dated in junior high school. The prosecutrix did not protest the defendant's presence and did not tell him to leave until well into their second conversation. Eventually, the defendant put his arm around her and announced that he was going to rape her. A struggle ensued on the bed, the girl escaped into the living room, only to be caught by the defendant, but she escaped to a nearby house. This was the evidence against the defendant.[83] The defendant unequivocally denied her story through his not guilty plea.

Thus, the trial court was faced with the responsibility of making a choice between believing sworn testimony, on one hand, and an unequivocal denial on the other. The trial court convicted the defendant on the charge of assault with intent to commit rape. The supreme court reversed for lack of corroboration.

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80. State v. Ferguson, 188 Neb. 330, 196 N.W.2d 374 (1972).
81. Noonan v. State, 117 Neb. 520, 221 N.W. 434 (1928).
82. 190 Neb. 742, 212 N.W.2d 568 (1973).
83. *Id.* at 743, 212 N.W.2d at 569; Brief for Appellant at 3-4. For an interesting line of questioning, *see* Brief for Appellee at 3-8.

The record indicated neither physical evidence of an assault, nor timely complaint, and the circumstances revealed in the prosecutrix' testimony created a reasonable doubt. It must be remembered, however, this does not mean that there could not have been sufficient corroborative evidence available, but simply that none was presented. Nor is it intended to imply that the assault charge was not true, but simply that it was not proved.

V. CONCLUSION

The record of the *Fisher* case contains all three factors discussed above as justifications for retaining the corroboration rule. The distinctive corpus delicti, of course, was a part of the case, as in all such cases. Concerning the consent issue, the trier of fact simply adopted the prosecutrix' after-the-fact report of her self-perceived attitude toward the event as proof beyond a reasonable doubt of non-consent. Where only one person testifies, it would appear likely that that person's testimony would be considered credible by the trier of fact in most cases. To determine a factual issue on such a basis would obviously favor the state in criminal cases where the defendant exercises his constitutional right to remain silent. Finally, only two people participated in or witnessed the events which gave rise to the criminal charge.

Admittedly, the *Fisher* case is only one case. However, in view of the additional fact that the case was tried to the court without a jury, it can reasonably be speculated that ad hoc trial court determinations of the sufficiency of the evidence, coupled with the Nebraska law on the power of trial judges,[84] would not be an effective safeguard. The corroboration rule is a "blunderbuss approach,"[85] but seems preferable to the alternatives. In operation, the corroboration rule "does not make inevitable the escape of the innocent, and it makes less likely the punishment of the guilty."[86]

Finally, the burden of proof beyond a reasonable doubt rests on the State—few would want it otherwise. By retaining the corroboration rule, the Nebraska Supreme Court continued a laudable tradition of seeking to protect individual liberty by preventing convictions based on unreliable evidence and injecting greater rationality into the criminal process.

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84. *See* notes 49-55 and accompanying text *supra.*
85. *Supra* note 20, at 1384.
86. *Supra* note 19, at 1148.

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