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Condom or Not, Rape Is Rape: Rape Law in the Era of AIDS—Does Condom Use Constitute Consent?

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CONDOM OR NOT, RAPE IS RAPE: RAPE LAW IN THE ERA OF AIDS — DOES CONDOM USE CONSTITUTE CONSENT?

I. INTRODUCTION

On September 17, 1992, a man forced entry into a young woman's apartment, held her at knife-point, and forced her to have sexual intercourse.[1] At the earliest opportunity, the woman fled naked to a neighbor's house to summon help.[2] The woman identified the man, then the police arrested and charged him with sexual assault.[3] Although this situation seems like a classic case in which the attacker would be found guilty of rape, a Travis County, Texas grand jury refused to indict the man on sexual assault charges.[4] The man asserted that the victim consented to the sexual intercourse because she requested that he wear a condom.[5] In fact, the woman provided the condom to protect herself from AIDS.[6] According to the Assistant District Attorney who prosecuted the case, consent was the only issue in the case.[7] It has been speculated that in refusing the indictment, the seven-woman, five-man grand jury reasoned that since the woman requested that the attacker use a condom, she consented to sexual intercourse.[8]

This Comment examines the issues raised by the Travis County case. Specifically, this Comment argues that requesting a sexual attacker wear a condom and providing the condom, do not constitute consent to sexual intercourse. Section II of this Comment reviews the history of consent as a defense to the crime of rape or sexual assault. The Section then discusses the evolution of consent in marital rape and the evolution of the inadmissibility of the victim's sexual history as evidence of consent. Additionally, Section II reviews the reason why a

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1. *Nobill in Rape Case Prompts Outrage; Suspect Wore a Condom at Woman's Request*, HOUSTON CHRON., Oct. 10, 1992, at 30.

2. Ross E. Milloy, *Furor Over a Decision Not to Indict in a Rape Case*, N.Y. TIMES, Oct. 25, 1992, at 18.

3. *Id.*

4. *Id.*

5. *Id.*

6. *Id.*

7. *Id.*

8. *Id.* The case was later presented to a second grand jury, which did indict the attacker. Ross Ramsey, *Judge refuses to grant new trial for condom rapist*, HOUSTON CHRON., July 2, 1993, at 26. The attacker was convicted at trial and sentenced to forty years in prison. *Id.* An appeals court rejected the request for a new trial, finding that the jury followed the law when sentencing the attacker. *Id.*

victim of sexual assault would request that her[9] attacker use a condom. Section III analyzes the question of whether a victim's request of her attacker to use a condom constitutes consent, in light of the current state of the law and its historical development. This Comment concludes in Section IV that a victim's request of her attacker to use a condom does not constitute consent to sexual intercourse.

II. BACKGROUND

A. Consent as a Defense to Rape: Evolution of the Law

Consent has always been a defense to rape. Under traditional statutes, consent negated the "lack of consent" element of rape and was, therefore, a defense to the crime.[10] To establish lack of consent, courts required proof of resistance.[11] Although lack of consent is no longer an explicit element of the crime of rape and modern statutes do not require resistance to negate consent, the statutes do require proof of forcible compulsion as an essential element of rape.[12] Lack of consent is implicit in the forcible compulsion element,[13] thus, consent remains a defense.

1. Lack of Consent and Resistance

"Ancient authority" defined rape as "carnal knowledge of a woman without her consent."[14] In traditional rape statutes, lack of consent was an element of the crime.[15] Under these statutes, consent negated that element of rape and, therefore, was a defense to that crime.[16]

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9. Female pronouns are used throughout this Comment to refer to the rape victim, unless in a specific case the victim was male. "It is a matter of common knowledge that most sexual assaults are perpetrated by men against women." Green v. Wyrick, 462 F. Supp. 357, 361 (W.D. Mo. 1978). Such use of female pronouns is for stylistic purposes, but in no way indicates that a male cannot be a rape victim.

10. See *infra* notes 14-16 and accompanying text.

11. *See infra* notes 17-23 and accompanying text.

12. *See infra* notes 28-49 and accompanying text.

13. *See infra* notes 29-32 and accompanying text.

14. *See* People v. Barnes, 721 P.2d 110, 117 (Cal. 1986); *see also* Reynolds v. State, 42 N.W. 903, 904 (Neb. 1889); MODEL PENAL CODE § 213.1 cmt. 1 (1980); *see also* JOEL PRENTISS BISHOP. THE CRIMINAL LAW §§ 641-43 (1892).

15. *See* Commonwealth v. Mlinarich, 542 A.2d 1335, 1340 (Pa. 1988). Since lack of consent was an essential element of the crime, the prosecution was required to prove that the victim did not consent. *See* MODEL PENAL CODE § 213.1 cmt. 1. For examples of statutory language which follow the traditional formulation of the definition of rape, see ARIZ. REV. STAT. ANN. § 13-1406 (1989) (without consent part of the definition of rape); DEL. CODE ANN. tit. 11, § 775 (Supp. 1992) (same); FLA. STAT. ANN. § 794.011 (West 1992) (same); KAN. STAT. ANN. § 21-3502 (1988) (same); MO. REV. STAT. § 566.030 (Supp. 1993) (same); UTAH CODE ANN. § 76-5-402 (Supp. 1993) (same); WIS. STAT. § 940.225(2)(a) (1982) (same).

16. MODEL PENAL CODE § 2.11 cmt. 1. Model Penal Code (MPC) section 2.11 provides:

A corollary to the traditional requirement of lack of consent was proof of resistance by the victim.[17] Lack of consent was proven[18] only if the victim exerted "utmost resistance" against her attacker.[19] Courts required that the intensity of the victim's struggle reflect her physical capacity to resist.[20] Furthermore, the victim could not weaken her resistance during the attack.[21] The only excuse for failure to resist was the threat of great bodily harm to the victim coupled with the apparent ability of the attacker to carry out the threat.[22] The purpose of the

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(1) *In General.* The consent of the victim to conduct charged to constitute an offense or to the result thereof is a defense if such consent negatives an element of the offense or precludes the infliction of the harm or evil sought to be prevented by the law defining the offense.

Id.

17. United States v. Clark, 35 M.J. 432 (C.M.A. 1992) (failure to make lack of consent manifest by resisting leads to inference of consent); *Barnes*, 721 P.2d at 117 (historically, it was "inconceivable that a woman who truly did not consent . . . would not meet force with force"); State v. Morrison, 179 N.W. 321, 322 (Iowa 1920) (sexual intercourse is rape only when the victim's resistance is "overcome by force or violence."); *Mlinarich*, 542 A.2d at 1340 (discussing traditional requirement of victim's resistance).

18. When the victim "makes no outcry and no resistance, she by her conduct consents." BISHOP, *supra* note 14, at 648.

19. People v. Carey, 119 N.E. 83 (N.Y. 1918) (victim must resist to utmost limit of power); State v. McCune, 51 P. 818 (Utah 1898) (same); MODEL PENAL CODE § 304-05; *see also Barnes*, 721 P.2d at 117 (discussing traditional requirement of utmost resistance); Anderson v. State, 4 N.E. 63, 65 (Ind. 1885) (victim must resist to full extent of ability); *Mlinarich*, 542 A.2d at 1340 (discussing traditional requirement of utmost resistance). Comment four of the MPC suggests that the harshness of the utmost resistance requirement resulted from the extreme penalties for a rape conviction. MODEL PENAL CODE § 213.1 cmt. 4. Early statutes had maximum sentences of death or life imprisonment. *See* Coker v. Georgia, 433 U.S. 584 (1977) (finding the death penalty for rape unconstitutional). Later statutes retain harsh penalties, albeit not death. *See, e.g.*, ALA. CODE § 13A-5-6 (1982) (life or not greater than 99 years or less than 10 years); ARIZ. REV. STAT. ANN. § 13-1406B (1992) (no commutation of sentence, probation, pardon, or parole is permitted for conviction of sexual assault unless specifically authorized by statute); D.C. CODE ANN. § 22-2801 (1989) (any term of years or life); FLA. STAT. ch. 794.011 (1992 & Supp. 1993) (life felony when use or threaten to use deadly weapon or force likely to cause serious physical injury); IDAHO CODE § 18-6104 (1987) (in discretion of judge, sentence may be extended to life); MISS. CODE ANN. § 97-3-65 (1992) (life sentence in certain circumstances).

20. "Resistance must be to the extent of the woman's ability." BISHOP, *supra* note 14, at 648; *see also Barnes*, 721 P.2d at 117; MODEL PENAL CODE § 304-05.

21. MODEL PENAL CODE § 304-05; *Barnes*, 721 P.2d at 117; *McCune*, 51 P. 818 (failure to resist throughout attack constitutes voluntary consent).

22. Ransbottom v. State, 43 N.E. 218 (Ind. 1896); State v. Morrison, 179 N.W. 321, 323 (Iowa 1920); *Mlinarich*, 542 A.2d at 1340-41; *McCune*, 51 P. at 819. In *Morrison*, a forty-eight year old widow driving a horse and buggy on a road near a state penitentiary was attacked by a man. 179 N.W. at 321. The man told her to keep quiet or he would kill her. *Id.* He dragged her into a corn field and raped her. *Id.* The Supreme Court of Iowa reversed the rape conviction. *Id.* at 323. The court reasoned that the mere threat of harm was insufficient to excuse the requirement for resistance. *Id.* The court noted that in this case the victim did not see a weapon such as a gun or a knife, notwithstanding that the attack occurred after dark and the attacker had covered the victim's face. *Id.* at 321, 323. Further, the attacker did not tell the victim in what manner he would harm her should she cry out. *Id.* at 323. The victim, therefore, was not excused from resisting the attack. *Id.*; *see* MODEL PENAL CODE § 309.

utmost resistance requirement was, therefore, to demonstrate lack of consent.[23]

Now, the Model Penal Code (MPC) and most state statutes define rape without lack of consent as an express element of the crime.[24] Additionally, the MPC rejects the explicit resistance requirement.[25] Under modern statutes, evidence of resistance is probative of forcible compulsion, rather than to prove lack of consent as was required under the older statutes.[26] These statutes, therefore, do not require the prosecution to prove lack of consent.[27]

2. Forcible Compulsion

Modern statutes require proof of forcible compulsion as an essential element in rape prosecutions.[28] Forcible "compulsion plainly implies [lack of] consent."[29] Consent, therefore, negates the forcible com-

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23. MODEL PENAL CODE § 304-05; *see also Barnes*, 721 P.2d at 117; Bowman v. Commonwealth, 143 S.W. 47 (Ky. 1912); *Mlinarich*, 542 A.2d at 1341.

24. "A male . . . is guilty of rape if: (a) he compels her to submit by force or by threat of imminent death, serious bodily injury. . . ." MODEL PENAL CODE § 213.1(1); *see also infra* note 28. *But see* N.Y. PENAL LAW § 130.05 (McKinney 1987) (lack of consent is an element of rape). The New York statute goes on to provide, however, that "[l]ack of consent results from . . . forcible compulsion." *Id.* § 130.05(2). Under the New York formulation, therefore, proof of forcible compulsion establishes lack of consent. *See id.* The drafters of the MPC criticize the New York formulation for placing "unwarranted emphasis" on the victim, rather than focusing upon the force used by the attacker. MODEL PENAL CODE § 213.1 cmt. 3.

25. MODEL PENAL CODE § 306; *see also id.* § 213.1. Some state statutes explicitly reject a requirement for resistance. *See, e.g.*, N.J. REV. STAT. § 2C:14-5(a) (1992) (proof of resistance by victim not required); OHIO REV. CODE ANN. § 2907.02(C) (Anderson 1992) ("[a] victim need not prove physical resistance").

26. United States v. Townsend, 34 M.J. 882 (C.G.C.M.R. 1992) (proof of resistance is central to finding the element of force under the Uniform Code of Military Justice); *Barnes*, 721 P.2d at 113-16 (former statute explicitly required resistance, new statute does not); People v. Fransua, 522 N.Y.S.2d 684 (N.Y. App. Div.), *appeal denied*, 526 N.E.2d 54, and *appeal denied*, 529 N.E.2d 182 (1987) (same); *Mlinarich*, 542 A.2d at 1340-42 (recognizing that lack of consent was traditionally an essential element "as manifested by the extent of the victim's resistance"; under the current statute, physical or psychological coercion sufficient to overcome the will of the victim meets the forcible compulsion requirement). Even when the statute retains lack of consent as an element of the offense, a minimal amount of force used by the attacker can be sufficient to meet the statutory requirements. *See, e.g.*, Commonwealth v. Stockhammer, 570 N.E.2d 992, 996-97 (Mass. 1991); *see also infra* notes 36-49 and accompanying text.

27. *See* cases cited *supra* note 26 and accompanying text.

28. For examples of statutes which require "forcible compulsion" as an element of rape, see ALA. CODE § 13A-6-61 (1982); ARIZ. REV. STAT. ANN. § 13-1406 (1989); CONN. GEN. STAT. § 53a-70 (1985); DEL. CODE ANN. tit 11, § 775 (1987 & Supp. 1992); IND. CODE ANN. § 35-42-4-1 (1986 & Supp. 1993); KY. REV. STAT. ANN. § 510.040 (Baldwin 1988); MASS. GEN. LAWS ANN. ch. 277, § 39 (West 1990); NEB. REV. STAT. § 28-319(1) (1989); N.Y. PENAL LAW § 130.35 (1987); OHIO REV. CODE ANN. § 2907.02 (Anderson 1992); OR. REV. STAT. § 163.375 (1990); WASH. REV. CODE ANN. § 9A.44.040 (1988).

29. MODEL PENAL CODE § 213.1 cmt. 4.

pulsion element of rape and remains a viable defense.[30] When the prosecution in a rape case proves forcible compulsion, consent is not present[31] and a consent defense fails.[32]

The question for the courts in a rape case is whether the attacker forced the victim to have sexual intercourse or whether the victim merely made a voluntary choice to have sexual intercourse with the defendant.[33] When the victim makes a voluntary choice, the forcible compulsion requirement is not met.[34] The forcible compulsion requirement can be met, however, when the attacker induces the victim's involuntary submission by using actual or constructive force or duress.[35]

Under modern law, a minimal amount of force meets the statutory requirement of forcible compulsion.[36] Constructive force, as well as actual force, meets the statutory force requirement.[37] The attacker's force or threat of force, however, must be sufficient to "overcome the resolve

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30. *See* cases cited *supra* note 26. Consent thus negates the forcible compulsion element of the crime, even when nonconsent is not an explicit element. State v. Smith, 554 A.2d 713, 716 (Conn. 1989); State v. Suka, 777 P.2d 240, 243 (Haw. 1989); State v. Camara, 781 P.2d 483, 486 (Wash. 1989).

31. See discussion in *supra* note 24 regarding the New York statute and the Model Code criticism. Additionally, the victim is no longer required to resist to her "utmost" ability. *See, e.g.*, People v. Sargent, 512 N.Y.S.2d (N.Y. App. Div. 1987); *see also* cases cited *supra* note 26.

32. *See supra* note 15 and discussion in *supra* note 21.

33. *See* MODEL PENAL CODE § 213.1 cmt. 2. A line must be drawn "between forcible rape . . . and reluctant submission, . . . between true aggression and desired intimacy." *Id.* The Code drafters recognized the difficulty of drawing such a line because the act constituting the offense "may, under other circumstances, be desirable to the victim." *Id.* at 279. The drafters resolved this dilemma by focusing the elements of the crime upon the force used by the attacker. *Id.* at 280.

34. Commonwealth v. Mlinarich, 542 A.2d 1335, 1342 (Pa. 1988). In *Mlinarich*, the victim was a fourteen year old girl in the custody of the attacker and his wife who were neighbors of the victim's family. *Id.* at 1337. The attacker threatened to have the girl sent back to the detention home if she refused his advances. *Id.* at 1337. The Opinion in Support of Affirmance found that the victim made a voluntary choice between submission and being sent back to the home. *Id.* at 1341-42.

35. *See* cases cited *infra* note 41; *see also* MODEL PENAL CODE § 2.11(3)(d).

36. In *State v. Archuleta*, the Supreme Court of Utah found that grabbing the victim and pulling her to the bed constituted sufficient force to meet the statutory forcible compulsion requirement, although the attacker made no direct threat to the victim. 747 P.2d 1019, 1022 (Utah 1987). The *Archuleta* court made its decision under the Utah statute which provides that rape occurs when "the actor compels the victim to submit or participate by force that overcomes such earnest resistance as might reasonably be expected under the circumstances." *Id.; see also* United States v. Clark, 35 M.J. 432 (C.M.A. 1992) (Sullivan, C.J., concurring) ("where intimidation or threats of death or physical injury make resistance futile . . . the force component is established by the penetration alone"); Commonwealth v. Stockhammer, 570 N.E.2d 992, 996-97 (Mass. 1991) (evidence that the attacker pushed the victim onto the bed while the victim pushed him and told him to stop was sufficient to prove beyond a reasonable doubt that the attack was forcible and without consent).

37. *See* cases cited *infra* note 41.

and prevent further resistance" of a reasonable person.[38] In *State v. Brown*,[39] for example, the Supreme Court of North Carolina held that the prosecution establishes the element of forcible compulsion when it proves that the attacker used force "sufficient to overcome *any* resistance the victim might make."[40] The court reasoned that "constructive force in the form of fear, fright, or coercion" meets the forcible compulsion requirement if, under the totality of the circumstances, the unspoken purpose of the threat was such compulsion.[41] The statutory requirement of force can thus be met by compulsion which overcomes the will of the victim, even when no physical harm results.[42]

Modern decisions have considerably diminished the requirements for resistance both as proof of lack of consent and as evidence of forcible compulsion.[43] The law regarding consent, therefore, has transformed over time, shifting the focus of the inquiry from the victim to the attacker.[44] Lack of consent is either no longer an element of the

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38. *Mlinarich*, 542 A.2d at 1340-42. The dissent, however, reasoned that a purely objective standard was contrary to legislative intent and precedent. *Id.* at 1347-48 (Larsen, J. dissenting). The Supreme Court of Pennsylvania was equally divided in this case. *Id.* at 1343. The lower court's reversal of the rape conviction was therefore affirmed. *Id.; see also Archuleta*, 747 P.2d 1019 (constant verbal refusals and attempts to push attacker away could establish earnest resistance given the victim's intellectual disability); *see also* cases cited *infra* note 41. On this basis, the dissent would have found that threats to deprive the child of her liberty were sufficient " 'psychological duress' which overwhelmed the will of the victim." *Mlinarich*, 542 A.2d at 1344. The dissent also would have found that threats to have the child physically confined in the detention home, by a person who had the power to do so, constituted threats of actual physical force and violence. *Id.*

39. 420 S.E.2d 147 (N.C. 1992).

40. *Id.* at 152 (emphasis added).

41. *Id.* The *Brown* court, therefore, upheld a conviction on a forcible rape charge when the force against a hospital patient consisted of "pulling back the bedclothing, pulling up the victim's gown and pulling her panties aside." *Brown*, 420 S.E.2d at 147. The attack occurred in the middle of the night, and the victim was on intravenous medication. *Id.; see also* United States v. Mathews, 1992 C.M.R. LEXIS 686, at *5 (A.F. C.M.R. 1992) ("consent induced by fear, fright or coercion is equivalent to physical force"; where victim is compelled by parental command physical resistance is not required); United States v. Williams, 1992 C.M.A. LEXIS 107, at *6-7 (A.F. C.M.R. 1992) (same); Flanagan v. State, 533 So. 2d 637 (Ala. Crim. App. 1987) (constructive force sufficient to meet forcible compulsion requirement); Moore v. State, 551 N.E.2d 459 (Ind. Ct. App. 1990) (constructive or implied force can constitute forcible compulsion); Yarnell v. Commonwealth, 833 S.W.2d 834 (Ky. 1992) (actual physical force not necessary to prove forcible compulsion); State v. Eskridge, 526 N.E.2d 304 (Ohio 1988). *Mathews* and *Williams* were governed by the Manual for Court Martials (M.C.M.) which requires resistance to show "force and without consent," unless the victim is overcome by threats of "death or great bodily harm or if resistance would be futile." M.C.M. Part IV para. 45(b)(1) (1984).

42. *See supra* notes 36-41 and accompanying text.

43. *See supra* notes 28-42 and accompanying text.

44. The drafters of the MPC used the "forcible compulsion" language to put the focus of the crime upon the attacker rather than the victim. *See* MODEL PENAL CODE § 213.1 cmt. 4. The MPC also recognizes the need for a balanced inquiry, "focus[ing] primarily on the conduct of the male" but not ignoring the possibility of consent by the woman. *Id.* at 303; *see also* State v. Smith, 554 A.2d 713, 716 (Conn. 1989) (discussing the *mens rea* requirement to prove rape,

crime of rape or is proven by showing that the rapist used a minimal amount of force.[45] Resistance is no longer required to prove lack of consent.[46] Proof of resistance is merely evidence that the attacker used force.[47] Moreover, psychological coercion is sufficient to meet the requirement of forcible compulsion.[48] This evolution of the requirements for conviction of rape shifts the focus from the victim to the attacker, his motives, and his aggressions.[49]

B. Consent in Marital Rape

Rape originated as a crime against property.[50] The underlying theory was that a woman was the property of her husband; thus, a rapist committed a property offense against the husband.[51] A man, therefore, could not be charged with the rape of his wife.[52]

Other rationales for the marital exemption developed once a wife was no longer considered the chattel of her husband.[53] For example, one court reasoned that a woman consented to sexual intercourse with her husband by virtue of the marriage.[54] This consent was irrevocable

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which is a state of mind of the actor, while considering the manifestations of the victim's consent or lack of consent); Commonwealth v. Mlinarich, 542 A.2d 1335, 1340 (Pa. 1988) ("traditional focus on victim behavior" abandoned "to direct the focus upon the conduct of the alleged offender"); State v. Camara, 781 P.2d 483, 487 (Wash. 1989) (channel focus of the jury upon "the culpability of the actor" rather than the victim's actions); SUSAN ESTRICH, REAL RAPE 58-59 (1987) (focus should be on the attacker rather than the victim).

This change in language may also alter the burden of proof. The prosecution may no longer be required to prove lack of consent. *Camara*, 781 P.2d at 486-87; *cf.* State v. Lira, 759 P.2d 869, 874 (Haw. 1988) (defendant's burden as to nonconsent is to raise reasonable doubt regarding forcible compulsion, not to prove consent). Rather, the defendant must prove consent as a defense. *Camara*, 781 P.2d at 486-87; *Lira*, 759 P.2d at 874. *But see Smith*, 554 A.2d at 717 (finding the burden is on the state to prove lack of consent when the issue of consent is raised because the state's statute does not make consent an affirmative defense to rape).

45. *See supra* notes 36-44.

46. *See* cases cited *supra* note 26.

47. *See* cases cited *supra* note 25 and accompanying text.

48. *See* cases cited *supra* note 41.

49. Injury to the victim objectively verifies the aggression and hence, the culpability of the attacker. *See* MODEL PENAL CODE § 213.1 cmt. 1. Objective indicia of aggression are needed because in most rape cases the only witness is the victim. *Id.* When the attacker inflicts serious bodily injury upon the victim, the rape is a first degree felony. *Id.* § 213.1(1). On the other hand, evidence of prior companionship between the victim and the attacker reduces the conclusion of aggression and lack of consent. *Id.* § 213.1 cmt. 1. Rape, therefore, is a second degree felony when the attacker is a prior companion of the victim. *Id.* § 213.1 cmt. 4; *see also id.* § 213.1 cmt. 9. But see *infra* notes 76-86 and accompanying text for a discussion of rape shield statutes which exclude evidence of the victim's sexual history.

50. IRVING J. SLOAN, RAPE 33 (1992); *see* cases cited *infra* note 58.

51. *See* SLOAN, *supra* note 50, at 33; MODEL PENAL CODE § 213.1 cmt. 8.

52. MODEL PENAL CODE § 213.1 cmt. 8.

53. SLOAN, *supra* note 50, at 33.

54. Frazier v. State, 86 S.W. 754, 755 (Tex. Crim. App. 1905) (wife gives consent which she cannot retract).

and could not be withdrawn.[55] Another theory is that upon marriage the legal identity of the woman merged with that of her husband.[56] In many jurisdictions the legislatures have statutorily rejected these rationales.[57]

At least three jurisdictions have judicially abrogated the traditional rationales for the marital rape exemption.[58] In *People v. Liberta*,[59] the Court of Appeals of New York criticized the traditional rationales of the marital rape exemption.[60] The *Liberta* court stated that in modern society, no woman is treated as the chattel of her husband, nor denied a separate legal identity.[61] The court also rejected the notion of irrevocable implied consent, stating that to imply consent to such a "degrading, violent act which violates the bodily integrity of the victim and frequently causes severe, long-lasting physical and psychic harm . . . [is] . . . irrational and absurd."[62] Moreover, the court rejected the modern rationales of protecting the privacy of marriage by preventing governmental intrusion and promoting reconciliation.[63]

The *Liberta* decision reflects the modern view that the marital exemption to rape has no justifiable basis in today's society. The marital

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55. *Id.*

56. Shunn v. State, 742 P.2d 775, 777-78 (Wyo. 1987) (reciting a brief history of the marital exemption); *see also* SLOAN, *supra* note 50, at 33.

57. Some state legislatures have determined that marriage is never a defense to rape. *See* ALA. CODE § 13A-6-60 to 61 (1982) (rape is forcible sexual intercourse with *any* female person) (emphasis added); ALASKA STAT. § 11.41.445 (1989) (marital exemption revoked when offense committed without consent of victim); ARIZ. REV. STAT. ANN. § 13-1407(D) (1989) (legal marriage and cohabitation at the time of occurrence is a defense to general sexual abuse/assault crimes, but not a defense to the separate crime of "sexual assault of a spouse"); DEL. CODE ANN. tit. 11, §§ 770-775 (1987); IND. CODE § 35-42-4-1 (Supp. 1992); N.J. REV. STAT. ANN. § 2C:14-(b) (West 1982); OHIO REV. CODE ANN. § 2907.02(G) (Anderson 1992); OR. REV. STAT. §§ 163.395, .415, .425 (1991); UTAH CODE ANN. § 76-5-402(2) (Supp. 1993).

58. State v. Rider, 449 So. 2d 903, 903-04 (Fla. 1984) (finding that a man could be prosecuted for raping his wife even where there was no divorce or separation action, no restraining order, and the husband and wife were cohabitating at the time of the offense); People v. Liberta, 474 N.E.2d 567, 573 (N.Y. 1984) (man prosecuted for raping his wife where the spouses were living apart and a protection order had been granted), *cert. denied*, 471 U.S. 1020 (1985); *Shunn*, 742 P.2d at 778.

59. 474 N.E.2d 567 (N.Y. 1984), *cert. denied*, 471 U.S. 1020 (1985).

60. *Id.* at 573-74; *see also Shunn*, 742 P.2d at 778 (the legal fiction behind the spousal immunity was faulty).

61. *Liberta*, 474 N.E.2d at 573 (quoting Trammel v. United States, 445 U.S. 40, 52 (1980)).

62. *Id.* at 573. The *Liberta* court went on to find the marital exemption statute underinclusive and thereby unconstitutional under the equal protection clause of the Fourteenth Amendment to the United States Constitution. *Id.* at 576-78. The court reasoned that there is no rational basis for distinguishing between marital and nonmarital rape. *Id.* at 573. The court, therefore, struck down the marital exemption, while preserving the gender-neutral application of the remainder of the rape statute. *Id.* at 578-79; *see also* Merton v. State, 500 So. 2d 1301, 1305 (Ala. Crim. App. 1986) (marital exemption unconstitutional).

63. *Liberta*, 474 N.E.2d at 574.

exemption required the courts to focus upon the status of the female victim.[64] As the legislatures and courts discredit the traditional rationales for the marital exemptions,[65] the focus of the crime of rape shifts to the attacker. This shift of focus follows the shift occurring in the area of consent.[66] Both shifts recognize that rape is a violent crime which should be provable without reliance on the actions or status of the victim. The purpose of the law of rape is now to protect a "female's freedom of choice and punish unwanted and coerced intimacy."[67] Therefore, legislative and judicial actions implicitly recognize that the focus of the crime of rape is not upon the victim. Rather, the focus of rape prosecutions must be upon the attacker.

C. Consent as evidenced by the Victim's Sexual History — Rape Shield Statutes

In addition to the evolution and development of the law regarding consent and the marital rape exemptions, the law of evidence in rape cases has changed, shifting the focus of the prosecution from the victim to the attacker. Traditionally, an attacker could present evidence of the victim's sexual history to prove consent.[68] Modern rape shield statutes prevent the attacker from using the victim's sexual history as evidence of consent, with very limited exceptions.[69]

Traditionally, the defense in a rape case had a right to introduce evidence of the victim's prior sexual conduct at trial.[70] Defendants would attempt to prove the "unchaste" character of the victim in order to establish an inference that the victim consented to the sexual act in question.[71] Many jurisdictions also permitted the admission of evidence of the victim's sexual history to discredit the victim's testimony.[72] Allowing evidence of the victim's sexual history "puts the victim rather

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64. The first step in reviewing a suspected rape was to look at the marital status of the victim, then at whether the attacker was her husband. If so, no crime had occurred under the law. *See* SLOAN, *supra* note 50, at 33 (discussing the theory that rape began as a crime against property); BISHOP, *supra* note 14, at 645 (a man could not be charged with the rape of his wife). The MPC defines a rapist as "a male who has sexual intercourse with a female *not his wife* . . . ." (emphasis added). MODEL PENAL CODE § 213.1(1)

65. *See supra* notes 57-64 and accompanying text.

66. See *supra* notes 14-64 and accompanying text for a discussion of the evolution of the law of consent, which has shifted the focus from the victim to the attacker.

67. MODEL PENAL CODE § 213.1 cmt. 4.

68. *See infra* 70-76 and accompanying text.

69. *See* statutes cited *infra* note 77.

70. *See* cases cited *infra* note 72.

71. Bowman v. Commonwealth, 143 S.W. 47 (Ky. 1912) (a woman of bad character is more likely to consent than a woman of good character).

72. *See, e.g.*, Williams v. State, 282 So. 2d 349, *cert. denied*, 282 So. 2d 355 (Ala. 1973); Wilson v. State, 264 So. 2d 828 (Miss. 1972); Stafford v. State, 285 S.W. 314 (Tex. Crim. App. 1926).

than the offender on trial."[73] Admission of such evidence not only causes the victim embarrassment and humiliation, it diverts the attention of the jury "away from the critical issue of the actor's conduct."[74] This traditional approach resulted in fewer reports of rape to the police,[75] fewer indictments, fewer prosecutions, and even fewer convictions.[76]

Most jurisdictions now have "rape shield" statutes to prevent admission of testimony regarding the victim's sexual conduct unless specifically relevant to an issue in the case.[77] These statutes not only protect the privacy of the victim,[78] but also assure that irrelevant evidence does not divert the attention of the jury away from the attacker.[79] Rape

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73. MODEL PENAL CODE § 213.1 cmt. 8.

74. *Id.*

75. 124 CONG. REC. 34, 913 (1978) (Representative Holtzman, citing estimates that as few as one in ten rapes is ever reported because many victims find the trial almost as degrading as the rape itself, as a reason why the new federal rape shield statute was needed); *see also* MODEL PENAL CODE § 213.1 cmt. 3.

76. *See* ESTRICH, *supra* note 44, at 15-26; SLOAN, *supra* note 50, at 63-67.

77. *See* ALA. CODE § 12-21-203 (1986) (prior sexual conduct generally inadmissible; conduct with defendant may be admitted if relevancy determined according to strict procedures); ALASKA STAT. § 12.45.045 (1990) (same); ARK. CODE ANN. § 16-42-101 (Michie 1987) (same); COLO. REV. STAT. ANN. § 18-3-407 (West 1990) (same); CONN. GEN. STAT. ANN. § 54-86f (West 1985) (same); DEL. CODE ANN. tit. 11, §§ 3508-09 (1987 & Supp. 1992) (same); FLA. STAT. ch. 794.022 (1992) (same); GA. CODE ANN. § 24-2-3 (1982 & Supp. 1993) (same); IDAHO CODE § 18-6105 (1987) (same); ILL. REV. STAT. ch. 725, para. 5 § 115-7 (Smith-Hurd Supp. 1993) (same); IND. CODE Ann. § 35-37-4-4 (West 1986) (same); KAN. STAT. ANN. § 21-3525 (1988 & Supp. 1992) (same); KY. REV. STAT. ANN. § 422A.0412 (Baldwin 1992) (same); LA. CODE EVID. ANN. art. 412 (West 1991) (same); MD. CRIM. LAW CODE ANN. § 461A (1987) (same); MASS. GEN. LAWS ANN. ch. 233, § 21B (West 1986) (same); MICH. COMP. LAWS ANN. § 750.520j (West 1991) (same); MINN. STAT. ANN. § 609.347 (West 1987 & Supp. 1993) (same); MISS. CODE ANN. § 97-3-68 (Supp. 1992) (same); MO. ANN. STAT. § 491.015 (Vernon Supp. 1993) (same); MONT. CODE ANN. § 45-5-511(2)-(3) (1991) (same); NEB. REV. STAT. § 28-321 (1989) (same); N.H. REV. STAT. ANN. § 632-A:6 (1986 & Supp. 1992) (same); N.J. STAT. ANN. § 2C:14-7 (West 1982 & Supp. 1993) (same); N.M. STAT. ANN. § 30-9-16 (Michie 1984) (same); N.Y. CRIM. PROC. LAW § 60.42 (McKinney 1992) (same); N.C. GEN. STAT. § 8C-1, Rule 412 (1992) (same); N.D. CENT. CODE § 12.1-20-14 (1985) (same); OHIO REV. CODE ANN. § 2907.02 (D) (Anderson 1992) (same); OKLA. STAT. tit. 12, § 2412 (Supp. 1993) (same); 18 PA. CONS. STAT. ANN. § 3104 (1983) (same); R.I. GEN. LAWS § 26.3 (1989-90) (same); S.C. CODE ANN. § 16-3-659.1 (Law. Co-op. 1985) (same); WASH. REV. CODE ANN. § 9A.44.020(4) (West 1988) (same); WYO. STAT. § 6-2-312 (1988) (same). The Federal Rules of Evidence also generally prohibit admission of evidence of the past sexual behavior of the victim of a sexual offense. FED. R. EVID. 412(a). Such evidence is admissible only after specific procedural requirements are followed, the court finds that the evidence is relevant, and its probative value outweighs the danger of unfair prejudice. FED. R. EVID. 412(b)-(c).

78. State v. Camara, 781 P.2d 483, 489 (Wash. 1989) (noting that a rape shield statute should be interpreted narrowly to support its purpose of protecting the rape victim); 124 CONG. REC. 34, 913 (1978) (Representative Mann commenting on the federal rape shield statute that the principle purpose of the new rule "is to protect rape victims from the degrading and embarrassing disclosure of intimate details about their private lives").

79. 124 CONG. REC. 34, 913 (1978) (Representative Mann stating that the new federal rule prevents prejudicial evidence from clouding the issues before the jury).

shield statutes thus recognize that the proper focus in a rape case is upon the attacker, rather than upon the victim.

Case law supports the exclusion of evidence regarding a victim's sexual conduct except in exceptional circumstances.[80] "The time is long past when a defendant charged with rape could put his victim on trial."[81] Evidence of past sexual history is admissible only when the defense precisely demonstrates its probative value *and* the benefits of the evidence outweigh its prejudicial effect.[82] Evidence of a victim's prior conduct has probative value only when it specifically attacks the prosecution's evidence or is relevant to a material factual dispute.[83]

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80. *See infra* notes 81-87 and accompanying text; *see also* State v. Miller, 579 N.E.2d 276, 279 (Ohio Ct. App. 1989) (Ohio's rape shield law prohibits introduction of "essentially . . . any extrinsic evidence pertaining to the victim's sexual activity" except as evidence of origin of semen, pregnancy, or disease, or past sexual activity with the offender).

81. Brewer v. United States, 559 A.2d 317, 320 (D.C. 1989). In *Brewer*, the defendant alleged as reversible error the trial court's ruling that testimony regarding the victim's prior acts of prostitution was inadmissible. *Id.*; *see also* Commonwealth v. Mlinarich, 542 A.2d 1335, 1343 (Pa. 1988) (Larsen, J., dissenting: "[D]oes the criminal 'justice' system take a giant step backward towards the universally condemned state of the law where the rape victim was put on trial and blamed for seducing her assailant by 'asking for it' and by not putting up enough resistance[?]"). In *Brewer*, the defendant and victim were companions earlier in the evening on which the attack occurred. *Brewer*, 559 A.2d at 318. The attack occurred after the victim went to the defendant's apartment with the defendant and another man. *Id.* at 319. The defendant offered the prostitution evidence to show that the incident at issue was merely an act of prostitution in which the victim willingly participated. *Id.* at 320.

82. *Brewer*, 559 A.2d at 320; State v. Archuleta, 747 P.2d 1019, 1023 (Utah 1987).

83. See *supra* note 81 and accompanying text for discussion of a case in which the victim's prior sexual conduct was held to be relevant to a material factual dispute. Many times, however, such evidence is held inadmissible. In *State v. Camara*, for example, the Supreme Court of Washington ruled that evidence of prior sexual conduct was inadmissible. 781 P.2d 484 (Wash. 1989). In *Camara*, the defendant and victim were companions at a gay bar. *Id.* at 484. The victim agreed to accompany Camara to his home to participate in oral sexual activity. *Id.* The victim explicitly rejected the possibility of anal intercourse, and Camara agreed. *Id.* Camara sought to admit evidence that the victim had participated in anal intercourse with other men to show that the victim consented to such activity with him. *Id.* at 488. The defense argued that this line of questioning was opened by the prosecution when the victim testified that he explicitly refused to have anal intercourse with Camara because "[i]t is unsafe, and I don't find it pleasurable." *Id.* at 484. The defense proposed that since the victim stated that he found anal intercourse displeasurable, the victim had participated in such activity in the past. *Id.* at 489. The *Camara* court held that the evidence was inadmissible under the Washington rape shield statute. *Id.* The court reasoned that the statute permits evidence of "a victim's sexual past only when the State's evidence casts the victim's sexual history in a light favorable to the State's case." *Id.* In this case, the State's evidence cast the victim in an unfavorable light, so cross-examination about the victim's prior sexual history would not rebut his testimony. *Id.* at 489-90.

Similarly, in *Archuleta*, the Supreme Court of Utah held that evidence regarding the victim's sexual past was irrelevant to a material factual dispute. 747 P.2d at 1023. In *Archuleta*, the defendant argued that the state portrayed the victim as a naive girl who did not understand what was happening during the sexual assault. *Id.* The defense sought to introduce the victim's sexual history to rebut the state's evidence that the victim did not understand the sexual assault. *Id.* The court disagreed, finding that the state evidence merely showed that the victim was "non-assertive." *Id.* The *Archuleta* court, therefore, upheld the rape conviction. *Id.* at 1025.

In some circumstances, however, evidence of past sexual history should be admitted because of its relevance to a material factual dispute. In *Commonwealth v. Stockhammer*,[84] for example, the Supreme Judicial Court of Massachusetts held that it was reversible error to eliminate cross-examination regarding the victim's past sexual conduct, when offered to show bias, prejudice, or motive to lie.[85] The court reasoned that the cross-examination might show that the victim lied about the rape because she was afraid to tell her parents about her sexual conduct with her boyfriend.[86] A court must admit evidence of the victim's past sexual conduct when it is directly relevant to a fact in issue.[87]

The rape shield statutes and the interpretive case law prohibit introduction of evidence as to the victim's sexual history merely to attack the victim's credibility or to show consent. The modern law regarding testimony as to the victim's sexual past thus protects the victim's privacy and alleviates some of the difficulties in reporting and proving rape. Furthermore, the developments in the law of evidence concerning rape cases shift the focus from the victim to the attacker.

D. Condom Use

" 'In today's world, . . . a rape might also be a death sentence if the assailant has AIDS.' "[88] Sexual contact is the primary method by which AIDS is transmitted from one person to another.[89] Not only is the rape victim subjected to a "degrading, violent act which violates [her] bodily integrity" and can "cause[] severe . . . psychic harm,"[90] she is also subjected to the risk of death.[91] Therefore, a rape victim has a very compelling reason to try to convince her attacker to use a condom.

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84. 570 N.E.2d 992 (Mass. 1991).

85. *Id.* at 998.

86. *Id.* at 998.

87. Olden v. Kentucky, 488 U.S. 227 (1988) (failure of trial court to admit evidence which would tend to show victim's motive to lie about the alleged rape is an unconstitutional denial of the defendant's right to confront witnesses against him); *see also* People v. Labenski, 521 N.Y.S.2d 608, 609 (N.Y. App. Div. 1987) (error to exclude evidence of sexual intercourse with another person three hours before alleged rape when victim's semen-stained underwear was admitted into evidence).

88. Judy Mann, *Beyond the Risk of Rape*, WASH. POST, Oct. 16, 1992, at E3 (quoting the director of the D.C. Rape Crisis Center). Condom use may also provide protection from pregnancy and transmission of other sexually-transmitted diseases. *Id.* These fears, however, are overshadowed by the fear of AIDS which is " 'literally a death sentence.' " *Id.*

89. *Prevention and Control of Acquired Immunodeficiency Syndrome; An Interim Report*, 258 JAMA 2097, 2097 (1987) [hereinafter *Prevention and Control*].

90. People v. Liberta, 474 N.E.2d 567, 573 (N.Y. 1984), *cert. denied*, 471 U.S. 1020 (1985).

91. *See* Mann, *supra* note 88, at E3.

The AIDS crisis has reached dramatic proportions in today's world.[92] It is estimated that five to ten million people worldwide are infected with HIV, the virus that leads to AIDS.[93] Medical experts predict that approximately 200,000 people in the United States have died of AIDS in 1991-1993.[94] These statistics are staggering.

Even more staggering is the fact that there is no cure for AIDS.[95] There is "no protection [against infection with HIV] beyond avoiding or making safer intimate contact."[96] Avoiding sexual contact is the "only sure protection[]."[97] The use of condoms during sexual contact, however, decreases the likeihood of contracting the AIDS virus.[98] Since avoiding sexual contact is not an alternative for the rape victim, the only possible protection she has from an HIV-infected attacker is to convince him to use a condom.[99] Avoiding possible infection with HIV, and hence a potential "death sentence," is a very good reason for asking a rapist to use a condom.[100]

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92. *Prevention and Control, supra* note 89, at 2097.

93. *Prevention and Control, supra* note 89, at 2097. The United States Department of Health and Human Services estimates that 1 to 1.5 million people in the United States were infected with HIV as of 1992. U.S. DEPT. OF HEALTH AND HUMAN SERVICES, *HIV Infection Treatment Costs Under Medicaid In Michigan*, 107 PUB. HEALTH REP. 461 (1992). From 1981, when AIDS was first recognized, until 1990, over 100,000 deaths were reported to the Center for Disease Control. *Current Trends in Mortality Attributable to HIV Infection/AIDS—United States, 1981-1990*, 127 ARCHIVES DERMATOLOGY 621 (1991) [hereinafter *Current Trends*]. Of these deaths, over 31,000 were reported in 1990. *Id.* In 1988 AIDS was the third leading cause of death among men aged 25 to 44. *Id.* In the same year, AIDS was the eighth leading cause of death among women aged 25 to 44. *Id.*

94. *See Current Trends, supra* note 93, at 622.

95. *Prevention and Control, supra* note 89, at 2098.

96. *Prevention and Control, supra* note 89, at 2098.

97. *Prevention and Control, supra* note 89, at 2098.

98. *See* Margaret V. Ragni & Pamela Nimorwicz, *Human Immunodeficiency Virus Transmission and Hemophilia*, 149 ARCHIVES INTERNAL MED. 1379 (1989). Fifty percent of hemophiliacs in this country are infected with HIV. *Id.* Ragni and Nimorwicz assert that the adoption of safer sex practices can decrease transmission of HIV in heterosexual couples. *Id.* The National Hemophiliac Foundation and the United States Public Health Service jointly recommend that infected hemophiliacs use a combination of the spermicide nonoxynol-9 and a condom to help prevent transmission of the virus during sexual contact. *Id.*

99. *See infra* text accompanying note 100.

100. Even traditional rape law recognized the the victim's need to avoid great bodily harm by excusing the requirement to resist to the utmost when faced with serious injury. See the discussion of excuse from the utmost resistance requirement *supra* note 22 and accompanying text. Thus, when viewing the sexual attack from the perspective of preventing bodily harm to the victim, condom use is justified to prevent such harm, just as failing to resist was justified. See *supra* notes 91-97 and accompanying text for a discussion of the harm resulting from HIV infection and the potential for such harm in unprotected sexual contact.

III. ANALYSIS

The law of rape has undergone significant change, particularly since passage of Married Women's Property Act statutes.[101] The passage of these statutes reflected a significant change in societal norms: a woman's identity was no longer thought to be merged into the legal identity of her husband.[102] Consequently, a woman is no longer thought to be the property of her husband.[103] Rape is, therefore, considered a crime against the person rather than a crime against a man's property.[104]

Although lack of consent is, in most jurisdictions, no longer an element of the crime of rape, consent remains a defense to the crime.[105] Resistance, however, is no longer required to prove lack of consent.[106] This analysis will show how these developments, in conjunction with the changes in the law of consent as a defense, support the theory that condom use at the victim's request does not constitute consent to rape.[107]

Next, this analysis will show how changes in the forcible compulsion requirement and developments in the proof required to show forcible compulsion also support the theory that a victim who convinces her attacker to use a condom has not consented to sexual intercourse. Finally, this analysis will show how the shift of focus to the attacker in modern rape law supports the conclusion that condom use does not constitute consent, because the focus of a rape prosecution should not be upon the woman who requests that her attacker wear a condom.

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101. *See* JESSE DUKEMINIER & JAMES E. KRIER, PROPERTY 325 (1988). These statutes, enacted in all states by the end of the nineteenth century, removed the legal disabilities of the married woman. *Id.* As a result of the passage of these statutes, a married woman could enter into contracts, control her own separate property, and control her own earnings. *Id.*

102. Frazier v. State, 86 S.W. 754, 755 (Tex. Crim. App. 1905); SLOAN, *supra* note 50, at 33.

103. SLOAN, *supra* note 50, at 33.

104. Reflective of this change is the fact that most states now recognize that rape can be committed upon a male as well as a female. *See, e.g.*, ARIZ. REV. STAT. ANN. § 13-1406 (1989); COLO. REV. STAT. ANN. § 18-3-402 (West 1990); KY. REV. STAT. ANN. § 510.040 (Baldwin 1992); MICH. COMP. LAWS ANN. § 750.520b (West 1991); MO. ANN. STAT. § 566.030 (Vernon 1991); NEB. REV. STAT. § 28-319 (1989); N.Y. PENAL LAW § 130.35 (McKinney 1992) (gender-based classification struck down by the state's highest court in People v. Liberta, 474 N.E.2d 567, 577-78 (N.Y. 1984), *cert. denied*, 471 U.S. 1020 (1985)); OHIO REV. CODE ANN. § 2907.02 (Anderson 1992); OR. REV. STAT. § 163.375 (1991 & Supp. 1992); UTAH CODE ANN. § 76-5-402 (1990 & Supp. 1993); WASH. REV. CODE ANN. § 9A.44.040 (West 1988); WIS. STAT. ANN. § 940.225 (West 1982 & Supp. 1992).

105. For a discussion of consent as a defense, see *supra* notes 14-32 and accompanying text.

106. *See supra* notes 26, 36-49 and accompanying text.

107. *See infra* notes 108-85 and accompanying text.

A. Consent as a Defense to Rape

The evolution of the theory of consent has paralleled the changes in the law of rape. Historically, lack of consent was an essential element of the crime of rape.[108] Thus, a woman was required to prove that she did not consent before her attacker could be convicted.[109] Under modern rape law, consent remains a defense to the crime, not because it negates lack of consent, but rather because it negates the forcible compulsion element of the crime.[110] Moreover, when forcible compulsion is proven, lack of consent is also proven.[111]

1. Resistance to Prove Lack of Consent

Historically, in order to prove lack of consent, the rape victim was required to prove that she resisted her attacker throughout the attack, to the utmost of her capability.[112] The victim, therefore, was required to show that she resisted to prove that she did not consent.[113] The only excuse for a victim's failure to resist was the threat of great bodily harm.[114] The purpose of the excuse was to avoid the necessity of the woman risking death or serious harm.[115]

The reduction in the amount of resistance required,[116] and, in some states, the statutory elimination of the requirement altogether,[117] reflect a recognition that resistance to a rapist often results in bodily

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108. *See supra* notes 14-23 and accompanying text.

109. Commonwealth v. Mlinarich, 542 A.2d 1335, 1340 (Pa. 1988); Frazier v. State, 86 S.W. 754, 755 (Tex. Crim. App. 1905); *see also* State v. Morrison, 179 N.W. 321, 322-23 (Iowa 1920) (resistance required to prove lack of consent).

110. *See supra* notes 24-49 and accompanying text.

111. *See supra* notes 28-49 and accompanying text.

112. *See supra* notes 17-23 and accompanying text.

113. *See supra* notes 17-23 and accompanying text.

114. *See supra* note 22 and accompanying text.

115. *See* State v. Morrison, 179 N.W. 321, 322 (Iowa 1920).

116. *See supra* notes 24-25, 37 and accompanying text.

117. For statutes with no resistance requirement, *see, e.g.*, ALASKA STAT. § 11.41.410 (1989) (no statutory resistance requirement); CAL. PENAL CODE § 261 (West 1982 & Supp. 1993) (same); CONN. GEN. STAT. § 53a-70 (1985) (same); DEL. CODE ANN. tit. 11, § 775 (1974 & Supp. 1992) (same); D.C. CODE ANN. § 22-2801 (1981 & Supp. 1993) (same); FLA. STAT. ANN. § 794.011 (West 1992 & Supp. 1993) (same); GA. CODE ANN. § 16-6-1 (1992 & Supp. 1993) (same); ILL. REV. STAT. ch. 720, para. 5 (1993) (same); KAN. STAT. ANN. § 21-3502 (1991) (same); KY. REV. STAT. ANN. § 510.040 (Baldwin 1987) (same); MASS. GEN. LAWS ANN. ch. 265, § 22 (West 1990) (same); MISS. CODE ANN. § 97-3-65 (1972 & Supp. 1989) (same); MO. ANN. STAT. § 566.030 (Vernon's 1979 & Supp. 1993) (same); MONT. CODE ANN. § 45-5-511 (5) (1991) (resistance not required to show lack of consent; force, fear or threat sufficient alone to show lack of consent); NEB. REV. STAT. § 28-319 (1989) (no statutory resistance requirement); N.J. STAT. ANN. § 2C:14-5(a) (West 1982) (same); OHIO REV. CODE ANN. § 2907.02 (C) (Anderson 1992) ("[a] victim need not prove physical resistance"); 18 PA. CONS. STAT. ANN. § 3107 (1983) (no statutory resistance requirement).

harm other than that associated with the rape itself.[118] Moreover, the elimination or diminution of the resistance requirement recognizes that even if the victim fails to physically resist, the fact that the attacker has committed a rape does not change.[119] The historical excuse from the resistance requirement, together with the modern diminution or elimination of the resistance requirement, support the theory that nonconsensual intercourse remains nonconsensual despite the fact that the victim requested her attacker use a condom.

The victim of a crime should not be required to subject herself to further injury in order to prove that the attacker in fact committed the crime.[120] Historically, a woman was not required to resist her attacker if such resistance would result in serious bodily harm.[121] Logically, therefore, a woman should also not be prevented from protecting herself from the risk of serious bodily harm[122] by convincing her attacker to use a condom.[123]

With the threat of HIV present in all sexual encounters, a woman should be entitled to protect herself from the threat even when the sexual encounter is forced upon her. A woman is no longer required to resist her attacker to the limits of her ability to prove that she did not consent to the sexual attack.[124] Even when the law required utmost resistance of the rape victim, the victim was excused from such resistance when great bodily harm was likely to result.[125] The woman was excused from resistance because the law did not permit an inference of consent based on a failure to resist until death.[126] The logical reasoning for the

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118. People v. Barnes, 721 P.2d 110, 116 (Cal. 1986) (citing the assembly committee report, which gave as a reason for deletion of the resistance requirement the fact that rape victims who resist are twice as likely to be injured than those who do not resist).

119. *See supra* notes 28-42.

120. *See* MODEL PENAL CODE § 213.1 cmt. 4 at 305 (criticizing the resistance requirement because "resistance may prove an invitation to the danger of death or serious bodily harm").

121. The MPC defines serious bodily harm as "bodily injury which creates a substantial risk of death or which causes serious, permanent disfigurement, or protracted loss or impairment of the function of any bodily member or organ." MODEL PENAL CODE § 210.0(3); *see also supra* note 22 and accompanying text.

122. Infection with AIDS constitutes a substantial risk of death. *See supra* notes 88-97 and accompanying text. The potential for infection with a deadly disease through unprotected sexual contact would, therefore, meet the MPC definition of serious bodily harm. *See supra* note 121.

123. *See* MODEL PENAL CODE § 213.1 cmt. 4 ("[I]t is wrong to excuse the male assailant on the ground that his victim failed to protect herself with the dedication and intensity that a court might expect of a reasonable person in her situation"). Analogously, it is wrong to excuse an assailant because the victim attempted to avoid further serious harm by convincing the assailant to use a condom.

124. *See supra* notes 25-27, 36 and accompanying text.

125. *See supra* notes 19-23 and accompanying text.

126. *See supra* notes 22-23 and accompanying text. The law, however, did infer consent

excuse, therefore, is that a woman should not be required to resist until death.[127]

Unprotected sexual contact constitutes a threat of great bodily harm through the possibility of infection with HIV.[128] A woman should be permitted, even encouraged, to protect herself from the threat of serious harm by using a condom,[129] just as she was traditionally permitted to protect herself from serious harm by not resisting the attack.[130] The law should prohibit an inference of consent from condom use and consequent protection from the risk of death, just as the law traditionally prohibited an inference of consent from failure to risk death by continuing resistance.[131]

2. Consent

The consent defense focuses upon whether the victim made a voluntary choice to engage in sexual conduct with the attacker.[132] A request to use a condom does not mean that the victim voluntarily engaged in the sexual act.[133] When a woman being sexually attacked seeks to protect herself from the threat of AIDS by convincing her attacker to wear a condom, she has not negated the fact that the intercourse was not voluntary and that the attack occurred without her consent.[134] Lack of consent, even where not a statutory element of the

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127. See *supra* notes 17-27 and accompanying text for a discussion of the resistance requirement.

128. *See supra* notes 88-97 and accompanying text; see also *infra* notes 156-69 and accompanying text for a discussion of HIV-related crimes.

129. *See Prevention and Control, supra* note 89, at 2098. The Board of Trustees of the American Medical Association recommend that "those individuals who are not infected with the AIDS virus must have every opportunity to avoid transmission of the disease to them." *Id.*

130. *See supra* notes 17-23.

131. Traditional rape law recognized the victim's need to avoid great bodily harm by excusing utmost resistance when the victim was faced with a choice between resistance and serious bodily harm. *See supra* notes 17-23 and accompanying text. Similarly, when a victim is faced with a choice between condom use and possible infection with a deadly disease, the law should recognize the choice as coerced submission rather than consent. *See* cases and statute cited *supra* note 19.

132. *See* Commonwealth v. Mlinarich, 542 A.2d 1335, 1341-42 (Pa. 1988); *supra* notes 11-27 and accompanying text.

133. *See* State v. Lira, 759 P.2d 869 (Haw. 1988). The Supreme Court of Hawaii stated:

> We by no means suggest that mere submission to the act constitutes consent. "Use of force may cause the [victim] to submit to the will of the [aggressor], but this is submission and not consent. Consent is an operation of the mind rather than one of the body. It implies a positive mental attitude on the part of the person granting consent."

Id. at 872 n.6 (quoting BASSIOUNI, SUBSTANTIVE CRIMINAL LAW § 14.1.5, at 285 (1978)).

134. Consent is not proven merely because a victim submits but asks the rapist to use a condom. *See Lira*, 759 P.2d at 872 (submission does not mean consent); People v. Barnes, 721 P.2d 110, 123 (Cal. 1986) ("pretending to be a willing partner" does not mean the victim consented); FLA. STAT. ch. 794.011(1)(a) (1992 & Supp. 1993) (consent "shall not be construed to include coerced submission").

crime,[135] is implicit in the requirement that the sexual intercourse be compelled by force.[136] Consent, therefore, remains a defense to the crime of rape because it negates the forcible compulsion element of the crime.[137]

When the defense in a rape case raises the issue of consent, evidence of resistance may be used to show that the victim did not consent.[138] Evidence of failure to resist, however, does not prove consent.[139] Furthermore, evidence of the victim's prior sexual conduct is generally inadmissible to prove consent.[140] Consent is lacking where the victim is compelled to submit to sexual intercourse.[141] Compulsion, thus lack of consent, can be shown when force or threat of force is actual or constructive.[142]

When a victim is sexually attacked, the victim does not know whether or not the attacker is infected with HIV. Although the victim may make a voluntary choice to request that the attacker wear a condom, the victim is not making a voluntary choice to engage in sexual intercourse.[143] Since the defense of consent is contingent upon the victim voluntarily engaging in sexual intercourse, consent is not proven by

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135. *See supra* notes 11-27 and accompanying text. Many modern statutes do not explicitly command proof of lack of consent as an element of the crime. *See, e.g.*, ALA. CODE § 13A-6-61 (1982); COLO. REV. STAT. § 18-3-402 (1990); IND. CODE § 35-42-4-1 (1986); KY. REV. STAT. ANN. § 510.040 (Baldwin 1992); MICH. COMP. LAWS § 750.520b (1991); NEB. REV. STAT. § 28.319 (1989); N.Y. PENAL LAW § 130.35 (McKinney 1987); OHIO REV. CODE ANN. § 2907.02 (Anderson 1992); OR. REV. STAT. § 163.375 (1989); WASH. REV. CODE § 9A.44.040 (1988). *But see* ARIZ. REV. STAT. ANN. § 13-1406 (1992) ("without consent" an element of the crime); MO. REV. STAT. § 566.030 (1991) (same); UTAH CODE ANN. § 76-5-402 (1992) (same); WIS. STAT. § 940.225(2)(a) (1982) (same).

136. MODEL PENAL CODE § 213.1 cmt. 4; see also *supra* notes 28-49 and accompanying text for a discussion of compulsion by force as proof of lack of consent.

137. MODEL PENAL CODE § 213.1 cmt. 4.

138. *See Barnes*, 721 P.2d at 118; *see also supra* notes 24-27 and accompanying text.

139. *Barnes*, 721 P.2d at 118; MONT. CODE ANN. § 45-5-511(5) (1991) (resistance not required to show lack of consent; force, fear or threat is sufficient alone to show lack of consent).

140. *See supra* notes 77-81 and accompanying text. Evidence of prior conduct which is specifically relevant to consent in the instant case may be admissible. *See supra* notes 81-86 and accompanying text. Additionally, evidence of prior sexual conduct to prove motive for the witness to lie may be admissible. *See supra* note 87 and accompanying text.

141. ALA. CODE § 13A-6-70(b) (1982) ("lack of consent results from: (1) forcible compulsion"); KY. REV. STAT. ANN. § 510.020 (1984) (same); MONT. CODE ANN. § 45-5-501(1) (1991) (without consent means compelled to submit by force).

142. *See supra* notes 36-38 and accompanying text.

143. *See* Cruz-Sanchez v. Rivera-Cordero, 835 F.2d 947 (1st Cir. 1987). The First Circuit Court of Appeals stated: "A woman does not waive her right to refuse to have sex on one occasion by consenting to have sex on a prior one." *Id.* at 948-49. Similarly, a woman does not waive the right to refuse sex by suggesting that her attacker use a condom. Choosing to protect herself from HIV infection is not equivalent to the woman choosing to have sexual intercourse with the attacker.

establishing that the victim merely requested that the attacker use a condom.[144]

B. *Forcible Compulsion*

A person is guilty of rape when he compels his victim to submit to sexual intercourse by force or threat of force.[145] Forcible compulsion can be proven with evidence of minimal force.[146] For example, when the attacker pushes or pulls the victim to the bed, the forcible compulsion requirement is met.[147] Furthermore, where a victim is fearful of possible injury, the forcible compulsion element is met, even when the victim appears to cooperate with her attacker.[148] Thus, although a victim may appear to be cooperating with her attacker by pleading with him to use a condom, and even by providing the condom, the fact that this "cooperation" was forced by the assailant does not change.[149]

A defendant charged with rape may argue that when his victim requested he use a condom, he believed that she consented to the sexual intercourse. His reasoning might be that condom use is generally associated with consensual sex, so the victim's conduct caused a mistaken belief that she consented. Reasonable and good faith belief of consent, though mistaken, is a defense to the crime of rape.[150] The defendant

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144. *See supra* note 143.

145. *See* MODEL PENAL CODE § 213.1.

146. The force may be actual force of a minimal level, constructive force, or the threat of force. *See supra* notes 36-38 and accompanying text.

147. Commonwealth v. Stockhammer, 570 N.E.2d 992 (Mass. 1991) (evidence that attacker pushed victim to bed was sufficient to prove forcible and without consent); State v. Archuleta, 747 P.2d 1019, 1022 (Utah 1987) (forcible compulsion requirement met when attacker pushed and pulled victim to bed).

148. *See* People v. Barnes, 721 P.2d 110, 122-23 (Cal. 1986). Attacker's verbal onslaughts and threats in which he claimed he could pick up the victim and throw her out with one hand and that he would become angry if she refused his sexual advances were sufficient to prove reasonable fear. *Id.* This was sufficient even though the victim later appeared to cooperate with sexual intercourse and slept for a period of time afterward before convincing her attacker to allow her to leave his home. *Id.*

149. A rape victim, held at knifepoint by her attacker, does not consent by requesting that the attacker use a condom. The victim has merely submitted to the force of the attacker. Submission resulting from force of the aggressor is not consent. *See supra* notes 33-41 and accompanying text. Consent requires a positive mental attitude on the part of the victim. *See supra* note 33. Thus, while a victim may appear cooperative by convincing her attacker to use a condom, if she does not have a positive mental attitude she is not consenting. *See infra* note 150.

150. *See* People v. Williams, 841 P.2d 961, 965 (Cal. 1992) (upholding conviction where no evidence was presented which could lead the accused to reasonably believe the victim consented); State v. Smith, 554 A.2d 713, 717 (Conn. 1989) (whether a complainant consented "depends upon how her behavior would have been viewed by a reasonable person under the surrounding circumstances"). The *Smith* court further noted that after the victim spat in the attacker's face and kicked at him, "[o]nly by entertaining the fantasy that 'no' meant 'yes,' and that a display of distaste meant affection, could the defendant have believed" that the victim consented. *Id.* at 718. "Such a distorted view of [the victim's] conduct would not have been reasonable." *Id.*

must form the mistaken belief "under circumstances society will tolerate as reasonable."[151] In *People v. Williams*,[152] the Supreme Court of California found that the defendant's belief was unreasonable when the victim's conduct, mistaken as consent, followed only after the attacker blocked her attempt to leave, punched her in the eye, pushed her onto the bed, and ordered her to take her clothes off, all while warning her that he did not like to hurt people.[153] Similarly, there are no reasonable grounds for an attacker to mistakenly believe the victim consents, when the attacker holds the victim at knifepoint but the victim requests that the attacker use a condom. The "mistaken belief" defense fails when considered in light of the requirement that only minimal force or threat of force is required to prove the forcible compulsion element of rape.[154]

The reasoning also fails when considered in light of the development of the law in assault-type crimes when HIV is involved.[155] Because of the risk of serious bodily harm if a person becomes infected with AIDS, Courts recognize assault-type crimes related to the transmission of the AIDS virus. For example, many courts have upheld attempted murder convictions when the defendant, infected with HIV, bit, scratched, or spit upon the victim.[156] The theory of these cases is that a knowing attempt to expose a victim to the AIDS virus constitutes a risk of death sufficient to meet the requirement of a crime such as attempted murder.[157]

Extending this theory to the law of rape, a court should conclude that a rapist, knowing he was infected with HIV, who forced unprotected sexual intercourse upon his victim, committed attempted murder as well as rape. It is as incongruous to say that a rapist is not guilty of rape because the victim asked him to use a condom to protect her from AIDS as it is to say that a person is not guilty of attempted murder because the intended victim wore a bullet-proof vest to protect against a gunshot. The only difference between the two situations is that the rape victim has no option to protect herself without convincing the rapist to use a condom.[158]

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151. *Williams*, 841 P.2d at 965.

152. 841 P.2d 961 (Cal. 1992).

153. *Id.* at 966.

154. *See supra* notes 36-38 and accompanying text.

155. *See infra* notes 157-70 and accompanying text.

156. *See, e.g.*, United States v. Katzenbach, 824 F.2d 649 (8th Cir. 1987) (bit, scratched and spit); State v. Haines, 545 N.E.2d 834 (Ind. Ct. App. 1989) (spit at, bit, scratched, and threw blood); Scroggins v. State, 401 S.E.2d 13 (Ga. Ct. App. 1990) (bit); *see also* State v. Farmer, 805 P.2d 200, 211 (Wash. 1991) (upholding an exceptional sentence when defendant exhibited deliberate cruelty by exposing two minor victims to HIV).

157. *See* cases cited *infra* note 159.

158. *See supra* notes 36-48 and accompanying text; *see also infra* notes 169-70.

Other courts have found that unprotected, uninformed consensual sexual intercourse constitutes aggravated assault when the defendant is infected with HIV.[159] In *United States v. Johnson*,[160] for example, the United States Air Force Court of Military Review reasoned that the specific intent required for conviction was present because the defendant intended to gain sexual gratification by releasing semen.[161] Semen, which carries HIV, was the vehicle or means potentially causing harm or death.[162] The *Johnson* court also found that uninformed consent is not a defense when the conduct is injurious to the public as well as to the individual victim.[163]

The theory of the cases of assault-type crimes in which the victim is exposed to potential infection with HIV can be analogized to rape. A victim is confronted with the possibility of rape and the further possibility of infection with HIV. In this situation, it is reasonable that the victim would try to protect herself against infection with HIV, although she cannot prevent the rape itself.[164] Constructive force in the form of fear, fright, or coercion is recognized as meeting the forcible compulsion requirement.[165] Additionally, minimal amounts of actual force, such as pulling the victim to the bed, have been held to meet the forcible compulsion requirement.[166] In a case where the victim is being held at knife-point, for example, the forcible compulsion is still present although the victim convinces her attacker to use a condom.[167] The fact that the victim requests her attacker to use a condom, and provides the condom, does not change the fact that she was compelled to submit to sexual intercourse by force.[168] Further, if an attacker infected with

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159. United States v. Johnson, 27 M.J. 798 (A.F. C.M.R. 1988); United States v. Schoolfield, 36 M.J. 545 (Army C.M.R. 1992) (reasoning that the offensive touching is the exposure to the HIV virus, which can produce death or grievous bodily harm); State v. Stark, 832 P.2d 109, 111 (Wash. Ct. App. 1992) (conviction on three counts of second degree assault, each with a different victim).

160. 27 M.J. 798 (A.F. C.M.R. 1988).

161. *Id.* at 803.

162. *Id.*

163. *Id.* at 803-04.

164. HIV infection is a deadly disease. *See supra* notes 88-98. Resistance, when the victim was faced with serious bodily harm, was not required even under the oldest statutes. *See supra* note 22 and accompanying text. When a victim attempts to protect herself from infection with HIV, she has not prevented the rape. Similarly, when a victim failed to resist when threatened with serious bodily harm, she did not prevent the rape. *See supra* notes 21-22 and accompanying text. Submission, and condom use, may limit the harm to the victim, but neither prevents rape.

165. *See supra* note 36.

166. *See supra* notes 36-49 and accompanying text.

167. See *supra* notes 36-49 and accompanying text for a discussion of the minimal amount of force used which meets this requirement.

168. *See* Keeton v. State, 190 S.W.2d 820 (Tex. Crim. App. 1945). The Court of Criminal Appeals of Texas noted that even if a victim willingly accompanied her attacker with the intent of engaging in sexual intercourse with him, she still "had a right to change her mind and to refuse."

HIV forces a victim to have sexual intercourse without a condom, the fact of unprotected intercourse alone should be sufficient to meet the force requirement.[169]

C. Modern Rape Law — Focus Upon the Attacker Rather Than the Victim

By following the trend in rape law, it becomes evident that mere use of a condom at the victim's request does not constitute the victim's consent to the crime. Modern rape law focuses upon the attacker rather than the victim.[170] The law focuses upon the attacker by eliminating lack of consent as an essential element of the crime of rape,[171] recognizing that forcible compulsion can be constructive, implied, or actual, eliminating the marital exemption, and protecting the victim against interrogation.[172]

This shift of focus should also apply when considering a case in which the victim requests that her attacker use a condom. The focus should be upon the attacker rather than the victim. The attacker forcibly compels the victim to submit to sexual intercourse.[173] By convincing the rapist to use a condom, the victim has merely attempted to limit the harm which the attacker inflicts upon her.[174] The focus should not be upon the fact that the victim attempted to mitigate the harm forced

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Id. at 823. Analogizing this reasoning to a scenario where the victim requests her attacker to use a condom, the attacker might consider providing the condom as the victim's intent to engage in intercourse with him. However, if the victim, after providing the condom, changes her mind and refuses, there is no consent. *Id.* at 823. The same analysis applies where the victim submits only because of the force threatened by the attacker, such as a knife held to her throat.

169. Moreover, the attacker should be subject to other charges, such as attempted murder, beyond the charge of rape. *See supra* text accompanying notes 156-63.

170. *See supra* notes 24-49 and accompanying text.

171. Even where lack of consent is still an element of the crime, the proof required to show lack of consent has evolved to focus upon the attacker rather than upon the victim. *See, e.g.*, UTAH CODE ANN. § 76-5-402 (1992). The Utah Code provides that "[a] person commits rape when the actor has sexual intercourse with another person, not the actor's spouse, without the victim's consent." *Id.* In 1898, the Utah Supreme Court found that although the attacker used force and violence against the victim, a rape conviction could not be sustained because the victim's failure to resist throughout the attack constituted voluntary consent. State v. McCune, 51 P. 818, 819 (Utah 1898). In 1937, the court found that utmost resistance was not required to prove non-consent and force. State v. Roberts, 63 P.2d 584, 587 (Utah 1937). In 1977, the court found that physical, psychological, or emotional stress could be sufficient to overcome the victim's will, thus meeting the statutory requirement of lack of consent. State v. Studham, 572 P.2d 700, 702 (Utah 1977). The Utah Supreme Court has also found that failure to call for help, escape, or physically resist the attack does not constitute consent. *See* State v. Archuleta, 747 P.2d 1019, 1021-22 (Utah 1987); State v. Stettina, 635 P.2d 75, 77-78 (Utah 1981).

172. *See supra* notes 36-87 and accompanying text.

173. For example, the victim may be forcibly compelled by the attacker holding a knife at her throat. *See supra* text accompanying notes 1-3.

174. *See supra* notes 87-97, 149-148 and accompanying text.

upon her. Rather, the focus should be upon the fact that the attacker forced the victim to submit to sexual contact.

Modern rape shield statutes force the focus of rape to remain upon the attacker rather than shifting to the victim and her sexual past.[175] In the past, the victim of a sexual crime was subjected to interrogation into her sexual past.[176] The defense used the "unchaste" character of the victim to create an inference that the victim consented to the sexual act.[177] Using the sexual history of the victim allowed the rapist to shift the focus of the jury from the attacker to the victim.[178] Modern statutes keep the focus of the jury upon the act of the rapist by excluding evidence regarding the victim's past sexual conduct except in exceptional circumstances.[179] Exclusion of such evidence keeps the focus of the jury upon the conduct of the rapist while protecting the privacy of the victim.[180] Furthermore, the introduction of evidence of the victim's past sexual conduct is generally not relevant to the issue of whether a rape occurred.[181] Similarly, the fact that the attacker used a condom is not relevant to the issue of whether a rape occurred. If the attacker uses a condom on his own initiative, the fact of his condom use would not negate the fact that the victim was forced to have sexual intercourse.[182] Likewise, the fact that a victim convinces the attacker to use a condom should not negate the fact that the attacker forced sexual intercourse upon her.

If the rapist understood at the beginning of the incident that sexual contact was nonconsensual, when the victim stops active resistance the act does not become consensual.[183] The victim who ceases active

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175. *See supra* notes 68-87.

176. Morris v. Commonwealth, 459 S.W.2d 589, 590-91 (Ky. 1970) (evidence of victim's promiscuity admissible). For cases allowing evidence of a victim's prior sexual conduct with the defendant, see Woods v. People, 55 N.Y. 515 (1874); State v. Ogden, 65 P. 449 (Or. 1901); State v. Scott, 188 P. 860 (Utah 1920).

177. *See, e.g.*, Bowman v. Commonwealth, 143 S.W. 47 (Ky. 1912) (stating that a woman of bad character is more likely to consent than a woman of good character).

178. *See* MODEL PENAL CODE § 213.1 cmt. 8.

179. *See supra* notes 77-87 and accompanying text. Most states now have so-called "Rape Shield" statutes. *See* statutes cited *supra* note 76.

180. *See supra* note 76.

181. *See supra* notes 77-83 and accompanying text.

182. *See* Gelfant v. Riley, No. C 91-1384 BAC, 1993 U.S. Dist. LEXIS 7315 (N.D. Cal. May 19, 1993) (finding violation of 42 U.S.C. § 1983 when police officer, under color of law, raped victim although condom used by attacker); State v. Thomas, No. 61078, 1992 Ohio App. LEXIS 4746 (Ohio Ct. App. Sept. 17, 1992) (rape conviction upheld even when attacker used condom); Sibley v. State, No. A14-87-00169-CR, 1988 Tex. App. LEXIS 47 (Tex. Ct. App. Jan. 14, 1988) (rape conviction upheld when attacker used condom so he would not "leave evidence on" his victim).

183. *See* State v. Smith, 554 A.2d 713, 718 (Conn. 1989) (words and actions prior to "giving in" sufficient to prove that the incident was nonconsensual).

resistance merely attempts to minimize the effect of the rape upon her.[184] Similarly, when a woman requests that her attacker wear a condom and provides the condom, she is merely trying to minimize the harmful effects of the rape. She is attempting to limit the risk that she will be exposed to a life-threatening disease as a result of the attack. She has not consented.

V. CONCLUSION

The days are gone when a woman is treated as the chattel of her husband. The days are gone when a woman's identity merges with that of her husband upon marriage. The days are gone when a woman must resist a sexual attack, from beginning to end, to the full extent of her physical ability, lest the law treat her lack of resistance as consent. The days are gone when a woman is subject to intense interrogation about her sexual past so that a rapist can go free. So, too, should the days be gone when a rapist goes free because a woman protects herself from the risk of death by convincing the rapist to use a condom. "Condom or not, rape is rape."[186]

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184. *See supra* notes 87-97, 124 and accompanying text.

185. Milloy, *supra* note 1, at 18. This is an excerpt from a letter written by a victim, which was read to a group of people protecting the grand jury refusal to indict her attacker. *Id.*