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## The Requirement of Corroboration in Prosecutions for Sex Offenses in New York

### Cover Page Footnote

Judge of the Civil Court of the City of New York. Judge Younger received his A.B. from Harvard College and his LL.B. from New York University where he was the Editor-in-Chief of the Law Review.

# THE REQUIREMENT OF CORROBORATION IN PROSECUTIONS FOR SEX OFFENSES IN NEW YORK

IRVING YOUNGER\*

## I. INTRODUCTION

A favorite subject of legal commentary at the present time is the nature of the rights guaranteed to defendants in criminal cases by the United States Constitution. Those less glamorous safeguards which find their basis not in the Bill of Rights but in statutes or decisions have received less than their due. This article is an attempt to remedy the deficiency with respect to one of them: the requirement of corroborative evidence in prosecutions for sex offenses. To that end, the article summarizes the rule of number by which several pieces of evidence must be associated in presentation before the jury may consider any one of them;<sup>1</sup> surveys the manner in which other jurisdictions have applied the rule requiring corroboration in prosecutions for sex offenses; describes the development and present state of the rule in New York; and offers criticism and suggestions for change.

## II. CORROBORATION ACCORDING TO THE RULE OF NUMBER

The Code of the Emperor Justinian stated that on any important issue the testimony of a single witness would be inadequate.<sup>2</sup> This general principle, called the rule of number, was taken up in ecclesiastical law which gave it practical effect by specifying, in many instances, the precise number of witnesses necessary to prove a point. Against the word of a Cardinal, for example, forty-four witnesses were required.<sup>3</sup> The rule of number made perfect sense to the canon lawyers of the middle ages, for whom the act of taking the oath itself had probative force. The more times the oath was taken, the greater was the persuasiveness which

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1. The definition is Wigmore's. 7 J. Wigmore, *Evidence* § 2030 (3d ed. 1940) [hereinafter cited as Wigmore].

2. 9 W. Holdsworth, *History of English Law* 203-11 (3d ed. 1944); Wigmore, *Required Number of Witnesses; A Brief History of the Numerical System in England*, 15 *Harv. L. Rev.* 83 (1901). In writing this and the following sentences, I have borrowed liberally from the scholarship of Holdsworth and Wigmore, to whose masterful work I am, like every other lawyer, much in debt.

3. Wigmore § 2032.

attached to the testimony that followed. Certainty rested not in careful scrutiny of the significance of each oath with respect to the person taking it, but in a simple count of the number of swearers. Gradually, as other modes of inquiry into the truth became fashionable, the rather primitive formalism of the rule of number gave way to conceptions of evidence and of proof more congenial to the modern mind. To illustrate, until the early eighteenth century, an English jury was free to consider its own extra-judicial knowledge of a cause.<sup>4</sup> This being so, it was difficult to ask the jury to give its verdict automatically to the side with the longer line of witnesses in court. The consequence, ultimately, was that the common law rejected the rule of number; it excepted only prosecutions for perjury where the testimony of a single witness, without corroboration, remained insufficient.<sup>5</sup>

### III. CORROBORATION IN JURISDICTIONS OTHER THAN NEW YORK

Many American jurisdictions follow the common law rule, imposing no requirement of corroboration in sex offense cases.<sup>6</sup> It is fairly well known, however, that charges of sexual misconduct are easy to make and difficult to rebut.<sup>7</sup> Accordingly, several states have chosen to depart from the common law rule.

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4. See 9 W. Holdsworth, *supra* note 2, at 137; J. Thayer, *A Preliminary Treatise on Evidence* 296 (1898).

5. One court has said, without citation of authority and erroneously, that the common law also required corroboration in prosecutions for rape. *People v. Friedman*, 139 App. Div. 795, 796, 124 N.Y.S. 521, 522 (2d Dep't 1910). But see *People v. Gibson*, 301 N.Y. 244, 93 N.E. 2d 827 (1950) where the court properly noted: "At common law, in the case of sexual offenses, it was not necessary that the testimony of the injured female be corroborated . . . . The necessity of corroboration, if it exists at all, must thus be found in a specific statute." *Id.* at 245, 93 N.E.2d at 827 (citation omitted).

6. E.g., *Herndon v. State*, 2 Ala. App. 118, 56 So. 85 (1911); *People v. Gump*, 17 Cal. App. 2d 221, 61 P.2d 970 (Dist. Ct. App. 1936). But cf. *People v. Gidney*, 10 Cal. 2d 138, 73 P.2d 1186 (1937); *McQueary v. People*, 48 Colo. 214, 110 P.2d 210 (1910). Additional cases are collected in Wigmore § 2061.

7. A classic expression of this perception is that of Lord Chief Justice Hale: "The party ravished may give evidence upon oath and is in law a competent witness; but the credibility of her testimony, and how far forth she is to be believed, must be left to the jury, and is more or less credible according to the circumstances of fact that concur in that testimony. . . . It is one thing whether a witness be admissible to be heard; another thing, whether they are to be believed when heard. It is true, rape is a most detestable crime, and therefore ought severely and impartially to 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." 1680 *Pleas of the Crown* I, 633, 635, cited in Wigmore § 2060, at 342-45; see text accompanying note 104 *infra*.

A. *Rape*

A number of states, either by statute<sup>8</sup> or decision,<sup>9</sup> have decreed that corroboration is necessary to sustain a conviction of rape. Beyond that there is no uniformity of view. Among the circumstances which have been held to constitute sufficient corroboration are the opportunity to commit the crime,<sup>10</sup> presence at the scene of the crime,<sup>11</sup> the subsequent birth of a child,<sup>12</sup> physical signs of recent violent intercourse,<sup>13</sup> the defendant's expressions of desire for the complainant,<sup>14</sup> the fact that the complainant complained,<sup>15</sup> and the defendant's admissions concerning the act.<sup>16</sup> In addition, a few states do not require corroboration as such, but recognize certain situations in which the bare word of the complainant will simply not do. Thus, some courts have insisted upon the introduction of corroborative evidence where the complainant's testimony is not clear and convincing,<sup>17</sup> is incredible,<sup>18</sup> improbable,<sup>19</sup> or contradictory,<sup>20</sup> where the defendant denies the accusation,<sup>21</sup> where the complainant did not make prompt outcry,<sup>22</sup> or where her testimony is inconsistent with the surrounding circumstances.<sup>23</sup>

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8. E.g., Ga. Code Ann. § 26-1304 (1953); Iowa Code Ann. § 782.4 (1950); Miss. Code Ann. § 2360 (1956); R.I. Gen. Laws Ann. § 11-37-4 (1969).

9. E.g., *Davis v. State*, 120 Ga. 433, 48 S.E. 180 (1904); *State v. Elsen*, 68 Idaho 50, 187 P.2d 976 (1947); *Stapleman v. State*, 150 Neb. 460, 34 N.W.2d 907 (1948); *State v. Clevenger*, 27 N.M. 466, 202 P. 687 (1921).

10. *State v. Fehr*, 45 S.D. 634, 189 N.W. 942 (1922).

11. *Ewing v. United States*, 135 F.2d 633 (D.C. Cir. 1942).

12. *State v. Mason*, 41 Idaho 506, 239 P. 733 (1925).

13. *People v. Cox*, 383 Ill. 617, 50 N.E.2d 758 (1943).

14. *Whetstone v. State*, 99 Neb. 469, 156 N.W. 1049 (1916).

15. *People v. DeFrates*, 395 Ill. 439, 70 N.E.2d 591, cert. denied, 331 U.S. 811 (1947).

16. *Autrey v. State*, 94 Fla. 229, 114 So. 244 (1927); *State v. Geier*, 184 Iowa 874, 167 N.W. 186 (1918).

17. *People v. Nelson*, 360 Ill. 562, 196 N.E. 726 (1935).

18. *State v. Haston*, 64 Ariz. 72, 166 P.2d 141 (1946); *State v. Beacraft*, 126 W. Va. 895, 30 S.E.2d 541 (1944).

19. *McDaniel v. Commonwealth*, 308 Ky. 132, 213 S.W.2d 1007 (1948).

20. *Roberts v. State*, 87 Okla. Crim. 93, 194 P.2d 219 (1948).

21. *People v. Garafola*, 369 Ill. 232, 16 N.E.2d 741 (1938); *Boling v. State*, 91 Neb. 599, 136 N.W. 1078 (1912).

22. *Hindman v. State*, 152 Tex. Crim. 75, 211 S.W.2d 182 (1948); *Armstrong v. State*, 136 Tex. Crim. 33, 125 S.W.2d 578 (1939).

23. See *Boyd v. State*, 189 Miss. 609, 198 So. 561 (1940).

### B. *Seduction by Promise of Marriage and Other Sex Crimes*

Many states, by statute, require corroboration in prosecutions for the crime of seduction by promise of marriage.<sup>24</sup> The type of evidence which will suffice varies. Some states demand corroboration of all material elements of the crime;<sup>25</sup> others merely require that the complainant be shown in some measure worthy of belief.<sup>26</sup> Still other states demand corroboration for both the promise of marriage and the act of intercourse,<sup>27</sup> while others require corroborating evidence only for the promise of marriage.<sup>28</sup> Yet others add a final requirement that the prior virtue of the complainant be supported by something more than her uncorroborated declaration.<sup>29</sup>

Various states require corroboration in prosecutions for adultery,<sup>30</sup> abortion,<sup>31</sup> compulsory prostitution,<sup>32</sup> fornication,<sup>33</sup> and abduction.<sup>34</sup> The standards used to determine whether the corroboration is sufficient, however, are too miscellaneous to make discussion profitable.

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24. Ala. Code tit. 14, § 419 (1958); Ark. Stat. Ann. § 41-3408 (1947); Colo. Rev. Stat. Ann. § 40-9-7 (1963); Ind. Ann. Stat. § 9-1612 (1956); Iowa Code Ann. § 782.4 (1946); Miss. Code Ann. § 2374 (1956); Mo. Ann. Stat. § 546.340 (1949); Mont. Rev. Codes Ann. § 94-7216 (1947); N.J. Stat. Ann. § 2A:142-3 (1969); N.C. Gen. Stat. § 14-180 (1969); N.D. Cent. Code § 12-32-03 (1960); Ohio Rev. Code Ann. § 2945.63 (Page 1954); Okla. Stat. Ann. tit. 22, § 744 (1969); Ore. Rev. Stat. § 167.025(2) (1969); Pa. Stat. Ann. tit. 18, § 4510 (1959); R.I. Gen. Laws Ann. § 11-37-4 (1969); S.C. Code Ann. § 16-405 (1962); S.D. Code § 34.3639 (Supp. 1960); Tex. Code Crim. Proc. art. 38.07 (1966); Va. Code Ann. § 18.1-42 (1960); Wyo. Stat. Ann. § 7-261 (1957).

25. E.g., Ind. Ann. Stat. § 9-1612 (1956).

26. E.g., *Pace v. State*, 32 Ala. App. 65, 21 So. 2d 565 (1945).

27. E.g., *Rickey v. State*, 74 Okla. Crim. 398, 126 P.2d 753 (1942).

28. E.g., Pa. Stat. Ann. tit. 18, § 4510 (1959).

29. E.g., *State v. Forbes*, 210 N.C. 567, 187 S.E. 760 (1936); *State v. Crook*, 189 N.C. 545, 127 S.E. 579 (1925).

30. E.g., Del. Code Ann. tit. 11, § 312 (1953).

31. Cal. Penal Code § 1108 (West 1970); Idaho Code § 19-2115 (1947); Mont. Rev. Codes Ann. § 94-7216 (1947); Nev. Rev. Stat. § 175.301 (1969); Pa. Stat. Ann. tit. 19, § 583 (1964); S.C. Code Ann. § 16-83 (1962); Utah Code Ann. § 77-31-14 (1953).

32. Ala. Code tit. 14, § 3 (1958); Cal. Penal Code § 1108 (West 1970); Idaho Code § 19-2115 (1968); Iowa Code Ann. § 782.4 (1946); Mass. Ann. Laws ch. 272, § 11 (1968); Mont. Rev. Codes Ann. § 94-7216 (1947); Nev. Rev. Stat. § 175.301 (1969); N.D. Cent. Code § 12-22-24 (1960); Okla. Stat. Ann. tit. 22, § 744 (1969); Ore. Rev. Stat. § 167.140 (1969); Utah Code Ann. § 77-31-14 (1953).

33. N.H. Rev. Stat. Ann. § 579:4 (1955).

34. Idaho Code § 19-2115 (1968); Neb. Rev. Stat. § 29-2013 (1964); Va. Code Ann. § 18.1-42 (1960); Wyo. Stat. Ann. § 7-261 (1957).

## IV. CORROBORATION IN NEW YORK STATE

For nearly a century, New York's statutes have required corroborative evidence in prosecutions for certain sex offenses.<sup>36</sup> However, in one respect at least, New York law relating to this requirement is different from that of other jurisdictions; it has surpassed them all in the number and complexity of its rules on corroboration.

A. *Offenses Where Corroboration is Specifically Required by Statute*

## 1. The Law Prior to 1967

Under the Penal Law which prevailed in New York prior to 1967, corroboration was required in prosecutions for abduction,<sup>36</sup> adultery,<sup>37</sup> compulsory prostitution of a wife,<sup>38</sup> rape,<sup>39</sup> seduction,<sup>40</sup> and compulsory prostitution.<sup>41</sup> In construing these statutes the courts were concerned with three questions: (1) How much corroborative evidence would suffice? (2) Could the jury return a conviction of a lesser sex offense (as to which there was no corroboration requirement), the commission of which was revealed in the uncorroborated testimony of the complainant describing a greater sex offense (as to which there was a corroboration requirement)? (3) Could the jury return a conviction of a non-sex offense (as

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35. Law of July 26, 1881, ch. 676, § 283, [1881] N.Y. Laws 104th Sess. 69. This statute was amended in 1886 (Law of June 15, 1886, ch. 663, § 1, [1886] N.Y. Laws 109th Sess. 953) and in 1909 became part of the Penal Law which remained authoritative in New York until 1967. Law of May 27, 1909, ch. 524, § 1, [1909] N.Y. Laws 132d Sess. 1316 (codified, until repealed, at N.Y. Penal Law § 2177 (McKinney 1944)).

36. N.Y. Penal Law § 71 (McKinney 1944) (repealed 1967) provided: "No conviction can be had for abduction, upon the testimony of the female abducted, unsupported by other evidence."

37. *Id.* § 103 provided: "A conviction under this article [adultery] can not be had on the uncorroborated testimony of the person with whom the offense is charged to have been committed."

38. *Id.* § 1091 provided: "In all prosecutions under the previous section [compulsory prostitution of wife], the wife shall be a competent witness against the husband, but no conviction under this article shall be had upon the testimony of the wife unsupported by other evidence."

39. *Id.* § 2013 (now N.Y. Penal Law § 130.15 (McKinney 1967)) provided: "No conviction can be had for rape or defilement upon the testimony of the female defiled, unsupported by other evidence."

40. *Id.* § 2177 (repealed 1967) provided: "No conviction can be had for an offense specified in the last section [seduction under promise or pretense of marriage], upon the testimony of the female seduced, unsupported by other evidence." (footnote omitted).

41. *Id.* § 2460(9) (now N.Y. Penal Law § 230.35 (McKinney 1967)) provided: "No conviction shall be had under this section [compulsory prostitution of women] upon the testimony of the female unless supported by other evidence."

to which there was no corroboration requirement), the commission of which was disclosed in the uncorroborated testimony of the complainant as part of an episode in the course of which a sex offense (as to which there was a corroboration requirement) was also committed?

a. *How Much Corroborative Evidence is Sufficient?*

Analytically, the prosecution of any crime involves proof of three propositions. First, it must be proved that something has occurred, *e.g.*, the complainant has been sexually penetrated. Second, it must be proved that the cause of the occurrence is criminal in nature, *e.g.*, the penetration was without the complainant's consent. Finally, it must be proved that the defendant committed the act.<sup>42</sup> The first two propositions constitute the *corpus delicti*. Where they are conceded or are obvious, the trial deals solely with the third proposition. Where the first two are in contention, the trial deals with all three.

The New York courts have read the corroboration statutes as requiring corroboration, not merely of the first two propositions, but of all three, *i.e.*, that a crime has been committed and that the defendant is the guilty party. The customary formula is that the corroboration "must extend to all the material elements of the crime and connect the defendant with its commission."<sup>43</sup> Searching for a more detailed measure, one finds that the corroboration need not be enough in and of itself to support a conviction,<sup>44</sup> nor must it consist in eyewitness testimony or confirmation of the complainant's story in every detail.<sup>45</sup> On the other hand, some types of evidence are too flimsy to do service as corroboration. Thus, it has been held insufficient to constitute corroborative evidence that the complainant complained promptly,<sup>46</sup> that the defendant had been convicted of rape before,<sup>47</sup> that the defendant had an opportunity to commit the crime,<sup>48</sup>

42. Wigmore § 2072.

43. Communication and Study Relating to Requirement of Corroborative Evidence for Conviction of Certain Crimes, 1962 N.Y. Law Revision Comm'n Ann. Rep. 639, 653; see *People v. Masse*, 5 N.Y.2d 217, 156 N.E.2d 452, 182 N.Y.S.2d 821 (1959) (rape); *People v. Jelke*, 1 N.Y.2d 321, 135 N.E.2d 213, 152 N.Y.S.2d 479 (1956) (compulsory prostitution); *People v. Downs*, 236 N.Y. 306, 140 N.E. 706 (1923) (rape); *People v. Plath*, 100 N.Y. 590, 3 N.E. 790 (1885) (abduction).

44. *People v. Imperiale*, 14 Misc. 2d 887, 180 N.Y.S.2d 814 (Spec. Sess. 1957).

45. *People v. Adams*, 72 App. Div. 166, 76 N.Y.S. 361 (1st Dep't 1902).

46. *People v. Carey*, 223 N.Y. 519, 119 N.E. 83 (1918) (*per curiam*); *People v. Murray*, 183 App. Div. 468, 170 N.Y.S. 873 (2d Dep't 1918); *People v. Green*, 103 App. Div. 79, 92 N.Y.S. 508 (3d Dep't 1905). But cf. *People v. Yannucci*, 283 N.Y. 546, 550, 29 N.E.2d 185, 186 (1940).

47. *People v. Bills*, 129 App. Div. 798, 114 N.Y.S. 587 (4th Dep't 1909).

48. *People v. Croes*, 285 N.Y. 279, 34 N.E.2d 320 (1941); *People v. Tench*, 167 N.Y.

or that the defendant made something less than clear-cut admissions.<sup>40</sup> Any attempt to generalize further is "a waste of . . . time."<sup>40</sup>

b. *Conviction of a Lesser Sex Offense Where the Testimony Describes a Greater Sex Offense*

Assume that the defendant has been indicted for rape.<sup>51</sup> The complainant testifies that it happened, but there is no corroboration; therefore there can be no conviction for rape.<sup>52</sup> Suppose, however, that the jury convicts the defendant for a lesser offense included within the charge of rape, such as attempted rape<sup>53</sup> or assault with intent to commit rape.<sup>54</sup> For these lesser offenses, no corroboration is required. The question then arises: May the conviction stand? "Yes," answered a number of courts.<sup>55</sup>

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520, 60 N.E. 737 (1901); *People v. Kingsley*, 166 App. Div. 320, 151 N.Y.S. 980 (3d Dep't 1915); *People v. Cole*, 134 App. Div. 759, 119 N.Y.S. 259 (3d Dep't 1909). It appears, however, that evidence of opportunity may be enough to corroborate the third element, i.e., defendant's identity as the assailant. *People v. Masse*, 5 N.Y.2d 217, 156 N.E.2d 452, 182 N.Y.S.2d 821 (1959); *People v. Deitsch*, 237 N.Y. 300, 142 N.E. 670 (1923) (dictum).

49. *People v. Downs*, 236 N.Y. 306, 140 N.E. 706 (1923); *People v. Page*, 162 N.Y. 272, 56 N.E. 750 (1900).

50. This superb example of the Dismissal Magisterial is Wigmore's. Wigmore § 2062, at 356. Representative cases holding particular items of evidence to be sufficient are: *People v. Yannucci*, 283 N.Y. 546, 29 N.E.2d 185 (1940); *People v. Deitsch*, 237 N.Y. 300, 142 N.E. 670 (1923); *People v. Chumley*, 24 App. Div. 2d 805, 263 N.Y.S.2d 748 (3d Dep't 1965); *People v. Marshall*, 5 App. Div. 2d 352, 172 N.Y.S.2d 237 (3d Dep't 1958), aff'd mem., 6 N.Y.2d 823, 159 N.E.2d 698, 188 N.Y.S.2d 213 (1959). Cases holding particular items of evidence insufficient are: *People v. Cysz*, 262 App. Div. 1027, 30 N.Y.S.2d 299 (2d Dep't 1941); *People v. Speeks*, 173 App. Div. 440, 159 N.Y.S. 308 (2d Dep't 1916); *People v. Shaw*, 158 App. Div. 146, 142 N.Y.S. 782 (3d Dep't 1913); *People v. Doyle*, 158 App. Div. 37, 142 N.Y.S. 884 (3d Dep't 1913); *People v. Haischer*, 81 App. Div. 559, 81 N.Y.S. 79 (4th Dep't 1903).

51. N.Y. Penal Law § 2010 (McKinney 1944) (now N.Y. Penal Law §§ 130.25-35 (McKinney 1967)).

52. *Id.* § 2013; see note 39 supra.

53. This was not mentioned in the appropriate article of the pre-1967 Penal Law (N.Y. Penal Law art. 180 (McKinney 1944) (now N.Y. Penal Law art. 130 (McKinney 1967))), and therefore was cognizable under the general attempt provisions. *Id.* art. 22 (now N.Y. Penal Law art. 110 (McKinney 1967)).

54. *Id.* art. 20 (now N.Y. Penal Law §§ 35.10-30, 120.00, .05, .10(1) & (4), .15 (McKinney 1967)).

55. E.g., *People v. Weinberger*, 2 N.Y.2d 892, 141 N.E.2d 630, 161 N.Y.S.2d 146, cert. denied, 354 U.S. 913 (1957) (sodomy); *People v. Gibson*, 301 N.Y. 244, 93 N.E.2d 827 (1950) (incest); *People v. Chimino*, 270 App. Div. 114, 58 N.Y.S.2d 844 (4th Dep't 1945), aff'd mem., 296 N.Y. 554, 68 N.E.2d 863 (1946) (assault with intent to commit rape); *People v. Phillips*, 204 App. Div. 112, 197 N.Y.S. 567 (2d Dep't 1922), aff'd mem. on other grounds, 235 N.Y. 579, 139 N.E. 742 (1923) (attempted rape); see Note, Corroboration in the New York Criminal Law, 24 Brooklyn L. Rev. 324 (1958).

Ever alert to their opportunities, prosecutors thereupon fell into the habit of circumventing the corroboration requirement by procuring convictions for lesser offenses, as to which corroboration was unnecessary, in cases where they had only uncorroborated complaints of greater offenses.<sup>56</sup>

The New York Court of Appeals finally called a halt to this practice in *People v. Lo Verde*.<sup>57</sup> There the indictment charged both rape, the conviction of which required corroboration, and impairing the morals of a minor, the conviction of which did not require corroboration. The complainant, without corroboration, testified to a rape. The defendant was acquitted of rape and convicted of impairing the morals of a minor. Reversing the verdict, the court of appeals held that in a case of this kind corroboration would be required to support a conviction of impairing the morals of a minor, although no statute specifically required it:

Were we to hold that no corroboration was necessary to support the conviction of the crime as charged in this indictment, then a prosecutor might easily circumvent the requirement of corroboration necessary for a conviction of misdemeanor rape simply by charging instead the impairment of the morals of a minor, as he did here. The law may not be so circumvented.<sup>58</sup>

Any misapprehensions<sup>59</sup> as to the reach of the holding in *Lo Verde* were subsequently corrected by *People v. English*<sup>60</sup> and *People v. Radunovic*,<sup>61</sup> cases in which the court of appeals made it clear that where the uncorroborated testimony of the complainant described a sex offense as to which corroboration was necessary for conviction, the defendant could not be found guilty of some lesser sex offense as to which corroboration was unnecessary.<sup>62</sup> However, according to the court in *People v. Colo*,<sup>63</sup> should the jury find the defendant to have actually committed the lesser sex offense as to which no corroboration is required, it may convict him of that offense without regard to the lack of corroboration.

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56. See M. Ploscowe, *Sex and the Law* 222 (1951).

57. 7 N.Y.2d 114, 164 N.E.2d 102, 195 N.Y.S.2d 835 (1959).

58. *Id.* at 116, 164 N.E.2d at 103, 195 N.Y.S.2d at 836.

59. E.g., *People v. Dixon*, 36 Misc. 2d 1068, 234 N.Y.S.2d 415 (Sup. Ct. 1962).

60. 16 N.Y.2d 719, 209 N.E.2d 722, 262 N.Y.S.2d 104 (1965). In this case the court reversed convictions of attempted rape and assault with intent to commit rape based upon the complainant's uncorroborated testimony of actual rape.

61. 21 N.Y.2d 186, 234 N.E.2d 212, 287 N.Y.S.2d 33 (1967). In this case the court reversed a conviction of assault in the third degree based upon the complainant's uncorroborated testimony of actual rape.

62. This "anti-circumvention" doctrine applies whether or not the lesser sex offense is separately charged in the indictment. *People v. Young*, 22 N.Y.2d 785, 239 N.E.2d 560, 292 N.Y.S.2d 696 (1968) (mem.).

63. 16 N.Y.2d 988, 212 N.E.2d 891, 265 N.Y.S.2d 653 (1965).

c. *Conviction of a Non-Sex Offense Where the Testimony also Describes a Sex Offense*

If the complainant's uncorroborated testimony shows that the defendant committed a rape and a robbery upon her, the defendant cannot be convicted of the rape since corroboration is lacking. But may he be convicted of the robbery, as to which there is no statutory requirement of corroboration? The answer is that he may, so long as the evidence of rape is merely "relevant," not "inherent" or "integral," to proof of the robbery.<sup>64</sup> But if a non-sex offense conviction, *e.g.*, burglary, depends upon proof of an offense, *e.g.*, assault, the sole evidence of which is the complainant's uncorroborated testimony concerning a corroboration-required sex offense such as rape, the evidence of rape may be deemed inherent or integral to proof of the burglary. Corroboration will then be required to sustain the burglary conviction.<sup>65</sup>

2. The Law Subsequent to 1967

Effective September 1, 1967, New York State adopted a new Penal Law. Section 130.15 of the law states: "A person shall not be convicted of any offense defined in this article, or of an attempt to commit the same, solely on the uncorroborated testimony of the alleged victim. This section shall not apply to the offense of sexual abuse in the third degree."<sup>66</sup> The offenses defined by article 130 are sexual misconduct,<sup>67</sup> rape in the third,<sup>68</sup> second,<sup>69</sup> and first<sup>70</sup> degrees, consensual sodomy,<sup>71</sup> sodomy in the third,<sup>72</sup> second,<sup>73</sup> and first<sup>74</sup> degrees, and sexual abuse in the third,<sup>75</sup> second,<sup>76</sup> and first<sup>77</sup> degrees.

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64. *People v. Moore*, 23 N.Y.2d 565, 245 N.E.2d 710, 297 N.Y.S.2d 944, cert. denied, 393 U.S. 887 (1969); *People v. Lennon*, 22 N.Y.2d 677, 238 N.E.2d 756, 291 N.Y.S.2d 369 (1968) (per curiam); *People v. Jenkins*, 22 N.Y.2d 675, 238 N.E.2d 755, 291 N.Y.S.2d 368 (1968) (per curiam); *People v. English*, 16 N.Y.2d 719, 209 N.E.2d 722, 262 N.Y.S.2d 104 (1965) (mem.).

65. *People v. Scruggs*, 31 App. Div. 2d 842, 298 N.Y.S.2d 194 (2d Dep't 1969) (mem.); see *People v. Sigismondi*, 21 N.Y.2d 186, 234 N.E.2d 212, 287 N.Y.S.2d 33 (1967).

66. N.Y. Penal Law § 130.15 (McKinney 1967).

67. *Id.* § 130.20.

68. *Id.* § 130.25.

69. *Id.* § 130.30.

70. *Id.* § 130.35.

71. *Id.* § 130.38.

72. *Id.* § 130.40.

73. *Id.* § 130.45.

74. *Id.* § 130.50.

75. *Id.* § 130.55.

76. *Id.* § 130.60.

Where the Penal Law in effect prior to 1967 required corroboration for six sex offenses as there defined,<sup>78</sup> the current Penal Law requires corroboration for ten sex offenses as newly defined. Further, the current law makes explicit the requirement of corroboration for attempts to commit corroboration-necessary sex offenses; it thereby minimizes the confusion attendant upon courts threading their way through the "anti-circumvention" cases<sup>79</sup> and forestalls the problem of prosecutors' misuse of the doctrine announced in *Colon*.<sup>80</sup>

By excluding from the requirement of corroboration the offense of sexual abuse in the third degree, however, the draftsmen of the current Penal Law kept open the issue whether a defendant charged with a sex offense as to which corroboration is necessary can, in the absence of corroboration, be convicted of a sex offense, such as sexual abuse in the third degree, as to which corroboration is unnecessary. This issue was recently resolved in *People v. Doyle*,<sup>81</sup> where the dispute concerned a charge of sexual abuse in the third degree supported solely by the complainant's uncorroborated testimony of rape and sodomy, as to which the law requires corroboration. Nevertheless, argued the prosecutor, the sexual abuse charge should not be dismissed since the statute excludes that offense from the requirement of corroboration. The court disagreed, saying that *Lo Verde*, *English*, and *Radunovic* show that the district attorney may not circumvent the statutory requirement of corroboration by charging a lesser or different offense as to which corroboration is unnecessary, which he then proves by the complainant's uncorroborated testimony of an offense as to which corroboration is necessary.<sup>82</sup> Therefore testimony of sexual abuse in the third degree must be corroborated when the complainant in fact describes the commission of a sex offense requiring corroboration. The statute's exemption applies *only* when the act actually charged and found by the jury to have been committed is sexual abuse in the third degree.<sup>83</sup>

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77. Id. § 130.65.

78. See notes 36-41 *supra*.

79. See text accompanying notes 51-62 *supra*. See also *People v. Colon*, 37 App. Div. 2d 21, 321 N.Y.S.2d 992 (2d Dep't 1971).

80. The misuse would occur if a prosecutor put uncorroborated testimony of a completed corroboration-necessary offense before the jury and then asked for an attempt conviction. See text accompanying note 63 *supra*.

81. 31 App. Div. 2d 490, 300 N.Y.S.2d 719 (2d Dep't 1969), *aff'd mem.*, 26 N.Y.2d 752, 257 N.E.2d 648, 309 N.Y.S.2d 199 (1970).

82. Id. at 498, 300 N.Y.S.2d at 727.

83. Id. at 499, 300 N.Y.S.2d at 728; see *People v. Colon*, 16 N.Y.2d 988, 212 N.E.2d 891, 265 N.Y.S.2d 653 (1965). The decision in *Doyle* is criticized in 44 N.Y.U.L. Rev.

### B. Cases Involving the Testimony of Children

In many states, corroboration of an infant complainant is not required to sustain a sex offense conviction.<sup>84</sup> Several courts hold that some measure of corroboration is necessary when the infant's testimony is inherently improbable<sup>85</sup> or inconsistent,<sup>86</sup> or where there is a motive to falsify.<sup>87</sup> Other courts have adopted the practice of instructing the jury to examine the testimony of an infant with great care and caution.<sup>88</sup>

In New York, no person may be convicted on the unsworn testimony of a child under twelve years of age<sup>89</sup> unless that testimony is corroborated by evidence as to each essential element of the crime.<sup>90</sup> A judge may, however, determine that a child under twelve is competent, in which instance the child takes the oath and the jury considers his testimony as it would the testimony of any other witness.<sup>91</sup>

Apart from these general rules, New York courts have traditionally

1025 (1969). The present Penal Law makes no other change in the matters discussed above. In *People v. Thompson*, 36 App. Div. 2d 497, 321 N.Y.S.2d 941 (3d Dep't 1971), however, the court held that, in connection with a prosecution for sexual abuse in the first degree (N.Y. Penal Law § 130.65 (McKinney 1967)) and sodomy in the third degree (*id.* § 130.40) committed upon a fifteen-year old boy, the old rule requiring corroboration of "all the material elements of the crime" (text accompanying note 43 *supra*) would be replaced by a rule simply requiring "corroboration of a sort which lends credibility to the victim's testimony . . ." 36 App. Div. 2d at 499, 321 N.Y.S.2d at 944.

84. *People v. Carlson*, 73 Cal. App. 2d 933, 167 P.2d 812 (Dist. Ct. App. 1946); *Wesner v. People*, 126 Colo. 400, 250 P.2d 124 (1952); *Jones v. People*, 69 Colo. 500, 195 P. 526 (1921); *State v. Doss*, 246 Iowa 651, 67 N.W.2d 451 (1954); *State v. Saibold*, 213 La. 415, 34 So. 2d 909 (1948); *State v. Newcomb*, 146 Me. 173, 78 A.2d 787 (1951); *Pittman v. State*, 236 Miss. 592, 111 So. 2d 415 (1959); *State v. King*, 342 Mo. 975, 119 S.W.2d 277 (1938); *State v. Browne*, 7 N.J. Misc. 1, 143 A. 810 (Sup. Ct. 1928) (*per curiam*); *State v. Ellison*, 19 N.M. 428, 144 P. 10 (1914); *Davis v. State*, 272 P.2d 478 (Okla. Crim. App. 1954); *Curtis v. State*, 167 Tenn. 427, 70 S.W.2d 363 (1932); *State v. Hilberg*, 22 Utah 27, 61 P. 215 (1900); *State v. Pickett*, 259 Wis. 593, 49 N.W.2d 712 (1951); see *Wigmore* § 2066.

85. See *People v. Manuel*, 94 Cal. App. 2d 20, 209 P.2d 981 (Dist. Ct. App. 1949) (*dictum*); *People v. Goard*, 11 Ill. 2d 495, 144 N.E.2d 603 (1957) (*dictum*).

86. See *State v. Perlin*, 268 Wis. 529, 68 N.W.2d 32 (1955) (*dictum*).

87. *Id.*

88. *People v. Garrett*, 27 Cal. App. 2d 249, 81 P.2d 241 (Dist. Ct. App. 1938); *State v. Dodson*, 67 N.M. 146, 353 P.2d 364 (1960).

89. N.Y. Crim. Proc. Law § 60.20 (McKinney 1971).

90. See, e.g., *People v. Dutton*, 305 N.Y. 632, 111 N.E.2d 889 (1953) (*per curiam*); *People v. Nolan*, 2 App. Div. 2d 144, 153 N.Y.S.2d 905 (4th Dep't 1956) (*per curiam*); *People v. Spencer*, 165 N.Y.L.J., June 16, 1971, at 19, col. 7 (Queens County Crim. Ct.); *People v. Fazio*, 5 N.Y.S.2d 195 (Rochester City Ct. 1938).

91. N.Y. Crim. Proc. Law § 60.20 (McKinney 1971); see *People v. Klein*, 266 N.Y. 188, 194 N.E. 402 (1935) (*per curiam*).

taken a strict view of infant testimony in sex offense prosecutions. Virtually every conviction based upon the uncorroborated testimony of an infant has been reversed, not for lack of corroboration, since the statute in these cases required none, but for insufficiency of proof.<sup>92</sup>

This proclivity to reverse is best examined in *People v. Oyola*<sup>93</sup> and *People v. Porcaro*.<sup>94</sup> In *Oyola*, the court of appeals reversed convictions of impairing the morals of a minor and third degree assault<sup>95</sup> based upon the uncorroborated sworn testimony of a ten-year-old complainant. The majority opinion suggested that some supporting evidence was necessary to prove guilt beyond a reasonable doubt.<sup>96</sup> In *Porcaro*, the court reversed a conviction for impairing the morals of a minor, also based upon the uncorroborated sworn testimony of a ten-year-old complainant. The majority opinion stated that the conviction had to be reversed "[f]or the reasons stated in *People v. Oyola* . . ."<sup>97</sup> Judge Fuld, concurring, noted that "as [a] matter of law, no conviction for impairing the morals of a child may validly rest on the uncorroborated testimony of the child victim."<sup>98</sup>

In sum then, sex offense convictions resting upon the uncorroborated testimony of an infant complainant will almost always be reversed for insufficiency of evidence. Furthermore, it remains a possibility that the court of appeals will formulate a rule, inspired by Judge Fuld's concurrence in *Porcaro*, insisting upon corroboration of an infant complainant's testimony in sex offense cases even when the statute under which the prosecution has been lodged does not require it.<sup>99</sup>

92. *People v. Meyers*, 309 N.Y. 837, 130 N.E.2d 622 (1955) (mem.); *People v. Rosen*, 293 N.Y. 683, 56 N.E.2d 297 (1944) (mem.); *People v. Derner*, 288 N.Y. 599, 42 N.E.2d 605 (1942) (mem.); *People v. Slaughter*, 278 N.Y. 479, 15 N.E.2d 70 (1938) (mem.); *People v. Churgin*, 261 N.Y. 661, 185 N.E. 782 (1933) (mem.); *People v. Levy*, 265 App. Div. 841, 37 N.Y.S.2d 648 (2d Dep't 1942) (mem.); *People v. Clemons*, 242 App. Div. 846, 275 N.Y.S. 982 (2d Dep't 1934) (mem.); *People v. Saraceno*, 150 App. Div. 786, 135 N.Y.S. 149 (2d Dep't 1912); *People v. Donohue*, 114 App. Div. 830, 100 N.Y.S. 202 (2d Dep't 1906).

93. 6 N.Y.2d 259, 160 N.E.2d 494, 189 N.Y.S.2d 203 (1959).

94. 6 N.Y.2d 248, 160 N.E.2d 488, 189 N.Y.S.2d 194 (1959).

95. For neither of these crimes did the statute require corroboration.

96. 6 N.Y.2d at 263-64, 160 N.E.2d at 497-98, 189 N.Y.S.2d at 207.

97. 6 N.Y.2d at 252, 160 N.E.2d at 490, 189 N.Y.S.2d at 196.

98. *Id.*, 160 N.E.2d at 490, 189 N.Y.S.2d at 197. The dissent points out that neither the Penal Law nor the Code of Criminal Procedure required corroboration to sustain a conviction of impairing the morals of a minor. *Id.* at 253, 160 N.E.2d at 491, 189 N.Y.S.2d at 198. See *People v. Thompson*, 36 App. Div. 2d 497, 321 N.Y.S.2d 941 (3d Dep't 1971), in which the court rested its decision on the authority of Judge Fuld's concurrence. See also note 83 *supra*.

99. Compare the language of certain lower court opinions stating that an infant com-

### C. Cases Involving the Testimony of Accomplices

New York State demands that the testimony of an accomplice be corroborated by other evidence "tending to connect the defendant with the commission of [the] offense."<sup>100</sup> With respect to those sex offenses independently requiring corroboration,<sup>101</sup> the accomplice rule is unimportant since corroboration will be required every time. However, with respect to those sex offenses which have no independent requirement of corroboration, a distinction must be made between complainants who are victims and complainants who participated in the act in question as principals. Those who are victims cannot be accomplices; thus their testimony need not be corroborated.<sup>102</sup> Those who are properly designated as principals in the commission of the act are accomplices; thus their testimony must be corroborated.<sup>103</sup>

### V. SUGGESTIONS FOR IMPROVEMENT

It has been said that those accused of sex offenses need extraordinary protection since the charge is often false, the defense may lack supporting

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plainant's testimony must always be corroborated. *People v. Smith*, 6 Misc. 2d 732, 734, 167 N.Y.S.2d 329, 331 (Sup. Ct. 1957); *People v. Ohlson*, 37 N.Y.S.2d 421, 422 (Kings County Ct. 1942). But see *People v. Weinberger*, 2 App. Div. 2d 806, 153 N.Y.S.2d 926 (4th Dep't 1956) (mem.), *aff'd mem.*, 2 N.Y.2d 892, 141 N.E.2d 630, 161 N.Y.S.2d 146, cert. denied, 354 U.S. 913 (1957), where the court of appeals affirmed, without discussion, a conviction of carnal abuse based upon the uncorroborated testimony of two infants, one thirteen and the other fifteen. Since in *People v. Slaughter*, 278 N.Y. 479, 15 N.E.2d 70 (1938) (mem.), the court had reversed a conviction of impairing the morals of a minor based upon the uncorroborated testimony of a fifteen-year-old complainant, *Weinberger* cannot be explained by the fact that it involved complainants who were older than twelve. Query: Is the key to *Weinberger* the circumstance that there were two complainants, so that one corroborated the other?

100. N.Y. Crim. Proc. Law § 60.22(1) (McKinney 1971).

101. See text accompanying notes 66-77 *supra*.

102. *People v. Gibson*, 301 N.Y. 244, 93 N.E.2d 827 (1950) (female under eighteen years of age cannot consent, and therefore cannot be an accomplice to the crime of incest); *People v. Weinberger*, 2 App. Div. 2d 806, 153 N.Y.S.2d 926 (4th Dep't 1956) (mem.), *aff'd mem.*, 2 N.Y.2d 892, 141 N.E.2d 630, 161 N.Y.S.2d 146, cert. denied, 354 U.S. 913 (1957) (complainant in carnal abuse case cannot be an accomplice); *People v. McKinney*, 20 Misc. 2d 976, 188 N.Y.S.2d 728 (Kings County Ct. 1959) (infant complainant cannot be an accomplice to the offense of impairing his morals). But cf. N.Y. Crim. Proc. Law § 60.22(3) (McKinney 1971), which provides: "A witness who is an accomplice . . . is no less such because a prosecution or conviction of himself would be barred or precluded by some defense or exemption, such as infancy . . ."

103. *People v. Knorr*, 281 App. Div. 772, 118 N.Y.S.2d 429 (2d Dep't 1953) (mem.) (infant under twelve can be an accomplice to sodomy, in which case his testimony must be corroborated). But see *People v. McKinney*, 20 Misc. 2d 976, 978, 188 N.Y.S.2d 728, 731 (Kings County Ct. 1959).

evidence for its side of the story, and the presumption of innocence gives way to the emotion of outrage.<sup>104</sup> But to say this is not to prove it. One wonders whether a court or legislature free of tradition would independently come to the conclusion that the plight of a person accused of a sex offense is worse than the plight of a person accused of any of the hideous crimes for which no corroboration is required. If the ordinary safeguards suffice for a case of murder, blackmail, or robbery, why do they fail for a case of rape?<sup>105</sup> Jurors are not ignorant; they look with suspicion upon *ipse dixit* complaints of sexual misconduct<sup>106</sup> and, in any event, appellate courts do not hesitate to reverse "thin" convictions.<sup>107</sup>

However, the matter is not open to debate. After so many years of taking for granted that the evidence offered by complainants in sex offense cases should be corroborated, it is unlikely that members of the judiciary and legislators will look at the problem afresh and suddenly announce that the corroboration rule should no longer exist.<sup>108</sup> Rather than totaling up its merits and demerits, therefore, it should be assumed that the requirement of corroboration, in one form or another, is a permanent part of the law of New York State. Accordingly, efforts should be directed toward improving it.<sup>109</sup> To this end there are three ways.

First, the exemption from the requirement of corroboration of sexual abuse in the third degree<sup>110</sup> should be eliminated. It has been conjectured that the only reason for the exemption is that the legislature had thereby

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104. See note 7 *supra*; Note, Corroborating Charges of Rape, 67 Colum. L. Rev. 1137, 1138-39 (1967).

105. When all is said and done, it just might be that the requirement of corroboration in prosecutions for sex offenses (where, remember, the complainant is usually female and the defendant almost always male) is nothing more than another illustration of the law's unequal treatment of women.

106. Wigmore § 2061. One empirical study has shown that juries seldom return convictions in rape cases. H. Kalven & H. Zeisel, *The American Jury* 253 (1966).

107. See text accompanying note 92 *supra*.

108. For an argument in favor of jettisoning the corroboration requirement completely see Ludwig, *The Case for Repeal of the Sex Corroboration Requirement in New York*, 36 Brooklyn L. Rev. 378 (1970).

109. Some commentators have urged that something which they would consider stronger or surer than ordinary corroboration be required. E.g., compulsory psychoanalysis of the complainant (3A J. Wigmore, *Evidence* § 924a (Chadbourn rev. ed. 1970)), wide open admissibility of evidence bearing on the complainant's moral and mental qualities (*id.* § 924b), physical examination of both complainant and defendant (44 N.Y.U.L. Rev. 1025, 1033 (1969)), lie-detector interrogation of the complainant (30 N.Y.U.L. Rev. 994, 1004 (1955)), as to rape, complaint to the authorities within three months of the offense (Model Penal Code § 213.6(5) (Proposed Official Draft, 1962)).

110. N.Y. Penal Law § 130.15 (McKinney 1967); see text accompanying note 66 *supra*.

hoped to reach uncorroborated sex offense cases.<sup>111</sup> If so, the decision in *Doyle*<sup>112</sup> precludes any such result and disappoints the legislature's hope. Nothing remains to justify the exception;<sup>113</sup> consequently it should be abandoned.

Second, the requirement that the defendant's connection with the commission of the offense be corroborated should be eliminated while retaining, however, the requirement of corroboration for the corpus delicti.<sup>114</sup> The danger sought to be avoided by the corroboration rule is that of the deranged complainant who invents a story of sexual indignities visited upon her. That she will accuse the wrong person of an offense which actually occurred is a possibility neither more nor less troublesome in sex offense cases than in any other kind of case. Thus, where the commission of a sex offense has been corroborated there is no need peculiar to sex offense cases for the corroboration of the complainant's testimony as to the identity of the offender. To require it, moreover, is to impose "an impracticable burden on the prosecutor."<sup>115</sup>

Third, it should be provided that the complainant's uncorroborated testimony of a non-sex offense is sufficient for a conviction of the non-sex offense even though committed with a sex offense. At present, on such a record the conviction must be reversed<sup>116</sup>—a result "repellent to any

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111. 44 N.Y.U.L. Rev. 1025, 1029 (1969).

112. See text accompanying notes 81-83 supra.

113. The practice commentary on section 130.15 is silent. Denzer & McQuillan, 1967 Practice Commentary to N.Y. Penal Law § 130.15, at 278 (McKinney 1967). One scholar has stated that he cannot understand why the exemption was written into the statute. Ploscowe, Sex Offenses in the New Penal Law, 32 Brooklyn L. Rev. 274, 275 (1966). Moreover, it cannot even be argued that sexual abuse in the third degree—a class B misdemeanor (N.Y. Penal Law § 130.55 (McKinney 1967))—is a less serious offense than any for which corroboration is required. Corroboration is required for consensual sodomy, and it also is a class B misdemeanor. Id. § 130.38.

114. See text accompanying notes 42-43 supra.

115. Model Penal Code § 207.4, Comment 22, at 264 (Tent. Draft No. 4, 1955). This section provides: "The text requires corroboration, but does not attempt to particularize as to its nature. A general caution to the authorities against convicting on the bare testimony of the prosecutrix may be desirable in view of the probable special psychological involvement, conscious or unconscious, of judges and jurors in sex offenses charged against others. The only rational alternative would be to require corroboration as to every element of the crime, since there is no reason to believe that complainant is more likely to lie or deceive herself on one point rather than another. A requirement as broad as that would impose an impracticable burden on the prosecutor . . ." It has been suggested that the requirement of corroboration as to the defendant's identity be retained in cases where there has been "consent" by a complainant incapable of consenting because of age or mental condition. See Comm. on Criminal Courts, Law and Procedure of The Ass'n of the Bar of the City of N.Y., 1971 Legis. Bull. No. 28.

116. *People v. Radunovic*, 21 N.Y.2d 186, 234 N.E.2d 212, 287 N.Y.S.2d 33 (1967).

sense of logic or justice . . . ."<sup>117</sup> In short, a defendant who merely assaults a complainant goes to prison since the complainant's uncorroborated testimony suffices to convict, whereas a defendant who assaults and rapes her goes free since her uncorroborated testimony is insufficient to convict of either the assault or the rape.<sup>118</sup> Such a result is ridiculous. Section 130.15 of the Penal Law should be amended to provide that the corroboration requirement does not apply to non-sex offenses, whether or not associated in the complainant's testimony with the commission of a sex offense.

The implementation of these changes might go far toward rationalizing a rule which, however salutary its original intention, has thus far in its existence been troublesome in application and at times absurd in result.

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117. *Id.* at 191, 234 N.E.2d at 215, 287 N.Y.S.2d at 36 (Breitel, J., concurring).

118. Assuming here, of course, that the proof of the rape is "integral" to proof of the assault. See text accompanying notes 64-65 *supra*.