# FEDERAL RAPE LAW REFORM

# HEARINGS

BEFORE THE

SUBCOMMITTEE ON CRIMINAL JUSTICE

OF THE

COMMITTEE ON THE JUDICIARY

HOUSE OF REPRESENTATIVES

NINETY-EIGHTH CONGRESS

SECOND SESSION

ON

FEDERAL RAPE LAW REFORM

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# FEDERAL RAPE LAW REFORM

FRIDAY, AUGUST 31, 1984

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON CRIMINAL JUSTICE,
COMMITTEE ON THE JUDICIARY,
*Pontiac, MI.*

The subcommittee met, pursuant to call, at 10:25 a.m., in Oakland County Commissioners chambers, Pontiac, MI, Hon. John Conyers, Jr. (chairman of the subcommittee) presiding.

Present: Representative Conyers.

Staff present: Thomas W. Hutchison, counsel.

Mr. CONYERS. The Subcommittee on Criminal Justice will come to order.

Good morning, I'm Congressman John Conyers, chairman of this subcommittee. We are meeting to hold hearings on H.R. 4876, the Sexual Assault Act of 1984. I'm accompanied by the counsel for the subcommittee, Tom Hutchison.

This is the first hearing on this legislation, which has been sponsored by my friend and distinguished colleague in the Congress, Representative Robert Carr, to reform the Federal rape statutes. The Federal rape laws date back to the 19th century, and the purpose of the Carr bill is, frankly, to bring them into the 20th century.

There are basically three Federal rape statutes. The first simply makes it a Federal offense to commit rape. The second makes it an offense to assault someone with the intent to commit rape. These two provisions incorporate the common law definition of rape that requires that the prosecution show that the defendant had sexual intercourse with a woman forcibly and against her will.

The third statute is what is commonly called a statutory rape provision, which makes it an offense for someone to carnally know a female, not his wife, who has not attained the age of 16 years.

Thus, only a woman can be the victim of a Federal rape offense. Federal statutes do not proscribe homosexual rape.

The common-law tradition from which the Federal statutes come is not particularly inspiring. The rape laws ostensibly existed to protect women from having unwanted, coerced, sexual intimacy, but the legal system seemed to be more concerned with protecting males from conviction than with protecting females from criminally injurious conduct. The notable exception is when the defendant was black and the victim was white. There the system worked with remarkable speed and vigor.

The legal system's undue concern with protecting males is seen in doctrines concerning spousal exemption, utmost resistance, cor-

roboration, and evidence of the victim's character and reputation. All of these things have made it extremely complicated and difficult, and sometimes impossible, to obtain a conviction that might otherwise be readily arrived at.

The spousal exemption doctrine held that a man could not rape his wife no matter how brutally the act was carried out. The rationalization for this doctrine was that a woman, when she married, gave continuing consent to sexual intercourse, and her consent could be revoked only by having the marriage dissolved. This rationalization reflected a view of marriage entailing the husband's ownership of the wife.

Rape was unique for being the only crime of violence for which marriage was a defense. The Federal law of rape, sad to say, probably incorporates this common-law doctrine.

The doctrine of utmost resistance, at its most rigorous, required not only that the victim struggle with an intensity reflecting her physical capacity to resist the unwanted sexual intimacy, but also that her efforts not diminish at any time during the course of the offense.

Such a doctrine served only to increase the risk of harm to victims, and Federal law fortunately seems to have avoided incorporating it.

Federal law, likewise, seems to have avoided incorporating the corroboration requirement. At its most stringent, the doctrine required corroboration of the use of force, penetration, and the assailant's identity. The result was that an assailant who assaulted a woman and abandoned an attempt to commit rape could be convicted on the victim's uncorroborated testimony. If the assailant carried out the rape, however, corroboration was necessary.

The policy behind the corroboration requirement, ensuring that there is sufficient evidence of an offense, is already served by the requirement that the jury find beyond a reasonable doubt that the Government has proved every element of the offense. Most States have done away with the corroboration requirement, and Federal law does not require it.

Finally, evidence rules permitting wide ranging inquiry into the victim's reputation and prior sexual activities served to discourage women from filing complaints and testifying at trial. Congress addressed this problem in 1977 by enacting the Privacy Protection for Rape Victims Act, which limited the use of such evidence.

The legal system's traditional approach to rape reflected a view of women and their place in society that may have been accepted in another day and age, but no longer is. The Carr bill seeks to bring Federal law into line with modern perceptions of the woman's role in our society.

Efforts to reform Federal rape laws have been underway for several years. In the 96th Congress, about 4 years ago, the House Judiciary Committee reported a criminal code revision bill that modernized Federal rape laws. Last Congress, 2 years ago, this subcommittee reported my own criminal code revision bill, which also reformed the Federal rape law.

The Carr legislation has built on these prior efforts, and I am optimistic that the subcommittee will be able to take action within this session of Congress on the pending proposal.

Today's hearing, in my judgment, is an important step toward enactment of the bill, and I am certain that our witnesses will provide the subcommittee with testimony that will be most helpful in our work.

A sponsor of the legislation, the Honorable Robert Carr, a former member of the House Judiciary Committee, is our first witness. He is currently a member of the Appropriations Committee, serving on the Subcommittee on Transportation and, more importantly for the purposes of these hearings, on the Commerce and Justice Subcommittee, which controls the Federal appropriations for many Federal law enforcement activities.

He is a graduate of the University of Wisconsin Law School, and served with distinction on the attorney general's staff here in Michigan as an assistant attorney general for 3 years. I can attest to his continuing interest in the improvement of the criminal justice system and making it more effective.

I welcome you to be our leadoff witness this morning. The prepared statement that you have submitted will, without objection, be included in our record. You may proceed as you desire.

## TESTIMONY OF HON. ROBERT CARR, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF MICHIGAN

Mr. CARR. I thank you, Congressman Conyers, for not only coming to Pontiac to hold this hearing, but for your excellent leadership in the Congress on all these criminal justice issues.

As you have indicated, I was privileged to be a member of your full committee for a time in the 96th Congress, and I thoroughly enjoyed the experience of being there. It is a committee made up of thoughtful members from a variety points of view, and both sides of the aisle. It was a most stimulating time for me, and gave me great confidence that the judicial matters of authorization in the Congress are indeed in good hands. In your case in particular, I can recall that it was during that Congress we considered the criminal code reform offered by our former colleague, Father Bob Drinan of Massachusetts. And I can recall the many stimulating debates and comments that you engaged in with Father Drinan. That piece of legislation did not succeed, but it became quite evident that you are chief among those fighting crime in the Congress of the United States. I think the fact that you would speedily act upon our proposal here today is testimony to your commitment to move ahead with criminal law reform, even if on a piecemeal basis.

Mr. CONYERS. Well, Father Drinan is still working with the Committee on the Judiciary on criminal justice matters.

Mr. CARR. He is a brilliant man.

Let me turn my attention to H.R. 4876 and give you a brief oral background on why it came into being. It turns out that there were two Members of Congress who were on identical paths not knowing of one another's path. The fact was that Steny Hoyer, our good friend and colleague from the State of Maryland and a former State senator in the State Senate of Maryland, had been for some time considering a bill which would take the Maryland experience into Federal law. I was doing the same thing, feeling that because Michigan was the very first State of the Nation in 1975 to lead the

way with a revision in the definition in the way of treating the crime of rape, reformulating it into a crime of criminal sexual assault; such reform was desparately needed at the Federal level.

Fortunately, Congressman Hoyer and I discovered each other's interest and activity. And H.R. 4876 is indeed a joint product.

That brief explanation is necessary so that my friends here in the State of Michigan will understand why the piece of legislation before the committee today is not identical in each and every respect to the Michigan law. We think that we have borrowed from the experience of all 38 States which have passed the criminal sexual assault formulation for this terrible crime. We believe that we have improved upon what the Michigan experience and product has been.

I congratulate you for coming here and for opening your hearings on this matter in the State of Michigan.

One of the reasons we are here is that Michigan has had the longest experience with this new law. Perhaps that experience is going to bring about some changes in Michigan law itself, but we want to be sure that we have the benefit of the views of the State that has the longest experience with criminal sexual assault formulations.

Inasmuch as it is the first hearing, I also want to include my good friend Steny Hoyer. Steny is grateful to you as well for having these hearings and moving this piece of legislation. And like you, we believe that if it can be worked out, even though the remaining days in this session are short, this bill is needed and should be passed. It is important. It has bipartisan support. And the Justice Department, I understand, has no serious reservations about it, indeed has made some helpful suggestions about how it might be improved. That being the case, it would be my hope that your leadership in the Judiciary Committee, and that of Chairman Rodino, could convey a sense of urgency to our colleagues in the Senate, principally Senator Strom Thurmond, that this is most important and noncontroversial legislation to put the Federal Government on record as 38 States have already done in making it a crime to criminally and sexually assault another individual.

Before moving on to the bill, I also want to pay honor to the people who came together with Congressman Hoyer and myself. Congresswoman Barbara Mikulski, also from the State of Maryland; and Congresswoman Bobbi Fiedler from the State of California. All four of us contributed to the final product, and are its principal joint sponsors.

Now, as to the bill itself, I do not think I need to outline to you, as you already outlined for the hearing, the background. I certainly do not think that we need to outline the need. I hope that there will be some testimony today that might focus on it, but I think the need is rather self-evident, that you only have to pick up the newspaper to find that people are being criminally and sexually assaulted each and every day. It has dominated the news coverage, I know, in my own district.

It has dominated the coverage of Michigan newspapers as there has been a spate of rapes in the Wayne County area, and just as there have been up in the Lansing area, which is the other end of my congressional district.

People walk at night in fear, generally. Crime, in its omnibus features and faces, terrorizes us all. But probably there is no crime that strikes more fear in the unattacked—the apprehension level can be no higher—than the violation, the sexual violation, of your person.

We can be held up and mugged and asked to empty our wallets and a lot of other things, and they are offensive, too, no doubt about it. But I think you have to rank the anxiety over the potential for criminal sexual assault as being the most heinous of violations short of murder itself.

Therefore, I think the Federal Government ought to move to the new and modern criminal sexual assault formula. Simply speaking, the current Federal law is inadequate. It is so tough, one might say, at the upper limits of criminal behavior that it is probably not possible to gain convictions in an easy and expeditious manner.

Now, Federal jurisdiction, of course, is not preeminent in this matter in this country. This crime is largely handled by the States. But there are important jurisdictions, as you know, in which Federal law does apply. Federal law does apply in most Federal parks, Indian reservations, offshore oil rigs, ships at sea, and, perhaps, according to some legal theories, airlines and airplanes aloft. There are important areas of navigable waters in the Great Lakes, for example, national forests, post offices, and any Federal building which would fall under Federal jurisdiction. And I am told there are approximately 100 rape prosecutions a year in Federal jurisdictions.

I think that that is a small number, not only because the jurisdiction may be small, but also because the law is inadequate and Federal prosecutors just do not want to use the law. Fortunately, a Federal prosecutor in the State of Michigan could in fact turn that prosecution over to the State authority, and have some confidence that that prosecution would be carried out successfully. In such circumstances, victims would be willing to come forward, because they would be confident of fair and even treatment, and that they would be confident that the offender had a likely chance of being convicted. On the other hand, if you are in one of the 12 States that have not yet acted, and a sexual crime occurs in the post office or military reservation or Indian reservation, or whatever the Federal hook may be in that State, the Federal prosecutor is in a very desperate situation. He or she cannot turn over that prosecution to State authority with any great confidence of success. Hence, I think we have a situation in which the victims in those States in particular have no alternatives, even when they are on Federal property.

So, I am hopeful that we will pass this bill, not only for what it does in Federal jurisdictions, but what it might do in terms of leading these other 12 States toward the modern-day definition of criminal sexual assault.

Now our bill differs slightly from the Michigan law, in that it does remove the spousal exception in every case, not just those in which marital partners are living apart or initiating divorce proceedings. The elimination of the spousal exception is a very important step in this law. We all talked about it, and we deliberated

when we were putting it together; we hope the committee will continue it.

It provides a break with the English common-law tradition that, in effect, sanctioned domestic violence, as you said, Mr. Chairman, as a matter of matrimonial privilege. I think we have gone beyond that in today's day and age.

Today the problems of domestic violence are so extensive that our laws must be structured to meet this problem head on. Simply stated, no law should shield from prosecution a person who beats or sexually abuses a spouse.

Finally, our legislation removes the word "rape" from the law and replaces it with the term "criminal sexual assault" and "sexual battery."

The change of the wording is more than a symbolic gesture. It is, first of all, an acknowledgement of the complexity of the crime, and the need to define different degrees of criminal behavior to have successful prosecutions.

And, second, the use of the word assault by definition implies nonconsensual action, thus removing the focus of attention from the victim and placing it squarely on the assailant where it ought to be.

Making these changes in the Federal Criminal Code's treatment of rape is not simply a legal exercise. It is, most importantly, a response to the increased incidence of rape in our society. Today, there will be one forcible rape in our Nation in every 7 minutes. This hearing is going to be going on for some 3, 4 hours; and quick mathematics could show you how many people are being sexually assaulted while we sit here.

The number of rapes reported has climbed steadily. However, nationwide we are still able to reach a conviction in only about 50 percent of the cases; I believe Michigan's experience has been slightly better than that.

Too many sexual criminals continue to walk the streets of our country. Too many victims are still humiliated, degraded and physically harmed, some of them permanently. By modernizing sexual assault laws on the Federal books, we are saying that 50 percent is not enough. We are putting the Federal Government solidly behind the States' efforts to fight this unspeakable crime, and we are helping to set a standard that puts violent criminals behind bars. And we are assuring that all Americans can walk the streets and live their lives safely and without fear.

Once again, thank you, Mr. Chairman, for allowing me to testify, for bringing the hearings to this State, and for being a leader in Congress in the fight against crime.

Mr. CONYERS. Thank you, Mr. Carr. You have opened up an interesting discussion that reflects your thoughtfulness and amply describes the reasons that you put your energies into reshaping our Federal law on rape.

This is a test of our society in a way, isn't it? The whole notion of freedom begins with being able to be free from physical attack and abuse, and the most obscene kind of personal attack that one could make on another person would be a sexual assault.

And so it seems to me it goes to the heart of what a free society ought to be protecting its citizens against. If the women, half our

population, cannot feel free and comfortable without having this kind of worry, to that extent they are really not free; is that not the case?

Mr. CARR. That is true, especially given the fact that the incidence of rape is steadily increasing. And I might point out, as you did in your opening statement, it is not just violence against women, it is homosexual rape and a whole variety of things that have not heretofore been considered in the law.

It produces an anxiety in the population as a whole. It puts us all behind invisible bars when it is the criminal that ought to be behind bars, not the individual in society. I think you hit the nail on the head—if freedom of your person is not protected as the most fundamental of freedoms, we have not lived up to our ideas.

Mr. CONYERS. Thank you very much.

Now, I will tell you the most disturbing thing I read in your statement is this sentence: "However, we are still able to reach a conviction in only about 50 percent of the cases reported." That is an amazing statistic, and I think it is worth some discussion.

Was this statistic culled from a combination of Federal and State cases or just State?

Mr. CARR. Well, I believe if you take Federal alone, it is lower. It was a combination. It is, you might say, a blended average.

I believe and am hopeful that the testimony today will show that Michigan's rape conviction rate has been going up. And hopefully this hearing will demonstrate that there is a solid basis for believing that passage of this law will in fact improve the conviction rate.

Also, of course, one of the key purposes of this law is to encourage victims to come forward. So that has, perhaps, a slight dampening effect. I don't know empirically how that would shake out, but what you hope to get are more victims willing to come forward and charge criminal conduct than in the past.

And thereby, of course, you are getting good charges and bad charges that the criminal justice system has to begin to sort out. But I think that the net effect of having more people come forward will be to improve the conviction rate itself. And then, because the focus will be on the perpetrator rather than the victim, I think the chances of conviction will vastly improve.

I might point out, to those people who are sitting in our audience who might not realize it, that there is one other difference between our bill and Michigan's law. If you read the bill you will not find the so-called shield law, which is the prohibition in court against evidence of prior sexual conduct. As you pointed out in your opening statement, that has already been taken care of in the Federal law in rule 412 of the Federal Rules of Evidence.

Mr. CONYERS. One of the witnesses at our next hearing authored the legislation enacting that rule.

Mr. CARR. Yes.

Mr. CONYERS. She will be testifying.

Mr. CARR. Exactly. And so, for those people who read the bill side by side with the Michigan law and might note that difference and feel that we omitted something, I wanted to echo your statement that the shield provision was not necessary in this case.

I know I have given my testimony and I have already used too much of your time, because we do want to hear from others, but I do want to make a note, perhaps, for your counsel to look into. It concerns section 2243, sexual abuse of a minor. I do not want to complicate the passage of this bill by making it too complex, if some thought were given to that section and its improvement, we might provide a new avenue of attack against another heinous crime, child pornography. Child pornography does require sexual contact, sometimes between two minor children.

We have generally attacked child pornography from the standpoint of the publication and sale and distribution of the documents themselves. And, of course, that raises touchy dilemmas over first amendment, freedom of the press and a variety of other issues.

We may be able to attack that problem instead through assessing some vicarious liability against those who may not personally touch minor children themselves, but who force minor children to touch each other in front of cameras. If we were to make that a crime of criminal sexual assault, we may provide prosecutors with yet another avenue to fight child pornography.

But again, I do not want to complicate the passage of this bill unduly, but if that seems to be an easy way to move, it might be a suggestion to improve the bill.

Mr. CONYERS. We are going to check with the Department of Justice to see what its experience is.

My final question to you is about the problem with the present law. You know, sometimes we may be so anxious to satisfy the requirements of justice that we may enact a law that is so severe that prosecutors are reluctant to prosecute and juries are reluctant to convict.

Does this describe the present situation? Does that add to the—that low percentage you suggested that even less than 50 percent might be the Federal percentage in convictions under the rape statute?

Mr. CARR. I believe, sir, that problem is one of the Congress. It is not one of the prosecutors.

We in the Congress have to decide whether when we pass a law we want to actually make something work or whether we want to state our revulsion to a particular type of conduct.

I would recommend, perhaps, that when the Judiciary Committee sends legislation to the House floor, it also put out a companion sense of the Congress resolution, so that the Members of Congress can vent their own desire to lament the heinousness of certain conduct. That ought to be treated from a resolution point of view—how we feel about the crime and what we think ought to be done about the criminal.

And then we ought to proceed to pass a law that prosecutors in their day-to-day lives can actually make work. And that judges can find easily administrable.

So, to some extent you are calling us to examine our own house.

Mr. CONYERS. Well, I think that's some excellent closing advice because you and I know how hard it is to separate passions from a rational evaluation of crimes of violence. You immediately start thinking about securing a conviction and maximizing the punish-

ment, and this can lead to an overkill situation. I am glad your caution came into this testimony.

I appreciate your bringing this matter to our subcommittee's attention. You can assure the rest of the cosponsors that we are going to move forward expeditiously. There may be some objection to this legislation, but we have not noted any of a serious nature thus far.

I thank you for creating the opportunity for the Judiciary Committee to close in on something that has been laying around too long. You have used Michigan's law as a basis and drawn upon provisions in Father Drinan's criminal code revision bill and mine.

There was some reluctance, Bob, during our work on the criminal code, about whether or not we were going to expand Federal jurisdiction at the expense of the State.

But I think that you keep this bill within the legitimate sphere of Federal concern. You know more about the FBI's budget than I do, and it seems to me that you have kept those restrictions very carefully in mind as you have crafted this piece of legislation.

Mr. CARR. Well, it does not require the prosecutor to prosecute under the Federal law. If the prosecutor does feel that there is competent judicial authority elsewhere; if the prosecutor feels that the resource is available to the prosecutor or to the FBI in a particular location to investigate and follow up on a crime, it does not compel them to a make a Federal case out of it. On the other hand, of course, in those 12 States where they have not moved into the modern day of criminal sexual assault definitions, we would hope that those prosecutors would use the more enlightened Federal statute rather than pushing it off to the State authority.

So, we are not necessarily putting Federal prosecutors in a bind, and we are not trying to up the amount of work that they and the Federal courts have. But there are certain situations where they have the resources and the States do not.

Mr. CONYERS. Excellent. Thank you very much. It is good to see you, and when the Congress reconvenes we will begin our work among our colleagues on both sides of aisle. Thank you very much.

If you can, would you join us on the dais? I would be pleased to have you with me.

[The prepared statement of Mr. Carr follows:]

TESTIMONY BY REPRESENTATIVE BOB CARR ON THE SEXUAL ASSAULT ACT OF 1984 BEFORE THE COMMITTEE ON THE JUDICIARY, SUBCOMMITTEE ON CRIMINAL JUSTICE

Mr. Chairman, I would like to thank you for calling this hearing today on the Sexual Assault Act of 1984, and I'd especially like to thank you for holding it in our home state of Michigan. We're here today to address a very serious national problem, one on which Michigan has taken a pivotal role in addressing at the state level. Michigan's experience over the past decade with its Criminal Sexual Conduct Law can tell us a great deal about how we should address this problem at the Federal level, and how we can better lead other states to pass effective laws to combat the crime of sexual assault. I'm pleased that so many of our state's leaders who have dealt with this issue from various perspectives are coming forward to speak today. I look forward to hearing their statements, and working with them to make this legislation the strongest and most effective law possible.

I joined in introducing the Sexual Assault Act six months ago because I believe the Federal government must take a leadership role in helping halt violent crime across our nation. The crime of sexual abuse, in particular, demands federal attention both in an effort to broaden understanding of the nature of the crime itself and to institute penalties that enable us to fight this crime most effectively.

Rape is perhaps the most demeaning violation of privacy one can experience. It may be the most feared crime of any we know, and the crime of highest emotional impact upon its victims. The effects of the crime itself are compounded by a legal tradition that has too often framed the victim as the criminal. Over the years, rape victims have been afraid to report the crime and afraid to pursue their assailants to court—afraid that they might be assaulted yet again by the judicial system. Too often, victims watched as courts allowed the sexual criminal to go free, because the laws did not account for the complexity of the crime, and the sentencing structure did not offer judges and prosecutors the flexibility needed to administer the property punishment.

It was this legal and societal tradition that Michigan aimed to change when its legislature adopted reformed rape laws ten years ago. Michigan's law included a "shield" provision, which rendered a victim's personal life irrelevant to the criminal proceedings, shifting the focus of the courts' attention to the assailant and not the victim. Fortunately, such a shield provision is now in effect on the federal level.

Michigan also adopted a "staircase" of penalties for sexual crimes, thus acknowledging that every crime is not the same, nor should it be treated the same way in a court of law. Michigan recognized that just as we try the crime of murder by degree, the crime of sexual assault should be tried by degree.

The most violent sexual assaults in Michigan continue to draw a very severe penalty, life imprisonment. However, cases involving little or no violence—cases which once might have been thrown out of court—are now prosecuted as well, and a conviction often results. Michigan's laws match offenses, which means that more criminals are going to jail.

It is my understanding that this law has brought about substantial progress in bringing sexual criminals to justice. The number of convictions in the state jumped from eight per month before 1975, when the Criminal Sexual Conduct law went into effect, to 21 per month between 1976 and 1978. Many other states followed Michigan's example by instituting "staircase" penalties, so that more convictions resulted nationwide.

Unfortunately, the positive reforms instituted by so many states have yet to reach the Federal level. While sexual offenses are tried primarily at the state level, there are cases which occur under special Federal jurisdiction—on the high seas, on oil rigs, in certain Federal prisons, on Indian Reservations, and a number of other areas. It behooves the Federal government to take a position of leadership, not only to assure proper enforcement in Federal cases, but to create a model for better law enforcement at the state level.

During Congressional hearings on this legislation, the members of the committee will have ample opportunity to review the particular details of the bill I have joined in introducing. For our purposes today, I would simply like to highlight what I consider to be the bill's most important aspects:

First, and most importantly, our bill maintains a very tough penalty for the most violent sexual assaults: life imprisonment. There should be no misunderstanding about our belief that our society's most violent criminals must be punished swiftly and severely. But by the same token, our bill recognizes that the law must be structured to cover the less severe cases, particularly those in which actual sexual intercourse has not occurred. Under current federal law it is very difficult to obtain a conviction in cases in which the perpetrator touched a person's private parts, but in which no intent to have intercourse could be proven. By creating the opportunity to mete out a punishment in every case, regardless of the circumstances or severity, we are effectively preventing certain criminals from going free and possibly committing a more heinous crime in the future.

Secondly, our bill expands the scope of the law by establishing that the victim may be of either sex, and by abolishing spousal immunity from prosecution. Thus, our bill would apply in both hetero- and homosexual forcible circumstances, and would expand protection to males. This aspect is especially important in assuring the protection of children.

Our bill differs slightly from Michigan's law in that it does remove the spousal exception in every case, not just in those in which marital partners are living apart or initiating divorce proceedings. Elimination of the spousal exception is a very important step, providing a break from the English common law tradition that in effect sanctioned domestic violence as a matter of matrimonial privilege. Today, the problems of domestic violence are so extensive, that our laws must be structured to meet this problem head on. No law should shield from prosecution a husband who beats or sexually abuses his wife.

Finally, our legislation removes the word "rape" from the law and replaces it with the terms "sexual assault" and "sexual battery." The change in wording is not

just a symbolic gesture. It is first of all an acknowledgement of the complexity of the crime and the need to define different degrees of criminal behavior. And secondly, use of the word assault by definition implies nonconsent to the act, thus removing the focus of attention from the victim to the assailant.

Making these changes in the Federal Criminal Code's treatment of rape is not simply a legal exercise. It is, most importantly, a response to the increased incidence of rape in our society. Today, there will be one forcible rape in our nation every seven minutes. The number of rapes reported has climbed steadily. However, we still are able to reach a conviction in only about 50 percent of the cases reported. Too many sexual criminals continue to walk the streets in our country. Too many victims are still humiliated, degraded, and physically harmed, some of them permanently.

By modernizing sexual assault laws on the federal books, we are saying that 50 percent is not enough. We are putting the Federal Government solidly behind the states' efforts to fight this unspeakable crime. We are helping set a standard that puts violent criminals behind bars, and we are assuring that all Americans can walk the streets and live their lives safely and without fear.

Mr. CONYERS. The next witnesses sound like a case, Boyle and Boyle, but are a panel of witnesses. They are, of course, the Honorable Justice Patricia Boyle and Terrence Boyle, Esq., chief of the appellate division and special services of the Wayne County Prosecutor's Office.

Good morning and we welcome you before the subcommittee.

Justice BOYLE. Good morning.

Mr. CONYERS. Justice Boyle has previously appeared before the subcommittee while a recorders court judge, testifying in Washington about the privacy protection for rape victims legislation that enacted rule 412 of the Federal Rules of Evidence.

I am delighted to see you both here this morning. You bring, combined, a great deal of experience with the specific subject that is before us.

And so, I would invite you to proceed to make your statements in your own way.

## TESTIMONY OF HON. PATRICIA BOYLE, JUSTICE, MICHIGAN SUPREME COURT AND TERRENCE BOYLE, CHIEF, APPELLATE DIVISION AND SPECIAL SERVICES, WAYNE COUNTY PROSECUTOR'S OFFICE

Justice BOYLE. Thank you, Mr. Congressman. I wanted to thank you for the opportunity to appear here this morning. And also, of course, thank Congressman Carr for his efforts in behalf of this legislation.

This is, as you mentioned, Congressman Conyers, the second opportunity that I have had in 8 years to testify; both times involving the rights of women in this society, and both times involving the issue of sexual abuse in our country.

My husband and I both take great pride in the fact that we worked hard with the group that drafted Michigan's criminal sexual conduct law which both you and Congressman Carr have noted was the pioneering reform effort in the country and is the model for the reforms that have occurred in 38 States in this country.

Prior to 1974 Michigan had about 18 statutes that covered various forms of what we now call criminal sexual conduct. I understand from the remarks that I have heard here this morning that under the Federal law there are three statutes. This law, as did our efforts, exemplifies a concern that the various statutes, the offenses

and penalties, be rationally related one to the other, so that like offenses carry like penalties. And that was one of our primary concerns in the Michigan experiment.

A second concern was that the law should focus on the assaultive nature of the act; and on the act as a sexual offense, an assaultive offense.

Our third concern was our conviction that the law must protect the victim from cross-examination into his or her past sexual history.

And our final concern was a desire to focus public attention on the issue of sexual abuse, particularly of women and children, and the way that historically our society had treated that issue. And I mean by that, the way in which the police, hospitals, prosecutors, juries, and society at large had failed, in our judgment, to recognize the very serious problems involved in the abuse sexually of women and children.

This bill, although it does have some differences in structure, reflects three of the aims of the Michigan reform effort.

The protection of women from, or of the victim from, unfair exposure of sexual history has, as has already been noted, been accomplished in Federal law. I did testify before at the request of Representative Holtzman, and Federal Rules of Evidence do incorporate now the Michigan rape shield provision.

We approach the problem of this rational relationship between offenses and penalties as does H.R. 4876. Let me give you an example of how we saw that this was necessary. Suppose that a man after several dates with a woman, forcibly has intercourse with her. Is that rape under the old law? And the answer to that question is: yes, that is the classical definition of rape.

But supposed that a man assaults or abducts a woman at a bus stop, and after brutally beating her forcibly injects some sort of instrument, a coke bottle, into her vagina, causing serious physical injury. Is that rape? And the answer under the old law was: no. Under Michigan law and under H.R. 4876 the answer to that question is: yes. Because what the bill does is to divide prohibited conduct into four grades of offenses. And for the purposes of one and two, sexual act is now defined to include, not simply sexual intercourse, but the penetration by any object of any person's genital or anal opening for purposes of sexual gratification or abuse.

The act thus clearly attempts to do what we attempted to do in the Michigan reform act; that is to treat like abuses in like manner.

The proposed legislation, as you know, contains a series of graded offenses ranging from a misdemeanor to the most serious offenses, which carry potential penalty of up to life imprisonment.

These definitions also focus attention on the nature of the actor's conduct, our second goal under the Michigan act. These efforts are to focus attention on the fact that sexual offenses are assaultive crimes.

The purpose of the act is to eliminate the sexist notions that were embedded in the old law: that a victim must resist to the utmost, that the victim must prove that she did not consent—concepts which often put the victim on trial.

James Newhart, who is the head of our State Appellate Defender's Program, providing counsel to indigent defendants, has described the major symbolic accomplishment of the Michigan reform act as follows: "The law's great value is that it makes a statement to the entire bureaucracy that the concept of woman as chattel is over."

This bill also admirably focuses attention on the actor's conduct, rather than on the nonconsent of the victim. The cultural statement about women, which was reaffirmed by the old rape law, was that woman was to be used; and that if abuse occurred it was more in the nature of a property offense against another man rather than an offense against the victim.

The cultural statement that is being made in the Michigan act, and I believe being reenforced by this bill, is one of woman's full sexual integrity before the law. A right to be free of all nonconsensual activity.

Let me suggest here one reservation that I do have about the bill for your counsel's consideration, and I do not profess to be an expert in the subject of Federal development under the Federal rape statute. Nonetheless, I bring this to your attention for whatever consideration and vitality it may have.

The goal of the bill as Congressman Hoyer has said is to redirect the factfinder's focus away from the victim to the offender. As drafted, my reservation is that the bill may actually retain and carry over the old notions that the offense must be against the will of the victim.

For purposes of aggravated sexual assault and sexual assault, the bill uses the phrase: "places another person in fear, either of death, serious bodily injury, or kidnaping," for aggravated assault, or "of present or future physical harm reasonably believed," for sexual assault.

My reservation is that these phrases may shift the focus again back to the victim's state of mind, because they raise questions about what the victim's perceptions were. Was she really afraid of someone that she had known and gone to bed with several times before, and on this one night when she said, "No," and he said, "I am going to kill your child if you do not."? Was she afraid or should she have known that he was only kidding around?

I point this out to illustrate that, if the goal is to focus attention on the actor and not the victim, I think it is necessary to continually keep in mind that the focus must remain on the actor's conduct, and must not be shifted or be permitted to be shifted back to the victim's state of mind.

Let me compare this reservation that I have with the Michigan model to illustrate. The major crime under the Michigan model is criminal sexual conduct, which is penetration. Penetration is an objective fact. And it is defined as sexual act is defined in the House bill. But it is penetration plus. Plus what? Other objective circumstances. That is, it is focused on facts other than the victim's state of mind. What are the other objective circumstances? Penetration plus age equals our major sexual crime. Penetration plus commission of another felony. Penetration plus use of a weapon. Penetration plus infliction of injury. Penetration in the presence of or by multiple perpetrators.

The point is simply that the focus here is on the demonstration of facts that can be shown independent of the victim's state of mind. Any of these present with penetration make the offense complete.

I mention this only for your consideration and in the knowledge that you possess, how much greater degree of expertise than I do, regarding Federal law.

But I would urge, unless you are certain that there is no possibility that a concept like resistance to the utmost will be able to creep back into judicial interpretations of this law once it is enacted, to add the statement, as we have added it in Michigan law, that it is not necessary to a prosecution under these provisions that the victim need resist.

The purpose for our having inserted that provision in the Michigan act was to make it absolutely clear that the focus was on the actor's conduct, not on whether the victim resisted.

I urge you to do this, so that you make the clearest possible statement that no longer will the law tolerate the "death before dishonor" philosophy of our forefathers.

I would also like to comment on the definition of the circumstances—I made these notes here since I sat down—elevating the offense to a life penalty in H.R. 4876. You have used the phrase, "Protracted, incapacitating mental anguish."

And I think you might be interested in knowing that in my judgment that is a wise judgment. We use the phrase in our bill, "mental anguish." And what has happened after 10 years experimentation and prosecution under the law is that the court of appeals has now divided on the issue of what is sufficient mental anguish that will make out personal injury under our law.

Since we have only used the phrase, "mental anguish" with no modifiers, of course, what has happened is that, some cases have said at the court of appeals level: "Well, every penetration is accompanied by some mental anguish." And so in order to prove the first degree offense, there must be additional anguish, more than would accompany what some people shamefully call the "garden variety" offense.

And then, there are other cases that have said: "Any mental anguish accompanying the offense is sufficient to make out the more severe crime."

I think you have wisely included some modifiers. If your goal is to avoid protracted litigation over a number of years before the issue is resolved; even now this issue is in the pipeline to reach the Michigan Supreme Court, 10 years after we began the enforcement of this law.

Finally, the last Michigan goal is a goal which I think this bill will carry forward. The Michigan experience accomplished our goal of heightening public sensitivity to this issue throughout our State. It prompted reforms in police training. It prompted changes in medical protocol, as hospitals began to be conscious of the need for their preparation, and their careful preparation, of medical histories of victims of sexual offences. It prompted the elimination of the use of polygraphs for rape victims. It helped to spawn the creation of women's justice centers; victim-witness assistance programs; battered spouse shelters. And it focused attention on a

newly recognized plague in this society. One that Senator Carr referred to in his closing remarks to you. Congressman Carr, I just gave you a promotion.

Mr. CARR. Not necessarily.

Justice BOYLE. That plague is the plague of sexual abuse of children in this society. And I applaud this effort, because I think that this bill will similarily dramatize and emphasize the heightened concern of this Nation for the eradication of sexual abuse in all of its forms.

Thank you.

Mr. CONYERS. Thank you very much, Justice Boyle. I will have some questions that I would like your expertise on in just a little while.

I recognize now Terrence Boyle who brings a great deal of experience to this subject from the Appellate Division of the Wayne County Prosecutor's Office. Welcome.

Mr. BOYLE. Good morning. This is one of the few times that I can say that I agreed with everything my wife said. No, that is just a nice way of opening up. Actually, I agree with her almost all the time on everything.

But today I can say I want to open by strongly supporting everything she said and being in total agreement with it. I probably will go on to make some separate remarks which she may disagree with in part, so feel free to question us on the nature of the disagreement.

Let me start by saying, the Michigan—in the Michigan experience we had an overall objective to start with, that was to reform the law. I think you start with a similar objective here, and I am strongly in favor of the effort and this particular bill. Whatever else I say in my remarks today notwithstanding, this bill is worth passing in its present form, even though I am going to make some suggestions on how I think it could be improved. But I would take it without any question the way it presently sits.

In the Michigan experience, what we tried to bring into it was analyzing our past experience, identifying problems in the prosecution of sex cases, and creating some form for legislative solution.

What we really did was develop key concepts. They were:

One, to comprehensively deal with all sexual conduct which the government wishes to declare as criminal in one statute.

Two, to create a rational classification system, which grades offenses by seriousness of harm caused and relates punishment to that system of gradation.

Three, to the extent possible to define crimes in objective terms exclusively.

Four, to shift the focus from the victim to the defendant.

Five, to protect the victim's sexual privacy by a rape shield provision.

Six, to eliminate the concept of resistance by the victim as an element of the government's case.

Seven, to make the law gender neutral.

Eight, to protect the mentally and physically disabled.

Nine, to limit or eliminate the marital exemption.

The Michigan legislation accomplished all of those objectives. The proposed Federal legislation, that is H.R. 4876, let me address

myself to that: in general it is a key step in the right direction. I am strongly in favor of it. It accomplishes most of the goals of Michigan's legislation. But I will end up telling you, I prefer the Michigan model to this proposed bill for several reasons:

One, I have a question about your penalty structure. The first thing that I would note is that some of the remarks that were made by Congressman Carr in response to questions by you, Mr. Chairman, I want to take—I want to disagree with to some degree.

Rape—if you have what I call a person who is a habitual rapist—all of the current scientific evidence, and some of that scientific evidence has been developed after the Michigan legislation went through, but I think it is safe to say that virtually all people who deal, have studied with and dealt with problems of rape in this society will tell you that there is no conceivable way to rehabilitate a rapist. That fundamentally what you have is something that runs out with age. And you can start with about the age of 40. Rape is fundamentally a crime of persons committed from 15 to 35, but it tails off, it reaches its zenith for one group with the 15 to 18, 19 year olds, and it tails down by age group until after the age of 40 it becomes negligible.

And basically, most of the people who are experts in this field now, and they do not come from the prosecutor's side, these are people who for a long time have been espousing the rehabilitative ideal, have basically given up and said, "If you have somebody who is an habitual rapist, the best thing you can do is put him in an environment where he can no longer commit that crime until he reaches at minimum the age of 40 or perhaps even 45 with particular rapists." After that the incidence of crime is likely to go down dramatically.

In light of that experience we dealt with the Michigan Women's Task Force on Rape, and our proposed legislation originally removed a life imprisonment for rape, and substituted therefore a maximum term of 20 years. And our original penalty structure would have been 20, 10, 2, and 1 for the four different degrees.

I took strong exception to that, based on the evidence, and convinced them that first degree ought to be life; that second degree ought to be 15; third degree ought to be 15, and fourth degree ought to be 2.

Now, let me point out that the Michigan structure is substantially different than yours. For example, I'll use that shameful term, the "garden variety" rape case: if we have a penetration by force without other aggravating circumstances, under Michigan law the maximum term of imprisonment is 15 years. Under your Federal law the maximum term of imprisonment would be 25 years.

So, under this proposed legislation, in some ways—and I say for most crimes—your penalty is more severe than Michigan's penalty is. And I prefer the Michigan penalty in that respect.

What I tried to convince the Michigan Women's Task Force on Rape is, for those people who are habitual rapists and who engage in the kind of serious life threatening behavior or any of the other categories that you, the task force, wish to define as seriously socially harmful, we have to retain a life imprisonment penalty, not as a max—I mean, not as a mandatory penalty, but we have to give a judge the discretion to recognize that individual who is going to

be a serious threat to society for a substantial period of time and give a penalty that will protect the public.

And so what we did was we restructured the entire original draft and redrafted it by defining aggravating circumstances, that part is already alluded to, and put those in and made it first degree. That's the standard, pat, "garden variety" rape, just penetration plus force is a third-degree offense under Michigan's law.

But I have a real question, first of all, with the penalty structure in this bill, because 25 years may not be enough to accomplish your—I do not—when a judge in a Federal system gives 25 years—first of all, it is not 25 years. It is a commitment to a Federal correctional system that ultimately will have the responsibility for determining when that person is released.

And so, to some degree, whatever penalty structure you provide, unless you make it a mandatory minimum term, is a misnomer under Federal law because the judge does not have the power to keep the person in, and that power rests with whatever the correlative Department of Corrections is. However, I am merely saying, even in a term of 25 years may not be enough for certain kinds of cases.

Second, it may be too much for the first offender involved in—I mean, let's assume it is some kind of a military camp and you have two couples that know each other, and over a course of 5 years there is an adulterous relationship going on between a man and a female, and it regularly occurs for 5 years. One night one of the parties says: "No, I do not really want to." And the man goes ahead and does it. I do not think that there is any judge in the world, and certainly not I as a prosecutor, that would say, "The guy in that circumstance deserves 25 years in prison." I just do not, absent other circumstances such as a brutalization of the victim or the causing of serious harm beyond that which adheres in the rape itself.

I prefer a system that allows life imprisonment where there are defined circumstances in the act itself, that the legislature wishes to define, and allows then the discretion to a judge to impose that penalty, if it is necessary to protect society, but limits the imposition of that penalty where it would be too much for the standard kind of case. Therefore, I like the Michigan model better.

Mr. CONYERS. In your example, the judge would have discretion to sentence up to 25 years.

Mr. BOYLE. That is correct. That is correct.

Mr. CONYERS. He would not have to sentence to 25 years.

Mr. BOYLE. Yes, but I do not trust judges, Mr. Chairman. I found that there are a lot of judges that would give 25 years when I do not think the person deserves 25 years. That is what I am saying. And ultimately it is a legislative determination to make. What you do not want to do is prohibit a judge from giving what the judge should be able to give under certain circumstances, but you do not want the judge to give more than he should give under certain circumstances. And that initial determination is a legislative determination.

The Michigan model chose to define the circumstances where we could define it, and say, in virtually each and every one of these circumstances a judge ought to have the discretion. We are not re-

quiring him to, but he ought to have the discretion to go up. But in this set of circumstances he does not have the discretion to go up, because we are making that judgment. And I prefer that model.

You settled on a 25-year max for the routine rape case. We settle on 15. We say life imprisonment for the rape case with certain aggravating circumstances, although it is not mandatory on the judge. And I prefer that model.

Mr. CONYERS. Well, I think you made your case very well, and we are going to consider that.

Mr. BOYLE. OK. If I could just go on briefly. On the marital exemption, while it is represented that this legislation eliminates the marital exemption, I as a lawyer would tell you my opinion is, as it presently sets, it does not. That is to say, you will not eliminate it. The marital exemption comes from common law; and if you want to eliminate it, put a section in here that expressly eliminates it. There is nothing in the proposed legislation that does that right now.

I am not going on record as recommending that. I prefer the Michigan model which limits the marital exemption to certain exceptions. But—and I could go into all the reasons, I will not take the time right now. I am a prosecutor, but I have some reservations about the extent that Government ought to be intruding into the sexual privacy of a marital relationship.

I also cannot countenance a husband who rapes his wife. But what I am saying is, that is a delicate balance to draw. I personally prefer the balance drawn in the Michigan legislation, but I do not see anything wrong in going further. I think currently 19 States have chosen—18 or 19 States have chosen to go with what the Federal model would purport to be, eliminating the marital exemption entirely. I only know of two cases in the last 10 years, both of which resulted in acquittals, that were brought by a wife against the husband. One case of notoriety in Oregon where, after the criminal trial they—I mean, they were—I think they got divorced and then remarried after that. I just—I have some real reservations about acting in this area. I prefer the Michigan balancing of it. But if you choose to eliminate the marital exemption altogether, I do not have a problem with that. But I think you better expressly say it in your legislation or there is a real chance that it is not going to occur.

Mr. CONYERS. I appreciate you making that clarification, even though you are not personally supportive of it.

Thank you very much.

Mr. BOYLE. Then, I would expressly eliminate the element of resistance in the legislation itself. I mean, if your theory is all nonconsensual sexual conduct is a crime, and that is what it purports to be, I would do just what the Michigan law did and expressly eliminate the element of resistance. Because, maybe it has not been a problem in Federal courts. But the truth of the matter is, I bet you half of the Federal judges have never had a rape case, either.

You are probably talking about 100 total cases a year in the Federal jurisdiction, which comes up with probably 20 trials throughout the entire Nation in the Federal jurisdiction every year.

We have 400 rape trials in the city—in Detroit recorder's court every year. I will tell you that, to the extent that this is handled by the judiciary, the judiciary will look toward common-law concepts in its statutory construction. And this statute does not say that resistance is eliminated. And if you wish to do that, you ought to put the provision in it that exists in the Michigan law.

Finally, well, I was about to say, finally, but another point is on corroboration. Corroboration is not a problem under Federal law; similarly it was not a problem under Michigan law.

But my distrust of the courts is so great that I decided this legislation ought to have a provision that says corroboration is not required because some judge somewhere would be convinced by some defense attorney somewhere that it might be a good idea, and if the statute is silent on it, that judge might say, "Well, I have got a common-law power to require it, and the statute does not eliminate it." If you do not want corroboration as a requirement, even though under current Federal case law it is not, I would put it in the statute and say corroboration is not required. And that is what we did in the Michigan statute.

The use of words assault and battery generally I am not in favor of for the very reasons that Justice Boyle indicated. This very issue came up with us when we were drafting the Michigan statute.

And the original statute used the words that the Maryland statute chose to use, and used the words criminal sexual assault and criminal sexual battery. When we were finished with it, we decided that the use of the word assault implies the old common law concepts of an unlawful offer of force generally against the will of the person, that that got us back into resistance notions. That when you talk about against the will, it is a focus on the victim instead of on the actor, that the focus ought to be on the actor; that the best way to do that was to use a new word. So we said, "criminal sexual conduct." There is not any way a judge can look at conduct, in terms of other cases, and come up with limitations on that law.

We could define criminal sexual conduct in the statute itself, and it would not import into the statute any notions from anywhere else. So, we chose to use that word, "criminal sexual conduct." And let me tell you, in 10 years of experience now with Michigan law, we have had no problems whatsoever with the definitional sections. No problems whatsoever with the classification system. There have been literally thousands of cases that have gone through the appellate system now in all definitional ways. There has been no problem with this legislation.

The current problem that exists is one paddling into mental anguish; that is a problem. And I adopt her sentiments entirely, that you ought to put that limitation in the Federal law.

The second thing is with the rape shield provision. There are two cases currently pending before the Michigan Supreme Court. We have had two that have gone through, and the rape shield provision has survived. But it is up again with full scale attack. And quite frankly, my wife does not even share with me the private conversations that she has with the other justices. So, I do not know what result is going to come out of those cases.

But those are the only ways in which this legislation has any doubt to it right now. It has survived all other attacks.

I think—I really think that those are basically—that is the sum and substance of the reservations I would have. I am still strongly in favor of this reform. If the question were, take this in its form or not: Take it and run with it, you work for it and fight for it.

I still believe that I prefer the Michigan model and the Michigan experience. It was a carefully crafted piece of legislation that was based not just on a lawyer's notion; we got statistical evidence on all types of crimes, related it then into criminal sexual conduct, and defined the statutory terms in terms of the statistical evidence.

One final comment, that is: I would not expect, contrary to what has been represented, that if you adopt this legislation you are going to improve the conviction rate.

Conviction rates, you know, I could—I used to prepare the statistical evidence for the Wayne County Prosecutor's Office for about 6 or 7 years, and I used to get irritated because I can give you a model that said we had 90 percent for a conviction rate. And I could give you the truthful model and talk about 50 or 60 percent for the conviction rate. And it depends on what you are comparing, obviously.

If you are talking—it is one thing to talk about a trial conviction rate. Nobody gets 90 percent, if you are talking about a true trial conviction rate. Not in the criminal justice system. If you add into it guilty pleas as well as trials; then, you inflate your conviction percentages.

Then, if you really tell the truth and you take all kinds reported and compared all people apprehended against whom the evidence is there, so therefore they are charged, and that is the next statistic—that is a highly relevant statistic, because you are probably only going to have about one-tenth at most in that group. Then, you end up with even that group, how many you start. And the best way is to talk about—let's say, recorder's court today—we start 12,000 serious felony cases a year for the city of Detroit.

And so those are cases that are supposed to be solid that we are going forward for. If the conviction rate is how many convictions we get, we get about 6,500 to 7,000 convictions a year. That makes it look like it is around a 50- to 55-percent conviction rate. But that is not true. Because most of the dropoff, some people—don't have personal bond, they do not appear and they are never reapprehended. That takes out about 10 percent of the cases a year.

Some people plead guilty to one offense and have two or three other cases dismissed. That carves off another group. There are various reasons why it is difficult to get an accurate statistical base. But I can tell you that the value of the new law in Michigan, it did not improve the conviction rate at all, contrary to asserted statements about rape reform around the country.

Our experience, at least in Wayne County and throughout Michigan, before this law was adopted, is that the conviction rate at trial for rape is not statistically significantly different from that of other offenses. OK. That is No. 1.

No. 2, the conviction rate is different for the overall conviction rate because far more rape cases are tried than other type crimes. It is difficult for a man to get up and plead guilty to rape, more than it is to armed robbery. Therefore, instead of having out of 10 cases, 9 be guilty pleas and 1 be a trial, in the rape area it is much

more likely that 5 will be guilty pleas and 5 will be trials. Every guilty plea is a guaranteed win.

If you have got more trials, you are going to lower the overall conviction rate. OK. That was—but still, not really low—still fairly good in rape. That was the experience before the new law. That was the experience after the new law. The conviction rate remained for all practical purposes about the same.

Then you can say, well, then why have the new law? Because 250 percent more people went to prison who were sex offenders under the new law. One, far more cases are reported. More reports came in because victims were willing to come in and tell their story. The publicity attendant on law reform changed attitudes on the part of police officers and prosecutors, operatives within the system, and on the part of the public in general.

And we had a far larger group of cases that we had to deal with. And as a result more sex offenders actually were convicted, and far more sex offenders went to prison.

I believe firmly in the reform in this area. I am fully in support of what the Congress might do in this area with this bill. And I remain strongly in favor of the bill in its present form with some suggested modifications that I made in my statement.

Thank you.

Mr. CONYERS. All right. Let's pause just momentarily, and we will come back on the record for some questions.

[Pause.]

Mr. CONYERS. Well, let me thank you both for taking this subject matter out of the legislative corridors and drafting offices down to where the prosecutions, the convictions, and the sentencing goes on, and is frequently most confusing and frustrating as well.

I would like to begin our discussion by stating that you well may be the witnesses whose testimony I will study most carefully because your combined experience has taken you through every step in the legal system. I think that that is reflected in your testimony, Justice Boyle, and in the distinctions that you have drawn, Mr. Boyle.

Rape is violent but not always sexual. I think that that is a concept that I would like to hear you elaborate on because it seems to me that that is the base on which this legislation is based. It has always been traditionally thought of as sexually motivated but as you have looked at some of these perpetrators, they really have more violence in their hearts and minds than they do sexual gratification. Could you both elaborate?

Mr. BOYLE. Without any question in my mind. Even where there is a clear and expressed sex intent, the purpose is to degrade, and to humiliate, and to subordinate, and to control. It is to demolish the personality of the other person. It is a power kind of thing and a degrading kind of thing. It is not as what we would think of as an erotic intent, or a pleasurable intent, or the giving of pleasure that is involved. That is my own opinion.

Justice BOYLE. I certainly would never argue that for people who are motivated to commit these kinds of acts that there is not an erotic pleasure in the degradation of another human being. I think that there is a precise and probably very intense erotic pleasure in that kind of degradation.

But we want, as I think people who are interested in the formulation of public policy, not to treat it as a sexual offense. Because once we start doing that, we return to those old cultural ways of looking at the act. It reinforces this notion that I talked about as the full integrity of a woman as a sexually liberated person to focus on the act as primarily assaultive and not sexual.

Mr. CONYERS. Could I ask you to discuss with me as frankly as we can the attitudes in the police and the prosecutor's office? The police have such an enormous role, and we are not here to punch them around, nor are we here to award tributes. The police carry with them many of the old fashioned attitudes that makes it very hard for them to come into this with some sensitivity.

You probably know better than most that there is increasing sensitivity as requirements for police work, and examinations for getting into the field now have received more attention. But speaking generally and specifically, what can you tell us about the attitude of law enforcement officials and agencies that we should know about as we move forward. I am glad that you disabuse us of the notion that we can expect a great increase in the conviction rate. You are improving the law, and if this is some modest increase, we would not be surprised. But I would like you both tell us a little bit about these attitudinal problems.

Mr. BOYLE. I think that there was, not only on the part of the police but the prosecutor as well, some distinct views that I think are wrong, and I think that we have worked successfully to combat. On the part of the prosecutor, it would not only be an insensitivity. It is wrong both ways when a warrant would come through.

There would a presumptive disbelief. If you are talking about say a kidnaping or an abduction from a corner of a stranger, you do not have a problem in that area. And that is treated as a crime of violence. But if you are talking about two people acquainted with one another or related to some degree——

Justice BOYLE. The woman hitchhiker.

Mr. BOYLE. Yes, the woman hitchhiker. There was a presumptive disbelief.

And on the other hand, there would also be a sense that once the belief was entertained, once there was some credibility there, then there was a disproportionate response the other way. I hate the criminal, I hate the defendant, I want to smash him. Both attitudes are wrong.

I mean it is necessary to take this crime and treat it as a crime of violence, treat it as something to the extent that you are a professional that you should be dealing with, and to deal with the victim of that crime understanding that there are differences—someone has a car stolen from them. You are going to treat that victim a lot differently than you treat the victim of a rape case. Because you understand the inherent trauma that occurs as part of the crime itself, and the sense of feeling and loss that the victim has. So there had to be a greater degree of sensitivity.

But it is not necessary for a professional to respond either in a personally emotional sense and say that, "Now that I believe that I hate the guy on the other side, now I am going to smash him as hard as I can."

Mr. CONYERS. Do you see that?

Mr. BOYLE. Absolutely. I think that you still see that. No matter what you try to do about it, you still see that.

On the part of the police, there were similar kinds of feelings. I mean I know that the portrait of the police officer ordinarily portrayed is a callous disregard of the victim. I believe that is incorrect. Some officers are that way. But I think that the inappropriateness of the feelings goes both ways again. It is the presumptive disbelief of the woman under certain circumstances. And there was also an insensitivity to her personal plight particularly right after the crime was committed. But it is the other way as well. It is that once they believe, it is the rage that is entertained against the perpetrator of the offense.

We thought that law reform was only the first part, the drafting of the statute. The most important thing was Pat and I along with Dr. Virginia Nordby from the University of Michigan Law School and Jan Bendor, who were the four principal people involved in the statute, put on seminars around the State of Michigan.

The critical thing was to get the system professions to understand the change, to accept it, to not be skeptical, to embrace the objectives of the legislation, and to put them into every day practice.

I think that I want to go out of my way to commend the Detroit Police Department. Because I can tell you that they came forward and worked zealously to accomplish every goal that the task force had, including one particular commander who drafted himself about an 85-page booklet. They paid for its publication. It is a mandatory requirement for anybody who is in the sex crime unit. People have to pass tests on it before they get admitted into the unit.

And there were a lot of sensitivity sessions that went on making them aware. And they also did not go the other step. You know, a lot of departments have only women in the sex crime unit. Detroit said no, one goal of this thing is gender neutral. We are going to have men and women, and we are not going to make a gender based distinction with respect to the officers who investigate either. And I think that is a great idea, I really do.

I want to commend the Detroit Police Department for their cooperation in changing attitudes, which I think that they did successfully.

By the absence of my statement about other departments in the State, I do not want to indicate to you that I know that they did not. It is just that my professional life has me working with the Detroit police most of the time, so I know what they did. I do not know what other departments did.

But I think that the police and the prosecution have made monumental strides in Michigan in the last 10 years that would not have been accomplished had this legislation not gone through.

Justice BOYLE. One of the values, I think, of this kind of legislation and this kind of statement is that it is an affirmative statement of the protection of a certain group of people's rights. And you may not be able to change everybody's attitudes overnight, or maybe not in 5 years, and maybe not in 10 years, or maybe not ever. But by making that affirmative statement, you are saying that the force in government disapproves of those people who are

insensitive to these rights. The force in government is toward the full recognition of the rights. And that in itself is a major statement to members of the bureaucracy who have to administer and deal with victims.

I was reminded when you asked the question, Congressman, of hearing Dr. Evelyn Crockett speak at a seminar to new interns. And she was in the wake of the passage of this legislation doing something that was done at a lot of hospitals, which was, believe it or not, the necessity for sensitivity training for doctors treating rape victims.

And she described a situation to this assembled group of interns that she said that she never wanted to see again happen in that hospital. And that was a situation in which a victim came in, brought in by the police, reported as a rape victim, examined only vaginally, and released from the hospital with a bullet wound in her shoulder. Because that was the only thing that she was examined for.

And so I guess that is just a very dramatic illustration of other very good things that came from the enactment of this legislation in many segments of society.

Mr. CONYERS. Absolutely. What about the factor of race? What about when the victim is a black woman? Is it not true that frequently she has a higher barrier to overcome to get somebody to believe what is happening, or is frequently embarrassed to the point that she is sent packing from a police station never maybe even getting to the prosecutor's office, or to finally stop the visits to the police station and go to the prosector's office, or a lawyer or somewhere?

But is there not a factor that complicates this thing because of race?

Mr. BOYLE. Well, I think if you have a society which has racism, that it is probably going to manifest itself anywhere there is another phenomenon. I have to tell you that I have never had a report from a black female saying that she attempted to lodge a rape complaint, and was rebuffed by the police and she wanted to make an independent complaint to the prosecutor's office. I have never had that reported to me, although Pat just said that she has.

Justice BOYLE. I was just going to say that I think, more frequently, my experience is that you would see a manifestation of that attitude at the level of domestic abuse. Of a black woman coming into a police station, and saying that I am afraid of my husband or my boy friend. He had beaten me before, and I am afraid this time he is going to kill me or he is going to kill one of the kids.

And I think that at that level you might more frequently, at least that is my experience, see its manifestation with the police treating it as just another domestic quarrel between people who quarrel all of the time anyway. And I have seen situations like that that have resulted in death where the complainant wants to lodge a complaint, and the police just leave her sitting in the police station for hours and hours, and she finally goes home. And it does result in serious bodily injury or death.

Mr. BOYLE. I agree with that. Those are reports that I have had. I think that the Women's Justice Center, if they have a case like that, generally instruct the complainant to call my office, even

though it is not my department to handle. But I have had calls like that, probably 20 to 25 a year that come in.

The only thing that I would say is that I do not know that—I get them both from whites and blacks in about the proportionate level in which they would be throughout the county of Wayne—I do not know that it has a racial basis. I have had white women complaining where there were white husbands and white police officers with the same kind of thing.

I think that that is primarily the function of the attitude of the police that they do not wish to get into what they perceive to be domestic disputes. That attitude still exists. Again inside the Detroit Police Department, Jim Bannon has worked as hard as anybody that I know of to dislodge police officers of that notion. But you still have it, and there is no question. The notion is that I can put my life on the line.

I cannot give you the exact statistics, but I think that it runs something like 60 or 70 percent of all police officers who die in the United States die as a result of intervention in a domestic dispute, not as a result of some armed so-called professional criminal.

So there is a real reluctance on their part to enter into something that may be potentially life threatening when they will never know where it came from. And at the same time they understand that the system is somewhat unable to cope with a solution to this area of criminal activity.

I am not justifying that attitude. I am simply saying that that attitude still exists, and we need to work on it.

Justice BOYLE. At the trial court level too, as a trial court judge, I have seen cases where acquittal has resulted, even though in my judgment there was absolutely no question, and I think in the judgment of any reasonable person, that a criminal sexual offense had occurred.

And in the two cases that come to mind, the woman was black, the perpetrator was also black. But in each instance, the woman was severely handicapped. And not only in terms of lack of schooling and lack of ability to be articulate, she was also handicapped because she had been soliciting and accosting, and he was her procurer. And I think that that is one of those situations that involves an attitudinal change by the jury.

Because the sense of the jury, which was substantially a black jury, was just sort of leave them where they find them, even though this woman had been cut seriously in the course of this incident. And my own judgment was that the acquittal was certainly wrongful. But that is sort of the jury attitude. It is similar to it, because it is kind of like this is a domestic difficulty.

Mr. CONYERS. Right. Let me ask you now about your experiences in which the defendant is a black male.

What happens in those kind of cases, have you seen or evidence of racism, is it diminishing, and does our legislation in any way have any corrective effects on it? The *Scottsboro* case obviously is sort of a classic American piece on this. And probably in other parts of the country, more notably the South, it was pretty easy for a black male to be charged with rape, or attempted rape, or some attempted sexual misconduct.

And once something like that started into the court system, it was gone. The witnesses or nobody could frequently turn it around.

What do you see happening in this area?

Justice BOYLE. I think that as a piece of Federal legislation, you certainly would have greater concerns for its applicability around the country than we would see demonstrated here in terms of the issue that you raise. I say that because both of our principal experiences have been in Detroit.

And while it is certainly not true that blacks cannot be racist toward black, and we know that they can be, we do have a representative jury panel, population representative jury panel. So that even though the prosecutor's office is substantially white, the bench is also a very representative bench—George Crockett used to say the most integrated branch in the United States of America in terms of women and blacks.

Cases that are bad cases I think are flushed out at preliminary examination for the most part. And the jury system is representative of the community. To contrast the case that I gave you before with another case that I think represents the same sort of problem where the system miscarries is a case that involved a black defendant and a white woman, who was a college student at Wayne State University living off-campus.

It was pretty clear that this woman had had a number of relationships with black and white men, consensual relations. And in the instance in question, this man had entered her apartment; he had been admitted. He had a couple of drinks with her. He knew what had occurred with this woman and other people in the building. And he then sort of suggested to her that the same thing might occur between them, and she said no.

And he took a knife. They were in the kitchen while she was doing the dishes. And he took a knife. He never directly threatened her with the knife. But he had the knife in his hand at all times, and accomplished intercourse with her.

The jury acquitted that individual. But again I think that it was because the jury is expressing a rather traditional middle-class, rather than racist, view. That is part of the educational value of the kind of effort you are engaged in.

Mr. CONYERS. When you said that blacks can be racist toward blacks, were you referring to the fact that sometimes they are harder on the black defendant because they are outraged and maybe even by extension feel some embarrassment that this person is before them?

Justice BOYLE. I was referring to that fact, and I was also referring to the fact that the jury which was principally black in the first case that I talked to you about may have been harder on that woman because she was out on the streets accosting and soliciting. And that is maybe even more repulsive to the sense of middle-class black Americans.

Mr. CONYERS. Remember that case of Cynthia Brown, the police officer and the black prostitute, and the prostitute was shot by the police officer. Sam Olson was the prosecuting attorney there. I think that I was in law school.

Mr. BOYLE. Yes, that was before I was there.

Mr. CONYERS. Oh, OK. I just remembered that case. Because I got involved on a committee. We were protesting. And we got a lot of that attitude in the black community. She was a prostitute. She was monkeying around with a policeman and she got——

Justice BOYLE. What she deserved.

Mr. CONYERS. Yes. So what is your committee about? The last question is about the rape epidemic that occurred earlier this year in Detroit.

What did we learn from that as members of the legal community and as Government officials? Where are we going, Justice Boyle, and what is the prognosis?

Justice BOYLE. Well, I am probably going to give you an answer that you will not like, and you may choose to disagree with. And it is going to sound like I am a bureaucrat, and maybe I am. Maybe I have become that. I do not regard the cycle, I mean I do not regard the phenomenon that occurred in the last year, as something to be seriously concerned about, even though I know that the community was.

If you go through and look at 10- and 12-year cycles, you are going to find by random selection that something occurs in a given year, and somebody sees that there is a pattern. You know, 1,300 or 1,400 rapes, and all of a sudden there is a pattern. People have gone beserk, and we have a major problem.

I would rather focus on the background of that. We saw a pattern of increasing rape every year until 1975 or 1976. From 1976 to 1983, there were decreasing rapes in the city of Detroit. Nobody bothers to say that. We had one big leap from 1974 to 1976. And that is when everybody came in and that established the base. I mean more people reported. But after that, there were decreasing reported rapes in the city of Detroit.

And all of sudden in 1983, we had a jump, and the jump was, I don't know, 20 to 25 percent roughly. But that should be examined in the course of what has happened in the preceding 10 years as well.

Mr. CONYERS. Well, they seem to be focused on schoolchildren and young girls going to school. There seemed to be a method or a pattern in the increase.

Mr. BOYLE. That is correct, that is correct. And I do believe, and I did not follow that up as it was outside of my division, but I do believe there was one offender that was responsible for a disportionately large number of those, and in that you will see a pattern. And the answer to that is that is sort of exemplative of what I told you earlier. If you have an offender who is 19 years old that is now responsible for 19 rape abductions of schoolchildren where there is a lot of trauma, that is exactly the guy that you ought to have the potential for a life imprisonment sentence on once he gets convicted.

But there was one offender responsible for a disproportionately large number of those. And I also think that what happens when you begin to report it in the news media and everyone sees it, you get those people who are marginally on the edge of that, that get an idea and go out and do it again. It is the phenomenon of reporting. That is the second thing.

Third, I cannot explain why certain things happen in a society either. Because over the course of time, I have learned that things will randomly associate together. The best example that I can give you of that is in 1 year the Wayne County prosecutor's office, which I regard as the finest professional prosecuting agency in the entire Nation if not the world, lost in succession the Cobo Hall rape trial—you know, when things went amuck—and we lost the Cobo Hall rape trial, and all the defendants were acquitted. The Massenburg, which was the Olympia—you know, a suburban gentleman came in, and there was a robbery, and he ended up dying. And what we call the 911 case where two old people, I mean 80 years old, and the woman calling 911, and the defendant is inside the house beating on them and killing them, and it takes 45 minutes for any response to get there.

And those three trials were tried within a 1-month period, and our office lost all three cases. Even Cohen at that time had not gone to Federal court and he was on the police commission, and he came over to investigate, you know, "Is the prosecutor's office destroying all of these cases, or is the police department at fault?".

You know, the Free Press had editorials, the News had editorials, "What is happening in the prosecutor's office?". Well, when everybody was done with all of their investigation, there were adequate rational reasons for the acquittals in all of those cases.

In one case, there probably should not have been, but that happens whenever you have a jury trial. It is a roll of the dice basically. You could take a group of 10 strong cases and win 7 or 8 out of 10. And you could take a group of 10 very weak cases and win, in fact, 10 cases where the defendant ought to be acquitted, if you looked at it seriously. But it still is going to trial, and you might win two or three of those. Because on the margins, it is a roll of the dice in terms of what goes in.

Well, over the course of a 10-year time, it just so happened randomly that those three cases came up at the same time, and the three cases had those results. They were not there for a reason. And the fact that that occurred indicated nothing about the quality of prosecution in the prosecutor's office.

I suggest to you similarly that the incidents of rape, especially the increase in the city of Detroit over the last year, does not indicate in and of itself some problem that needed to be addressed officially and separately by the organized institutions in society.

I am very glad that churches and neighborhood groups got so upset about it because what they will do now in terms of prevention is good anyway.

Mr. CONYERS. The education that came out of it citywise and countywise is very strong.

Mr. BOYLE. Exactly.

Mr. CONYERS. Bringing in the telephone company trucks to help scout. I know that citizens now are far more sensitized to the problem of youngsters going to school in the early morning hours than they ever had been before.

Mr. BOYLE. And that should have been done in any event, and it should have been done even without the incidence of those cases. But we know that we act that way. We are reactive in the society frequently.

Mr. CONYERS. All right, I am going to let you go on probation now. You have been here and punished for quite a long time.

But where do you put the repeat rapist now that we have agreed that he should be put way possibly for long periods of time?

Justice BOYLE. Is that a separate whole hearing?

Mr. CONYERS. That is the way I understand judges operate. They say this is it. But what about that?

Justice BOYLE. Well, of course, the court has representatives on the sentence guidelines revision committee. The court has been concerned about it. Our State legislature is extremely concerned about it. Perry Johnson, I think in part, resigned from his role because he is so frustrated. Because the issue really is a fiscal issue, where are the funds going to come from for this.

My own view on it is that the Jeff Padden bill, the legislative bill, as it was left in the legislature when they adjourned, probably contains—if it is still there, because the judges were doing all kinds of end runs around it, which I personally disassociate myself from—a provision, the purpose of which is to confront the public with that issue.

The commission as Padden conceived it is to look at the available beds, and to tell the public essentially, "OK, folks, this is what we have available. And given what we have available, these are what the sentences are going to be." To me, that is a very responsible way to try to confront an issue that is highly volatile in terms of the public's sensitivity to any increase.

Mr. CONYERS. When you put a rapist away—I mean throwing him up there at Jackson with other people might be continuing a problem. Is there medical treatment, or has our psychiatric development in this area led us to any kinds of treatment?

Mr. BOYLE. No. There is no adequate, I think—there are certain psychiatrists, very few who purport to have something that they can with a certain small percentage of rapists have effective rehabilitative therapy. I believe that most responsible psychiatrists indicate that there is no remedy in terms of psychiatric counseling.

That is the development of depo-provera, and the recent controversy that we had in Michigan in the *Gauntlet* case. And by the way, I should indicate contrary to what was carried in the press, depo-provera is in fairly widespread use, if what you are talking about is the treatment of sex offenders on a voluntary basis. And I think that it is used in some Federal facilities, and it is certainly used in a lot of State facilities, never coercively but at the request of certain prisoners.

And there are a number of prisoners who absolutely swear by its use, who swear that they have a sense of freedom from a compulsion that they previously experienced over which they had absolutely no control, and that this drug for the first time in their life has set them free.

Again, I do not want to be heard to be recommending it. I have some very serious reservations about governments using any chemical with respect to this on a defendant. I have the strongest sense of anything that people have reason and will. And that before they are held criminally accountable, you have to understand and the assumption is that they have acted through free will. And if you want to guarantee freedom in a society, you have to keep believing

in that. And that people chose to do what they do as opposed to a deterministic philosphy.

And because I believe that, I think that you do not ever administer drugs or chemicals to somebody in order to accomplish behavior modification against their will. To me, that violates due process. But having said that, where people voluntarily want to take it, the evidence is that the drug is quite successful in assisting an individual to control his own conduct.

Whether that might suggest something in the future for treatment on a voluntary basis, I do not know. But I think that most system professionals pretty much hold up their hands still, other than say depo-provera, and say we just do not know what to do with this person in order to give him any enlightenment about controlling his own conduct, or assisting him in any way, and most of the attempts to do so are failures.

That is not to say that there are not some sucesses, because there are in any kind of program. But they are very, very marginal at best.

Mr. CONYERS. But in the slammer, there is not much that can be done?

Mr. BOYLE. No. The only thing that you can do is make sure that he does not go out and rape other people while he is in there.

Mr. CONYERS. Mr. Carr.

Mr. CARR. Thank you, Mr. Chairman. I only want to make a comment for the historical record, and hopefully it will be contained. And if we need to, we can have a colloquy on the House floor regarding the first suggestion of Justice Boyle about the defenses creeping or a shifting of focus about knowingly threatening or placing another person in fear, and beginning to focus the attention on the victim once again.

Those of us who came together to carefully, as carefully as we might, to put the bill together did in fact consider that. And I just draw the counsel's attention to the word "or" on page 2, line 5, and page 4, line 3. It is there very deliberately, so that the first and foremost focus of a prosecutor is going to be solely on the conduct of the offender.

We looked at the language that follows in subsection (b)(2) and the relevant sections that follow as being an enlarging of the prosecutor's discretion, and an enlarging of conduct which may be suspicious but not totally focused on the defendant.

Mr. CONYERS. Thank you very much. I think that the hearing has been greatly enriched by your experience and contribution to criminal justice across the years, and I have enjoyed the discussion very much.

Justice BOYLE. Thank you.

Mr. BOYLE. Thank you.

Mr. CONYERS. Our next witness is from Pontiac, the Honorable Charlie Harrison, who I would like to call to the witness table now. Charlie Harrison has served with distinction in the Michigan Legislature and House of Representatives as the majority whip, and a ranking member of the appropriations committee. He is a former county commissioner for Oakland County, and has demonstrated his concern over criminal justice matters by his vigorous activities as a cosponsor for the State rape law in 1975.

We welcome and are pleased to have you here, Charlie, as the State legislator for this area. You may proceed in your own way.

TESTIMONY OF CHARLIE J. HARRISON, JR., STATE REPRESENTATIVE, PONTIAC, MI

Mr. HARRISON. Thank you very much, Congressman Conyers, and gentlemen of the committee. I would also like to thank Congressman Carr, who is our Congressman in this area. It is the first time that we have had a Democratic Congressman in 20 years. And I would like to say at this time that you are certainly doing a wonderful job there.

We are pleased to have you here today to talk about the problems that we have throughout this country in rape and sexual abuse. It is very disheartening to even think about an individual committing an act of rape upon another individual. But it is very pleasing to know that we in the State of Michigan recognize that sometimes we must make adjustments to take care of the problems that are at hand.

And at this point, Michigan has shown itself to be a pioneer in reforming the rape law which was adopted in 1975. And I am happy to say that I was a member of the legislature at that time, and also a cosponsor of that legislation.

The previous speakers left a wealth of information and knowledge with the committee. It would be very difficult to improve upon the information that they left with you. But I would like to say that I support H.R. 4876. And I would just like to make a couple of brief comments. I will be very, very brief. I must say that I have another commitment that I must honor.

But I would like to say that Michigan's rape law is working. We have had here convictions of rapists about 70 percent in Detroit since 1975. Now those are convictions. And that was when the new statute was passed in 1975. The average number of convictions between 1972 and 1974 were eight forcible rape convictions per month. And between 1976 and 1978, the number of convictions went up to at least 21 a month. So that does show that our law in Michigan is working.

On the national level, there has been about 76,000 forcible rapes reported to the FBI in 1979, which is an increase of 20 percent in 2 years. In 1980, Federal experts estimated that 1 rape in 10 was reported.

There are only about 100 rape cases that are tried on a Federal level in a year, so that means that we must do something, and we must encourage you to do something to improve the rape law federally.

I would like to just sum up my comments by saying that I certainly hope that each individual that is within the Sixth Congressional District would certainly write Congressman Carr and also Congressman Conyers, who is the chairman of the committee. Also to encourage your friends and your neighbors to take a look at H.R. 4876, and also correspond with the Congressman to encourage them to try to be as expedient as possible to pass this bill. Because what this will do is it will assist in convicting people who are

charged with rape even on airplanes, and ships, and in Federal buildings, national parks and forests, and also in Federal prisons.

And once again, Michigan law has been a model for other States and for the Federal Government to take a look at. And if we are to discourage individuals from committing an act of rape on others, we must have tough laws.

I would also like to say that because of the present administration and the kinds of pressures that are being placed upon individuals in low-income areas, poor people, they are forced to do many, many things that they would not do ordinarily.

And if we have stringent laws that would lock people up to discourage people from committing these crimes, these crimes would be diminished. Once again, I encourage each individual here to talk about this particular problem with their friends, and neighbors, and relatives, and once again encourage Congressman Carr, and Congressman Conyers, and others to continue work on this bill.

At the reconvening of the Michigan Legislature, I will introduce a resolution to mobilize Congress to enact H.R. 4876, and I certainly hope that it can be done expediently.

Once again, thank you very much for allowing me the opportunity to testify before you today. I think that you are doing a very good job. We certainly hope that we will be successful in having a Federal law very shortly.

Mr. CONYERS. Thank you, Representative Harrison. We know of your continuing concern going back to 1975 and before. And I have no questions except to ask you what is the current situation like in the Pontiac area; has the rape pattern been aggravated by the explosion that occurred in Detroit, was there any relationship in the amount of that kind of crime?

Mr. HARRISON. No, we have had our share of rapes, as we have had with other variations of crime. But as it was pointed out before, there was one individual in Detroit who was identified as being responsible for a number of those rapes that did occur. We have not had that kind of outbreak in the Pontiac area.

And certainly, I think that the Michigan law has been very helpful in that area to discourage people from committing those kinds of crimes.

Mr. CONYERS. Thank you. Mr. Carr.

Mr. CARR. I have no questions other than to say how delighted I am to see my good friend, Charlie Harrison, here. He is providing excellent leadership in the State legislature. We enjoy appropriating in common. And I am delighted that he could take the time to be here with us today.

Mr. HARRISON. Thank you very much. I am certainly happy to be here.

Mr. CONYERS. Thank you.

Mr. HARRISON. Thank you.

Mr. CONYERS. The next witness is from Lansing, the director of Governor Branchard's office of criminal justice, Ms. Patricia Cuza. She is very familiar to this subcommittee, having testified earlier in Detroit when we held hearings on legislation to help crime victims. Her experience and broad view of this matter from across the State and the Governor's office in particular will be helpful to us. We are glad to have you before the subcommittee.

Welcome again, and please proceed in your own way.

## TESTIMONY OF PATRICIA CUZA, DIRECTOR, OFFICE OF CRIMINAL JUSTICE, STATE OF MICHIGAN

Ms. CUZA. Thank you, Congressman Conyers. I appreciate the invitation to address this committee on the subject of sexual assault legislation. I think that Congressman Carr has proposed a significant bill, and I hope that this hearing will lead to productive results.

Let me give you a little background of myself. I was the executive director of the Michigan Women's Commission, and the administrator of the Crime Victims Compensation Board before assuming my current position in March 1983.

In all of these positions, I was reminded of the devastating impact of rape on victims and their families and friends. There are few nonfatal crimes which can damage a person physically, mentally, and emotionally as much as sexual assault. And the victimization lingers on long after the actual event.

I want to briefly review the changes in Michigan law which encouraged Congressman Carr to propose H.R. 4786. Prior to 1974, Michigan had the typical archaic law. The chapter of the compiled laws was titled "Rape," but the section head was "Carnal Knowledge."

The section was first enacted in 1846. And although amended through the years, it remained archaic. The acts made felonious are to "ravish and carnally know and abuse a female . . . upon proof of any sexual penetration however slight." And upon those Victorian phrases have built up volumes of case law. And although we do not have that in Michigan anymore, I think that it is important to note that there are still some States in the United States that still have case law and decisions about rape today that are made on that kind of archaic language.

It was at a conference of rape victims' counselors in 1973 that a strong movement developed to modernize the rape statute. In rapid order, women's organizations met with key legislators and began drafting new legislation. The draft included parts of the Model Penal Code.

In what is considered astounding speed by legislative standards, the bill was introduced, amended, passed, and signed by the Governor on August 12, 1974, and it took effect on April 1, 1975. By contrast, a complete revision of the Criminal Code with classes of offenses similar to the sexual assault act have been languishing in the legislature since first proposed in 1967.

So just in terms of legislative strategy, by pulling this one particular act out and having a special act passed on it rather than waiting for the Criminal Code, I think was very wise.

The Michigan Sexual Assault Act accomplished a much needed clarification of such terms as intimate parts, contact, and penetration. The act also consolidated and in part repealed nine related statutes, such as assault with intent to commit rape, sodomy, and incest. The act is sex neutral in that offenders and victims are not limited to gender stereotypes.

A key provision is the creation of four degrees of criminal sexual conduct. Under the prior laws, many so-called minor rapes were prosecuted as assault, assault and battery, and assault with intent to commit rape. Through plea bargaining and guessing at what juries might do and might accept, less severe cases often bore little resemblance in court to what actually took place.

The standard was that juries often found rape defendants not guilty unless there were aggravating circumstances. The new degrees allowed each case to be prosecuted honestly in accord with the actual facts. First and second degree sexual conduct include aggravating circumstances of age, relationship, use of weapons, aiding and abetting, and injury.

The penalty for rape under the old law was indeterminate with prison terms from life to any number of years. The four degrees in the new act have increasing maximums up to life for first degree.

One of the more significant features of the new law is that it does not require the victim to resist. The prosecution must prove that force was used, but does not have to prove the victim's nonconsent. Under the new law, the victim's state of mind is not determinative, the coercion of the actor is.

Generally, evidence on the victim's chastity, reputation, and sexual conduct is no longer admissible. The exceptions are evidence of prior activity with the defendant or specific instances showing the origin of pregnancy, disease, or semen, but only if the defense files a motion and offers proof within 10 days after arraignment. Then the judge must find the evidence material and of probative value. This minimizes but does not always prevent the case from becoming a trial of the victim. That practice in the past had inhibited many victims from pursuing prosecution.

Neither the old nor the new law requires corroboration of the victim's testimony, leaving the jury to weigh each witness' credibility, although prosecution is obviously encouraged if such corroborating testimony is available.

The new law allows counsel, the actor, or the victim to request suppression of the names of offender or victim and details of the offense until the defendant is arraigned, charge dismissed, or the case otherwise concluded.

The revised act also allows a wife to charge a spouse with sexual misconduct, but only if they are living apart and one has filed for separate maintenance or divorce.

In these several ways, the Sexual Assault Act of 1974 has brought the issue of rape prosecution into a new century and a new era. It is interesting to compare the outcomes of sexual crimes before and after the 1974 code reform. I chose 1972 as a year to compare with 1982, the latest year for which we have complete dispositional data available on a statewide level. So the figures that I am giving you are State figures.

The uniform crime reports of the State police include offenses reported to State or local law enforcement agencies. The definition of rape includes assault to rape and attempted rape. In 1972, there were 2,644 reported offenses. In 1982, there were 4,082 reported offenses, and increase of 54 percent.

There is not clear agreement as to whether this reflects more incidences or more reporting due to the better treatment of victims

and prosecution of offenders. According to the National Crime Survey, which interviews a representative sample of citizens, the rate of rape offenses for 1,000 citizens has actually declined from 1.0 in 1973 to 0.8 in 1983.

By projection, the victimization surveys would estimate 160,000 rapes in America in 1973, and 153,000 in 1983. One figure remains constant. In 1972, 1,047 rapes were considered cleared by arrest, or 39.6 percent of the offenses reported. The comparable figure in 1982 was 39.5 percent.

Another figure remains constant. Of those convicted of prisonable sexual offenses in both 1972 and 1982, 49 percent were sentenced to a prison term, and 45 percent were placed on probation. But that similarity conceals some very major differences.

First, only 348 offenders were convicted of such offenses in 1973 compared to 1,215 in 1982, a 250-percent increase. One hundred seventy-two were sent to prison, compared to 592, a 244 percent increase. Another significant difference is that in 1972, 23 percent of those imprisoned were convicted of assault with intent, often a plea bargained charge. By 1982, only 12.8 percent were sent up for assault with intent to commit sexual conduct. The rest were found guilty of the actual act.

Clearly, the creation of four classes of criminal sexual conduct has had the desired effect. In 1972, 55 persons went to prison for violation of the old rape statute. In 1982, 502 persons began prison terms for criminal sexual conduct; 240 for first degree, 122 for second degree, and 113 for third degree, and 27 for fourth degree.

And expected, the rate of those convicted who actually went to prison ranged downward from 81 percent convicted of first degree to 11 percent for fourth degree.

I know that these percentages and numbers are just floating around. I do have a chart that I will leave with you, so that you do not have to remember all of this. I was going to threaten you by telling you that I was going to have a test at the end.

It is also clear that reliance on related statutes has declined as the new law made appropriate charges under the fourth degree more visible. Perhaps the most telling of all the statistics is that the 502 new inmates under the revised code in 1982 represents a 813 percent increase over the 55 new prisoners in 1972 under the old rape law.

The intended and expected effect also occurred on length of minimum sentence. Under the old law, the average term for a rape conviction in 1972 was 6.37 years. Under all degrees of the new code, the average minimum sentence was 5.53 years, actually lower in 1982. But among the degrees, the difference is striking. First degree offenders average 7.3 years; second degree and third degree, 3.8 years; and fourth degree, 1.5 years.

There is no doubt that the 1974 Sexual Assault Act encouraged more reporting of rape. It most certainly resulted in more accurate charges being brought. It dramatically improved the treatment of the rape victim in the adjudication process. It does not necessarily punish the offender more severely, just more routinely and more appropriately given the nature of the act.

I am extremely proud that the genesis of this long overdue reform was the women in Michigan who were rape victims, rape

counselors, law students, and lawyers. They made a strong case that the legislature could not and did not ignore. And if the U.S. Congress would act with equal speed and righteousness, the people of Michigan can be doubly proud, and all Americans will benefit.

That is the end of my prepared remarks. But having listened to the previous speakers, I would just like to make a few extemporaneous remarks if I may.

I was pleased to hear the understanding of the committee that rape is a crime of violence, and not of sex. I think that that is the most important thing that we have to get across to legislators and to people in general. And that the purpose of rape is to punish, to humiliate, and to hurt the victim. It has nothing to do with sex at all.

And the other important thing that legislators should look at is that the law must acknowledge that the victim is in no way responsible for the act. We live in a sexist society. We would like to think that because of the women's movement in the last 10 years, that we are all much more enlightened, but I do not think that that is necessarily true.

Women do not deserve it just because they wear certain clothes, just because they walk in a certain way, just because they make certain eye contact. No one deserves to be punished in that way for those kinds of things.

And I would also like to point out for whatever it is worth that in the Michigan experience, our experience in the legislature, the two areas in which legislators seem to have the most difficulty in dealing with the 1974 bill as we were lobbying it through is that there was difficulty in dealing with the exclusion of the victim's prior sexual history, and the second area was the opportunity of the victim to charge her spouse with rape. Those seem to be the two most controversial areas that were the most difficult to make people understand.

And as the former director of the agency that was very much involved in lobbying for that law, so I think that I have a special feel for it, I want to commend Congressman Carr and you, Congressman Conyers, for focusing national attention on something that we in Michigan like to think that, well, we did that 10 years ago, but that is not true across the country.

And I think that it is absolutely essential this kind of discussion be held in all of the States. And I want to thank you for bringing it to the attention of the country.

Mr. CONYERS. Well, thank you. That is why we are holding the hearings here in Michigan. We think that it is very important that we continue to learn from the Michigan experience.

Would you prefer to have the Carr version over the State version with reference to spouses bringing actions against another?

Ms. CUZA. I am sorry to say that I am not as familiar with the Carr version.

Mr. CONYERS. His is more liberal. There would be instances where a person would be able, within the same house, to bring charges against his or her spouse.

Can you imagine situations in which that would be an appropriate circumstance to lodge a complaint?

Ms. CUZA. Yes, if you want to hold another series of hearings on domestic violence, whether or not people are married or just living together. I think that that is an important element. And in the entire domestic violence situation, that happens often. And of course, those women would not have any recourse to charge under the Michigan law.

The other thing that I think is important, if we can also talk about crime victims compensation. If you are living in the same household, you would be excluded under the Michigan crime compensation law from receiving any kind of remuneration. So yes, I would certainly support Congressman Carr.

Mr. CONYERS. Thank you very much. Mr. Carr.

Mr. CARR. Not a question. I am delighted to see you here today, Pat. And thank you for your remarks. But in relation to crime victims compensation, I understand, and I might ask counsel, I understand that the Justice Department has made a welcomed suggestion that there be an additional penalty of fines. Not to be in substitution of prison terms, but they have come forward with a suggestion that fines be levied in appropriate cases, and that those fines be earmarked to a fund to help compensate victims of criminal and sexual assault.

And I would as the author of the bill ask the committee to kindly consider such a recommendation should the Justice Department make it. Or in the event that they do not, perhaps consider it in the markup of the bill.

Ms. CUZA. I think that that would be a welcome addition.

Mr. CONYERS. We would be happy to do that. Well, we thank you, Ms. Cuza, for your efforts in the past and your continuing concern about this matter. We are really still at the threshold of developing community and citizenwide understanding of the problem, and you have contributed greatly.

Ms. CUZA. Thank you.

[The prepared statement of Ms. Cuza follows:]

TESTIMONY PRESENTED BY PATRICIA A. CUZA, DIRECTOR, MICHIGAN OFFICE OF CRIMINAL JUSTICE, BEFORE THE HOUSE JUDICIARY COMMITTEE

Good morning: I am Patricia Cuza, Director of Michigan's Office of criminal Justice. I appreciate the invitation to address this Committee on the subject of sexual assault legislation. I think Congressman Carr has proposed a significant bill and I hope this hearing will lead to productive results.

Let me give you a little background on myself. I was the Director of the Michigan Womens' Commission and the Administrator of the Crime Victims' Compensation Board before assuming my current position in March of 1983. In all of these positions, I was often reminded of the devastating impact of rape victims and their families and friends. There are few non-fatal crimes which can damage a person physically, mentally and emotionally as much of sexual assault—and the victimization often lingers on long after the actual event.

I want to briefly review the changes in Michigan law which encouraged Congressman Carr to propose H.R. 4786. Prior to 1974, Michigan had the typical archaic law. The chapter of the compiled laws was titled "Rape", but the section heading was "Carnal Knowledge". The section was first enacted in 1846 and, although amended through the years, it remained archaic. The acts made felonious are to "ravish and carnally know and abuse a female . . . . . upon proof of any sexual penetration however slight". Upon those Victorian phrases have built up volumes of caselaw.

It was at a conference of rape victim counselors in 1973 that a strong movement developed to modernize the rape statute. In rapid order, women's organizations met with key legislators and began drafting new legislation. The draft included parts of the model penal code. In what is considered astounding speed by legisiative stand-

ards, the bill was introduced, amended, passed, and signed by the Governor on August 12, 1974. It took effect April 1, 1975. (By contrast, a complete revision of the criminal code, with classes of offense similar to the sexual assault act, has been languishing in the legislature since first proposed in 1967.)

The Michigan Sexual Assault Act accomplishd a much-needed clarification of terms such as "intimate parts", "contact", and "penetration". The act also consolidated and, in part, repealed nine related statutes, such an assault with intent to commit rape, sodomy, and incest. The act is sex-neutral in that offenders and victims are not limited to gender stereotypes.

A key provision is the creation of four degrees of criminal sexual conduct. Under the prior laws, many so-called "minor" rapes were prosecuted as assault, assault and battery, and assault with intent to commit rape. Through plea bargaining, and guessing at what juries might accept, less severe cases often bore little resemblance in court to what actually took place. The standard was that juries often found rape defendants not guilty unless there were aggravating circumstances. The new degrees allowed each case to be prosecuted honestly in accord with the actual facts. First and second degree sexual conduct include aggravating circumstances of age, relationship, use of weapons, aiding and abetting, and injury.

The penalty for rape under the old law was indeterminate with prison terms from life to any number of years. The four degrees in the new act have increasing maximums up to life for first degree.

One of the more significant features of the new law is that it does not require the victim to resist. The prosecution must prove that force was used, but does not have to prove the victim's nonconsent. Under the new law, the victim's state of mind is not determinative, the coercion of the actor is.

Generally, evidence of the victim's chastity, reputation and sexual conduct is no longer admissible. The exceptions are evidence of prior activity with the defendant or specific instances showing the origin of pregnancy, disease, or semen—but only if the defense files a motion and offers proof within ten days after arraignment. Then the judge must find the evidence material and of probative value. This minimizes, but does not always prevent, the case from becoming a trial of the victrim. That practice in the past had inhibited many victims from pursuing prosecution.

Neither the old nor the new law require corroboration of the victim's testimony, leaving the jury to weigh each witness' credibility, although prosecution is obviously encouraged if such corroborating testimony is available.

The new law allows counsel, the actor or the victim to request suppression of the names of offender or victim, and details of the offense, until the defendant is arraigned, charge dismissed, or the case otherwise concluded.

The revised act also allows a wife to charge a spouse with sexual misconduct, but only if they are living apart and one has filed for separate maintenance or divorce.

In these several ways, the sexual assault act of 1974 has brought the issue of rape prosecution into a new century and a new era.

It is interesting to compare the outcomes of sexual crimes before and after the 1974 code reform. I chose 1972 as a year to compare with 1982, the latest year for which complete disposition data are available.

The uniform crime reports of the state police include offenses reported to state or local law enforcement agencies. The definition of rape includes assault to rape and attempted rape. In 1972 there were 2,644 reported offenses. In 1982, there were 4,082 reported offenses, an increase of 54 percent. There is not clear agreement as to whether this reflects more incidents or more reporting due to the better treatment of victims and prosecution of offenders. According to the national crime survey, which interviews a representative sample of citizens, the rate of rape offenses per 1000 citizens has actually declined from 1.0 in 1973 to .8 in 1983. By projection, the victimization surveys would estimate 160,000 rapes in America in 1973 and 153,000 in 1983.

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Clearly, the creation of four classes of criminal sexual conduct has had the desired effect. In 1972, 55 persons went to prison for violation of the old rape statute, in 1982, 502 persons began prison terms for cirminal sexual conduct: 240 for 1st degree; 122 for 2nd degree; 113 for 3rd degree; and 27 for 4th degree. As expected, the rate of those convicted who actually went to prison ranged downward from 81 percent convicted of 1st degree to 11 percent for 4th degree.

It is also clear that reliance on related statutes has declined as the new law made appropriate charges under the four degrees more viable. Perhaps the most telling of all the statistics is that the 502 new inmates under the revised code in 1982 represents a 313 percent increase over the 55 new prisoners in 1972 under the old rape law.

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## DISPOSITION OF RAPE CONVICTIONS—MICHIGAN—1972–82

| | Prison | | Probation | | Jail/fine | | Total |
|---|---|---|---|---|---|---|---|
| | Number | Percent | Number | Percent | Number | Percent | |
| 1972 | | | | | | | |
| 750.520 Rape | 55 | 64.7 | 28 | | 2 | | 85 |
| 750.333 Incest | 4 | 50.0 | 2 | | 2 | | 8 |
| 750.342 Carnal knowledge—Fem. ward | | | 1 | | | | 1 |
| 750.338B Gross inde/M/M | 17 | 44.7 | 16 | | 5 | | 38 |
| 750.338B Gross inde/M/F | 5 | 25.0 | 14 | | 1 | | 20 |
| 750.338B Gross inde/F/F | | | 1 | | | | 1 |
| 750.158 Sodomy | 10 | 50.0 | 8 | | 2 | | 20 |
| 750.341 Carnal knowledge—State ward | 1 | 33.3 | 1 | | 1 | | 3 |
| 750.336 Ind. Lib. child | 40 | 23.8 | 62 | | 6 | | 108 |
| 750.85 Assault/Int. rape | 40 | 62.5 | 24 | | | | 64 |
| | 172 | 49.4 | 157 | 45.1 | 19 | 5.5 | 348 |
| 1982 | | | | | | | |
| Criminal sexual conduct: | | | | | | | |
| 750.520B 1st degree | 240 | 81.3 | 49 | | 6 | | 295 |
| 750.520C 2d degree | 122 | 43.7 | 142 | | 15 | | 279 |
| 750.520D 3d degree | 113 | 48.9 | 109 | | 9 | | 231 |
| 750.520E 4th degree | 27 | 11.5 | 161 | | 47 | | 235 |
| Assault/intent: | | | | | | | |
| 750.520G: | | | | | | | |
| 1st degree | 42 | 53.8 | 34 | | 2 | | 78 |
| 2d degree | 31 | 45.6 | 36 | | 1 | | 68 |
| 750.520 Rape | 10 | 71.4 | 3 | | 1 | | 14 |
| 750.338 Gross inde M/M | 3 | 42.9 | 3 | | | 1 | 7 |
| 750.158 Att. sodomy | 1 | | 1 | | | | 2 |
| 750.85 Assault/int. rape | 3 | | | | | | 3 |
| 750.338 Gross inde M/F | | 3 | | | | 3 | |
| | 592 | 48.7 | 541 | 44.5 | 82 | 6.8 | 1,215 |

Source: Department of Corrections annual statistical reports, 1972, 1982.

MINIMUM TERM OF NEW SENTENCES—MICHIGAN—1972–82

| | Cases | Years | | | | | | | | | | | | | Average | Life |
|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|
| | | 0.5 | 1 | 1.5 | 2 | 2.5 | 3 | 3.5 | 4 | 5 | 10 | 15 | 20 | 25 | | |
| 1972: 750.520 Rape | 52 | 3 | 2 | 5 | 2 | 10 | 1 | 3 | 1 | 6 | 10 | 3 | 4 | 2 | 6.37 | 7 |
| 1982—Criminal Sexual Conduct: | | | | | | | | | | | | | | | | |
| 750.520B 1st degree | 154 | ..... | 2 | 3 | 4 | 4 | 12 | 4 | 14 | 20 | 50 | 16 | 11 | 14 | 7.3 | 26 |
| 750.520C 2d degree | 92 | 1 | ..... | 3 | 8 | 9 | 25 | 7 | 9 | 12 | 17 | 1 | ..... | ..... | 3.8 | ..... |
| 750.520D 3d degree | 102 | 1 | 5 | 13 | 12 | 6 | 17 | 3 | 4 | 9 | 29 | 3 | ..... | ..... | 3.8 | ..... |
| 750.520E 4th degree | 14 | ..... | 1 | 11 | 2 | ..... | ..... | ..... | ..... | ..... | ..... | ..... | ..... | ..... | 1.5 | ..... |
| Total | 362 | 2 | 8 | 30 | 26 | 19 | 54 | 14 | 27 | 41 | 96 | 20 | 11 | 14 | 5.7 | ..... |

Source: Department of Corrections annual statistical reports, 1972, 1982.

Mr. CONYERS. Our next witness is appearing on behalf of the Detroit chief of police, William Hart. She is Lt. Audrey Martini, commanding officer of the Detroit Police Department's Sex Crimes Unit. I am sure that she has listened to our discussions with great interest. I welcome you to make your own remarks and comment upon anything that has been discussed here. Welcome to the subcommittee.

## TESTIMONY OF LT. AUDREY MARTINI, COMMANDING OFFICER, SEX CRIMES UNIT, DETROIT POLICE DEPARTMENT

Ms. MARTINI. Well, thank you, Congressman Conyers. I have mixed emotions about this bill. I definitely support and Chief Hart definitely supports Congressman Carr's belief that it is time to replace archaic Federal legislation. But in reviewing the copy that I have, and I am assuming that it is accurate as I do not think that there have been any changes since the copies were made——

Mr. CONYERS. Not yet anyway.

Ms. MARTINI. I turn to page 5, line 25, where it says, "with the intent to arouse or gratify the sexual desires." And I have a major problem with that when we are dealing with the sexual act. And because I have 16 years experience with the Detroit Police Department, and I have been spending that entire 16 years investigating sex crimes.

I instruct the Michigan criminal sexual conduct statute throughout the State of Michigan. And I get a lot of comments from police officers throughout the State who have problems with particular areas. Whenever we have a specific intent of crime, a red flag goes up, because we have to show a specific intent.

When I see, and it jumped right out at me as I was reading this, when I see "with the intent to arouse or gratify the sexual desire of or to abuse any person," I see a specific intent crime. How am I, going from an investigator's standpoint, to establish that element in an investigation? I have to delve into the mind of the offender to establish whether he is doing this for some sexual arousal, or if he is doing it for some monetary gain. I have a real difficulty in how I am going to prove this.

And I would like to give a couple of examples. I have files and files of examples, and I have only brought a few.

Mr. CONYERS. Specific intent is always in the mind. I did not know that the prosecutor was requiring the police to try to develop that kind of a case.

Ms. MARTINI. Let's back up a little bit, and go to the Michigan statute. Maybe I am jumping ahead. Let's back up a little bit. With the Michigan statute, we have the act of sexual penetration. And it includes the five types of penetration: Sexual intercourse, anal intercourse, cunnilingus, fellatio, or the insertion of any other object into another person's body, and the emission of semen is not required, OK. That is all it relates to when we talk about sexual penetration.

When we talk about sexual contact with the Michigan criminal sexual conduct statute, it talks about the touching or the intentional touching of the intimate parts or the clothing covering the immediate area of the intimate parts. And it has to reasonably be construed, said touching has to reasonably be construed for the purpose of sexual arousal or gratification.

The drafters of this law put that for the purpose of sexual arousal or gratification in there, because they did not want to have to charge somebody that is touching in a legal capacity, the police officer. We have got a traffic stop, a routine traffic stop, we have got a female. They run a criminal history. And if I am using some police language that you do not understand, let me know.

They do a traffic warrant check to see if she is wanted on traffic warrants. They find that she has $800 outstanding in traffic warrants. They have to make an arrest. They have to take her into the station to collect the $800. Before they put her in the back seat of their car, they are going to do a cursory pat-down search, which means that they will do some intentional touching of the intimate parts.

The Michigan statute protects the police officer from later being charged with criminal sexual contact, because it is not for the purpose of sexual arousal or gratification. He is doing it as part of this job. So the drafters put that in there under sexual contact.

They did not put in under sexual penetration, even though there may be some forced penetration. You know, the 8-year-old kid that does not want the thermometer shoved into the anal opening of his body, OK. But they did not put it into the penetration.

We have not had problems with it with the sexual contact definition, because the appeals court ruled that it was not intended to be an additional element. The wording was such. I think that I have the file here. "Adduced to infer." They left it up to the jury to decide, OK.

Now comes the Federal legislation, and they are putting it very specifically, "with the intent to arouse or gratify the sexual desire." And they are putting it in under penetration, and they are putting it in under contact. Let me give you an example.

Mr. CONYERS. Does that not help?

Ms. MARTINI. No. Let me give you an example. I am ready now. Let's take contact first, because that is going to be the easiest. We have got a young woman who is coming from the grocery store with two arms full of grocery bags, OK. A young man comes around from the corner of the house, comes up behind her, puts his arm around her throat and says, "OK, give me your money."

She says, "I have not got any money. I have just been to the grocery store, can't you see that? I don't carry a purse, because my purse gets snatched. I have got my money stashed inside my bra." So he knows this. It is not unusual. At least, we see it quite often.

He sees that I do not have a purse. He reaches inside my blouse, and touches an intimate part, which one of the five intimate parts happens to be the breast. I have an intentional touching. Do I have for the purpose of—this is the test. She is threatened, and I am going to do it. Do I have for the purpose of sexual arousal or gratification here? No. He is going in there to get the money.

OK, the same circumstance. The same kid has his hand inside my blouse. I better clean my language up. He says, "You really don't have any money, but look at what you do have." He gets a smirky little grin on his face, like Larry Green usually has but he is not here right now, and he leaves it in there for 10, 15, 16 seconds, OK.

Finally, she says, you know, "Get out of here," kicks him in the shin and he runs off. Do you have sexual contact then? Some people say yes. What elements do you have to show that sexual contact at that point? You have a smirkly little grin. Unless you have got instant replay, you are not going to see it again for the jury. And if the complainant is so concerned about her safety she does not see it and misses it, you have missed it.

You have got the 10, 15, 16 seconds inside there touching an intimate part. And you might have the remark that, "Oh, look, you don't have any money, but look what you do have." And that is all you have got to show for the purpose of sexual arousal or gratification. And you do not always get those remarks or those behaviors when you are talking to sexual assault offenders.

Now those are the problems that we have with contact for the purpose of sexual arousal or gratification. Let's move it to penetration. We have a dope pad. Three gals and a guy in the dope pad. There is a knock on the door, they let a man in. And as soon as they open the door, he comes barging in with a sawed-off shotgun, and there are three men behind him.

They tell everybody to lay on the floor. They are looking for dope and money. They cannot find the dope or they do not find as much as they think is in the house. So they tell the gals to strip and lay on the floor spread eagle.

They insert the barrel of the shotgun into one of the girl's vagina. And say, "OK, now you are going to tell me where this dope is, or I am going to blow you away." Their purpose is not sexual arousal or gratification, and they really don't want to abuse the gal. They want the money. It is monetary gain.

My contention is I don't care why they are touching them down there or why they are penetrating them. They have no business being there, and it should be an offense. It should not be a specific intent offense.

Mr. CONYERS. Which kind of offense, though?

Ms. MARTINI. Either one of them, either one of them. My recommendation is that it be stricken completely from sexual act, and that it be reworded when we talk about sexual contact, so that it can be inferred as opposed to an additional element of. Because you

are adding something to even the old rape law that is going to be more difficult to prove than the old rape law was.

Usually when you talk about a specific intent offense, you are talking about an individual that comes up and states his intent, and then makes an overt act to go about doing it. You know "I intend to kill you," and then he racks off the shotgun and then pulls it up ready.

Mr. CONYERS. So your recommendation is that we drop the sexual desire or to abuse any person of both sexes?

Ms. MARTINI. My desire is that we drop "the intent to arouse or gratify the sexual desire of, or to abuse any person" when it relates to sexual act. And to modify it to read under sexual contact. Line 6, it would read, "thigh or buttocks of any person, and that touching can reasonably be construed for the purpose of sexual arousal or gratification."

Mr. CONYERS. Well, we will give that some consideration. Why do you not go on with your testimony, and then we will talk about this.

Ms. MARTINI. OK.

Mr. CONYERS. Thank you.

Ms. MARTINI. If we can get beyond those two major hurdles, I am all for this legislation. In fact, I do not think that it probably has gone far enough. I do have a few other questions, or perhaps we should look at a few other areas that cause some concern.

One of them, I noticed under section 2244 where it relates to:

> Whoever engages in or compels sexual contact with or by another person if so to do would violate section 2241 or 2242 of this title had the sexual contact been a sexual act shall be imprisoned not more than 10 years.

Now if we look at that, it refers to four circumstances when you are talking about a sexual act where the maximum penalty of 25 years, "unless such other person inflicts severe bodily injury, disfigurement, permanent disease, or protracted and incapacitating mental anguish on any person."

Now when you are talking about sexual contact, it is not clear. I do not think that it states that there is an additional penalty if there is some bodily injury connected with sexual contact. And I think of instances with sexual contact where bodily injury does occur, and we have not allowed for a penalty in that instance.

Take for instance the young woman exiting the corner drugstore walking to her car. There is a group of five or six males on the corner, and they start making sexual remarks at the woman, move off the corner where they are standing, and encircle the woman. They come up and start pinching on the buttocks, start fondling the breasts, sexual contact.

She says, "You know, I do not have to put up with them," and pushes one of the men or boys, or however you want to refer to them, out of the way and she kicks at another one. This is all they needed, and they then proceeded to beat and kick her resulting in a broken jaw and several broken ribs.

It was sexual contact that resulted in her receiving, to me, severe bodily injury. Or the individual that is being subjected to fondling, and the man decides to bite a breast leaving a mark or even taking off part of it. That is not a sexual act. That is a sexual contact. And

as far as I am concerned, that is inflicting severe bodily injury. It is a very tender part of mine, and that deserves at least some penalty, and there has been none provided in this act.

Mr. CONYERS. You would like to see the 10 years?

Ms. MARTINI. No, I am not going to touch the 10 years. What I am saying is you have provided, if I use the circumstance, "knowingly uses physical force against any other person, and thereby knowingly compels such other person to participate in sexual contact," you have provided a 10-year penalty. That is great.

You have not provided for the additional "when such other person inflicts severe bodily injury or disfigurement." There is no penalty when disfigurement, bodily injury, and contact are combined. I do not see it, I do not understand it if it is in there.

Mr. CONYERS. All right. We will take that one under advisement, too.

Ms. MARTINI. Do you want another one?

Mr. CONYERS. Well, if you have any more, I suppose we cannot turn them down.

Ms. MARTINI. No, I do not think that I have anything more original, I do not believe. I share Justice Boyle's concern about the only type of force being physical force, or the only type of threat being that of "imminent death, serious bodily injury, or kidnaping." I think that there are other types of force. That by not allowing for them, we are, as Justice Boyle has indicated, going back to the old law where we are going to have to have resistance.

I also question in section 2243 where it relates to—I am sorry, section 2241. That requires that the victim be under 12 years of age, which is a year younger than the Michigan statute, and that the offender must be at least 4 years older. I do not understand why there is that 4-year gap there.

We in the sex crimes unit of the Detroit police department are seeing more and more violent crimes perpetrated by younger juveniles, 12 and 13. In fact, I think that we just had a cab driver that was killed by a 13-year-old. And it is not unusual to have women, adult women, raped by juvenile men, or young girls raped by juveniles, 12, 13, 14 years of age.

By putting that age differential in there, we have the possibility of denying prosecution in some instances. We have naive 11-year-old girls that are conned by 13-, 14-, or 15-year-old boys into an act of sexual intercourse and then "trained." And by that, I mean that three, or four, or five different juveniles have sexual intercourse with the girl. And there was no force to begin with, so you cannot refer back to a force section of the statute.

We also have 11-year-old boys that commit fellatio upon 13-, 14-, 15-year-old boys because they want to be liked by that boy or by some group that that boy belongs to. And again, you are not talking about force.

So if the victim needs to be protected, or if the victim can make the decision at 12, since that is the arbitrary age that you have set there, then why are we making some protection for the offender? I think that any time a victim, and if the age that you choose is 12, any time a victim 11 years or under is victimized by a sexual act or a sexual contact, that the penalty should be there regardless of the age of the defendant.

Another area where probably the penalty should be the same has to do with the elderly, and nobody has mentioned that here. But I think that the elderly should be in just as much of a protected area as the very young. Many times, they are widowed, they are staying in a house that they have been familiar with. They do not want to leave the neighborhood. It is changing, it might be a younger neighborhood. It might be a different ethnic makeup, it might be a different racial makeup.

But they are not going to leave that house. They are 65, 70, 80, 90 years of age. They have a right to that house. And a young man of whatever age breaks into the house, ransacks the house, and then forces this elderly person to submit to any type of a sexual act.

You are not going to have protracted, incapacitating mental anguish. You are not going to have severe bodily injury or disfigurement. But there is definitely going to be trauma there. It is going to be something that a person of this age is not going to get over. And I think that they deserve the same protection that the children under 12 years of age deserve.

And Pennsylvania has recently introduced a statute or a bill to their State senate, I believe, with just this type of protection. When the victim is over 60 and the offender is under 60, there is some special penalty considerations given. And I would like to see some consideration given to that, because our elderly deserve it.

Mr. CONYERS. You do not think that the judge would do it?

Ms. MARTINI. Do I think that the judge would do it?

Mr. CONYERS. You do not think that the judge would take that into consideration, that the victim was a senior citizen?

Ms. MARTINI. That is what I was getting to next. I do not trust judges. I guess it is 16 years experience. I do not trust a lot of people. Because number one, they are not really familiar—even as long as we have had Michigan's criminal sexual conduct statute, they are not familiar with all of the ins and outs of it.

And the Federal judges I can see or Federal jurisdictions from what I have heard today, they are going to be even less familiar with it, because they are going to see it less often.

The next point that I was going to get to is that I think that penalty should be raised to a like penalty. I think that the under 12 and the 60 or whatever age and over should be a life option. And the reason that I say that is when we are talking about sexual assault offenders, we are talking about repeat offenders.

We have got a series of B and E dwellings with elderly people that are victimized in the neighborhood to begin with, and then this individual comes in and sexually assaults them. So we have got five elderly people in the neighborhood who have had their homes broken into, and the women sexually assaulted, and many times in the presence of the husband, because he can do nothing about it.

We have got a very real concern that our victim and our witness will die before it gets to court, or before they give testimony. When we get one conviction, the tendency in the courts is to go with that conviction, and to dismiss the other three or four warrants that might have issued from it.

So you have got one case there with one conviction to do a sentence on, and 25 years just does not seem to do justice for an individual who has perpetrated more than one offense.

Mr. CARR. Mr. Chairman, may I comment?

Mr. CONYERS. Certainly.

Mr. CARR. Thinking about your comment about the scenario of an elderly woman with an attachment to her house and the neighborhood changes, can you think of one of those circumstances that would be in a Federal jurisdiction?

Ms. MARTINI. That would be in a Federal jurisdiction? An Indian reservation.

Mr. CARR. How would the neighborhood be changing on an Indian reservation?

Ms. MARTINI. It would not have to change. I am not saying that the neighborhood has to change. I am just saying that for whatever reason the woman will not leave. And the circumstances are that she is not accorded the protection that she may have had.

Mr. CARR. All right. I appreciate your comment. And I think that your suggestion is really very meritorious and worthwhile, but I was not quite sure how it applied to the Federal jurisdictions. Because I think that we are not generally dealing with neighborhoods. The Indian reservation is an exception.

Mr. CONYERS. Well, then you support the bill, Ms. Martini, with these five caveats that you would like us to repair?

Ms. MARTINI. As soon as I feel comfortable with the fact this is not an additional element, the intent is not an additional element, I can support the bill, yes.

Mr. CONYERS. You mean that you do not support the bill at present?

Ms. MARTINI. If I have to show an additional element of intent, I have a real difficult problem as to how we are going to be able to prosecute a lot of these cases.

Mr. CONYERS. Well, one of the representatives of the prosecutor's office did not seem too offended by it.

Ms. MARTINI. I was listening very carefully to him. And when he read that section, he did not read it with the intent. He read it with the Michigan interpretation. And that is why I questioned you to make sure that this had not been changed since I saw it. And I am not sure that if he has seen it, that it registered.

I have talked to two other attorneys, one with the Detroit Police Department, and one of them I think is scheduled to speak next. And they do see that as an additional element with a specific intent.

I would also like to add that I agree with the Boyles in that I think that it should be restated that corroborating evidence is not needed in a prosecution, even though it has never been. Again I am a little bit not completely trusting. It is very easy to change laws, but it is very difficult to legislate changes in people's thinking.

And if somewhere along the line, somebody gets a notion that it should be corroborated with evidence, then it is going to go against the intent of the statute. And with no more space than it is going to take, I think that we might better restate it. I would make that suggestion.

Mr. CONYERS. All right.

Ms. MARTINI. I also noticed—in fact, I think you said in your opening statement, Congressman, that there were only three Federal statutes relating to sexual assaults, and one of them was the assault with intent provision. And I did not see a replacement of assault with intent in the bill that I have here. And I do not know whether the Federal jurisdiction has the option of using the attempt statute like we do in the State. We have an attempt statute that covers an intent of anything that is prohibited. I am not sure that the Federal Government has that.

Mr. CONYERS. We do not have that.

Ms. MARTINI. OK. Then I would also like it to be considered that perhaps we would like some consideration on a replacement of the assault with intent statute that has been or will be repealed with this bill.

And the last little card I have here relates to second or subsequent offenders. I think that there should be some provision that when a man does come back as a second or subsequent offender, that the penalty should be more severe than were it his first time.

I overhead the discussion that you had earlier on this epidemic in Detroit. And I think that part of the problem was, as Mr. Boyle pointed out, one or two individuals that were perpetrating numerous crimes, and both of those individuals were second and subsequent offenders. Anybody who causes me that much problem for such a duration should get more than a little bit of time.

Mr. CONYERS. Well, how much more?

Ms. MARTINI. Well again, it depends on what the first offense was and what the sentence was. I think that Michigan handles theirs with a mandatory minimum of 5 years. When we correlate back to what—I believe it was Ms. Cuza; I was freezing, so I had to warm up, and I missed the introduction—Ms. Cuza was relating to the prison time depending upon the various degrees of criminal sexual conduct.

And I am not familiar statewide, but Detroit right after the criminal sexual conduct statute went into effect, we did an unofficial survey of what kind of sentences did offenders receive. When the initial charge was criminal sexual conduct first degree, regardless of what he was found guilty on or sentenced on, he was 85 percent of the time going to get a prison term. OK. He is going to get a number of years.

If he was charged with second, third, or fourth degree criminal sexual conduct regardless of what he took the plea to or regardless of what third or fourth degree criminal sexual conduct, regardless of what he took the plea to or regardless of what he was found guilty of, the majority of the time he got probation and maybe 1 year in jail.

So the only way that he was going to get prison time was if we charged him originally with CSC-1. Now under Michigan's criminal sexual conduct statute, the majority of rapes are criminal sexual conduct third degree, force and sexual penetration.

So if we have got a man that is forcing sexual penetration repeatedly, he has been to jail and served his time. And he has come back out there, and again forcing sexual penetration again with no CSC-1 circumstance, then the judge is going to give him probation and first time again, or can we ask the judge for mandatory mini-

mum as Michigan does of 5 years. So we know that the second or subsequent offender is going to get some prison time.

Mr. CONYERS. Well, that goes back to your concern about whether judges will take all of this into consideration or not, does it not?

Ms. MARTINI. Yes, and it goes back to that you can legislate changes in the law, but you cannot legislate changes in judge's thinking or anybody's thinking. It does not just relate to judges.

Mr. CONYERS. Well, no one has ever advertised that legislation can change thinking, but it does impact. I think that the case can be made somewhere that people's thinking does get affected.

Ms. MARTINI. Oh, yes, they do. And I am absolutely amazed at what has happened in the last 10 years in Michigan, and I am looking forward to the next 10 years. And I would hope that the Federal legislation model that we are talking about today would do an awful lot to change perhaps the minds of the remaining 12 States.

Mr. CONYERS. Well, I am surprised that your reservations, some of which I think are quite appropriate, would lead you not to support the bill.

Ms. MARTINI. If I can get that one area with the intent cleared up, I have no problems with supporting the bill. I am all for it. I do not think that there is a thing that I can do to assist anybody that comes to me with probably 85 percent of the cases if I have to show intent as well. I do not think professionally that I can show the additional element. Personally, I do not think that the intent makes any difference.

If he is touching an individual and an intimate part where he should not be touching, I do not care why he is touching. He is not supposed to be touching. Or if he is penetrating for some reason, I do not care what his intent is. He has got no business penetrating.

The Michigan case law, as I understand it, says that rape is not a specific intent offense. The wording, as I see the wording—I am not a legal person, I have not gone to law school—but as I see it here, it is making rape a specific intent offense. And I think that it could be reworded to soften that.

Mr. CONYERS. I am going to yield to counsel for some of the observations here. But of course, this is going to be in the Federal system, is it not? So unfortunately you probably would not be operating under this under any circumstances.

Ms. MARTINI. Could I give you an example of one that did go to the appeals court in the State of Michigan? Let me read it. It involved a 6-year-old boy. Let me show you some of the problems that I am talking about. All I have got to do is find it.

It involved a 6-year-old witness who testified that he entered the men's room in order to urinate. When he was approaching a toilet, the offender told him to move over to a different one. The offender then unzipped the boy's pants, pulled them down, and held the victim's penis while he was urinating.

The 6-year-old testified that his zipper was not stuck, and that he did not request the offender's help. Moreover, the victim unqualifiably stated that he never asks for help when he has to urinate.

Now if I have to show that the touching, the contact of his intimate parts was for the purpose of sexual arousal or gratification, how am I going to do that? Because I am telling you as the offender that I thought he needed help, and that was why I was there.

Mr. CONYERS. Is that not a fact question that a jury would have to determine?

Ms. MARTINI. I have to—when you put in a specific intent offense, you have—it is an additional element that has to be proven, as opposed to the wording that the Michigan statute has relating to reasonably construed for the purpose of sexual arousal or gratification.

Mr. CONYERS. I see. It is not one of the elements that have to be proven.

Ms. MARTINI. As Michigan has worded it, it is not an additional element; yes.

Mr. CONYERS. You have raised a lot of very fine points, and I can tell that you are very familiar with the State law, and you have read the bill very carefully.

I am just not sure if Chief Hart would want the Detroit department to go on record as not being for the bill. If we do not succeed in correcting these—I have never gotten a bill through in my life where all the parts were in place, because I had to compromise it to get it through.

But I would not want the department to suggest that—I would not want it to be on the record that the department was against the bill because of those reasons.

Ms. MARTINI. No; the department is not against the bill. The department is concerned about the addition of a specific intent requirement as relates to contact, sexual act and sexual—particularly sexual act, and sexual contact. We support the effort completely.

We realize that the Federal legislation has got to be changed and we see it as an ideal opportunity to set a standard. But by the same token we are concerned that we do not make the law that we pass more difficult to prove than the one we are repealing.

Mr. CONYERS. All right. We will take that into consideration. I repeat, we will go over this very carefully and see what we can do.

As you can tell, I am not persuaded that we are going to start losing cases as a result of including this within the specific intent.

Ms. MARTINI. OK. Michigan has never considered rape to be a specific intent to crime. And like I say, I am not a legal mind. But I do know that when I say, "with the intent," to me that means that I am going to have to prove an additional element. I am going to have to show an intent, a specific intent, either to arousal or gratify the sexual desire or to abuse any person.

Mr. CONYERS. Let's talk with counsel about this. First of all, there is an intent required for all crimes; is that not correct?

Mr. HUTCHISON. That is correct.

Mr. CONYERS. And second, that intent must be inferred.

Mr. HUTCHISON. The intent will always have to be inferred from the objective facts that are proven, because you cannot put on any objective evidence of what's inside a person's mind.

Ms. MARTINI. Except on specific intent, it has to be very specific.

Mr. CONYERS. Well, there is no way in other crimes, such as murder, to specifically look inside a person's mind to determine that they were going to commit murder.

Ms. MARTINI. Doesn't that make the difference between the degrees, as to the intent?

Mr. CONYERS. Well, yes, there are all kinds of degrees. But I am talking about——

Ms. MARTINI. Like putting the intent right there, because with—before you can have a sexual act or a sexual contact you have got to have—you have got to have this intercourse, genital intercourse—cunnilingus with the intent, and you have got to have a circumstance.

So, you have put with the intent, right up there to begin with. You have not allowed it to be part of the degree structure. It has got to be there to begin with regardless of what—what circumstance or what degree you go with.

Mr. CARR. Would it not be inferred?

Ms. MARTINI. I do not know.

Mr. CARR. As a matter of proof.

Ms. MARTINI. I do not know. That is a concern that I have that I am bringing to your attention.

Mr. CARR. And, I mean, we cannot make it so that it is full proof, so that you can objectively prove a state of mind. And intents are inferred in cases. Clearly, one of the difficulties here that the drafters considered was the circumstance of physicians.

Ms. MARTINI. Concerned of that same circumstance.

Mr. CARR. I recognize that. But that is essentially why that—that statement is in the bill. I guess I would say as a drafter, and as a former prosecutor, that I do not really see any burden of proof problem there that would shift the focus from the defendant to the victim.

Ms. MARTINI. If you are satisfied that it is not an additional element, then, the department has absolutely no problem at all supporting the bill.

Mr. CARR. We would be glad to—I would hope that the committee and I am sure that they will, consult with the Justice Department officials and get their thinking on it in light of your raising the reservation.

Ms. MARTINI. Yes.

Mr. CONYERS. We can tell you are very concerned about it. But there is always an intent to be proven anyway. No one has been able to go into people's minds about any crime. If you steal a hamburger, you have got to have an intent to deprive another of property. It goes along with all criminal law. Without that intent, as a matter of fact, there is not any crime. So, I think your concern turns on whether we are making the element of proof more difficult for the prosecution.

Ms. MARTINI. Whether you are adding an additional element to the offense of rape, that is my concern.

Mr. CONYERS. What makes you think that that might be happening in this——

Ms. MARTINI. Because you have asked—you have asked to show—you have asked us to show an intent, a specific intent. More than just the intent to penetrate or contact. You are asking for the intent to penetrate with a purpose of sexual arousal or gratification or sexual desire.

Mr. CARR. Or abuse.

Ms. MARTINI. Or abuse.

Mr. CARR. Are there any circumstances, whether it be penetration for another reason that——

Ms. MARTINI. I went over the one with the drug raid and the narcotic pad, with the shotgun in the vagina. And it was monetary. It was purpose—they wanted the narcotics and the money. That was the monetary purpose.

Mr. CONYERS. Don't you really consider that abuse of the worst sort?

Ms. MARTINI. That is abuse. To me that is abuse. But how am I going to show that—the man is telling you on the stand that my intent was not to abuse the woman; she could have laid there and I would not have touched her if she had given me the narcotics. My intent was to find out where the narcotics and the money is.

Mr. CONYERS. I think maybe you are confusing the fact that defendants create all kinds of defenses to their conduct.

Ms. MARTINI. OK. And as long as we do not have to prove an additional element there, I have no problems supporting this bill. All I am asking is that you give it some consideration.

Mr. CONYERS. I am sure that that would be asserted many times in the kind of hypothetical that you have brought forward. But I am also equally sure that there would be very few people who would not consider that the most outrageous kind of abuse imaginable. I mean, violent, obscene, degrading. So, if someone were to say, "I did not mean to abuse anybody because I did this awful act, I just wanted some money," it is unlikely that the reply would be, "Oh, well, in that case you did not have any intent to abuse any person, and so you are not guilty of aggravated sexual battery."

I do not think juries would buy that very much. I do not think ordinary people would be fooled by that kind of a discussion in a courtroom.

But at any rate, we appreciate, Lieutenant Martini, your concern, and we can tell that you have done quite a bit of studying and have brought your experience forward. For that reason we have spent this amount of time with your concerns.

Ms. MARTINI. There is enough concern that we spent that much time with it, and that is good because then it does bring it to our attention better.

Mr. CONYERS. Well, you certainly brought this to our attention, and we have a nice lengthy record to go back and examine and review these central points that you have made.

I think that this discussion was well worth the time, and I think we will all be the better for making sure that we have not overlooked anything, thanks to your very careful and detailed research.

And do not let anybody tell you that you do not have a legal mind, by the way.

Ms. MARTINI. All I have got to do is read about—getting the proofs, that is the difficulty.

Mr. CONYERS. Well, apparently you have been in court many times.

Ms. MARTINI. Too many times.

Mr. CONYERS. Well, thank you again. Can I just ask you, how the department's sex crimes unit operates and how many people are in it?

Ms. MARTINI. OK. We have 42 people that are broken down into five squads. Four of them rotate on—every fourth week they are on nights. So, they go for 7 days on nights. And the fifth unit is a special assignments task force that deals with the school girl problem that we had. The series of cases where we have got one individual doing several cases throughout the city.

And we have—we keep it balanced, male and female. We respond when we get an assault complaint, we respond to the scene, or if the victim requires immediate medical attention, she is conveyed by EMS to the hospital—we respond to the hospital. We will talk to the victim, collect the evidence. Talk to all the witnesses we can find. Write out the investigation and a warrant request to the prosecutor's office, present it to the prosecutor's office and they will review what we have. Let us know if they want us to go back and do a little bit more, and then they will make a recommendation on the warrant.

We also talk with the accused. We will interview him. And assist the prosecutor in any way we can in preparing the case for trial.

Mr. CONYERS. And frequently you or one of your officers end up testifying at the trial?

Ms. MARTINI. I try to stay out of court as much as possible, yes. As the officer in charge of the case, there may be some point along the way that the court would like to know about what happened or how it came about.

Mr. CONYERS. Now, are sex crimes being handled, in your view, by the prosecutor's office in a diligent way?

Ms. MARTINI. Yes, they are. In fact, if I—if we have a difference of opinion as to how it should be handled, then I usually go over and talk to Mr. Padjewski over there and we get it ironed out. I have no complaints at all with the prosecutor's office that we deal with.

Mr. CONYERS. And the courts themselves, what experiences do you have there in terms of how they and the juries handle the cases?

Ms. MARTINI. Well, unfortunately, I think there needs to be a lot of public education as relate to sexual assaults. I think a lot of our citizens that sit on juries are not familiar with the facts about sexual assaults. They still are under the old way of thinking that, a rape does not happen to a girl unless she wants it to happen or she was asking for it by the way she walked or talked.

And I think our next big undertaking, after we get the legislation through, is a major public education program. And I think——

Mr. CONYERS. Well, what about the judge's job? If it seemed that what you just said would lead me to suspect that perhaps the court is not explaining the law to the citizens sufficiently for them to reach the kinds of conclusions that would be reasonable.

Do you feel that sometimes they do not instruct properly?

Ms. MARTINI. Sometimes I think that the judges are not as familiar with the criminal sexual conduct statute as they could be. And I do know that the statute is very complicated. As simple as it is when you understand it, trying to explain it to somebody, it does sound complicated.

And many times when there are 39 charges that we might be able to charge, we will—it will be lessened to 5 or 6, so that the

jury is not overwhelmed with all the charges. And it is the same thing with criminal sexual conduct. We try to keep it simple, straightforward and to the point, so that they do not go back and spend a lot of time trying to sort out the myriad of other problems with proofs.

Mr. CONYERS. Do defense attorneys in these kinds of cases seize an opportunity to confuse the jury?

Ms. MARTINI. Defense attorneys—if the judge will allow it, defense attorneys frequently do, yes. And there are some judges that do allow it. And you walk into a courtroom and you think that you are in a circus. OK.

But again, I think that goes back to the individual jurist's idea of sexual assault and his concept of—of whether the focus should be on the victim or the defendant.

Mr. CONYERS. Well, I want to thank you again very much. We had no idea that you were going to bring the kind of fine tuning in terms of your recommendations that you did. But we are grateful for your coming here, and I thank you very much.

Ms. MARTINI. Thank you, Mr. Conyers and Mr. Carr.

Mr. CONYERS. You are welcome.

Is Mrs. Jane Flaharty of HAVEN here? OK, fine, please come forward.

Our next witness is the Community Education Coordinator for HAVEN. HAVEN is an Oakland County United Way organization that provides services to victims of sexual assault and domestic violence.

And we are delighted to have you here to represent your organization, and we would like to hear from you now.

## TESTIMONY OF JANE FLAHARTY, COMMUNITY EDUCATION COORDINATOR, HAVEN, PONTIAC, MI

Ms. FLAHARTY. Thank you.

The kinds of experiences I can talk about rather than being in a rather—all tend to have to do with the kinds of clients we have seen over the years.

HAVEN has been in existence in Oakland County since 1975, when we were started as a crisis hotline for victims of sexual assault. From that time to today we have received over 12,000 crisis calls dealing with sexual assault or family violence.

We provide services that are not only specific to the areas of domestic violence and sexual assault, but are also comprehensive. We no longer have just the crisis line; we provide counseling services to families and individuals. We provide children's preventive programming because we are aware of the fact that both family violence and sexual assault tend to be cyclical in nature. People who are victims as children tend to grow up to be perpetrators.

We provide services in terms of advocacy, where we go to court with people who have been victims of assault or violence.

We have a speakers bureau and do a number of preventive presentations, especially focusing now in the schools because we are realizing that more and more children are becoming victims of sexual assault as well as being victims of domestic violence.

The county has more than 1 million people living in it; and the number of calls we have received as well as the number of people to whom we have provided services over the years are many.

Our experiences at HAVEN during the past 9 years, working with literally hundreds of adults and child victims of sexual abuse are what brings me here today, to add support to the passage of the Hoyer-Carr bill on Federal level.

We are encouraged that this bill is being considered nationally, recognizing it is one way of changing our society's misconceptions about the crimes of sexual assault, criminal sexual conduct, as well as it being a beginning to the updating of our criminal sexual conduct laws on a State-by-State basis.

Despite media attention of late, focusing on the reality of sexual assault, often achieved by use of threats rather than actual physical violence. Societal attitudes about rape still too often view it as a little sex rather than being a serious crime.

One way of changing this attitude is by the enactment of stricter laws; those like the Carr-Hoyer bill which more specifically define the criminal activity. And by that I refer to the behavior of the perpetrator rather than the behavior of the victim, and which provide punishment which fit the severity of the crime rather than being an all or nothing kind of response.

I can think of a number of specific kinds of examples when I contemplate the calls that have come in. And most of our calls are not reported, and are not prosecuted because of the victim's fears about what will transpire in the legal system. And also in regard to individual contacts. For example, the number of men and adolescent boys who have been sexually assaulted and who are very fearful about being misjudged by others about their sexual orientation because of the fact that they were assaulted.

Second, the sexual abuse that takes place within marriage. And we think this is something that is absolutely crucial to address on a Federal level as well. We have seen in the more than 800 victims of family violence, and there are children who have stayed at the shelter, that sexual abuse has existed in most cases as well as physical violence.

There are women victims who are fearful of being placed on trial themselves. And I know there is a rape shield law that is federal, but there are still far too many people who are concerned because of where they were, the way they were dressed and their past sexual history of being admissible.

Next, victims who are unsure of whether they were actually raped. We have received so many calls, and I can react to experiences with so many people who call and say, "Something horrible happened to me, but it was not a real rape because it was not penetration of my vagina." There really is not understanding of most people that sexual assaults can mean a great deal more than penetration of someone's vagina.

Child victims—and child victims are so important; 1 out of 4 girls, according to FBI statistics and according to their statistics, also, 1 out of 11 boys, but in studies that have been done the percentage of boys is much, much higher than 1 out of 11 who are sexually victimized before they are 18 years old.

Mr. CONYERS. Much higher or much lower?

Ms. FLAHARTY. Much higher than 1 out of 11.

In most cases the abuse is done by someone who is a family member or an adult who is known to and trusted by the child. And that is between 75 and 85 percent of cases.

And in most of those cases the child is manipulated or tricked into the sexual activity, and it is not a violent kind of activity.

Next the number of victims who give up after the lengthy process that goes on in the courts. We have seen so many people who have been involved in the legal system for over a year's period of time.

And No. 2, whose eye witness testimony is—has been called "stale" by prosecuting attorneys because the trial never came to court for a couple years period of time after the abuse had taken place.

And then finally, the distress of victims who after a long legal proceeding have seen their assailant being put on probation because it was called their first offense even though it was possibly only the first offense for which they were prosecuted.

So, in general, more individuals in Oakland County feel more helped, more comfortable with reporting and prosecuting because of the fact that we have Michigan's criminal sexual conduct law.

The process did start here by focusing the legal proceedings on the criminal acts of the perpetrator, and by matching the severity of the crime to the severity of the punishment or the other way around. But there still is a long way to go.

We do not believe that justice in regard to criminal sexual conduct is going to take place in this country until the rights of victims are responded to, as much as the rights of the accused, and until some kind of therapeutic intervention is mandated by the courts in cases involving criminal sexual abuse.

Mr. CONYERS. Thank you, Ms. Flaharty. I can tell that your concern is probably doing HAVEN a great deal of good as you do your coordination and education work.

Is the organization succeeding to get more volunteers in?

Ms. FLAHARTY. We have many, yes. We can always use more, though.

Mr. CONYERS. How old is the organization?

Ms. FLAHARTY. As I indicated, it started in 1975.

Mr. CONYERS. Thank you.

Mr. Carr.

Mr. CARR. I have no questions. Thank you for your testimony.

Ms. FLAHARTY. Thank you.

Mr. CONYERS. We are grateful to you.

Our next witness is Ms. Judy Reynolds, legislative assistant to Michigan State Representative Mary Brown, who sponsored the State rape reform legislation. Ms. Reynolds is also a member of the Ingham County Commission on Women.

We welcome you before the subcommittee and we would like to hear what you have to say about this subject.

## TESTIMONY OF JUDY REYNOLDS, LEGISLATIVE ASSISTANT TO MICHIGAN STATE REPRESENTATIVE MARY BROWN AND A MEMBER OF THE INGHAM COUNTY COMMISSION ON WOMEN

Ms. REYNOLDS. Thank you for the opportunity.

Please accept Representative Mary Brown's apologies for not being able to attend because of a prior commitment. I will leave her prepared statement. However, I am going to take leeways since you have heard some of it previously.

Mr. CONYERS. Well, what we will do is incorporate this entire statement into the record. Why don't you, Ms. Reynolds, go over the important points.

Ms. REYNOLDS. Let me highlight what I think is important out of this. There were four areas that she believes should be reviewed, and I can switch to them.

The first one was in relation to the children. She would recommend that the statutory rape age be increased to 13; and that provisions of the bill which limit applicability to instances where the assailant is more than 4 years older than the victim be stricken.

I raise the latter concern because of the relatively large number of assailants who were juveniles. For example, in 1982, 18.7 percent of the persons arrested in Michigan for criminal sexual conduct were juveniles; that is, under the age of 17. And while the percentage of juvenile arrestees has decreased from a high of 26.2 percent in 1979, the problem is one which should not be overlooked, particularly since it is my impression based on conversations with law enforcement officials, that juvenile offenders often commit the most violent crimes.

A further protection which the Michigan law affords young victims involves situations where the victim is between 13 and 16. In that instance, if the assailant is a relative, a member of the same household or in a position of authority over the victim, it constitutes CSC I or II, depending on whether or not there is penetration.

Also related to the age factor, I am unclear as to the intent of section 2243, which I believe Representative Carr addressed in his opening remarks. It appears to provide reduced penalties for those who assault children between 12 and 16. And if that is true, it would be the opposite of the current Michigan law.

Second, I believe that there should be a definition of the word "force." If it is intended to include the situation where the assailant is armed or the victim reasonably believes the assailant to be armed.

And third, I am concerned about the failure of the proposed legislation to deal with the problem of the mentally handicapped or mentally ill individual. In the earlier remarks in the statement, the Michigan bill had to be revised because it did not deal with mentally—handicapped or mentally ill individuals when it was first passed. And we had to go back in 1983 and amend that law and make the changes.

So, she would recommend on that experience, that Michigan indicates that it is imperative that special provisions be made to insure the protection of all individuals in society, including the physically and mentally handicapped.

The fourth provision is whether or not—and that has been raised off and on today—on how—whether or not to include the language on the rape shield provisions and the corroboration of evidence. And she would support because of the Marsh study to reference that, and put that into the law, because it has proven an important, valuable aspect in the Michigan law.

One concern that a lawyer brought up to us that went through this, which I have not heard addressed today is, whether or not this addresses at all—the military reservations.

The Uniform Code of Military Justice continues to treat rape in the traditional manner. And given the large number of persons residing on military reservations, I would urge you to consider the possibility of amending the UCMJ to treat rape in the same manner it will be treated in the Federal code, if H.R. 4876 is adopted.

Mr. CONYERS. We can reach it from another committee——

Ms. REYNOLDS. I figured it could have been done through this, but it should be brought to your attention.

Mr. CONYERS. I am not sure we can reach it at all. I am happy to know that, that they do not write their own codes of conduct.

Ms. REYNOLDS. So that could be addressed on your committee that you serve on.

Mr. CARR. I am no longer on the Armed Services Committee, but when we drafted the bill we gave some attention to that. However, that would have required a sequential referral and we thought it would slow the process down. If we pass this one, I think speedy passage of a companion bill is really no problem.

But this is the committee that really should be the lead committee. On the Armed Services Committee, with all deference, people over there are not justice types.

Mr. CONYERS. We have a member of the Judiciary Committee, Pat Schroeder of Colorado, who does serve on both committees and works very closely with us. So, we will bring these points up to her.

That was a very excellent summary, Ms. Reynolds, and I wish you would convey to Representative Brown our deep appreciation for all her work in this matter over the years. We can tell the statement is an excellent one.

Ms. REYNOLDS. Thank you.

[The prepared statement of Ms. Brown follows:]

TESTIMONY BY MARY BROWN

I appreciate the unique opportunity your Subcommittee's visit to Pontiac affords for input on HR 4876. The introduction of this proposed legislation in the Congress should serve as a valuable guide to those states who have not yet moved their rape laws into the 20th century.

As I am sure each of you is aware, Michigan was the first state to develop a statute that viewed rape not only as a crime of violence acted out in a sexual manner, but also as a crime of violence that was capable of being committed in varying degrees. Thus, our law—public Act 266 of 1974—developed four degrees of criminal sexual conduct, each of which attempts to differentiate between the level of force or violence used, the presence or absence of a weapon, sexual penetration or offensive touching, the mental and physical capacity of the victim, the age of the victim and the assailant's relationship to the victim.

To facilitate the discussion, let me briefly outline the contents of 1974 PA 266 as it was signed into law:

Criminal Sexual Conduct I.—There must be sexual penetration and any one of the following circumstances:

(a) The victim is under 13 years of age;
(b) The victim is at least 13 but less than 16 and the assailant is a member of the victim's household, is related to the victim to the fourth degree of consanguinity or is in a position of authority over the victim;
(c) Penetration occurs during the commission of any other felony;
(d) The assailant is aided and abetted by another individual or individuals and either knows or has reason to know that the victim is mentally defective, mentally incapacitated or physically helpless or uses force or coercion to accomplish penetration;
(e) The assailant is armed or the victim reasonably believes that the assailant is armed;
(f) The victim is injured and force or coercion is used to accomplish penetration; or
(g) The victim is injured and the assailant knows or has reason to know that the victim is mentally defective, mentally incapacitated or physically helpless.

CSC I is punishable by any term of years to life.

Criminal Sexual Conduct II.—There must be sexual contact without penetration and any one of the circumstances listed for CSC I. The maximum punishment is 15 years.

Criminal Sexual Conduct III.—There must be sexual penetration and any one of the following circumstances:
(a) The victim is at least 13 but under 16;
(b) Force or coercion is used to accomplish penetration;
(c) The assailant knows or has reason to know that the victim is mentally defective, mentally incapacitated or physically helpless.

CSC III is punishable by a maximum of 15 years in prison.

Criminal Sexual Conduct IV.—There must be sexual contact without penetration and any one of the circumstances listed under CSC III. CSC IV is a high misdemeanor punishable by a maximum of two years.

Other important features of PA 266 included changes in the rules of evidence to preclude the necesssity for corroboration of the victim's testimony and to preclude the use of testimony concerning the victim's prior consensual sexual activities except as to conduct with the alleged assailant or specific conduct which may have been the source of semen, disease or pregnancy.

Finally, in instances where married couples are living apart, the law permits allegations of criminal sexual conduct to be prosecuted.

Research conducted on the effectiveness of the Michigan act concluded that "the victim's interaction with the criminal justice system has improved . . . victims are able to pursue cases not covered under previous statutes: incest cases, male rape and those involving legally separated spouces." (83) The summary went on to note that while the successful prosecution rates for the newly covered cases has been good, the most dramatic improvements have been "for cases that were covered under the old law but damaged by admissibility of evidence of complainant's sexual history." (83) Rape and the Limits of Law Reform, Marsh, Geist and Caplan (1982).

These statements are substantiated by data which indicate that the number of rapes reported since 1973 has increased significantly and at a greater rate than the reported increases for other crimes. More importantly, the number of cases cleared has increased steadily with the exception of two years since PA 266 took effect.

Experience has demonstrated, however, that the law as enacted still had some flaws. Thus, during the last two sessions of the legislature we have given attention to the need to improve on what commentators already considered a good law.

Specifically, we have been very concerned about the extensive use of probation as a sentence on CSC cases. For example, 1982 data prepared by the Michigan Department of Corrections indicate that 81.3 percent of persons convicted of CSC I went to prison in that year. But, prison was not used as frequently with other degrees: only 47.3 percent of CSC II convictions; 56.1 percent of CSC III convictions and 12.2 percent of CSC IV convictions resulted in commitment to prison. To me, this data indicated that judges still do not treat the crime of sexual assault as seriously as it warrants. Thus, I sponsored 1982 PA 470 which amended the Code of Criminal Procedure to prohibit the use of probation as a sentencing option on CSC I and III cases. Assuming that this would get offenders at least one year in prison, I felt that we had resolved the problem. Unfortunately, shortly after passage of the Act, the Michigan Supreme Court ruled that a sentence of less than one year to the county jail met the requirements of that section of the Code. Thus, this session, the House has before it several proposals to require mandatory minimum terms for CSC convictions.

An even more serious problem was brought to our attention by mental health professionals concerned about the sexual assault of clients—particularly in community facilities. Arguing that the definitions of mentally defective and mentally incapacitated contained in PA 266 were unclear and unworkable, the professionals requested amendments. The result of this concern was 1983 PA 158. This amendatory act inserted a definition of developmental disability, a definition of mental illness and a definition of mentally retarded. It then modified the provisions relative to the degrees of the crime to include the new definitions. It is our hope that this change will provide the much needed protection to our state's mental health clients.

Having outlined the Michigan experience, let me turn to HR 4876. As I noted above, I am very pleased to see this effort to recognize the crime of rape as a crime of violence with varying degrees. I am sure that its adoption will provide much needed protection for persons in the special maritime and territorial jurisdiction of the United States. More importantly, as I noted above, it should serve as a model for other state's to adopt.

My review of H.R. 4876 has led me to conclude that there are a number of areas in the bill which could be strengthened in order to provide better protection for the victims of sexual assault. First, I would recommend that the statutory rape age be increased to 13 and that provisions of the bill which limit applicability to instances where the assailant is more than 4 years older than the victim be stricken. I raise the latter concern because of the relatively large number of assailants who are juveniles. For example, in 1982, 18.7 percent of the persons arrested in Michigan for criminal sexual conduct were juveniles; that is, under the age of 17. While the percentage of juvenile arrests has decreased from a high of 26.2 percent in 1979, the problem is one which should not be overlooked, particularly since it is my impression, based on conversations with law enforcement officials, that juvenile offenders often commit the most violent crimes.

A further protection which the Michigan law affords young victims involves situations where the victim is between 13 and 16. In that instance, if the assailant is a relative, a member of the same household or in a position of authority over the victim, it constitutes CSC I or II, depending on whether or not there is penetration.

Related to the age factor, I am unclear as to the intent of Sec. 2243 which creates a crime called the "sexual abuse of a minor." It appears to provide reduced penalties for those who assault children between 12 and 16. If this is true, this is exactly the opposite of the Michigan law—at least insofar as it relates to persons in positions of authority, persons living in the home, or family relationship. If the intent of the language is to deal with consensual sexual activities between teenagers, it needs to express that more clearly. But, more importantly, I believe that you must evaluate whether or not you want such a distinction in law.

Second, I believe that there should be a definition of the word "force" if it is intended to include the situation where an assailant is armed or the victim reasonably believes the assailant to be armed. If that is not intended to be included within the definitions of force, I believe that the bill should be revised to provide penalties for the use of weapons.

In much the same vein, the bill makes no reference to when the sexual assault is committed during the course of the commission of another felony or to aiding and abetting instances. The Michigan law clearly addresses both of these circumstances.

Third, I am very concerned by the failure of the proposed legislation to deal with the problem of the mentally handicapped or mentally ill individual. As I noted above, our experience in Michigan indicates that it is imperative that special provisions be made to insure the protection of all individuals in society—including the physically and mentally handicapped.

Fourth, the law is silent on the issue of corroboration and it does not provide a shield from cross-examinaton of the victim related to irrelevant prior consensual sexual activities. The March study referenced above clearly concludes that that is an important feature of the law.

Once again, thank you for the opportunity to appear before you and to share my concerns about this important legislation. I applaud your legislation for including the gradation of sexual offenses, the sex neutral language and the elimination of spousal exception.

It is my hope that you will accept these comments as they are intended: to offer you the benefit of our experience and to suggest ways in which H.R. 4876 can be strengthened. You are to be commended for giving this important issue a hearing and I urge your timely action on the legislation.

Before concluding, let me suggest another area for Congressional action on the sexual assault issue. The Uniform Code of Military Justice continues to treat rape in the traditional manner. Given the large numbers of persons residing on military

reservations, I would urge you to consider the possibility of amending the UCMJ to treat rape in the same manner it will be treated in the federal code if H.R. 4876 is adopted and, hopefully in the not too distant future, in all of the 50 states.

Mr. CONYERS. Our next witness is Ms. S. Aesha Collier who appears here on behalf of the Women's Action Team Against Violence. And I would like to welcome her personally to the subcommittee. We have talked about these matters informally on more than one occasion, and I am glad that she is here now.

Ms. Collier, you can feel free to comment on any of the matters that have been discussed before, since you have been here and heard most, if not all, of the testimony.

Welcome before the Criminal Justice Subcommittee.

## TESTIMONY OF S. AESHA COLLIER, ON BEHALF OF THE WOMEN'S ACTION TEAM AGAINST VIOLENCE

Ms. COLLIER. Thank you, Mr. Chairman, Representative Carr, counsel. I am pleased to be here.

I believe I can just give you a brief summary of the kinds of things we have been doing.

We organized our Women's Action Team Against Violence in February 1984 as a result of all the rapes and murders against school children and women in the city of Detroit. Prior to that time I had been involved in various activities in the city, including court watching. I used to work for Neighborhood Legal Services as a paralegal. And we have been doing other things as far as community work is concerned.

When we look at it, I think about the statistics that are really horrifying. For instance, there has been a report that overall in America there has been on the average of 25 assaults every—25—every 25 seconds—there is an assault; every 35 seconds there is a B and E; every 3 minutes there is an armed robbery; every 25 minutes there is a rape; and every 30 minutes in America there is a murder. Those statistics are horrible. Our cry is "one is too many."

We, for the most part, are a group of women who have been together in various struggles inside the city of Detroit. I have been here listening to the police department staff person, Ms. Martini. Some of the things that she mentioned about the courts I agree with, and some things I do not agree with. I have been court watching for years. I am not there every day, but whenever there is an opportunity or whenever there is a case that has notorious merit, more or less, pertaining to the violence against women and children, I usually try to go down there, either on arraignment or preliminary or if not the whole trial.

I can concur with her when she mentioned that some of the judges are not as sensitive to the problems or not as aware of the varying degrees of criminal sexual conduct as they instruct the juries, as they should be. A lot of the judges are very good, I must say that in all fairness. Some of the judges, especially since now they have younger judges and have gotten more women judges, are quite effective. They do have more women in the prosecutor's office, and they have been very fair, in my estimation, in most instances.

We also work together, as with Ms. Dolan back there. She, Edie VanHorn and myself work with Erma Henderson's Crime and Jus-

tice Task Force. Mrs. Henderson is the president of the Detroit City Council. She organized a citywide task force as a result of the notoriety regarding the school girl rapes inside of Detroit. Most of the task force expressed a desire to make changes in the criminal justice system both locally and nationally.

And we have had a march and a rally, we have organized, and cooperated with other groups of women and men. There have been some men who have organized against rapes and other violence. They have been very vocal, and they have been helpful to us as far as being supportive. So, we have been doing quite a few things these past few months.

Now, I did have a prepared statement, and I did get an opportunity to read H.R. 4876. I think the bill is commendable. I think that everytime that there is an opportunity for progress it is good that we have some progress from the Federal level, because we need all the help we can get out here.

And, so—being both black and female, it is a double whammy for me. I am sure you understand that.

Basically, I did have a prepared statement, and I will modify it or if there are any questions that you might have afterwards, I will try to address them.

The Women's Action Team Against Violence was formed in February 1984 in response to the wave of rapes and murders of women and children in the city of Detroit.

On the surface the Federal sexual assault act as proposed by Representative Carr, although commendable, is a little bit limited in scope. However, we do not know all the ramifications. I am here today learning about some of the ramifications; where those particular crimes could be prosecuted from the Federal level. It was interesting to note that someone mentioned the Indian reservations and someone mentioned the parks and Federal property, because I was kind of in a quandary when I talked to one of your staff members about where and how that enforcement would be effective, Representative Conyers. It was good that I came here, that I get a more clear understanding on just where and how the law could be implemented.

Michigan currently has legislation governing varying degrees of criminal sexual assaults. The implementation of just penalties and/or sentences by our criminal justice system right now is another matter. That is one thing that I find in court watching and some of the other members of our committees have found that, the laws perhaps are on the books; and perhaps they have some teeth in them, but the implementation and the inequities in the administration of justice, depending on what crime and what criminal and whatever is often lacking.

Our women's action team focus has primarily been in areas of prevention, deterrence, protection, and detention as necessary for criminals.

Regarding prevention, we are talking about, not just for today, but in the near future and long range, we are talking about family, school and community cooperation, as far as preventing some of these crimes from occurring.

We are talking about correct values that should not be left to the educational system alone. Discipline and value orientation should

begin in early stages of childhood development. We recommend that parents be held accountable for the actions of their children in some legal way. I do not know if that would be something that you could consider from the Federal level or not. Adults should demonstrate themselves as part of the positive role models for children and younger adults. A sense of extended family could be redeveloped, we feel in every community. This is a workable ideal. Respectable kinds of values can be put in place from the home, the school, the church and the community. I did not put it in there, but the business sector could be kind of in tune with that kind of thing, too.

Now, we talk about deterrence; crime deterrence can include anything from a basic "No," like they have the spot announcements on television telling the kids just say "No" to drugs. Tragically, crime deterrence has escalated to the use of deadly force or to the widespread and costly use of safety and burglar alarms. The safety and burglar alarm business is big business as we know. That could be—all of that could be considered crime deterrence.

Also, under crime deterrence we could—we would request that adequate deployment of concerned police in strategic areas could also used as a deterrent.

Community councils and trained community arbitrators could defuse possible violent situations. We are talking about in the sense of community that, there should be people, perhaps, if there were Federal moneys available, to be community arbitrators. If you see a problem occurring before it gets all out of proportion, there could be people in communities who could serve as community arbitrators, mediators or whatever; and they could kind of defuse a situation that could erupt into something bigger.

I read that there were some similar programs in other cities. I do not know if that is anywhere around Michigan. I do not know if it is from the Federal level or the State, but I thought it was a commendable idea.

We also think that in terms of deterrence, that if there were adequate health care, nutrition, education and employment available to citizens in the community, that would be a great help. A lot of people have all kinds of health problems, including mental health and substance abuse problems. I think the cutbacks in some of the programs is such a disgrace. There should be an increase in funds, especially in view of the fact that we do have many people who have been discharged from mental institutions who walk around the communities, and there is just no—no accountability from them or from the community to them. Often they do not take their medication; they are just out there. That is a point that perhaps we could really try to see what we could do from our level.

Another thing is that, young people who are healthy, educated and employed are less likely to be perpetrators of crime. But unfortunately, far too many have also become crime victims because of the above-mentioned inadequacies in the various institutional systems.

Again, in recent years Federal and State programs for the average citizen's needs have suffered severe cutbacks. Available money should be increased and a greater portion given proportionately for long-term viable programs like your title I, your section VIII hous-

ing programs and the Headstart Program. I think that Headstart has been one of the programs that they found to be very workable after all these years. We want that kind of thing to continue in terms of prevention and deterrence to head off future criminal behavior.

Now, we talk about protection. We believe that the first line of defense is self-defense. And anywhere we go, you know, when it comes down to really being out here, you have to take care of yourself. There are—a lot of women have formed self-defense groups. They have taken karate and all these other self-defense lesson. Too bad, a lot of women have resorted to carrying guns. I do not approve of that, but a lot of women have had to do that. I guess they feel that they can protect themselves that way.

But we still, for the most part, depend on and rely on law enforcement officials for protection, however inadequate. In Detroit, and especially in many large cities, over 50 percent of families are headed by females who have low income. Many women have no other recourse but to look to the police and to the courts for redress in child abuse and wife abuse matters. We also look to the police and courts for child support and other civil and/or criminal matters. We expect and we should demand adequate protection and justice from the system.

We also emphasize that, although we seek justice, we could never accept any semblance of a police state.

And finally, under detention, we feel that there should be mandatory sentencing and maximum terms in prison for serious and violent crimes like murder, rape, assaults, robbery, arson and so on.

We concur with the House bill as proposed by Congressman Carr, and we would agree with that. But there should be some mandatory sentences. These sentences should be similar from the State and the Federal Government.

While in prison, there should be some ways made that mandatory training skills and education be given to inmates. Whether they want to do it or not, it should be mandatory. Once they come back out, they usually have an attitude that the world owes them something. While incarcerated, they may have done something like making license plates—I do not know what they do in the Federal penitentiary. But there should be some kind of training or skills program, so that when they return from prison they are prepared to at least do many things that will keep them employed and they would have some greater sense of responsibility and self-sufficiency.

Hopefully, that would, in terms of their learning some basic skills or getting some adequate training inside, make for a more orderly transition to the larger society.

Thank you again for allowing me to appear here. And it has been my pleasure.

Mr. CONYERS. It is always good to hear from you, Aesha, because you have been very thoughtful in this very turbulent area. We appreciate it very much.

How is your organization coming along these days?

Ms. COLLIER. Well, we are doing OK. There was—after we met with you a couple weeks ago, there was another hearing that we

had with a group of women together. We just sort of, you know, came together to discuss some of the things that we talked about. It was not like a hearing, it was like a meeting among us; and we discussed some of the pros and cons.

I also got an opportunity to talk to Althea Grant; she is director of the Rape Crisis Center. She told me, "Well, they have started again." There was a rape of a school girl yesterday morning at 7:30. I did not see anything about it in the paper.

So, we have got to be ever vigilant.

Mr. CONYERS. Well, I think you have done a lot in rallying the community to require more of law enforcement and the school system as well, And your organization is to be commended. I hope you take that back to them from me.

And I would like now to recognize Mr. Carr for any questions or comments he may have.

Mr. CARR. I, too, want to thank you for testifying and coming here today.

I hope you have some counterparts in the city of Pontiac.

Ms. COLLIER. Well, perhaps we do.

Mr. CARR. Maybe you can get together with someone, because I know that they are concerned, too, and we could all benefit by your example.

Ms. COLLIER. Thank you, sir. Thank you so much.

Mr. CONYERS. Well, I want to thank you.

This concludes our hearing. We are grateful to the Oakland County Commissioners for providing us space, and we know that Congressman Carr's staff and many of the organizational representatives have been very helpful.

Do you have any closing observations?

Mr. CARR. Merely to thank you again, and commend you for your diligence on this and so many other matters that are important to the country.

Mr. CONYERS. It is entirely a pleasure. Thank you very much, Mr. Carr. With that note, the subcommittee stands in adjournment.

[Whereupon, at 2:15 p.m., the hearing was adjourned.]

# FEDERAL RAPE LAW REFORM

WEDNESDAY, SEPTEMBER 12, 1984

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON CRIMINAL JUSTICE,
COMMITTEE ON THE JUDICIARY,
*Washington, DC.*

The subcommittee met, pursuant to call, in room 2226, Rayburn House Office Building, at 10:10 a.m., Hon. John Conyers, Jr. (chairman of the subcommittee) presiding.

Present: Representatives Conyers, Boucher, and Gekas.

Staff present: Thomas W. Hutchison, counsel; Ronald A. Stroman, assistant counsel; Raymond V. Smietanka, associate counsel; and Cheryl D. Reynolds, clerk.

Mr. CONYERS. The subcommittee will come to order. Today, the Criminal Justice Subcommittee will receive testimony on legislation to reform Federal rape statutes, which date back to the 19th century. There are three principal Federal rape statutes. One simply makes it a Federal offense to commit rape. A second makes it an offense to assault someone with intent to commit rape. Neither specifically define the term "rape," but they have been held to incorporate the common law definition that requires that the prosecution show that the defendant had sexual intercourse with a woman, "forcibly and against her will."

The third statute is what is commonly called a statutory rape provision, which makes it an offense for someone to "carnally know a female, not his wife, who has not attained the age of 16 years."

Under the current Federal statutes, therefore, only a woman can be the victim of a rape offense. Federal statutes do not proscribe homosexual rape.

The common law tradition from which the Federal statutes come is not particularly inspiring. Rape laws ostensibly existed to protect women from having unwanted, coerced sexual intimacy, but the legal system frequently seemed to be more concerned with protecting males from conviction than with protecting females from criminally injurious conduct. One exception, of course, was where the victim was white and the accused was black. The race problem is very apparent in this area. Historically, the death penalty for rape has been imposed in a racially discriminatory fashion.

The legal system's undue concern with protecting males is seen in several doctrines; the spousal exemption doctrine held that a man could not rape his wife no matter how brutally the act was carried out. This doctrine was rationalized on the basis that a woman, when she married, gave continuing consent to sexual inter-

course that could be revoked only by having the marriage annulled. It reflected a view of marriage entailing the husband's ownership of the wife. Rape was, therefore, unique. It was the only crime of violence for which marriage was a defense.

The Federal law of rape probably incorporates the spousal exemption doctrine. The Federal rape law, however, appears to have avoided incorporating two other doctrines that made rape convictions difficult. One is the doctrine of utmost resistance. At its most rigorous, that doctrine required not only that the victim struggle with an intensity reflecting her physical capacity to resist the unwanted sexual intimacy, but also that her efforts not diminish during the course of the offense. Such a doctrine served only to increase the risk of harm to victims.

The second doctrine that Federal law has avoided incorporating is the requirement of corroboration. Today, most States do not require corroboration. At its most stringent, the corroboration doctrine required that there be evidence, other than the victim's testimony, corroborating the use of force, penetration, and the assailant's identity. The result was that if a woman was assaulted and the rape attempt was abandoned, the assailant could be convicted on the victim's uncorroborated testimony. But, if the rape was carried out, the assailant could only be convicted if there was corroboration for the victim's testimony. That doctrine is, in my view, unnecessary.

Finally, evidence rules permitting wide-ranging inquiry into the victim's reputation and prior sexual activity served to discourage women, obviously, from filing complaints and testifying at trial. Congress addressed this problem in 1977 by enacting legislation drafted by one of today's witnesses, our former colleague on the Judiciary committee, Elizabeth Holtzman. The Privacy Protection for Rape Victims Act of 1978 amended the Federal Rules of Evidence to limit the use of such evidence.

The legal system's traditional approach to rape reflected a view of women and their place in society that may have been accepted in another day and age but, I think, no longer is. Efforts to bring Federal law into line with modern perceptions of the woman's role in our society have been underway for several years.

The subcommittee has approved two measures that have included rape reform provisions, a criminal code revision in the 96th Congress, and my criminal code revision bill last Congress. The bill in the 96th Congress received approval of the full committee, but neither was considered by the House.

The subcommittee's initial hearing on the legislation developed very important information, and I'm sure today's will be equally helpful. The first witness, my colleague from Maryland, Steny Hoyer, is one of the principal sponsors of H.R. 4876, the "Sexual Assault Act of 1984." In another career of public service, Mr. Hoyer was president of the Maryland Senate and chairman of the Maryland General Assembly Study Committee on Rape and Related Sexual Offenses at a time when Maryland enacted its rape law reform. About 2 years ago, he testified before this subcommittee on the rape reform provisions of the criminal code revision legislation that I've mentioned.

We welcome you to start us off here again, Steny. We have your prepared testimony; it will be incorporated in the record without objection.

In addition, we welcome our distinguished colleague from California, Bobbi Fiedler, who is seated with Mr. Hoyer. Welcome.

## TESTIMONY OF HON. STENY HOYER, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF MARYLAND; AND HON. BOBBI FIEDLER, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF CALIFORNIA

Mr. HOYER. Mr. Chairman, counsel to the committee, I am thankful you would schedule this hearing, Mr. Chairman, in a timely fashion, notwithstanding the fact that we have but a few short weeks left to go in this Congress. I am seated at the table, as you have already observed, with Congresswoman Fiedler, from California, who has been a real leader and a principal cosponsor of this legislation with me, along with your colleague from Michigan, Congressman Carr, who also has been a leader in this effort; and my colleague from Maryland, Congresswoman Barbara Mikulski.

As you know, neither Congresswoman Mikulski nor Congressman Carr could be here. I know that you have already held hearings in Michigan on this bill and, therefore, you are intimately familiar with the subject matter itself, as your opening statement reflects, Mr. Chairman. Again, I want to thank you on behalf of all of the cosponsors, of whom there are another 30 to 35, for holding these hearings. We appreciate very much this opportunity to appear before you.

Mr. Chairman, I also appreciate the fact that my full statement will be submitted at this time in the record. I know that there already have been substantial hearings on reform, sentencing assistance for victims of crime, and protection for Federal officials.

I know you have also held extensive oversight hearings on the exclusionary rule. The House has acted favorably on several crime bills from your subcommittee recently, such as the "Criminal Fine Enforcement Act," the "Financial Bribery and Fraud Amendments Act," and legislation to close loopholes in the law with respect to the possession of contraband in prison. So I know you have been very busy and very concerned, as I am, as Congresswoman Fiedler is, and Mr. Carr and Ms. Mikulski are, with reference to crime in general but also with regard to rape, one of the highest unreported crimes in our society.

Crime, unfortunately, has become a fact of life in America and our efforts as legislators should deal with the curbing of criminal activity. We must draft and review legislative proposals that are rational, sensible and sensitive to the needs and rights of victims, and which clearly define what activity is or should be criminal. Today, a rape or a sexual offense occurs every 7 minutes. In our efforts to proscribe criminal activity, it is critical that statutes are drafted so that prosecutors can, in fact, secure convictions and judges can impose thoughtful, rational sentences.

It's a well-known conclusion that if we cannot enforce our laws effectively, prosecute criminals successfully, and impose sentences based upon the dangerousness of the offender as well as the degree

of harm inflicted upon the victim, then it serves little purpose to legislate.

Mr. Chairman, you referred to my activity in the State of Maryland. I would point out that in Maryland we started our research on rape reform in approximately 1974, a short time after your own State of Michigan had begun significant activity in this area.

We held a year of hearings in 1975 and then enacted legislation somewhat similar to that which I'm proposing, which you have been in favor of in the past and have spoken and drafted legislation in a similar vein toward. We have adopted similar legislation in Maryland over 1976, 1977 and 1978. Unfortunately, the positive reforms undertaken by States such as Michigan, Maryland, California, New York, and many others, have not yet reached the Federal level, as you pointed out in your opening statement. Although sexual offense crimes are principally a concern of State law enforcement, to the extent that they occur within the special maritime and territorial Federal jurisdiction, they become a significant Federal law enforcement problem as well.

I might say at this point in time in my testimony I have had the opportunity of reading the testimony of Victoria Toensing, Deputy Assistant Attorney General, who is here today. The Justice Department is recommending, and I fully concur in that recommendation, to expand the jurisdictional scope of H.R. 4876 to cover offenses committed against any person in official detention in a Federal facility.

The Federal statute, as you pointed out, Mr. Chairman, is construed by courts to incorporate the common law definition of rape, which you have enunciated. It has also been held that this statute does not cover homosexual rapes.

Clearly, I am sure the Justice Department had in mind, and I know that all of us have dealt with this in dealing with correctional authorities, that homosexual rape is a principal, significant problem that we must deal with and our statute should speak to that question, as have significant State reforms throughout the Nation.

The Federal statute is gender biased. The proposal we are making is not. The Federal statute also does not take into consideration the seriousness of the offense.

Mr. Chairman, you alluded to that. Everyone of us who has done any research on the common law genesis of 18 U.S.C. 2031 knows that historically the crime of rape was a crime against property. It was essentially a diminution essentially in the value of the father's property or the husband's property, or the family's property more generally.

Obviously, that was insensitive to the injury, either psychological or physical, suffered by the victim. H.R. 4876 would speak to that issue as well, as have most State reforms.

Our own statute on the Federal level fails to acknowledge that the factual circumstances of all sexual offenses are not the same and, thus, should not be subjected to the same penalty. One of the problems that prosecutors have encountered has been that juries have been reluctant to find defendants guilty of rape absent a very heinous situation; a fact pattern that clearly showed physical trauma, although that clearly is not necessary; or that showed perhaps the presence of a weapon, although, clearly, that is not neces-

sary. Juries have done so because they have been faced with a statute which defines the crime of rape in a very limited nature and which imposes a maximum penalty regardless of the factual circumstances.

Very briefly, Mr. Chairman, H.R. 4876 provides for gradation of the offense. This approach is premised upon the theory that sexual offenses should be categorized and dealt with in terms of seriousness of the offense, the degrees of criminal activity undertaken by the assailant and the extent of harm suffered by the victim. This approach is similar to that taken regarding other major crimes such as petty and grand theft, as well as first and second degree murder.

I might add, Mr. Chairman, it is working very well in Maryland, and I'm sure Ms. Fiedler can speak to its effectiveness in the State of California.

The effect of gradation upon penalties, Mr. Chairman, is that they would be based appropriately, as I said, upon the character and circumstance of the commission of the offense; that is, on the dangerousness of and culpability manifested by the defendant, and the degree of harm inflicted upon the victim, a different focus than we have had historically.

A rational grading scheme would allow a more just and appropriate sentence. This grading scheme, I might say, does not eliminate the thoughtful imposition of individualized sentences, but it does provide a more reasonable framework for evaluating the appropriateness and fairness of sentences for individuals convicted of committing sexual offenses.

Mr. Chairman, we have also replaced the term "rape" with "sexual assault." The term "rape" has historical connotations which have been, and continue to be, insensitive to the victim, and to women in particular.

The bottom line has been that the victim has felt as if she were on trial in almost every rape trial that I know of.

As a result of the historical connotations, testimony at the State level, and I'm sure, Mr. Chairman, you have heard it, has indicated that it is very difficult for victims—for the most part, women—to deal with reporting the crime of rape. After all, what has actually happened is an assault—assaultive behavior, violent behavior—not a crime sexually related but a crime of violence, an acting out, a striking out. And we believe that it will be a significant reform to use a more appropriate definition by defining the offense in terms of "assault," which, by definition, of course, implies nonconsent.

The legislation attempts to redirect the factfinders' focus away from the victim to the offender's actions and the injuries sustained by the victim.

The legislation, as I said, is sexless. Thus, homosexual rapes, Mr. Chairman, which are not presently punished under the code, would be. This is also critical when we are confronted with the issue of sexual abuse of children, for instance, of which we hear much. And I know Congresswoman Fiedler, has been particularly concerned about that aspect.

Mr. Chairman, one of the most controversial of the proposals that we have recommended, but one which I believe is very important, is the abrogation of the marital rape exemption. The justifi-

cation for this exemption, couched in terms of consent, has been deemed a matrimonial privilege, existing for as long as the term of the marriage.

Of course, another justification, as you pointed out, for the exemption, is that, historically, women have been regarded as the property of their husbands, just as children were regarded as the property of their fathers.

I believe, in present day society, and it should have been historically, but, certainly, today, that is a totally unacceptable rationale for us to adopt. Present State laws vary widely to the extent for which spouses may be prosecuted for the crime of rape. Clearly, the majority of States do not permit the prosecution of a husband for rape of his wife if they are living together.

Eighteen States, however, have abolished the exemption and permit prosecution of husbands who rape their wives under all or most circumstances. This mosaic of individual rights reveals uncertainty and inequity. The law does not recognize the rights of a spouse to beat the other, nor does the law erect shields behind which spouses may engage in otherwise violent behavior.

In this instance, however, sexual assault carries additional burdens on the victim. It involves violence as well as a specific kind of degrading, unwanted intimacy, psychologically more damaging, I would suggest to you, and more intrusive than—simple is a bad word—but than simply physically assaultive behavior of a nonsexual nature.

The law does not sanction violence between strangers or among friends. Certainly there is no justification for permitting it between spouses. Mr. Chairman, I know there will be some questions. I have submitted, as I say, a longer statement which describes specifically the gradations of the offenses and the criminal activity proscribed.

At this time, Mr. Chairman, I would like to yield to Congresswoman Fiedler and reiterate how much she has been in the leadership working with the administration, working with other Members of Congress, and working with community groups throughout the country to generate support for this legislation. I'm very appreciative personally of her efforts in this regard.

Mr. CONYERS. First of all, let me thank you for the comments you have in your prepared statement. I'm well aware that Congresswoman Fiedler has been very supportive and has demonstrated excellent leadership in this area.

We're delighted that she's here at the table with you. We will incorporate her prepared statement. We invite you, Congresswoman Fiedler, to make any additional comments you wish.

Ms. FIEDLER. Thank you very much, Mr. Chairman, for the opportunity to come here and testify this morning, particularly the leadership you have taken, as well as my colleage, Congressman Hoyer.

I think the people across this country will feel very good to know about the degree of caring that takes place here in the Congress about issues of this kind. And I just wanted to express my personal appreciation to you all, and for giving me the opportunity to testify on behalf of H.R. 4876.

Let me explain for the subcommittee briefly why this legislation was introduced over and above the comments of my colleague. Over

the past 10 years, the laws of many of our own States, my State of California included, have been changed to recognize not only the differences in society and its view of sexual assault, but with our judicial system's ability to deal with it. These changes in State laws have resulted in increased convictions. Until H.R. 4876, Federal law had remained unchanged and, hence, the ability of the Federal judiciary to deal with sexual assaults occurring on Federal lands was hampered by the current law's inflexibility.

I would like to cite to the subcommittee two examples of how H.R. 4876 will allow prosecutors to deal more effectively with criminals who commit sexual assaults.

When I was a member of the Los Angeles School Board, a 6-year-old child was molested by an adult male. The method of assault was the use of a foreign object.

Under current Federal law, if the crime had been committed on Federal property, the assailant could not have been charged with a sexual assault or rape because there was no gradation in the law. Under H.R. 4876, the assailant could have been charged with sexual assault.

Additionally, under current law, rape by a spouse is not considered a crime. The subcommittee should know that the majority of women who are murdered in this country are killed by their spouses. Consequently, the incidence of violence by one spouse against another is extremely high. One has only to look at the incidence of wifebeating to get some idea of how common this crime is.

The fact that spousal rape is not considered a crime on Federal property is one of the last vestiges in our laws where women are treated as property.

There are a number of other legal points to be made about H.R. 4876, but I will leave those to individuals more skilled in the law than I. However, as a representative who comes from a State where a majority of the landmass is Federal property, I would urge the subcommittee to give the women of California and the Nation the protection provided in H.R. 4876, as well as children and those who are subject to other types of sexual assault.

When you consider that a crime in my State could be treated completely differently on one side of a street than the other, and that, in one case, a rapist could conceivably go free, while in the other, he could receive the just and proper sentence for his crime, passage of this legislation, in my opinion, is crucial.

Mr. CONYERS. Thank you very much.

Let me just find out if you agree with me that the problem in many rape cases is that you have an offender who is committing an act of violence more than an act of sexual gratification. Frequently, these perpetrators are people bent on the most humiliating and embarrassing kind of violence that can be devised. They are not really driven by sexual needs, or any desire for sexual gratification.

Does that reflect your experiences?

Mr. HOYER. Mr. Chairman, as you pointed out, I chaired a Joint Commission of the Maryland General Assembly for the entire year of 1975. We had prosecutors, individuals from sexual assault centers, public defenders, and in general a large spectrum of the criminal justice system participating in the hearings. I do not believe there was anyone who disagreed with the premise that the crime of

rape was a crime of violence as opposed to a crime of sexual gratification; for clearly it is a vicious, as you point out, degrading assault because it involves not only a physical assault that is a battering, an unwanted touching under minimal or aggravated degrees, but it also violates psychologically the privacy of the victim.

Thus, I think your statement is absolutely correct and it was universally agreed by all the witnesses who testified before us.

Ms. FIEDLER. I would completely agree with the statement that you have made. When I served on the Los Angeles School Board, in the 4-year time that I served, we saw an increasing number of sexual assaults and batteries involving sex. And we saw it occurring with younger and younger people.

And I think when you take a look at what is happening in terms of domestic violence in this country and realize that recent studies are showing that some amount of incarceration does have a positive effect on repeat offenders, it seems to me that it is important that we recognize that these violent acts are being encouraged by not creating sufficient penalty for the act, sufficient statement on the part of society that this is unacceptable behavior. And it's regrettable we see so much in society, but we do see it. Often, it is carried out in the form of sexual assaults against vulnerable people in our society.

So I think that the recognition of it being violent as opposed to it being sexual in nature is a very important step forward on the part of not only this committee but our society as a whole.

Mr. CONYERS. That being the case, do you have any recommendations as to how we ought to be treating these repeat offenders in this particular heinous offense?

We know that repeat persons are usually younger. We have had some testimony to the effect that sometimes these offenders grow out of it. But do you have any particular insight about the psychological nature of this crime, or how a person incarcerated ought to be treated once there has been a conviction, especially if it is a repeat situation.

Ms. FIEDLER. Let me just share with you a little bit of my experience. We found, in dealing with young people, when penalties were not sufficient to make it understood that certain behaviors were unacceptable to society early on, we saw a cycle of repeat offenders taking place, where young people would be sent for some type of treatment, counseling of this kind. They'd be back in school. They'd be back in their normal environment very, very quickly.

I don't think we are making the statement clearly enough early enough. If we were able to make a clear-cut statement as far as society is concerned in terms of the law early, so that we do not treat these matters in a casual fashion, I think we could help to deter that kind of behavior later on.

Because, essentially, what you have is you start out with small crimes, modest crimes initially, and then the older they get, the more serious, the more violent they become.

So I think that would be an important step in the right direction.

Mr. HOYER. Mr. Chairman, I have dealt extensively with sexual assault crisis centers throughout my State. Prince George's County General Hospital, under the leadership, by the way, of our former colleague and good friend, Gladys Spellman, when she was a

member of the County Commission of Prince George's County, was one of the first to become involved with treatment and counseling. It first involved itself, of course, with victims. Second, it involved itself with the police community to sensitize police officers on the treatment of victims. And, third, it involved itself with prosecuting attorneys to sensitize them to the trauma of the victim while both being interviewed as well as testifying.

Lastly, it is starting to become involved with the perpetrators of the crime, acting on the premise that it is a violent act, that there is a violence within the perpetrator that needs to be dealt with.

All of us well realize that our correctional facilities are woefully inadequate at the Federal and State level with respect to psychological services available to defendants.

Now does that mean they ought not to be incarcerated? Clearly, they should be segregated from society as long as they cannot comport with the laws and pose a physical danger to others.

However, our legislation does not deal with that, Mr. Chairman, but it is a critical problem which is, I think, being addressed. There have been, a number of programs, for example, HBO just did a major program on interfacing with sexual offenders.

As Ms. Fiedler expressed, we know from statistics that victims of child abuse are very likely to become child abusers. So we are, I think, getting in the last 10, 15, 20 years a lot more information about what we are dealing with. Hopefully, we are going to react.

Mr. CONYERS. I think the criminologists can do a lot more in this area. I think Congresswoman Fiedler's point about youth committing this crime is very disturbing because it shows a lack of respect for the person. It's sort of a vindictiveness that really doesn't accompany other crimes of violence, property crimes.

Ms. FIEDLER. I would just like to share with you my own view of what I see happening and the difficulty in terms of trying to resolve some of these issues. They are very perplexing, very frustrating. I think people of good will from different perspectives see different answers to the problems. But I think that we have a major societal problem that is taking place. It has come as a result of the fact that there are many changes taking place in our society.

We no longer see the large number of traditional homes that we once saw. We see more divorce. We see more single parents trying to raise their children under very difficult circumstances. And I think that as these kinds of problems expand, we have a greater challenge in our society to try to deal with many of the problems that come from the fact that there is not the kind of interaction today that may have existed 20, 30, and 40 years ago.

So many of the frustrations that young people feel when they are very young, there is not the level of support within our entire society for children as a whole. And I think many of the frustrations and many of the angers that are expressed through this type of violent behavior as children get older is something that we have to look on in a broader sense than just a specific bill; although I have been told by people in the State of California that by changing the law, they have seen some substantial reduction of this kind of action and lawbreaking.

But it goes much beyond that. That is really only touching at the outcome of what is happening. And I think this is a challenge that

we, as a country, are going to have to face in the next 10, 15, 20 years: How are we going to deal with our children? How are we going to provide them with the kinds of support they need so that we don't see the increase in anger and frustration that we often see carried out in these kinds of violent ways?

Mr. CONYERS. I would like to turn now to my colleague, Mr. Gekas.

Mr. GEKAS. Thank you. To Representative Hoyer and Representative Fiedler, I want to say at the outset that I am supportive of the entire concept of legislation. There are a couple of things that disturb me, and they disturb me by way of previous experience in these matters in court as well as just from visceral reaction to some of them.

No. 1, I think I could frame my concern by asking you questions: Would this bill be less attractive to you and less attractive to the Congress, and less deserving of support, if it retained the age, rather at 12, at 16? Would it be less deserving of your support if we reestablished 16 as the age of consent rather than 12?

Now, before you begin to address the responses to that, Ms. Fiedler just now said that she was concerned about establishing at an early age this respect or fear for the law, if you will, or whatever constraints that we can place on youthful bad behavior, so that we can deal with those individuals better as they grow older.

And I'm just wondering, what advantage do we have by establishing the consent age at 12?

Ms. FIEDLER. Excuse me, I don't mean to interrupt.

Mr. GEKAS. That's all right. Am I wrong?

Ms. FIEDLER. Yes, you are looking at it as an age of consent. That really isn't what it is. It deals with the gradation of the law and the penalties against those who commit these acts.

Mr. GEKAS. Yes, but the effect of it is consent, is it not?

Ms. FIEDLER. No, it isn't because one of the reasons I personally—I think that's much too young an age of consent personally, from my own experience, but this basically deals with gradations in the penalties because of the idea of coercion and the implication.

Mr. GEKAS. If there was a 15-year-old male dealing with a 12-year-old girl, that amounts to a consent, does it not, under this position?

Mr. HOYER. First of all, to place your question in context, age is only a factor in a consensual situation. Obviously, in a nonconsensual situation, age is irrelevant.

Mr. GEKAS. That's correct.

Mr. HOYER. So we come to consent. At the State level, we had a difficult time dealing with this issue because, obviously, any age you pick is an arbitrary age. It is therefore a judgment by society as to what age a minor can give meaningful consent. I think, generally, you are correct, what age will you say?

But, notwithstanding whatever other circumstances may prevail and may be proved at trial, the age factor alone will mitigate against any defense. In other words, relations with the victim will in and of itself be statutory rape.

Congresswoman Fiedler is correct in that what we have tried to do, and that what most States have tried to do, is use two ages, that is an age below which the most serious offense will have been

committed when it involves very young children under the age of 12 and a situation in which when you are dealing with minors 12, 13, 14, or 15. In both circumstances we have proposed that there must be an age differential of 4 years between the victim and the offender.

Obviously, that differential is somewhat arbitrary. It could be 3 years. It could be 5. However, many States do have a 4-year differential and I believe it both reasonable and workable.

Now, the Justice Department has raised a question in its testimony that by not making certain sexual activity criminal where it is between minors close in age, closeness or proximity of age, that we are thereby condoning or appear to be condoning that activity.

First of all, let me say that is absolutely not the case. Second, in dealing with this issue at the State level, almost every counselor, and we have heard testimony from many psychologists, psychiatrists, and prosecutors, this age differential, No. 1, and in dealing with was concerned that if the age differential was made too low, that prosecutors would exercise discretion not to prosecute.

Let me give you a factual situation. I'm the father of three children. They are 20, 15, and 13, all girls. I should amend that. One of them, clearly, is a woman. They're all different, as I'm sure all of us who have children know.

They respond differently. They look different. Some have matured more quickly than others. What happens under the definition of a crime when two 11-year-old children are involved in either a sexual act or sexual contact?

A. Who is the victim, and who is the perpetrator?

B. Is that a criminal act? Should it be a criminal act?

In trying to respond to that question, we have adopted what your question goes to, a relatively arbitrary sort of judgment. If you're asking me: Would the statute be less attractive if you made a sexual contact between a 15- and 13-year-old criminal, thereby subjecting the 15-year-old to prosecution, I would respond "Yes." I do so because all the information that I have received indicates that when confronted with consensual situations involving minors close in age prosecutors are very reluctant to go forward and do so in many cases only because of substantial community pressure which dramatizes a particular case but generally is not a precedent.

But, the bottom line, to answer your question, is: The Justice Department will be making a recommendation as it relates to the age differential under aggravated sexual assault. I think a reasonable argument can be made on both sides of that question.

For instance, again, two 11-year-olds involved in sexual activity; clearly, the Justice Department's response is no prosecutor in the land is going to prosecute that kind of case.

I tend to agree with that. But, if we define such activity as a crime, I question, from a public policy standpoint, whether that's appropriate. That's why we have included that differential, the belief being that you get to a point, whether it's 3 years, 4 years, or 5 years, where the perpetrator-defendant, clearly, the elder participant, should be held culpable for such activity. That elder defendant, 15-year-old, 16-year-old, 17-year-old, involved with an 11-, 12- or 13-year-old child ought to know he or she should not be involved in this way.

That is a long answer to a complicated and controversial question.

Mr. GEKAS. It does give me pause, I'll have to confess that. I have no further questions.

Mr. CONYERS. Thank you. Mr. Boucher?

Mr. BOUCHER. Thank you, Mr. Chairman. I want to commend the sponsors for bringing this matter before us.

As in your case, Steny, when I was a member of the Virginia General Assembly, I sponsored a bill which revised Virginia's criminal sexual assault laws.

Mr. HOYER. It's good to be dealing with experts.

Mr. BOUCHER. Thank you. I'm not sure the title applies. One of the matters used by a defendant in Virginia was the victim's prior sexual history, to show that the act was committed with the consent of the victim.

We addressed that specifically in the statute by disallowing that evidence on that point. Now I gather that that's covered by the Federal rules of evidence, currently rule 412, so it's not necessary to address that in the bill.

Mr. HOYER. Ms. Holtzman is here. She was, as Chairman Conyers has pointed out earlier, responsible for that statute. I would say, in the State of Maryland, we adopted a series of statutes, one dealing with substantive law and the other dealing with evidentuary law, and others dealing with the administrative sections of the law. So it was not just limited to the substantive definition of the crime. We did not deal with evidentiary questions in this bill.

I am strongly of the opinion that evidence of reputation and chastity should not be admissible except in the very limited instances which the Supreme Court has addressed. In Maryland, we limit it to evidence which would relate to prior sexual experiences with the defendant, which would obviously go to the question of consent, or prior sexual experience which would go to the presence of semen, pregnancy, or disease or physical trauma.

Other than that, one could not introduce prior sexual activity at all. We don't believe that's relevant at all. I might point out to you an interesting fact. An anachronism, but, historically, the definition of chastity had nothing to do with the incidence of sexual activity, but had to do with the state of one's mind.

Ms. FIEDLER. Would my colleague yield?

Was there any direction previously to looking at the sexual history of the male as well as the female? Or, was it always directed to the female?

Mr. BOUCHER. In the formulation that we derived in Virginia, it was merely a matter of addressing the previous sexual history of the victim of the offense.

Ms. FIEDLER. The victim usually being the female?

Mr. BOUCHER. That's correct.

Mr. HOYER. The interesting thing which has happened in almost all rape trials is that the defense has to be consent. But, what has happened, of course, is that the defendant is relatively protected at that point in time because the defendant doesn't testify for the most part. No evidence of the defendant's character or prior activities is admissible at that point.

Mr. BOUCHER. I think the formulation that you had in the State of Maryland was very similar to one that we had in Virginia. And, I gather that, at least in the Federal system, it is adequately addressed through rule 412. And your position would be that we don't need to address that in this legislation to any greater extent?

Mr. HOYER. Correct. There is one additional point I would like to make because the chairman mentioned it in his opening statement. We perceive the present status of the Federal law to be that there is no necessity for corroboration, that the victim's statement alone is sufficient for conviction if the jury believes beyond a reasonable doubt that a crime has been committed.

If that is perceived by the committee and counsel not to be the case, I don't think Ms. Fiedler or I, or any of the cosponsors, would have any objection to the inclusion of that specific reference. Again, it's an evidentiary question as opposed to a substantive definition. But, I think, clearly, we all agree that that ought to be the status of the law. It's the status of the law as far as I know in every State that has reformed its statute.

Mr. BOUCHER. I would agree with that.

Ms. FIEDLER. I urge the committee to take a look at the results following the passage of the State laws that have been passed and implemented.

Mr. BOUCHER. Another question we addressed in our efforts in Virginia was cross-examination of the victim based upon the degree and the extent of physical resistance that the victim put forward. We have a notion in our statute that the victim needs to make known her desire not to engage in the conduct, but that can be communicated verbally. The testimony that we had was that physical resistance can actually aggravate the risk of physical injury to the victim and can lead to death in some instances as well. The scholarship on the subject was to the effect that perhaps physical resistance after the victim had made known her desire not to engage in the conduct was counterproductive. Therefore, cross-examination on that subject is not permitted under our statute.

Do either of you have any thoughts as to whether we should address that subject in this bill, where we did not address that?

Mr. HOYER. My perception and belief is that under present Federal law, proof of physical resistance is not necessary. I have not read the revised Virginia statute, therefore I don't know specifically how you dealt with that issue. In Maryland the statement of the victim that it was against his or her consent is not necessary.

Ms. FIEDLER. Traveling back and forth to California, I make about a 6,000-mile round trip every time I go from Washington. I've had a chance to talk with a number of stewardesses on planes. One of the things, when you get into the idea of resistance, they often face problems in interstate travel in this area, and it would be very difficult to prove—somebody trying to conduct business, trying to do it in as sedate a way as possible and facing some type of an assault, some more serious than others, but nonetheless, assaults—that it would be very hard to use that, plus the fact your safety, your security as a woman. I don't know if I was ever faced with that by a very strong man, I don't know what my decision would be. That would depend upon the circumstances as to whether or not you had to make that resistance, whether you felt your

own security or safety was further at risk, other than the assault itself.

So I think that's a really difficult thing to try to prove, because simply of your impression of danger—or you take a look at this Martin School case in California. Here you're dealing with babies. You're dealing with very young children. What does it take to coerce a young child? Not very much.

Mr. BOUCHER. I was very sympathetic to the concerns that were expressed in our hearings several years ago in Virginia, when a number of women's advocates testified that women oftentimes would not report sexual assault incidents, because they had not engaged in a great degree of physical resistance. They were afraid that during the course of the trial, the defense attorney would ask, "Well, did you bite him? Did you kick him? Did you scratch? And if not, why not?", trying to show that the act was committed with the consent of the victim. We felt that it probably would enhance the reporting of sexual assault offenses to dignify the role of the victim somewhat more and simply disallow that kind of cross-examination, once it was clear that the victim had made known orally her desire not to engage in that conduct. And that is the status of our law today. Again, if you wouldn't object, you could look at that as a possibility for this statute.

Mr. HOYER. I wouldn't object. Clearly, one problem we may encounter is of a constitutional nature that is imposing limitations on cross-examination of the victim, as to where you transgress the defendant's right to confront witnesses. I haven't read the Virginia statute yet, but that's one of the problems we had, for instance, in dealing with prior sexual activity. You had to permit relevant, material evidence, which I described earlier.

Mr. Chairman, something has come to mind that I did not mention earlier in response to one of your questions, that Congresswoman Fiedler has reminded me of. One of the advantages of having rape defined as a sense of graded offenses is that convictions are specifically spelled out as being sexual assaults. Thus, where an offender may be found not guilty of aggravated sexual assault yet guilty of a lesser offense, such as sexual assault or aggravated sexual battery, the criminal record of that defendant will reflect the fact that the assaultive behavior was sexual in orientation. This is particularly pertinent when that person is subsequently convicted of a similar offense. As it is under present law, unless the offender is convicted of rape, the record will not reflect the sexual nature of the assaultive behavior.

Mr. BOUCHER. Mr. Chairman, that concludes my questions. I again want to compliment the sponsors for bringing this matter before us, and I'm sure they desire to see this bill acted upon very promptly.

Mr. CONYERS. We're grateful to you, at the start of these hearings here in Washington. Your work and experience is reflected in your very excellent testimony.

Mr. HOYER. Thank you very much, Mr. Chairman, Mr. Gekas, Mr. Boucher, and members of the committee staff. We appreciate it.

[The prepared statements of Mr. Hoyer and Ms. Fiedler follow:]

TESTIMONY OF HON. STENY HOYER, SEPTEMBER 12, 1984

Mr. Chairman, to my coming to the Congress, when I served as president of the Maryland Senate, I also acted as chairman of the Maryland General Assembly's Special Legislative Committee on Rape and Related Offenses.

Out of the work of this committee came the adoption in 1976 of a major revision and reform of the State's laws and evidentiary rules concerning rape and sexual offenses. This development was clearly the result of the recognition, at the time, of the marked increase in the incidence of rape, together with a growing concern in society about the emotional trauma and treatment experienced by the victims of this crime. This heightened awareness, both the difficulty faced by the prosecutors in successfully prosecuting rape cases and in the mistreatment and handling of victims of these crimes by the very system that should protect them, prompted Maryland to modernize and reform its rape and sexual offense laws.

Unfortunately, the positive reform undertaken by the States has not yet reached the Federal level. Although sexual offense crimes are principally a concern of State law enforcement to the extent that they occur within the special maritime and territorial Federal jurisdiction, they become a significant Federal law enforcement problem as well.

H.R. 4876 would replace the current law by adopting a series of graded sexual offenses. A second significant change would be to replace the term rape with a reformulation of the offense in terms of sexual assault. In addition, it would affirmatively abrogate the common law marital exemption and would make the statute "sex neutral"; that is, it would apply both to hetero and homosexual forcible circumstances as well as expand the scope of the law's protection to males.

Let me for a moment review the current Federal statute as it pertains to this crime:

(1) Section 18 USC 2032, which punishes statutory rape, sets the age of consent at sixteen years. Under the provision, only females can be victims, and the age of the perpetrator is not an element in the crime. Thus it is possible to have a defendant younger than the victim.

(2) Section 18 USC 113 (a), which punishes assault with intent to rape, requires a specific intent to have intercourse as an element of the crime. The touching of a person's intimate parts will not sustain a conviction, without proof that the perpetrator intended to have intercourse.

(3) Section 18 USC 2031 provides for a rape conviction to carry the death penalty or any term of years up to life imprisonment. The Federal statute has been construed by courts to incorporate the common law definition of rape . . . carnal knowledge of a female, not the offender's wife, by force or threat of bodily harm and without here consent. It has been held that this statute does not cover homosexual rapes. *United States* v. *Smith,* 574 F.2d 988 (9th Cir. 1978); cert. denied, 439 U.S. 852 (1978).

A brief review of current Federal law shows that it is gender biased and does not take into consideration the seriousness of the offense. Federal law fails to acknowledge that the factual circumstances of all sexual offenses are not the same and thus should not be subject to the same penalty. A brutal attack by a stranger which leaves its victims crippled, disfigured or in a psychiatric ward is an aggravating circumstances which justifies the imposition of a sentence of life imprisonment.

H.R. 4876 adopts a graduation approach which is premised upon the theory that sexual offenses should be categorized and dealt with in terms of seriousness of the offenses, the degrees of criminal activity undertaken by the assailant and the extent of harm suffered by the victim. Penalties would then be based appropriately upon the character and circumstance of the commission of the offense; that is, upon the dangerousness of and culpability manifested by the defendant and the degree of harm inflicted upon the victim. A rational grading scheme would allow a more just and appropriate sentencing scheme.

The proposed legislation thus replaces the current single crime of rape with a series of graded offenses ranging from sexual battery, which would be a misdemeanor punishable by imprisonment not to exceed one year, to aggravated sexual assault, which would be a felony punishable by up to life imprisonment.

The gradations are as follows:

Sexual battery is defined as an intentional touching either directly or through the clothing, of the genitalia, anus, groin, breast, inner thigh or buttocks of any person, without that person's consent, and with the intent to arouse or gratify the sexual desire of or to abuse. The contact is nonconsensual and is distinguishable from ordinary assault by the requirement of a specific intent to arouse or gratify sexual desire or to abuse. The act needs to involve violence, the threat of violence, or coer-

cion, and may be accomplished through the victim's clothing. Though the touching is an unwanted sexual intimacy, the likelihood of serious physical or emotional harm to the victim is relatively minor and thus sexual battery, unaggravated by other circumstances, is a misdemeanor punishable by a fine of $500 or imprisonment of not more than one year, or both.

Aggravated sexual battery involves the same intentional touching as sexual battery, but the magnitude of harm caused by the perpetrator in many cases will be greater. In certain instances, contact will be aggravated by the use of actual force, intoxicants or other similar substances, or the threat of bodily harm. Additional aggravating circumstances are where the contact is performed upon certain segments of society that are deserving of societal protection, such as children under the age of 12 and those who are known by the offender to be unable to appraise the nature of such conduct whether by reason of mental disease or defect or of intoxication.

The presence of aggravating circumstances raises the likelihood of harm to the victim and measures the degree of criminal activity undertaken by the assailant. Thus, the offense is punishable by imprisonment of up to ten years.

Sexual assault involves a significantly greater degree of sexual imposition. The term "sexual act" is defined as genital intercourse, cunnilingus, analingus, fellatio, anal intercourse and any penetration by any object of any person's genital or anal opening with the intent to arouse or gratify the sexual desire of or to abuse any person.

Sexual assault involves engaging in a sexual act with persons known by the offender to be incapable of appraising the nature of such conduct; those who are physically incapable of declining participation in or communicating unwillingness to engage in the sexual act, and those persons compelled to engage in such sexual activity by threat of present or future physical harm to any person in circumstances in which the person so threatened or placed in fear reasonably believes the offender has the ability to effectuate such harm.

In all three instances, the degree of sexual imposition is significant and though there is an absence of imminent physical violence, there is involved coercion, a marked disregard for a person's dignity and a substantial deviation from acceptable behavior. Thus this criminal behavior is punishable by imprisonment not to exceed 15 years.

Aggravated sexual assault occurs where the sexual assault is accomplished by the use of physical force or by a threat that any person will be imminently subjected to death, serious bodily injury or kidnapping such as where the assailant employs or displays a dangerous or deadly weapon or is aided and abetted by one or more other persons. Additional aggravating circumstances are when the assault is performed upon a child not yet 12 years of age and the offender is at least 4 years older or where the assault is performed upon an individual whose ability to appraise his or her conduct has been substantially impaired by the imposition of intoxicants or other similar substances by the offender. The crime is punishable by imprisonment not to exceed 25 years.

Unquestionably, a victim of aggravated sexual assault suffers personal humiliation, degradation, substantial emotional trauma and often physical harm. Under the legislation proposed, if during the offense of aggravated sexual assault the offender inflicts severe bodily injury, disfigurement, permanent disease or protracted incapacitating mental anguish upon the victim or any person, then the offender is subject to a term of life imprisonment.

Finally, Mr. Chairman, there is a specific provision that deals with the sexual abuse of minors. Under H.R. 4876, Sexual Abuse of a Minor involves a particularly vulnerable section of our society, children. Thus under this section of H.R. 4876 anyone who knowingly engages in a sexual act with a minor, who has attained the age of 12 years but has not attained the age of 16 and is at least 4 years younger than the offender, commits sexual abuse of a minor and may be imprisoned up to 5 years.

Mr. Chairman, as I mentioned earlier, a significant reform which is a byproduct of the grading scheme is that penalties are prescribed with regard for the relative seriousness of the offense, the amount of harm inflicted upon the victim and the culpability of the defendant. The grading scheme does not eliminate the thoughtful imposition of individualized sentences, but it does provide a more reasonable framework for evaluating the appropriateness and fairness of sentences for individuals convicted of committing sexual offenses.

In addition to gradation, a second significant change imposed by the legislation is to replace the term "rape" with a reformulation of the offense in terms of sexual assault. This is more than a symbolic gesture or a simple renaming of a violent

crime, for it does represent a significant break with tradition and with the connotations surrounding the word "rape."

The change carries with it a substantial rethinking both in how we view the crime of rape as well as how it is prosecuted. By defining the offense in terms of assault, which by definition implies nonconsent, the legislation attempts to redirect the factfinder's focus away from the victim to the offender's actions.

The problem of eliminating sexist traditions, which have evolved around the concepts of "consent" and "against her will" is enormous. Historically, the overriding significance attached to determining whether the victim had consented has had serious repercussions upon the victim who often felt as if she were the offender.

Although legislation can not erase sexist traditions or concepts, it can have an influence in reshaping our thinking.

Historically, the term rape has been defined to be a crime that could only be committed by men upon women. By replacing the term rape with sexual assault, by broadening the type of activity which is encompassed within the term "sexual act": and by omitting any references to gender, the legislation is made sex neutral.

As I mentioned earlier, under current Federal law it has been held that section 18 USC 2031 does not encompass homosexual rapes. This is a significant vacuum in Federal law partiuclarly within a prison context. Thus the proposed legislation would apply to both hetero and homosexual forcible circumstances and expand the scope of the law's protection to males. The latter is also very significant when we are confronted with the sexual abuse of children.

Finally Mr. Chairman, a third change intended by the legislation is an affirmative abrogation of the common law marital rape exemption. Historically, the laws relating to rape in most States include, as a bar to prosecution either by statute or case law, the marital rape exemptions and, as I mentioned earlier, section 18 USC 2031 has been construed to incorporate the common law definition of rape, that is carnal knowledge of a female, not the offender's wife, by force or threat of bodily harm and without her consent. The origin of this exemption is traced to a pronouncement by Matthew Hale, Chief Justice in England during the 17th century. That pronouncement stated: "But the husband cannot be guilty of a rape committed by himself upon his lawful wife, for by their mutual matrimonial consent and contract the wife hath given up herself in this kind unto the husband which she cannot retract." Thus the justification for the marital rape exemption, couched in terms of consent, has been deemed a matrimonial privilege existing for as long as the term of marriage.

The theory that a woman possessed the right to deny her spouse sexual access was, and is still, viewed by many State statutes as being inconsistent with the social expectations regarding marriage. Another justification for the spousal exemption is that historically women have been regarded as the property of their husbands just as children were regarded as property of their fathers.

Presently, State laws vary widely as to the extent to which spouses may be prosecuted for the crime of rape. According to a State by State analysis on the marital rape exemption in State criminal statutes by the National Center on Women and Family Law as of January, 1984, at least 28 States bar prosecution of a husband for rape of his wife if they are living together. Twelve States additionally bar unmarried cohabitants from being charged with rape of the women with whom they live. Eighteen States have abolished the exemption and permit prosecution of husbands who rape their wives under all or most circumstances. There are four States which currently bar husbands from being charged with rape of their wives, and no exception is made even where separation agreements or interlocutory decrees exist. Mr. Chairman, for purposes of your consideration and a more thorough review of each State I would like to submit for inclusion in the record a State by State analysis prepared by the National Center on Women and Family Law.

This mosaic of individual rights reveals uncertainty and inequity.

It is true that marriage involves a prior and continuing relation of intimacy. The law does not recognize, however, the right of a spouse to beat the other nor does the law erect shields behind which spouses may engage in otherwise violent behavior. In this instance, sexual assault carries additional burdens. It involves violence as well as a specific kind of degrading and unwanted intimacy. The law does not sanction violence between strangers or among friends. There is no justification for permitting it between spouses.

The justifications for eliminating the marital rape exemption are compelling, however rational the arguments may be for retaining the exemption. Violent crimes against spouses are a national problem. Such crimes committed within the privacy of homes by those who profess love in public and then brutalize their spouse in private moment need to be addressed. It has been estimated that one-third of the

women who seek shelters have also been sexually assaulted by their spouses. The problem that confronts legislators when considering the marital exemption is deciding at what point, if any, should the Government intervene in a marital relationship. I think the appropriate response was eloquently stated by Susan Brownmiller.

CONCLUSION

"Since the beginning of written history, criminal rape has been bound up with the common law of consent in marriage, and it is time, once and for all, to make a clean break. A sexual assault is an invasion of bodily integrity and a violation of freedom and self-determination wherever it happens to take place, in or out of the marriage bed. I recognize that it is easier to write these words than to draw up a workable legal provision, and I recognize the difficulties that juries will have in their deliberations. . ., but the principle of bodily self-determination must be established without qualification, I think, if it is to become an inviolable principle on any level."

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TESTIMONY OF HON. BOBBI FIEDLER, SEPTEMBER 12, 1984

Mr. Chairman, Members of the Subcommittee, I am here this morning to testify on behalf of H.R. 4876, the Sexual Assault Act of 1984. As an original co-sponsor of this legislation, I believe it to be one of the most important efforts put forth during the 98th Congress.

Let me review for the subcommittee briefly why this legislation was introduced. Over the past ten years the laws of many of our states, my own state of California included, have been changed to recognize not only the differences in society and its view of sexual assault, but with our judicial system's ability to deal with it. These changes in state laws have resulted in increased convictions.

Until H.R. 4876, Federal law had remained unchanged and hence the ability of the Federal judiciary to deal with sexual assaults occurring on Federal lands was hampered by the current law's inflexibility.

I would like to cite to the subcommittee two examples of how H.R. 4876 will allow prosecutors to deal more effectively with criminals who commit sexual assaults.

When I was a member of the Los Angeles School Board a six year old child was molested by an adult male. The method of assault was the use of a foreign object. Under current Federal law, if the crime had been committed on Federal property, the assailant could not have been charged with a sexual assault or rape because no gradation in the law exists. Under H.R. 4876 the assailant could have been charged with sexual assault.

Additionally, under current law rape by a spouse is not considered a crime. The subcommittee should know that the majority of women who are murdered in this country are killed by their spouses. Consequently, the incidence of violence by one spouse against another is extremely high. One has only to look at the incidence of wife beating to get some idea of how common this crime is. The fact that spousal rape is not considered a crime on Federal property is one of the last vestiges in our laws where women are treated as property.

There are a number of other legal points to be made about H.R. 4876, but I will leave those to individuals more skilled in the law than I. However, as a representative who comes from a state where a majority of the land mass is Federal property, I would urge the subcommittee to give the women of California and the nation the protections provided in H.R. 4876. When you consider that a crime in my state could be treated completely differently on one side of a street or another. And, that in one case a rapist could conceivably go free while in the other he could receive the just and proper sentence for his crime, passage of this legislation is crucial.

Mr. CONYERS. I'd like to call now a former member of the Judiciary Committee, the Honorable Elizabeth Holtzman, a former member of this subcommittee and Chair of the Judiciary's Subcommittee on Immigration. She was very active on the committee. We go back to the days of the great impeachment resolution. She was the author of the Privacy Protection for Rape Victims Act, which limited the use of evidence concerning a rape victim's reputation and prior sexual activity. She has now, for a number of years, been serving with distinction as the district attorney for Kings County, NY.

Welcome, Ms. Holtzman, back to your former committee. We are very anxious to hear your comments that will be supplementary to your prepared statement, which will be incorporated in the record, without objection.

## TESTIMONY OF HON. ELIZABETH HOLTZMAN, DISTRICT ATTORNEY, KINGS COUNTY, NY

Ms. HOLTZMAN. Thank you very much, Mr. Chairman. It's a special privilege to appear before this subcommittee, on which I had the pleasure to serve when I had the privilege of being a Member of Congress.

I commend you and the other members of the subcommittee for holding these hearings and the sponsors of the bill for bringing forward legislation on this very important subject.

Rape is a very serious problem nationwide. I will go through a few statistics. According to the FBI, one woman is raped every 7 minutes in the United States. One woman in ten can expect to be raped in her lifetime. In 1983, FBI figures show that rape increased last year by 1.5 percent, although other violent crimes decreased. A similar pattern occurred in New York City.

I believe the Federal Government can play a key leadership role in combating the escalating violence against women by adopting a model rape law. It can set an example for other States to follow. But I believe more needs to be done than law reform alone. A comprehensive approach has to be taken to the problem, in my judgment—an approach that deals with problems of the victims by providing help and counseling, one that attempts to address the problem of offenders and providing treatment programs where appropriate, and one that examines and attacks the forces in this society that dehumanize women and encourage violence against them.

I've said the subcommittee and the Congress are in a position to play a critical leadership role in combating the problem of rape nationwide. With respect to the provisions of H.R. 4876, the bill is clearly a substantial improvement over current Federal law. Among the most significant benefits of the bill are that it describes sex crimes in gender neutral terms, which means that men as women will be protected; it broadens the definition of rape to include all acts of sexual penetration; it eliminates the spousal exception, which is an important step in protecting married women; and it creates five distinct offenses with graded sentencing options in place of one.

These are very important features, and I support them all strongly. There are several ways in which the bill can be improved, however. I believe that the use of the word "compels" ought to be eliminated. It's an antiquated word, and it represents an antiquated notion which focuses on what the victim was thinking or doing, as opposed to what the defendant did. The statute in Michigan, which does not use the word "compels," might be a model for the subcommittee to look at.

There is another problem with the bill. It has to do with the bill's effort to differentiate between kinds of threats in terms of the degree of sex crime. I don't believe that it's appropriate in terms of determining the seriousness of the crime to distinguish between

whether the threat to the victim is of imminent harm or the threat is of future harm.

For example, let's take a situation in which you have a young girl who is confronted by a rapist who threatens to kill her mother at the end of the day, as opposed to 2 days or a week away, if she doesn't submit. Is there a substantial difference in the threat? Should there be any difference in the crimes? What the subcommittee ought to be looking at is whether the threat is serious and credible, and if so, then a serious crime is committed. It's not a wise or appropriate way to proceed to start distinguishing between the quality of serious threats and the time when the act threatened will occur.

I also am concerned about a matter that the chairman raised, the question of whether sex crimes are crimes of passion or crimes of violence. It's clear from the experience I've had as a prosecutor as well as the testimony we've already heard that sex crimes are acts of violence and aggression. They're not acts of sexual passion. Nonetheless and despite that, this bill requires the prosecution to show that the defendant had a specific intent to arouse or gratify sexual desire. I think there are other ways of defining criminal sexual contact. Personally, I'm not sure that a specific intent provision should be in the bill at all, but, if it is, it ought to be substantially broadened, because the proposed definition of "abuse" is far too narrow.

There are some other steps that could be taken to strengthen the bill. I think that conceptually the gradations should be different from the ones that are suggested in the bill. I think that there ought to be what I would call aggravated sexual assault as the most serious offense. It should be different from what the bill proposes. In the bill, the only criterion for an aggravated sexual assault is the infliction upon the victim of a particular kind of injury. I think an aggravated assault carrying a substantial maximum penalty of 35 years should be based not only on the kind of serious injury to the victim, but alternatively, on the brutality or viciousness of the defendant. For example, if the defendant commits multiple sexual assaults or if the assailant is a participant in a gang rape or if there is a kidnaping involved, I would suggest that the crime be considered aggravated sexual assault.

I would redefine sexual assault to include forcible acts of penetration without the aggravating factors, since the bill does not, in my judgment, adequately cover such acts. And for the 25-year penalty, a forcible act against vulnerable victims ought to be expanded to include not only victims less than 13, but also persons who are physically helpless, mentally defective, or mentally incapacitated.

In my written testimony, I propose a similar approach to the crimes labeled in H.R. 4876 as aggravated sexual battery and sexual battery. The gist of my proposed changes stem from a different view of what the aggravating factors ought to be.

Finally, with respect to statutory rape provision in the bill, I think the title ought to be changed and the maximum penalty reduced.

Beyond that, I would also suggest that the bill cover attempts, which it does not do now, as well as completed acts of sexual assault.

I also believe, getting to the issue of repeat offenders, that there ought to be mandatory minimum sentences for second-time offenders.

I have included all of these suggestions in my written testimony, and I believe the subcommittee ought to consider each recommendation.

I also believe that the subcommittee ought to consider addressing the issue of lowering the age of criminal responsibility for these sex crimes. You heard testimony about 11-year-olds committing sexual assaults. In most States, these acts would not be considered crimes because a person that age is not considered capable of committing a crime. In New York State, however, for the equivalent crime of aggravated sexual assault, the age at which someone can be prosecuted as an adult is 14. H.R. 4876 is completely silent on the question of rapes, or sexual assaults or aggravated sexual assaults committed by persons under the age of 18. I think the subcommittee ought to consider at what age should young people be prosecuted as adults for this crime?

I also believe that there is an evidentiary question that needs to be addressed. Congress dealt effectively with the question of rape privacy, but there is a new evidentiary issue that is extremely important in the prosecution of rape cases involving the rape trauma syndrome. Sometimes, as a result of the trauma of the sexual assault, the victim will deny that the experience took place, will retract the testimony, or will say it never happened. In a number of jurisdictions courts have now allowed expert testimony by psychiatrists and psychologists on the rape trauma syndrome, a condition that can explain inconsistent postrape statements or acts by the victim. I think it is important that the Federal Government take a leadership role in assuring that this kind of expert testimony is allowed in trials of sexual crimes.

I also believe that a comprehensive attack on the problems of sexual violence should include programs designed to help victims. The effects of sexual assault on victims can be severe and long-lasting. Nonetheless, there is an extraordinary dearth of adequate and appropriate counseling services for rape victims, not only adult victims but child victims around the country.

I believe that it is important for this committee, even if it covered only victims of Federal crime, to enact, as part of the effort to improve the definition of sex crimes, programs to help victims.

I think also that it would be helpful if the Federal Government were to provide assistance to States to create comprehensive counseling centers for victims of sexual assaults and sex crimes.

There is another area that I think ought to be addressed—the trauma, particularly for children, of testifying at trials or before grand juries. I think Congress can take the lead in exploring options that would reduce the extraordinary psychological hardship on children of testifying such as closed-circuit television, specially furnished courtrooms, the presence of support persons, and other innovations.

Another problem noted by some of the sponsors of the legislation and some of the members of the subcommittee is the dearth of treatment programs for young offenders in particular and for offenders in general. I think this is a very serious matter.

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It is especially serious with respect to prosecution of cases in which the defendant is a relative of the victim. Many times the victim will not proceed to prosecute. There will be tremendous pressure—emotional, economic, and societal—against putting the defendant in jail. Currently, there are very few alternatives to jail. If the victim succumbs to the pressure not to proceed there will be no prosecution, maybe no treatment, and the victim will be in a situation where she or he can be revictimized.

In addition, there is a very serious problem as I found in New York State with regard to the absence of treatment programs for young offenders. Suppose a 12-year-old boy sexually molests a 7-year-old girl or boy. Chances are that the act cannot be prosecuted as a crime. Chances are that nothing will happen to that young boy. There are no treatment programs; at most the boy will be put on probation by a family court only to go out and commit those acts again and again and again, creating problems for society as a whole as well as for potential victims.

I think we desperately need to begin seriously to develop programs to treat offenders, particularly young offenders. We have too few programs. In fact, in New York City the first one was established only this year, which gives you an indication of the serious lack in this area and the urgent need for help. I believe Congress can play a leadership role in that respect.

In addition, I think that it is critical to examine the social forces that encourage sexual violence against women. Congress again can take the lead in urging an examination of the role that pornography, the pervasive display on television and in the movies of violence against women, and the depiction of women as sex objects in the media play in generating the attitudes that lead to the violence that this bill seeks to combat.

I believe, as I have indicated, that there is a wide spectrum of efforts that need to be undertaken to combat sexual violence against women. The subcommittee has taken a very important first step in holding hearings on this legislation. I encourage it to adopt the legislation, with amendments that I have proposed, and go on to examine some of the other areas I have suggested as well.

Mr. CONYERS. Thank you for a very thoughtful and detailed exposition of your recommended changes.

Do you think we should deal separately with any kind of program or provision requiring expenditures, or should we try to incorporate it all in one bill?

Ms. HOLTZMAN. Mr. Chairman, I leave that decision to your expert wisdom and guidance. You are aware of the problem of dealing with the attitudes of this administration toward funding programs. But I believe that simply to enact statutes that improve the definition of a crime without also recognizing the desperate needs of the victims of the crime and the serious problems of recidivism, particularly in this case of young offenders, while an important step forward, is not the entire answer to the problem.

Mr. CONYERS. What about your experience in the prosecutor's office? Has the attitude that the woman invited the situation or did not resist adequately—has that male chauvinist attitude been modified, in your experience?

Ms. HOLTZMAN. We have had some very serious battles with the State legislature to get some of the State legislation changed. For example, until recently, New York State required corroboration in cases of sexual molestation of children, which made it virtually impossible to prosecute those cases. My office worked to change that.

In addition, we had a requirement in New York State law that required a woman to put up earnest resistance. That was eliminated.

Then the State legislature decided to put another barrier in the way of prosecution, requiring that a woman fear serious bodily harm or imminent death; otherwise, it wasn't a rape. We had to overcome these terrible hurdles which, I think, reflected deeply held but antiquated notions that a woman is raped only because she asks for it. I think, therefore, that Federal legislation in this area is critical because, while we in New York State have made piecemeal attempts to undo some of the harmful things that the legislature has done and some of the extremely antiquated provisions in our laws, our laws need further reform.

Legislation such as H.R. 4876, with its amendments, can serve as a model for my State and make it easier to change existing laws so we can have truly progressive and effective statutes. Such changes, I am sure, would also help other States to adopt more effective and better legislation. I think this is a key role that the Congress can play.

Mr. CONYERS. Was there a problem, in addition, with the attitudes of the police and the prosecutor's office toward the victims? Has there been any noticeable change?

Ms. HOLTZMAN. I think there has been a serious effort on the part of the police to improve their handling of these cases. I think many, many prosecutors have made serious efforts to try to sensitize themselves and their staffs toward handling these cases.

For example, in our office, in dealing with children, we use anatomically correct dolls. We are also in the process of getting some expert help in reviewing our practices to make sure that we are doing absolutely the best possible thing in terms of dealing with victims.

We have had some encounters with the judiciary that have been disturbing in terms of attitudes toward witnesses, and it is obvious that more progress can be made. But what Congress does obviously sets a tone for how sex crimes are viewed in the State.

Therefore, that is the reason I was delighted to accept the invitation of the subcommittee to testify, because I think Congress can play a key role in sending a very clear message around this country that women who are raped are victims—they are not the perpetrators of the crimes—and in stimulating legislative reform all over this Nation to help prevent the serious crime of sexual violence against women.

Mr. CONYERS. Do you have any experience with the sentencing practices of judges on the subject of rape?

It seems to me that they probably have a fairly wide discretion, and I think how they react to that responsibility is important.

Would you comment on that?

Ms. HOLTZMAN. Well, New York State, while it gives the judges very wide discretion, they also have mandatory minimum penal-

ties. So, for example, while there is discretion, nonetheless, for example, unlike this statute, for an aggravated sexual assault, the second most serious felony, there would be a mandatory prison sentence, and the judge could not give probation for that kind of a crime.

What we try to do as a general practice in these cases, in order to assure the most appropriate kind of sentencing, we try to invite the victim to appear at the time of the sentence to personally make a statement before the judge. I will tell you that very few victims want to do this because the experience of testifying, the experience of trial is so traumatic. But some occasionally do, and we think it is important, one, to make them feel as though they count in the process, and, two, we think it is important also to give the judge a better sense of the consequences of the crime on the victim in terms of arriving at the appropriate sentence.

Mr. CONYERS. Thank you very much.

Mr. Boucher?

Mr. BOUCHER. No questions.

Mr. CONYERS. You have given us a number of new items, and I am very supportive of your testimony and your recommendations. I will personally be willing to go back to the drawing board with all of my colleagues on the subcommittee and with the Department of Justice and see if we can incorporate a number of these.

Ms. HOLTZMAN. I very much appreciate that, Mr. Chairman.

If there is any way I and my staff could be of assistance to you, please don't hesitate to call us.

Thank you again for inviting me and for addressing this very important subject.

Mr. CONYERS. Thank you very much.

[The prepared statement of Ms. Holtzman follows:]

TESTIMONY BY ELIZABETH HOLTZMAN

I appreciate the opportunity to testify before the House Judiciary Subcommittee on Criminal Justice on H.R. 4876, the Sexual Assault Act of 1984. I commend the Subcommittee on Criminal Justice and its distinguished Chairman, John Conyers, for holding these hearings which focus on the serious question of rape and the adequacy of the federal laws on this subject.

Rape is a major problem nationwide. According to the FBI, one woman is raped every seven minutes and one woman in 10 can expect to be raped in her lifetime, statistics that are truly frightening. In addition, FBI figures released last week for 1983 show that rape increased by 1.5% last year despite the fact that other violent crimes were declining significantly. In New York City as well the incidence of rape went up in 1983 although that of other violent crimes went down.

I believe the federal government can play a key role in combatting the escalating violence against women. By enacting a model rape law in place of the present antiquated statute, it can create an example to follow for the other approximately 28 states, including New York, that have still not systematically revised their own laws.

But more needs to be done than law reform. A comprehensive approach should be taken to the problem—one that provides help and counseling for victims, treatment programs for offenders, and examines and attacks the forces in this society that dehumanize women and encourage violence against them.

This Subcommittee and the Congress are in a position to play a critical part in developing a strategy that will help combat the problem of rape nationwide. I urge you to do so.

Let us look first at the provisions of H.R. 4876 itself. This bill is clearly a substantial improvement over current federal law, which makes it a crime simply to "commit rape," with only one grade of sentencing.

Among the most significant features of H.R. 4876 are the broadening of the definition of rape to include all acts of sexual penetration and the description of sex offenses in gender-neutral terms. This new wording protects male as well as female victims of sex offenses and allow oral and anal intercourse to be prosecuted.

In addition, H.R. 4876 eliminates the spousal exception, based on outdated English common law, which completely bars prosecution of rape committed by one spouse against the other. All women, regardless of marital status, should be protected against rape—and the federal government should be at the forefront of the movement to achieve that objective. Ten days ago, in Florida, for the first time, a husband was convicted of rape while living with his spouse. If Congress provides the leadership, it will help encourage New York and other states to reform their laws to protect against spousal rape.

Another benefit of the bill is its creation of five distinct offenses in place of one with gradated sentencing options. This "staircasing" principle, adopted by a number of states which reformed their rape laws, has the decided advantage of allowing greater flexibility in prosecution.

Nonetheless, and despite its good qualities, there are several ways in which the bill can be improved. For example, the bill retains antiquated language, such as its use of the word "compels," (page 2, line 9) which inappropriately focuses the jury's attention on the victim's state of mind rather than on the defendant's conduct. The Subcommittee might wish to examine the Michigan statute for ways in which such language can be eliminated. In addition the bill uses terms such as "severe bodily injury" (page 3, line 9) and "incapacitating mental anguish" (page 3, lines 10-11) but leaves their meaning and scope ambiguous. An excessive and unnecessary burden of proof is placed on the prosecution by the repetitive requirement that virtually each one of the defendant's actions be "knowing" (page 2, lines 4-9). The use of the word "knowing" once per section would be sufficient to establish clearly the requisite state of mind.

The bill improperly differentiates between a threat of "imminent" harm (page 2, lines 6-8) and a threat of future harm (page 4, lines 1-9) and treats the sex attacks differently depending on the kind of threat. There is no justification for distinguishing between a rapist's threat to kill a young girl's mother the next day or the next week if she does not succumb. This provision inappropriately imposes a burden on the victim to assess the immediacy of the threat at a moment of great psychological trauma. Instead, the statute should consider any serious and credible threat to the victim or another person sufficient.

To prosecute certain crimes, the bill also requires that the defendant have a specific intent to arouse or gratify sexual desire or to abuse another person (page 5, lines 23-24). This provision does not adequately recognize the fact that sexual crimes are acts of violence and aggression, not of sexual passion. At the very least, the provision should be broadened to include the intent to annoy, harass, degrade or humilate the victim.

But minor revisions and adjustments in the language of the bill are not enough. I think the proposed statute should be substantially revised and strengthened. The underlying principle ought to be that federal rape laws should punish most severely those offenders whose crimes are committed against particularly vulnerable victims or with excessive brutality or wanton disregard for the physical and psychological consequences of their conduct on their victims.

I recommend that the bill be redrafted according to the following framework.

The most serious offense should continue to be called aggravated sexual assault and should include forcible acts of sexual penetration committed under any one or more of the following circumstances.

(1) Defendant is armed with or displays a deadly weapon.

(2) Defendant causes severe physical or psychological harm to the victim.

(3) Defendant kidnaps the victim.

(4) Defendant commits multiple sexual assaults on the victim.

(5) Defendant knows the victim is physically helpless, mentally defective or mentally incapacitated.

(6) Defendant participates in a gang rape.

(7) Victim is less than 13 years old.

I propose that this crime be punished by a maximum term of imprisonment of 35 years.

Under H.R. 4876 as it now stands, the aggravating factors are only those producing a special kind of injury; the viciousness of the defendant's acts are irrelevant. In addition, under the bill, the court alone finds the aggravating factors; under my proposal those factors would be part of the offense itself and determined by the finder of fact.

Following aggravated sexual assault, there should be the crime of sexual assault in the first degree, the second most serious offense under my proposal. This crime would encompass two kinds of conduct: (1) forcible acts of sexual penetration not involving these aggravating circumstances and (2) non-forcible acts of sexual penetration committed against vulnerable victims (persons less than 13 years old, or persons who are physically helpless, mentally defective or mentally incapacitated.) The maximum penalty for this offense would be 25 years.

Sexual assault in the second degree essentially would encompass forcible acts of sexual contact involving the aggravating circumstances previously enumerated under aggravated sexual assault. Sexual assault in the second degree should also cover any act of sexual penetration committed by a person who is in a position of authority over the victim and who uses that authority to accomplish the act. The maximum penalty for this offense should be 10 years.

Similarly, sexual assault in the third degree, the fourth crime in my proposal, would encompass (1) forcible acts of sexual contact in the absence of aggravating circumstances, and (2) non-forcible acts of sexual contact committed against those vulnerable victims listed under sexual assaults in the first degree. The maximum penalty for this offense would be five years.

Finally, I would modify the bill's proposal on statutory rape by changing the title to unlawful sexual activity with a minor and by reducing the maximum penalty to one year.

In order to provide sufficient protection to the vast numbers of potential victims of sexual assault, it is imperative that this bill cover attempts as well as completed acts of sexual assault. There is no sound reason for not punishing those defendants who are unable by circumstance of time or opportunity to complete the sexual crime which they have initiated.

Any legislative policy of rape reform should include mandatory minimum sentences for second time offenders. I propose a mandatory minimum sentence of 10 years for a second conviction for aggravated sexual assault, 7 years for a second conviction for sexual assault in the first degree and 5 years for a second conviction for any other sexual assault.

It is also crucial to recognize that many of these violent sexual crimes are committed by young teenagers. I therefore urge that the Subcommittee consider reducing the age of criminal responsibility for the especially serious crimes of aggravated sexual assault and sexual assault in the first degree. In New York, for example, a 14 year old can be prosecuted as an adult for equivalent crimes.

In order to facilitate the effective prosecution of rape, Congress should amend the federal rules of evidence to allow specifically the presentation of expert testimony concerning rape trauma syndrome. This syndrome has been recognized as a legitimate psychological phenomenon which affects victims of rape. Expert testimony regarding the syndrome would enable the jury accurately to reconcile apparently inconsistent post-rape statements or acts by the victim. Admission of this expert testimony has been allowed by the courts of several jurisdictions; action by Congress would give an impetus to greater admissibility nationwide.

A comprehensive attack on the problems of sexual violence must include programs designed to help victims.

The effects of sexual assault on victims can be severe and long-lasting. Nonetheless, the availability of appropriate counseling services is seriously inadequate. Congress should provide funding in H.R. 4876 for counseling programs for federal victims and encourage and help fund the establishment of badly needed programs across America.

In this respect it is also important to bear in mind that the trauma of the sexual assault can often be exacerbated by the trauma of testifying before grand juries or at trial. This is particularly true for young children. In New York, the legislature recently adopted a proposal I made to allow videotapes of a child to be used in the grand jury in place of the child's live testimony, thereby sparing the child that difficult experience. Congress can take the lead in exploring other options that would lessen the psychological hardships on children of testifying—such as closed circuit television, specially furnished courtrooms, and the presence of a support person.

Another problem that should be addressed is the dearth of treatment programs, especially for young offenders. It is important for Congress to provide incentives for the development of such programs. San Jose's model program for incest cases, with an 80% completion rate and a 1% recidivist rate, suggest that excellent programs can make a difference.

The efforts of Congress to address the problem of violence against women would not be complete unless it explored and attacked the social attitudes toward women that encouraged this aggression. What role does pornography play in this problem?

The pervasive violence against women on television and in movies? The depiction of women as sex objects in all sorts of media? Congress can provide leadership in getting us the answers.

As my testimony suggests, there is much to be done to combat the problem of sexual violence. In considering H.R. 4876, the Subcommittee has taken an important step forward; I urge it to follow through on the broad agenda for action I have outlined today.

Mr. CONYERS. I now call on the U.S. Department of Justice witness, who is no stranger to the subcommittee, Deputy Assistant Attorney General Victoria Toensing. Ms. Toensing recently testified and helped us with the bank fraud and bribery legislation.

I am happy that she has been reviewing this legislation and has prepared a detailed statement. Without objection, it will be incorporated in the record.

We will be happy to hear from you on this subject.

## TESTIMONY OF VICTORIA TOENSING, DEPUTY ASSISTANT ATTORNEY GENERAL, CRIMINAL DIVISION, U.S. DEPARTMENT OF JUSTICE

Ms. TOENSING. Good morning, Mr. Chairman, and thank you. For your pleasure I have a short statement. Congressman Boucher, I would like to address your question, too, before I am through with my testimony.

I thank the subcommittee for asking me to present the views of the Department of Justice. We strongly urge the reform of the current antiquated rape laws, and we support the thrust of H.R. 4876. However, from our perspective as the prosecutors there are some problems. So we have suggested changes, Mr. Chairman, which we think will be helpful to successful prosecutions of this heinous crime.

As I said, we welcome the approach in H.R. 4876 of having the gradations of sexual offenses. This approach would prohibit a much wider range of sexual and violent behavior directed against the victim.

However, there remains a gap. Ms. Holtzman also addressed it. Under the bill as drafted there is no criminal sanction for an attempted sexual offense. For example, since there is no attempt provision, the bill would not cover a situation where an offender coerces a victim by threat to go to some secluded spot for the purpose of having a sexual act and at the last minute is prevented from carrying this out by a bystander or a police official. We feel it is important that this type of conduct be subject to a sex offense violation if the intent to do a sex offense violation is there.

Additionally, as a prosecutor, when I look at a person's criminal record and it just says "assault," that tells a much different story than a record or a sexual offense violation as far as knowing the history of the offender. So we urge the committee to enact the attempt provisions.

Second, the maximum terms of imprisonment for the two most serious offenses, aggravated sexual assault and sexual assault, should be increased.

First, I want to address the most serious offense, that of aggravated sexual assault. It is punishable under H.R. 4876 by a maximum of 25 years, unless during the offense the offender inflicts

"severe bodily injury, disfigurement, permanent disease or protracted, incapacitating mental anguish on any person."

In the Department's view, Mr. Chairman, there should be a possible life imprisonment for any conviction under aggravated sexual assault. The present law has a maximum life imprisonment. This is a serious offense, and there could be circumstances where the offender should be subject to serious sanctions, such as where the victim was not permanently disfigured or severely injured, but where the defendant has a previous criminal history of sexual crimes. But there's another very important consideration on this issue. To require the prosecutor, in cases where there is not the serious bodily injury or disfigurement, to prove that the victim has suffered "protracted, incapacitating mental anguish" once again victimizes the victim. The evidence which would appear from the bill's language to be necessary for that element to be proved would subject the victim to yet more embarrassing revelations. In addition to testimony about having been sexually violated, we pile on questions about the victim's future mental health, in order to prove that element. Therefore, we ask that life sentence be applicable to any violation of that provision.

We additionally recommend that the penalty for the second most serious offense, the sexual assault offense, be increased to 20 years instead of the 15 years proposed under the present bill.

Third, H.R. 4876 is silent on the issue of corroboration. We ask for a clear statement, either in the bill or the legislative history, that no corroboration is required. Current Federal law does not have sufficiently clear precedents to ensure that no corroboration will be required. A congressional statement is needed to avoid unnecessary ligitation.

There are other changes we go into in more detail in our prepared statement—such as expanding jurisdiction to include offenses against a person in official detention in Federal facilities—Congressman Hoyer testified about that earlier—imposing fines for all the offenses; eliminating the 4-year age differential as a required element under aggravated sexual assault and leaving the decision to charge in such cases to prosecutorial discretion; and providing some conforming amendments to make this bill applicable to Indian reservations.

I'll be happy to provide answers to any questions you might have on these issues. But let me say in closing that the Department strongly supports the thrust of this legislation—a rationally graded, comprehensive, sex-neutral series of offenses—and we will be delighted to provide any help we can to work out the proposed changes.

If you prefer, Mr. Chairman, I can wait until it's time for Congressman Boucher to ask his questions before I answer.

Mr. CONYERS. You can refer to it now, if you will.

Ms. TOENSING. Congressman Boucher, the case law I happened to bring with me has one of the key provisions on rape regarding your issue. It says to constitute rape, it is not required that the person attacked and threatened with rape has to fight "to the last ditch," and that a threat of bodily harm with some degree of physical force is sufficient. It seems to be pretty boilerplate law, and I would think that force, under many factual situations, would require re-

sistance in order to show that there was force. So the language in the bill, "knowingly compel," might be a problem for the prosecutor. I would suggest some change in that language to perhaps "cause" rather than "compel."

Mr. BOUCHER. Thank you, ma'am. I appreciate that. The path we chose to follow in Virginia was to state in the statute that once the victim had made known his or her desire not to engage in the conduct, that there would be no further requirement of physical resistance beyond that point. That was the thrust of it. But would a statement to that effect cause problems for you?

Ms. TOENSING. I can't see any problem. In many factual situations, the fact that the person was threatened would be sufficient evidence, but we have the verb "knowingly compel". There may be a factual situation when perhaps there's a knife or something that on its face looked compelling, but you have to show you resisted, in order for that to be forced.

Mr. BOUCHER. So if we soften that to "cause," that's a step in the right direction?

Ms. TOENSING. A more neutral verb might be of help.

Mr. BOUCHER. Thank you.

Mr. CONYERS. Do you have any idea how many rape prosecutions are brought in the Federal jurisdiction annually?

Ms. TOENSING. I'm told 150, but let me check on that.

[Pause.]

Mr. CONYERS. Our information is that there were about 80 annually.

Ms. TOENSING. We have approximately 140 sexual offenses, but it appears that 80 of them are classified as rape.

Mr. CONYERS. What are the other 60? What are they classified as? Are those attempts or assaults?

Ms. TOENSING. They are carnal knowledge and white slave traffic, not the assaults. It would not include something between two males, because that would have to be prosecuted as an assault.

Mr. CONYERS. When we spread this over 94 district courts, this crime is prosecuted very rarely, so a change of the law is really more largely for the fact of bringing this ancient statute up to date and aiding, perhaps, the States in bringing forward a more modern and comprehensive rape law. Would you agree with that?

Ms. TOENSING. I never thought that insignificant numbers were a deciding factor in changing legislation. You probably heard that argument with the insanity defense. I think the example that the Federal Government sets for the various States cannot be denied. The importance of that is extremely significant. Also, we have such a gap when we prosecute these kinds of crimes, for example, homosexual rapes. Whenever rape occurs in a Federal enclave, it's important the law provides that it be punished.

Mr. CONYERS. I don't have any other questions.

I think that your suggestions are worthy of consideration. I'm quite frankly a little bit reluctant about mandatory minimums. I would assume that a judge for some reason may not want to impose a very long sentence for a second offense.

Ms. TOENSING. For the record, Mr. Chairman, that was Ms. Holtzman's suggestion, not mine. We've taken no stand on that.

Mr. CONYERS. But the life, the 35 years to life, also leaves me with some reluctance. I think the treatment aspect, perhaps, is one that I'm more concerned with, but I'm not sure we can entertain programs in this area at the same time that we bring the law up to date. It might be important that we keep those separate. Maybe we should try it. What do you think?

Ms. TOENSING. The Department has not taken an official stand on that. Certainly, treatment and protection for victims are the subject of a very strong mandate from this administration, Mr. Chairman. So that is possible legislation we could go into.

Mr. CONYERS. But you would prefer that it be separate to the reform of the statute itself?

Ms. TOENSING. If I answered you, it would be a gut reaction right now because it's not one of our suggestions. We'd have to put a couple minds together on that.

Mr. CONYERS. Surely. Mr. Boucher.

Mr. BOUCHER. Thank you, Mr. Chairman. I want to compliment the witness on her very fine testimony this morning. I would like to have the citation to the case that defines the degree of resistance which is required, as a first matter. And if you can submit that to us, I'd apprecite it.

Second, I noticed with interest, your suggestion that we should add Indian reservations to the territorial jurisdiction statement in the bill. I wonder if we say "special maritime and territorial jurisdiction of the United States or a Federal prison," do we need to specifically mention an Indian reservation, or is that covered under "territorial jurisdiction" of the United States?

Ms. TOENSING. It's my understanding that we will have to amend some of the specific criminal laws that apply to Indian reservations in order to make this applicable to them. Let me check with my expert.

It's always nice to know you were correct.

Mr. BOUCHER. If we simply added in reservations to this listing, would that solve the problem?

Ms. TOENSING. Perhaps a better legislative approach would be to amend the laws that pertain to the Indian reservations.

Mr. CONYERS. Did you wish to make a statement?

Ms. TOENSING. This is Roger Pauley from the Department of Justice.

Mr. PAULEY. The problem, Congressman, is that the Major Crimes Act, which is the principal Federal statute permitting Federal prosecution of certain enumerated major felonies that occur in Indian country, refers now in the antiquated common law terms that the special maritime and territorial jurisdiction statutes use to refer to crimes of rape and carnal knowledge. Thus, it would seem that the same proposed modernization for the special maritime and territorial jurisdiction statutes should be made applicable to the Major Crimes Act. We had previously furnished some suggested language to the staff.

Mr. BOUCHER. Thank you very much. Mr. Chairman, that's all the questions I have.

Mr. CONYERS. That's a very important consideration, and I'm glad it was gone into in detail.

Thank you very much, Ms. Toensing for your statement on behalf of the Department of Justice. We also have a letter from Assistant Attorney General McConnell to Chairman Conyers that will be made a part of the record. Thank you very much.

Ms. TOENSING. Thank you, Mr. Chairman.

[The prepared statement of Ms. Toensing and the letter from Mr. McConnell follow:]

STATEMENT OF VICTORIA TOENSING

Mr. Chairman and Members of the Subcommittee: I appreciate the opportunity to present the views of the Department of Justice on H.R. 4876, the "Sexual Assault Act of 1984." The Department strongly urges reform of the current federal sexual offense laws. We support the approach to do so in H.R. 4876. There are several aspects of H.R. 4876 as drafted, however, which cause problems, and my statement will suggest changes helpful to the successful prosecution of these heinous crimes.

H.R. 4876 replaces the current rape and statutory rape laws in title 18 of the United States Code with a series of graded offenses. It substitutes more modern terms, such as aggravated sexual assault and sexual abuse, for the old common law terms of "rape" and "carnal knowledge" and includes a precise description of this prohibited conduct. H.R. 4876 eliminates the current exception under federal law that a spouse cannot be raped. And, it makes the federal provisions sex neutral.

The most serious offense under H.R. 4876 is aggravated sexual assualt, which consists of compelling another person to engage in a sexual act by physical force or threat of death, serious bodily injury, or kidnaping. The offense of aggravated sexual assault also incudes two other types of behavior: (1) participating in a sexual act with a person under twelve years of age if the offender is at least four years older and (2) forcing an intoxicant on a person, which impairs his or her ability to appraise or control conduct, and who thereby performs a sexual act with the offender. Aggravated sexual assualt would be punishable by up to twenty-five years' imprisonment or by life imprisonment in certain circumstances.

The second most serious offense under the bill is sexual assault. This is defined as (1) engaging in a sexual act with a person known by the offender to be incapable of appraising the nature of the conduct or physically incapable of declining participation in it, or (2) compelling a sexual act through threats or fear. This offense is punishable by up to fifteen years' imprisonment.

Additionally, the bill prohibits a person from having a sexual act with a minor between twelve and fifteen years of age if the offender is at least four years older than the minor. Finally, H.R. 4876 proscribes aggravated sexual battery and sexual battery, which concern "sexual contacts," as defined in the bill and distinguished from "sexual acts." The bill applies to offenses within the special maritime and territorial jurisdiction of the United States.

The need for reform of the federal sexual offense statutes is clear. Indeed, criminal code revision bills considered in recent years in both the House and Senate Judiciary Committees included proposals for reform similar in outline to H.R. 4876. Current law prohibiting rape is very limited. It does not proscribe a full range of serious sexual offenses. Sections 2031 and 2032 of title 18, United States Code, prohibit only rape and statutory rape; 18 U.S.C. 113(a) prohibits assault with intent to commit rape. Aside from prostitution offenses, these are virtually the only federal statutes that describe and punish sexual crimes. The present rape statute, section 2031, has been construed as proscribing rape as defined in the common law—that is, carnal knowledge of a female (not the offender's wife) by force or threat of bodily harm and without her consent. Rape, under present federal law, has been held inapplicable to homosexual rapes.[1] The statutory rape provision, section 2032, also reflects gender bias by expressly protecting only females (not the offender's wife) under the age of sixteen from carnal knowledge. No lesser offenses, such as those described in H.R. 4876 as well as in more modern State penal codes, are in the current United States Code. Nor does the Code punish such serious offenses as forcible sodomy.

Therefore, the Department of Justice supports the thrust of H.R. 4876, that is, to create a rationally graded, comprehensive sex-neutral series of offenses in place of the inadequate laws now on the books. However, there are certain aspects of the bill as introduced which the Department does not favor. In our June 6, 1984, letter to the Chairman of the Judiciary Committee, the Department furnished requested

[1] *United States* v. *Smith*, 574 F.2d 988 (9th Cir. 1978), cert. denied, 439 U.S. 852 (1978).

comments on H.R. 4876 by discussing some difficulties presented by the bill and the need for amending it. Since that time, and upon further reflection, we have identified certain additional areas in which we believe the bill should be strengthened. I shall discuss only our most significant concerns.

First, we recommend that H.R. 4876 be amended to include attempted offenses. Despite the fact that H.R. 4876 provides a series of graded offenses, it nevertheless retains unmerited gaps because it lacks an attempt provision. For example, it would not cover the situation where an offender coerces a victim by threat to go to a secluded area to compel a sexual act but is prevented by a bystander or law enforcement official from actually engaging in the sexual act or in sexual contact as defined by the bill. Such conduct should not escape new federal sex offense laws if the offender intentionally engages in the conduct and if the conduct constitutes a substantial step toward the commission of the crime.

Second, the maximum terms of imprisonment applicable to the most serious offenses of aggravated sexual assault and sexual assault should be increased. H.R. 4876 provides that aggravated sexual assault is punishable by a maximum of twenty-five years' imprisonment, except that life imprisonment is authorized if during the offense the offender inflicts "severe bodily injury, disfigurement, permanent disease, or protracted incapacitating mental anguish on any person." In our view, life imprisonment should be applicable to any conviction for aggravated sexual assault. This change would make punishment for aggravated sexual assault consistent with punishment under the present rape law. Determining whether an offender has inflected "protracted incapacitating mental anguish" could be extremely difficult in many cases. Moreover, the seriousness of the offense justifies the possible imposition of life imprisonment even where the offender has not permanently disfigured the victim or inflicted "severe bodily injury," such as where the defendant has a previous criminal history of sexual crimes. We also believe that the penalty for sexual assault should be increased from fifteen to twenty years to reflect the seriousness of this offense.

Third, H.R. 4876 should include, either in the bill or its legislative history, a clear statement that corroboration is not required to prove the offenses under the bill.[2] Without a clear statement on the issue of corroboration, H.R. 4876 would leave courts to fashion their own rules. While current federal case law indicates it is unlikely that corroboration would be required, the case law is not so extensive as to have settled the matter. A statement by Congress would avoid the need for protracted litigation.

Fourth, the jurisdictional scope of H.R. 4876 should be expanded to cover offenses committed against any person in official detention in a federal facility. There are seven federal prisons which are not currently within the special maritime and territorial jurisdiction of the United States, although plans exist to bring them within such jurisdiction. Extension of jurisdiction to persons in official detention in a federal facility would assure coverage of sex offenses committed against inmates of a federal detention facility following, for example, arrest, surrender in lieu of arrest, charge or conviction of an offense, or an allegation or finding of juvenile delinquency. Such an extension of jurisdiction would also include coverage of persons in official detention in a federal facility pursuant to a State sentence.

Fifth, the four-year age differential, required as an element of the proposed offense of aggravated sexual assault, should be deleted. As proposed, the bill would make it an offense for a person to engage in a sexual act with an individual less than twelve years old only if the actor were at least four years older than the victim. This evidently represents an effort to distinguish, in terms of blameworthiness, between sexual activity among young peer group members and such activity between a young person and a person considerably older than that person, who may well have taken advantage of the victim's immaturity. While we acknowledge that some increase in the gravity of the offense may be present when the offender is significantly older than the juvenile victim, we do not agree that the solution is to decriminalize sexual conduct with persons less than twelve years old based upon an arbitrary age differential. The effect of such legislation might be to send an unfortunate signal that the Congress condones sexual activity by and with pre-teen age children, so long as both participants are of similar tender years. We believe that the better solution is, as under current law, to criminalize sexual activity by anyone with a person under twelve years old, and to leave to prosecutorial and judicial discretion the occasions when such activity occurs between two persons of very young

[2] We express no view as to whether corroboration should, nevertheless, be required in interspousal cases since this issue is best left for determination by the Congress.

age. We are not aware of any instance in which such discretion is alleged to have been abused.

Sixth, H.R. 4876 does not provide for an appropriate defense to the crime of sexual abuse of a minor between the ages of twelve and fifteen regarding the defendant's belief as to the victim's age. Some teenagers have been known to hold themselves out as adults. Sex offense laws should reflect the view that, in some limited circumstances, a belief as to the victim's age is a defense to a prosecution under proposed 18 U.S.C. 2243. A person who genuinely and reasonably believes that another person with whom he or she engages in sexual activity is sixteen years of age or older does not pose the same danger to society as a person who intends to have sexual relations with a child. However, the availability of this defense should be limited to persons who establish by a preponderance of the evidence that they not only believed the other person to be sixteen or older but had substantial reason for this belief. Moreover, the defense should be limited to cases in which the defendant's course of conduct did not also constitute an offense under 18 U.S.C. 2251, sexual exploitation of children; 18 U.S.C. Chap. 117, the White Slave Traffic Act; or 18 U.S.C. 1952, the Travel Act, to the extent that this last provision is violated with respect to prostitution activities. The limitations on this suggested defense are designed to prevent a person from commercially exploiting teenage victims by developing false documentary evidence indicating the victim's age to be sixteen or older.

Seventh, approriate fines should be provided for each of the offenses. The bill currently only provides for a fine (of $500) for violations of proposed 18 U.S.C. 2245 concerning sexual battery but not for the more serious offenses in the bill. In our view fines should be included for all the offenses since some cases may warrant a fine as well as imprisonment.

Eighth, conforming amendments to other statutes, such as the Major Crimes Act, 18 U.S.C. 1153, are necessary to deal with the elimination of the current rape and carnal knowledge provisions, and certain ambiguities and overlap in the sexual assault and aggravated sexual assault provisions should be remedied.

We suggest that thought be given to the possibility of redesignating the labels of the enumerated offenses. To some extent, "assault" and "battery" as used in H.R. 4876 are confusing inasmuch as the offenses defined by these terms do not correspond to their common law definitions. Additionally, it may be simpler to combine all of the crimes relating to children into the same section.

With these amendments and the others recommended in our letter to Chairman Rodino, H.R. 4876 would constitute a valuable revision and strengthening of the federal sexual offense laws.

U.S. DEPARTMENT OF JUSTICE,
OFFICE OF LEGISLATIVE AND INTERGOVERNMENTAL AFFAIRS,
*Washington, DC, September 28, 1984.*

Hon. JOHN CONYERS, Jr.,
*Chairman, Subcommittee on Criminal Justice, Committee on the Judiciary, House of Representatives, Washington, DC.*

DEAR MR. CHAIRMAN: This is in response to your letter of September 20, 1984, asking whether the Department of Justice supports the amended version of H.R. 4876, the "Sexual Assault Act of 1984," recently reported by the Subcommittee on Criminal Justice. The bill is a reform of the federal rape and carnal knowledge laws and would replace current chapter 99 of title 18, United States Code, with a series of graded, sex-neutral, sexual offenses.

The Department strongly supports the reported version of H.R. 4876. The recent amendments substantially conform to the recommendations made in our letter of June 6, 1984, to the Chairman of the Committee on the Judiciary and in the testimony of Victoria Toensing, Deputy Assistant Attorney General of the Criminal Division, before the Subcommittee on September 12. We believe that the bill in its current form would constitute a significant improvement over current federal law prohibiting sexual offenses.

The Office of Management and Budget has advised that there is no objection to the submission of this report from the standpoint of the Administration's program.

Sincerely,

ROBERT A. MCCONNELL,
*Assistant Attorney General.*

Mr. CONYERS. I'd like now to call our final witness, Mrs. Carol Coady of the Committee on Violence Against Women of the National Organization for Women. She's also a board member of the National Coalition Against Sexual Assault. We appreciate your listen-

ing through the hearing. Feel free to make any comments you might want about anything that has been discussed here.

TESTIMONY OF CAROL COADY, COMMITTEE ON VIOLENCE AGAINST WOMEN, NATIONAL ORGANIZATION FOR WOMEN, ON BEHALF OF THE NATIONAL COALITION AGAINST SEXUAL ASSAULT

Ms. COADY. Thank you, Mr. Chairman. Good morning. Members of Congress and congressional staff.

Mr. Chairman, as you just said, I am a member of the National Organization for Women's National Task Force on Violence Against Women. I'm also on the board of the National Coalition Against Sexual Assault.

I speak today on behalf of myself and on behalf of the National Coalition Against Sexual Assault in support of H.R. 4876. This legislation, as drafted, will increase the number of convictions for sexual offenses. Prosecutors will be able to specifically define the offense committed against the victims and by defining the offense, in terms of assault, which implies nonconsent, this legislation will focus not only against behavior but on the offenders' actions. The insensitive questioning of the victim during a rape trial oftentimes attempts to portray the victim as more guilty than the offender.

My testimony here today will focus on allowing spouses the legal protection that any other victim of sexual assault has. Presently, 22 States, plus Washington, DC, allow prosecution of a rape committed when the couple is married and share the same household. In 24 States, marital rape is not a crime, but the definition of not married makes possible prosecution only when the couple is living apart, has filed for a sepration agreement, or filed for an order of protection. In four States, the spouse cannot be prosecuted until the day of divorce. In the State of West Virginia, rape laws are so horrendous, that a man who rapes his date cannot be prosecuted, even if they have never had previous sexual relations.

To date, since 1978, nationally, we have had 154 reported cases of marital rape. Of these 154 cases, 100 have gone to trial. We have had 89 convictions. Twenty-four of these convictions have been while the spouses were married and living together, including the recent Florida conviction, the *State of Florida* v. *William Rider,* which was erroneously reported in the press as the first living together case. This case is the first married and living together case to have the issue of whether or not it could be prosecuted decided by an appeals court.

Sociological studies of rape in marriage done by Richard Gelles, a prominent researcher, whose work focuses on violent families, states that there may be up to 1 million cases of marital rape occur each year. Diana Russell's book, "Rape in Marriage," points out that one woman in seven who has ever been married has been raped by her spouse. She also found that twice as many women have been raped by husbands as by strangers. It's extremely difficult to get all the statistics on the occurrence of rape in marriage, because in the States where rape in marriage is not a crime, there are no statistics kept.

There are three historical reasons which have permitted the marital exemption in the rape laws. First we have marital privilege. Sir Mathhew Hale, a 17th century chief justice of England, wrote a lengthy article on rape, in which he states "But that the husband cannot be guilty of rape committed upon his lawful wife, for by their mutual matrimonal consent and contract, the wife hath given up herself in this kind unto her husband which she cannot retract."

Second, we have the unity theory. Justice Blackstone states, "In marriage, the two become one, and that one is the husband."

Third, we have the property theory, which as been discussed on numerous occasions by the other people who have given testimony. As the Yale Law Journal articles explains, "but as a husband cannot be guilty of robbing himself, likewise the husband cannot be guilty of rape, because he would be guilty of raping himself of his own property."

There are many misconceptions about the concept of spousal rape. Legislators have said to me, "But we can't have a law like this, because the government will be meddling in the bedroom." The reality is that the government already meddles in the bedroom but it protects the offenders' interests. This would be an appropriate statement for consensual relations, but we are talking about assault. The government cannot both take away a woman's right to consent in marriage and excuse that by calling it a between-consenting-adults' issue. Another misconception is that a spouse should charge the offending spouse with assault. First of all, calling a crime by another name when it is specifically exempt in the law will not hold up in court. Second, an assault charge does not address the additional devastation, suffering, and humiliation of rape victims. A third misconception is that the wife does not suffer much. The reality is that a women who is raped by a stranger lives with a memory. A woman raped by her husband lives with a rapist every day of her life, and she never knows when another attack will occur.

Another myth is that a rape prosecution will break up a marriage. As the Justice of the Supreme Court of the State of Virginia stated in April 1984, *State* v. *Weishaupt:* [1]

> This argument is absurd. It is hard to imagine that charging a husband with a violent crime of rape can be more disruptive of a marriage than the violent act itself. Moreover, if the marriage has already deteriorated to the point where intercourse must be commanded at the price of violence, we doubt that there is anything left to reconcile.

Another misconception is that the wife will lie to get a better divorce settlement, child custody, or support. Our government is set up to weed out frivolous charges. This law will only give spouses options. In the 22 States that have this law, women are not flocking to the police to accuse their spouse of rape. Also the same criteria for establishing evidence in stranger rape cases applies to all marital rape cases.

There have been numerous amendments offered by State legislators to marital rape bills. I agree with none of these. The first is an amendment which I discussed earlier, that the spouses must be

[1] Editor's note: *Weishaupt* v. *Commonwealth*, 227 Va. 389, 315, S.E. 2d 847 (1984).

living apart, have filed a separation agreement or both, filed for a divorce or obtained an order of protection. Many rapes occur during the last stages of an intact marriage, because of the intense feelings of anger and powerlessness experienced by the husband toward the wife, or as a way for the husband to overpower the wife to make her stay, or as a way to make the woman pregnant, in the hopes that she will then be unable to leave. Because these women are prisoners in their own home, it is cruel and irrational to expect them to leave. It is the law's job to remove their assailant.

Presently in Pennsylvania, we have a marital rape case before the State Supreme Court. The husband beat his wife. She fled to her mother's, which was a distance away. The husband found her six hours later, beat her up and raped her. The State of Pennsylvania found him guilty of rape. His case is being appealed because he states they were not technically living apart, because she was only gone six hours. This case clearly demonstrates the problem with this amendment.

There is another myth that men only rape their wives when they discover that their property has developed a will of her own, and they are attempting to get their property back under their control. Many husbands who think that they must be both, begin the marriage with a rape and continue the degradation by brainwashing the woman into believing that no one else will want her.

Another amendment would attempt at making spousal rape a lesser penalty. Most marital rape victims suffer more physical injuries, not less than stranger rape cases.

Another amendment is that there must be a history of physical violence, in order to charge the spouse with rape. No other crime requires a victim to clearly demonstrate that another crime was committed before she can exercise her right to justice for the rape crime. Sometimes there will be no evidence of physical violence because the husband forced her to submit by threatening to kill her.

Another amendment is a statute of limitations in regard to reporting. California law requires a victim to report this felony within 120 days. There have been several cases in California alone where the victim was comatose after the rape incident and was not able to prosecute because the reporting period had passed. Prosecutors have been angered because their cases have been weakened. In these situations, they could only prosecute for one of the rapes, although there may have been a long history of rape.

The final amendment which I would like to discuss is that the marital exemption still applies for people who are retarded or under the influence of drugs or alcohol or asleep. I find it unconscionable to further discriminate against a group of people in our society who must always struggle for daily survival. These provisions are in our present rape laws to protect people who are unable to consent. Marriage should not put them in more jeopardy.

Most of the States have passed this legislation without the amendments. We have not had any opposition to this bill. The major opposition to the bill is the individual legislator's personal fears, biases, and misconceptions. Many are concerned that their personal reputations will be jeopardized by a vindictive wife. In States that have passed this legislation, this has not happened. Prosecuting attorneys oftentimes lead the lobbying efforts, because

nationally we have an 86-percent conviction rate. A major reason for this is the additional physical violence inflicted upon the victim besides the rape act itself. Statements from prosecuting attorneys show that women are not coming forth with trumped-up charges.

Presently the current Federal rape laws do not clearly exempt spouses from prosecuting each other. Rather the law remains silent, for it doesn't say anything about spousal rape. Under current Federal law, a case would go to the U.S. Supreme Court for review to uphold the conviction. To date, State supreme court decisions have been upheld. If a case were prosecuted under Federal law, it would most likely be upheld by the U.S. Supreme Court. The major difference between the Federal sexual assault law proposed here is that the legislative intent is clear that spousal rape is a crime, while the current law is silent.

I am the second woman in this country to speak out publicly as a victim of marital rape. The first woman was Greta Rideout from Salem, OR, in 1978. Over the last 3 years I have traveled extensively across this country sharing my own experience as a victim and the dynamics, history, and legal issues concerning rape in marriage. I have been interviewed on radio and television over 100 times and by the press at least another 100 times. I have traveled to more than 20 States lecturing and lobbying and giving keynote speeches close to 200 times.

I speak out because there are so many thousands of women's lives at stake. It is always painful for me to share my experience for a time in my life where I felt I had no control over my day-to-day existence. I must become a victim again, at least emotionally, so that others can understand the depth of my pain when I was raped by my husband.

I grew up in a working class family who espoused traditional values for women, that a woman's fulfillment in life is to be a wife and mother. I married at 19. My husband was 23. I was the caretaker in my family, because I was the oldest of six children. I desperately needed to love and be loved, and I did not see the aggressive personality that my husband would become. He never was violent while we were dating. In the 6 years I was married, I was beaten over 800 times. I had a son 3½ years into the marriage, because I felt that I did not have a right to decide that it was not OK to have a baby at this time. He had made the decision.

Part of the reason I stayed was because I was very religious. I felt a failure, that it was my responsibility to make our home happy and somehow I was failing. I guess the major reason I stayed is because I didn't have any money. In the early 1970's in Pennsylvania, there were no shelters.

I would get beaten for forgetting to put the cap on the toothpaste, for not turning the shower drain button off and for many other numerous minor offenses.

One morning my ex-husband came home. He told me to get up and make breakfast. It was 8 o'clock in the morning. So I went downstairs. I burned the eggs because he started screaming at me for how stupid I was because I forgot to put the outside porch light on before I went to bed the night before. When I burned the eggs, he beat me for about half an hour in front of my 2-year-old son, who stood there and screamed, "Don't hurt my mommy." And he

used to pull his hair out as a way of expressing his frustration, because of the horror that he would see.

About 10 minutes after the beating, my husband came in the kitchen while I was making new eggs and said, "Get upstairs or I'm going to kill you and I'm going to kill the baby." I never thought he would rape me because rape happens to you from a stranger not from your husband. He ripped off my pajamas in one pull, and I didn't know what to do. Because it was February, it was cold outside, and I didn't know if I could make it to my neighbor's house. I didn't want anybody else to see me naked because I felt like I would be embarrassed, and I really didn't think I could make it out the door with my child, and I wasn't going to leave my child behind.

I guess my basic reason for staying was that I didn't feel he would really rape me.

I thought he was going to beat me up. So he beat me up again through our kitchen and our dining room into the living room to get upstairs. When I was in the living room, I tripped over a toy. He jumped on top of me. He unzipped his pants. My son was kneeling at my head crying. My ex-husband did not even see that my son was there.

I asked that we go upstairs, so Brian, my son, wouldn't see. All the way up the steps he kept telling me he was going to kill me and he was going to kill the baby, if I didn't do this. We got into the bedroom. I locked the door somehow. I ended up being in the corner of our room. He picked me up, and I hated him and I hated me, because I knew I wasn't strong enough to fight him. He looked like "The Hulk." He picked me up; he threw me on the bed and couldn't penetrate me because I was too tight, because I was frightened. He started to punch me in the face to loosen up. After that it lasted for about 5 minutes. And he said, "This is the way you always wanted it."

I took a shower. When I got up, I couldn't stand, because I didn't have—my legs wouldn't hold my weight. I went in and took a shower because I felt dirty. Then when I went downstairs, I was sobbing hysterically the whole time. And I came down, and I said, "What did you do to me? Do you know what that's called?"

He said, "A man can't rape his wife. There's no such law. Check it out." And he was right, because at that time there was no law in any State in this country.

I left after that, but it took me 6 weeks because I had to leave in secret, because he told me he would kill me if I left. I blanked out for 2 days after that. I needed to take care of my son, going to work. I worked part-time. I know I did those things, but I don't remember any of that. I remember being in church at a meeting talking to this priest who was a friend of mine about what happened. And after I told him about the incident, I asked him, "Do you know what that is, Father?" And he said, "Yes, that's rape."

In the 6 weeks that it took me to get a secret plan to move out, he raped me 11 more times. He would just pull down the bottom of my pajamas and pull off the tops and bit my breasts as a way—until I cried out in pain. The first time was the worst.

I just share that with you, because I feel it's really important that people really understand what victims suffer. It took me 3½

years to get over it. I entered counseling. It was hard to talk about. Part of the way I survived those 800 beatings is I became numb from the pain. When he would pick up and throw me against the wall, I would not feel any physical sensations. I had to reexperience all that emotionally, so that I could get over it.

And what's really tragic for me is that I travel around the country, my experience is not unique, it's common. That's the tragedy. This is one of the reasons why I really would urge all the Members of Congress to seriously consider making sure that the marital exemption—that wives have the same legal protection as all other women in the country, the United States.

Thank you for your time. I'm willing to answer any questions.

Mr. CONYERS. Thank you for your testimony, but more so for your courage and commitment in telling of your personal experience.

Let me just ask you, are increasing numbers of women coming forward with their experiences?

Ms. COADY. Not for prosecution, but at least they come forward and recognize that they were raped.

The prosecuting attorneys still have a lot of misconceptions, and it is like domestic violence was 10 or 12 years ago, you know. You had to be mentally ill to have this happen to you. So women don't come forward. But as the focus of whose fault it is and what the problem is about is becoming more defined, there is less blame on the victim. Women are coming forward.

I would say in another 3 or 4 years that there will be more women coming than before.

Mr. CONYERS. Are you still only the second woman in the country who has spoken out on marital rape?

Ms. COADY. I am not the only one now, Mr. Chairman. I did a TV show last year. There were 12 of us on one show. Each case had a specific reason for being there. We all had different circumstances, and it was really tragic for me. I have been on TV the most, and one of the women who came forward, I thought she had laryngitis, and when we got onto the TV program she started to talk about her own personal experience, what happened after her husband had raped her. He had slit her throat and cut her vocal cords in front of their 6-year-old son. The 6-year-old son tried to commit suicide, and I guess it was really tragic for me because I have spent many days in therapy and in my own private struggles to not have this have an impact on me for the rest of my life.

It seems to me that this woman will never be able to totally get over it because she is never going to be able to talk again, at least the way you and I would talk.

Mr. CONYERS. You raised the question of your young son and the youngster in this case. We hadn't considered or heard testimony up until now about the impact of these kinds of family situations on youngsters, and I think that is a very important aspect.

Did you mention anything about treatment programs and counseling for those offenders in these kinds of matters?

Ms. COADY. Treatment from Emerge. It is an organization which deals with men who are batterers, abusers, and rapists in Boston. They publish a study. For every 20 cases that they saw, they only took 3, I think. That is because the other 17 would not accept the

responsibility for their actions. You know, they would say, "Well, if she didn't burn the eggs I wouldn't beat her." They found that there is a really poor rehabilitation rate, similar to stranger rape.

So I basically have spent most of my time—I have been a child abuse counselor for the last 3 years. Besides I am now a women's counselor.

But I worked consistently to try to help kids get over this and help women because it is really—I think the only way to go with men who do this is the prison system because there's very few who really choose to change. It is really hard to get through to them, for whatever reasons. Many of them have some kind of personality disorder. Many of them have been abused themselves. But basically they are really resistant to saying, "Yes, I was wrong and now I am going to be different."

Mr. CONYERS. That is what we have been trying to explore. I think you have covered what I would have asked you in my last question, whether the criminal justice system has been diligent enough in trying to get to the psychological reasons for this behavior and see if there are ways that it could be corrected. You suggest that it is pretty much uphill.

Ms. COADY. I think—my own personal opinion is that we should have prison sentences without parole because of the nature of the crimes that get committed and because of the amount of repeat offenses that we see. I feel we have to take some strong measure on this.

From my own experience, the rape made me see that the next step for me was that he was going to kill me. I would be dead now and so would my child if I hadn't been able to get it together and to leave in those 6 weeks.

Mr. CONYERS. Thank you very much, Ms. Coady.

Mr. Boucher?

Mr. BOUCHER. Thank you, Mr. Chairman. I certainly want to commend the witness for her statement here this morning.

Do you know how many States at the present time have abrogated by statute the common law exemption for rapes between husband and wife?

Ms. COADY. Are you talking about the silence statute?

There are 22 States that have made it a crime. Some of them have done it legislatively. Some, as in Virginia, it wasn't specifically stated in the law whether it could be a crime or not. It would take a case to come up before the Supreme Court to decide on it. In the States that have had a Supreme Court decision it has always been favorable to uphold the conviction.

Mr. BOUCHER. So we have 22 States now that in terms either of statutory enactment or a court decision have made a rape between spouses a felony?

Ms. COADY. Yes.

Mr. BOUCHER. Let me get you to respond to the argument that I hear when this question is raised. Let me say at the outset that I share your view on the subject, and I intend to support making a rape a crime between spouses with respect to Federal jurisdictions.

But what I hear when the subject is argued is the statement from those who oppose that position, that if it is a crime for one spouse to commit a sexual assault against the other, that that will

become a weapon—the charge of that assault having occurred will become a weapon that one spouse may use against the other during the course of a lawsuit, a divorce litigation, or the like.

What is your response to that?

Ms. COADY. There's a few responses for that. One is that our court system is set up to weed out frivolous charges, in the sense, you know, that is the way it is set up with checks and balances, the type of evidence that can be submitted, and I don't think a woman really wants to go through a rape trial—I mean, I could not prosecute because it was not a crime, but I don't know if I emotionally at that time of my life could have held up through a rape trial.

I think the victim feels a stigma, you know, to say that she was a rape victim. There is still that societal "What did you do to cause that to happen to you?" notion.

I also think that the divorce issue, the divorce settlement, the child custody, and the support are a civil issue. We are talking about a criminal issue, and they are separate, and you cannot bring in that—what happened in a criminal way into the civil thing.

From my own experience, I would say—like when I was setting up visitation with my ex-husband for my child, even though he was an abuser, and a severe one, that had no determination on the amount of visitation or the limitation of visitation that my son has with his father because it wasn't proven, for one thing. I couldn't prove it because, as I say, it wasn't a crime.

Basically, it was like, well, we were incompatible. You know, my son does go see his father. I had a lot of concerns about that at the beginning, and there is a lot of problems sometimes with these abusers and rapists continuing to use the children to commit further acts of violence.

The only time there is a limitation is when the abuser continues to use the children violently. Like he will break into the house when he comes to pick the kids up and he will harass the wife again.

But basically it has not been used. There is just not that many charges.

Mr. BOUCHER. I think that is a good answer. Let me ask this further question.

When we attempted in Virginia to override by statute the exemption for spouses, we were not successful. One of the secondary positions that we tried was to say that if spouses were living apart then a sexual assault committed by one against the other would be a criminal act.

Do you have any views as to whether that is——

Ms. COADY. I don't think that is eliminating the marital exemption in the rape law if they have to be living apart. Most of the severe rapes occur toward the end of a marriage when there is much bickering and fighting and things are going really badly, and there is a lot of reasons for that.

One is anger, issues of anger and power, and there is also—if you look at men who are violent, they are extremely insecure and they need that woman, you know, so badly, even though they are beating her, raping her, they need her and they don't want her to leave. They beg her not to leave. So they will do anything. My ex-

husband raped me as one way to not get me to leave. He felt that he could force me to stay there.

It sounds sick, but you have to understand the mentality of the men that we are dealing with. They are not always sick-sick, but they are sick in a certain way.

Mr. BOUCHER. So your answer really is that most of the kind of conduct that we are seeking to criminalize here actually occurs during the time the spouses are living together?

Ms. COADY. Both. There's also many States, many cases, where they are using the child visitation rights as a way to further the abuse.

But as I stated in my testimony, in the case of Pennsylvania, the woman was fleeing her husband, he beat her up, you know, she fled the house, going to her mother's. She was on foot. Six hours later he caught up with her, and he raped her. He was convicted of rape, but because Pennsylvania says, you know, you have to have been living apart—they are now appealing that. The argument is were they technically living apart because she was only gone 6 hours.

I just see, I think, more "living together" cases will come forward. I don't think marriage should jeopardize women, and I feel women are in jeopardy. I guess that is a little bit female, but if they are married then they don't have that kind of protection.

Mr. BOUCHER. Of the 22 States that have now criminalized assaults between spouses, how many of those 22 make the conduct a crime only if the spouses are living apart? Do you know?

Ms. COADY. There's 22 States that a spouse can charge another spouse with rape whether they are living together or apart.

Anyway, OK, there's 24 States that you have to be at least living apart. In New York, of which Ms. Holtzman spoke earlier, the New York rape law was really terrible because in New York you have to be both living apart and the husband has to sign a separation agreement or a letter saying, you know, if he does this kind of behavior she can charge him with rape.

Mr. BOUCHER. Let me just be sure I understand you. In 22 States, if they are living together, it is a crime for one to sexually assault the other. In another 24 States, if they are living apart, although still married, it is a criminal offense for one to sexually assault the other.

Ms. COADY. In those 24 States, if they were living together they couldn't charge, and then there's 4 other States where up to the day of divorce a woman could not charge her spouse with rape, and the intent of the law also in the States that have it is sex neutral, so that one spouse—it would not just be the woman charging the man. It could go both ways, although the amount of incidents where a woman would rape her husband would be very limited.

Mr. BOUCHER. Thank you very much for your testimony.

Thank you, Mr. Chairman.

Mr. CONYERS. We appreciate your testimony.

I again reiterate that I think you are a very courageous human being for striking out in this area of social reform in the way that you have. I am very pleased that you have come forward, and I encourage the organizations that you are associated with to continue

their work in bringing some sanity to this important area of our lives.

Thank you, Ms. Coady.

Ms. COADY. Thank you, Mr. Chairman.

[The prepared statement of Ms. Coady follows:]

TESTIMONY TO BE PRESENTED AT THE HOUSE OF REPRESENTATIVES CONGRESSIONAL HEARINGS ON H.R. 4876—SEPTEMBER 12, 1984

Good morning Honorable Members of Congress and distinguished guests. My name is Carol Coady. I live in Philadelphia, Pennsylvania. I am Director of the Northeast Philadelphia YWCA Women Today Center and a professional counselor for child abuse and rape. I am a member of the National NOW Committee on Violence Against Women and a member of the Board of the National Coalition Against Sexual Assault.

I speak today in support of H.R. 4876. This legislation as drafted will increase the number of convictions for Sexual Offenses. Prosecutors will be able to specifically define the offense committed against the victim. And by defining the offense in terms of assault, which implies non-consent, this legislation will focus not on the victim's behavior but the offender's actions. The insensitive questioning of the victim during a rape trial oftentimes attempts to portray the victim as more guilty than the offender.

My testimony here today will focus on allowing spouses the legal protection that any other victim of sexual assault has. Presently, 22 states plus Washington, D.C. allow prosecution of a rape committed when the couple is married and share the same household. In 24 states, marital rape is not a crime but the definition of not married makes possible prosecution only when the couple is living apart, or filed for a separation order, or both or filed for an order of protection. In 4 states, a spouse can not be prosecuted for rape until the day of divorce. In the State of West Virginia, the rape laws are so horrendous, that a man who rapes his date cannot be prosecuted even if she never had previous sexual relations with this man.

To date since 1978, nationally, we have had 154 reported cases of marital rape. Of these 154 cases, 100 have gone to trial. We have had 89 convictions, 24 of these convictions have been while the spouses were married and living together including the recent Florida conviction (the State of Florida vs. William Rider) which was erroneously reported in the press as the first living together case. It is the first married and living together case to have the issue of whether or not it could be prosecuted decided by an appeals court.

Sociological studies of Rape in Marriage done by Richard Gelles, a prominent researcher whose work focuses on violent families states that maybe up to 1,000,000 cases of rape in marriage each year. Diana Russells' book "Rape In Marriage" points out that one woman in seven who has ever been married, has been raped by her husband. She also found that twice as many women have been raped by husband's as by strangers. It has been difficult getting statistics on the occurrence of rape in marriage because in the states where rape in marriage is not a crime there are no crime statistics.

There are three historical reasons which have permitted the marital exemption in the rape laws. First—Marital Privilege—Sir Matthew Hale, a seventeenth century Chief Justice of England, wrote a lengthy article on rape in which he states, "But the husband cannot be guilty of rape committed upon his lawful wife, for by their mutual matrimonal consent and contract, the wife hath given up herself in this kind unto her husband which she cannot retract. Second—The Unity Theory, Justice Blackstone states, "In marriage the two become one and that is the husband." Third—The Property Theory, as the Yale Law Journal article explained, "but as a husband cannot be guilty of robbing himself, likewise the husband cannot be guilty of rape because he would be guilty of raping himself of his own property."

There are many misconceptions about the concept of spousal rape. Legislators have said to me, "but we can't have a law like this because the government will be meddling in the bedroom." The reality is that the government already meddles in our bedrooms but it protects the offenders interests. This would be an appropriate statement for consensual relations, but we are talking about assault. The government cannot both take away a woman's right to consent in marriage and excuse that by calling it a between consenting adults issue. Another misconception is that spouses should charge the offending with assault. First of all, calling a crime by another name, when it is specifically exempt in the law will not hold up in court. Secondly, an assault charge does not address the additional devastation, suffering and

humiliation of rape victims. A third misconception is that the women doesn't suffer much. The reality is that a woman who is raped by a stranger lives with a memory, a woman raped by her husband lives with a rapist every day of her life and she never knows when another attack will occur. Another myth is that a rape prosecution will break up a marriage. As the Justice of the Supreme Court of the State of Virginia stated in April, 1984 (the State vs. Weishoupt), "this argument is absurd. It is hard to imagine that charging a husband with a violent crime of rape can be more disruptive of a marriage than the violent act itself. Moreover, if the marriage has already deteriorated to the point where intercourse must be commanded at the price of violence, we doubt that there is anything left to reconcile.

Another misconception is that women will lie to get a better divorce settlement, child custody and support. Our government is set up to weed out frivilous charges. This law will only give spouses options. In the 22 states that have this law, women are not flocking to the police to accuse their spouse of rape. Also, the same criteria for establishing evidence in stranger rape cases applies to marital rape cases.

There have been numerous amendments offered by State Legislators to marital rape bills. I agree with none of these. The first is an amendment which I discussed earlier; that is spouses must be living apart, have filed a separation agreement or both, filed for a divorce or obtained an order of a protection. Many rapes occur during the last stages of an intact marriage because of the intense feelings of anger and powerlessness experienced by the husband toward the wife, or as a way for the husband to overpower the wife to make her stay or as a way to make the woman pregnant in hopes that she will be unable to leave. Because these women are prisoners in their own home, it is cruel and irrational to expect them to leave. It is the laws job to remove their assailent.

Presently, in Pennsylvania we have a marital rape case before the State Supreme Court. The husband beat his wife. She fled to her mothers which was a distance away. The husband found her six hours later enroute to her mothers. He beat her and raped her. The state of Pennsylvania found him guilty of rape. His case is being appealed because he states that they were not technically living apart because she was only gone six hours. This case clearly demonstrates the problem with this amendment.

There is another myth that men only rape their wives when they discover that their property has developed a will of her own and they are attempting to get their property back under their control. Many husbands who think that they must be boss, begin the marriage with a rape and continue the degradation by brainwashing the women into believing that no one else will want her.

Another amendment would attempt at making spousal rape a lesser penalty. Most marital rape victims suffer more physical injuries not less than stranger rape cases.

Another amendment is that there must be a history of physical violence in order to charge the spouse with rape. No other crime requires a victim to clearly demonstrate that another crime was committed before she can exercise her right to justice for the rape crime. Sometimes there will not be evidence of physical violence because the husband forced her to submit by threatening to beat her or kill her.

Another amendment is a statute of limitations in regard to reporting. California law requires a victim to report this felony within 120 days. There have been several cases in California alone, where the victim was comotose after the rape incident and was not able to prosecute because the reporting period had passed. Prosecutors have been angered because their cases have been weakened. In these situations, they could only prosecute for some of the rapes although there may have been a long history of rape.

The final amendment which I would like to discuss is that the marital exemption still applies for people who are retarded or under the influence of drugs or alcohol or asleep. I find it unconscienceable to further discriminate against a group of people in our society who must always struggle for daily survival. These provisions are in our present rape laws to protect people who are unable to consent. Marriage should not put them in more jeopardy.

Most of the states have passed this legislation without the amendments. We have not had any opposition to this bill. The major opposition to this bill is the individual legislators personal fears, biases and misconceptions. Many are concerned that their personal reputations will be jeopardized by a vindictive wife. In the states that have passed this legislation, this has not happened. Prosecuting attorneys oftentimes lead the lobbying efforts because nationally we have an 86% conviction rate. A major reason for this is the additional physical violence inflicted upon the victim besides the rape act itself. Statements from prosecuting attorneys show that women are not coming forth with trumped up charges.

Presently, the current federal rape laws do not clearly exempt spouses from prosecuting each other. Rather the law remains silent, for it doesn't say anything about spousal rape. Under current Federal law a case would go to the United States Supreme Court for review to uphold the conviction. To date the State Supreme Court decisions have upheld the convictions. If a case were prosecuted under Federal law, it would most likely be upheld by the United States Supreme Court. The major difference between the Federal Sexual Assault law proposed here, is that the legislative interest is clear that spousal rape is a crime while current law is silent.

I am the second woman in this country to speak out publicly as a victim of marital rape. The first woman was Greta Rideout from Salem, Oregon in 1978. Over the last three years, I have extensively traveled across this country sharing with the public my own experience as a victim and the dynamics, history and legal issues concerning rape in marriage. I have been interviewed on radio and television over one hundred times and by the press at least another one hundred times and I have given talks, lectures and keynote speeches close to two hundred times. I have traveled to more than 20 states lecturing and lobbying to give spouses the same protection in the rape laws as is guaranteed other citizens of our country.

I speak out because there are so many thousands of women's lives at stake. It is always painful for me to share that time in my life when I felt that I had no control over my day to day existence. I must become a victim again, at least emotionally, so that others can understand the depth of my pain when I was raped by my husband.

I grew up in a working class family who espoused traditional values for women, that is a women's ultimate fulfillment would be in marriage and children. My parents argued often and I became the caretaker of my brothers and sisters. I never felt cared about and I grew up wondering if I were lovable. Steve, my future husband made me feel lovable I desperately needed to love and be loved. This need was so intense that I became blind to his aggressive personality, although he never hit me while we were dating.

I married at nineteen. He was twenty-three. We did not consummate our marriage for three weeks because he had a problem sustaining an erection. He was very insecure and I was very unaware of life. He did not beat me for the first 14 months of our marriage, but he verbally abused me; telling me how stupid I was for minor failings around housekeeping and cooking.

Fourteen months later he beat me for dancing with a 55 year old co-worker at my company Christmas party. He punched me in the face, then picked me up and banged me up against the wall repeatedly until I dropped and then he strangled me until I almost passed out. He left and came home about 3 or 4 in the morning. We never talked about the incident. He never said he was sorry. I rationalized that he lost his temper and that he wouldn't do this again. I didn't believe that one beating was enough justification for leaving home. I was afraid to tell my parents that I had failed at marriage.

The beatings became more regular after this. He beat me every month, then every week and after my child was born every day.

He would pick me up and throw me at the wall for not putting the tooth paste cap on the tooth paste or because I didn't drain the shower after I took a shower. He would not try to understand that we didn't have a shower in my family so I didn't know about draining the shower and because I came from a big family, a tube of toothpaste only lasted three days, so we never had to worry about putting the cap on. The beatings became so bad that at times I would pray the Act of Contrition because I thought that he was going to kill me. I begged God, that if I were going to die please don't let me hurt so bad. I did not know how to make him stop hurting me. I felt like I must be the only woman that this was happening to, so that I must be partly at fault. There were no shelters in the early 1970's.

After we were married 3½ years, I became pregnant. We had decided before we were married to have a child when we were married 4 years. Although I was beginning to have serious doubts about our future together. I did not feel that I had the right to change the rules. My son was born and the beatings escalated. I started a part time catering business from my home as a way to have money because he controlled all the finances, did the food shopping and would not give me any house money. I was penniless. I took my son to work with me because he refused to babysit.

He would always beat me when I would return home from work each night. Sometimes I would drive around the block 3 or 4 times to get the courage to come in the house. I would park in the driveway and come in through the kitchen. Sometimes he would be sitting in the kitchen floor in the dark and if I didn't turn the light on I would not know he was there. He would sniff me to see if I had been cheating as I walked by. I had to stand there with the baby in my arms while he

examined me. On other nights, he would jump out at me from one of the rooms in the house, hold a knife to my throat and ask if I believed that he could kill me. The terror was overwhelming and I was afraid to make the wrong move because I did not want my son to get hurt too.

One of the ways that I survived this is that I became numb to physical pain. He would beat me and throw me up against the wall and I would not feel it. I felt like I was watching what was happening to me from outside of myself except that I was the actor that all this was happening to.

My son was a year and a half old when I vowed to myself that I would try to leave. I did not have any money to leave with and my parents were in the middle of a separation so I couldn't go home. My brothers and sisters were either in high school or grade school so I didn't have any help there either. And there still was no shelter in 1977 in Philadelphia.

Lack of money was the major factor in my staying. Also, I was very religious and I took serious my vow to love, honor and cherish 'till death do us part. I also felt responsible for making our home happy, so somehow I failed. I didn't know about self esteem to know that I didn't have any left.

In February 1978, he raped me. I usually awoke about 6:00 A.M. to do the paperwork for my business. This one morning I chose to sleep later because he was working night work. The nights that he was away were the only nights that I could sleep well because he would beat me up if I rolled into him while I was asleep. I could not sleep in another room either because he wouldn't give me permission to do so.

I heard him pull into the driveway with his motorcycle around 8:00 A.M. He came up the steps and I pretended to be sleeping because I did not want to get into an argument with him already. He went into the baby's room and brought the baby downstairs. They were playing together and I wanted to join in the fun but I was afraid that he would start trouble so I stayed in bed. About a half hour later, he came upstairs and said if you are going to stay in bed all day get up and make me breakfast. I did what he asked. I went into the kitchen and started cooking breakfast. A few minutes later, he came into the kitchen and started screaming at me because I had left the porch light on all night. He was screaming at me for being stupid, inconsiderate and not concerned about energy conservation. Then I noticed that the eggs were burning. He beat me for a half hour for burning the eggs, through our kitchen, dining room, living room and back again. After it was over, I went back into the kitchen to cook breakfast all over again. He came into the kitchen again and told me to get upstairs. I knew what he wanted. I said to him I can't make love to you, we just had a fight. Wait till tonight, when I come home from work we can talk about it. He stated, "get upstairs or I will kill you and the baby". I thought, "Oh My God." I'm going to get beat again. He ripped off my pajamas in one pull. The baby started crying again, "don't hurt my mommy, don't hurt my mommy." He stood there and pulled out his hair on the left side of his head and sucked his thumb with the hair in his hand, the same way children hold security blankets.

I didn't think that he would rape me. Rape happens by a stranger who jumps out at you from behind a bush, not one's husband. I got married so that he could protect me from that. I thought about running to my neighbors but decided I couldn't outrun him and I was embarrassed for someone to see me nude. Mainly, I stayed because I didn't believe that he would rape me, just beat me which is bad enough.

He beat me through the kitchen, dining room. I tripped over a toy in the living room and fell down. He jumped on top of me and started to unzip his pants. I pleaded with him not to do this because the baby was at my head crying and I didn't want Brian to see any more of this. I bargained with him to go upstairs. As I climbed the steps to our bedroom, he kept telling me that he was going to kill us if I didn't do what he wanted.

I locked the bedroom door to keep Brian out. He was still crying don't hurt my mommy. I remember being crouched in the corners of our bedroom pleading with him not to do this to me. I felt naked to my very soul. I knew he was going to rape me. I hated him for what he was about to do and myself for not being able to stop him. He picked me up and threw me on the bed, punched me in the face and bit my breasts. He couldn't penetrate me because I was too tight from being so frightened. He punched my face more and stated, loosen up. Somehow, I accommodated him. He raped me for about 5 minutes.

He left the room and went upstairs. My legs could not hold my weight. I vomited in the bedroom and vomited again in the bathroom. I took a shower because I felt dirty. Afterwards, I dressed and I went downstairs still sobbing. I said to him, "do you know what you've done? Do you know what that's called?" He stated, a man

can't rape his wife, there is no such law, check it out. I wasn't concerned about the law, I was concerned about what he was doing to me as a person.

After that I blanked out for two days, from the trauma. I don't remember if they ate or who did dishes, and other incidentals around the house. I probably did this but even now, 6½ years later, I don't remember. Two days later, I became aware again. I was at church at a meeting. After the meeting I asked this priest if I could speak with him because I made up my mind to leave. I was willing to resign my positions of authority in the church, if he thought that it would be a bad reflection on the Church because the Church is against divorce. We talked about what happened to me two evenings before. I asked him, "do you know what that is," he said "that's rape." I needed him to validate my experience. If he had said, "you are supposed to have sex with your husband", I would have questioned myself.

I moved six weeks later. I had to move secretly because he said that he would kill me, if I left him which is another major reason why women stay. I decided that if I were to die, I would go down fighting. I couldn't take any more dying day by day. In the six weeks that I spent formulating and implementing an escape plan he raped me eleven more times. I would come home in the evening from work. He would pull my pajamas down and the pajama top up. He would bite my breasts until I bruised. The mattress shook because I was shaking violently. I was afraid.

After he went to work one evening, I moved all my things that weighed less than one hundred pounds. I moved all evening until 5 o'clock in the morning. I took my son to my girl friends so that he would be safe. Like a good wife, I went home and cleaned up the house, at 7:45 a.m., I called the police and stated that there was a man outside beating up this woman. The first question they asked me was if this man was beating his wife. I told him that I didn't know, but to please come quickly. I called my husband and stated if he wanted to know when I was leaving. Today is the day he had threatened to kill me if I didn't tell him when I was leaving.

The police and the movers came down one end of the street together. My husband came down the other end. Then all met in the driveway. He jumped out and threatened to kill me. The police stayed until the movers moved the rest of my things.

Living through such brutality, was like living in a war zone. I felt like I had been in Vietnam and spent all my energy trying to survive. My home became a war zone. I became skilled in guerrilla warfare. Both, my son and myself suffered delayed stress. We became hyperactive. As I look back, leaving him was one of the most courageous things I have ever done in my life.

I entered therapy just before I was leaving Steve so that I could begin the process of finding myself. It was painful for me to re-experience all of those atrocities that he had done to me because one of my ways of surviving was to become numb to physical pain when he punched me or threw me up against the wall.

I feel sad when I think about the broken woman I had become. I was struggling to stay sane. I felt ashamed of what he had done to me. I did not want others to know. Therapy helped me find who I am, become the person I am today and helped me work with my child to resolve the trauma that we both endured.

I did not know how the rape would affect my sexuality. A few months after I left him, my sexual experiences were basically testing whether I could physically function as a woman again. I was fine physically, but I knew that I would spend much more time recovering emotionally. I was afraid to become vulnerable and trusting in a relationship with a man again.

Some of my male friends have been helpful in helping my son experience the value of being male. They have taught him that violence is not a sign of competence but of powerlessness. They have given him a sense of fairness and strength from a man's point of view. They have helped him feel o.k. about being male. These men have also taught me the specialness of a man's perspective so that I could begin to trust again.

Three and one half years after I had been raped by my husband, I began to talk publicly about my own experience so that other women would not experience the depth of the tragedy that befell my son and myself. I spoke so that other women would be able to understand and define being raped. I spoke so that other women would be able to give themselves permission to change their lives in whatever fashion that they felt was most effective for them. I was horrified to find out that my rape experience was so typical of many women. The response from women, through the use of the media coupled with the knowledge that I have made an impact on so many women has helped me stay public about an experience that is so personal, painful and tragic.

The act of rape is an act against all members of society whether or not the rapist attacks his wife or a stranger. Rape is the ultimate act of degradation and humiliation forced upon women and the children who view the rape. Rape is the ultimate

lie against being male, because rape is not an act of maleness but of powerlessness. To sexually force oneself upon another human being goes against men's sense of fairness and morality. The act of rape sickens, appalls and illicits guilt feelings in men because one of their own has forced such human destruction upon another human being. These statements are no less true when the victim is married to the rapist.

In closing, honorable gentlemen of the Senate, I respectfully request that you support House Bill 400, vote in the affirmative in the judiciary committee and lobby for its full passage in the Senate. The lives of thousands of Pennsylvanians are at stake.

Thank you.

Mr. CONYERS. There being no further witnesses, the subcommittee is adjourned.

[Whereupon, at 12:15 p.m., the subcommittee was adjourned, subject to the call of the Chair.]

# APPENDIX

TESTIMONY PRESENTED ON H.R. 4876, BEFORE THE SUBCOMMITTEE ON CRIMINAL JUSTICE OF THE HOUSE JUDICIARY COMMITTEE, 98TH CONGRESS, 2D SESSION, HEARINGS HELD SEPTEMBER 12, 1984, BY LEIGH B. BIENEN, ESQ., SPECIAL PROJECTS SECTION, DEPARTMENT OF THE PUBLIC ADVOCATE, HUGHES JUSTICE COMPLEX CN-850, TRENTON, NJ

Mr. Chairman, members of the committee, counsel and staff, ladies and gentlemen. My name is Leigh Bienen. I am an attorney who has specialized for the past several years in legislative reform in the area of sex offenses. I would like to comment upon some specifics of H.R. 4876, the Sexual Assault Act of 1984. H.R. 4876 is a significant step forward and brings the federal law closer to the laws of the more than twenty five states which have passed rape reform legislation since 1975. I have also included for the information of the Committee some recent reprints of mine which discuss the legal issues raised by this kind of legislation. I am also pleased to make myself available to the Committee and counsel. Although H.R. 4876 is a distinct improvement over prior law, I believe the present version would be more effective with some changes. Particularly since the federal statute will serve as a model for other states which will be considering rape reform legislation, it is important that the federal statute), even if there are few federal prosecutions for sex offenses, be as clear and complete as possible.

### ADDITION OF A SPECIFIC OFFENSE FOR SEXUAL ACTS COMMITTED BY FAMILY MEMBERS OR PERSONS IN A POSITION OF AUTHORITY UPON PERSONS OVER 12 AND UNDER 16

In its present form H.R. 4876, The Sexual Assault Act of 1984, does not contain a specific definition for offenses committed by family members or persons in a position of authority. I believe that a new subsection should be added to § 2242, presently termed Sexual Assault, to create specially defined offenses for this category of cases. In the present version of H.R. 4876 for persons under the age of 12, a sexual act committed by any person who is 4 years older is the most serious category of sex offense. There is no necessity for creating a special category for offenses committed by members of the family or others in a position of authority when the victim is under 12. A number of states, including Michigan and New Jersey, have taken the position adopted in H.R. 4876 regarding victims under 12. The rationale for this policy is: if a sexual act is committed upon a person under 12, it should be considered the most serious category of sex offense irrespective of who commits the offense. For victims between the ages of 12 and 16, however, a different policy is required. H.R. 4876 now defines in § 2243 a crime termed Sexual Abuse of a Minor. This crime, which carries a relatively low penalty, defines as an offense sexual acts with a person over 12 and under 16, when the other person is more than 4 years older. The policy objective is to establish a relatively minor offense for what is assumed to be nonforcible sexual behavior involving one person under 16. Sexual acts committed by family members or persons in a position of authority do not belong in this category of offense. Nor do they meet the standard of proof required for the two serious sex offenses set out in § 2241 and § 2242. There is in this version of H.R. 4876 no specially defined category for offenses involving family members or those in positions of authority, when the victim is over 12 and under 16, and this is a serious omission. I propose that H.R. 4876 be amended to include such a specific offense under § 2242, presently termed sexual assault, the second most serious sex offense defined.

Sexual acts with person over 12 and under 16 when the offender is a member of the family or in a position of authority are frequently reported to the authorities and in the past they have been difficult to prosecute because of a body of law which has grown up around the definition of statutory rape. In addition, traditionally defined incest statutes have been ineffective as vehicles for criminal prosecution, and the proposed federal statute defining sex crimes properly does not include "incest" as a separately defined offense. Most states have civil statutes prohibiting the marriage of closely related persons. The federal law, to the best of my knowledge, does

not and should not apply. There is no reason to incorporate at this point a traditional incest statute in the federal criminal code.

These statutes have never protected children from intra-familial assault; they are ineffective as instruments of prosecution. Most states enacting rape reform legislation have adopted a policy of specially defining offenses involving family members within the newly defined sex offense provisions. I suggest that there is every reason for the federal statute to adopt the same or a similar policy. I enclose a copy of the New Jersey statute as an example. "Rape III, National Developments in Rape Reform Legislation," Women's Rights Law Reporter, vol. 6, no. 3 (1980) and its supplement also contains citations to a variety of statutory definitions of position of authority and member of the family.

A specifically defined offense for family members or persons in a position of authority, when the victim is over 12 and under 16, should have the following features:

(1) A definition of family member which is broad enough to include so called blood relatives, step parents, foster parents, and adults living within the family; [see e.g. N.J.S.A. 2C:14-2(2)] and

(2) Position of authority should be defined to include professional, legal or occupational status in general terms. This is an area where there are many drafting problems, but most analysts agree the policy objective should be to include the scoutmaster and the high school coach. A number of states have come up with language, and counsel can choose from ten or twelve state formulations which have been in operation for several years now. Once again, sex neutrality is a critical aspect of this reform.

It is important to have a category of offenses for acts by family members and those in a position of authority because otherwise these cases are never pursued. The prosecution bogs down on the issue of force or threat of force; the judge or jury start worrying about whether the twelve year old who has been abused by her mother's live-in boyfriend for years should have or could have done anything about it. And where was the mother anyway? The creation of a specific offense helps to bypass these obstacles and make a prosecution possible. These cases will always be difficult for the prosecution, but there is no reason why case law and traditions concerning consent or the victim's sexual conduct should continue to be the principal focus of the court's attention. These cases have no rational relationship to the present § 2243, Sexual Abuse of a Minor, which is designed to cover situations in which the sexual behavior of the person under 16 is in some meaningful sense noncoercive.

One final comment with regard to the offense now termed Sexual Abuse of a Minor. I hope the legislative statement accompanying the bill will include language making it clear that this offense with its maximum penalty of 5 years not be considered the exclusive provision governing offenses involving persons over 12 and under 16. In a number of states where statutory rape has been separately defined as an offense covering what was presumed to be consenting behavior, the statutory rape provision is used as the exclusive vehicle for prosecutions for offenses involving persons within the specified age range.

Since statutory rape typically has a lower penalty than forcible rape of an adult, in practice this means that the penalty for the forcible rape of a minor is significantly less than the penalty for the equivalent crime if the victim was an adult. The legislative statement, if not the bill itself, should make it clear this is not the legislative intent here. Sexual abuse of a minor should be explicitly limited to these situations where the acts are noncoercive. Some of the special problems involved in the prosecution and defense of cases involving persons under 16 are discussed in L. Bienen "A Question of Credibility" 19 Cal. —West. L. Rev. 235 (1983)

### THE ABOLITION OF THE MISTAKE AS TO AGE DEFENSE

The present version of H.R. 4876 does not contain a statutory defense for mistake-as-to-age. In my opinion there should be no such statutory defense. Many reform jurisdicitons have specifically outlawed this defense. (See e.g. N.J.S.A. 2C:14-5(b).) To the extent it is required by the constitution, general principles governing mistake and the mental element required for the commission of a crime are always applicable. In my experience the mistake-as-to-age defense has been used disingenuously as a strategy for introducing evidence concerning the victim's sexual behavior and for eliciting prejudicial and hostile attitudes towards victims. See Bienen, "Mistakes" Philosophy and Public Affairs, vol. 7 no. 3 (1978). Particularly when the case goes to trial a year or more after the event, the mistake-as-to-age defense is inappropriate. The judge or jury is visually confronted with a victim who now may indeed be over

16, and the defense has become persuasive simply by the passage of time. But even without delays to trial, in my opinion there should be no such special defense for sex offenses. The law either prohibits sexual acts with a person under 16 or it doesn't. My research indicates the mistake as to age provision typically served the purpose of offering an excuse in cases where social attitudes did not condone the prosecution for other reasons.

Since the penalties for sexual abuse of a minor are low, and probation or a suspended sentence is always a sentencing option, there is no need for a special "mitigating" defense for this category of crime.

CONCLUSION

Regarding the other provisions in H.R. 4876, for the reasons expressed in my earlier testimony before the Senate Judiciary Committee and elsewhere, (see e.g. L. Bienen "Rape Reform Legislation in the United States: A Look at Some Practical Effects," Victimology vol. 8, no.s 1-2 (1983)) I support the introduction of a sex neutral definition of offenses, the repeal of the spousal exception, and the redefinition of the acts constituting the offense. All of these changes are important and timely. I realize the complicated and technical nature of the jurisdictional questions. Nonetheless, if it is possible for this legislation to encompass those statutes governing offenses committed on Indian reservations, it seems to me desirable to do so. What justification can there be for having those offenses governed by definitions of the crimes which the Congress now believes to be inappropriate? Why for example should a spousal exception remain in effect in a few pockets of the country? Finally, with regard to the imposition of a fine for the most serious sex offenses, my only concern is that fines not be considered as an alternative to the imposition of criminal sanctions, that is imprisonment, for the defendants who can afford to pay. The philosophy behind criminal penalties for offenses against the person is that the State itself is harmed by acts of assault or aggression committed by members of the community, and that harm is not rectified by the payment of a fine. The payment of fines as an alternative to criminal penalties suggests payment of a fine makes the State whole. I sympathize with the notion that defendants should pay the State for the costs of their trial or incarceration, but I would hope that adding the alternative of a fine would not suggest that a fine was a suitable alternative to imprisonment for the most serious sex offenses, which are offenses against the person. Perhaps this is another point which can be clarified in the legislative statement.

Enclosed: Rape III and IV, Women's Rights Law Reporter, vol. 6, no. 3, 1980; 19 Cal.—Western L. Rev. 235 (1983); Bibliography on Sex Offenses (1983); Philosophy and Public Affairs, vol. 7, no. 3, (1978); Victimology, vol. 8, no. 1-2 (1983); Woodrow Wilson School Task Force Report (1982-83); N.J.S.A. 2C:14-1, Sexual Offenses.

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