A Comparison of Sexual and Non-Sexual Assault Prosecution

Susan Caringella-MacDonald

Western Michigan University

Follow this and additional works at: https://scholarworks.wmich.edu/dissertations

Part of the Criminology Commons, and the Social Control, Law, Crime, and Deviance Commons

Recommended Citation
https://scholarworks.wmich.edu/dissertations/2447

This Dissertation-Open Access is brought to you for free and open access by the Graduate College at ScholarWorks at WMU. It has been accepted for inclusion in Dissertations by an authorized administrator of ScholarWorks at WMU. For more information, please contact maira.bundza@wmich.edu.
A COMPARISON OF SEXUAL AND NON-SEXUAL ASSAULT PROSECUTION

by

Susan Caringella-MacDonald

A Dissertation
Submitted to the
Faculty of The Graduate College
in partial fulfillment of the
requirements for the
Degree of Doctor of Philosophy
Department of Sociology

Western Michigan University
Kalamazoo, Michigan
December 1983
In 1974 the state of Michigan enacted what has come to be referred to as model rape legislation. A salient objective of the Criminal Sexual Conduct (CSC) Code in this state was to facilitate the comparable rather than unique handling of sexual assaults in the criminal justice system. The primary purpose of this study was to discern whether or not this objective of equitable case treatment was realized through implementation. The focus of this research was therefore directed towards the discovery of differences in sexual and non-sexual assault case prosecutions. Specific aspects of legal change involving corroboration requirements, consent and resistance standards, and issues of victim precipitation and credibility, were scrutinized as they related to the intents underlying enactment of the CSC code.

A second objective of this investigation was to apply theoretical perspectives on the origin and operation of the criminal law to the enacted and enforced statute alteration. Previous work in this field has neglected not only the assessment of change effected by legal modifications, but also has been lacking in the application of theory to empirical research, and additionally in the examination of the comparative viability and/or implications of various theories for legal change.
Data were collected for a two year period on the charging and plea bargaining decisions rendered by prosecutors in these two types of assaults in one Michigan jurisdiction. Prosecutors' discretionary decisions were focused on as they have a critical impact upon case treatment and outcome, yet rarely have been studied. Sexual and non-sexual assault cases were compared in terms of univariate, bivariate, and multivariate analytic techniques. A number of differences were found to exist between these assault offenses along the dimensions of case characteristics, types of decisions made, and factors influencing these discretionary decisions. The host of research findings were interpreted given the six theoretical perspectives described.

Consensus and plural conflict theories were of limited utility for interpretation purposes. While the labeling orientation provided the basis for some insight, it too was found wanting. Instrumental Marxian theory facilitated explanation of some research results, but also fell short of full applicability. Structural Marxian theory was of greater value in the interpretation of the variety of findings encountered in this endeavor, but, too was found problematic in several respects. It was dialectic Marxian theory that was most productively applied to the seemingly inconsistent results indicating both success and failure in terms of the implementation of alleged intents underlying the CSC code.

The tenets of dialectic Marxian theory were drawn on to conclude that enactment of even model sexual assault legislation, while representing a progressive step in this area, necessarily falls short in effecting true gains for rape victims. The root causes of this
phenomenon in our society must first be addressed and then interwoven with legal solutions designed to alleviate problems concomitant with sexual assault and its victims.
INFORMATION TO USERS

This reproduction was made from a copy of a document sent to us for microfilming. While the most advanced technology has been used to photograph and reproduce this document, the quality of the reproduction is heavily dependent upon the quality of the material submitted.

The following explanation of techniques is provided to help clarify markings or notations which may appear on this reproduction.

1. The sign or “target” for pages apparently lacking from the document photographed is “Missing Page(s)”. If it was possible to obtain the missing page(s) or section, they are spliced into the film along with adjacent pages. This may have necessitated cutting through an image and duplicating adjacent pages to assure complete continuity.

2. When an image on the film is obliterated with a round black mark, it is an indication of either blurred copy because of movement during exposure, duplicate copy, or copyrighted materials that should not have been filmed. For blurred pages, a good image of the page can be found in the adjacent frame. If copyrighted materials were deleted, a target note will appear listing the pages in the adjacent frame.

3. When a map, drawing or chart, etc., is part of the material being photographed, a definite method of “sectioning” the material has been followed. It is customary to begin filming at the upper left hand corner of a large sheet and to continue from left to right in equal sections with small overlaps. If necessary, sectioning is continued again—beginning below the first row and continuing on until complete.

4. For illustrations that cannot be satisfactorily reproduced by xerographic means, photographic prints can be purchased at additional cost and inserted into your xerographic copy. These prints are available upon request from the Dissertations Customer Services Department.

5. Some pages in any document may have indistinct print. In all cases the best available copy has been filmed.

University Microfilms International
300 N. Zeeb Road
Ann Arbor, MI 48106

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.
Caringella-MacDonald, Susan

A COMPARISON OF SEXUAL AND NON-SEXUAL ASSAULT PROSECUTION

Western Michigan University

University Microfilms International

300 N. Zeeb Road, Ann Arbor, MI 48106

Ph.D. 1983
ACKNOWLEDGEMENTS

Gratitude is expressed to James Gregart, Prosecuting Attorney of Kalamazoo County, for his continual facilitation of research and for his openness to change. More significantly, I wish to acknowledge this man and this office for the commitment to victims of sexual assault.

Appreciation is extended to each member of my doctoral committee for expecting the autonomy that made this project meaningful. To Paul Friday, my dissertation chair, I am indebted for all of the support, respect, and previously unacknowledged guidance over the years which have contributed to my professional growth. I am grateful to Ron Kramer who has more than once pointed out my oversights with a critical question posed at an opportune moment. My appreciation is also expressed to Brad Huitema for his insight and knowledge which have helped to shape much of my work.

I am deeply indebted to my husband, Richard MacDonald who is perpetually supportive and understanding of my physical and psychological absence because of work, and who has been an unwitting yet integral part of my intellectual development.

And finally, thanks are extended to all who understood the pressure of a deadline, or two, or three...

Susan Caringella-MacDonald
TABLE OF CONTENTS

ACKNOWLEDGEMENTS ............................................ ii
LIST OF FIGURES ............................................. v
LIST OF TABLES ................................................ vi

CHAPTER

I. INTRODUCTION AND STATEMENT OF THE PROBLEM .......... 1
   Introduction .............................................. 1
   Statement of the Problem ................................. 7

II. THEORETICAL AND RESEARCH LITERATURE ................. 11
   Perspectives on the Law and Its Enforcement .......... 11
   The Law on Rape ......................................... 29
   Alternative Interpretations of New Rape Law .......... 54
   Prosecution ............................................. 72

III. RESEARCH DESIGN AND ANALYTIC TECHNIQUES .......... 80
   Design .................................................. 80
   The Independent Variables ............................... 83
   Dependent Variable Operationalization ................ 88
   Analytic Techniques .................................... 93

IV. RESEARCH FINDINGS AND DISCUSSION .................... 99
   Introduction ............................................ 99
   Research Findings ..................................... 101

V. INTERPRETATIONS: THE DISCRETIONARY IMPLEMENTATION
   OF MODEL SEXUAL ASSAULT LEGISLATION ................. 124
   Consensus and Plural Conflict Theory .................. 124
CHAPTER

V. INTERPRETATIONS: THE DISCRETIONARY IMPLEMENTATION OF MODEL SEXUAL ASSAULT LEGISLATION (Continued)

Labeling Theory ........................................ 127
Instrumental Marxian Theory .......................... 128
Structural Marxian Theory ............................. 134
Dialectic Marxian Theory ............................... 140

VI. SUMMARY AND CONCLUSIONS .......................... 144

Summary .................................................. 144
Conclusions .............................................. 157

APPENDICES

A. MICHIGAN'S CRIMINAL SEXUAL CONDUCT CODE .......... 165
B. NON-SEXUAL ASSAULT OFFENSES INCLUDED IN STUDY .... 176

BIBLIOGRAPHY .............................................. 180

iv
LIST OF FIGURES

FIGURE

1. Rape "...is an accusation easily to be made...and harder to be defended against by the party accused, tho never so innocent" (Lord Hale, 1680:635)? ........ 39

2. Stages of Prosecutorial Discretion ............... 100
LIST OF TABLES

TABLE

1. Case Characteristics in All Sexual and Non-Sexual Assaults ...................... 103
2. Correlation Coefficients for all Sexual and Non-Sexual Assaults .............. 104
3. Case Characteristics for Authorized Sexual and Non-Sexual Assaults ........ 108
4. Discriminate Function Analysis Results for Authorized Sexual and Non-Sexual Assault Cases ............... 114
5. Correlation Coefficients for Charge Reduction at Authorization ...................... 115
6. Correlation Coefficients for Charge Reduction through Plea Bargaining .............. 121
CHAPTER I

INTRODUCTION AND STATEMENT OF THE PROBLEM

Introduction

The crime of rape has been included as a Part I Index offense in the FBI's Uniform Crime Reports (UCR) since 1930, but not until approximately the last decade has attention been directed towards the problematics associated with this phenomenon. Numerous factors can be related to the growing awareness surrounding the vast array of issues attending sexual assault.

In 1954 the Supreme Court decision in Brown v. the Board of Education gave official recognition to the plight of minorities in American society. The Civil Rights Movement, which ensued and gained momentum throughout the 1960s, generated a critical attitude in regards to the lack of implementation of fundamental American values such as equality and justice for all in society.

The Women's Movement, inspired in part by the developments in the Civil Rights areas, directed specific attention to the minority status of women and the failure of American society to accept women as full participating members within the social structure. As the consciousness regarding the plight of women in society grew, so too did the more specific concern with rape and its victims.

The feminist movement has been instrumental in pointing out that indignation over rape, when existent, has historically been predicated upon the violation of another man's property (Brownmiller,

The atmosphere during the 1960s, engendered by such phenomena as the Civil Rights Movement, anti-war protests, and campus rebellions, facilitated the critical examination of the views, roles, and treatment of women in society. The problems with the views and treatment of rape victims were similarly beginning to be assessed.

There are several considerations in addition to women's movements which contribute to the explanation of the increase in concern about rape. Urban violence and riots during the 1960s stimulated fear and drew emphatic attention to the incidence of crime in general. The Commission on Law Enforcement and Administration of Justice (1967) and the National Commission on the Causes and Prevention of Violence (1969) were both established during this time frame to evaluate and make recommendations with regard to crime. Nation-wide concern about crime included concern about rape.

The alarm over crime in general and over rape in particular were also both fueled in the mid to late 1960s when the National Opinion Research Corporation (NORC) released figures on the amount of crime not reported to the police (Ennis, 1966) and thus not a part of national statistics. NORC (1966) estimated that for every one rape reported to police, three to four rapes actually occurred. The under-reporting, and hence underestimation, of crime in the United
States, including rape, was further substantiated by the first victimization survey undertaken by the government in the following year (President's Commission on Law Enforcement and the Administration of Justice, 1967).

Subsequent victimization surveys conducted by the U.S. Department of Justice's Bureau of Justice Statistics report fairly consistent results through the 1970s (50% of all rapes were estimated to be unreported). Several other sources (Brownmiller, 1975b; Curtis, 1976) estimate the percentage of unreported rapes to be as high as 90% or more.

It is important to note that rape was declared to be the most notoriously under-reported offense in this country by the FBI itself (FBI, 1975:15). Therefore, the concern about rape, which was beginning to materialize around the early 1970s, can be viewed as partially the result of increased knowledge about the sheer incidence of this offense. Feminist and women's groups had begun to draw attention to rape, and these new research findings served to strengthen the cause. The Speak Out On Rape, sponsored by the New York radical feminists in 1971, WAR (Women Against Rape) groups, and Rape Crisis Centers emerging around this time illustrate the consolidation of concern among women which was developing in the 1970s.

The publication of Patterns in forcible rape in 1971 (Amir) also contributed to the heightened attention being paid to this offense. Amir's study of 646 rape cases in Philadelphia has been cited as a "...landmark behavioral science study of the crime of rape" (NILECJ, 1978:2). Amir's work stimulated much academic interest and drew yet
further attention to the topic of rape. Moreover, Amir's work prompted much criticism and subsequently furthered research and theorizing on the subject.

Susan Brownmiller's classic treatise, *Against our will*, publicized rape as a social and ideological issue in 1975(a). Brownmiller substantiated her articulation on the sexism concomitant with rape offenses, attitudes, and treatment through an historical analysis. This work accomplished much by way of sensitizing the public to the problem of rape.

The increases in forcible rape as documented in the UCR during the 1960s and 1970s constitute another element which elevated concern. Between 1968 and 1973, forcible rapes increased 65%, while murder, assault, and robbery (the other three violent/personal Index crimes) grew by 45% (FBI, 1973:6, 11, 15). Between 1975 and 1979 reported cases of forcible rape had increased another 35% (FBI, 1980:14). Forcible rapes increased a full 100% over the decade of the 1970s. In 1980 the FBI stated that "...forcible rapes showed the highest increase among all Crime Index offenses during the past decade. The trend has shown no sign of mitigating" (1980:326).

It might be pointed out that whether the increase in the number of rapes is due in part to increased reporting or to an actual increase in its incidence over time is not of concern at this juncture. Moreover, it is virtually impossible to make such a determination. The relevant contention here is that increases, and estimates of the proportion of unreported rapes, have all contributed to the heightened attention being paid to sexual assault.
There are innumerable issues which can be expounded upon as they relate to the heightened sensitivity and concern surrounding the crime of rape. The rape literature and research take a number of different directions in dealing with the topic and relevant issues. Perhaps the most salient problem concerns the victimization of rape victims by the criminal justice system. Historically grounded beliefs and attitudes and antiquated statutes defining rape as carnal knowledge of a female forcibly and against her will are interwoven in the fabric of present day inequitable rape case treatment. Recent titles such as Twice traumatized: The rape victim and the court (Bohmer & Blumberg, 1975), Rape: The victim goes on trial (Holmstrom & Burgess, 1975), Rape: The victim as defendant (Landau, 1974), Q. If you rape a woman and steal her T.V., what can they get you for in New York? A. Stealing her T.V. (Lear, 1972), Rape and rape laws: Sexism in society and the law (LeCrand, 1973), Rape victim: A victim of society and the law (Mathiasen, 1974), Existentialism and corroboration of sex crimes in New York: A new attempt to limit "If someone didn't see it, it didn't happen" (Pitler, 1973), and Forcible rape: Institutionalized sexism in the CJS (Robin, 1977) all indicate that the criminal justice system is anything but a minor concern vis-à-vis the crime of rape and its victims.

Because the victims of rape suffer at the hands of the rapist and the law, change has been demanded. Carnal knowledge statutes have been attacked for their discriminatory and unjust requirements and for perpetuating inequitable sexist practices and attitudes.
Alteration of legislative codes has thus become a focal point for those concerned about rape in the nation. To state that reform is long overdue is most charitable, particularly given that present day statutes contain concepts and principles articulated in law as early as 1900 B.C. (in the Code of Hammurabi).

Over less than the span of a full decade, virtually every state in this nation has altered its rape legislation (Field & Bienen, 1980:153). In some states the changes are quite minor, while in others the changes have been sweeping and radical. The massive legislative alteration in this country is in no small measure a response to women's groups calling for change.

Perhaps the most critical component behind reform is the call for rape to be viewed and treated as a violent, assaultive crime, like any other (Ben Dor, 1976; Brownmiller, 1975a; Gager & Schur, 1976; Klemmack & Klemmack, 1976). The inequitable treatment of rape has historically been tied to statutory standards, such as corroboration and resistance requirements, which are unique to the crime of rape. The removal of such obstacles has been a major thrust of reform legislation. The underlying logic is that if rape is seen and treated as a violent rather than sexual act, victims will undergo less differential and discriminatory treatment. If rape were treated comparably to other violent assaults, less scrutiny would be attending victim demeanor, consent, precipitation, credibility, and
the like. The desired end result concerns the fair and just handling of the crime and contingently the reduction of double victimization and trauma.

Statement of the Problem

Given the tremendous amount of legal change over recent years, it is somewhat surprising that virtually no studies have been conducted assessing the enforcement of new rape codes. Whether or not the objectives inspiring new rape statutes are realized is wholly contingent upon the implementation process. The question of whether or not enactment of new laws represents a sufficient measure to accomplish problem resolution, i.e., comparable rather than unique rape case treatment, must be evaluated via examination of the administration of such new laws. Yet, such efforts do not appear to be forthcoming.

The purpose of this research is to assess specifically this issue. The objectives embodied in a model sexual assault code are investigated in light of the implementation of the law. The ultimate objective of fair rape case treatment intends equity in terms of the types of requirements, standards, practices, and overall handling of sexual and non-sexual assault crimes. The problem of the differential treatment of these forms of criminal offenses has been addressed through statutory changes. Model sexual assault laws, such as the code examined in this research, directly mirror the intent of equitable rape case treatment through the elimination of antiquated standards such as those pertaining to corroboration, resistance,
and victim character/reputation. This research examines whether or not this overriding objective has been met through implementation by investigating the (dis)similarity in the handling of sexual and non-sexual assaults. If the goal of having rape viewed and treated as a violent crime is realized through the enactment and implementation of new laws, few (if any) differences between this offense and other personal, violent offenses should be discovered.

Applying theoretical perspectives in criminology pertaining to the origin and enforcement of criminal law to legal change in rape provides insight into alternative types of implications of both the change in rape law and into the relative neglect in attention being paid to the actual implementation process attending such enactments. While theoretical applications can facilitate predictions and anticipate consequences of statute change in rape, interpretations in the literature at present suffer from three major problems. First, the few authors in the field who do apply criminological theory to the topic of rape have yet to assess or interpret new legislation with such perspectives (Brownmiller, 1975a; Curtis, 1976; Schwendingers, 1974). The second point is that there exist only a very few studies on the effect of sexual assault laws after their passage, and none on the comparability of sexual and non-sexual assault case treatment under new legislation. A third problem is that empirical assessments rarely accompany theoretically oriented works. In short, comparative testing of the applicability of differing theoretical approaches on the subject of change in rape law are non-existent. The importance of this type of assessment lies in the insights, explanations, and
understanding facilitated by applying theory to everyday practice in the effort to discern whether or not, and why, enactment of new laws does or does not achieve stated goals.

The type of enforcement of any law is contingent upon discretionary decisions rendered by criminal justice officials. It is discretion then, and the factors underlying discretionary decisions rendered, that must be scrutinized in order to determine whether or not rape is treated in a consistent manner with other personal violent assaults in the implementation of enacted change.

Focus on discretion in the criminal justice system has generally centered around the trichotomous classification of police, courts, and corrections. The problem here is that this discretion "...fails to take into account the most powerful figure in the administration of justice" (Cole, 1975:227). Prosecutors have not only been said to be the most powerful agents of the law (Blumberg, 1979; Cole, 1975; Miller, 1969), but also those who operate with the greatest discretionary latitude (Blumberg, 1979; Chambliss & Seidman, 1971; Cole, 1975; Davis, 1976; Jacoby, 1977; Newman, 1966). It is the prosecutor who decides who to charge, what/how many charges to levy, whether or not to plea bargain, noile cases, and so forth. The prosecutor is an independently acting official to whom scant attention is paid in the theoretical and research literature (Cole, 1975; Grosman, 1979; Neubauer, 1974). This oversight must be remedied, especially in light of the preceding discussion regarding the importance of discretionary criminal justice decision-making in reaction to the implementation process. If prosecutors represent the most powerful
figures in the criminal justice system, there is good reason to assume that they will shape, if not determine, the type of implementation of new legislative enactments, i.e., whether or not the goal of comparable versus discriminatory rape case treatment will be realized. The factors that prosecutors consider in making determinations in different types of cases about who will be charged, what charge(s) will be leveled, and whether or not, and to what extent cases will be plea bargained, are critical to understand if assessment is to be made about the equity and fairness in rape case treatment and outcomes.

The objective of this research is to contribute to the understanding of the implementation process attending new and model rape legislation as it exists in Michigan. The "bottom line" question concerns whether or not the salient objective of victim advocate groups, such as the women's rape task forces, of comparability in sexual and non-sexual assault case treatment has been realized through the implementation of enacted legal change. Additionally, this research seeks to contribute to the growing body of theoretical and research literature in criminology by not only examining prosecution, but additionally, assessing the implications of differing theoretical perspectives on the origin and operation of the criminal law through empirical application. These various theoretical models with varying assumptions and tenets, provide for different types of interpretations of altered rape codes and their implementation.
CHAPTER II

THEORETICAL AND RESEARCH LITERATURE

Perspectives on the Law and Its Enforcement

Theoretically, the most significant orientations toward the origins of law and the enforcement of the law are consensus, pluralistic, labeling, and conflict perspectives. The latter type of orientation can be further subdivided into instrumental, structural, and dialectic Marxian theory. These major alternative models of law and the criminal justice process provide the theoretical framework within which this research operates. These divergent perspectives serve to guide the questions asked as well as the interpretation of research results.

It is important to note at the outset that these types of theory do not always distinguish between the origin of law and operation of the criminal justice process, i.e., some perspectives assume continuity between source and enforcement, while others address these issues separately. It is not the intent of this research to test or assess these alternative models as they pertain to the origin of the law, but rather to draw on such perspectives as they facilitate understanding the operation dimension involving the criminal justice system. The objective is to draw on these differing theoretical models to shed light on the new sexual assault law and its enforcement.
Value Consensus

Consensus theory assumes, as the name would imply, that laws arise out of shared values by societal members. Laws thus reflect the commonly held beliefs, norms, and collective will of the people. Sutherland and Cressey's (1974) discussion of the origin of law includes two somewhat different consensus views. They state that laws can be viewed as the crystallization of mores and alternatively as the result of the rational process of a unified society (1974:10-11). The difference between the two lies in that the former sees customary beliefs getting translated into laws because of habit and pattern, while the latter takes the cognitive, planning, rational aspect of law making into account. This latter view is consistent with Weber's (1922) position on the tendency for increasing rationalization of the state and law to accompany the progressive industrialization of society. Both, however, assume that the values which become embodied in law are agreed upon by the society as a whole.

This consensus view draws heavily on functionalism. Chambliss clearly demonstrates this connection when he cites Durkheim who states that "...the only common characteristic of crimes is that they consist...in acts universally disapproved of by members of each society" (Chambliss, 1976:4). This same article elaborates on the role of the state and criminal justice system given this "functional paradigm." Not only do laws arise out of value consensus, but the criminal justice system, as an arm of the state, executes these laws in a neutral fashion made possible by the shared values and interests.
The functionalist contention is that the legal system is designed and functions to protect fundamental social values (Hall, 1974; Durkheim, 1893).

**Plural Conflict**

The pluralistic orientation is frequently referred to as plural conflict theory. Both the pluralism and the conflict stem from the recognition of the existence of differing groups with different values and interests within any social structure. Plural conflict perspectives thus reject the notion of an homogeneous society so critical to consensus theory. The point of convergence between the two, however, lies in that both see the state and legal system as acting in an objective fashion. Plural conflict asserts that the state acts as an impartial mediator between diverse groups, each vying for state power to protect and promote its values and interests. The law is believed to represent the compromise between such differential values and interests (McCaghy, 1976; Quinney, 1970; Turk, 1966, 1969, 1977).

Authors working within this perspective have taken somewhat different directions. Austin Turk's (1969) discussion of authority-subject relationships falls within a pluralistic orientation. The crux of Turk's argument is essentially that there is a continual socialization process whereby societal members learn "norms of deference" and "domination" in preparation for the range of authority-subject roles they will occupy. Conflict is engendered by a number of different factors, e.g., "differences in perceptions, beliefs, and aspirations" (Turk, 1977:215) between these two primary groups.
Cultural and social differences between authorities and subjects lead not only to conflict, but also to the criminalization of behaviors or persons who fail to abide by the norms, specifically, those who fail to comply with the norms of deference. According to this view, authorities maintain control and stability not through coercive power but through submission to these universal norms. As subjects and authorities struggle, modifications are effected, and stability in these relationships results temporarily. Necessarily, as learning of norms is continual, so too are struggles and adjustments.

Richard Quinney's early work (1970) was also pluralistic in nature. He posited six different "institutional orders" (1970:38) in society. These six different political, economic, religious, kinship, educational, and public groups may come into conflict owing to differential values and interests. Quinney considers differential power among such groups, yet still keeps within the pluralist notion that balance and equity are the result of state action (Quinney, 1970:41-42; Taylor, Walton, & Young, 1973:259).

Chambliss and Seidman (1971) develop their pluralistic conception along somewhat more radical lines. They posit that different groups with different interests vie for state power, but argue that groups are not equal in power and hence in ability to have their interests embodied in law. Moreover, they assert that the state does not necessarily act in a neutral, unbiased manner (Chambliss & Seidman, 1971). Sheldon (1982:58-59) categorizes this type of perspective as an interest group/conflict model.
While variants on the plural conflict tenets exist, the thrust of pluralism can be evidenced in each of the prominent works mentioned above. This similarity becomes even more apparent upon comparison with consensus theory and the subsequent perspectives discussed below.

The Labeling Perspective

A third type of approach to the study of the origin and administration of criminal law can be found with the labeling perspective. This orientation addresses itself to the question of how collective definitions of deviance and criminality emerge and are applied. Additionally, this perspective focuses in on the consequences of such designations (Davis & Stivers, 1975; Schur, 1979; Traub & Little, 1975).

The labeling orientation does not systematically expound on the role of the state, except to recognize that power plays an important role in the definitional process (Becker, 1973; Currie, 1968; Plummer, 1979; Schur, 1980 - on power). In this sense it is similar to the previously cited work of Chambliss and Seidman (1971).

This orientation is similar to the pluralistic conflict perspective in another way as well. Becker's (1963) discussion of "moral entrepreneurs" in relation to the tax act of 1937, Dickson's (1968) of the tax act in terms of organizational self interests, Gusfield's (1963, 1967) of symbolic crusades in regards to prohibition, and Duster's (1970) and Lindesmith's (1965) of bureaucracies are all indicative of the assumption that different groups with different
interests and power struggle for advantage in the legal definition process. These types of studies have much in common with the pluralism of, for example, the early work of Quinney, but to reiterate, they do not assess the relative or absolute objectivity or equity owing to the role of the state.

That which this perspective sets out to do renders it relevant to a discussion of the origin and administration of the law because of its objective of examining the emergence and application of deviant and criminal "labels." This perspective, however, does not fit neatly into a classification of orientations on the origin and operation of the law based upon considerations of the nature of society and the work of the state for several reasons. First, the labeling perspective has been critiqued for focusing on the consequences of labeling at the expense of examining exactly these dimensions of emergence and application of laws and labels (Davis, 1980; Thio, 1973). Second, this orientation does not specifically delineate its conception of society in terms of social grouping and consensus. Additionally, while this perspective makes reference to the importance of power in the definitional and administrative processes, it has been critiqued for assuming rather than analyzing a dichotomous power structure (Turk, 1977:210). Because of these considerations, the labeling perspective can be conceived of as falling into pluralistic theory as shown above, or into a more Marxian type of orientation as discussed below. Regardless of these problems, the advantage of this orientation is that it calls attention to the collective process involved in designations and attributions of deviance, crime,
Instrumental Marxian Theory

Marxian conflict theory represents a drastic departure from the previously discussed orientations. Instrumental Marxian conflict theory is a more deterministic or strict application of Marx's work to the criminological field than structural Marxian theory which assumes broader latitude in the interpretation of his writings.

The more conventional instrumental theory can be described most succinctly by first identifying several of the most critical tenets of Marxian theory. Marx stated, for example, that the "History of all hitherto society is the history of class struggle" (Marx, 1848:13). Societies are characterized by conflict emanating from the struggle over scarce resources. This struggle leads to stratification and the development of classes. Social and economic class is determined by ownership over the means of economic production. In capitalistic societies, such as the United States, there are two distinct classes, the bourgeois and the proletariat. The bourgeois, or ruling elite class, own and control the economic means of production, i.e., a disproportionate share of societal resources. The proletariat, or the masses, work for wage labor for those who own, control, and rule.

The economy, referred to as the infrastructure, is believed by instrumentalists to determine the rest of societal arrangements, such as those relating to the government and legal apparatus, and those
relating to civil society such as the family, educational, and religious systems. A significant assertion with instrumental Marxian theory is that the dominant ruling class utilizes the infrastructure to control the superstructure in order to perpetuate its advantage and position. The bourgeois dominate, subjugate, and oppress the masses in order to maintain and enhance their disproportionate resources, power, and control.

Perhaps the most critical tool involved in this system is ideology. Marx stated that the ideas of the ruling class are always the ruling ideas and that the dominant economic or material force would be the dominant intellectual force (Marx, 1848). Ideology can be conceived of as beliefs or belief systems employed by the ruling class to justify, legitimate, and hence perpetuate the inequitable status quo.

Instrumental theory in criminology is predicated upon these assumptions. The most relevant application of Marx to the criminological field involves a consideration of the role of the state. The state, as the embodiment of political power, is manipulated at will, ergo, it is an instrument of the capitalist class. The state is used not only to maintain the monopoly over material resources and promote accumulation, but further to protect and facilitate the monopoly over non-material resources, i.e., over power and ideology for legitimation purposes. It is precisely these dynamics of resource, power, vested interest, and conflict which give rise, through the state apparatus, to the criminal law and its enforcement (as well as to law-violating behavior itself).
According to instrumentalists, acts which are defined as criminal as well as those who will be processed as criminal are wholly contingent on ruling class interests. Chambliss and Mankoff (1976) state that "Acts are defined as criminal because it is in the interest of the ruling class to so define them." (1976:7). Along these lines, Quinney states that the capitalist class alone is seen to have the resources, control of the state, and power to translate its values and interests into law. Laws, therefore, protect the inequitable material and non-material resource distribution, and perpetuate the superordinate position of the bourgeois through the exploitation and subjugation of the proletariat (Balkan, Berger & Schmidt, 1980; Chambliss, 1976; Kolko, 1963; Miliband, 1970; Quinney, 1977; Reiman, 1979).

The enforcement or administration of such laws is explained in a comparable fashion. The laws are designed and therefore applied so as to protect the vested interests of the bourgeois. The result is discriminatory enactment as well as enforcement (Braithwaite, 1981; Bullock, 1961; Clelland & Carter, 1980; Hepburn, 1973; Lizotte, 1978; Peterson & Friday, 1975; Pope, 1978; Thornberry, 1973; Wolfgang & Reidel, 1973). It is the masses, particularly the lowest echelons of the poor and minority group members, who are targeted in both processes. It is not only that the acts defined as criminal are primarily those committed by the proletariat, but also that those processed through the state apparatus of the criminal justice system are disproportionately those committed by the disadvantaged segment of the population.
The ruling class is seen to benefit from this in a number of different ways. This legal structure serves the upper class by functioning to divert attention away from the wrongs, harms, and crimes committed by those in power (Chambliss, 1976; Greenberg, 1981; Reiman, 1979). Because of the types of laws enacted as well as enforced, the focus, fear, and state resources are all directed at conventional street crime. A stable and visible class of "criminals" is socially constructed (Quinney, 1970; Reiman, 1979) which channels attention, concern, and the use of state power towards the lower class, rather than towards acts engendering even greater harm in terms of lives lost, injuries, and material and social costs incurred. In other words, the focus, fear, and punishment is aimed at crime "in the street" at the expense of the recognition, definition, and processing of crime "in the suites" (Newfield, 1980). Simultaneously, attention is drawn away from the more general and profound "crime" of the ruling class, i.e., exploitation, subjugation, and oppression. In a similar vein, hostility in both classes comes to be directed at only those defined as criminals, viz., the lower class. As Marx noted, this acts as a divisive force amongst the proletariat, thus thwarting the development of class consciousness and liberation.

The capitalist class directly manipulates ideology through its control over the state. The state is a significant instrument utilized to formulate and disseminate ideology. The manner in which laws arise and are implemented benefits the ruling class by generating false consciousness (Carsen, 1974; Chambliss, 1976; Hepburn, 1977; Michalowski & Bohlander, 1976; Reiman, 1979). The
proletariat are "duped" into believing that the legal system operates out of shared or consensual interests, that the laws are designed for the equal protection of all, and in short, that there exists a criminal justice system, state, and society.

All of this serves yet another purpose for those who rule. The "social reality of crime" (Quinney, 1970) created by enactment and enforcement systems facilitates greater dependence on the state and legitimizes the continual, if not increasing, use of coercive power to control "problem populations" (Spitzer, 1975) and to quell threats and opposition (Chambliss, 1976; Greenberg, 1981; Michalowski & Bohlander, 1976; Quinney, 1980).

The net result of law creation and implementation in a capitalist society is a perpetuation of the status quo. Forceful domination by those who own the means of economic production is accomplished in a fashion and by a system believed by the masses to be fair, equitable, and just.

**Structural Marxian Theory**

Because the instrumental Marxian view appears overly deterministic, structural conflict theorists have addressed themselves to this issue. Structuralists in the criminology field differ in their reading and application of Marxian theory from the instrumentalists in several respects.

The first difference lies in that structural conflict theory rejects the notion that the state is an instrument of the ruling elite. Structuralists view the state as developing its own relative
autonomy, independence, and even interests and contradictions (Althusser, 1977; Bierne, 1979; Bierne & Quinney, 1982; Greenberg, 1982; Harring, 1981; Picciotto, 1982; Poulantzas, 1982; Quinney, 1980). Because of this, the state cannot be manipulated at will by the capitalists. Greenberg best captures the meaning of this when he states that the state protects the rules and relations of capitalism, rather than the will or interest of capitalists (1981:192).

Along these same lines, structuralists argue that the economic infrastructure shapes rather than determines the superstructure of society (Greenberg, 1981). In this vein Poulantzas asserts not only the relative "separation" of the state from the dominant class, but also of the economic from the political (1982:313). This broader interpretation of Marx intends that the infrastructure sets the parameters within which classes will function, but does not decisively delimit all superstructure arrangements (Greenberg, 1981; Poulantzas, 1982) such as the character of the state and lower class consciousness, and divisions and alliances among classes (Greenberg, 1981).

A third point of divergence between instrumental and structural Marxian theorists is that structural arguments do not involve perceptions of the bourgeois as an homogeneous ruling elite. Structural conflict theorists allow for internal dissensions and conflict within as well as between class members. Structuralists recognize that there may well exist different factions within the ruling class (Bierne, 1979; Greenberg, 1981).

The law itself is viewed in somewhat different light by structuralists. As the state is viewed to protect capitalism rather than
capitalists, the law too is seen to be rooted in and an expression of class relations rather than determined strictly by capitalists and their interests (Balbus, 1977; Bierne, 1979; Chambliss, 1979; Greenberg, 1981; McCormick, 1979). This means that laws may be influenced by the masses and in appearance ostensibly serve their interests. Laws do exist, in modern day capitalistic societies such as the United States, which appear to be inimical or irrelevant to the ruling class, or appear to arise out of consensus and shared interest. Instrumentalists have a more difficult time explaining such phenomena than do structural conflict theorists. Instrumental Marxian theorists' response to these types of critiques is generally that the laws are either not enforced (Carsen, 1974; Chambliss, 1974; Hepburn, 1977) or that they serve the interests of generating false consciousness (Carsen, 1974; Hepburn, 1977; Kolko, 1963).

While structural conflict theory is amenable to such interpretations, a critical further insight predicated on structural tenets can be offered. Very simply, the law, in order to appear fair, must at times be fair (Bierne, 1979; Greenberg, 1981; Humphries & Greenberg, 1980; Thompson, 1975). The appearance of fairness and shared interests is integrally tied to the stability of the social system. The system must be perceived as legitimate in order to have the stability requisite to reproduce class relations and the capitalistic system. Bierne states that the state must, in fact, "...routinely pursue policies which are at variance with the interests or wishes of certain factions of capital" (1979:379). The long term interests of those with power are served by permitting concessions which placate,
and thus facilitate false consciousness. Structural Marxian theory, therefore, emphasizes the legitimation or "consent" function of the state rather than the "repressive or coercive," as stressed by instrumentalists (Greenberg, 1982; Hunt, 1982; Picciotto, 1972). Hunt, speaking of structuralism and its debt to Gramsci, notes that "...class relations are sustained and reproduced in such a way that relationships of domination and exploitation persist without general or frequent recourse to state coercion" (1982:86). Poulantzas states that "...the state can never exercise its function of domination, in the long run, by repression alone; this must always be accompanied by ideological domination." (cf. Ritzer, 1983:140 - emphasis in the original).

These differentiating aspects of structural conflict theory can be viewed as a progressive modification of the instrumental scheme. The basic congruity as well as difference between the two remains in the interpretation and application of Marx's works.

**Dialectic Marxian Theory**

Hegel, who first theorized on the dialectic, posited in an ideational sense that first there is the thesis, an original idea, which generates challenge or contradiction. From this challenge, referred to as the antithesis, emerges a synthesis which combines the best of the thesis and antithesis. Drawing on this, Marx talked of the dialectic in historical material terms. He inverted Hegel by declaring that ideas are epiphenomena resulting from dialectic materialism. In other words, Marx posited that ideas are products
of the economic infrastructure and that contradictions in the infra-
structure engender new social formations.

The dialectic model is similar to the structural in its recog-
nition of conflicts within class, the overriding, yet not determina-
tive importance of the material basis of the social structure, and
the state as somewhat independent of the dominant class in its
capacity as a resolution apparatus for conflicts stemming from con-
tradictions inherent in the capitalist structure. The present day
dialectic departs from structuralism by recognizing and attempting
to resolve the weaknesses found in both the instrumental and struc-
tural Marxist approaches.

The salient weaknesses of instrumentalism have been elaborated
through the discussion of structural Marxist theory. To reiterate,
instrumental Marxist theory has been heavily critiqued for its
economic determinism, assumption of a monolithic ruling class, and
instrumental view of the state as a repressive organ of the bourgeois
(Balbus, 1977; Bierne, 1979; Greenberg, 1981; Humphries & Greenberg,
1981; Klochars, 1979; O'Connor, 1973). Structural accounts too have
most recently been critically examined. Greenberg himself notes that
structural Marxism is found wanting by "minimizing" the discrimina-
tory, repressive aspect of law and its enforcement (1982:193) through
its focus on relative autonomy and the "consensual," legitimizing
functions of the state. Grau (1982) along with Greenberg notes that
structural Marxist theory additionally neglects to engage in syste-
matic historical analysis of class struggle leading to the "content
of legal reforms" (Grau, 1982:199) rendering it amenable to the very
critiques it seeks to avoid, i.e., being overly determinate (Hunt, 1982:87-88; Picciotto, 1982).

The dialectic model calls for the remedying of such problems in these two forms of Marxian analysis by attempting to integrate them (Grau, 1982:207). This alternative focuses on the dynamic process involved in the enactment and implementation of law through the state. It calls for the historical analysis of class struggle and the role that power differentials play in legal enactments. It assesses the politics of the law and the state, both as relatively autonomous entities (Grau, 1982) and simultaneously addresses the dichotomy of "coercion" or repression as emphasized by instrumentalists and "consent" or legitimation as emphasized by structuralists (Hunt, 1982:87).

This model can be seen as dialectic in essentially two different lights. First the model itself endeavors a "synthesis" of instrumental and structural orientations to bypass theoretical stalemates and to further understanding. The new theoretical direction arises out of the differing aspects characteristic of instrumental and structural approaches. The second form of the dialectic is found in the specific works of these authors.

Chambliss (1979) expounds his "dialectic paradigm" as one which "...sees law creation as a process aimed at the resolution of contradictions, conflicts, and dilemmas which are inherent in the structure of a particular historical period (1979:7). He intimates that the thesis, so to speak, as represented in the social form of capitalism and its inherent contradictions, leads to antithetical challenges which result in "resolutions." These resolutions do not necessarily
represent the synthesis in a truly Hegelian/Marxian sense. Chambliss states that resolutions do not address the basic contradictions in the social order, but rather the "conflicts and dilemmas" stemming from the contradictions which confront this established order (1979:17). He goes on to contend, therefore, that resolutions underscore dormant contradictions, which lead to new conflicts, dilemmas, and resolutions (1979:7). Change thus must be viewed in a dynamic yet cyclical, rather than progressive fashion, given this view which posits that resolutions arise out of contradiction. Along these lines, Chambliss concludes:

The more general point is that the creation of the law reflects a dialectic process, a process through which people struggle and in so doing create the world in which they live. The history of law in capitalist countries indicates that in the long span of time, the capitalists fare considerably better in the struggle for having their interests and views represented in the law than do the working classes; but the shape and content of the law is nonetheless a reflection of the struggle and not simply a mirror image of the shortrun interests and ideologies of the "ruling class" or of "the people" (1979:24).

Grau (1982) expounds on a critical dimension of the dialectic in his critique of structural Marxian accounts. While Grau agrees with the notion of relative state autonomy, he chastizes the structural theorists for failing to make a distinction between the state and the law (1982:198). The law too, he argues, is autonomous relative to the state as it represents the culmination of class struggle. The contradictions of the state and its functions of accumulation, legitimation, and repression (O'Connor, 1973) are manifest in law. The type of resolution to the contradictions and conflicts as seen in law
is, significantly, tied to the distribution of power among classes (1982:207). Therefore, he intimates that resolutions may or may not represent true gains (or a true synthesis as discussed in above terms) contingent upon power differentials. In reference to this he documents historical cases to show that laws not only serve state functions, but also "frustrate them" (1982:207).

Grau's work can be viewed dialectically in that it is the nature of the political economic structure and its contradictions which engender power differentials and challenge, and these may ultimately alter the nature of social relationships or the political-economy itself. Few gains or compromise for the dominated class are seen to be a common outcome of such challenges and struggles. Yet Grau teases that real gains or change are tenable if the challenging force has an underlying power base (which itself originates in capitalist contradictions). As Grau concludes, "If it is true that the capitalist state and the law are structurally limited, the content of policies and actions can vary, and that the variation can be theoretically and politically significant" (1982:207). Similarly, Bierne and Quinney point out that "...significant inroads may be confirmed and implemented through law" (1982:6).

**Theoretical Perspectives in Sum**

As previously mentioned, consensus, plural conflict, labeling, instrumental, structural, and dialectic Marxian perspectives are all models that relate to the origin and operation of the law. The consensus and pluralistic orientations assume that the state is
neutral and acts in the public interest in the creation of laws and by inference, due to the assumption of social consensus, in their administration. The labeling perspective allows for the role of power as an influence in these processes, yet does not specifically assess the role of the state, objectivity, and so on. The first two Marxian perspectives contend that the creation and enforcement processes both are controlled and work (in the long run) to further ruling class interests. The third variant of Marxian conflict theory allows for the possibility of change owing to contradictions inherent in the political economy.

This type of summary suggests that the perspectives discussed vary in the degree to which they differentiate and address the two separate issues of legal enactment and enforcement. Some of these perspectives more thoroughly address the issue of the source of law and then generalize to its operation, e.g., consensus and plural conflict perspectives. The Marxian perspectives pay more direct attention to both the origin and enforcement aspects of law. The attempt of this research is to specifically analyze the relative viability of these perspectives as they relate to this latter enforcement or implementation phase of the criminal justice process.

The Law on Rape

"Rape is no doubt as old as human existence, as evidenced by the recorded history of a brief six millennia" (Warner, 1980:1). While the act of rape "...dates back to earliest times, for centuries there were no laws against it" (Dean & deBruyn-Kops, 1982:18). Along these
same lines the "conspicuous" absence of "Thou shalt not rape" from the Ten Commandments has been noted (Brownmiller, 1975b:9). Historically, rape was a legitimate form of "bride capture;" as Brownmiller explains:

The earliest form of permanent, protective conjugal relationship, the accommodation called mating that we now know as marriage, appears to have been institutionalized by the male's forcible abduction and rape of the female. No quaint formality, bride capture, as it came to be known, was a very real struggle: A male took title to a female, staked a claim to her body, as it were, by an act of violence. Forcible seizure was a perfectly acceptable way - to men - of acquiring women, and it existed in England as late as the fifteenth century (1975b:7).

The first laws against rape, dating back several thousand years, set the tone for literally centuries upon centuries of subsequent legislation, attitude, and enforcement practices. In point of fact, the appearance of real, substantive change in law was not forthcoming until this past decade.

Some of the earliest laws against forcible "abduction" can be found in early civilizations dating back to almost 2,000 B.C. These laws blamed and punished both men and women when rape occurred. The code of Hammurabi in Babylon, for instance, stipulated that married women who were raped were to be punished along with their attacker (by being bound and thrown into the river) for committing adultery (Brownmiller, 1975b:9). The Hebrews stoned married rape victims and virgins to death along with their attackers for the same reason, i.e., consent was assumed as the women could have cried out for help and avoided the attack if it were truly unwanted (Brownmiller, 1975b:10). Dean and deBruyn-Kops note that "The Assyrians went one step further.
If a man raped a virgin, her father was entitled to take the wife of the ravisher" (1982:19, citing Saggs, 1962:13).

Laws and attitudes which blame and punish victims have carried through the times and pages of history. For example, the first laws in this country corporally punished both rapist and victim (Dean & deBruyn-Kops, 1982:21). The long standing carnal knowledge statutes enacted in the eighteenth and nineteenth centuries and still existent in numerous states today continue to punish rape victims, but in a less direct fashion, i.e., through attributions of blame, responsibility, precipitation, and the like which culminate in victimization and trauma for the rape victim. Such statutes generally define rape as carnal knowledge of a female forcibly and against her will. This form of rape law securely affixes the focus on victim rather than assailant behavior, and has operated to victimize the rape victim in the past as well as the present through the criminal adjudication process. It was not until the 1970s that change finally began to occur.

 Calls for Reform

The feminist movement which emerged during the 1960s is largely responsible for the changes in rape statutes across this nation. Feminists, inspired in no small part by civil rights activists, defined women as a minority and drew critical attention to the lack of implementation of fundamental American values such as equity and justice for all members of society. As the consciousness regarding
the plight of women and minorities in society grew, so too did the more specific concern with rape and its victims.

The feminist movement has been instrumental in pointing out that laws against and indignation over rape, when existent, have historically been predicated upon the violation of another man's property (Brownmiller, 1975a; Dean & deBruyn-Kops, 1982; LeGrand, 1973; NILECJ, 1978; Schwendingers, 1983; Wood, 1973). The laws, both in terms of origin and enforcement, have been critiques by feminists as discriminatorily protecting only certain classes of rape victims, i.e., the "legitimate" property of wives and virginal daughters rather than all women (Weis & Burges, 1978).

Feminists have additionally levied scathing criticism against rape laws across the country for placing such extensive and unique burdens on any rape victim so that the victim, rather than the assailant, is on trial (Bohmer & Blumberg, 1975; Brownmiller, 1975a; Harris, 1976; Holstrom & Burgess, 1975; Landau, 1974; LeGrand, 1973; Luginbill, 1975; Washburn, 1973).

Feminists and other victim advocate groups began to form over the past decade in the decided effort to change sexist laws and practices with regard to rape. The Speak Out On Rape sponsored by the New York radical feminists in 1971, WAR (Women Against Rape), and Task Forces on Rape throughout the country were all influential in calling national attention to the problem concomitant with rape vis-à-vis the legal and social structure. They further played no
small role in altering the carnal knowledge statutes which contributed to victim trauma and differential treatment of rape.

The difficulty in prosecuting rape cases and corollary trauma imposed on rape victims are integrally tied to the structure of the law as it has existed in this country since codification. The beliefs, misconceptions, and justifications for rape as "carnal knowledge forcibly and against her will" are, as previously noted, more antiquated than the statutes and case law interpretations themselves. The specific critiques, and consequently changes sought, by such groups as Women's Task Forces concern the issues of corroboration, resistance and consent standards, and character evidence. The following takes each of these issues sequentially and discusses the bases upon which historical requirements and practices are justified, and then goes on to critique each of these dimensions from a victim advocate point of view.

Corroboration

Corroboration requirements are one type of obstacle to the successful prosecution of rape cases. While the requirement varies from one state to the next, its existence in any form places unique strains on rape victims in the adjudication process. Although many states do not have a de jure corroboration requirement, it exists in a de facto manner in most jurisdictions (Hibey, 1973:169; Shapo, 1975:1530; Yale Note, 1972:1383).

Corroboration requirements impose the general rule that convictions cannot be sustained in rape cases on the sole basis of the
victim's statements. The general categories of corroborative evidence sought concern the identity of the accused, penetration, and lack of consent (Hibey, 1973; Luginbill, 1975; Sebba, 1974; Washburn, 1975). The specific types of verification required from independent sources range from:

1) Medical evidence and testimony, 2) Evidence of breaking and entering the prosecutrix' apartment, 3) Condition of clothing, 4) Bruises and scratches, 5) Emotional condition of prosecutrix, 6) Opportunity of accused, 7) Conduct of accused at time of arrest, 8) Presence of semen or blood on clothing of accused or victim, 9) Promptness of complaints to friends and police, and 10) Lack of motive to falsify (Allison vs. U.S., 1969:448 n. 8).

The first rationale for refusing to convict on the basis of victim testimony is embedded in the belief articulated by Chief Justice Hale approximately 400 years ago and echoed in courtrooms in the form of jury instructions to this day. He stated:

It is true that rape is a most detestable crime, and it ought severely and impartially to be punished with death, but it must be remembered, that it is an accusation easily to be made and hard to be proved, and harder to be defended against by the party accused, tho never so innocent (Lord Hale, 1680:635).

The belief that women frequently falsely "cry" rape provides a second justification or underlying belief which has given rise to the existence and persistence of the corroboration requirement. A further commonly held notion is that with such a heinous offense, the proclivity is for juries to sympathize with victims and thereby operate with a presumption of guilt towards rape offenders. The corroboration requirement is thus justified on the basis of protecting innocent men from guilty verdicts and punishment (Luginbill, 1975; Sebba, 1974; Shapo, 1975; Washburn, 1975).
Feminists, as well as academicians and legal researchers, have attacked corroboration requirements and the basis for them on a number of different levels. The demand for corroborative evidence is said to represent an unjustifiable requirement in rape case prosecutions. To determine that a rape did not occur because no one witnessed the attack (Pitler, 1973) is ludicrous. To dismiss a case or decide that no rape occurred because the only available evidence is comprised of victim and defendant testimony is inequitable and unjust. Victims of no other crime are so suspicioned. The prosecution is not required to provide additional evidence verifying victim statements in order to proceed with prosecution and sustain convictions in other types of criminal cases. The bases upon which the corroboration requirement rests are equally unfair. The result of a corroboration requirement in rape prosecutions is thus the differential and unequal treatment of rape victims. Low conviction rates constitute an additional and serious deleterious effect of this requirement (Ludwig, 1970).

A point of departure for the argument against the corroboration requirement concerns the availability of corroborative evidence. It has been pointed out that "The nature of the crime is such that eyewitnesses are seldom available" (Stapleman v. State, 1948). For example, rapes do not frequently occur with eyewitnesses present and do occur disproportionately in private residences rather than public places (Amir, 1971; MacDonald, 1975) where corroborative evidence will be difficult, if not impossible, to come across to verify the victim's accounts (Yale Note, 1972:1368-69). Similarly, evidence
additional to the victim's testimony to corroborate force and penetration also may not exist. Some women decide not to resist for fear of injury and thus have no bruises, cuts, or other wounds to substantiate or prove that a "real" rape occurred. Lack of resistance cannot rightfully or logically be equated with the absence of force and rape. Evidence of penetration may also be lacking due to a number of factors, e.g., no emission, douching, semen undiscovered after time has elapsed between the attack and the medical exam, and lack of disease and/or pregnancy (Yale Note, 1972:1371). It is important to further bear in mind that even overt indicators of resistance "...are not at all probative of penetration. And conclusive evidence of penetration has no probative value on issues of consent" (Washburn, 1975:292).

The justifications and beliefs upon which corroborative rules and practices are predicated are erroneous and/or misguided as well. The belief that frequent false accusations are corollary to rape complaints has been discussed by many (Columbia Law Review Note, 1967; Lear, 1972; Ludwig, 1970; Younger, 1971). Motives attributed to false reports range from shame, guilt, and bitterness, to hatred, vengeance, and shielding the origin of pregnancy (Herzog, 1931; MacDonald, 1971; Ploscowe, 1951; Williams, 1962).

Although false reports do, in fact, occur with sexual assaults as with other criminal offenses, they happen in only 15% of the cases (FBI, 1975). Thus, figures alone should detract credence from the myth that rape is commonly (intending more frequently than not) a falsely reported crime. The evidence for this belief being false
goes yet further. The Pennsylvania Law Review reported that 38% of the cases categorized as unfounded (no rape) by police in Philadelphia involved weapons, and 40% of the unfounded rapes involved victims who struggled and screamed (University of Pennsylvania Law Review, 1968:227-332). Moreover, in New York City the percentage of cases classified as unfounded dropped to 2% when female rather than male police officers were assigned to rape cases (Brownmiller, 1975a:435). McCahill, et. al. (1979:103-122) and Peters et. al. (1976:92-98) discuss similar findings.

In addition to this and to the fact that rape represents the most notoriously underreported offense in the nation to begin with (FBI, 1975:15), it has also been stated that of the minority of rapes which are reported (5% and lower) (Brownmiller, 1975a; Curtis, 1974; Haines, 1948; Kanin, 1975) the number of false reports"...will almost certainly be so small that modern techniques of criminal investigation and traditional legal rules, other than corroboration requirements, will effectively protect innocent defendants" (Yale Note, 1972:1972).

The second justification for corroboration requirements involving the emotionally sympathetic predilections of jurors and judges toward complainants alleging rape provides no more basis for the rule than did the myth of frequent false accusations. The misguided nature of this presupposition is readily apparent when one examines empirical data. It is a fact that rape is a charge where the difficulty lies in sustaining convictions, rather than a charge difficult to defend oneself against. Attrition in rape cases is
alarmingly high. Most rapes are not reported (FBI, 1975; U.S. Department of Justice, 1979), of those reported approximately 15% are declared to be unfounded (FBI, 1975); of those reported and "founded" 48% are cleared by police (FBI, 1980:178); of those cleared anywhere between 27 and 72% are not prosecuted (Caringella-MacDonald, 1984:forthcoming); of those prosecuted 46% of the charged rapists are acquitted (FBI, 1975:24). Yet law and practices are designed to deal with "sympathetic" criminal justice actors - the very people who, with or without corroborative evidence, are anything but eager to convict the accused in rape cases (Kalven & Zeisel, 1966).

The third justification (for corroboration requirements) that rape is a crime difficult to defend oneself against is also inaccurate, given these data. In other words, how difficult can it be to defend oneself against rape charges if most rapes are never charged, many not prosecuted, approximately one-half not convicted, in short, if all but a minute handful of offenders go free? Figure 1 diagrams this progressive loss of cases, i.e., the difficulty of sustaining convictions, as opposed to charges, of rape.
Figure 1. Rape "...is an accusation easily to be made...and harder to be defended against by the party accused, tho never so innocent" (Lord Hale, 1680:635)?

In an attempt to protect innocent men by invoking corroboration rules, the veracity or truthfulness of rape victims is questioned. Yet the honesty of complainants' testimony/statements in other criminal offenses is not subject to such skepticism. If trials, judges, and juries are believed to be capable of discerning the truth in all other criminal matters so as to effectively protect the innocent, why must additional burdens be leveled in rape cases? Judges have exactly the same power in rape and other criminal trials to "...set aside or direct a verdict based on insufficient evidence" (Younger, 1971:276). Thus, the criminal justice system has safeguards built
into all criminal proceedings for all defendants, not all of the accused excluding rape defendants.

**Consent and Resistance**

A second difficulty in rape legislation revolves around the issue of consent. If it can be established that the victim consensually participated in the sexual act(s) alleged, it is deemed that the crime of rape did not occur. In other words, consent is a defense to a charge of rape. It must, therefore, be demonstrated in criminal prosecutions that the sexual act(s) were "...against her will."

The issue of consent is interwoven with resistance standards. The resistance standards existing are utilized to demonstrate the presence of force, i.e., lack of consent (Sasko & Sesek, 1975:474). They frequently require that victims resist to the "utmost" throughout the entire sexual attack. Submission, even under force or the threat thereof, at any point in the duration of the sexual assault can be construed as consent.

The belief that "rape is a charge which is easily made but difficult to disprove" (Eisenberg, 1976:58) and similarly, that women often falsely accuse men of rape are again relevant to the explanation of consent and resistance issues. Perkins reports a comment from Starr vs. State (1931) which highlights the relationship between the beliefs, justifications, consent and resistance standards:

> Obviously a man should not be convicted of this very grave felony where a woman merely puts up a little resistance for the sake of "appearance" so to speak, taking care not to resist too much. The law goes beyond this. The absence of consent is necessary for this
crime. And even where the resistance is genuine and vigorous in the beginning, if the physical contact arouses the passion of the woman to the extent that she willingly yields herself to the sexual act before penetration has been accomplished - or if she yields before this time for any other reason - it is not rape (Perkins, 1969:161-162).

Victim advocates, particularly feminists, have raised a variety of issues relating to consent as it has existed and slowly evolved in statute, case law, and attitudes over many years. While consent in rape may be a legitimate defense in some instances, the criminal justice system has slanted its focus to such an extent that all rape victims are required to prove their "innocence" or lack of consent and desire, rather than focusing on the criminal behavior of the accused. The issue of consent subsumes the question of resistance, past sexual history of the victim, and evidence of character.

The "...against her will" phrase in conventional rape statutes is designed to deal with consent issues. But as Harris (1976) notes, the lack of consent and "against her will" are not strictly synonymous. They carry rather different connotations. She states that "While the first implies only that the victim should withhold active approval or expressed non-consent, the second connotates active resistance" (Harris, 1976:618-19).

The consent standards in rape adjudication represent a further dimension upon which differential treatment of rape cases has been justified. Again, victims of other assaults and criminal offenses are not asked to demonstrate that they did not consent to being victimized, yet it is believed that rape is unique enough to justify a rigid and differential standard. It is in this vein that Harris
states that the "...argument for separating a theory of consent in rape from consent in other areas of law was based on prejudicial assumptions than on purposes unique to the crime of rape" (1976:632).

Resistence on the part of rape victims has traditionally been required as an element of the offense and used as an indicator of non-consent, but lack of resistance does not, in fact, imply consent. Submission under force and/or the threat thereof cannot be equated with consensual participation in the sexual act(s) constituting the crime. However, lack of resistance, i.e., submission, has traditionally been a basis for dismissing allegations and determining that no crime occurred. Washburn argues that:

It is difficult to see why a woman should be required to physically resist when a verbal refusal can be just as effective. The woman should not be punished because the man believes the myth that when a woman says "no," she really means "yes." And the woman is definitely punished by the requirement of resistance (1975:284 - emphasis in the original).

Not only have conventional statutes required that victims resist, but further that they resist "to the utmost," from the inception to the close of the sexual assault (Cobb & Schauer, 1977). The nebulous nature of this phrase has often been interpreted in such a strict manner that even when resistance has been documented, defendants have been acquitted due to "insufficient" resistance on the part of the rape victim. The following court interpretations of the resistance requirement are indicative of the stringent standards imposed:

The court found no indication of the "terrific resistance which (a) determined woman should make". Thus requiring as fulfillment of "against her will" not simply the general
absence of mental consent but rather "the most vehement exercise of every physical means or faculty within the woman's power to resist the penetration of her person... to persist until the offense is consummated." The court buttressed this high standard with statements of medical writers that a woman could pose unsuperable obstacles (hands, limbs, and pelvic muscles) against sexual attack (Shapo, 1975:505, citing Brown v. State).

It is not sufficient that the carnal act be violently accomplished, or that it be without her consent...In such cases, although the woman never said 'yes,' nay, more although she constantly said 'no' and kept up a decent show of resistance to the last, it may still be that she more than half consented to the ravishment (Mares v. Territory).

It should be obvious from these common types of statements that unique burdens are placed upon rape victims who decide to proceed with charges owing to legalistic requirements, practices, and the attitudes regarding false accusations and so forth. Not only are these requirements and attitudes unjust, they are prima facie ill-founded and unrealistic. Moreover, as previously discussed, many women are physically overpowered and incapable of resisting their attackers, while others become paralyzed by fear. Furthermore, resistance may have the propensity to increase assailant anger and determination, and hence incur greater victim injury.

Victim precipitation is a notion which bears mentioning as it relates to resistance and consent issues. This concept essentially involves blaming the rape victim for provoking or asking for the criminal act of sexual assault. This is integrally tied to the notion of resistance. The myths regarding victim precipitation vis-à-vis resistance can be found in common misconceptions and beliefs such as "an unwilling woman cannot be raped," or "a victim could avoid
rape if she really wanted to," or "no victim can be raped unless she somehow wanted to be." Such a belief is related to the notion of consent, i.e., the victim asked for/consensually participated in the sexual act(s), and therefore no rape/crime took place. In no other crime are victims seen to be deserving of or asking for an attack based on such post hoc reasoning (Michigan Women's Task Force on Rape, 1974), i.e., viewed as simply attractive before a sexual attack and provocative afterwards, seen as asking for an attack because of vulnerable circumstances, and so on.

The resistance requirement, along with the related issues of consent and precipitation, have had the effect of affixing excessive and categoric focus on rape victims, while simultaneously deterring attention and scrutiny away from the criminal activities perpetrated by the accused.

Character Evidence

Character evidence is additionally admissible in rape trials. The past sexual conduct and reputation of the victim has traditionally been publicly scrutinized in the courtroom in the attempt to discern whether or not consent was existant at the time of the alleged rape. It is believed that if women have consented to sex in the past, the probability is high that they consented with the defendant in the present instance, and hence no rape could have occurred. The rationale for admitting character evidence also extends to the more broad or general issue of victim credibility. Past sexual history and reputation evidence are introduced additionally
to "impeach the credibility of the victim in her capacity as witness" (Washburn, 1975:293).

Whether introduced to establish the defense of consent or simply to impune the rape victim, the justifications provided for the admissibility of such evidence are similar to those previously noted in terms of corroboration, consent and resistance, e.g., the ease and frequency of false accusation in relation to the difficulty of defending oneself against such charges. One further basis for admitting character evidence stems from the sixth amendment right to confront one's accusers in cross-examination (Sasko & Sesek, 1975:485). In this light, Herman states "...the defendant is entitled to participate in the fact-determining process by offering evidence to cast doubt on the prosecution's case" (1977:17). The argument here is that "the defendant should be afforded every opportunity to present evidence relevant to his innocence" (Sasko & Sesek, 1975:485) in light, once again, of the difficulty of defending charges, and so forth.

Prying into sexual activities of victims is a second legally permitted tactic which is conducted under the guise or with the "objective" of establishing non-consent, i.e., lack of force, or proof of consent as a defense to criminal culpability. This principle was first articulated in 1888 (Sasko & Sesek, 1975:478). The assumption is that if victims consented in past sexual encounters they are prone or more likely to have consented in the case under review, thus rendering the charges to be a matter of false accusation.
In this way, chaste women are protected (more often) by rape laws than are any other women.

Even where consent is not being argued, information regarding moral turpitude and reputation may still be admissible to impeach victim credibility (Luginbill, 1975; Washburn, 1975). The underlying assumption remains the same—consent in the past indicates likely consent in the case at hand.

Utilization or reliance on character evidence as an indicator of present consent is more than highly suspect; it is unjust and rests on assumptions that are outright fallacious. Consent in past sexual relations has nothing to do with the forceful and violent crime of rape. Deciding or agreeing to engage in sexual activity in the past has little bearing upon present crime circumstances. For example, sharing one's money or property with a friend at one point in time is never considered as evidence that one decided to "share" one's money or property with robbers orburglars. Yet, such is the case with rape (Michigan Women's Task Force on Rape, 1974).

Character/reputation evidence is generally allowed in court only in homicide cases to show that the victim was the aggressor (McCormick, 1972; Washburn, 1975; Wigmore, 1940). It is disallowed, even if potentially relevant, if "...its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issue, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence" (Washburn, 1975:303). How then can evidence of such a biasing nature as past sexual activity of victims be permitted in the courtroom? The
rationale offered concerns the consent defense and rights of the accused.

Several quotes serve to highlight the issues surrounding the admissibility of character evidence. Luginbill comments that "...the focus often dramatically shifts to the character of the prosecutrix, almost as if she were the one whose guilt or innocence was to be determined" (1975:674). Washburn, in discussing the constitutionality of character evidence states that "The Constitution does not require that the defendant be allowed to subvert the fact finding process by appealing to the baser motives of juries" (1975:306). LeGrand's discussion of the consent standard nicely summarizes character evidence issues in relation to consent and credibility. She notes that "Thus, legally, a man's previous sexual attacks, even if criminal, are of no relevance to his credibility, but once a woman has had sexual relations with one man, a legal presumption exists that she has consented to sexual relations with all men" (1973:874-75).

Rape as a Violent Assault

Statute, case law interpretations, practices, and attitudes have rendered the crime of rape so unique in our legal system that it is rape victims who are put on trial to demonstrate their innocence after being sexually attacked. The victimization of the rape victim by the criminal justice system has its roots deeply embedded in history. To claim that reform is long overdue is charitable.
The underlying and essential thrust of the women's movement vis-à-vis lobbying for changes in rape legislation has been targeted at the objective of redefining rape as a violent rather than purely a sexual crime. Dealing with rape as a sexual crime tied to passion drives and motives has slanted the criminal justice system's treatment of this offense (Bendor, 1976; Brownmiller, 1975b; Gager & Schurr, 1976; Klemmack & Klemmack, 1976; LeGrand, 1973; Sasko & Sesek, 1975; Shapo, 1975) to such a degree that the system exists in a state of "tilt," i.e., to a point where the system/machinery ceases to function for its stated purpose (viz. equity, fairness, and justice). It is argued that recognizing the violent nature of this offense, rather than viewing it as a purely sexual crime, will render criminal justice processing less discriminatory and unjust. The relevant assumption here is that if rape is seen as a violent crime, it can then be handled in a manner comparable to other types of assaults. The goal of consistency in regards to sexual and non-sexual assault is predicated on the belief that comparability will preclude considerations, requirements, and differential standards such as those of corroboration, resistance, character evidence, and consent.

Enacted Change and the Michigan Criminal Sexual Conduct Statute

Numerous states have altered their rape legislation in response to the types of problems discussed herein. The decade of the 1970s witnessed an incredible amount of legislative activity, particularly given the centuries of what amounts in practice essentially to
inaction. Between 1976 and 1978, 36 states changed their rape statutes (NILECJ, 1978:1). While virtually every state in this country has altered its rape legislation within the last full decade (Field & Bienen, 1980:153) some states have enacted only minor amendments, for example Illinois and Kansas, while others such as Michigan and California have radically altered their rape laws.

Michigan was one of the first states to enact sweeping changes in rape legislation in 1974. The Criminal Sexual Conduct Code (CSC) in Michigan, now implemented, is referred to as model legislation (BenDor, 1976; Dean & deBruyn-Kops, 1982; Field & Bienen, 1980; Marsh et. al., 1982; NILECJ, 1978). Because Michigan law represents the existing exemplar in rape statutes, because it is most comprehensive in nature, and because it is the specific statute being scrutinized, it is focused upon in this section. Michigan's law will be employed as a vehicle for discussing the various dimensions of change throughout the nation.

Corroboration requirements have become more relaxed and even abolished due to reform legislation. While some authors state that most states adhere to common law standards which did not require corroboration, it has simultaneously been noted that the requirement has existed in a de facto fashion in most jurisdictions (BenDor, 1976; Dean & deBruyn-Kops, 1982; Field & Bienen, 1980; Marsh et. al., 1982; NILECJ, 1978). Michigan's case is illustrative of the meaning intended by such statements. Michigan never formally stipulated a corroboration requirement, but the de facto situation which historically existed was one where few defendants were ever convicted.
without some corroborative evidence (Michigan Women's Task Force on Rape, 1974; Cobb & Schauer, 1977). The enacted change in Michigan specified the lack of a de jure corroboration requirement in the attempt to eliminate its de facto existence. The CSC Code now specifically stipulates that "The testimony of a victim need not be corroborated in prosecution" (P.A. 266, 1974:520(h)).

States such as New Mexico (1975) and Florida (1977) followed Michigan's lead by repealing their corroboration rules, while others such as New York (1974) and Georgia (1978) settled on a compromise strategy, requiring some types of corroboration for some offenses, e.g., only in statutory rape cases.

Attempts to alter the consent standard as manifested in statutes and in case law interpretations have also been made. Reform efforts have directed their attention to the preclusion of sexist practices which grew and solidified through consent standards. Michigan (1974) and New Jersey (1979) for example, have avoided the word consent and delineated objective circumstances such as the existence of weapons, victim injury, or authority relations between victims and offenders which, if present, automatically constitute sexual assault, i.e., the lack of consent (Field & Bienen, 1980:160).

Addressing the problem of consent has also been accomplished through the abolition of resistance requirements. Michigan's CSC Code does not require victim resistance in order to sustain convictions, but instead permits that it is sufficient to prove that force and/or the threat thereof existed at the time of the sexual assault. This shifts the focus from the victim's behavior (as in resistance)
to the offender. Minnesota (1975) and Ohio (1974) have enacted similar legislation. Moreover, even where the resistance standards have been retained, "resistance to the utmost" has been deemed "obsolete and outdated" (Bailey & Rothblatt, 1973:278). Utmost resistance has been replaced by a more lenient (yet still inequitable) practice (Shapo, 1975:478). The prosecution now must demonstrate only "good faith resistance, measured in relation to the total circumstances of the alleged attack" (LeGrand, 1973:620).

The admissibility of character or reputation evidence as an indicator of consent has been perhaps the most significantly affected dimension of traditional rape statutes. Forty states have enacted some provision for limiting victims' past sexual history in the courtroom (Field & Bienen, 1980:171). The degree of protection afforded rape victims by the CSC Code revision in Michigan has, unfortunately, been unmatched in other states. Michigan's Code states that:

Sec. 520(j). (1) Evidence of specific instances of the victim's sexual conduct, opinion evidence of the victim's sexual conduct, and reputation evidence of the victim's sexual conduct shall not be admitted under sections 520(b) to 520(g) unless and only to the extent that the judge finds that the following proposed evidence is material to a fact at issue in the case and that its inflammatory or prejudicial nature does not outweigh its probative value:

(a) Evidence of the victim's past sexual conduct with the actor.

(b) Evidence of specific instances of sexual activity showing the source or origin of semen, pregnancy, or disease.
(2) If the defendant proposes to offer evidence described in subsection (1) (a) or (b), the defendant within 10 days after the arraignment on the information shall file a written motion and offer of proof. The court may order an in-camera hearing to determine whether the proposed evidence is admissible under subsection (1). If new information is discovered during the course of the trial that may make the evidence described in subsection (1) (a) or (b) admissible, the judge may order an in-camera hearing to determine whether the proposed evidence is admissible under subsection (1). (P.A., 266, 1974:3-4, 520(j)).

While numerous reforms in statutes have addressed the issue of character evidence, Field and Bienen state that "Most states, however, have enacted rules which simply require a pre-trial hearing on relevance before evidence regarding the victim's sex conduct with persons other than the defendant can be admitted" (1980:171).

Michigan and other state statutes contain several additional provisions designed to improve the protection of sexual assault victims. Only 29 states presently use the term rape somewhere in their statutes as numerous states have endeavored the redefinition of this offense (Field & Bienen, 1980:154). Definitional revisions in approximately one-half of the states have been constructed to cover not only a wider range of victims, but further a wide range of behaviors. For example, many states have gone to sex-neutral terminology, so that the law extends to cover male victims of sexual assault.

In a similar attempt to protect larger classes of victims, many states have begun to include provisions for the inclusion of spouses as rape victims. Revisions designed to include a consideration of a greater range of behaviors now cover "...oral and anal conduct,
vaginal or anal penetration with an object, and other kinds of sexual abuse" (Dean & deBruyn-Kops, 1982:20).

Moreover, 22 states have redefined rape in terms of a series of graduated offenses (Field & Bienen, 1980:154). The degree structure for different types of sexual assaults and the corresponding differential penalties have been enacted with the intent of rendering the treatment of this offense more comparable with other violent assaults and crimes (Shapo, 1975:1522). The degrees are generally differentiated on the basis of the severity of the crime as determined by such factors as victim injury, presence of weapon, aiders and abettors, age of victim, and so forth. These factors represent some of the objective criteria which are stipulated so that sexual assault is handled in a more equitable manner throughout the criminal justice system.

Many states have additionally increased the amount of punishment associated with sexual assault offenses (Sasko & Sesek, 1975). This type of reform is aimed at correcting the problem of light sentences being handed down to convicted offenders. States such as Michigan have even enacted additional proposals which preclude special "good time" allowances for early parole for those convicted of criminal sexual conduct.

A further alteration involved in reform legislation forbids the identity or name of the victim to be publicized. For example, the Michigan Code states:

Upon the request of the counsel or the victim or actor in a prosecution...the magistrate before whom any person is brought on a charge of having committed an offense...
shall order that the names of the victim and actor and
details of the alleged offense be suppressed until such
time as the actor is arraigned on the information, the
charge is dismissed, or the case is otherwise concluded,
whichever occurs first. (P.A. 266, 1974:4, 520(k)).

It is more than apparent that our legislators have been active
in attempting resolutions aimed at the issues and problematics asso-
ciated with archaic statutes, case law, and practices. The enacted
legislative alterations in general appear most positive from a victim
advocate point of view. The final and absolutely critical question
then concerns the effect of all of this change given the implementa-
tion process. As stated by The Michigan Women's Task Force on Rape:

While we must have done something right to so upset the
traditionalists, I would nevertheless caution the enthu­
siasts against the belief that an untested law can be a
model law. Its carefully chosen words may say what many
of us want a fair law to say. But we do not yet know if
in practice it will help to right what is so desperately
wrong. More than a legal reform, the Michigan law is an
experiment in which we hope to learn how a major revision
in the criminal code can deter, control, publicize, and
equalize the treatment of a very destructive set of acts

Alternative Interpretations of New Rape Law

The theoretical perspectives on the legal system described in
the first section of this chapter can now be drawn upon in the effort
to explain the origin of rape laws across the country in general and
the new Michigan law in specific. The application of these perspec-
tives to the enforcement/implementation dimension of the legal system
is of particular importance given the research objective. Thus, each
perspective needs to be assessed in terms of both the legislative
change and its enforcement.
In assessing the three types of statements made about the origin and operation of law with consensus theory, it becomes apparent that certain tenets or types of consensus theory are more relevant than others. Sutherland and Cressey's (1974) first point regarding the "crystallization of mores" is most difficult to apply to the new rape legislation. Protection of all classes of sexual assault victims, comparability of treatment with other crimes, etc., cannot be characterized as custom or habit in this country. The point that Sutherland and Cressey make in this light is that laws arise out of the process of translating custom or habit into legal codes. Since the new law attempts to alter prevailing definitions and customs, it is not amenable to interpretation with this variant of consensus theory.

Sutherland and Cressey additionally posit that laws may emerge out of the "rational process of a unified society." This orientation can be employed to explain the new rape law and to anticipate its administration. The recognition of and calling attention to discriminatory handling of rape vs. other crimes can be seen as part of a rational process. This perspective would explain that once the discrepancy between stated and consensual societal goals, such as justice, equality, and fairness before the law, and actual case treatment were brought to light, laws were changed to bring about consistency. Thus the society can still be seen as unified and the new law explained as an attempt to implement consensual values which were being unwittingly distorted under a previous condition due to
the shared but different value of protecting the rights of the ac­
cused. Given the assumption of value consensus attributed to society
and the legal system with this rational process view, it would be
assumed that continuity would exist between the shared values leading
to legislative alteration and the implementation of the new law
reflecting these values.

The third variant of value consensus relates to functional
theory. This type of orientation would lead to an interpretation
similar to that above in terms of the new rape law and its enforce­
ment. The historically standing carnal knowledge statute would be
seen to represent the collective conscience, and the new law as an
attempt to better align such consensus with practice. This is to say
that the interpretation, given functional consensus theory, would be
that both violent and property crimes offend the collective con­
science. When feminists brought to light that differential treatment
of rape for the protection of the accused resulted in injustice, it
became apparent that this was consistent with neither the consensual
values of right and wrong, nor with societal goals of justice. The
laws would be seen to change in the effort to have the legal system
better reflect and meet the shared societal values and goals.

This type of explanation, however, begs the question of the
impetus for feminist groups who challenge the prevailing value con­
sensus (consensus being the need for differential standards and
treatment of rape because of concern about the rights of the accused).
The fact that a unified challenge to the "collective conscience" was
levied by feminists is difficult to account for given consensus
orientations such as functionalism. One could draw on Durkheim's
discussion of deviance in an attempt to explain this phenomenon, yet
this too falls short. Durkheim asserted that deviants, such as the
feminists who did not accept the prevailing consensus, serve certain
functions for the social structure. One of the functions he men-
tioned, which can be viewed as applicable in this case, is that of
innovation (1895). The feminists can be seen to be innovators
bringing about a change in the collective conscience, with such
change ultimately serving as the basis for continued solidarity and
integration of societal members. The problem with this type of ex-
planation is that functionalism is not able to account for the origin
of the deviance or collective challenge, owing to the fact that this
contradicts the strength of the collective conscience. Moreover,
Durkheim's discussion of innovators pertains to a more individualis-
tic level.

While value consensus approaches facilitate certain insights,
they do fall short of fully explaining the creation of the new rape
laws. The enforcement aspect of the legal system must be inferred
from the same value predicates leading to the law. The implemented
law would therefore be anticipated to resolve noted inconsistencies,
and reflect the consensual intentions and values of justice and

Plural Conflict Theory

Pluralistic conflict theory would posit a different type of
interpretation of the new law. This perspective, which posits that
there are different groups with different interests in society, would view women as one such group. Women, such as feminists, vied for state power to protect their set of interests, i.e., being better protected from rape and from the trauma imposed through the criminal justice system. This is consistent with the view that all groups have the right to access the political arena to have their interests protected. In this pluralist view, the state would be seen as acting in a fair and objective fashion by weighing the interests and demands of this group against those of other groups and ultimately, then, conceding to enact a more fair law.

In applying Turk's pluralistic conceptualization it might be stated that the feminist group (by lobbying for change) followed appropriate channels by recognizing the legitimate authority of the state. Change would be seen to be necessary as the norms of domination and deference required modification. The struggle of women which manifested itself in the challenge to authority to protect the interests of women is accommodated by Turk's pluralistic position. The adjustment in law can be taken as an adjustment in these norms between authorities and subjects. The legal resolution to the challenge and conflict would be viewed to result in the temporary stability of the social order.

The pluralism of Chambliss and Seidman (1971) and of Quinney (1970) render somewhat different insights. The work of authors such as these leads to speculations about why a less powerful group, such as women, were able to have their interests reflected in law. The response to this query is not terribly difficult to discover. Women
represent a numerical majority (albeit slight) in this country and women can vote. Therefore, the "less powerful" or subordinate group does, in fact, wield some power because of their numbers and the political power of the vote. These factors would be interpreted as influential dimensions in the successful enactment of new rape legislation.

Again, the varieties of the general perspective lead to somewhat different interpretations. The essential thread weaving these perspectives together is that they assert that different groups with different interests (and power) compete for implementation of interests in law. The law and its operation are assumed to operate in an impartial fashion, protecting the general public welfare. While the form of operation of the law must be inferred from these premises, it can be stated that the implementation process would be anticipated to mirror the enactment process. In other words, the law and its enforcement would reflect a fair, protective compromise of interests in a Turk scheme, and an inequality in power relationships along the lines of more radical pluralistic theorists. It is obvious that since women are a subordinate group in this society in most every way save numerically, a contradiction is inherent in this latter view. This form of plural conflict theory is therefore hard pressed to fully explain the emergence and enforcement of a law serving the interests of a group less powerful in most all ways.
The Labeling Perspective

As similarities were pointed out in the general discussion between the labeling orientation and plural conflict theory, it can be expected that the application of this perspective to the new rape laws will also manifest some congruity. The labeling perspective asserts that definitions of crime arise out of power bases. The enforcement process is also employed to reflect power relationships. The interpretation of new rape statutes must, therefore, once again take into consideration the numerical superiority of women and the power they hold as a group primarily because of their vote. The problem of inattention to differential degrees of power which besets the pluralistic conceptions is of equal relevance here.

A significant contribution of this orientation, however, in relation to the women's movement and rape legislation, lies in the consideration of the nature of labels. A critical element of reform legislation has been to redefine rape so that it is conceived of and treated as other violent assaults. It is precisely the social reconstruction of the reality of rape as a form of assault that reform efforts have attempted to address. Viewing rape as a violent assault in law is believed to be one significant means of resolving the problems tied to historical legislation and practice. The nature of rape definitions thus comprises a target of reform. If criminal justice officials begin to develop and share conceptions of rape as a violent crime, as the new law would envision, less differential treatment (e.g., attributions of consent, blame, etc.) would be anticipated.
The labeling orientation calls attention to these definitional and attributional processes and the likely consequences for individuals of such designations. Labeling would therefore view the new law as a means to accomplish the re-labeling of the crime of rape and its victims, and because of these new constructions of reality, view the new law as a possible measure to reduce differential treatment and hence victim trauma.

Because labeling recognizes the role of power but does not analyze power structures and relationships (Turk, 1977) it is difficult to utilize this orientation to lead to anticipations about the discrepancy between enactment and implementation. Whether the enacted redefinition of rape as sexual assault, sexual battery, criminal sexual conduct, or deviate sexual conduct accomplishes the objective of treating this offense comparably (to other assaults) is a question better answered by the Marxian perspectives.

Instrumental Marxian Theory

The instrumental Marxian conflict approach would assume that not only is it that those in power determine what laws will be enacted, but also that this is the class who will control the law's implementation. This view would contend that the new rape laws, while appearing to be equitable and just, actually serve the interests of the ruling class by perpetuating the inequitable status quo.

It is instructive to note at this juncture that Marxian analysis specifically deals with the dichotomous distinction of the upper class and the masses as these two classes are related to the modes of
economic production. While women as a social group cannot all right-fully be strictly classified as lower class, the tools of a Marxist approach, especially pertaining to the dichotomy of the superordinate or powerful vs. the subordinate or powerless, can be utilized to interpret the origin and enforcement of new rape statutes that affect both men and women.

It is anticipated, given instrumental Marxian theory, that power interests can be facilitated, even by passing legislation supposedly inimical to such interests, for a number of reasons. The point of departure for this argument is that laws may be enacted which appear and purport to serve interests other than those of the power elite; however such legislation on the books remains just there, rather than being enforced (Carsen, 1974; Chambliss, 1974; Hepburn, 1977; Kolko, 1963). In the case of altered rape legislation it might be anticipated that while new laws exist, enforcement through the judicial arm of the state maintains the historical practices of protecting man's property, and this only when the property is legitimate, i.e., there is very little in the new law which can preclude discriminatory enforcement. The instrumental perspective allows for and even predicts that the implementation process can/will totally negate the intent of the law as envisioned by those so instrumental to its enactment. In point of fact, the protection of property, i.e., wives and daughters, is not at all inconsistent with even model legislation. In Michigan, for example, the crime is automatically more severe (carries a greater penalty) if the victim is under the age of 13. Men still cannot legally rape their property/wives in this same state.
The law endeavors to reduce victim trauma and attributed culpability, but if discriminatory enforcement endures, as would be predicted by this approach, then it is primarily still only upper class women who are protected. The seemingly inimical law may be seen to serve the dominant class in another fashion. The interpretation might be offered that the patriarch is spared the stigmatization of disloyalty where victim culpability and consent become less visible and frequent issues.

From the instrumental Marxist view a further response to the apparently inimical law is that such laws are advantageous to the ruling class by furthering false consciousness (Carsen, 1974; Hepburn, 1977). The false consciousness is facilitated by virtue of the fact that, for instance, new "fair" rape laws can and have been enacted, while no real substantive changes are actually forthcoming by those in power. The public is then duped into believing that the democratic and just system is viable and operating while the ruling class retains control of the enactment process. In reality the new rape laws represent a ploy by the upper class to achieve just such an end result. Put differently, the ruling class perpetuates false consciousness in order to maintain the status quo by passing a law and simultaneously being cognizant that the law will not be enforced any differently than the old law. By introducing legislation into the state apparatus which endeavors to redefine the crime of rape as a violent assault, feminists and other victim advocates are placated, and an open challenge and threat is quelled. The point instrumental theory brings to light is that legislation alone is an insufficient
measure - for the class that is ruled - but more than sufficient for those that rule since the ultimate test of reality is determined by enforcement.

Additional reasons exist which explain why the new rape laws serve principally the ruling class. The nationwide focus on rape, as well as the attempt to have it viewed as a violent assaultive crime that needs to be controlled, also serve those with power. First, the focus on "violent" or "street" crime is heightened. This serves to divert attention and concern, and even definitional efforts, away from upper class offenses, such as corporate crime and the pervasive domination and oppression of the lower class (Hepburn, 1977; Reiman, 1979; Reiman & Headlee, 1981). Additionally, the rapist himself is still stereotypically conceived of as a lower class black man who needs to be controlled and punished. This lends greater legitimacy to the state as a repressive branch of government (Hepburn, 1977; Michalowski & Bohlander, 1976).

The state gains legitimacy, not only in this respect, but in yet another fashion. It is the law which groups such as women address themselves to in the effort to abate the problems of rape. It is, therefore, the state, an arm of the ruling elite, which is believed to have the ability to resolve conflicts for the people. The inherent contradiction of using the state by and for the people has already been discussed. The additional point to be made here is that because, in part, of false consciousness, or the inability of the proletariat to know their true collective class interests, a major symptom rather than cause of the problem is being addressed.
Specifically, the call for reform has been to change rape laws rather than to alter the class structure which leads to domination and exploitation of women, and thus to rape itself.

The attempt to broaden the definition of rape by making it sex neutral and encompassing a wider range of acts represents a final component of new legislation which can act to serve ruling class interests. By broadening the scope of those who can fall within the arms of the law, the state and hence the upper class are able to control "problem populations" and/or quell threats from lower class members with greater ease.

In sum, instrumental Marxian theory points out that the bourgeoisie will benefit from the new rape legislation in this country, while the legislation itself appears to serve interests other than those of this class. While application of this perspective yields some very significant insights, it too falls short in explaining the emergence of a group who challenged prevailing ideology, law, and practice. The instrumental approach has been critiqued for dictating that the economic infrastructure determines the superstructure, including class consciousness. Therefore, a change in the infrastructure must necessarily precede a change in ideology or counter ideology development. To the degree that the instrumental approach subscribes to the requirement that a change in the material conditions is necessary for a change in consciousness, it cannot satisfactorily explain the rise and challenge of feminists in regard to rape. The issue of implementation is an empirical question to be addressed later.
Structural Marxian Theory

While the structural and instrumental approaches have much in common, the structural conflict approach can be drawn upon to explain that which the instrumental fails to do. Because structuralists recognize that the infrastructure shapes rather than determines the superstructure and that the superstructure develops relative autonomy, the perspective can more easily account for the emergence of a challenging ideological stance by feminists. The structural argument allows for consciousness changing independently from changes in the material realm of life. Therefore, structural conflict theory can take into account the altered consciousness of women as an impetus for changes in rape legislation across the nation.

Because of the recognition of the relative autonomy of superstructures, such as the state apparatus, structural theory like instrumental theory allows for a discrepancy between enactment and implementation of legislation. The new rape laws passed by legislators in this country over the past decade may take on quite a different character when put into effect by police, prosecutors, defense attorneys, judges, and juries. While instrumental theory takes on a somewhat conspiratorial flavor, structural perspectives, while acknowledging such potentialities, suggest they may not always hold true. It is in this vein that Bierne (1979:379) states that in order for laws to appear fair, they must, at times, be fair. The implementation of the new rape statutes might then actually reflect the objectives sought by groups who called for such change. This is
not to suggest that the consensus or pluralist models are accurate since, however, it must be remembered that this "fairness" is to be viewed in light of accomplishing the legitimation function of the state. From the structuralist perspective, the upper class, in order to perpetuate their rule, endeavors to minimize resistance by persuading the populace that consensus exists, that the system is fair, just, and serves the interests of all. Thus, some legislative and enforcement change is permitted to preserve the capitalists' long term advantaged position.

Structuralists elaborate this position by stating that the individualization of rights, such as those accruing to the rape victim, "...does not create but fragments class solidarity" (Picciotto, 1982:175). Grau asserts that:

...social movements equate changing the law with transforming society. Collective needs asserted by these movements get articulated in terms of individual rights; ...Laws are changed, and if changed, challenged. Interpreted by the courts, the changed laws acquire meanings other than those held by those who sought the changes. Turned solely to legal ends, the social movement is diffused (1982:205, citing Klare, 1977).

Again, generating and perpetuating false consciousness via placation, legitimation, and rationalization are seen by structural Marxian theorists to be an ideological means of domination. The new rape laws can be seen to fit squarely within such a scheme.

**Dialectic Marxian Theory**

As the dialectic approach departs from structuralism, so too do the insights it can provide. The dialectic theorists critique
structural Marxists for their ambiguity and "unwarranted generalizations" (Bierne & Quinney, 1982:4) brought about by the lack of historical specificity. The argument is that "each case must be examined empirically and on its own merits, and understood in the proper historical context" (Bierne & Quinney, 1982:11). Without historical analysis, or conversely with "unwarranted generalization," the theory obscures certain issues and answers, e.g., why the very first rape laws favored male "property rights" in pre-capitalist social formations. Thompson (1978) argues that the ahistorical universal type of theorizing engaged in by structuralists renders the theory incapable of accounting for the dynamic process of contradiction, struggle, and change so critical to a Marxian analysis.

The contribution of dialectic theory can be seen along these lines. This position facilitates the examination of new rape statutes in specific historical context, where change arises out of contradictions and class struggle. The implementation of such change can effect several different outcomes. The repressive function of the state and law as discussed in terms of instrumental Marxian theory is recognized as a potential outcome in the dialectic approach. The generation of new false consciousness as emphasized by structural theorists is also possible. A third possibility lies in the dialectic view that contradictions and conflicts can usher in real change; not just change in appearance (as the instrumentalists suggest) or inconsequential and sporadic change to maintain the overall ideology and thus the social system (as implied by the structuralists).
Chambliss' (1979) dialectic model insinuates that real gains are possible. Applying his perspective to the new rape legislation one could conclude that the new laws represent an adjustment or "resolution" from which the challenging group may benefit. Chambliss' argument suggests, however, that regardless of limited gain for the subordinate class, in the long run the law will still work to favor the dominant class and its interests (1979:24).

Grau's discussion goes one step further. He leads one to speculate that real gains may be made not only because of the need for legitimation as structuralists would have it, but additionally because of the contradictions which have led to power accruing to women as a group in present day society. Women have increasingly gained both economic and political power because of, for example, the intermittent need for them in the work force and economy, because of increased political participation in voting, lobbying, campaigning, holding political positions, and because of their ability to develop alliances within and between class divisions. This yields a more powerful base of operations relevant to struggle and conflict between the super- and subordinate groups. The new rape laws women's groups were able to get enacted across this country in the past decade can be seen to represent true gains of an under class in the population. As Bierne and Quinney state, "true inroads can in fact be gained through law" (1982:6).
Discretion and the Enforcement of Laws

The source of legislative change, as manifested in new rape codes in this country, has been interpreted according to each of the theoretical perspectives above presented. General anticipatory explanations regarding the implementation dimension of such statute change have also been made, given each of these approaches. The importance of the enforcement aspect of the law cannot be overstated, yet, as can be evidenced in the previous section, several of the theoretical orientations either neglect or merely assume the generalizability of tenets to this critical component of law. It is the actual implementation and operation of the law which determines specific case treatment and outcome and is, therefore, a significant factor in assessing the theoretical applicability of any perspective. The discretion which permeates the enforcement system in the country renders implementation at least as important as the enactment element of the legal system. Discretion allows all criminal justice enforcement agencies a wide range of choices in the interpretation and implementation of any given legislative enactment. Discretion, therefore, should be scrutinized as it pertains to the anticipated style of law enforcement, given each of the theories. This comprises the empirical question to be assessed.

With consensus theory, discretion would have to be explained as operating in a fashion reflective of the shared sense of morality and values. Therefore, non-discriminatory, fair, and just enforcement
would be expected, given the societal value consensus, the objectives of the state, and sanctioning mechanisms.

Consideration of plural conflict theory leads to a similar type of interpretation, since this perspective also views the state as neutral, fair, and objective. The difference is that as pluralistic theory sees the law as reflecting a mediated compromise of competing interests, it would see discretionary decisions in the enforcement process as also reflecting these same competing interests.

Labeling and Marxist accounts depart from such expectations. These approaches generally intimate that discretion in the enforcement system yields discriminatory treatment. Discrimination in the enforcement of laws, made possible by discretion, is in very general terms interpreted by these three orientations as protecting the interests of those in power.

The structural approach posits one additional consideration which merits reiteration. Structuralists argue that in order for the law to appear fair, it must at times be fair (Bierne, 1979; Greenberg, 1981). In order to serve upper class interests, therefore, discretion can be seen to facilitate both discrimination and fairness in the enforcement process, both of which continue to serve status quo interests. The problem here is that structural arguments do not specify which laws it is that will be enacted and enforced to appear fair, and which to actually be fair.

Dialectic Marxist theory makes a contribution here by calling attention to power differentials involved in conflicts and their resolution. If the challenging group has power (arising out of
contradictions inherent in the social structure) the change/resolu-

tion may engender true fairness and equity through implementation.

Prosecution

When enforcement or the operation of the law is scrutinized, con-
ceptualization and focus have generally been on the three compo-
nents of police, courts, and corrections. Even casual perusal of cr
riminal justice text titles attests to this fact, yet this theore-
tical and research focus fails to take into account perhaps the most
important figure in the administration of justice - the prosecutor
(Blumberg, 1979; Cole, 1975; Miller, 1969; Southern California Law
Review, 1969). It is the prosecutor alone who "activates the judi-
cial machinery" (Karlen & Schultz, 1972:113). Prosecutors decide not
only who will be processed through the criminal justice apparatus,
but also the number and severity of charges to be levied against the
accused, and whether or not, and to what extent, cases will be plea
bargained.

Coexistent with the tremendous amount of power which prosecuto-
rs hold is an incredibly vast discretionary latitude in the office.
There are very few structured checks or controls over the exercise of
prosecutorial discretion (Davis, 1976:65-67). Moreover, the few
controls that do exist are by and large ineffective (Blumberg, 1979;
Davis, 1976). This means that the figure in the criminal justice
system that wields the most power simultaneously wields the broadest
range of discretion.
Ironically it is precisely this powerful and autonomous figure who is "...relatively free to choose his causes, cases (and) targets" (Blumberg, 1979:122-23) and to choose the levels of prosecution that are often neglected in the study of the criminal justice system. The paramount importance of prosecutors must not be overlooked any longer. Given the nature and impact of their powerful and discretionary roles and decisions, prosecutors will shape, if not determine, the effectiveness of enacted legislation through the implementation process. Whether or not rape is to be treated as a violent assaultive offense or a sexual crime, even under model legislation, is therefore largely contingent upon the types of decisions rendered by prosecutors. Prosecutors may, for instance, decide not to pursue a rape case without corroborative evidence, victim resistance, and so forth, with relative immunity even when such requirements no longer exist in statute.

Because of the virtual isolation and immunity which surround prosecutorial decision-making, and because of the wide range of power and discretion, it is crucial not only to examine the types of decisions made, but also to discern the types of factors which impact upon such discretionary decision-making. The particularly germane issue here concerns the role prosecutors play in the implementation of new legislative enactments. The factors considered, and thus leading to the types of decisions rendered by prosecutors, hold broad implications for whether or not sexual assault cases will be handled in an equitable and just manner, i.e., consistent with the objective of comparable case treatment.
Research on Prosecution

Several sets of factors have been identified as influences on the exercise of discretion by prosecutors. The traditional legalistic school of thought, characteristic of much of the early work in the field, posits that the prosecutor makes decisions based upon legally stipulated criteria such as evidence for the various elements of the corpus delicti of the crime (Cole, 1975; Grosman, 1969; Jacoby, 1977; Kaplan, 1965; Mather, 1974; Miller, 1970; Neubauer, 1974; Newman, 1966; Sudnow, 1965). In other words, enforcement of laws by prosecutors basically reflects the letter of the law as enacted. Miller's (1970) classic work on the charging decision best reflects this early legalistic tradition. He discusses the existence of probable cause, the sufficiency of evidence, and the severity of the criminal act as legalistic elements impacting on prosecutors' decisions to "charge a suspect with a crime" (1970).

A slightly broader conceptualization of legalistic factors is found with Cole's categorization of evidential concerns (1975). The essential ingredient of evidential elements can be summed up as conviction probability. Prosecutors have been hypothesized, observed, and found to consider evidentiary factors such as past criminal record of the accused and victim credibility in their assessments of criminal cases (Cole, 1975; Miller, 1970; Neubauer, 1974; Newman, 1966; Sudnow, 1965).

This legalistic tradition aligns itself with both consensus and plural conflict perspectives. The enforcement process is logically
inferred to operate in the same interests as those underlying the origin of the law. Since both view the state apparatus as impartial, they would be consistent with the view that prosecutors consider legally prescribed criteria, such as the amount, type, and quality of evidence, in the decision-making process. Elements not required by the new law, e.g., victim resistance and corroboration, would not be expected to influence decisions, given the legalistic orientation to prosecution.

The research identifying extra-legal factors as influences on prosecutorial discretion challenges this legalistic position. Much of this research emanates explicitly from an instrumental Marxian conflict perspective. Variables such as race and socio-economic status (SES) have been found to be associated with decisions rendered by prosecutors (Hagen, 1974; Jones, 1977; Southern California Law Review, 1969). The interpretation herein is that prosecutors, as an arm of the state and ruling class, make discriminatory/discretionary decisions (against the lower class, minority group members, and the young) which serve to perpetuate the status quo which benefits those in power (Chambliss & Seidman, 1971; Quinney, 1969; Turk, 1966). It would therefore be expected that discriminatory law enforcement would be characteristic of the administration of both old and new rape statutes, not only in terms of defendant characteristics, but also, and importantly, in terms of continuing to protect only a select group of "legitimate" victims. This perspective then portends the comparability of treatment under old and new law, rather than the comparability of treatment in sexual and non-sexual assault case
prosecutions. The reason for lack of change in enforcement is that extra-legal discriminatory factors (e.g. sexist attitudes, belief in false accusations, etc.) persist as influences on discriminatory decisions, regardless of legal enactments.

Cole (1975) posits a further type of influence on the exercise of discretion by prosecutors. His classification of organizational concerns suggests that the pressures within the office of the prosecutor itself need to be considered as they impinge upon decision-making in criminal cases. Specifically, Cole (1975) and others (Blumberg, 1979; Eisenstein & Jacob, 1977; Jacoby, 1977; Littrell, 1977; Meyers & Hagan, 1979) have delimited organizational matters as those involving resource availability and allocation, community and political pressures, and the "exchange relationship" (Cole, 1975) between prosecutors and other criminal justice official agents.

These types of influences can be discussed in light of both labeling and structural Marxian approaches. Dickson's (1968) study operating within the labeling perspective, for instance, points out that organizational self interests (to survive and grow as an agency) have a bearing on the definitional process. This is similar to the organizational influence of particularly political and community concerns as they affect the elected office of the prosecutor. Prosecutors decide their "...causes, cases, and targets for prosecution" (Blumberg, 1979:123) contingent in part on pleasing the citizenry who have the ability to (re)elect them. In jurisdictional positions where prosecutors are appointed, they need to consider appealing to those governmental units and agents that hold power over their
position. In a similar political vein, assistant prosecutors must consider their superior chief prosecuting attorney in making decisions about who is to be charged and at what level. It would be expected, therefore, that the attitudes of the citizenry and politically powerful people in the community would be reflected in the implementation of the new rape statute by prosecutors.

The structural argument that superstructures develop and grow to be relatively autonomous is also relevant to organizational considerations. Structural accounts are amenable to taking into consideration "exchange relationships" as identified by Cole (1975) as well as political, community, and resource concerns. Structuralists recognize not only that the state develops a degree of independence from the infrastructure arrangements, but further that other agencies falling under state control also develop a certain independence. Thus, prosecutors function not only to meet agency needs as discussed above, but also are constrained and influenced by other relatively autonomous criminal justice organizations, such as the interests and concerns of police and courts, in carrying out their role.

Cole's (1975) typification and structural Marxian theory coincide on a final type of influential factor pertinent to prosecutorial discretion. Cole states that a third influence on decisions can be found in pragmatic considerations. By pragmatic, Cole intends the attempt to individualize justice, to act in a manner most fair to defendant, victim, and society, given crime circumstances (Cole, 1975; Rossett & Cressey, 1976). Examples of pragmatic influences would be the severity of the sentence and the degree of victim trauma.
likely if the case were to be pursued, and the availability of alternatives for case resolution.

The structural assertion that laws, in order to appear fair, must at times be fair, is once again relevant in connecting the two different types of approaches to the legal system. Fairness is a critical component of pragmatic decisions. A second interpretation given pragmatic structural considerations is that structuralists additionally acknowledge that even some upper class persons may act out of "benevolent" motivation (Grau, 1982:197). It is in this light that the implementation of the new rape law might be expected to achieve the objective of justice in the effort to legitimate the capitalistic social system.

Insofar as dialectic Marxian theory is similar to both instrumental and structural Marxian perspectives, the same types of interpretations rendered above are pertinent. Dialectic theory, however, proceeds to take on a further direction in relation to prosecutorial implementation. Chambliss' contention that resolutions do not address contradictions connotes that legislative alterations address only the conflicts and dilemmas brought to the fore by feminists. Therefore, the implementation of the new law by prosecutors would function only to underscore dormant contradictions, such as the discrepancy between enactment and enforcement of legislation, and would thus serve to generate new conflicts, challenges, and dilemmas, rather than resolve the problem of unique and inequitable rape case treatment. The discussion of extra-legal considerations impinging on prosecutorial discretion would therefore be relevant again here.
Grau's work is compatible with the above interpretation as can be evidenced in his statement that social movements must view law "...not as the end product of their struggles, but as an intermediate product, a further stepping stone to further struggles" and that such movements must insist "...on enforcement on their terms, rather than on the terms the courts ultimately impose" (1982:206). One need only substitute the agency of the prosecutor for the courts here.

It is tenable however to draw a slightly more optimistic conclusion, given Grau's dialectic position. If feminists view the legal change as a stepping stone, insist that powerful prosecutors and other criminal justice officials implement the objective as well as rule of the law and insist "extra-legally as well as legally" through for example continued monitoring, lobbying, and protesting (Grau, 1982:206), it is possible that a synthesis representing true gains for rape victims while simultaneously protecting innocent accused parties might materialize. It is premature at this juncture to assess the viability of such conditional "if" statements. The significance of the dimensions pointed out by the dialectic model above (as well as by the other models) lies in the assessment and interpretation of research findings.
CHAPTER III

RESEARCH DESIGN AND ANALYTIC TECHNIQUES

It is beneficial to reiterate the major research objective at the outset of this chapter for clarification purposes. This objective flows from the examination of discretionary charging and plea bargaining decisions made by prosecutors in sexual and non-sexual assault cases in a jurisdiction operating under model rape legislation. The primary objective of this research is to examine the effectiveness of model rape legislation in the implementation process by assessing the differences and/or similarities associated with the prosecution of sexual and non-sexual criminal assault cases. Theoretical perspectives on the origin and operation of the criminal law will be applied in the interpretation of research findings to gain an understanding of any differences/similarities discovered.

Design

The type of sexual assault cases included in this research are all those delineated in the model Criminal Sexual Conduct (CSC) Code in the State of Michigan. Specifically, these offenses are CSC in the first, second, third, and fourth degrees, assault with intent to commit criminal sexual penetration, and assault with intent to commit criminal sexual contact (See Appendix A).

The selection of other personal and violent assaults was predicated upon the consideration of crimes classified as assault
offenses in the Michigan Penal Code. These offenses are: Assault 
with Intent to Murder, Assault with Intent to do Great Bodily Harm 
Less than Murder, Assault with Intent to Maim, Assault with Intent to 
Commit a Felony Not Otherwise Punished, Felonious Assault, Assault: 
Infliction of Serious Injury, Assault with Intent to Rob and Steal: 
Armed, Assault with Intent to Rob and Steal: Unarmed. Appendix B 
provides penal code descriptions for these offenses.

Robberies, both armed and unarmed, are additional types of per-
sonal and violent assaults included in this study. The difference 
between assaults with intent to rob, as specified under the assault 
heading in the penal code, and robbery itself lies in the realization 
of the intent to steal.

While murder does represent a personal violent assault, it was 
excluded from this study for essentially two reasons. First there 
were too few cases in the research jurisdiction for analytic purposes. 
Second, murder is not included in this study as victim credibility, 
character, resistance, and so forth as elements influencing prosecu-
torial judgments are moot issues with this offense.

The time frame for this research encompassed the years of 1980 
and 1981. The reason for this was to ensure both a sufficient number 
of cases for analysis, and that the cases would be recent yet com-
pleted (not pending in the courts) at the time of data collection. 
This time frame represents the new Michigan rape law in its operation 
for a two-year period, five years after its enactment.

Data were collected on the above types of crimes for this two-
year period in Kalamazoo County, Michigan. All warrant requests for
all of the above assaults from all police departments in this county constitute the universe of cases for this research.

The universe of CSC cases for the two-year period were included for analysis. The same is true for the armed and unarmed robberies, and for all assaults, excluding felonious assaults.

The sheer volume of felonious assaults for this two-year period necessitated sampling. The strategy employed consisted of a stratified systematic sample. All felonious assault cases for each year were first stratified according to the warrant disposition as either authorized or denied. A systematic sampling strategy was then employed to select first the denied and then the authorized cases to be included in this study. The list of cases (elements) was compiled by listing every felonious assault warrant as it was encountered in the prosecutor's files. The prosecutor's files are in chronological order by date (throughout the year) of police request. This then avoids the problem of "periodicity" (Babbie, 1979:178-179). Cases were then systematically sampled in first the authorized and then the denied felonious assault cases.

The total population of cases, excluding these felonious assaults, were included, i.e., not sampled, due to the desire to permit for flexibility in sentence (and thus discretion) range. Another reason for including the population of cases was that there were so few cases of assault with intent to commit murder, assault with intent to do great bodily harm less than murder, and assault with intent to rob and steal: armed and unarmed, all added together that sampling would have been disadvantageous, particularly given the
strategy used for the operationalization of the dependent variable (See pp. 89-93). There were no cases of assault with intent to maim, assault with intent to commit a felony not otherwise punished, or assault: infliction of serious injury encountered during the time frame of this research.

The Independent Variables

Data were collected on a number of different independent variables. For those cases denied at intake, only limited data were available. Demographics on the defendant and crime, the charge(s) requested by various police departments, and the reasons for denial were the types of information available for these cases. In the authorized instances, a wealth of information on victim, defendant and crime characteristics, and the criminal justice process existed in the prosecutor files. There were several different kinds of information involved in data collection in addition to the above types of information in these authorized cases. The attempt was to gather as much pertinent information as possible, given the research objective and literature reviewed.

The selection of variables for incorporation in the research analysis was predicated on the amount of missing data found in the variable, variable redundancy, and theoretical concerns. Inspection of preliminary frequency data led to the automatic exclusion of any variable containing 50% or more missing data. Examination of the entire independent variable list yielded variable reduction due to overlap in the dimensions being measured. For example, defendant's
income was an independent variable deleted as the court appointment of an attorney vs. the private payment of an attorney essentially measured the same phenomenon, i.e., social class. While absolute (internal/ratio) income of the defendant was the preferred measure, the appointing/retaining of one's defense attorney had much less missing data.

Theoretical considerations provided a third basis for variable deletion. The theoretical and research literature reviewed in Chapter I led to the inclusion of the following categories of variables. Data on victim and defendant demographics, such as race, age, and socio-economic status (SES) were included in light of the attempt to assess the applicability of theory as it relates to the implementation process. In this same effort, data were also included on variables pertaining to the issues such as victim credibility, precipitation, character, and resistance in both sexual and non-sexual assault cases.

Additional variables retained for analysis related to evidential, pragmatic, and organizational concerns as described in the literature on prosecution. The amount and type of evidence concerned, for example, the number and type of witnesses, presence and type of weapon, injury, and so on. Alternatives, such as psychiatric or alcohol treatment, and likely victim trauma were factors considered in this selection of data on pragmatic concerns. The police department requesting the warrant and investigating the crime was taken into account, given Cole's (1975) organizational category.
Once variables were narrowed down on these bases, the variable categories were collapsed for several of the independent measures. The categories of variables were manipulated in a couple of different ways. First, categories were frequently collapsed for variables where numerous or low frequency categories existed. Inspection of frequencies on these variables revealed such low occurrences of certain categories that maintenance of all categoric distinctions was unwarranted. For example, after looking at the police department requesting the assault or CSC charge, all small police departments corresponding to the low frequencies were joined together as one category. Similarly where race of victim/offender had originally been coded as black, white, and other, the instances of minorities other than blacks were so few, given the entire data set, that these variables were dichotomized as white/other for analytic purposes.

The reasons given in prosecutor files for denying warrant requests and for plea bargaining were diverse and numerous, particularly for the latter variable. In order to make these critical data manageable and interpretable, reduction of categories was imperative. The literature on prosecutors was drawn upon in this effort. Most all reasons offered for either denial of a warrant or for plea bargaining an assault or CSC were amenable to classification as either evidential, pragmatic, or organizational. Warrants were denied on evidential grounds such as insufficient circumstance or testimony to establish an element of the crime, or insufficient proof of the identity of the accused. The referral to a diversion program or the sending of a warning letter were taken as pragmatic reasons for
failing to invoke the criminal justice process by denying a warrant. Denial due to other charges pending against the accused or because the police failed to get witness statements at the time of the request represents an instance of organizational category.

The rationale for plea bargaining was similarly trichotomized. Instances of evidential factors were found in stated reasons such as "weak case," "no weapon found," "question intent to do battery," "Possible mental defense," "poor complaining witness." Sufficient sentence latitude was an often cited pragmatic type of reason for plea bargains. Other pragmatic elements were evidenced in concern about victim trauma and testimony against a relative through court proceedings. Organizational factors relate to reasons such as the willingness to testify against a co-defendant, or simply the willingness to enter a guilty plea to the original or reduced charge, and thus save the prosecutor resources.

While most all reasons offered for warrant denials and plea agreements could be conceptually linked to this trichotomy, there were several reasons which did not fit neatly into this scheme. A fourth category was therefore devised to encompass these "other" kinds of considerations. This category can be conceived of as pragmatic in the more literal sense of the word, i.e., practical, rather than as an attempt to "individualize justice." Reasons such as the victim deciding not to proceed or desiring to drop charges were included here. Additionally, since the policy in this jurisdictional office requires the complainant to appear for an interview with a prosecutor before authorization in both CSC and all types of other
assault cases, failure to show was considered as "practical" reason for warrant denial.

There were two variables coded geometrically (permitting for a variety of category combinations) which were recoded into an ordinal variable code. Victim resistance was rank ordered according to extent of resistance, with no resistance at one end of the scale and victim use of a weapon at the other. The interim categories were first the non-assaultive category of flight, verbal persuasion, and/or screaming, then weak physical resistance, then the combination of weak physical with the non-assaultive type of resistance, then strong physical resistance, and subsequently the combination of strong physical with the non-assaultive, then victim use of a weapon, and finally the use of a weapon along with any of the above forms of resistance.

The categories and combinations in the independent variable of weapons were also recoded so as to be able to deal with this variable as ordinal for some types of analysis. Weapons were trichotomized as absence of weapons, use of hands, fist, feet as weapons, and presence of gun, knife, or other sharp or blunt instrument.

The interval/ratio data such as age of victim and defendant, number of convictions and arrests, etc., were not transformed in any way because of the type of analyses conducted. One final type of category alteration did involve making dummy variables out of nominal data such as race of victim and offender for correlation analysis. Here nominal variables were treated as zero/one dichotomies.
Dependent Variable Operationalization

The dependent variable in this research was prosecutorial discretion as manifested in the decisions to charge, plea bargain, and/or nolle charges against the accused. Ostensibly, each of these decisions appears to represent a dichotomous choice by the prosecutor. A nominal level of measurement on the dependent variable, however, would have been detrimental to the study. The most which could have been ascertained, if prosecutorial discretion had been categorized as a series of dichotomous choices, would have been a simple set of distinctions. These distinctions could have only differentiated between cases in which warrants were authorized or denied, between cases where the adjudicated charges were either adjusted or comparable to those requested, between cases which were plea bargained and those which were not, and between cases where charges were retained or dropped.

Because a great deal of information would have been lost by treating the dependent variable in this type of dichotomous manner, a strategy was conceived whereby it would be possible to quantitatively measure the magnitude of prosecutorial discretion exercised at each decisional stage. To this extent it was first necessary to construct a rank ordering of charges based upon the severity of the criminal offense. The charge severity was determined by looking at the legislatively stipulated maximum sentences. This type of criterion not only defines parameters within which criminal justice officials must operate, but further can be assumed to reflect
legislative interpretations regarding the seriousness of different
criminal offenses. The reason for employing maximum sentence guide-
lines was predicated upon the belief that the amount of discretion
exercised by prosecutorial altering of charges was directly related
to the type of crime and its severity as determined by the sentencing
structures associated with criminal cases.

An illustration is instructive at this point. An armed robbery,
for one example, can be viewed as a qualitatively different and more
serious offense, than a simple assault and battery. Plea bargaining
an armed robbery (which carries a life imprisonment maximum sentence)
down to an assault and battery (which carries a 90 day maximum sen-
tence) obviously represents a different and greater amount of dis-
cretion than changing an armed robbery to a robbery-unarmed (which
carries a maximum sentence of 15 years).

The aim was to operationalize these types of discretionary
actions in a fashion such that the difference, due to alterations in
charges by prosecutors, would be presented as an interval/ratio scale.
Hence, the magnitude of prosecutorial discretion exercised at any
stage could be assessed, and the factors which influenced this mag-
nitude of discretion analyzed. The final weighted scale would then
portray the seriousness associated with each charge encountered at
every stage of the study, and attrition and alterations reflecting
the extent of prosecutorial discretion could be treated as interval/
ratio differences. These differences could then be taken to reflect
both the direction and magnitude, or amount and type of discretion,
exercised in dropping cases and altering charges, through charging and plea bargaining decisions.

Once the rank order of all offenses encountered in the data was established by legislative maximums, it was necessary to devise a means for assigning a numerical weight to each category of maximums. The baseline for the assignment of scale values was determined by first looking at the most severe maximum of life imprisonment. To more accurately interpret the meaning of a life sentence, from the standpoint of years in prison, the average age of defendants included in the research project was calculated.

The mean age of defendants was calculated to be 28.863 years in this particular research. It is important to note at this point that the mean age of all defendants in all crimes examined was utilized for basically two reasons. First, there was not a significant difference in the average age of defendants in sexual and non-sexual assaults and, perhaps even more importantly, it was necessary to have a standardized scale for comparison of these two types of cases. In order to construct a realistic estimate of the time which could be served under a life term, the rounded mean age of 29 was subtracted from 65—the life expectancy of a male born in 1950 (Delury, 1979:956). The figure of 65 was the closest approximation to that which would be representative of the defendants included in this two-year study, as the actuarial tables are calculated on a decennial basis. Thus, taking the difference between the mean age of the defendants and their average life expectancy, a maximum life sentence at the time of the study would imply the equivalent of a 36 year term.
This most severe sentence was accorded the highest scale weight and subsequently served as the basis for calculating all other scale weights. The procedure used to determine all scale values was to divide the maximum sentence for each lesser offense by the most severe maximum operationalized as 36 years. Applying this criteria to those offenses carrying a maximum of life resulted in a weighted scale value of one. To clarify, dividing the ultimate maximum of 36 years into the 36 year maximum associated with crimes carrying this penalty yields a quotient of unity. This number was then multiplied by 1,000 (as were all other later quotients), in order to avoid dealing with decimal numbers at any stage in the scale.

The second most severe sentence for an offense in this study was 15 years. By dividing 15 years by the 36 year figure, it was possible to obtain a ratio of the proportionate distance between life and the 15 year maximum. The resulting quotient of .41667 was then multiplied by 1,000 and subsequently dealt with as 417.

The same general logic was employed to calculate a weighted scale value for the next highest maximum sentence which was 10 years. Ten years was divided by the previous 36 year figure and then multiplied by 1,000 yielding a scale value of 278. The same strategy was used to arrive at a weighted scale value for the remaining maximum terms encountered in the study. The operationalized values were 139 for a five-year maximum, 111 for a four-year maximum, 56 for a two-year maximum, 28 for a one-year maximum, and 7 for a 90 day (½ of a year) maximum term.
Once new variables were created for each case representing the points on the dependent variable scale associated with charge(s) requested, charge(s) authorized, and final charge(s), three more new variables were created. The first of these represents the total point values of the first plus the second charge requested. If only one count was requested this new variable was simply equivalent to the points corresponding to the first requested charge. The second new measure represents the joint points of the first and second authorized charge, and the third the added points of the first and second final charge. When cases were denied at intake, the points for authorized charges were assigned as zero. Similarly, when cases were dismissed by the prosecutor in the form of a *nolle prosequi* at any point after authorization, the points for final charge(s) were assigned as zero.

Operationalizing discretion in this manner leads to the development of two dependent variables. The first dependent variable represented the magnitude of discretion exercised by prosecutors in denying or authorizing an arrest warrant, i.e., change in this dependent variable represents the difference between the associated value of requested charges and authorized charges. Zero was the baseline figure used to represent no charge alteration in this dependent variable. The second dependent variable portrayed the degree to which prosecutors exercised their discretionary powers primarily when engaging in plea bargaining, i.e., the discrepancy between the authorized and adjudicated or final charges. Again zero was the figure used to represent the absence of charge alteration.
Alteration of charges to the same level of severity as those requested in the case of the first dependent variable or as those authorized as in the case of the second dependent variable was not deemed to be a significant exercise of discretion by prosecutors, and thus represented no charge cases on these measures.

While the original intention was to examine all such differences for all sexual and non-sexual assault cases, this strategy had to be altered later on in the research. It was discovered that in a few CSC and non-sexual assault cases, charges were increased at authorization from that which police had originally requested. These charging increase cases were excluded from analysis for essentially three reasons. First, there was an insufficient number of cases involving charging increases for separate analytic purposes. Second, the same percent of both CSC and non-CSC assaults experienced such increase at the screening intake stage (5%). Additionally, combining the increased with the decreased charge alterations in the dependent variable measure rendered interpretation of research results (particularly correlation coefficients) most problematic.

Analytic Techniques

The first type of analysis consisted of simple frequency and percentage compilations. This was conducted with the objective of providing descriptive profiles of both sexual and non-sexual assault cases. This permits for a type of summary or overview of the differences and/or similarities in case characteristics pertaining to the two kinds of assault offense.
A second type of analysis was conducted with a similar purpose in mind. The means (for interval/ratio independent variable) and proportions (for nominal independent variable) were first determined and then compared. The statistical significance of the difference between the means/proportions was then tested in order to further contrast case characteristics of sexual and non-sexual assault crimes.

Chi-square was the statistical test employed to determine the significance of discovered differences with proportional variables. While Chi-square can be utilized for several different purposes, it was used here to determine whether or not certain nominal independent variables or case characteristics were statistically different for sexual as opposed to other personal assault crimes.

The procedure for analyzing the statistical significance of the difference in means was a $t$ test. There are several different formulas which can be used for $t$ tests. This research employed the two sample $t$ test formulas designed for independent, but unequal size, samples since there were a different number of CSC and assault offense cases. This formula is additionally designed to correct for excessive type I error when heterogeneity of variance exists and the smaller variance is associated with the larger sample (as was the case in several instances). The formula employed in this research was:

$$t = \frac{\bar{X}_1 - \bar{X}_2}{\sqrt{\frac{s_1^2}{n_1} + \frac{s_2^2}{n_2}}}$$
The type of information ascertained by this second kind of analysis permits for determinations about whether, in a general sense, certain elements such as force, injury, resistance, number of witnesses, and so forth, are more characteristic of one or the other types of assaults.

After contrasting such composites, the next step in analysis was to calculate and test the statistical significance of the difference of means on the dependent variable in sexual vs. non-sexual assault cases. Once again, the \( t \) test for statistical differences in means was utilized for the comparison. The information provided by such a procedure concerns whether or not prosecutors exercised comparable amounts of discretion in an overall sense in those two types of criminal cases.

Discriminate function analysis was then conducted in an effort to discern whether the independent variables, when considered simultaneously, rather than individually, could significantly differentiate the sexual from non-sexual assaults. It was suspected that one finding might be that the given independent variables might not be strong enough to distinguish between these two types of cases when considered one at a time, but when considered in combination, i.e., when all relevant variables were in the equation at the same time, that some might significantly differentiate these cases. Discriminate function analysis seeks to maximize the difference between a clearly classified dependent variable, e.g., sexual vs. non-sexual assault cases, given independent variable (case) characteristics.
The F ratios calculated in discriminate function analysis were examined to make decisions about independent variable significance as it differentiated the cases. The result with this type of analysis is the discovery of the group of independent variables which best discriminate between the (two) groups specified, given all variables considered in the analysis or equation.

The discriminate function weighting factors can be interpreted in a manner similar to regression coefficients. This is to say that they can be drawn on to assess the relative contribution of each variable to the separation or discrimination of the groups.

A further kind of analysis was conducted in the effort to meet the stated research objective. Pearson product moment correlation coefficients (r) were calculated and contrasted for these two forms of assaults. The r's represent a measure of correlation between a given independent variable and the dependent variable measure. This measure provides information on the strength or degree of association between a given independent and dependent variable, as well as directional information, i.e., whether the relationship is positive or inverse. The square of the correlation coefficient, referred to as the coefficient of determination ($r^2$), provides interpretation as to the percent of variation in the dependent variable (charging reductions) explained by the given independent variable.

The probability level of each correlation coefficient was examined in order to make assessments regarding the statistical significance of each correlation. Where significance was not found

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.
the relationship discovered in the data was likely to have occurred by chance alone. Put somewhat differently, the null hypothesis was retained where correlations failed to meet the pre-selected .05 critical alpha level.

The test of the significance of the correlation coefficient employed was the conventional students t test as determined by:

\[
\frac{r}{\sqrt{\frac{N - 2}{1 - r^2}}} \]

SPSS calculates specific probabilities associated with such coefficients given n-2 degrees of freedom. It should be pointed out that simultaneous testing of a series of correlation coefficients from the same samples potentially inflates the likelihood of Type I error. To minimize this possibility, independent variables were narrowed down to as few as absolutely theoretically necessary. As previously stated, the noted redundancy in data collection, given the underlying dimension attempting to be discerned, facilitated this task. The caveat remains that significance tests can lead to false rejections of null hypotheses when numerous simultaneous comparisons are made and critical values determined for sampling distributions generated for the test of a single statistic are utilized for decision making.

Partial correlation coefficients were additionally computed in cases where there was reason to suspect that the observed relationship between an independent and dependent variable was related to some underlying independent variable. Partials represent the correlation of a given independent and dependent variable where
other independent variables have been statistically controlled, i.e., where the effect of such other variables has been eliminated from the correlation. Partial correlation coefficients were employed in the effort to discover such patterns as intervening and spurious relationships among variables.

Taken together these analytic techniques provide the basis for answering the questions posed in the previous chapter. The analysis facilitates the examination of discretionary decision-making as it shapes the implementation of enacted rape reform law through the comparative scrutiny of sexual and non-sexual assault case prosecution.
CHAPTER IV

RESEARCH FINDINGS AND DISCUSSION

Introduction

There were a total of 420 cases included in the analysis of sexual and non-sexual assault prosecution. Two hundred and eighty-five of these were the sampled non-sexual assault cases, and 135 the total number of CSC's in Kalamazoo County over the time span of 1980-1981.

Figure 2 on the following page depicts what can happen to cases owing to the exercise of discretion by prosecutors. At intake, prosecutors may decide to:

1) authorize a charge(s) at the level requested,
2) authorize as more or less serious crimes, or
3) deny a request altogether.

These options comprise the first dependent variable for this study. The decision to plea bargain a case comprises the second dependent variable.

Overall, 67% of all CSC warrant requests were authorized. Conversely, 33% were denied. One half (50.5%) of those cases authorized were plea bargained. The total number of non-sexual assaults for the time period of 1980-1981 was 492. Fifty-four percent of these were authorized and 46% denied. The proportions in the research sample were identical. Forty-three percent of the sample non-sexual assaults were plea bargained once warrants had been authorized.
Figure 2. Stages of Prosecutorial Discretion
Research Findings

The thrust of the research analysis was to discern whether or not differences existed in the characteristics and treatment of sexual and non-sexual assaults. Chi-square and \( t \) tests were conducted to assess the significance of discovered differences in proportions and means pertaining to case characteristics. Discriminate function analysis was employed to discern, in an overall sense, which case characteristics when considered simultaneously were best able to differentiate the two types of assaults. Pearson product moment correlations were run on the selected independent variables in relation to the dependent variables, and the significance of such correlations examined. This was done with the objective of discovering factors associated with charging reduction in sexual vs. non-sexual cases.

The Charging Decision

The dependent variable first analyzed represents the discrepancy between the severity of crime as requested by the police and the severity of the crime as seen in authorizations by prosecutors. Charges were authorized as requested in 63% of the CSC's and 31% of the assaults. Charges were issued for less severe crimes in 20 and 18% of these cases respectively. As previously noted, police requested charges were dropped from the criminal justice system because of warrant denials in 33 and 46% of the CSC and assault cases.
Charging and Denial

There were essentially only five independent variables of relevance which could be analyzed in relation to the charging reduction including total denial at intake. Tables 1 and 2 delineate these variables as well as the results of analysis for each variable.

Most variables differentiated the sexual from the non-sexual assaults in terms of the case characteristics. The only variable on which data were available, where there existed no difference, was age of the accused. While defendants involved in CSC offenses were somewhat older than those involved in other violent assaults, this difference was not statistically significant.

The significantly different dimensions of these two forms of assaults involve police department requesting the warrant, time delay between crime occurrence and warrant request, race and status of the offender, and the nature of reasons given for warrant denials. The first distinguishing variable concerned which police agency in the jurisdiction made the warrant request. It was thought that this might potentially represent an additional factor influencing prosecutors' decisions, i.e., the requests stemming from the less experienced, less professional police departments might be denied/reduced more frequently. The significant difference discovered with chi-square in this variable means that, while the largest and most professional city wide police department made the majority of requests for both CSC's and other assaults (understandably, given its size and jurisdiction), it proportionately requested more non-sexual
<table>
<thead>
<tr>
<th>Variables</th>
<th>CSC Proportion/ X</th>
<th>Assault Proportion/ X</th>
<th>$x^2$</th>
<th>Test</th>
<th>p</th>
</tr>
</thead>
<tbody>
<tr>
<td>Police Department (KPD)</td>
<td>.49</td>
<td>.69</td>
<td>15.72</td>
<td>.001</td>
<td></td>
</tr>
<tr>
<td>Days Between Crime and Warrant Request</td>
<td>26.81</td>
<td>(12.51)</td>
<td>-3.02</td>
<td>.003</td>
<td></td>
</tr>
<tr>
<td>Race of Suspect (minority)</td>
<td>.38</td>
<td>.49</td>
<td>4.55</td>
<td>.05</td>
<td></td>
</tr>
<tr>
<td>Age of Suspect (30.02)</td>
<td>(28.30)</td>
<td></td>
<td>-1.48</td>
<td>---</td>
<td></td>
</tr>
<tr>
<td>Status of Suspect (jailed)</td>
<td>.30</td>
<td>.48</td>
<td>1.43</td>
<td>.001</td>
<td></td>
</tr>
<tr>
<td>First Reason for Denial:</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Evidential</td>
<td>.67</td>
<td>.23</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Organizational</td>
<td>0</td>
<td>.02</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Pragmatic</td>
<td>0</td>
<td>.01</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>&quot;Practical&quot;</td>
<td>.33</td>
<td>.74</td>
<td>28.97</td>
<td>.000</td>
<td></td>
</tr>
<tr>
<td>Second Reason for Denial:</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Evidential</td>
<td>.58</td>
<td>.35</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Organizational</td>
<td>0</td>
<td>.09</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Pragmatic</td>
<td>0</td>
<td>0</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>&quot;Practical&quot;</td>
<td>.42</td>
<td>.57</td>
<td>2.39</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Dependent Variable Scale Points for Requested Charge(s)</td>
<td>(681)</td>
<td>(326)</td>
<td>-7.73</td>
<td>.000</td>
<td></td>
</tr>
<tr>
<td>Dependent Variable Scale Points for Authorized Charge(s)</td>
<td>(411)</td>
<td>(182)</td>
<td>-5.16</td>
<td>.000</td>
<td></td>
</tr>
<tr>
<td>Point Discrepancy between Authorized and Requested Charge(s)</td>
<td>(-270)</td>
<td>(-144)</td>
<td>3.62</td>
<td>.000</td>
<td></td>
</tr>
</tbody>
</table>
Table 2

Correlation Coefficients for all Sexual and Non-Sexual Assaults

<table>
<thead>
<tr>
<th>Variable</th>
<th>CSC</th>
<th>Sig.</th>
<th>Assault</th>
<th>Sig.</th>
</tr>
</thead>
<tbody>
<tr>
<td>Police Department</td>
<td>.13</td>
<td>.164</td>
<td>.07</td>
<td>.247</td>
</tr>
<tr>
<td>Days Between Crime and Reports</td>
<td>-.01</td>
<td>.929</td>
<td>-.13</td>
<td>.032</td>
</tr>
<tr>
<td>Race of Suspect</td>
<td>-.13</td>
<td>.146</td>
<td>-.11</td>
<td>.070</td>
</tr>
<tr>
<td>Age of Suspect</td>
<td>.02</td>
<td>.867</td>
<td>.07</td>
<td>.208</td>
</tr>
<tr>
<td>Status of Suspect</td>
<td>.004</td>
<td>.961</td>
<td>.08</td>
<td>.288</td>
</tr>
<tr>
<td>First Reason for Denial</td>
<td>-.54</td>
<td>.000</td>
<td>-.25</td>
<td>.000</td>
</tr>
<tr>
<td>Second Reason for Denial</td>
<td>-.17</td>
<td>.064</td>
<td>.01</td>
<td>.888</td>
</tr>
</tbody>
</table>

assaults as compared to other smaller police departments, than it did CSC's. This variable provided the first piece of information relevant to separating the sexual from non-sexual assault cases.

There were four additional variables which were significantly different as case characteristics in these two kinds of assaults. Minorities were more frequently involved in non-sexual assaults than was the case for CSC offenders. Similarly, defendants were jailed at the time of the warrant issuance rather than arrested and/or released, proportionately more in these non-sexual crimes. The difference in the mean number of days passing between the actual occurrence of the

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.
crime and the warrant request (due to victims not reporting the crime immediately, inability to locate suspect, etc.) was significantly higher in the sexual as opposed to non-sexual assaults. The final independent variable which significantly differed for these two offense types was derived from the reasons given by prosecutors for warrant denials. Warrants were denied for evidential reasons more than twice as frequently in CSC's than in assaults.

It is interesting to note that when the evidential/non-evidential categories are broken down, although organizational and pragmatic criteria were infrequently utilized by prosecutors as reasons for denial in non-sexual cases, they were never offered as either first or second (additional) reasons for denying warrants in CSC cases. The category most frequently drawn upon as a basis for denying non-sexual assault warrant requests was what has been termed "practical." Practical considerations most frequently involved the complainant/victim not showing for the required interview with the prosecutor. In contrast to this, it is important to bear in mind that the modal category for CSC denials was lack of sufficient evidence.

In terms of the dependent variable itself, there were significantly greater charging reductions with CSC cases than was true for non-sexual assaults at the screening stage. The mean number of points relating to the magnitude of discretion exercised by prosecutors at this initial screening stage was 270 for CSC's and 144 for other violent assaults. Charge requests must, however, be examined in interpreting this finding. The mean points for requested charges
in sexual assault cases was 681, as compared to 326 for other violent offenses. This means that more serious charges were more frequently requested in the CSC cases than was true for the other assault offenses. Therefore, denial of a typical CSC resulted in a greater point reduction than did denial of a typical assault, and hence the difference in reduction at charging means with these two offenses.

The only independent variable significant in its correlation with the first dependent variable of discretion exercised at screening was the first reason offered for warrant denial (Table 2). This means that while variables such as police department, race, and status of offender were significantly different as case characteristics, they did not impact upon charging reductions or denial at this stage of prosecution in the sexual or in the non-sexual assaults. It additionally means that evidence was a decisive factor in reducing/denying arrest warrant requests in both types of cases, but more frequently for CSC cases.

This factor alone explains almost one-third ($r^2 = .30$) of the variance in the dependent variable for sexual, and 6% ($r^2 = .06$) in non-sexual assaults. This suggests that evidence was a more important consideration in charge reduction through denial at intake for CSC's than it was for other violent assault offenses. Although this same pattern ensued for the second reason given for denying arrest warrants, the findings on this second reason were not significant, meaning that the first cited reason was the more distinguishing and important characteristic.
**Authorized Case Characteristics**

Because more information was available for the authorized cases, the case characteristics were separately scrutinized for these assaults. Additionally, because of the type of information it was possible to collect, the decision to reduce charges at authorization was also separately analyzed for these cases. In terms of the variables previously discussed, the same patterns were evidenced in this separate examination. That is, significant differences were discovered in similar proportions in case characteristics such as police department, status of defendant, days between crime and warrant request, and so forth in these authorized cases.

Table 3 summarizes the characteristics associated with the authorized cases. As this table indicates, there were several variables which were not significant in distinguishing sexual from non-sexual assault cases. Defendants did not differ in these two types of cases on the dimension of social class. Almost three-fourths of both types of defendants were of lower class as determined by court appointment of defense counsel. Defendants were also not significantly different in terms of having other additional cases pending against them. However, one difference was noted in terms of the type of other charges pending. In the CSC cases, where outstanding crimes were pending against defendants, they were for CSC's in 73% of these cases. By way of contrast, in the assault offenses, pending charges against the accused were most frequently (75%) for crimes other than the type presently charged, i.e., not for assault offenses.
<table>
<thead>
<tr>
<th>Variables</th>
<th>CSC Proportion/ $X$</th>
<th>Assault Proportion/ $X$</th>
<th>$X^2$</th>
<th>$t$</th>
<th>$\alpha$</th>
</tr>
</thead>
<tbody>
<tr>
<td>Conviction Probability</td>
<td>(9.24)</td>
<td>(10.45)</td>
<td>2.17</td>
<td>.031</td>
<td></td>
</tr>
<tr>
<td>Defense Attorney (appointed)</td>
<td>.72</td>
<td>.78</td>
<td>.63</td>
<td>---</td>
<td></td>
</tr>
<tr>
<td>Weapons (present)</td>
<td>.29</td>
<td>.88</td>
<td>75.67</td>
<td>.000</td>
<td></td>
</tr>
<tr>
<td>Victim Age</td>
<td>(17.33)</td>
<td>(30.44)</td>
<td>6.49</td>
<td>.000</td>
<td></td>
</tr>
<tr>
<td>Victim Injury</td>
<td>(1.53)</td>
<td>(1.95)</td>
<td>2.59</td>
<td>.001</td>
<td></td>
</tr>
<tr>
<td>Victim-Offender Relationship</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Strangers</td>
<td>.21</td>
<td>.43</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Acquaintance</td>
<td>.51</td>
<td>.54</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Family</td>
<td>.28</td>
<td>.02</td>
<td>34.13</td>
<td>.000</td>
<td></td>
</tr>
<tr>
<td>No. of Eyewitnesses</td>
<td>(1.53)</td>
<td>(3.43)</td>
<td>5.13</td>
<td>.000</td>
<td></td>
</tr>
<tr>
<td>Evidence Available (yes)</td>
<td>.63</td>
<td>.82</td>
<td>15.32</td>
<td>.000</td>
<td></td>
</tr>
<tr>
<td>Victim Credibility Problems</td>
<td>.34</td>
<td>.15</td>
<td>9.59</td>
<td>.010</td>
<td></td>
</tr>
<tr>
<td>Victim Precipitation (yes)</td>
<td>.06</td>
<td>.01</td>
<td>3.72</td>
<td>---</td>
<td></td>
</tr>
<tr>
<td>Victim Consent to Contact</td>
<td>.45</td>
<td>.34</td>
<td>2.67</td>
<td>---</td>
<td></td>
</tr>
<tr>
<td>Victim Initiation of Contact</td>
<td>.24</td>
<td>.26</td>
<td></td>
<td>---</td>
<td></td>
</tr>
<tr>
<td>Victim Resistance (present)</td>
<td>.53</td>
<td>.52</td>
<td>.00001</td>
<td>---</td>
<td></td>
</tr>
<tr>
<td>Variables</td>
<td>CSC Proportion/</td>
<td>Assault Proportion/</td>
<td>$x^2$</td>
<td>$t$</td>
<td>$\alpha$</td>
</tr>
<tr>
<td>-----------------------------------</td>
<td>----------------</td>
<td>---------------------</td>
<td>-------</td>
<td>-----</td>
<td>-----------</td>
</tr>
<tr>
<td><strong>Type of Resistance</strong></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Non-assaultive</td>
<td>.44</td>
<td>.63</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Weak physical</td>
<td>.44</td>
<td>.03</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Strong physical</td>
<td>.12</td>
<td>.34</td>
<td>29.76</td>
<td>.000</td>
<td></td>
</tr>
<tr>
<td><strong>SES of Victim</strong></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>(lower to lower middle)</td>
<td>.81</td>
<td>.75</td>
<td>.85</td>
<td></td>
<td></td>
</tr>
<tr>
<td><strong>Racial Composition</strong></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>(interracial)</td>
<td>.78</td>
<td>.73</td>
<td>.56</td>
<td></td>
<td></td>
</tr>
<tr>
<td><strong>Pending Cases Against the Accused (yes)</strong></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>.20</td>
<td>.26</td>
<td>.40</td>
<td></td>
<td></td>
</tr>
<tr>
<td><strong>Past Assaultive Behavior by the Accused (yes)</strong></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>.58</td>
<td>.33</td>
<td>10.83</td>
<td>.001</td>
<td></td>
</tr>
<tr>
<td><strong>First Reason for Plea Bargaining:</strong></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Evidential</td>
<td>.49</td>
<td>.52</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Organizational</td>
<td>.11</td>
<td>.15</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Pragmatic</td>
<td>.33</td>
<td>.24</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>&quot;Practical&quot;</td>
<td>.07</td>
<td>.09</td>
<td>1.51</td>
<td></td>
<td></td>
</tr>
<tr>
<td><strong>Second Reason for Plea Bargaining:</strong></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Evidential</td>
<td>.48</td>
<td>.62</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Organizational</td>
<td>.10</td>
<td>.08</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Pragmatic</td>
<td>.42</td>
<td>.30</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>&quot;Practical&quot;</td>
<td>0</td>
<td>0</td>
<td>1.41</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>
Table 3 (Continued)

Case Characteristics for Authorized Sexual and Non-Sexual Assaults

<table>
<thead>
<tr>
<th>Variables</th>
<th>Proportion/ CSC</th>
<th>Proportion/ Assault</th>
<th>$x^2$</th>
<th>$t$</th>
<th>$\alpha$</th>
</tr>
</thead>
<tbody>
<tr>
<td>Dependent Variable Scale Points for Requested Charge(s)</td>
<td>(756)</td>
<td>(432)</td>
<td>-4.99</td>
<td>.000</td>
<td></td>
</tr>
<tr>
<td>Dependent Variable Scale Points for Authorized Charge(s)</td>
<td>(608)</td>
<td>(342)</td>
<td>-4.57</td>
<td>.000</td>
<td></td>
</tr>
<tr>
<td>Point Reduction for Authorized Cases at Intake (Y)</td>
<td>(-148)</td>
<td>(-90)</td>
<td>1.66</td>
<td>.090</td>
<td></td>
</tr>
</tbody>
</table>

Victim characteristics were not found to be significantly different on the variables of social class, initiation of, or consent to, contact, and on resistance. The majority of all victims, like their assailants, were judged to be of lower to lower middle SES. Victims initiated contact with their assailant in approximately 25% of all cases, and consented to contact in roughly an additional 20% of the sexual and 10% of the non-sexual assaults. The existence of victim resistance in these kinds of assaults differed most negligibly. However, the type of resistance varied considerably (see below).

Assaults additionally evinced little variability in terms of their interracial character. Close to three-quarters of all assaults were either white offender-white victim or minority offender-minority
victim. The second type of characteristic associated with the criminal offense, rather than victim or assailant per se, which showed little variation between the two types of assaults concerned the nature of the reasons for plea bargaining. On the average, prosecutors offered evidential reasons for plea bargaining in one-half of both the sexual and non-sexual assault cases. Pragmatic reasons, such as sufficient sentence latitude, were the second modal category. Reasons classified as organizational were cited roughly 10% of the time, and "practical" reasons were infrequently utilized for plea bargaining in both types of assaults.

Certain independent variables pertaining to the defendant, victim, and crime did, however, individually differentiate the sexual and non-sexual assaults. Defendants had more frequently assaulted in the past in the CSC cases (58%) than was true for the other personal assaults (33%). Defendants had weapons a great deal more often in the non-sexual crime categories than was evident in the CSC's. It should be noted, however, that the existence of a weapon is of course part of the corpus delicti of the crime in these non-sexual assault cases (See Appendix B) and thus understandably more highly represented in these cases.

Three variables relating to the victim were significant in their ability to distinguish characteristics associated with the sexual and other violent assault cases. The first of these, as noted above, involved the type of resistance put forth by the assault victim when victims resisted. Non-sexual assault victims offered stronger resistance more often than was true for CSC victims. CSC victims were
evenly split between non-aggressive and weak physical resistance, whereas other assault victims were primarily non-aggressive or strongly physical in their efforts to ward off the attack.

The second and third independent variables differing significantly occurred in variations regarding victim credibility and judgment. Victim credibility problems were noted in a significantly higher proportion of CSC's (slightly over one-third of these cases) than other assaults (15%). And although prosecutors rarely stated that victims used bad judgment and thereby connoted that they precipitated the attack, when they did so, this was proportionately more often the case for CSC's than the converse.

One of the variables associated with the crime itself can be interpreted in this light. Evidence such as bruises, blood, crime scene photographs, confessions, and eyewitnesses significantly differed in availability for these two types of assaults. The fact that evidence was less often available in CSC cases might be drawn upon in the effort to explain the higher incidence of credibility problems noted. When corroborative evidence is lacking, the credibility of the victim is more heavily focused and/or relied upon and frequently found wanting.

The second crime characteristic differentiating these cases was victim-offender relationship. Strangers assaulted victims about twice as often in non-sexual as opposed to sexual assaults. Acquaintances of some sort were involved in roughly half of both of these types of cases, with the remainder being represented in family assaults in 28% of the CSC's and only 2% of the non-sexual crimes.
It should be noted that domestic assault cases involving family vic-

tim-offender relationships were frequently excluded in this study 
because of the request for authorization of the misdemeanor charge(s) 
of assault and battery. A high percentage of domestic assaults were 
therefore excluded by virtue of the case selection of only felonious 
sexual and non-sexual assaults.

The t test indicated four additional variables significantly 
different for these offenses. These variables were victim age, in-
jury, conviction probability (as scored by prosecutors on a scale of 
1 to 10), and number of eyewitnesses. Victims were much younger in 
the CSC cases than in other violent assaults. Victims sustained 
greater injury in this latter category; this perhaps contributing to 
the higher conviction probability associated with such cases. Addi-
tionally, the mean number of eyewitnesses was more than twice as high 
for those offenses.

When all relevant variables were considered in an overall simul-
taneous sense in the discriminate function analysis, it was evidence, 
victim credibility problems, victim injury, and victim-offender re-

tationship which most strongly differentiated the sexual from the 
non-sexual assaults at the .05 critical level. Table 4 presents a 
summary of these findings. The preliminary interpretations offered 
above are applicable to these findings. The discriminate function 
analysis indicates that these four previously described variables 
best differentiated these two forms of assaults.
Table 4

Discriminate Function Analysis Results for Authorized Sexual and Non-Sexual Assault Cases

<table>
<thead>
<tr>
<th>Variable</th>
<th>B</th>
<th>F</th>
<th>Significant</th>
</tr>
</thead>
<tbody>
<tr>
<td>Evidence Availability</td>
<td>-.328</td>
<td>13.458</td>
<td>✓</td>
</tr>
<tr>
<td>Victim Credibility Problems</td>
<td>-.247</td>
<td>6.458</td>
<td>✓</td>
</tr>
<tr>
<td>Victim Injury</td>
<td>-.076</td>
<td>4.411</td>
<td>✓</td>
</tr>
<tr>
<td>Victim-Offender Relationship</td>
<td>-.149</td>
<td>3.963</td>
<td>✓</td>
</tr>
<tr>
<td>Victim Resistance</td>
<td>-.093</td>
<td>1.511</td>
<td>—</td>
</tr>
<tr>
<td>Victim Consent to Contact</td>
<td>-.0498</td>
<td>.370</td>
<td>—</td>
</tr>
<tr>
<td>Number of Eyewitnesses</td>
<td>-.0025</td>
<td>.252</td>
<td>—</td>
</tr>
<tr>
<td>Overall</td>
<td>5.18</td>
<td></td>
<td>✓</td>
</tr>
</tbody>
</table>

Charge Reduction in Authorized Cases: Initial Screening

Of all the variables discussed, only a few were significant in their relationship to the dependent variable of charging reduction at warrant authorization stage. Table 5 presents the correlation coefficients of each of the independent variables with the first dependent variable of charge reduction at intake in the authorized CSC and non-sexual assaults.
<table>
<thead>
<tr>
<th>Variable</th>
<th>CSC</th>
<th></th>
<th></th>
<th>Assault</th>
<th></th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>$r$</td>
<td>$\alpha$</td>
<td>Sig.</td>
<td>$r$</td>
<td>$\alpha$</td>
<td>Sig.</td>
<td></td>
</tr>
<tr>
<td>Defense Attorney</td>
<td>-.01</td>
<td>.917</td>
<td>--</td>
<td>-.06</td>
<td>.567</td>
<td>--</td>
<td></td>
</tr>
<tr>
<td>Victim Age</td>
<td>-.12</td>
<td>.326</td>
<td>--</td>
<td>.16</td>
<td>.130</td>
<td>--</td>
<td></td>
</tr>
<tr>
<td>Victim Injury</td>
<td>-.13</td>
<td>.242</td>
<td>--</td>
<td>-.02</td>
<td>.805</td>
<td>--</td>
<td></td>
</tr>
<tr>
<td>Victim-Offender Relationship</td>
<td>.22</td>
<td>.047</td>
<td>✓</td>
<td>.12</td>
<td>.175</td>
<td>--</td>
<td></td>
</tr>
<tr>
<td>No. of Eyewitnesses</td>
<td>.06</td>
<td>.567</td>
<td>--</td>
<td>.06</td>
<td>.525</td>
<td>--</td>
<td></td>
</tr>
<tr>
<td>Evidence Availability</td>
<td>.26</td>
<td>.030</td>
<td>✓</td>
<td>-.05</td>
<td>.598</td>
<td>--</td>
<td></td>
</tr>
<tr>
<td>Victim Credibility Problems</td>
<td>-.15</td>
<td>.180</td>
<td>--</td>
<td>-.05</td>
<td>.569</td>
<td>--</td>
<td></td>
</tr>
<tr>
<td>Victim Resistance</td>
<td>.10</td>
<td>.573</td>
<td>--</td>
<td>.06</td>
<td>.631</td>
<td>--</td>
<td></td>
</tr>
<tr>
<td>Victim Consent to Contact</td>
<td>.10</td>
<td>.425</td>
<td>--</td>
<td>-.10</td>
<td>.350</td>
<td>--</td>
<td></td>
</tr>
<tr>
<td>Victim Initiation of Contact</td>
<td>.01</td>
<td>.966</td>
<td>--</td>
<td>.02</td>
<td>.857</td>
<td>--</td>
<td></td>
</tr>
<tr>
<td>Victim SES</td>
<td>-.07</td>
<td>.587</td>
<td>--</td>
<td>.07</td>
<td>.448</td>
<td>--</td>
<td></td>
</tr>
<tr>
<td>Pending Cases Against the Accused</td>
<td>-.35</td>
<td>.004</td>
<td>✓</td>
<td>.10</td>
<td>.350</td>
<td>--</td>
<td></td>
</tr>
<tr>
<td>Past Assaultive Behavior of the Accused</td>
<td>.01</td>
<td>.929</td>
<td>--</td>
<td>.23</td>
<td>.020</td>
<td>✓</td>
<td></td>
</tr>
</tbody>
</table>

The probability level (alpha) selected for decisions on these correlation coefficients was .05. This means that the null hypothesis was retained, i.e., that the observed correlation coefficient
was likely to be due to chance alone, in all instances where the probability associated with the coefficient did not reach the .05 level. It should be noted again that when making simultaneous comparisons of such coefficients drawn from the same research sample, there is the possibility of inflated significance/probability levels. For this reason, variables were narrowed down to as few as was theoretically tenable before such analysis. The potential problem here, however, remains.

Before discussing the significant correlations it is instructive to examine the mean charge reduction involved in both these kinds of authorized cases. While the same pattern evinced for all cases inclusive of denied warrant cases obtained here, the difference in mean charge reduction was not significant. Therefore, although charges were reduced at the screening stage by an average of 148 points for CSC's, and 90 points for other personal assaults, this difference was not statistically discrepant.

The strongest independent variable in relationship to CSC charging reduction concerned whether or not other separate cases (generally involving other victims) were pending against the accused. The significant correlation coefficient indicated that there was less charge reduction at authorization for CSC's when defendants had other outstanding cases against them. It is likely that, under this circumstance, prosecutors were more likely to operate under the presumption of guilt, have more confidence in sustaining a conviction, and/or operate to assure later plea bargaining leverage.
As previously noted, there did not exist a significant difference in the proportion of CSC and assault cases where other charges were pending yet the type of pending case did differentially impinge upon charging reduction in the two assault types. Given the general reticence of victims to pursue CSC charges in the first place, and the overall more serious nature of a CSC charge (see dependent variable scale points) it can be speculated that when CSC charges are not only presently under review, but also otherwise pending, prosecutors are likely to reduce charges less. This may be attributable to not only the presumption of guilt, but also to concern for specific deterrence and incapacitation.

The second significant independent variable correlating with charge reduction at authorization in CSC cases concerned whether or not evidence such as weapons, eyewitnesses, confessions, semen, injuries, and so forth was available. The absence of corroborating evidence correlated with greater charging reduction at this stage of prosecution for the sexual assault cases. It should be remembered that the absence of corroborating evidence places greater emphasis on victim credibility, which was found to be more often problematic in these same cases.

There was a significantly greater proportion of assaults where corroborative evidence was available than was the case for CSC's, yet this variable did not impact significantly on the charging decision in these non-sexual assault cases. It was relevant in explaining only CSC charge reduction due to lack of evidence at authorization.
The third and final independent variable significant in its correlation with charge reduction at authorization for CSC's was victim-offender relationship. Charges were reduced in CSC cases to a greater extent when acquaintances of any sort, from family member to old/new acquaintances, etc., were involved in the offense. This greater charge reduction with CSC's involving victims and offenders who knew one another in some way can be related back to the issue of victim credibility. It can be suggested that prosecutors decreased charges authorized to a greater degree with these cases due to lack of belief in the severity of original charges requested by police. Prosecutors might not have been as "sensitive" to CSC complaints as specialized and frequently female officers who requested the more severe charges regardless of victim-offender relationships. Alternatively, prosecutors may have been attempting to fit the charge with the corpus delicti of the crime, given the absence of the relationships involving family members and authority figures as is specified in the CSC code (See Appendix A).

In terms of the other component of victim-offender relationships, those cases which involved family members were, at times, reduced given victim/complainant desires. It was noted in reading through the files that, in cases involving related parties, e.g., incest cases, that the entire family was at times reticent to follow through on a case where a life sentence potential was involved. Therefore, prosecutors may have reduced charges at the authorization stage in such cases in order to meet the desires of the victim or complainant
(e.g., mother of victim) and thus still be able to proceed criminally against the accused.

While these three variables of pending cases, evidence availability, and victim-offender relationships did not significantly correlate with charging reduction at authorization in the non-sexual assault cases, previous assaultive behavior did. The indicated, somewhat surprisingly at first, that past assaultive behavior correlated with greater charge reductions at authorization in these non-sexual assault cases. What must be borne in mind in interpreting this finding is that police requested charges may be inflated for a number of reasons. What is indicated here is that police may overcharge when suspects have histories of assaultive behavior, in their attempt to get particular "criminals" put away. Prosecutorial alteration of charges may once again be interpreted in light of this, i.e., prosecutors authorize to better fit the charges with what can potentially be sustained in a legalistic sense.

Examination of the type of past record of the accused in these cases sheds further light on this finding. Where data were available in the assault cases, it was found that non-sexual assault suspects most frequently had misdemeanor arrests and convictions as a part of their past record. By way of contrast, the past record of CSC assailants more frequently involved a higher number of past felony, related (i.e., sexual assault) and other violent convictions than was the case for non-sexual assaults. Although this variable was not significant in the CSC cases, it is still tenable that police and prosecutors were likely to view charges and cases in a comparable
(severe) manner in CSC cases involving this above type of defendants, but non-comparably in the other assault cases where past records involved mere misdemeanor offenses.

**Charge Reduction in Authorized Cases: Plea Bargaining**

The decision to reduce charges once cases have been authorized comprises the second independent variable of this study. No correlations were found to be significantly related to the plea bargaining decision in the CSC cases. The reasons/interpretations pertaining to this are explored in the next section dealing with theoretical considerations.

Table 6 portrays the findings pertaining to this second dependent variable. In the assault cases there existed essentially four independent variables contributing to the explanation of charging reduction through plea bargaining.

Race of the accused significantly correlated with plea bargaining reductions in the non-sexual assault cases in the direction contended by "conflict" theory. The research result showed that non-sexual assault cases involving minority group members as defendants experienced less charging reduction than was the case for the non-sexual assaults involving white assailants. Given the research literature in the criminology field, it was thought that this relationship might be confounded by the influence of such variables as the past record of defendants and the race of the victim. The best available data on the former dimension concerned past assaultive behavior and pending cases against the accused. The partial
Table 6
Correlation Coefficients for Charge Reduction through Plea Bargaining

<table>
<thead>
<tr>
<th>Variable</th>
<th>CSC</th>
<th></th>
<th></th>
<th>Assaults</th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>( r )</td>
<td>( \alpha )</td>
<td>Sig.</td>
<td>( r )</td>
<td>( \alpha )</td>
<td>Sig.</td>
</tr>
<tr>
<td>Defense Attorney</td>
<td>.02</td>
<td>.576</td>
<td>—</td>
<td>-06</td>
<td>.581</td>
<td>—</td>
</tr>
<tr>
<td>Victim Age</td>
<td>.14</td>
<td>.240</td>
<td>—</td>
<td>-24</td>
<td>.021</td>
<td>✓</td>
</tr>
<tr>
<td>Victim Injury</td>
<td>.16</td>
<td>.145</td>
<td>—</td>
<td>-17</td>
<td>.052</td>
<td>✓</td>
</tr>
<tr>
<td>Victim–Offender Relationship</td>
<td>-.16</td>
<td>.165</td>
<td>—</td>
<td>.01</td>
<td>.911</td>
<td>—</td>
</tr>
<tr>
<td>No. of Eyewitnesses</td>
<td>.08</td>
<td>.452</td>
<td>—</td>
<td>.14</td>
<td>.119</td>
<td>—</td>
</tr>
<tr>
<td>Evidence Availability</td>
<td>.12</td>
<td>.338</td>
<td>—</td>
<td>-10</td>
<td>.283</td>
<td>—</td>
</tr>
<tr>
<td>Victim Credibility Problems</td>
<td>.14</td>
<td>.222</td>
<td>—</td>
<td>-.04</td>
<td>.656</td>
<td>—</td>
</tr>
<tr>
<td>Victim Resistance</td>
<td>-.05</td>
<td>.791</td>
<td>—</td>
<td>.07</td>
<td>.589</td>
<td>—</td>
</tr>
<tr>
<td>Victim Consent to Contact</td>
<td>-.02</td>
<td>.900</td>
<td>—</td>
<td>-.08</td>
<td>.377</td>
<td>—</td>
</tr>
<tr>
<td>Victim Initiation of Contact</td>
<td>.01</td>
<td>.913</td>
<td>—</td>
<td>-.05</td>
<td>.618</td>
<td>—</td>
</tr>
<tr>
<td>Victim SES</td>
<td>.03</td>
<td>.824</td>
<td>—</td>
<td>.01</td>
<td>.931</td>
<td>—</td>
</tr>
<tr>
<td>Race of Offender</td>
<td>.03</td>
<td>.800</td>
<td>—</td>
<td>-.25</td>
<td>.003</td>
<td>✓</td>
</tr>
<tr>
<td>Pending Cases Against the Accused</td>
<td>-.16</td>
<td>.217</td>
<td>—</td>
<td>.14</td>
<td>.165</td>
<td>—</td>
</tr>
<tr>
<td>Past Assaultive Behavior of the Accused</td>
<td>-.07</td>
<td>.541</td>
<td>—</td>
<td>-.01</td>
<td>.902</td>
<td>—</td>
</tr>
<tr>
<td>First Reason for Plea Bargaining</td>
<td>-.09</td>
<td>.433</td>
<td>—</td>
<td>-.18</td>
<td>.036</td>
<td>✓</td>
</tr>
<tr>
<td>Second Reason for Plea Bargaining</td>
<td>-.18</td>
<td>.112</td>
<td>—</td>
<td>-.17</td>
<td>.047</td>
<td>✓</td>
</tr>
</tbody>
</table>
correlation coefficients indicated, however, that the relationship between race and charge reduction through plea bargaining held, i.e., remained significant when the effects of these variables were removed (zero order -.25, first order partials for past assaults and pending cases -.25 and -.26 respectively). Similar findings were portrayed by the partials when controlling for the race of the victim and the victim-offender relationship as acquaintance/non-acquaintance. In other words, statistically removing the effects of other suspected independent variables did not render the correlation to non-significance. This means that conflict theory was supported by this finding insofar as the cases involving minority group members experienced less lenient treatment in plea bargains than was the case for white assailants.

The second strongest correlation in non-sexual assaults was between the age of the victim and plea bargaining reductions. The older the victims, the less the reductions through plea negotiations. It is tenable that victim credibility is higher when older victims are involved and thus prosecutors are less amenable to plea bargaining in these cases for two reasons. First, prosecutors themselves may take victim accounts and the nature of the case more seriously in cases involving older victims, and second, they may anticipate greater jury appeal/sympathy with such cases. Partial correlation coefficients were again examined in the effort to discern whether particular independent variables other than specifically age of victim were directly relevant to the charge reductions involved here. Controlling for age of offender, the age difference between offender
and victim, victim credibility problems, and attributions of victim precipitation did not in any instance significantly affect this relationship between age and charge reduction.

The third significant independent variable of victim injury is wholly consistent with the above interpretation. Cases involving more serious victim injury were reduced through plea bargaining to a lesser extent than was true for cases involving either nominal or no victim injury. One interpretation is that the more serious injury cases were reduced less due to prosecutors' judgments about the severity of the case and their anticipations concerning judge and jury concurrence as manifested in convictions.
CHAPTER V

INTERPRETATIONS: THE DISCRETIONARY IMPLEMENTATION OF MODEL SEXUAL ASSAULT LEGISLATION

The viability of each of the theoretical perspectives described in Chapter II can now be explored given the research findings. The discovery of significance on certain variables at certain stages holds implications for each of these perspectives. It is important to point out that several of the findings of non-significance are of equal importance in attempting to theoretically explain the prosecution of sexual and non-sexual assaults under the model CSC code.

Consensus and Plural Conflict Theory

The first perspective on the origin and enforcement of the criminal law discussed was consensus theory. From this perspective it was anticipated that the type of implementation of the new sexual assault law involved the issues of equitable case treatment in terms of an overall outcome, and legalistic or evidence-based considerations in terms of prosecutors and discretion. The reason for the expectation of comparable treatment in regard to sexual and non-sexual assault cases with consensus theory was explained as owing to the consistency of values permeating society. In other words, given the assumption that societal value consensus is pervasive, the value predicates leading to the change in law are necessarily the same as those influencing its implementation.
Pluralistic conflict theory ends up with a similar type of conclusion albeit using different logic. Although plural conflict theory posits diverse and competing values and interests, it assumes that the agencies of the state operate in a neutral and objective fashion. The state's role as impartial mediator between conflicting interests and groups renders the same commitment to equitable case treatment.

Because both of these perspectives lead to the conclusion of comparable case treatment, the variables indicative of such will be discussed jointly as they pertain to the discretionary implementation of the new sexual assault legislation vis-à-vis non-sexual offenses. There were several research findings which can be interpreted to be consistent with such contentions. At the outset, the percentages of warrant denials for CSC's (33%), and non-sexual assaults (46%) favored the CSC cases. In other words, support for continued discriminatory treatment of rape cases was not found to be the case in the research jurisdiction operating under the model code, given the proportion of cases denied at intake. Additionally, when CSC cases were dropped at the screening stage, they were denied for evidential reasons in two-thirds of these sexual assault cases. One possible interpretation of this is that prosecutors consider only legally relevant criteria and exercise their discretionary powers so that the implementation mirrors the letter of the law as enacted. The fact that non-sexual assaults were denied for what has been referred to as practical reasons (such as the failure to show for an interview as required for authorization in all assault cases), in the majority of
these cases might be taken as an indicator that CSC victims are more determined or serious or less fearful about pursuing their case through the criminal justice system under the CSC statute. Unfortunately, comparative baseline data were not available to substantiate this, and hence the notion must remain a speculation. Regardless, the lesser rather than higher frequency of denials for CSC's and the legalistic reasons offered for such denial can be interpreted as congruous with the consensus and pluralistic perspective assumptions about agreed upon morality, rational and neutral decision making leading to new laws, and such laws being implemented as enacted.

When examining all denied and authorized cases jointly, and when examining strictly those cases accepted by the prosecutor, consensus and plural conflict theory can additionally be brought to bear on research findings. The race of the offender, and status at the time of the warrant request, were neither significantly correlated with charging reduction including denial, nor with charging reduction associated with the authorized cases when analyzed separately. The socio-economic status of the defendant, of the victim, and the interracial composition of offenses all failed to significantly contribute to the explanation of the first dependent variable of charge reduction at intake. The absence of influence of these variables is best explained by consensus theory, which stands in stark contradiction to the conflict tenets concerning discretion and discrimination.

The mean charge reduction scores failed to distinguish CSC's from non-CSC assaults. This lack of significance can be interpreted to mean that the degree of charge reduction for authorized cases
differed insignificantly for the sexual and non-sexual assaults that were authorized. In terms of plea bargaining these cases, prosecutors did so in approximately the same proportion of each of the sexual and non-sexual assaults (50.5 and 54% respectively).

Investigation of the types of reasons for reducing charges through plea agreements failed to reveal significant differences once again, i.e., evidential and other types of reasons were employed for plea bargaining cases in comparable proportions for the CSC's and other violent crimes.

All of this can be interpreted as consistent with the comparable as opposed to discriminatory treatment of sexual assault offenses. These variables can potentially be taken as indices of the success of the law, or in other words, as evidence of the congruity between objective and enforcement. However, further analysis results point to contradictory conclusions.

Labeling Theory

Labeling theory, primarily as formulated by Lemert (1951) and Becker (1963) focuses on the consequences of social definitions. Lemert directed attention to the effects of labeling on secondary deviance and the creation of deviant careers. Becker highlighted differentials concerning the making and enforcing of rules as they pertain to deviance designations.

The significance of the labeling perspective for this study of implementation of sexual assault legislation concerns not the accused, but the victim of sexual assaults. There were some
indications in the research findings that the office of the prosecutor has not fully resolved the issues concerning the victim contribution to the commission of the crime. For example, while victim precipitation was not often an evaluation rendered with either type of case, when such judgments were made they were significantly more frequent in the CSC as opposed to non-sexual assault cases. Thus, there is some limited basis for inferring that traditionally conditioned conceptions or definitions about sexual assaults persist in the face of model legislation aimed at altering such conceptions.

Although labeling theorists assume that power differentials exist within society, the perspective does not explicate the role of such power in relation to the failures or successes in the definitional process. Whether or not sexual assaults have been successfully redefined as violent rather than sexual crimes remains to be explained by the subsequent interpretations facilitated by the Marxian theories.

Instrumental Marxian Theory

The contentions made by instrumental Marxian theorists stand in strong opposition to the above. One thrust of this perspective lies in assertions that laws enacted and appearing to be equitable are laws which are implemented in such a way as to maintain the status quo. The passage of the new CSC Code was interpreted in this vein as a means to quell collective challenges while simultaneously not being expected to substantively alter prevailing practice and sexist ideology serving dominant class interests.
Several of the differences discovered in this research can be explained with this instrumental conflict approach. The form of the new CSC law in Michigan met the objectives of doing away with the differential and unique corroboration requirements, consent and resistance standards, admissibility of past sexual character evidence, and notions of victim precipitation. In short, the form and wording of this model statute met with intents to shift the burden of proof and assumption of "guilt" (consent) away from victims of sexual assault and thereby render the treatment of this crime more compatible with other violent and personal assaults. Yet the implementation of this new law as studied in this research departed from such objectives, interests, and form.

Sequentially, the first finding which can be interpreted as consistent with this perspective is drawn from the dependent variable of charge reduction at authorization. The average charge reduction for all cases at the intake screening stage was higher for CSC's than for non-sexual assaults. This pattern persisted for the separately analyzed authorized cases in terms of authorization for less serious offenses, and for charge reductions through plea bargaining. Although the difference was not significant for authorized reductions, a statistical difference was determined to be existent at plea bargaining. The dependent variable then indicated a general pattern of less favorable treatment of CSC's.

More conclusive findings congruous with instrumental assumptions were discerned when examining the independent variables. In the denied cases, problems of evidence were significantly correlated in
the sexual as opposed to non-sexual assault cases. This criterion differed for the two types of assaults sufficiently enough to analytically separate the CSC from other violent assault offenses, given all other potentially relevant variable information. These findings mean that evidence, in addition to the victim's complaint, was found wanting. To put it somewhat differently, evidence was deemed insufficient by prosecutors more often in sexual assault crimes. In the non-sexual assaults, victims' decisions to not proceed as seen in the practical reasons for denial occurred more frequently for denials.

The need for corroborative evidence, in spite of the specific lack of requirement in statute, was found to be true in authorized CSC cases as well. The most significant distinguishing case characteristics of CSC's vis-à-vis other assaults were found to lie in considerations of victim credibility problems and evidence availability. In the CSC cases, less evidence was available and the veracity of victim accounts doubted to a greater extent than was true of non-sexual assaults. As was stated previously in the literature review, the very nature of sexual assault cases is such that less evidence is generally available than is true of other crimes. One purpose of the new CSC Code was to remove burdens from sexual assault victims by not requiring corroborative evidence, in addition to simply the complaint and testimony (which is often unavailable as was found to be the case here) as is the practice for other non-sexual crime categories. One possible interpretation of the findings on evidence and credibility in sexual vs. non-sexual assaults is that this objective of the law
was not realized through implementation. The absence of corroborating evidence was not only significantly different and discriminatory for these two types of offenses, but further significantly correlated with charging reductions in the authorized CSC cases. The greater frequency of victim credibility problems associated with CSC cases means that when victim accounts were focused on, particularly in light of the absence of other corroborating evidence, they were not given credence. This indicates that unique burdens remain for sexual assault victims in terms of not being believed and needing to have additional evidence pertaining to their cases specifically not required by law.

The finding that pending cases against the accused correlated with less charging reduction can be interpreted along these same lines. One possible interpretation of this research result is that when other, and most frequently other CSC, cases were pending against the alleged CSC assailant, prosecutors had more reason to believe victims, i.e., more potential evidence given past attacks on this victim by this suspect, or given other victims sexually assaulted by the accused. Thus, the existence of other open CSC cases in the criminal justice system being held against the accused can be seen as a type of corroborating evidence leading to less charging reduction.

The issue of victim consent to sexual assault can additionally be explored with instrumental contentions regarding the discrepancy between enactment and enforcement of laws. One explanation offered for the influence of victim-offender relationship in charging reductions was relevant to this consent issue. The fact that charges were
accepted as more severe when strangers were involved in the CSC's than when an acquaintance of some form was the assailant can be seen as an indicator of prosecutorial assumptions about consent. Although alternative explanations, such as victim reticence, given sentence severity and familiarity with the accused, must and have been considered, it remains tenable that prosecutors are less likely to question whether or not the victim consented to the sexual act(s) when strangers are involved, and thus proceed with the most severe charges. This then again relates back to the issues of victim credibility.

The new law's attempt to strictly limit victim sexual history or character evidence can also be interpreted along an instrumental Marxian line of reasoning. Although this pertains to the criminal justice system as a whole, rather than to prosecution, it is discussed here for its relevance and continuity with the discussion of instrumental Marxian theory and the implementation of altered laws. The most supportive finding of differential enactment and implementation here would have been if in-camera hearings were frequently requested and held, and the results deemed to be "relevant" and therefore admissible in court. While this was anything but the case, the findings on this dimension remain similar. In-camera hearings were requested and held in only one of all of the CSC's examined for the two-year period. And even here, evidence of past sexual activity was deemed irrelevant. However, it was discovered through discussions with prosecutors and through the reading of various case transcripts that this issue arises not so infrequently in open court. The typical scenario is a defense attorney questioning the victim on the
stand about past sexual activity in front of the judge and/or jury, the prosecutor objecting, the judge sustaining, and telling the jury to disregard. The instrumental argument that implementation of legal change will be discrepant from the apparent intent underlying enactment can be applied to this discovery. This above described practice which engenders victim trauma and discriminatory rape case treatment persists, albeit in a new form, in the face of legislation allegedly designed to preclude it.

The notion of victim precipitation has similarly not been totally abandoned under the new code. In spite of the fact that there were few cases of either sexual or non-sexual assault where prosecutors intimated culpability to victims, a significant difference was found to exist when such judgments were made. Attributing blame to the victims was proportionally more frequent in sexual as opposed to non-sexual assault offenses. This then again provides a basis for the substantiation of instrumental Marxian theory claims regarding the alleged or apparent interests behind legislation (i.e., comparable case treatment) and the reality as evidenced in the enforcement process.

There was one additional research result which was consistent with the contentions of this perspective. It was found that race correlates with charging reductions through plea bargaining for the non-sexual, but not for the CSC cases. The correlation indicated less charge reduction, i.e., less favorable treatment, for defendants who were minority group members. This in and of itself is predicted and borne out empirically by the work of instrumental conflict.
theorists. What is required is an examination of the finding that race did not show as a factor influencing charge reductions in the sexual assault cases. Certain theorists operating out of this orientation suggest one interpretation. Chiricos and Waldo, for instance, (1975) assert that race and SES are more likely to represent influences on discretionary decision making processes when crimes are less serious in nature. This was precisely the finding at hand. The remaining findings on plea bargaining are best explained by the remaining two theoretical orientations.

Structural Marxian Theory

The major divergence of structural from instrumental Marxian theory lies in the emphasis on the relative autonomy of the state and its branches from a ruling class who are not viewed as an homogeneous ruling elite. Structural Marxists further point out that in order to reproduce or perpetuate the capitalistic social order, the dominant class relies on ideology to legitimate and thus maintain rule through consent rather than coercion.

There are several research findings which can be interpreted within these structural tenets. The developing autonomy of the state in modern capitalist societies is most relevant to the explanation of the exercise of discretion by prosecutors. Not only does the state develop a measure of independence, its own interests, and even its own contradictions, but so too do the sub-branches of this embodiment of political power. Prosecutors' offices represent one legal agency which can be understood to have relative autonomy, self interests,
and even inherent contradictions. The autonomy of the prosecutor has
been previously discussed in light of the few controls which exist to
regulate decision-making. The fact that the office of the prosecutor
is not generally conceived of as a part of the trichotomy of police,
courts, and corrections, and that prosecutors can and do operate and
make many decisions with a good deal of anonymity and few effective
checks over them attests to the relative autonomy of this office.
Prosecutors function independently with different types of interests
than the state and other criminal justice agencies.

The particular vested interests of individual prosecutors may
vary along a number of dimensions. However, it is well understood
that this office is a political one. Prosecuting attorneys often use
their offices as political stepping stones to more powerful positions
in society. Because prosecutors are, by and large, elected officials,
it is important that they act with political acumen. An important
political concern is, therefore, found in the organizational interest
of chief prosecutors to have their agency's actions please the voting
public, whether this be for purposes of re-election or election to
higher office.

At first glance, there might appear to be an inconsistency be-
tween the dimension of prosecutorial autonomy and sensitivity to the
electorate. However, it must be remembered that there is a low de-
gree of monitoring or surveillance of the everyday operations of
prosecutors. Accordingly, the office of the prosecutor has consid-
erable latitude in presentation to the public.
The contradiction which develops in terms of CSC case prosecution is in terms of how to appease the community. Prosecutors' offices are generally perceived to be effective when conviction rates are high. This batting average, so to speak, is an important aspect of decision-making for prosecutors. Yet, simultaneously, prosecutors need to please generally the voting female (and to an unknown extent male) populace by accepting, proceeding, and treating sexual assault cases as any other. The contradiction lies in the lower conviction probabilities associated with these cases, the anticipated juror reaction if taken to court, and so forth on the one hand, and the need to not require corroborative evidence, not to question credibility, etc. on the other. In short, prosecutors are faced with the dilemma of treating sexual and non-sexual assaults comparably in their decision-making capacities and still maintaining high conviction rates.

The recognition of relative autonomy, independence, organizational interests, and these types of contradictions brings to light some important insights for this study. The independence of the prosecutor's office as an entity unto itself represents one level of autonomy. Another level is found in the amount of individualized discretionary power wielded by individual prosecuting attorneys. After reading cases and talking with prosecutors, it was the opinion of this researcher that consensus about the nature of sexual assault offenses was not total or shared in this jurisdiction and office. Given that individual prosecutors have a range of discretion and that total consensus was not interpreted to exist on the issues of consent,
corroboration, credibility, and so forth, the research finding of no systematic correlation with plea bargaining charge reductions for CSC cases can be better understood. If prosecutors do not agree on requirements, standards, and case evaluations, then consistency in factors associated with such case decisions is likely to be absent, as was discovered for the CSC offenses plea bargained.

Cole's organizational category as well as labeling theory's assertions about organizational and bureaucratic self-interest are clearly intertwined with the above discussion. The political nature of discretionary decision-making is one facet of organizational factors described by Cole. This is precisely what was found to be the case in terms of deviance designations in the work of Becker (1963) and Dickson (1968). The type of decisions and thus definitions of what is or is not a criminal sexual assault, or how serious it is, and how much burden or stigma is attributed to the victim are all tied to the political process and nature of prosecution as discussed above.

The exchange relationships between criminal justice officials referred to by Cole are also relevant here. For example, it was found that past records of assaultive behavior correlated with charging reductions at authorization for non-sexual assault offenses. Police with their own set of interests, roles, and responsibilities, were denied the higher requested charges in these cases, most likely due to the differential standard requirements pertaining to the agency of police and prosecutor. While police need only probable cause for an arrest, prosecutors must be able to demonstrate beyond a reasonable
doubt that the crime authorized was committed by the suspect at hand. Therefore, while police may have a sufficient probable cause basis for their request and their desire to rid society of and their job of dealing with recidivating (and usually less serious) assault offenders, prosecutors could not justify the higher charges, given the standards and interests of their office.

Exchange relationships as a factor influencing charge reductions were also found to be relevant with plea bargaining. Prosecutors plea bargained both sexual and non-sexual assault cases because of known patterns of dismissals by anticipated judges in these cases. They additionally plea bargained cases in order to save resources by recommending sentences that would have likely been handed down even with trial, again given the past patterns and practices of different judges in the jurisdiction.

A somewhat different aspect of structural Marxian theory facilitates a different set of interpretations. Bierne states that, in an attempt to meet the objective of the "...long-run stability of the social system" the law must at times "...pursue policies which are at variance with the interests or wishes of certain factions of capital" (1979:379-380). With theoretical refinement, this element of structural Marxian theory can be brought to bear on research finding interpretations. One critique, previously noted, on this account was that structuralism does not indicate which laws will be those which are fair in appearance, and which laws will be those that are fair in reality. The additional critique of structural accounts that is presently being offered as a potential refinement of the theory concerns
a further breakdown along this dimension. If some laws must be fair, perpetuate ideology and status quo arrangements, it is tenable to logically infer that some aspects of certain laws might alternatively be fair in reality as opposed to appearance. While structural tenets do not lead to conclusions about which laws or which segments of which laws will actually operate in the true public interest, they do call attention to the possibility of such.

In terms of the model CSC statute examined in this research, certain findings indicated actualized fairness from a victim advocate point of view, while others pointed to fairness in appearance (in enactment) rather than implemented form. The findings consistent with "fairness" in appearance only were discussed in terms of the difference in enactment and enforcement as discussed by instrumental Marxian theory. To briefly reiterate, the issues of victim credibility, character, consent, and differential corroborative evidence requirements could all be interpreted to exist in a discriminatory manner for CSC victims even under model legislation. The findings in terms of fairness in reality or as evidenced through implementation are discussed below.

The objective of removing unique burdens historically placed on rape victims and the prosecution of such cases met in some measure with success. The evidence for this can be found not only in the form of law passed, but in the implementation process. For example, past sexual history evidence was never allowed in courtroom procedures, in spite of the fact that defense attorneys tried to introduce it at trial. The fact that victim initiation or consent to contact
did not correlate with charging reductions provides further evidence of comparable case treatment. Resistance by victims was additionally not singled out as a factor influencing prosecutors' judgments in either the sexual or non-sexual assaults. And, while victim precipitation was attributed in proportionately more CSC than non-CSC assaults, this was done in only 6% of these former types of cases. The reduction of charges through plea bargaining was additionally for pragmatic reasons, such as concern over and attempts to preclude victim trauma, in many (roughly one-third) of the CSC cases. Evidential and other types of reasons for plea bargaining manifested comparability for these two types of assaults. In short, there were findings which indicated both the mere guise of fairness and the fairness in reality for victims of sexual assault.

Dialectic Marxian Theory

The advantage of dialectic Marxian theory lies in its dynamic approach to enacted and implemented legal change. The distinguishing characteristics of dialectic Marxian thought lie in the possibility for progressive change. While Chambliss' "dialectic paradigm" is applicable because of the focus on contradiction, conflicts, dilemmas, and resolutions, and because of his conclusion that the dominated class may, in fact, gain some advantage through such change, his work leads to a more cyclical than progressive type of change conclusion. The pessimism evidenced in Chambliss' work is only mildly offset by the allowance for some increment of advantage for those with less resources and power. The coexistent pessimism and accommodation for
gains for the disadvantaged segments of society renders his work somewhat ambiguous. The writings of other dialectic theorists such as Bierne and Quinney, and Grau, permit more decisively for progressive outcomes. The historically specific contradictions of capitalism, including particularly the relative power accruing to the subordinate group of women because of political position, voting power, and so forth, has facilitated both challenge and change. It is this enacted change endeavoring equitable case treatment that was empirically assessed in this research.

The paradigm put forth by Chambliss would predict that the outcome of the enacted CSC Code would ultimately favor the status quo arrangement, since resolutions, such as the new law, do not address the basic causes of the phenomena, e.g., sexism and the unequal treatment of women in all spheres of social life. Support for this type of conclusion has already been discussed, albeit for different reasons, in relation to the other Marxian perspectives. The dialectic model proposed by Chambliss goes yet one step further. Chambliss explains that resolutions underscore previously latent contradictions and thereby provide the basis for new conflicts and dilemmas, and then new resolutions. In the case of the CSC legislation and the noted discriminatory differences between sexual and non-sexual assaults, the discrepancy between the objectives supposedly built into the CSC code and the actual case treatment can be viewed as the impetus for further conflicts, resolutions, and change.
The dialectic work of authors such as Grau poses a final type of consideration which can productively be explored with regard to this research. Grau brings to light two important considerations which are worthy of elaborations at this juncture. These points follow directly from the above discussion of Chambliss. Grau's caution about the individualization of rights can be applied to the women's movement in relation to rape. The intent was to enact legislation guaranteeing rights for individual sexual assault victims, e.g., not to be required to resist, provide corroborating evidence, and so on. This intent can be interpreted as short-sighted in light of Grau's and Picciotto's caveats about the individualization of rights as fragmenting rather than cementing class solidarity and true change (Picciotto, 1982:175; Grau, 1982:206), and Chambliss' regarding resolutions which fail to address basic social structure contradictions.

Grau's discussion on the outcomes of social movements, challenge, conflict, and struggle goes on to factor in the elements of power and tenacity. What this branch of dialectic theory suggests is that since women as a group do have power, and since they have the ability to develop alliances within and between class structure, and so forth, if the goal of comparable and equitable case treatment is to be realized, efforts aimed at change must not halt with the sheer enactment of legal change. Grau proposes that if victim advocate groups monitor the enforcement process and "insist" on implementation of objectives underlying such change, and view the statutory alterations as mere stepping stones to real change, that a type of progressive synthesis protecting the rights of all human beings, as
in this instance both sexual assault victims and assailants, might materialize.

What this research indicates then is a need for the monitoring of the implementation process, given discovered differentials in the treatment of these two types of crime. Dialectic Marxian theory additionally highlights the nature of some actual gains made by women in terms of rape victims' rights as was discussed with the reality as opposed to appearance of fairness in structural Marxian theory. The additional caveat of dialectic theory is to take into account social structural arrangements as potentially precluding real change, if not directly assessed and thereby involved in the resolution process. In this sense dialectic theory calls for the integration of the historical specificity relevant to instrumental Marxian work, and the recognition of the ideological legitimation functions often accomplished by change in form rather than substance as highlighted by structural Marxian theorists.
CHAPTER VI

SUMMARY AND CONCLUSIONS

Summary

The purpose of this research was to discern whether or not model rape legislation met with the salient objective as put forth primarily by women's groups of equitable case treatment in our criminal justice system. A major objective of Michigan's Criminal Sexual Conduct Code was to facilitate the comparable, rather than unique, case treatment of sexual assaults. The focus of this research was, therefore, directed towards the discovery of differences in sexual and non-sexual assault case prosecutions. Particular focus was directed towards those dimensions specifically altered in the new sexual assault statute, namely, corroboration requirements, consent and resistance standards, and issues relating to victim precipitation and credibility.

A second objective of this research was to apply theoretical perspectives on the origin and operation of the criminal law to the enacted and enforced statute change pertaining to sexual assault. Previous research in this field has neglected not only to assess the changes effected through the enforcement and administration of new rape law, but additionally failed to examine the comparative viability and/or implications of differing theoretical orientations regarding legal reform. Additionally, the rape literature is notably lacking for any application of theoretical perspectives in empirical research.
This research focused on the office of the prosecutor in the attempt to make a preliminary assessment of the type of change effected by Michigan's model CSC statute and to theoretically explain any such change. Prosecutorial decisions were focused on because they have a critical impact upon case treatment and outcome and have rarely been studied. Discretionary decisions made by prosecutors such as those to charge or plea bargain, comprise a significant component affecting the type of change effected by reform legislation through its implementation.

The data for this study were collected from prosecutor files in Kalamazoo County, Michigan for a two-year period. All sexual and non-sexual assaults were included in the research sample, with the exception of felonious assaults which had to be stratified and then systematically sampled due to their large number. The analysis employed chi-square and t tests of significance in the attempt to discover case characteristic differences on a variable by variable basis. Discriminate function analysis was then conducted to examine in a simultaneous manner which independent variables best differentiated the sexual from non-sexual assaults. Pearson product moment correlation coefficients were subsequently scrutinized, along with the respective significance levels in the effort to disclose relationships between the magnitude of charge reduction as operationalized in an interval/ratio scale and the independent variables in the sexual and non-sexual assault cases at various stages of prosecution. Partial correlation coefficients were also computed to examine multiple variable relationships.
There were six theoretical perspectives considered as they related to the origin and most particularly to the implementation of the new sexual assault statute. These were consensus, plural conflict, labeling, and instrumental, structural, and dialectic Marxian theories. General explanations of the origin of the new CSC law were offered, given each orientation, and then discussed in terms of general expectations regarding the likely forms and consequences of implementation. It is instructive to highlight the salient aspects of each theory in relation to the new law before discussing the findings of this research.

The consensus orientation assumes continuity between the shared values and interests which give rise to law and the enforcement process. Given consensus theory, it was anticipated that the new CSC code would be implemented in such a manner as to reflect the underlying interest of comparable, rather than discriminatory, rape case treatment. Plural conflict theory recognizes competing rather than singular groups, values, and interests, yet still basically views the state as objective and acting in the general public interest. Because of this, pluralistic perspectives lead to much the same type of conclusion as consensus theory, i.e., few, if any, differences to be manifest between the prosecution of sexual and non-sexual assault cases after the enactment of the new sexual assault law.

The labeling orientation calls attention to power in the definitional process and in this way is similar to the variants of plural conflict theory which recognize the differing amounts of power accruing to the various groups in society. Yet labeling perspectives
assume essentially a dichotomous power structure in society and therefore can be seen as more similar to Marxian orientations. The problem discussed with regard to labeling was that neither the nature of society nor the state are specifically delineated, which renders difficult the task of making specific anticipations concerning the enactment and implementation of law. This orientation did however lead to expectations that power will influence that which is defined as criminal or deviant, how such individuals will be defined and treated, and what consequences any such labels will have for individuals so defined. The nature of the constructed definitions and their application are relevant for both offenders and victims of sexual assault. The new law in Michigan specifically endeavored the redefinition of rape as sexual assault in part to shift negative connotations and stigma from victims to offenders involved with this crime. Given labeling tenets, it was anticipated that considerations of power would determine the effectiveness of this effort, i.e., the economically and socially powerful would engage in the labeling and consequent stigmatization of the powerless and lower class men and women.

Consideration of the Marxian perspectives facilitated more specific and rather discrepant anticipations. Instrumental Marxian theory asserts that the state and law originate in class conflict and operate to perpetuate the inequitable distribution of resources, viz. the status quo favoring the bourgeois. Given that orientation, it was therefore expected that the new sexual assault law would make no difference in terms of abating historically grounded discriminatory
tactics, practices, attitudes, and problems concerning victims of rape, and serve only to perpetuate false consciousness and the status quo.

Structural Marxian theory provides for more latitude in the interpretation of Marx's works and contends that the state is not an instrument manipulated at will by the ruling class, but rather a relatively autonomous part of the superstructure. In order to realize the long range interest of status quo perpetuation, the state must engage in legitimation functions, not simply coercive tactics. Because a system must appear fair in order to endure, it must at times actually be fair. This type of logic led to the expectation that the new CSC code might actually result in fairness for sexual assault victims, but this would serve the long term interest of capitalists.

Dialectic Marxian accounts recognize both the repressive and consensual nature of the state and law, and additionally call attention to contradictions inherent in a capitalist social system which can engender bona fide change (in contrast to change merely in appearance or change still aimed and tied to perpetuation of the social order). Because of contradictions in the political economic structure of society women have gained power. The new rape legislation which women's groups have moved through legislatures might therefore be expected to truly represent the interests of this group as manifest of sexual assault and its victims.

The actual findings from this investigation revealed several different patterns. The above theoretical orientations and expectations were drawn upon to interpret all research results. For
purposes of clarity, the findings are first summarily presented and then discussed in light of the different theories.

Overall, one-third of all CSC cases were denied for prosecution at the intake charging stage. In the remaining cases roughly one-half were plea bargained. In the non-sexual assault cases approximately one-half were denied at the outset, and slightly less than one-half were plea bargained.

In the joint consideration of all denied and authorized or accepted cases, it was found that the case characteristics of police department, number of days elapsed between crime occurrence and warrant request, race and (jailed) status of the suspect all significantly differentiated the sexual from non-sexual assaults. Proportionally, police requested charges from the largest police department more often for non-sexual than sexual assaults. Non-sexual assault case requests also involved minority group members, jailed suspects, and a shorter time span between the crime and warrant request more frequently than was the case for the sexual assault request group. There was not a significant difference between these types of cases on the remaining available data item of defendant age.

In examining how independent variables impacted on the decision to deny police warrant requests, it was found that only the reason offered by prosecutors for denials significantly correlated with this ultimate form of charge reduction. Although significant in correlation with the denial decision in both sexual and non-sexual assaults, the type of reason offered was different with each type of assault. Warrants were not issued for evidential reasons more than twice as
frequently in CSC's as opposed to non-sexual assaults. The latter were more often denied for what was categorized as practical types of considerations.

When looking at the denied warrant case characteristics simultaneously it was found that evidential reasons for denial, police department requesting the warrant, and number of days between crime and request distinguished (in rank order) the sexual from the non-sexual assaults.

Because more information was available in the authorized case files, the discretionary decision to reduce charges at intake was separately analyzed for sexual and non-sexual assaults. The characteristics which differentiated between them were past assaultive behavior and pending cases against the accused, resistance type efforts by victims, evidence availability, victim-offender relationships, victim age, injury incurred, number of eyewitnesses, weapons present, judgments about victim precipitation and victim credibility problems. In the CSC cases defendants had more frequently assaulted in the past, less often had other charges pending against them, and less often had weapons; victims offered less aggressive resistance, knew their attackers more often, were younger, and sustained fewer injuries; and the crime presented less evidence, fewer eyewitnesses, and greater problems of victim credibility and precipitation than was the case for non-sexual assaults. When all relevant variables were considered simultaneously in the discriminate function analysis, it was evidence availability, victim credibility problems, victim
injury, and victim-offender relationship which most strongly differentiated the sexual from the non-sexual assaults.

The variables which were significant in the explanation of charging reduction at intake for the authorized CSC cases were additional pending cases, evidence availability, and victim-offender relationship. The findings here indicated that charge reduction correlated with the absence of pending cases and evidence, and with acquaintance assaults. The only independent variable significantly related to intake charge reduction in the non-sexual assault cases was past assaultive behavior of the accused. Charges were reduced less when such was the case.

The magnitude of charge reduction involved in plea agreements was separately scrutinized for both types of assaults. There were not any independent variables significantly related to charging reductions through plea bargaining in the CSC cases, but several were statistically significant for non-sexual assaults. These were race of offender, victim age and injury, and type of reason offered for entering into plea agreements. Charge reductions here were correlated with non-minority groups (whites), younger victims, non-injury cases, and cases where evidential problems were identified to be existent by prosecutors.

By way of summary, it is important to discuss the interface of the previous theoretical perspectives and the research results rather than to describe each of these findings. Different sets of findings in terms of case characteristics, significant and non-significant
differences and correlations, were amenable to interpretation predicated upon the six differing theories presented.

Both consensus and plural conflict theory led to anticipations that the type of implementation of the new sexual assault law would reflect equitable case treatment and legalistic considerations in terms of influences on prosecutors' discretionary decision making. Some of the findings were consistent with such expectations. Consensus and plural conflict perspectives positing congruity between values and interests engendering legal change and implemented outcomes were thus drawn upon to discuss findings such as a relatively low rate of warrant denials for CSC cases, the absence of race or SES as decisive criteria in charging decisions, and the straightforward legalistic or evidence-based criteria often drawn upon in prosecutorial decision-making. In other words, support for continued discriminatory rape case treatment was not found, given these types of results, but rather support was lent to the notion that the law was enacted and enforced to better protect victims. Fewer warrants were denied in the sexual as opposed to non-sexual assaults, and when they were denied it was most often due to legalistic factors, and approximately the same proportion of these two forms of assault involved charge reduction because of plea negotiations.

Although specific predictions did not flow easily from the labeling orientation, attention was called to a significant dimension involved with the new sexual assault law. The primary importance of the labeling perspective for this study concerned the implemented form of the new law, not necessarily from the point of view of the
accused, but rather from the victim. Part of the movement to redefine rape as sexual assault had as its impetus the objective of altering connotations and stigma historically relating to victims. One research finding which indicated partial success in terms of such an objective was that attributions of victim precipitation and blame occurred rarely in sexual assault cases (less than 10% of the cases). However, comparability of sexual with non-sexual assault crime definitions was not totally realized as evidenced by the finding that, while precipitation attributions were infrequent with sexual assaults, they were much more infrequent with non-sexual assault case victims.

The Marxian perspectives more directly facilitate the assessment and explanation of the new CSC code in relation to research findings. Certain research results were amenable to interpretation given the instrumental Marxian approach. In looking at overall charge reductions, CSC cases fared less favorably both at charging and at the plea bargaining decisional stages. Warrants were frequently denied in CSC cases for evidential reasons indicating the possibility that prosecutors still need or require more evidence than the victim's complaint in the sexual assault cases, in spite of the model legislation designed to encourage such prosecution. In the authorized sexual assault cases, corroborative evidence was less often available and the veracity of victim accounts more suspect than was so for the non-sexual assaults. These variables not only distinguished the two forms of assault, but further significantly correlated with charging reduction in the CSC cases. The anticipation which was interpreted as tenable, given this theory, was that the objective of comparable
case treatment as manifest in, for example, the lack of corroboration requirements in the new law, was not realized through implementation. The findings on victim precipitation (as previously described), victim-offender relationships, and pending cases were similarly discussed. To briefly reiterate, pending cases were seen as additional evidence and therefore negatively correlated with charging reductions, and victims who were acquainted with their attackers were less credible in terms of consent issues than were those who were complete strangers. One final research result consistent with instrumental Marxian assertions was that whites received more favorable treatment in terms of greater charge reduction through plea bargaining in the non-sexual assault cases than minority group members, even when controlling for other factors such as past assaults.

Structural Marxian tenets facilitated a different set of insights into the research findings. The structural discussions about the relative autonomy of the state and its branches, and about laws actually being fair at times were employed to interpret some of the research results. The office of the prosecutor is a political one in this country with most prosecutors being elected officials. This sub-branch of the state, like the state, develops autonomy, interests, and its own set of contradictions. In this vein, it was stated that prosecutors' need to please the voting public engenders certain conflicts. On the one hand, prosecutors desire to please women such as those instrumental in the passage of fair and equitable sexual assault legislation, and on the other, desire to please the more traditional populace who accept prevailing mythology about "innocent and
falsely accused" men. Additionally, prosecutors are concerned about developing and sustaining good "batting averages" or conviction rates, and this is not easily accomplished with the acceptance and prosecution of many sexual assault offenses. This type of explanation of prosecutors as facilitated by structural Marxian theory was drawn upon to explain two important categories of findings. First, the finding that none of the independent variables significantly correlated with CSC plea bargaining charge reductions could be interpreted as being due to the autonomy that develops not only between the prosecutor's office and the state, but additionally within this office itself. Differences in attitude and interest, and the discretion which permits for their manifestation, may be so vast and individualized that no systematic pattern of influences can be discussed in relation to this decision with this specific type of case. Second, the preceding logic can be employed to interpret what might appear to be inconsistency in the research findings and interpretations. In other words, these conflicting pulls on prosecutors help shed light on the previously discussed findings that indicate both failure and success in the implementation process. The significant type of summary statement, given structural Marxian theory, is that not only must laws be fair at least once in awhile in order to perpetuate the social system, but also that certain aspects of certain laws may be fair while other aspects may only appear fair in order to accomplish this same objective. The partial success of the new CSC code was interpreted in this regard. The success or fairness was not complete as evidenced in the section drawing on instrumental Marxian
theory, but fairness, from a victim advocate point of view, was found in terms of some aspects of the law such as past sexual history and character or reputation evidence not becoming an issue, resistance and victim initiation of contact not being a factor, and victim precipitation not becoming involved as a consideration in many cases in the prosecution of this offense.

Dialectic Marxian theory shed light on the nature of expected outcomes in more of a longer run sense, given that which was discovered in this research project. The dynamic approach entailed here called attention to the nature of change as progressive. The contradictions yielding power to women as a group helped to bring about challenge and change as seen in the model Michigan law. The outcome through the implementation process was not a total and complete gain for the subordinate group because "dilemmas" rather than causes were addressed in the enactment or resolution phase. One anticipation was that resolutions would underscore new contradictions and thereby engender new conflicts, dilemmas, and resolutions. This was seen to be the case as recognition of the discrepancy between enactment and implemented form can quite tenably lead to further change in the area of rape law and case treatment. The second anticipation entertained was that true gains may in fact materialize, owing to the contradictions and power accruing to previously disenfranchised groups or segments of the population. Some gains have been made and highlighted here. The degree to which true strides have been made is best left to concluding considerations.
Conclusions

The first conclusion is given in the form of a caveat. While theoretical interpretations were rendered for research findings in a general sense in order to explore the implications and meanings of results, only one jurisdiction in the state operating under model legislation was studied. Because of this, the findings and interpretations herein are not amenable to generalization about the relatively new model legislation elsewhere in the state. This study does, however, clearly indicate the need for further empirical and theoretically guided research concerning the type of implemented outcomes concomitant with the alteration of rape legislation so pervasive in this country.

Research is needed to assess whether or not the patterns observed in these data prevail elsewhere in the state if the model law is to truly be assessed. Research could most productively be conducted examining the decisions rendered, not just by prosecutors, but additionally by other criminal justice agencies and personnel involved in the implementation process. A scale such as that devised in this project for the measurement of discretion might be utilized (with modification) to assess criminal justice decision making by a host of officials. Moreover, baseline data could be examined in order to discern differences in case requirements and treatment before and after the model law was enacted. All of these kinds of research might also be done on a comparative, state-by-state basis in the effort to assess the varieties of legal requirements, changes, and
effects on sexual assault victims, offenders, convictions, and so forth. This type of examination might then provide insight into other types of regional, geographic, or demographic variables as influences on criminal justice decision making and the implementation of alleged legislative intent.

The application of theories to the explanation of the origin and enforcement of the CSC code provides the basis for different types of comments. While the different types of theoretical perspectives facilitated interpretation and insight into the research project results, they did so with varying degrees of adequacy.

Consensus theory has been critiqued as being unable to account for the emergence of collective challenge to the prevailing value consensus it assumes. This orientation falls short in the capacity to explain the large number of women, feminist, and victim advocate groups lobbying for change in rape law. The application of the consensus perspective to the findings concerning implementation in this research points to yet another shortcoming of this perspective. It was possible to draw on consensus theory in order to interpret only a particular set of research findings, those indicating the absence of discriminatory or unique sexual assault case treatment. Consensus theory could not be utilized to shed light on the host of findings obtained in this investigation.

Because plural conflict theory assumes objectivity, balanced compromise, and a neutral mediating role for the state, its applicability can also be concluded to be problematic. The only real
findings that could be explained, given the assumption of impartiality in law enactment and enforcement, were those indicating just such continuity. In other words the results indicating success in terms of the realization of intents underlying the sexual assault legislation were the only ones amenable to interpretation from this perspective. It remained the task of other approaches to more fully account for the variety of findings obtained in this research.

The assumption of the labeling perspective that stigma and definitions flow from power and organizational self interests were useful to draw on for certain interpretation purposes. However, given that the labeling orientation assumes rather than analyzes a dichotomy in power and that it fails to assess the success or failure of attempts to alter socially constructed designations, this theoretical orientation also falls short in its ability to account for the type of findings which emerged in this research.

Both structural and dialectic Marxian approaches, however, were consistent with the various research findings. Structural-Marxian arguments about fairness in appearance and in actuality were drawn upon to explain both the positive and negative results. The recognition of the relative independence of superstructural institutions greatly facilitated the interpretations of prosecutorial discretion in the implementation process. Structural accounts were, however, critiqued for lack of historical specificity and thus the inability to distinguish which laws, and which portions of which laws, will be fair in reality and which will be so only in appearance.
Dialectic Marxian theory, through its attempt at synthesis, presents an alternative to the above. It can be viewed as an integrative approach to the study of crime and law. Dialectic theory calls attention to specific time, contradictions, and struggles, pointing the way to considerations of political and economic power as they influence outcomes. Because of the recognition of autonomy as discussed above, the recognition of historically situated conflicts, and the recognition of both the consensual and coercive operations of the state and law, dialectic theory can more fully accommodate and explain the range of outcomes found in this study.

The success of the sexual assault law was interpreted as being tied to contradictions which engendered challenge by a subordinate segment of the population who had increasingly gained position and power. The failure as evidenced in the implementation process was interpreted from this theoretical stance as owing to the type of problem and resolution entailed in the conflict. In other words, root causes and solutions were not addressed by the model law, a point to be elaborated shortly.

Dialectic Marxian theory additionally highlights future types of considerations such as those pertaining to new conflicts, contradictions, and resolutions, and pitfalls to be guarded against, in the effort to effect true gains. One of the new contradictions previously noted was the discrepancy between intents underlying the model CSC code and that which was realized through implementation. Once recognized, this could act to bring about new challenges, conflicts, and ultimately new resolutions. Dialectic theory asserts that this
dynamic kind of process is to be expected as resolutions do not address causes.

Additional kinds of conflicts engendered by change in, as in this instance, rape law concern the form of the law itself. Reform legislation can be seen as a problematic resolution which has led to challenge. Statutes such as the model CSC code in Michigan have been criticized as unfair from the perspective of the rights of the accused. Sasko and Sesek (1971), for example, discuss the violation of constitutional principles potentially involved by the exclusion of victim character and reputation evidence. Although untested as yet, this element of reform has been protested as a violation of the sixth amendment right to confront the witnesses against the accused and as a violation of the due process clause of the fourteenth amendment. The fear is that relevant exculpatory evidence will not be permitted to emerge at trial. Thus, the balance of the rights of the accused and of rape victims are called into conflict in a new way because of reform measures.

Another example of problems brought about by reforms can be found in the early 1980 Michigan law which forbids the mere suggestion of polygraphs for sexual assault victims in order to reduce victim trauma and harassment. The contradiction which emerged was that, while the thrust of this piece of legislation was to better protect sexual assault victims, it can be argued that the law has operated against victim interests. Some cases that are lost to acquittal or even warrant denials could have been effectively prosecuted had victims been aware of the effect taking a polygraph could have made.
Reform efforts dealing with the crime of rape have further been criticized as the proclivity appears to be a move towards harsher sentencing. As Sasko and Sesek note:

If the severity of the sentence is such that it negates the possibility of conviction, it is obvious that the effect will not be upon the criminal but rather upon the jury (1975:492).

This indicates once again that, as dialectic Marxian theory would suggest, new laws can serve to underscore contradictions, conflicts, and dilemmas rather than to serve as resolutions.

These kinds of issues comprise one shortcoming of rape reform statutes designed to ameliorate the problems associated with this crime. A different sort of pitfall discussed by dialectic Marxian theory relates to the individualization of rights (Grau, 1982). Concerns about wide issues, such as the treatment of women as well as rape victims in American society get translated in the legal realm to more microscopic or individualized problems and rights which results in solutions that may satisfy the challenging group but do not address the core problem(s). Grau explains that:

...social movements equate changing the law with transforming society. Collective needs asserted by these movements get articulated in terms of individual rights; political decisions become delegated to a caste of legal professionals. Laws perhaps are changed, and if changed, challenged. Interpreted by the courts, the changed laws acquire meanings other than those held by those who sought the changes. Turned solely to legal ends, the social movement is diffused (1982:206, citing Klare, 1977).

What this means is that not only can laws be ineffective because they do not attend to underlying causes, but additionally that the law may quite tenably not represent a viable means of solution at
all. These two points are inextricably related and provide the basis for a final concluding point.

The root causes of not only the unique and inequitable treatment of rape cases but also of the phenomenon itself are tied to the very social structure of this country. The pervasive violence, inequality, and sexism in our society give rise to the act, the enactment, and the operation of laws relating to rape. Altering legislative codes therefore ignores both the causes of the phenomenon and the influences which determine implemented outcomes, and thus represents a resolution aimed at a symptom. Treating symptoms may be a stopgap measure which curtails some problems for a short time, but is doomed to very limited success at best. The political economic structure which has given rise to rape, rape law, and rape case treatment over the decades must be scrutinized and taken into account in calls for and forms of change if significant impact on any of these dimensions is to be realized. Modifications of the legal form alone fall short in terms of resolving the problems associated with rape.

In terms of the model CSC code enactment it is concluded that legal statutory change alone represents an insufficient measure to abate the problems concomitant with sexual assault prosecution in the criminal justice system. Addressing the symptom rather than the causes of both rape and its treatment in our legal system guarantees nothing by way of solution. As dialectic theory suggests, inroads may be gained (Bierne & Quinney, 1982) with victims traumatized and discriminated against to a lesser extent with such resolutions, as was evidenced here, but when these resolutions do not address the
underlying causes, i.e., of inequality, sexism, and violence as it permeates the political-economic structure, true solutions to the totality of the problem of rape will yet be forthcoming.

Enactment of even model legislation is inadequate not only because implementation cannot be assumed to mirror the content and (alleged) intent of law, but additionally because implementation will reflect status quo arrangements and ideologies which were not involved in the statute alteration process. If root causes are not addressed in the enactment of laws, they will surface to permeate the implementation process, and thus act to preclude true gain and progress.
The People of the State of Michigan Enact:

Section 1. Act No. 328 of the Public Acts of 1931, as amended, being sections 750.1 to 750.568 of the Compiled Laws of 1970, is amended by adding sections 520a, 520c, 520d, 520e, 520f, 520g, 520h, 520i, 520j, 520k, and 520l to read as follows:

Sec. 520a As used in sections 520a to 520l:

(a) "Actor" means a person accused of criminal sexual conduct.

(b) "Intimate parts" includes the primary genital area, groin, inner thigh, buttock, or breast of a human being.

(c) "Mentally defective" means that a person suffers from a mental disease or defect which renders that person temporarily or permanently incapable of appraising the nature of his or her conduct.

(d) "Mentally incapacitated" means that a person is rendered temporarily incapable of appraising or controlling his or her conduct due to the influence of a narcotic, anesthetic, or other substance administered to that person without his or her consent, or due to any other act committed upon that person without his or her consent.

(e) "Physically helpless" means that a person is unconscious, asleep, or for any other reason is physically unable to communicate unwillingness to an act.

(f) "Personal injury" means bodily injury, disfigurement, mental anguish, chronic pain, pregnancy, disease, or loss or impairment of a sexual or reproductive organ.
(g) "Sexual contact" includes the intentional touching of the victim's or actor's intimate parts or the intentional touching of the clothing covering the immediate area of the victim's or actor's intimate parts, if that intentional touching can reasonably be construed as being for the purpose of sexual arousal or gratification.

(h) "Sexual penetration" means sexual intercourse, cunnilingus, fellatio, anal intercourse, or any other intrusion, however slight, of any part of a person's body or of any object into the genital or anal openings of another person's body, but emission of semen is not required.

(i) "Victim" means the person alleging to have been subjected to criminal sexual conduct.

Sec. 520b. (1) A person is guilty of criminal sexual conduct in the first degree if he or she engages in sexual penetration with another person and if any of the following circumstances exists:

(a) That other person is under 13 years of age.

(b) The other person is at least 13 but less than 16 years of age and the actor is a member of the same household as the victim, the actor is related to the victim by blood or affinity to the fourth degree to the victim, or the actor is in a position of authority over the victim and used this authority to coerce the victim to submit.

(c) Sexual penetration occurs under circumstances involving the commission of any other felony.
PLEASE NOTE:

This page not included with original material. Filmed as received.

University Microfilms International
(d) The actor is aided or abetted by 1 or more other persons and either of the following circumstances exists:

(i) The actor knows or has reason to know that the victim is mentally defective, mentally incapacitated, or physically helpless.

(ii) The actor uses force or coercion to accomplish the sexual penetration. Force or coercion includes but is not limited to any of the circumstances listed in subdivision (f) (i) to (v).

(e) The actor is armed with a weapon or any other article used or fashioned in a manner to lead the victim to reasonably believe it to be a weapon.

(f) The actor causes personal injury to the victim and force or coercion is used to accomplish sexual penetration. Force or coercion includes but is not limited to any of the following circumstances:

(i) When the actor overcomes the victim through the actual application of physical force or physical violence.

(ii) When the actor coerces the victim to submit by threatening to use force or violence on the victim, and the victim believes that the actor has the present ability to execute these threats.

(iii) When the actor coerces the victim to submit by threatening to retaliate in the future against the victim, or any other person, and the victim believes
that the actor has the ability to execute this threat. As used in this subdivision, "to retaliate" includes threats of physical punishment, kidnapping, or extortion.

(iv) When the actor engages in the medical treatment or examination of the victim in a manner or for purposes which are medically recognized as unethical or unacceptable.

(v) When the actor, through concealment or by the element of surprise, is able to overcome the victim.

(g) The actor causes personal injury to the victim, and the actor knows or has reason to know that the victim is mentally defective, mentally incapacitated, or physically helpless.

2. Criminal sexual conduct in the first degree is a felony punishable by imprisonment in the state prison for life or for any term of years.

Sec. 520c. (1) A person is guilty of criminal sexual conduct in the second degree if the person engages in sexual contact with another person and if any of the following circumstances exists:

(a) That other person is under 13 years of age.

(b) The other person is at least 13 but less than 16 years of age and the actor is a member of the same household as the victim, the actor is related to the victim by blood or affinity to the fourth degree to the victim, or the actor is in a position of authority over the victim and used this authority to coerce the victim to submit.
(c) Sexual contact occurs under circumstances involving the commission of any other felony.

(d) The actor is aided or abetted by 1 or more other persons and either of the following circumstances exists:
   (i) The actor knows or has reason to know that the victim is mentally defective, mentally incapacitated, or physically helpless.
   (ii) The actor uses force or coercion to accomplish the sexual contact. Force or coercion includes but is not limited to any of the circumstances listed in sections 520b (1)(f)(i) to (v).

(e) The actor is armed with a weapon or any other article used or fashioned in a manner to lead a person to reasonably believe it to be a weapon.

(f) The actor causes personal injury to the victim and force or coercion is used to accomplish the sexual contact. Force or coercion includes but is not limited to any of the circumstances listed in section 520b (1)(f)(i) to (v).

(g) The actor causes personal injury to the victim and the actor knows or has reason to know that the victim is mentally defective, mentally incapacitated, or physically helpless.

(2) Criminal sexual conduct in the second degree is a felony punishable by imprisonment for not more than 15 years.

Sec. 520d. (1) A person is guilty of criminal sexual conduct in the third degree if the person engages in sexual penetration with another person and if any of the following circumstances exists:
(a) That other person is at least 13 years of age and under 16 years of age.

(b) Force or coercion is used to accomplish the sexual penetration. Force or coercion includes but is not limited to any of the circumstances listed in section 520b (1)(f)(i) to (v).

(c) The actor knows or has reason to know that the victim is mentally defective, mentally incapacitated, or physically helpless.

(2) Criminal sexual conduct in the third degree is a felony punishable by imprisonment for not more than 15 years.

Sex. 520e. (1) A person is guilty of criminal sexual conduct in the fourth degree if he or she engages in sexual contact with another person and if either of the following circumstances exists:

(a) Force or coercion is used to accomplish the sexual contact. Force or coercion includes but is not limited to any of the circumstances listed in section 520b (1)(g)(i) to (iv).

(b) The actor knows or has reason to know that the victim is mentally incapacitated or physically helpless.

(2) Criminal sexual conduct in the fourth degree is a misdemeanor punishable by imprisonment for not more than 2 years, or by a fine or not more than $500.00, or both.

Sec. 520f. (1) If a person is convicted of a second or subsequent offense under section 520b, 520c, or 520d, the sentence
imposed under those sections for the second or subsequent offense shall provide for a mandatory minimum sentence of at least 5 years.

(2) For purposes of this section, an offense is considered a second or subsequent offense if, prior to conviction of the second or subsequent offense, the actor has at any time been convicted under section 520b, 520c, or 520d or under any similar statute of the United States or any state for a criminal sexual offense including rape, carnal knowledge, indecent liberties, gross indecency, or an attempt to commit such an offense.

Sec. 520g. (1) Assault with intent to commit criminal sexual conduct involving sexual penetration shall be a felony punishable by imprisonment for not more than 10 years.

(2) Assault with intent to commit criminal sexual conduct in the second degree is a felony punishable by imprisonment for not more than 5 years.

Sec. 520h. The testimony of a victim need not be corroborated in prosecutions under sections 520b to 520g.

Sec. 520i. A victim need not resist the actor in prosecution under sections 520b to 520g.

Sec. 520j. (1) Evidence of specific instances of the victim's sexual conduct, opinion evidence of the victim's sexual conduct, and reputation evidence of the victim's sexual conduct shall not be admitted under sections 520b to 520g unless and only to the extent that the judge finds that the following proposed evidence is material to a fact at issue in the case and that its inflammatory or prejudicial nature does not outweigh its probative value:
(a) Evidence of the victim's past sexual conduct with the actor.

(b) Evidence of specific instances of sexual activity showing the source or origin of semen, pregnancy, or disease.

(2) If the defendant proposes to offer evidence described in subsection (1)(a) or (b), the defendant within 10 days after the arraignment on the information shall file a written motion and offer of proof. The court may order an in camera hearing to determine whether the proposed evidence is admissible under subsection (1). If new information is discovered during the course of the trial that may make the evidence described in subsection (1)(a) or (b) admissible, the judge may order an in camera hearing to determine whether the proposed evidence is admissible under subsection (1).

Sec. 520k. Upon the request of the counsel or the victim or actor in a prosecution under sections 510b to 520g the magistrate before whom any person is brought on a charge of having committed an offense under sections 520b to 520g shall order that the names of the victim and actor and details of the alleged offense be suppressed until such time as the actor is arraigned on the information, the charge is dismissed, or the case is otherwise concluded, whichever occurs first.

Sec. 520l. A person does not commit sexual assault under this act if the victim is his or her legal spouse, unless the couples are living apart and one of them has filed for separate maintenance or divorce.

Section 2. All proceedings pending and all rights and liabilities existing, acquired, or incurred at the time this amendatory act
takes effect are saved and may be consummated according to the law in force when they are commenced. This amendatory act shall not be construed to affect any prosecution pending or begun before the effective date of this amendatory act.


Section 4. This amendatory act shall take effect November 1, 1974.
APPENDIX B

NON-SEXUAL ASSAULT OFFENSES INCLUDED IN STUDY
Sec. 750.81a  **Assault; infliction of serious injury.**

Sec. 81a. Any person who shall assault another without any weapon and inflict serious or aggravated injury upon the person of another without intending to commit the crime of murder, and without intending to inflict great bodily harm less than the crime of murder, shall be guilty of a misdemeanor, punishable by imprisonment in the county jail or the state prison for a period of not more than 1 year, or fine of $500.00, or both.

Sec. 750.82  **Felonious assault.**

Sec. 82. Felonious assault--Any person who shall assault another with a gun, revolver, pistol, knife, iron bar, club, brass knuckles or other dangerous weapon, but without intending to commit the crime of murder, and without intending to inflict great bodily harm less than the crime of murder, shall be guilty of a felony.

Sec. 750.83  **Assault with intent to commit murder.**

Sec. 83. Assault with intent to commit murder--Any person who shall assault another with intent to commit the crime of murder, shall be guilty of a felony, punishable by imprisonment in the state prison for life or any number of years.

Sec. 750.84  **Assault with intent to do great bodily harm less than murder.**

Sec. 84. Assault with intent to do great bodily harm less than murder--Any person who shall assault another with intent to do great bodily harm, less than the crime of murder, shall be guilty of a felony punishable by imprisonment in the state prison not more than 10 years, or by fine of not more than 5,000 dollars.
Sec. 750.86 Assault with intent to maim.

Sec. 86. Assault with intent to maim—Any person who shall assault another with intent to maim or disfigure his person by cutting out or maiming the tongue, putting out or destroying an eye, cutting or tearing off an ear, cutting or slitting or mutilating the nose or lips or cutting off or disabling a limb, organ or member, shall be guilty of a felony, punishable by imprisonment in the state prison not more than 10 years or by fine of not more than 5,000 dollars.

Sec. 750.87 Assault with intent to commit felony not otherwise punished.

Sec. 87. Assault with intent to commit felony, not otherwise punished—Any person who shall assault another, with intent to commit any burglary, or any other felony, the punishment of which assault is not otherwise in this act prescribed, shall be guilty of a felony, punishable by imprisonment in the state prison not more than 10 years, or by fine of not more than 5,000 dollars.

Sec. 750.88 Assault with intent to rob and steal; unarmed.

Sec. 88. Assault with intent to rob and steal being unarmed—Any person, not being armed with a dangerous weapon, who shall assault another with force and violence, and with intent to rob and steal, shall be guilty of a felony, punishable by imprisonment in the state prison not more than 15 years.

Sec. 750.89 Assault with intent to rob and steal; armed.

Sec. 89. Assault with intent to rob and steal being armed—Any person, being armed with a dangerous weapon, or any article used or fashioned in a manner to lead a person so assaulted reasonably to
believe it to be a dangerous weapon, who shall assault another with intent to rob and steal shall be guilty of a felony, punishable by imprisonment in the state prison for life, or for any term of years.
BIBLIOGRAPHY


Brown vs. State, 127 Wis. 193, 201, 106 N.W. 539 (1906).


Hepburn, J. *Social control and the legal order: Legitimated repression in a capitalist state*. Contemporary Crisis, 1977, 1, 77-90.


Herzog, A. As cited in Yale Law Journal Note, 1972, 81, at 1373.


Landau, S. Rape: The victim as defendant. Trial, 1974, 10 (July), 19-22.


Mares vs. Territory, 10 N.M. 770, 776 (1901), citing People vs. Hulse, 3 Hill 309.


Stapleman vs. State, 150 Neg. 460, 464, 34 N.W. 2d 907 (1948).

Starr vs. State, 205 Wis. 310, 311, 237 N.W. 96, 97 (1931)


