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James P. Carey
Assoc. Prof. of Law, Loyola University of Chicago School of Law

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The New Illinois Criminal Sexual Assault Statute

*James P. Carey**

INTRODUCTION

The Illinois criminal sexual assault statute which became effective July 1, 1984[1] repealed eight sexual misconduct crimes.[2] In their place the new statute substitutes four new crimes: the sexual

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* Associate Professor of Law, Loyola University of Chicago School of Law. B.A. 1965, Holy Cross College; J.D. 1968, University of Chicago.

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1. ILL. REV. STAT. ch. 38, ¶¶ 12-12 to 12-18 (1984). Illinois joined the growing number of states which enacted some type of rape reform legislation. *See* ALA. CODE §§ 13A-6-60 to -70 (1982); ALASKA STAT. §§ 11.41.410 – .470 (1983); ARIZ. REV. STAT. ANN. §§ 13-14-1 to -1414 (1978 & Supp. 1983-1984); ARK. STAT. ANN. §§ 41-1801 to -1813 (1977 & Supp. 1983); CAL. PENAL CODE §§ 261-268, 283-291.5 (West Supp. 1983); COLO. REV. STAT. §§ 18-3-401 to -414 (1978 & Supp. 1983); CONN. GEN. STAT. ANN. §§ 53a-65 to -73a (1972 & Supp. 1984); DEL. CODE ANN. tit. 11, §§ 761-763 (1979); D.C. CODE ANN. § 22-2801 (1981); FLA STAT. ANN. §§ 794-011-.05 (West 1976 & Supp. 1984); GA. CODE ANN. §§ 26-2001 to -2020.1 (1981 & Supp. 1983); HAWAII REV. STAT. §§ 707-7630 to -738 (1976 & Supp. 1983); IDAHO CODE §§ 18-6101 to -6107, -6601 to -6608 (1979 & Supp. 1983); IND. STAT. ANN. §§ 35-42-4-1 to -4-4 (Burns Supp. 1983); IOWA CODE ANN. §§ 709.1 to -.12 (West 1979 & Supp. 1983-1984); KAN. STAT. ANN. §§ 21-3501 to -3525 (1981 & Supp. 1983-1984); KY. REV. STAT. ANN. §§ 510.010-.150 (Bobbs-Merrill 1975 & Cum. Supp. 1982); LA. REV. STAT. ANN. §§ 14:41 to -43.2 (West Supp. 1984); ME. REV. STAT. tit. 17-A, §§ 251-255 (1964 & Supp. 1983-1984); MD. CRIM. LAW CODE ANN. §§ 461-461-1/2 (1982 & Cum. Supp. 1983); MASS. GEN. LAWS ANN. ch. 265, §§ 22-24B (Supp. 1984-1985); MICH. COMP. LAWS ANN. §§ 750.520a-.5201 (Supp. 1984-1985); MINN. STAT. ANN. §§ 609.34-.351 (West Supp. 1984); MISS. CODE ANN. §§ 97-3-65 to -71, -95 to -103 (1972 & Supp. 1983); MO. ANN. STAT. §§ 566.010-.130 (Vernon 1979 & Supp. 1984); MONT. CODE ANN. §§ 45-5-501 to -511 (1983); NEB. REV. STAT. §§ 28-317 to -323 (1979); NEV. REV. STAT. §§ 200.364-.375 (1983); N.H. REV. STAT. ANN. §§ 632-A:1 -:8 (Cum. Supp. 1983); N.J. STAT. ANN. §§ 2C:14-1 to :14-8 (West 1982); N.M. STAT. ANN. §§ 30-9-10 to -17 (1984); N.Y. PENAL LAW §§ 130.00-.70 (McKinney 1975 & Supp. 1983-1985); N.C. GEN. STAT. §§ 14-27.1-.10 (1981 & Cum. Supp. 1983); N.D. CENT. CODE §§ 12.1-20-02 to -15 (1976 & Supp. 1983); OHIO REV. CODE ANN. §§ 2907.01-.12 (Page 1982 & Supp. 1983); OKLA. STAT. ANN. tit. 21 §§ 1111-1123 (1983 & Supp. 1983-1984); ORE. REV. STAT. §§ 163.305-.495 (1983); PA. STAT. ANN. tit. 18, §§ 3101-3127 (Purdon 1983); R.I. GEN. LAWS §§ 11-37-1 to -14 (1956 Cum. Supp. 1983); S.D. COD. LAWS ANN. §§ 22-22-1 to -25 (979 & Supp. 1983); TENN. CODE ANN. §§ 39-2-601 to -614 (1982 & Supp. 1983); TEX. PENAL CODE ANN. §§ 21.01-.13 (Vernon 1974 & Cum. Supp. 1982-1983); UTAH CODE ANN. §§ 76-5-401 to -411 (Supp. 1983 & Interim Supp. 1984); VT. STAT. ANN. tit. 13, §§ 3251-3255 (Cum. Supp. 1983-1984); VA. CODE §§ 18.2-61 to -67.10 (1982); W.

penetration crimes of criminal sexual assault[3] and aggravated criminal sexual assault,[4] and the touching and fondling crimes of criminal sexual abuse[5] and aggravated criminal sexual abuse.[6] Unlike the old sexual misconduct crimes, the new statutes specifically distinguish instances when aggravating factors accompany the crime.[7] These aggravated crimes carry much harsher penalties than the nonaggravated ones.[8]

This article will discuss the elements of the new crimes in the context of procedural problems that might arise in a trial of an accused.[9] Of particular importance are problems caused by the absence from the new law of the old rape statute's element of "nonconsent."[10] This article will also deal with problems related to the definitions of certain of the aggravating factors that escalate each of the two basic crimes to aggravated status.[11]

BACKGROUND

The first version of the new sex crimes legislation, which was introduced into the legislature in the Spring of 1982 as House Bill 606, was drafted by an ad hoc group consisting of members of the National Organization for Women, the Illinois Coalition of Women Against Rape and various representatives of the legal community.[12] The reasons given for drafting a new statute were: (1) to

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VA. CODE §§ 61-8B-1 to -13 (1977); WIS. STAT. ANN. § 940.225 (West 1982 & Cum. Supp. 1983-1984); WYO. STAT. §§ 6-2-301 to -312 (1983).

2. ILL. REV. STAT. ch. 38, §§ 11-1 to 11-5, 11-10 and 11-11.1 (1983) (repealed eff. July 1, 1984); § 11-1 (rape), §§ 11-2, 11-3 (deviate sexual assault), § 11-4 (indecent liberties with a child), § 11-5 (contributing to the sexual deliquency of a child), § 11-10 (aggravated incest), § 11-11.1 (incest).

3. ILL. REV. STAT. ch. 38, ¶ 12-13 (1984).

4. ILL. REV. STAT. ch. 38, ¶ 12-14 (1984).

5. ILL. REV. STAT. ch. 38, ¶ 12-15 (1984).

6. ILL. REV. STAT. ch. 38, ¶ 12-16 (1984).

7. ILL. REV. STAT. ch. 38, ¶ 12-14, 12-16 (1984). *See infra* notes 88-92 and accompanying text.

8. ILL. REV. STAT. ch. 38, ¶ 12-13(b) (Criminal Sexual Assault—Class 1 Felony), ¶ 12-14(c) (Aggravated Criminal Sexual Assault—Class X Felony), ¶ 12-15(c) (Criminal Sexual Abuse—Class A Misdemeanor), ¶ 12-16(e) (Aggravated Criminal Sexual Abuse—Class 2 Felony).

9. *See infra* notes 59-76 and accompanying text. This article will focus on the four basic crimes and their aggravating circumstances. Discussion regarding the children and family provisions of the new law are beyond the scope of this article.

10. *See infra* notes 77-87 and accompanying text.

11. *See infra* notes 88-98 and accompanying text.

12. Lawson, *Sex Crimes Revised*, Ill. Issues, Feb. 1984, at 6. Reform of the sex offenses in Illinois first was proposed by the Illinois House of Representatives Rape Study Committee in 1974. In 1977 a more sweeping reform was introduced by the Committee. It passed the General Assembly but was vetoed by the Governor. The bill created two

create a single, comprehensive rape law, encompassing all types of sexual assault committed by both sexes; (2) to increase the rate of conviction for sex offenders by providing more discretion in sentencing; and (3) to define sexual assault in terms of the offender's behavior rather than the state of mind of the victim.[13] The sponsoring groups concluded that they could not achieve these goals merely by amending the old sexual assault crimes; wholesale revision was necessary.[14] The seventh draft of the bill was brought before the Illinois House of Representatives Rape Study Committee[15] and subsequently was introduced into the House in March 1982.[16]

After much debate the General Assembly approved H.B. 606 on July 1, 1983.[17] The Governor, however, vetoed the bill citing both technical and substantive problems.[18] In the fall of 1983 the Illi-

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classes of rape as well as two sex-neutral categories in criminal sexual assault and aggravated criminal sexual assault. Some of what was at the time considered battery, for example, the insertion of a foreign object into the sex organs and anus of another person, was included in the sex offenses. The bill also added the offender's "threat of force" as an allowable factor in establishing rape. Rape Study Committee, Report to the House of Representatives and the 82nd Gen. Assembly, at iv-vi (1982) [hereinafter cited as Committee Report].

13. These reasons are derived from a "Fact Sheet" issued by the Illinois Coalition Against Sexual Assault.

14. Lawson, *supra* note 12, at 8.

15. The Illinois House of Representatives Rape Study Committee was originally formed on June 30, 1973 pursuant to a resolution introduced by Representative Aaron Jaffe during the 78th General Assembly. The committee function is to investigate sexual assault in Illinois including conducting public hearings, developing and sponsoring needed legislation and formulating and implementing public and private programs. It has been reconstituted from time to time in response to the apparent need for its work. Committee Report, *supra* note 12, at 1.

The Committee, in 1981 and 1982, focused its attention on reforming Illinois' sexual assault statute by inquiring into other states' statutes and researching sexual abuse of school children, sexual assault in Chicago and its suburbs and sexual assault in the Illinois Department of Corrections residential centers. As a result of the research, the Committee issued a report which was intended to afford the Illinois General Assembly an overview of the issue of sexual assault in the State of Illinois. *Id.* at vii. The report concluded, in part, that a new statute was needed to reform and consolidate the existing Illinois sexual assault laws which should be sex-neutral, provide for at least two classes of sexual assault with a separate penalty for each class and define sexual assault in terms of the conduct of the offender. *Id.* at 91. The report also proposed such legislation. *Id.* at 107.

16. Lawson, *supra* note 12, at 8.

17. H.B. 606, Journal of the House of Representatives, 83rd Gen. Assembly 7709, 7949 (July 1, 1983) (the vote was 113 voting for the bill, three voting against and two voting present); Journal of the Senate, 83rd Gen. Assembly 5010, 5141 (July 1, 1983) (the vote was 50 voting for the bill, one against and eight voting present).

18. Journal of the House of Representatives, 83rd Gen. Assembly 9091 (Sept. 23, 1983). The substantive changes included: (1) changing the terms "Criminal Sexual Assault with Aggravating Circumstances" and "Criminal Sexual Abuse with Aggravating

nois legislature accepted the Governor's amendatory veto and passed H.B. 606 into law.[19] The effective date of the statute was delayed until July 1, 1984 so that certain provisions could be refined.[20]

In addition to consolidating all sex offenses into four crimes, the new legislation departs in substance from that which preceded it in several important respects. First, the new sexual assault statute is sex-neutral.[21] Formerly only a female could be sexually assaulted.[22] Second, the new statute allows a person to charge his or her spouse with aggravated criminal sexual assault.[23] However, "spousal rape" is limited specifically to this particular offense[24] and the crime must be reported to the police or state's attorney within thirty days.[25] Third, the word "rape" is no longer used to define

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Circumstances" to "Aggravated Criminal Sexual Assault" and "Aggravated Criminal Sexual Abuse" respectively; (2) listing the offenses in ascending order of severity; (3) clarifying the language for repeat offenders under criminal sexual abuse laws to the effect that prior convictions for rape or deviate sexual assault are to be considered as factors for harsher sentencing of repeat offenders; (4) clarifying the language exempting hospital and related medical personnel because as written it implied that those people commit illegal acts but simply cannot be prosecuted for them; (5) deleting the gang rape offense from the bill; (6) deleting criminal sexual assault from the offenses for which a spouse can be charged with adding a thirty day reporting limitation and (7) striking the words "coercion" and "duress."

19. Lawson, *supra* note 12, at 10.

20. *Id.*

21. ILL. REV. STAT. ch. 38, ¶ 12-12(a) provides:

> "Accused" means a person accused of an offense prohibited by Sections 12-13, 12-14, 12-15, or 12-16 of this Code or a person for whose conduct the accused is legally responsible under Article 5 of this Code.

22. Illinois' former rape statute, ILL. REV. STAT. ch. 38, § 11-1 (1983), stated that a "male person . . . who has sexual intercourse with a female . . ." The present statute does not contain such limitation. *See, e.g.*, ILL. REV. STAT. ch. 38, ¶ 12-13(a) (1984) ("the accused commits criminal sexual assault if he or she . . .").

The sex-neutral aspect of the bill was never seriously debated by the General Assembly. Inman and Lewis, *HB 606: New Problems of Policy and Enforcement*, 14 ILL. B.J. 404, 407 (April 1984).

23. ILL. REV. STAT. ch. 38, ¶ 12-18(c) (1984). The former Illinois rape statute did not recognize a rape between a husband and wife. Ill. Rev. Stat. ch. 38, § 11-1 (1983) ("a male person . . . who has sexual intercourse with a female, not his wife . . .").

24. ILL. REV. STAT. ch. 38, ¶ 12-18(c) (1984). The bill as originally proposed allowed that a person could also charge his or her spouse with criminal sexual assault. The governor's amendatory veto, however, limited the circumstances to only aggravated criminal sexual assault, citing for this change possible confusion and potential abuse. Journal of the House of Representatives, 83d Gen. Assembly 9091, 9092 (Sept. 23, 1983).

25. The thirty day provision was also added by the Governor's amendatory veto. Journal of the House of Representatives, 83d Gen. Assembly 9091, 9092 (Sept. 23, 1983). The limitation, however, has a loophole. A person can bring a charge against his or her spouse if "the court finds good cause for the delay." ILL. REV. STAT. ch. 38 ¶ 12-18(c) (1984).

any sex offense.[26] Finally, the new legislation eliminates an element of the former rape statute which required proof either that the victim resisted or was prevented by fear from resisting.[27]

The new legislation also differs from the old in that there are now two all-encompassing sex crimes: criminal sexual assault[28] and criminal sexual abuse.[29] The more serious crime, criminal sexual assault, requires proof of two elements, sexual penetration plus any one of three alternatives: (1) proof that the accused used or threatened to use force; (2) proof that the accused knew the victim was unable either to understand or give knowing consent to the act; or (3) proof that the victim was under eighteen and of the same family as the accused.[30]

The new statute defines "penetration" more broadly than did the former rape statute.[31] The old rape statute limited the concept to penetration of the female sex organ by the male sex organ or intrusion of the sex organ of one person into the mouth or anus of another person for sexual gratification.[32] Under the new statute, there are two types of prohibited conduct that constitute sexual penetration: "any contact, however slight"[33] and "any intrusion, however slight."[34] To establish "contact", the proof must establish contact between one person's sex organ and another person's sex organ, mouth or anus. Where "intrusion" is charged, however, the proof must show intrusion by any part of the body of one person, or by any object, into the sex organ or anus of another person.[35]

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26. ILL. REV. STAT. ch. 38, ¶ 12-12 (1984).

27. ILL. REV. STAT. ch. 38, ¶ 12-17(a) provides the accused with a defense if the victim consented to the sexual act. The defense, however, contains the express proviso that

> [l]ack of verbal or physical resistance or submission by the victim resulting from the use of force or threat of force by the accused shall not constitute consent.

For an example of a case which dealt with the resistance element of the former rape statute, see People v. Muellner, 70 Ill. App. 3d 671, 388 N.E.2d 851 (1st Dist. 1979).

28. ILL. REV. STAT. ch. 38, ¶ 12-13 (1984).

29. ILL. REV. STAT. ch. 38, ¶ 12-15 (1984).

30. ILL. REV. STAT. ch. 38, ¶ 12-13 (1984). Penetration is expressly defined in the statute, ILL. REV. STAT. ch. 38, ¶ 12-12(f) (1984), as follows:

> Sexual penetration means any contact, however slight, between the sex organ of one person and the sex organ, mouth or anus of another person, or any intrusion, however slight, of any part of the body of one person or of any animal or object into the sex organ or anus of another person, including but not limited to cunnilingus, fellatio or anal penetration.

31. *See supra* note 30.

32. ILL. REV. STAT. ch. 38, ¶ 11-1 (1983) (repealed 1984).

33. *See supra* note 30.

34. *Id.*

35. *Id.*

The definition of sexual penetration contained in the new statute is significant because it includes conduct never before covered by Illinois sex offense statutes.[36] This broadening of the concept of "penetration" reflects the desire of the drafters to encompass all forms of sexual assault within the prohibition of the statute.[37] Criminal sexual assault is a non-probationary Class 1 felony.[38]

In contrast to criminal sexual assault, the other basic offense,

36. *See* Jaffe and Becker, *Four New Basic Sex Offenses: A Fundamental Shift in Emphasis*, 14 ILL. B. J. 400, 401 (April 1984).

37. *Id.*

38. ILL. REV. STAT. ch. 38, ¶ 12-13(b) (1984). Questions remain as to the relationship between the new act and the sentencing provisions of the repealed sex crimes. For instance, can a defendant who is conflicted of a sex offense which occurred before July 1, 1984 elect to be sentenced under the new act? Section 4 of "An Act to Revise the Law in Relation to the Construction of Statutes," ILL. REV. STAT. ch. 1, ¶ 1103 (1981) provides:

> No new law shall be construed to repeal a former law . . . as to any offense committed against the former law, or as to any act done, any . . . punishment incurred . . . or in any way whatever to affect any such offense or act so committed or done . . . or punishment so incurred . . . before the new law takes effect, save only that the proceedings thereafter shall conform, so far as practicable, to the laws in force at the time of such proceeding. If any penalty, forfeiture or punishment be mitigated by any provisions of a new law, such provision may, by the consent of the party affected by [sic] applied to any judgment pronounced after the new law takes effect. This section shall extend to all repeals . . .

The Illinois Supreme Court interpreted this provision in People v. Jackson, 99 Ill. 2d 476, 459 N.E.2d 1362 (1984). The issue was whether the change in the theft statute which raised the demarcation between felony theft and misdemeanor theft from $150 to $300 was a substantive change affecting an element of the offense or a sentencing change mitigating punishment. A defendant has no right to an election where the change is substantive because his election could operate effectively to repeal the former law, a result expressly prohibited by section 4. In *Jackson* the court concluded that theft is one offense, not two offenses composed of misdemeanor and felony parts. The value demarcation determines sentencing only. It has "nothing to do with the decision whether a theft has occurred." *Id.* at 479, 459 N.E.2d at 1364.

To consider the application of *Jackson* to the new sex offenses act, suppose a defendant is charged with indecent liberties because he is alleged to have engaged in lewd fondling and touching with a person under the age of 16. If the victim is between 13 and 16, and the defendant is over 17, then the defendant will, upon conviction, seek to be sentenced under the new law. His acts constitute indecent liberties with a child under the old law, a Class 1 felony; under the new law his acts constitute criminal sexual abuse, a Class A misdemeanor. Can he make the election?

Generally it appears that the new law has wrought substantive changes in sex offenses and therefore no election would be allowed. Is this true specifically for indecent liberties, where the gravamen of one of its alternatives is an act of touching or fondling? As it relates to the hypothetical case under discussion indecent liberties is composed of two basic elements, lewd touching with the intent to arouse sexual desire in the victim or offender, and age (victim under 16, defendant over 17). Similarly, criminal sexual abuse is composed of the same two elements, sexual conduct (touching . . . for the purpose of sexual gratification or arousal of the victim or the accused) and age (victim 13 to 16, defendant over 17).

It appears therefore that, applying the reasoning of the *Jackson* case, the hypothetical

criminal sexual abuse, requires no penetration.[39] To establish criminal sexual abuse the prosecution must prove both that an act of "sexual conduct" occurred and either that the accused forcibly committed the act or the accused knew the victim to be incapable of consenting to the act.[40] This statute defines "sexual conduct" as intentional or knowing touching or fondling by the victim or the accused of the sex organs, anus or breast of the victim or the accused.[41] Criminal Sexual Abuse is a Class A misdemeanor for the first conviction, and a Class 2 felony for the second or any subsequent conviction.[42]

Aggravating factors can make criminal sexual assault and criminal sexual abuse more serious crimes. Some of the factors that escalate the basic crimes to aggravated status are (1) if the accused displayed, threatened to use, or used a dangerous weapon or an object which, under the circumstances, the victim reasonably believed was a dangerous weapon;[43] 2) if the accused caused bodily harm to the victim (although aggravated criminal sexual abuse requires a showing of great bodily harm);[44] 3) if the accused acted in such a manner as to threaten or endanger the life of the victim or any other person;[45] 4) if the assault occurred during the course of the commission or attempted commission of a felony;[46] and 5) if the victim was at least sixty years old when the offense was com-

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defendant should be allowed to elect to be sentenced under the criminal sexual abuse provision, the change affecting only the sentence and not the elements of the offense.

39. ILL. REV. STAT. ch. 38, ¶ 12-15 (1984).

40. ILL. REV. STAT. ch. 38, ¶ 12-15 provides:

(a) The accused commits criminal sexual abuse if he or she:
(1) commits an act of sexual conduct by the use of force or threat of force; or
(2) commits an act of sexual conduct and the accused knew that the victim was unable to understand the nature of the act or was unable to give effective consent.
(b) The accused commits criminal sexual abuse if he or she commits an act of sexual penetration or sexual conduct with a victim who was at least 13 years of age but under 16 years of age when the act was committed.
(c) Sentence. Criminal sexual abuse is a Class A misdemeanor for the first conviction and a Class 2 felony for a second or subsequent conviction for a violation of subsection (a) of this Section. For purposes of this Section, it is a second or subsequent conviction if the accused has at any time been convicted under this Section or under any similar statute of this State or any other state for any offense involving sexual abuse or sexual assault that is substantially equivalent to more serious than the sexual abuse prohibited under this Section.

41. ILL. REV. STAT. ch. 38, ¶ 12-12(e) (1984).
42. ILL. REV. STAT. ch. 38, ¶ 12-15(c) (1984).
43. ILL. REV. STAT. ch. 38, ¶ 1005-8-1 (1983).
44. ILL. REV. STAT. ch. 38, ¶ 1005-8-1(3) (1983).
45. ILL. REV. STAT. ch. 38, ¶ 1005-8-1(3) (1983).
46. ILL. REV. STAT. ch. 38, ¶ 1005-8-1(5) (1983).

mitted.[47] While criminal sexual assault is a Class 1 felony carrying a penalty of not less than four nor more than fifteen years' incarceration,[48] aggravated criminal sexual assault is a Class X felony that carries a penalty ranging between six and thirty years.[49] Similarly, while criminal sexual abuse is a Class A misdemeanor carrying a penalty of not more than one year's incarceration,[50] aggravated criminal sexual abuse is as Class Two felony and carries a penalty of three to seven years.[51]

The primary reason that the new legislation provides for both basic and aggravated offenses is to allow greater discretion in sentencing, thus increasing the conviction rate of sex offenders.[52] Formerly, a rapist received the same penalty as a murderer.[53] Proponents of the new legislation argued that the extreme penalty imposed for rape convictions caused many cases either to be reduced by plea bargain to the lesser charge of assault and battery or to be dropped altogether.[54] Moreover, when a rape case did get to

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47. ILL. REV. STAT. ch. 38, ¶ 12-14(a)(1) (aggravated criminal sexual assault) and ¶ 12-16(a)(1) (aggravated criminal sexual abuse) (1984).

48. ILL. REV. STAT. ch. 38, ¶ 12-14(a)(2); and 12-14(b) (1984).

49. ILL. REV. STAT. ch. 38, ¶ 12-14(c) (1984).

50. ILL. REV. STAT. ch. 38, ¶ 12-15(c) (1984).

51. ILL. REV. STAT. ch. 38, ¶ 12-16(c) (1984).

52. Representative Jaffee explained that the purpose of the statute was to "get more convictions for sex crimes." Tape of House Judiciary Subcommittee on Criminal Law April 7, 1983 available from Clerk of the House of Representatives [hereinafter cited as Tap of Subcommittee]. *See also* Lawson, *Sex Crimes Revised*, *supra* note 12, at 10.

53. *See* Ill. Rev. Stat. ch. 38, § 11-1(c) (1983) (rape), ILL. REV. STAT. ch. 38, ¶ 9-1 (1984).

54. This idea is pervasive throughout the legislative history. The Committee Report concluded that

> charges of rape, which are exceedingly difficult to prosecute successfully in Illinois, are routinely plea-bargained down to battery. A higher percentage of rapes classified as batteries is dropped entirely from the criminal justice system. Under the present procedure of prosecution in Illinois, rapists and other sex offenders convicted of battery do not receive appropriate punishment for their offenses and are not identified as sex offenders in the criminal justice system or in the community. Committee Report, *supra* note 12, at 91.

The Rape Study Committee further concluded that the probation of sex offenders is often a threat to the safety of the public.

Likewise, the subcommittee hearings also reflect the concern that many cases are plea bargained. Representative Jaffee stated, "what usually happens is that it's plea bargained down to an assault or a battery and the offender never gets convicted of a sex crime . . . so you'll find an individual who has maybe an arrest sheet of twelve arrests and maybe six of those arrests are for assaults when, in fact they have been rapes." Tape of Subcommittee, *supra* note 12.

Several commentators have reiterated this concern. *See* Comment, *The Illinois Criminal Sexual Assault and Abuse Act*, 4 N. ILL. U.L.R. 355, 364 (1985); Jaffee and Becker, *Four New Basic Sex Offenses: A Fundamental Shift in Emphasis*, 14 ILL. B.J. 400 (April 1984).

trial, juries were often reluctant to convict, knowing that the penalty was the equivalent of that for murder,[55] especially in cases where the accused and the victim were acquaintances.[56] H.B. 606, according to its drafters, is an attempt to eliminate such "jury nullification" by providing graduated penalties for sex offenders.[57]

ANALYSIS

A. Consent

Perhaps the most radical change the new sex offense legislation makes is the utilization of the concepts of "force" and "consent." Under the old rape statute both concepts were combined to form one of the elements comprising the offense of rape.[58] This element provided that the offense was committed "by force and against her will."[59] "Against her will" meant, among other things, that the offense was committed without the victim's consent.[60] In effect, this required the victim to show either that she resisted[61] or that fear prevented her from resisting.[62] "Force" meant either the actual use of force, including circumstances of overbearance by superior size, strength, physical confinement or physical restraint, or the threat of force where the victim "reasonably believes" that the accused will carry out the threat.[63]

Under the new sex crimes legislation the concept of "force" remains essentially unchanged except that the notion of "consent" no longer comes into play.[64] Instead of requiring the prosecution to show that the victim did not consent to the act and in fact resisted, the victim's consent may only be brought into issue if the accused raises it as a defense.[65] The new statute's definition of consent evidences the shift:

"Consent" is the freely given agreement to the act of sexual pene-

55. *See* Lawson, *supra* note 12, at 10.
56. *Id.*
57. *See* Jaffee and Becker, *supra* note 36, at 404.
58. ILL. REV. STAT. ch. 38, ¶ 11-1(a) (1983).
59. *Id.*
60. IPI Criminal 2d 9.02, 9.05A defines "force as threat or threat of force" as "that under the circumstances the female did not voluntarily consent. . ." *See also* People v. Montgomery, 19 Ill. App. 3d 206, 210-11, 311 N.E.2d 361, 364 (1st Dist. 1974).
61. *See* People v. Muellner, 70 Ill. App. 3d 671, 388 N.E.2d 851 (1st Dist. 1979).
62. People v. Ardelian, 368 Ill. 274, 13 N.E.2d 976 (1938); People v. Muellner, 70 Ill. App. 3d 671, 388 N.E.2d 851 (1979).
63. See People v. Muellner, 70 Ill. App. 3d 671, 388 N.E.2d 851 (1st Dist. 1979); *See also* ILL. REV. STAT. ch. 38, ¶ 12-12(d) (1984).
64. *Id.*
65. ILL. REV. STAT. ch. 38, ¶ 12-17 (1984).

> tration or sexual conduct in question. Lack of verbal or physical resistance or submission by the victim resulting from the use of force or threat of force by the accused shall not constitute consent.[66]

The drafters of the new legislation explain that the new definition shifts the focus of the crime from the subjective state of mind of the victim to the conduct of the accused.[67] Thus, instead of requiring the prosecution to demonstrate that the victim did not consent to the act, which necessarily involved a showing either that she resisted or was restrained by fear from resisting, the accused must demonstrate that the victim consented to the act. As noted above, however, consent cannot be demonstrated by mere failure to resist.[68]

This shift, which had the effect of placing the burden of proving consent upon the accused, encountered many difficulties during its evolution and raises unresolved questions. For instance, the first draft of the new statute designated "consent" as an affirmative defense.[69] Some legislators argued that such a designation undermined the defendant's constitutional right to remain silent[70] because in Illinois, a defendant asserting an affirmative defense must present "some evidence of the affirmative defense."[71] To avoid forcing an accused to take the stand to present "some evidence" of consent, the legislature redesignated consent simply as a defense.

Legislative history shows that this redesignation was meant to allow the accused to develop the defense of consent through direct or cross-examination of other witnesses, including the complaining witness.[72] This legislative intent, however, is reflected in the new statute only by the redesignation of consent as a defense. Thus,

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66. ILL. REV. STAT. ch. 38, ¶ 12-17(a) (1984).
67. ILL. REV. STAT. ch. 38, ¶ 12-12(d)(1) (1984).
68. *See supra* note 64 and accompanying text.
69. Tape of Subcommittee, *supra* note 52.
70. *Id.*
71. People v. Greene, 102 Ill. App. 3d 933, 935, 430 N.E.2d 23, 26 (1st Dist. 1982); People v. Marchese, 32 Ill. App. 3d 872, 336 N.E.2d 795 (2nd Dist. 1976).
72. Tape of Subcommittee, *supra* note 52. The legislators were concerned that if consent were designated an affirmative defense the accused would have to take the stand to raise it, whereas if consent were designated a defense the accused could raise it by way of other witnesses or by cross-examining the victim. Their concerns were founded upon a belief that an affirmative defense is not properly developed during cross-examination, especially where the affirmative defense formerly had been an element of the crime. Senator McCracken explained "the reason we took out 'affirmative defense' is because it was the feeling of the ACLU that that really made the bill unconstitutional, that the burden [of raising an affir.native defense] . . . fell upon the defendant and the defendant had to take the stand." *Id.* The subcommittee noted "[t]he effect of [consent not being an af-

whether this cryptic redesignation will in practice fulfill the legislative intent is debatable, especially since Illinois criminal law has no definition of "defense" unaccompanied by the modifier "affirmative."[73] Moreover, the case law indicates that the terms "defense" and "affirmative defense" are interchangeable; they have no separate significance.[74]

The perception that the accused could establish consent by direct or cross-examination of non-party witnesses is faulty because sexual conduct generally takes place in private.[75] Accordingly, in order to raise the issue of consent the accused either must do it by cross-examining the complaining witness or by testifying. In effect, the accused must testify because, without the benefit of non-party witnesses, a jury will want to watch the accused on the stand and to balance his credibility against the credibility of the complaining witness.[76] Thus, as a practical matter the redesignation of consent as a defense often will force the accused to take the stand and thus imperil his right to remain silent.

B. Hearsay

In many cases, especially those in which a criminal sexual offense has allegedly occurred, there is often a special need for evidence of prompt disclosure because there are no eyewitnesses other than the accused and the victim.[77] Testimony that the victim promptly reported the act, although hearsay, has been traditionally admitted under the prompt complaint exception to the hearsay rule.[78] This hearsay exception allows such testimony on the theory that victims of forcible rape will naturally speak out about it.[79]

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firmative defense] is . . . he [the defendant] can raise this issue during cross-examination, direct examination, or anywhere in the course of the trial. . ." *Id.*

73. Inman and Lewis, *HB 606: New Problems of Policy and Enforcement*, 14 ILL. B.J. 404, 406 (April 1984).

74. *See, e.g.*, People v. Doller, 53 Ill. 2d 280, 290 N.E. 2d 879 (1972); People v. Monroe, 15 Ill. 2d 91, 154 N.E.2d 225 (1958); People v. Durand, 307 Ill. 611, 139 N.E. 78 (1923).

75. *See* Inman and Lewis, *supra* note 73, at 406.

76. *Id.*

77. *Id.*

78. Crimes such as sexual abuse are generally known only to the wrongdoer and the victim. Courts have consistently held that disclosure to a third person soon after an unusual occurence is a natural and predictable response and, recognizing this, Illinois courts have usually admitted evidence of a prior complaint or disclosure of rape or sexual abuse. *See* People v. Damen, 28 Ill. 2d 464, 193 N.E.2d 25 (1963). *See generally* G. LILLY, AN INTRODUCTION TO THE LAW OF EVIDENCE 181-82 (1978); E. CLEARY, MCCORMICK ON EVIDENCE 251 (1984).

79. People v. Damen, 28 Ill. 2d 464, 193 N.E.2d 25 (1963). One court explained that

Under the old statutes, the prosecution was saddled with the significant burden of proving the mental state of the victim at the time of the alleged crime.[80] The fact that such a showing was vital made the exception necessary.[81] Under the new statute, however, the prosecution is relieved of the burden of proving non-consent or resistance in its case-in-chief.[82]

The transfer of consent from an element of the crime to a defense may eliminate the need for the prompt complaint hearsay exception.[83] If the purpose for admitting the prompt complaint is to corroborate the victim's in-court testimony that the intercourse was forcible and against her will, then the new statute's shift in emphasis from the victim's state of mind to the accused's conduct erodes the basis upon which courts have traditionally allowed such testimony.

Although the basis for allowing the prompt complaint exception has been removed, arguments for admissibility remain.[84] For instance, it may be argued in a particular case that corroboration is necessary and, therefore, evidence of the prompt complaint is ap-

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the complaint is natural as an expression of indignation at the injury inflicted. People v. Defrates, 395 Ill. 439, 70 N.E.2d 591 (1947).

Because it is a natural reaction, if proof of the complaint were not admissible, the jury might assume that no complaint was made, thus hurting the complaintant's case. People v. Street, 72 Ill. 2d 371, 381 N.E.2d 285 (1978).

80. Admissibility is limited to the complaint itself; no details of the event are permitted. *See, e.g.*, People v. Robinson, 73 Ill. 2d 192, 383 N.E.2d 163 (1978); People v. Damen, 28 Ill. 2d 464, 193 N.E.2d 25 (1963); People v. Young, 89 Ill. App. 3d 333, 412 N.E.2d 167 (1st Dist. 1980); People v. Henricks, 32 Ill. App. 3d 49, 335 N.E.2d 521 (3rd Dist. 1975).

81. Adult victims of sexual assault were treated differently than other victims of crime. Illinois statutes and practice had put the onus on the victim in a sex offense rather than on the accused by focusing on the victim's state of mind in rape prosecutions and compounding the difficulty by requiring proof the crime was committed by force and against the victim's will. Illinois did not, and presently does not, have any other criminal offenses where the state of mind of the victim defined an element of the defense. *See* Jaffe and Becker, *supra* note 36, at 402.

82. The rationale for the exception is necessity. The state is under a significant burden when it is required to prove the mental state of the victim at the time of the alleged crime. See G. LILLY, *supra* note 78, at 182.

83. ILL. REV. STAT. ch. 38, ¶ 12-17(a). The new statute, for instance, eliminates the term "rape." One commentator has surmised that many courts will not permit prosecutors to use the term "rape" because the term no longer appears in the statute. A predictable consequence is that the prompt complaint exception for rape, which relies upon use of that term, may be eliminated or eroded. *See* Inman and Lewis, *supra* note 73, at 404.

84. *See* McCormick, *supra* note 78. Even though the underpinning for admissibility of the prompt complaint has been removed, arguments for admissibility remains. It may be argued in a particular case that corroboration is necessary, and therefore, evidence of the complaint is appropriate in rebutal where the defendant has offered evidence of consent. A prompt complaint of rape appears relevant to rebut a claim of freely given agreement to the sexual act.

propriate.[85] A prompt complaint of rape also appears relevant to rebut a claim of freely given agreement to the sexual act.[86] For instance, where a defendant has offered evidence of consent, allowing testimony that the victim promptly reported the rape may be appropriate in the prosecution's rebuttal case.[87]

Aggravated Circumstances

1. Dangerous Weapon

Under the new Illinois sex crimes statute, criminal sexual assault and criminal sexual abuse become aggravated offenses if certain circumstances exist.[88] An aggravating factor occurs when the accused displays, threatens to use or uses a dangerous weapon.[89]

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85. *See supra* note 81.
86. *See supra* note 83.
87. Some support for this approach is found in cases of indecent liberties where, although consent was not an element, the appellate court approved admission of a prompt complaint on a generalized notion of necessity, given the age and possibly presumptive unreliability of the victim. *See, e.g.*, People v. McKee, 52 Ill. App. 3d 689, 692-93, 367 N.E.2d 1073, 1075-76 (2d Dist. 1977) (trial court erred in allowing mother's testimony as to the substance of what ten year old child told his mother regarding sexual assault but not to the fact of the complaint); People v. Bolyard, 23 Ill. App. 3d 497, 500, 319 N.E.2d 265, 267 (4th Dist. 1974), rev'd on other grounds, 61 Ill. 2d 583, 338 N.E.2d 168 (one element to consider is the delay in making a complaint); People v. DeMoon, 16 Ill. App. 3d 510, 510, 306 N.E.2d 618, 618 (5th Dist. 1974).
88. *See supra* notes 38-40 and accompanying text.
89. ILL. REV. STAT. ch. 38, ¶¶ 12-14(a)(1), 12-16(a)(1) (1984) (the accused displayed, threatened to use or used a dangerous weapon or any object fashioned or utilized in such a manner as to lead the victim under the circumstances reasonably to believe it to be a dangerous weapon).

Both section 12-14 and section 12-16 provide for additional aggravating factors. Section 12-14 provides that aggravated criminal sexual assault is committed if:

> (1) the accused displayed, threatened to use or used a dangerous weapon or any object fashioned or utilized in such a manner as to lead the victim under the circumstances reasonably to believe it to be a dangerous weapon; or
> (2) the accused caused bodily harm to the victim; or
> (3) the accused acted in such a manner as to threaten or endanger the life of the victim or any other person; or
> (4) the criminal sexual assault was perpetrated during the course of the commission or attempted commission of any other felony by the accused; or
> (5) the victim was 60 years of age or over when the offense was committed;
> (b) the accused commits aggravated criminal sexual assault if he or she commits an act of sexual penetration:
> (1) with a victim who is under 13 years of age when the act was committed and the accused was 17 years of age or over; or
> (2) with a victim who was under 9 years of age when the act was committed and the accused was under 17 years of age; or
> (3) with a victim who was at least 9 years of age but under 13 years of age and the accused was under 17 years of age and the accused used force or threat of force to commit the act.

Prior to the adoption of the new statute, the Illinois Supreme Court faced the problem of defining dangerous weapon in the context of the armed robbery statute.[90] "Dangerous weapon" ran the gamut from the obvious gun and knife[91] to a "skinny object,"[92] a "sharp object" held against a throat,[93] and karate sticks.[94] An instrument which was not considered a *per se* dangerous weapon could be used in such a manner that it became a dangerous weapon.[95]

The new statute, however, defines dangerous weapon even more broadly. The object need only be "fashioned or utilized in such a manner as to lead the victim under the circumstances to reasonably believe it to be a dangerous weapon." Thus, "dangerous weapon" within the meaning of the new act appears to include: a gun or knife, which are *per se* dangerous; any object which is used in a dangerous manner; any object which *could* be used in any manner dangerous to the well being of the threatened individual; and finally, any object the victim actually believed to be a dangerous weapon, if under the circumstances the belief was reasonable.

ILL. REV. STAT. ch. 38, ¶ 12-14 (1984).

Section 12-16 provides that aggravated criminal sexual abuse is committed if:

> (1) the accused displayed, threatened to use or used a dangerous weapon or any object fashioned or utilized in such a manner as to lead the victim under the circumstances reasonably to believe it to be a dangerous weapon; or
>
> (2) the accused caused great bodily harm to the victim.
>
> (b) The accused commits aggravated criminal sexual abuse if he or she commits an act of sexual conduct:
>
> (1) with a victim who was under 18 years of age when the act was committed and the accused was a parent or grandparent, whether by whole blood, half-blood or adoption; or
>
> (2) with a victim who was under 13 years of age when the act was committed and the accused was 17 years of age or over; or
>
> (3) with a victim who was under 9 years of age when the act was committed and the accused was under 17 years of age; or
>
> (4) with a victim who was at least 9 years of age but under 13 years of age and the accused was under 17 years of age and the accused used force or threat of force to commit the act.

ILL. REV. STAT. ch. 38, ¶ 12-16 (1984).

90. ILL. REV. STAT. ch. 38, ¶ 18-2(a) (1983). A person commits armed robbery if he or she takes property from the person or preserve of another by using or threatening to use force and is armed with a dangerous weapon.

91. People v. Ware, 11 Ill. App. 3d 697, 701, 297 N.E.2d 289, 292 (1st Dist. 1978); People v. Sanders, 82 Ill. App. 2d 159, 159, 227 N.E.2d 79, 79 (1st Dist. 1980).

92. People v. Pennington, 75 Ill. App. 2d 62, 67, 220 N.E.2d 879, 882 (1st Dist. 1966).

93. People v. Montgomery, 19 Ill. App. 3d 206, 210-11, 311 N.E.2d 361, 364 (1st Dist. 1974).

94. People v. Wethington, 122 Ill. App. 3d 54, 460 N.E.2d 856, (3d Dist. 1974).

95. ILL. REV. STAT. ch. 38, ¶ 12-14(a)(1) (1984).

The most striking aspect of the new definition is that now a dangerous weapon may be defined in terms of the victim's perceptions.[96] At first glance the definition appears subjective. Use of the phrases "under the circumstances" and "reasonably believe," however, implies a subjective/objective standard. Did the victim believe the object was dangerous and was that belief reasonable? The notion that an object could be used in such a way as to make it a dangerous weapon is not new,[97] nor is the idea that even an unused weapon can be dangerous because of its potential.[98]

Under this definition of "dangerous weapon," perhaps a finger thrust in a pocket could be considered a dangerous weapon. The only obstacle to such a result is the common sense rationale previously employed by the Illinois courts in interpreting "dangerous weapon" in the context of armed robbery.[99] Under this rationale, courts have developed an objective test to elevate the offense of robbery to armed robbery: if the character if an object admits of only one conclusion, then the question of its character is a question of law to be determined by the judge. Conversely, if the character of an object does not admit of only one conclusion, then the question is for the fact finder to determine. In the latter situation, the jury is instructed that the object qualifies as a dangerous weapon if it susceptible to use in a manner likely to cause serious injury.

In the armed robbery scenario, something more than the inherent force and intimidation of robbery is necessary to justify the greater penalty imposed for armed robbery: the object must be something which could actually cause harm or injury. Similarly, in order to aggravate a sex crime offense, an object which is actually capable of causing harm should be required. Otherwise, almost every rape could be prosecuted as an aggravated crime. Under this analysis, therefore, a finger extended in a pocket and presented as a gun may create the force necessary for criminal sexual assault, but should not elevate the crime to an aggravated offense.

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96. *See supra* note 94.

97. *Id.*

98. The legislative history reveals that this concern was discussed. One proponent agreed that almost every rape could be prosecuted as an aggravated rape but the gradation allowed the prosecution to plea bargain to a lesser charge. Tape of Subcommittee supra note 41.

99. ILL. REV. STAT. ch. 38, ¶¶ 12-14(a)(1), 12-16(a)(1). *But see* ILL. REV. STAT. ch. 38, ¶ 18-2 (1983).

2. Bodily Harm

Bodily harm to the victim is another aggravating factor.[100] While criminal sexual assault requires only bodily harm,[101] criminal sexual abuse requires *great* bodily harm.[102] The definition of the term "bodily harm," however, may present interpretation problems for courts.

According to Illinois courts, a low threshold exists for proof which constitutes evidence of bodily harm.[103] The appellate court is virtually unanimous in the view that, in proving the bodily harm necessary for battery, there is no requirement that the evidence demonstrated physical injuries such as bleeding or brusing.[104] Testimony that a victim was struck or kicked by the accused is sufficient to demonstrate bodily harm.[105]

If such a low threshold is employed in interpreting bodily harm for the aggravated criminal sexual assault provision, many acts of forcible sexual penetration will become aggravated offenses. If bodily harm includes physical pain and damage "like bruises," testimony that the victim was pushed or dragged to the ground may well support a charge of aggravated criminal sexual assault. Likewise, testimony that a victim was slapped or punched or even pulled down by the hair, such that "it hurt," may aggravate the offense.

It is clear that with a broad definition of bodily harm, most cases involving criminal sexual assault can be aggravated to the more serious crime. Some guidance for resolving this problem, however, may be found in *People v. Mays*,[106] where the Illinois Supreme Court considered the relationship between rape and battery based on bodily harm. Specifically the issue in *Mays* was whether battery, based on bodily harm, is a lesser included offense of rape. Bodily harm, the court reasoned, requires a showing of physical pain or damage to the body such as lacerations, bruises or abrasions.[107] On the other hand, rape demands only a showing of force. Ultimately, the court determined that proof of force did not neces-

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100. *See supra* note 89 and accompanying text.
101. *Id.*
102. ILL. REV. STAT. ch. 38, ¶ 12-16 (1984).
103. People v. Lee, 46 Ill. App. 3d 343, 345, 360 N.E.2d 1173, 1176 (3d Dist. 1980).
104. People v. Taylor, 53 Ill. App. 3d 349, 351, 359 N.E.2d 1083, 1085 (2d Dist. 1977).
105. *Id.*
106. ILL. REV. STAT. ch. 38 ¶ 12-16(a)(2) (1984) ("the accused caused great bodily harm to the victim).
107. People v. Mays, 91 Ill. 2d 251, 256, 437 N.E.2d 633, 636 (1982).

sarily include physical pain, bruising, scratching or bleeding. The court acknowledged, however, that although bodily harm often occurred during rape, it was not required.[108]

The legislative intent in HB 606 is to create gradations of penalty between criminal sexual assault and aggravated criminal sexual assault.[109] An overbroad definition of bodily harm, however, will defeat the legislative intent by elevating most lesser criminal sexual assault cases to the more serious aggravated crimes. In order to effectuate the gradation, "bodily harm" should be defined to require evidence which demonstrates physical injuries such as bleeding or bruising.

3. Life Threatening

The offense of criminal sexual assault is also aggravated if the conduct of the accused threatens or endangers the life of the victim or any other person.[110] This aggravating factor stands in sharp contrast to the dangerous weapon factor because, unlike the dangerous weapon factor, the statutory language explicitly focuses on the conduct of the accused and omits mention of the victim's perceptions. What constitutes life threatening conduct, however, is unclear.[111]

The omission of mention of the victim's perception is significant in view of the explicit reference to the victim's perception in the definition of the aggravating factor of "dangerous weapon."[112] The omission implies the intention to restrict life-threatening to an objective definition. The absence of any legislative guidance as to what constitutes life-threatening behavior, however, may pose problems for the courts.

The objective test which has been previously employed by Illinois courts to elevate the offense of robbery to armed robbery may

108. *Id.*

109. 91 Ill. 2d 251, 437 N.E. 2d 633 (1982) (The legislative intent to create a schedule of offenses with gradations of penalty in order to increase the number of convictions for sex offenses would not be effectuated if such action aggravated a sex offense to the more serious crime. *See* Tape of Subcommittee, *supra* note 52).

110. ILL. REV. STAT. ch. 38 ¶ 12-14(3) (1984).

111. *Id.* Section 12-14(3) provides that the accused commits aggravated criminal sexual assault if "the accused acted in such a manner as to threaten or endanger the life of the victim or any person. . . ."

112. ILL. REV. STAT. ch. 38 ¶ 12-12 (1984). For the purposes of sections 12-13 through 12-18 of the Code, section 12-12 provides definitions for the terms "accused" (12-12[a]), "bodily harm" (12-12[b]), "family member" (12-12[c]), "force or threat of force" (12-12[d]), "sexual conduct" (12-12[e]), "sexual penetration" (12-12[f]), and "victim" (12-12[g]). The terms "life threatening" or "endanger the life of a victim," however, are undefined.

also be useful for evaluating whether the behavior of the accused has been life threatening.[113] Under this rationale, if the behavior of the accused allows only one conclusion, then the question of the life threatening behavior is a question of law to be determined by the judge. Conversely, if the behavior of the accused does not permit only one conclusion, then the question is for the fact finder to determine.

CONCLUSION

The new Illinois criminal sexual assault statute is a significant change in the law against sexual aggression in Illinois. By focusing on the conduct of the accused and, providing gradations in punishment, the statute provides a rational scheme for punishing harmful sexual aggression. The new law, however, also presents significant procedural problems. The absence of any legislative guidance as to what constitutes a dangerous weapon, bodily harm, or life threatening behavior will pose problems for the courts. Furthermore, the new sex crimes legislation's shifting of the burden of proving consent to the accused may lead to fifth amendment challenges.

113. *See* Inman and Lewis, *supra* note 73, at 405.