

AN EVALUATION OF NEBRASKA'S CORROBORATION REQUIREMENT

By retaining the corroboration rule, the Nebraska Supreme Court continued a laudable tradition of seeking to protect individual liberty by preventing convictions based on unreliable evidence and injecting greater rationality into the criminal process.¹

INTRODUCTION

The above statement, although made in 1975, is certainly applicable today in Nebraska, especially in light of recent decisions which retain the corroboration requirement in rape and sexual assault cases.² The corroboration requirement is an evidentiary rule which necessitates the production of additional evidence to support the victim's testimony before a conviction can be sustained.³ Nebraska presently retains a rule that one source has called "a tangled web of legitimate concerns, out-dated beliefs, and deep-seated prejudices."⁴ Further, Nebraska is the only state that retains a corroboration requirement in every case of sexual assault.⁵

This Comment will first examine a recent reiteration of the corroboration requirement by the Nebraska Supreme Court, *In re Interest of J.M.*⁶ Next, a review of the background of the corroboration requirement is necessary to understand why Nebraska has adopted the corroboration rule, and to identify the historical justifications for retaining the rule.⁷ Finally, this Comment concludes with an analysis of the reasoning behind the corroboration requirement and a discussion of whether there is any validity to the justifications.⁸

FACTS AND HOLDING

In re Interest of J.M. contains the Nebraska Supreme Court's re-

1. Comment, *Nebraska's Corroboration Rule*, 54 NEB. L. REV. 93, 110 (1975).

2. See, e.g. *State v. Polyascko*, 224 Neb. 272, 275-77, 397 N.W.2d 633, 635-36 (1986) (retaining the corroboration requirement in a third degree sexual assault); *In re Interest of J.M.*, 223 Neb. 609, 613, 391 N.W.2d 146, 150 (1986) (retaining the corroboration requirement in a sexual assault of a minor).

3. Note, *The Rape Corroboration Requirement: Repeal Not Reform*, 81 YALE L.J. 1365, 1365 (1972).

4. *United States v. Wiley*, 492 F.2d 547, 552 (D.C. Cir. 1973) (Bazelon, C.J., concurring).

5. See *infra* note 42 and accompanying text.

6. 223 Neb. 609, 391 N.W.2d 146 (1986).

7. See *infra* notes 19-101 and accompanying text.

8. See *infra* notes 102-75 and accompanying text.

iteration of the corroboration requirement in Nebraska.⁹ A juvenile proceeding in Lancaster County found beyond a reasonable doubt that J.M., a fourteen year old, had committed the offense of sexual contact against M.H., a five year old, and J.N., a four year old.¹⁰

On appeal to the Nebraska Supreme Court, J.M. asserted that the juvenile court erred in determining that the evidence presented supported a finding beyond a reasonable doubt that J.M. committed two acts of sexual conduct.¹¹ Specifically, J.M. contended that the victims' testimony was not corroborated.¹² The Nebraska Supreme Court found that there was sufficient evidence to support the juvenile court's finding against J.M.,¹³ and recited the corroboration rule in Nebraska:

The general rule is that testimony of the victim of a sexual assault must be corroborated as to material facts and circumstances which tend to support the victim's testimony and from which, together with the victim's testimony as to the principle fact, an inference of guilt may be drawn. Corroboration of the principle act constituting the offense is not required.¹⁴

Testimony of one of the victims that J.M. had touched the victim's "private parts" was direct evidence of the principle act which constituted the offense against that victim.¹⁵ Similar testimony was provided by the second victim.¹⁶ Corroborating evidence consisted of evidence of J.M.'s opportunity to commit the offenses and a post-event disruption in one of the victim's sleeping habits.¹⁷ Thus, corroboration of the victims' testimony, still being a requirement in cases involving sexual assault, was sufficiently met in this case.¹⁸

9. *J.M.*, 223 Neb. at 613, 391 N.W.2d at 150. The corroboration requirement in Nebraska is a judicially made rule, not legislative. See *State v. Fisher*, 190 Neb. 742, 746, 212 N.W.2d 568, 571 (1973).

10. *J.M.*, 223 Neb. at 610, 391 N.W.2d at 148. It was alleged that J.M. subjected M.H. to sexual penetration in violation of section 28-319 of the Nebraska Revised Statutes. *Id.* NEB. REV. STAT. § 28-319 (Reissue 1985) (stating that sexual assault in the first degree is a Class II felony). J.M. was also alleged to have subjected J.N. to sexual contact in violation of section 28-320. *J.M.* 223 Neb. at 610, 391 N.W.2d at 148. NEB. REV. STAT. § 28-320 (Reissue 1985) (stating that sexual assault in the third degree is a Class I misdemeanor).

11. *J.M.*, 223 Neb. at 612-13, 391 N.W.2d at 149.

12. *Id.* at 613, 391 N.W.2d at 150.

13. *Id.* at 613, 391 N.W.2d at 149.

14. *Id.* at 613, 391 N.W.2d at 150 (quoting *State v. Craig*, 219 Neb. 70, 79, 361 N.W.2d 206, 214 (1985)).

15. *Id.* at 613, 391 N.W.2d at 150.

16. *Id.*

17. *Id.* Corroboration is required in cases involving sexual assault, and is, with a few exceptions, not required in other criminal cases. See *infra* notes 86-91, 103-07 and accompanying text.

18. *J.M.*, 223 Neb. at 613, 391 N.W.2d at 150.

BACKGROUND

HISTORY AND JUSTIFICATIONS FOR THE CORROBORATION REQUIREMENT

The rule that unsupported testimony of the victim is not sufficient to support a rape or sexual assault conviction did not exist at common law.¹⁹ However, the corroboration requirement is often said to have originated three centuries ago with Lord Hale's oft-quoted observations:

It is true that rape is a most detestable crime, and therefore severely to be punished, with death; but it must be remembered that it is an accusation easily to be made, and hard to be proved, and harder to be defended by the party accused, though never so innocent.²⁰

Although Hale's comments on rape were made over three-hundred years ago, the rationale behind his statements remains as the basis for many of the justifications of the corroboration requirement.²¹

In addition to Hale's statement that a charge of rape is difficult to defend against, several reasons have been given to support the corroboration requirement.²² Perhaps the most prevalent contention is that false charges are more common with rape than with other crimes.²³ A woman, it is argued, is motivated to fabricate a rape charge because she may hate the man she accuses or because she wants to create an explanation for a pregnancy.²⁴ Furthermore, charges are supposedly more prevalent because it is said that women tend to fantasize rapes and may even go so far as to report such fantasized rapes.²⁵ This view has been supported in the past by members of the predominantly male medical profession.²⁶ One male psychiatrist, Dr. Karl A. Menninger, was quoted as saying:

19. 7 J. WIGMORE, EVIDENCE § 2061, at 451 (3d ed. 1940).

20. *Matthews v. State*, 19 Neb. 330, 335, 27 N.W. 234, 236 (1886) (citing 1 M. HALE, PLEAS OF THE CROWN, 635 (1778)).

21. See Note, *Corroborating Charges of Rape*, 67 COLUM. L. REV. 1137, 1137 (1967) (stating that the rationale behind Lord Hale's statements is still followed in some jurisdictions).

22. See *infra* notes 23-39 and accompanying text.

23. Note, 67 COLUM. L. REV. at 1138.

24. *United States v. Wiley*, 492 F.2d 547, 553 (D.C. Cir. 1973) (Bazelon, C.J., concurring) (discussing reasons why a woman might fabricate a rape charge).

25. See *e.g.*, *People v. Smallwood*, 306 Mich. 49, —, 10 N.W.2d 303, 305 (1943) (discussing the tendency of younger women to falsify rape charges); 3A J. WIGMORE, EVIDENCE § 924(a), at 736-47 (3d ed. 1940) (stating that psychiatrists believe that women may report fantasized rapes); Note, *Corroborating Charges of Rape*, 67 COLUM. L. REV. 1137, 1138 (1967) (discussing that the reason the corroboration rule exists is because women are believed to fantasize and report rapes).

26. See *Wedmore v. State*, 237 Ind. 212, —, 143 N.E.2d 649, 657-661 (1957) (Emmert, J., dissenting) (quoting psychiatrists regarding the tendency of women to falsify rape charges).

[M]ost women, if we may judge from our clinical experience, entertain more or less consciously at one time or another fleeting fantasies or fears that they are being or will be attacked by a man. Of course, the normal woman who has such a fantasy does not confuse it with reality, but it is so easy for some neurotic individuals to translate their fantasies into actual beliefs and memory falsifications that I think a safeguard should certainly be placed upon this type of criminal charge.²⁷

Another doctor stated that while psychiatric examinations may be desirable in all criminal cases, they are a necessity in sexual assault cases.²⁸ Beliefs such as these exemplify a feeling that there is a greater chance in a sexual assault case of prosecuting an innocent person without corroborated testimony than with other crimes.²⁹

The corroboration requirement has also been justified because of the severe penalties that are given to those who are found guilty of rape.³⁰ Because the penalty for rape can be a long prison sentence,³¹ corroboration, it has been argued, is necessary to make sure an innocent person will not face such a severe punishment.³² Thus, it has also been argued that any abandonment of the corroboration requirement should be accompanied by a reduction in the punishment for rape.³³

Another justification or reason for the corroboration rule is the existence of traditional gender based stereotypes.³⁴ Women have often been stereotyped as "good" or "bad," and a "good" woman would probably strongly resist a rape to the point where evidence of a rape would be obvious.³⁵ The corroboration requirement may also be met if the victim made an immediate complaint following the rape, and according to traditional wisdom regarding women, no woman who has legitimately suffered would be silent as to the rape.³⁶

27. 3A J. WIGMORE, EVIDENCE § 924(a), at 744 (3d ed. 1940) (reproducing Dr. Karl A. Menninger's M.S. letter of Sept. 5, 1983).

28. *Id.* § 924(a), at 745-46 (reproducing Dr. W. F. Lorenz's M.S. letter of Sept. 19, 1933).

29. Wedmore, at —, 143 N.E.2d at 657.

30. *United States v. Wiley*, 492 F.2d 547, 554 (D.C. Cir. 1973) (Bazelon, C.J., concurrence).

31. See NEB. REV. STAT. § 28-319 (Reissue 1985). In Nebraska a first degree sexual assault charge is a class II felony with a maximum of 50 years imprisonment and a minimum of one year in prison. See *id.*

32. *Wiley*, at 554 (Bazelon, C.J., concurring).

33. *Id.*

34. *Id.* at 555.

35. *Id.* See *infra* footnotes 66-73 and accompanying text.

36. *Matthews v. State*, 19 Neb. 330, 337, 27 N.W. 234, 237 (1886) (discussing the presumption that a rape victim would make a prompt complaint). This variation of the corroboration requirement is known as the complaint of rape rule. See *infra* notes 66-70 and accompanying text.

Therefore, it is argued, any time there is no physical evidence of resistance or there is no immediate complaint made, the victim must have either consented to intercourse or at least enticed the rapist.³⁷

Finally, another rationale related to sex stereotypes is that juries sympathize with the woman and therefore, are more likely to convict the man she accuses.³⁸ According to this rationale, the corroboration requirement balances against such purported sympathy.³⁹

Many jurisdictions have followed the reasons stated above, and in the past, several states have had a corroboration requirement.⁴⁰ However, today a majority of courts no longer require corroboration.⁴¹ In fact, Nebraska is presently the only state which requires corroboration in every sexual assault case.⁴²

ORIGINS OF THE REQUIREMENT IN NEBRASKA: *MATTHEWS V. STATE*

The corroboration requirement was recognized in Nebraska as early as 1886, in *Matthews v. State*.⁴³ Statements made by the Nebraska Supreme Court reflect the usual justifications for the necessity of testimony being corroborated:

The law, therefore, as evidence that the act was committed against her will, requires the prosecutrix to use all the means in her power to prevent the consummation of the act. If the act is committed with force, and against her will, there is a great probability that some marks will be left upon her person or clothing, or both, as evidence of the struggle; and if she make complaint at the first opportunity, these facts tend to corroborate her testimony that the offense was committed by some one. If no marks are left upon the person or clothing, and no complaint is made at the first opportunity, a

37. *Wiley*, 492 F.2d at 555 (Bazelon, C.J., concurring).

38. Note, 81 *YALE L.J.* at 1378.

39. *Id.*

40. See Annot., *Modern Status of Rule Regarding Necessity for Corroboration of Victim's Testimony in Prosecution for Sexual Offense*, 31 *A.L.R.* 4TH 120, 124. Several states have abandoned the corroboration requirement in the last twenty years. See, e.g., *State v. Settle*, 111 *Ariz.* 394, 531 P.2d 151 (1975); *People v. Barnes*, 42 *Cal.* 3d 284, 721 P.2d 110, 228 *Cal. Rptr.* 228 (1986); *State v. Byers*, 102 *Idaho* 159, 627 P.2d 788 (1981); *Taylor v. State*, 257 *Ind.* 664, 278 N.E.2d 273 (1972); *State v. Feddersen*, 230 *N.W.*2d 510 (Iowa 1975); *State v. Cabral*, 122 *R.I.* 623, 410 *A.2d* 438 (1980).

41. See B.A. MOROSCO, *THE PROSECUTION AND DEFENSE OF SEX CRIMES* § 2.03, at 2-14 (1987) (discussing the extent of the corroboration requirement in the United States).

42. See *State v. Daniels*, 222 *Neb.* 850, 388 *N.W.*2d 446 (1986) (Shanahan, J., concurring) (stating that Nebraska has the "somewhat dubious distinction of being the only jurisdiction still holding that 'corroboration of the victim's testimony is necessary in order to support a conviction' in every case of sexual assault"). Texas also requires corroboration, but only if the victim does not make a prompt complaint. See *Holloway v. State*, 695 *S.W.*2d 112, 115 (Tex. Ct. App. 1985).

43. 19 *Neb.* 330, 27 *N.W.* 234 (1886).

doubt is thrown upon the whole charge; and unless the testimony of the prosecutrix is corroborated on material points . . . the testimony of the prosecutrix alone is not sufficient to warrant the conviction.⁴⁴

The court, concerned with evidence of resistance,⁴⁵ was subscribing to the previously mentioned justification that any decent woman would strongly resist a rape and without evidence of resistance, the woman must have consented.⁴⁶ As a further justification the court also relied in part on the statements of Sir Matthew Hale.⁴⁷ The corroboration requirement was established by the decision in *Matthews* and has been a permanent fixture in Nebraska law to the present day.⁴⁸

SUBSEQUENT NEBRASKA CASE LAW.

The Nebraska Supreme Court in *McConnell v. State*⁴⁹ extended the corroboration requirement to cases involving assault with intent to commit rape.⁵⁰ The defendant in *McConnell* contended that the trial court erred in instructing the jury that a conviction could be had without any corroboration of the victim's testimony.⁵¹ Fearing that such an instruction would cause the jury to lose sight of the necessity of the corroboration requirement, the court reaffirmed Nebraska's commitment to the corroboration rule and saw no good reason why the same should not apply where the charge is intent to commit rape.⁵²

Subsequent decisions have modified the rule to some extent.⁵³ In *Noonan v. State*,⁵⁴ the court rejected the contention that it is necessary that the victim's evidence be corroborated so as to connect the defendant with the crime.⁵⁵ In rejecting this contention, the court upheld the lower court's jury instruction:

It is not essential that she be corroborated by direct evidence of the particular fact or facts constituting the crime. She must, however, be corroborated as to material facts and cir-

44. *Id.* at 334-35, 27 N.W. at 236.

45. *Id.* at 335, 27 N.W. at 236.

46. *United States v. Wiley*, 492 F.2d 547, 555 (D.C. Cir. 1973) (Bazelon, J., concurring).

47. *Matthews*, 19 Neb. at 335, 27 N.W. at 236.

48. *See J.M.*, 223 Neb. at 613, 391 N.W.2d at 150 (stating that corroboration is still a requirement in Nebraska).

49. 77 Neb. 773, 110 N.W. 666 (1906).

50. *Id.* at 775-76, 110 N.W. at 667-68.

51. *Id.* at 775, 110 N.W. at 667.

52. *Id.* at 775-76, 110 N.W. at 667.

53. *See infra* notes 54-65 and accompanying text.

54. 117 Neb. 520, 221 N.W. 434 (1928).

55. *Id.* at 526, 221 N.W. at 436.

cumstances which tend to support her testimony and from which, together with her testimony as to the particular act constituting the crime, the inference of guilt may be drawn.⁵⁶

This jury instruction mirrors Nebraska's present corroboration requirement.⁵⁷ The result of the acceptance of this instruction is that it is only necessary to establish *corpus delecti*.⁵⁸ The court reasoned that if there is enough evidence to show the actual commission of a rape, then there is no reason to believe fabrication exists, and there is no reason to extend the necessity of corroborating evidence to connect the accused with the offense.⁵⁹

The language used by the court at various times in corroboration cases could be interpreted as further limiting the requirement to those cases in which the accused denies the charge with his own testimony.⁶⁰ The court in *Matthews* required corroboration where "the accused testifies as a witness on his own behalf and denies the charge."⁶¹ In *State v. Gero*,⁶² the court held that corroboration is required when "the accused unequivocally denies the commission of the offense."⁶³ Despite the language used in these decisions, the court in *Fisher* recognized the corroboration rule to be an unqualified one and held

that as a matter of law the testimony of the prosecutrix alone and uncorroborated by any other evidence is not sufficient to sustain a conviction for rape, or assault with intent to commit rape. That rule is applicable whether the defendant does or does not testify.⁶⁴

Presently, corroboration is an absolute requirement in every sexual assault case in Nebraska.⁶⁵

56. *Id.* at 522-23, 221 N.W. at 435.

57. *See J.M.*, 223 Neb. at 613, 391 N.W.2d at 150 (stating that Nebraska's present corroboration requirement mandates corroboration of material facts and circumstances which support the victim's testimony, and corroboration of the principle act which constitutes the crime is not required).

58. *See Noonan*, 117 Neb. at 525-26, 221 N.W. at 436 (explaining that where *corpus delecti* is proven, no other evidence is necessary). *See generally* *Henn v. State*, 172 Neb. 597, 601, 111 N.W.2d 385, 388 (1961) (defining *corpus delecti* to be "the body or substance of a crime").

59. *Noonan*, 117 Neb. at 525-26, 221 N.W. at 436.

60. *See State v. Fisher*, 190 Neb. 742, 744, 212 N.W.2d 568, 570 (1973) (reviewing decisions which applied the corroboration requirement to only those cases in which the defendant testifies and denies the charge).

61. *Matthews*, 119 Neb. at 335, 27 N.W. at 236.

62. 184 Neb. 107, 165 N.W.2d 371 (1969).

63. *Id.* at 110, 165 N.W.2d at 373 (citing *Perry v. State*, 163 Neb. 628, 80 N.W.2d 669 (1957)).

64. *Fisher*, 190 Neb. at 746-47, 212 N.W.2d at 571.

65. *J.M.*, 223 Neb. at 613, 391 N.W.2d at 150 (stating that in every sexual assault in Nebraska the victim's testimony must be corroborated).

Another aspect of the corroboration requirement in Nebraska is the long standing complaint of rape rule.⁶⁶ This rule was set out in *Krug v. State*:⁶⁷

In a prosecution for rape, the prosecutrix may testify in chief, if within a reasonable time under all the circumstances after the act was committed she made complaint to another, to the fact and nature of the complaint, but not as to its details; and that other may likewise testify in chief to such fact and nature of the complaint, but not as to its details. Such testimony, together with all other facts and circumstances in evidence, may be considered by the jury in corroboration of the testimony of the prosecutrix on the trial as to the main fact in issue.⁶⁸

Under the complaint of rape rule, not only must the victim make a complaint, but the victim must also make the complaint "without unreasonable or inconsistent delay."⁶⁹ This rule, allows the person who receives the complaint to testify as part of the prosecution's case in chief to the "fact and nature of the complaint, but not as to its details."⁷⁰

The complaint of rape rule was discussed most recently in *State v. Daniels*.⁷¹ In *Daniels*, the court recognized the complaint of rape rule as a "long standing doctrine,"⁷² and noted that the rule is rationalized because a woman who charges a man with rape yet "said nothing about it to anybody constitutes in effect a self-contradiction."⁷³

The concurring opinion in *Daniels* criticized the complaint of rape rule and the corroboration requirement in general.⁷⁴ While the majority did not mention the word corroboration in connection with the complaint of rape rule,⁷⁵ the concurring opinion found the complaint of rape rule to be "nothing more than a form of required corroboration."⁷⁶ The concurring opinion also found the corroboration requirement to be "an anachronistic remnant of an era which lacked

66. *State v. Daniels*, 222 Neb. 850, 853, 388 N.W.2d 446, 449 (1986) (stating that the complaint of rape rule is well established).

67. 116 Neb. 185, 216 N.W. 664 (1927).

68. *Id.* at 189, 216 N.W. at 666 (citations omitted).

69. *State v. Watkins*, 207 Neb. 859, 863, 301 N.W.2d 338, 341 (1981).

70. *Id.*

71. 222 Neb. 850, 388 N.W.2d 446 (1986).

72. *Id.* at 853, 388 N.W.2d at 449.

73. *Id.* at 854, 388 N.W.2d at 450 (citing 4 J. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 1135, at 298-99 (J. Chadbourn rev. 1972)).

74. *Daniels*, 222 Neb. at 857-62, 388 N.W.2d at 452-54 (Shanahan, J., concurring).

75. *Id.* at 850-57, 388 N.W.2d at 448-52. The majority mentioned corroboration only in relation to a District of Columbia case which required corroboration in cases involving minors as victims. *Id.* at 855, 388 N.W.2d at 450.

76. *Id.* at 858, 388 N.W.2d at 452 (Shanahan, J., concurring).

the procedural protection and safeguards now available."⁷⁷ This concurring opinion marked the first time since the corroboration rule was established in *Matthews v. State*⁷⁸ that an opinion in any Nebraska case had advocated the abolishment of the corroboration requirement.⁷⁹

Interestingly, the majority in *Daniels* cited *Fitzgerald v. United States*,⁸⁰ and stated that the case was notable because the District of Columbia requires, as does Nebraska, corroboration in cases involving sexual assaults on minors.⁸¹ The District of Columbia was one of the few jurisdictions, along with Nebraska, to recognize a corroboration requirement.⁸² However, the court in *Daniels* failed to recognize that subsequent to *Fitzgerald*, in *Gary v. United States*,⁸³ the corroboration requirement was abolished entirely in the District of Columbia.⁸⁴ Thus, there became one less jurisdiction in the small minority of jurisdictions that followed the corroboration requirement.⁸⁵

STATUTORY LAW

The corroboration requirement in Nebraska is a judicially created rule.⁸⁶ However, it is worth noting that the Nebraska statutes do provide for a corroboration requirement in a few crimes.⁸⁷ For instance, corroborating evidence is needed to convict a person under the Uniform Controlled Substances Act.⁸⁸ Corroboration of the complainant is also necessary in a paternity suit,⁸⁹ and in cases where a man is charged with abducting a woman with the intent to seduce.⁹⁰

77. *Id.*

78. *See supra* note 43 and accompanying text.

79. *See Daniels*, 222 Neb. at 861-62, 388 N.W.2d at 454.

80. 443 A.2d 1295 (D.C. 1982).

81. *Daniels*, 222 Neb. at 855, 388 N.W.2d at 450.

82. *Id.* Corroboration in the District of Columbia did not apply to cases involving a mature victim as it does in Nebraska. *See Fitzgerald*, 443 A.2d at 1299.

83. 499 A.2d 815 (D.C. 1985).

84. *Id.* at 833.

85. *See supra* note 42 and accompanying text.

86. *See State v. Fisher*, 190 Neb. 742, 746, 212 N.W.2d 568, 571 (1973) (explaining that Nebraska is one of a small number of states which has a judicially created corroboration requirement).

87. *See infra* notes 88-90 and accompanying text.

88. NEB. REV. STAT. § 28-1439.01 (Reissue 1985). Section 28-1439.01 provides: "No conviction for an offense punishable under §§ 28-401 to 28-438 shall be based solely upon the uncorroborated testimony of a cooperating individual." *Id.*

89. NEB. REV. STAT. § 43-1412 (Cum. Supp. 1986). Section 43-1412 provides in part:

The uncorroborated testimony (a) of the mother, in a proceeding instituted by the mother or the guardian or next friend, or (b) of the alleged father, in a proceeding instituted by the alleged father, shall not alone be sufficient to support a verdict or finding that the alleged father is actually the father.

Id.

90. NEB. REV. STAT. § 29-2013 (Reissue 1985). Section 29-2013 provides:

The corroboration that has been required by the court in cases involving these offenses is similar to the rule set out in *In re Interest of J.M.*⁹¹

As for crimes of sexual assault or rape, a corroboration requirement has never been mentioned in a Nebraska statute.⁹² However, important changes have taken place in the philosophy behind Nebraska's statutes, as evidenced by the change from a rape statute to a sexual assault statute.⁹³ Three major differences exist between the old rape statute and the new sexual assault statute: (1) the sexual assault statute prohibits an act of violence, not an act of sex, as the rape statute did;⁹⁴ (2) the new statute expands the list of prohibited non-consensual sexual acts;⁹⁵ and, (3) under the former rape statute, sexual intercourse must have been forcibly obtained while under the

In trials for taking a woman away with intent to force her to be married or defiled, and for seduction for the purpose of prostitution, no conviction shall be had on the evidence of the female offended against, unsupported by other evidence.

Id.

91. Compare *Wade v. Hicks*, 191 Neb. 847, 849, 218 N.W.2d 222, 224 (1974) (stating that in a paternity suit the plaintiff must "be corroborated as to material facts and circumstances which tend to support her testimony, and from which, together with her testimony as to the principle fact, the inference of guilt may be drawn"); and *State v. Taylor*, 221 Neb. 114, 119, 375 N.W.2d 610, 614 (1985) (stating that in a controlled substance action "corroboration is sufficient if the witness is corroborated as to material facts and circumstances which tend to support the testimony as to the principle fact in issue"); with *J.M.*, 223 Neb. at 613, 391 N.W.2d at 150 (stating that in a sexual assault action the victim's testimony "must be corroborated as to material facts and circumstances which tend to support the victim's testimony and from which, together with the victim's testimony as to the principle fact, an inference of guilt may be drawn").

92. See NEB. REV. STAT. § 28-407, (Reissue 1964). Section 28-407 provided:

Whoever shall have carnal knowledge of his daughter or sister, forcibly and against her will, shall be deemed guilty of rape and shall be imprisoned in the Nebraska Penal and Correctional Complex during life.

NEB. REV. STAT. § 28-407 (Reissue 1964). The 1964 version of section 28-408 provided:

Whoever shall have carnal knowledge of any other woman, or female child, than his daughter or sister, as aforesaid, forcibly and against her will; or if any male person, of the age of eighteen years or upwards, shall carnally know or abuse any female child under the age of eighteen years, with her consent, unless such female child so known and abused is over fifteen years of age and previously unchaste, shall be deemed guilty of rape, and shall be imprisoned in the Nebraska Penal and Correctional Complex not more than twenty nor less than three years.

NEB. REV. STAT. § 28-408 (Reissue 1964). Section 28-319(1) of the Nebraska Revised Statutes provides in part:

(1) Any person who subjects another person to sexual penetration and (a) overcomes the victim by force, threat of force, express or implied, coercion, or deception . . . is guilty of sexual assault in the first degree.

NEB. REV. STAT. § 28-319(1) (Reissue 1985).

93. See *State v. Willis*, 223 Neb. 844, 848-49, 394 N.W.2d 648, 650-51 (1986) (discussing the philosophical differences between a rape statute and a sexual assault statute).

94. *Id.* at 848, 394 N.W.2d at 651.

95. *Id.*

new statute "threat of force, express or implied" is sufficient.⁹⁶ This third difference contradicts the reasoning behind the corroboration rule because under that rule physical evidence of violence was to protect against fabrication;⁹⁷ yet, under the sexual assault statute physical force is not a necessary element for conviction; threat of force is sufficient.⁹⁸ Further evidence of the change in attitude accompanying the change in type of statute is in section 28-317 of the Nebraska Revised Statutes, which provides:

It is the intent of the Legislature to enact laws dealing with sexual assault and related criminal sexual offenses which will protect the dignity of the victim at all stages of the judicial process, which will insure that the alleged offender in a criminal sexual offense case have preserved the constitutionally guaranteed due process of law procedures, and which will establish a system of investigation, prosecution, punishment, and rehabilitation for the welfare and benefit of the citizens of this state as such system is employed in the area of criminal sexual offenses.⁹⁹

This statute suggests a concern for the welfare of both the victim and the accused, whereas the corroboration requirement is mainly concerned with protecting the accused.¹⁰⁰ Despite the statutory change and the apparent enlightened attitude that accompanied the change, Nebraska's judicially imposed corroboration requirement has survived to this day.¹⁰¹

ANALYSIS

Nebraska is the only jurisdiction requiring corroboration of the victim's testimony.¹⁰² Is this position justified? In answering this question, it is important to first note that the accused in Nebraska can be convicted on uncorroborated evidence in cases involving charges of first degree murder,¹⁰³ burglary,¹⁰⁴ arson,¹⁰⁵ or breaking

96. *Id.*

97. *See supra* notes 45-46 and accompanying text.

98. NEB. REV. STAT. § 28-319(1)(a) (stating that "Any person who subjects another person to sexual penetration and (a) overcomes the victim by force, threat of force, express or implied . . . is guilty of sexual assault in the first degree").

99. *Id.* § 28-317.

100. *See Matthews v. State*, 19 Neb. at 335, 27 N.W. at 236 (citing Lord Hale's remarks about the need to be cautious in judging the credibility of a prosecutrix of a rape charge).

101. *See supra* notes 9-18 and accompanying text.

102. *See supra* note 42 and accompanying text.

103. *See State v. Joy*, 220 Neb. 535, 536-37, 371 N.W.2d 113, 114-15 (1985) (disagreeing with the accused that testimony of an accomplice must be corroborated).

104. *See State v. Huffman*, 214 Neb. 429, 432, 334 N.W.2d 3, 5 (1983) (stating that a burglary conviction may be based on the uncorroborated testimony of an accomplice).

105. *See Junglaus v. State*, 170 Neb. 704, 708, 104 N.W.2d 327, 331 (1960) (stating

and entering an automobile.¹⁰⁶ As was recognized in the concurring opinion in *State v. Daniels*:

[T]he corroboration requirement in sexual assault cases is judicial predetermination concerning credibility of a class of witnesses, that is, a victim of a sexual assault is not entitled to the same credibility accorded a victim testifying about a crime other than a sexual assault.¹⁰⁷

Thus, is the necessity of corroboration justified only in, for the most part, cases involving charges of sexual assault,¹⁰⁸ and not other crimes?

Apparently, other jurisdictions fail to see any justifications.¹⁰⁹ For example, in *State v. Byers*,¹¹⁰ the Idaho Supreme Court noted that had the prosecutrix been a victim of a battery, her uncorroborated testimony would have been sufficient to convict the defendant.¹¹¹ The court in *Byers* held that there was sufficient evidence to convict the defendant because it saw no "sound basis for continuing the philosophy that rape is distinctive from other crimes to the extent that corroboration is a necessary requirement."¹¹² In *People v. Barnes*,¹¹³ the California Supreme Court reviewed the California Legislature's decision to abolish a requirement that there be evidence of resistance by the victim.¹¹⁴ The court approved of the legislature's actions and noted that evidentiary rules for rape cases were now in "conformity with other crimes such as robbery, kidnapping, and assault, which require force, fear, and nonconsent to convict."¹¹⁵

Until *State v. Feddersen*,¹¹⁶ Iowa had required, in sexual assault cases, jury instructions which advised the jury that rape is a difficult crime to prove and even harder to disprove, while it is a charge that is easily made.¹¹⁷ The Iowa Supreme Court found three major criti-

that an arson conviction may be based on the uncorroborated testimony of an accomplice).

106. See *State v. Oglesby*, 188 Neb. 211, 212, 195 N.W.2d 754, 755 (1972) (stating that a conviction for breaking and entering an automobile may be based on the uncorroborated testimony of an accomplice).

107. *Daniels*, 222 Neb. at 861, 388 N.W.2d at 454 (Shanahan, J., concurring).

108. See *supra* notes 86-90 and accompanying text.

109. See *infra* notes 110-122 and accompanying text.

110. 102 Idaho 159, 627 P.2d 788 (1981).

111. *Id.* at —, 627 P.2d at 793.

112. *Id.*

113. 42 Cal. 3d 284, 721 P.2d 110, 228 Cal. Rptr. 228 (1986).

114. *Id.* at 301-02, 721 P.2d at 120-21, 228 Cal. Rptr. at 238-39.

115. *Id.* at 301-02, 721 P.2d at 120, 228 Cal. Rptr. at 239.

116. 230 N.W.2d 510 (Iowa 1975).

117. *Id.* at 514-15.

The charge of rape against a person is easy to make, difficult to prove, and more difficult to disprove. This charge is a serious one, and if established by the proof beyond a reasonable doubt, should not go unpunished. On the

cisms of such an instruction as it relates to corroboration.¹¹⁸ First, this kind of instruction is essentially a comment by the court on the evidence because it suggests that a prosecutrix in a rape case is more likely to lie.¹¹⁹ Second, the instruction is unfair because it applies a stricter standard of credibility to the victim than is applied to other witnesses.¹²⁰ Third, the court found that a stricter standard of credibility is applied to rape victims than to victims of other crimes.¹²¹ These criticisms were enough for the Iowa Supreme Court to strike down the jury instruction.¹²²

These cases reveal an increasing dissatisfaction with the corroboration requirement.¹²³ In light of these decisions in other jurisdictions, it must be determined in Nebraska if the reasons behind the existence of the corroboration rule are still, if they ever were, justified. A review of the justifications mentioned earlier shows that corroboration is purportedly necessary because: (1) rape is easy to accuse and hard to prove, but even harder to defend against;¹²⁴ (2) false charges are more prevalent with rape than in other crimes;¹²⁵ (3) there are severe penalties for those convicted of rape;¹²⁶ (4) rape is a charge that is easy to prosecute because of the jury's sympathy for the victim;¹²⁷ and, (5) because if there was no other visible evidence, the victim must have consented.¹²⁸ Each of

other hand, the charge is of such a serious character and nature as that the proof offered to establish its commission should have careful consideration.

You will, therefore, carefully consider and weigh all of the evidence offered and submitted to you upon the trial, and all of the facts and circumstances disclosed by the proof, together with all reasonable and ordinary deductions and inferences to be drawn therefrom which may throw light on the question of whether or not the defendant is guilty of the crime of rape.

Id. (quoting Iowa's former uniform jury instruction 524.4).

118. *Id.* at 515. A fourth criticism was that trial courts could give or refuse to give the instruction as they please. *Id.*

119. *Id.*

120. *Id.* The court relied on a former decision for the proposition that the court should not burden one witness' testimony with a higher standard of credibility. *See State v. Bester*, 167 N.W.2d 705 (Iowa 1969).

121. *Id. Feddersen*, 230 N.W.2d at 515.

122. *Id.*

123. *See supra* notes 109-122 and accompanying text. *See also*, *State v. Settle*, 111 Ariz. 394, —, 531 P.2d 151, 153 (1975) (disapproving the use of a cautionary instruction to the jury as to the credibility of the prosecuting witness); *Taylor v. State*, 257 Ind. 664, —, 278 N.E.2d 273, 275 (1972) (stating that a jury instruction which places less credibility on the testimony of the prosecutrix is erroneous); *State v. Cabral*, 122 R.I. 623, —, 410 A.2d 438, 441 (1980) (stating that since eyewitnesses in sex crimes are often unavailable the corroboration requirement is a major obstacle to a conviction).

124. *See supra* note 20 and accompanying text.

125. *See supra* notes 23-25 and accompanying text.

126. *See supra* notes 30-33 and accompanying text.

127. *See supra* note 38 and accompanying text.

128. *See supra* note 37 and accompanying text.

these justifications needs to be reexamined to see if it has any validity today.

The argument that rape is easy to claim and even harder to defend against simply is not supported by empirical evidence.¹²⁹ Many rapists go free without even a police investigation taking place as it has been estimated that at least 50% of forcible rapes go unreported to the police.¹³⁰ Evidence that rape is one of the most highly under-reported crimes goes against the justification that rape is frequently fabricated and reported.¹³¹ It has been stated that a woman reports rape because she is out for revenge,¹³² blackmail,¹³³ or trying to use rape as an excuse for a pregnancy.¹³⁴ However, more logical reasons exist that work to prevent a woman from reporting a rape:

[T]here are the stigma that attach to the victim of an incident culturally defined as sordid, and the humiliation caused by some forms of publicity associated with such charges. Also to be considered are the necessity of confronting the assailant and the reluctance to face the barbs and insinuations of the defense attorney. There is, in addition, the fear of retaliation from the accused rapist or his friends. Finally, there is a deterrent effect of the existence of the corroboration requirement itself, at least to the extent that a potential complainant may be aware of it.¹³⁵

Such disincentives, it is argued, may not affect those who make false accusations.¹³⁶ But statistics reveal that of those rapes that are reported, the conviction rate is low; lower than murder, for instance.¹³⁷ One commentator has stated that the odds are stacked in favor of the rapist to such a degree that a rapist who is fined is "extremely lucky"

129. See Note, *The Rape Corroboration Requirement: Repeal Not Reform*, 81 YALE L.J. 1365, 1382-84 (1972) (stating that studies show that rape is a charge that is much more difficult to prosecute than defend).

130. Tamkin, *Women, Rape and Law Reform*, in RAPE 21 (Tomaselli & Porter ed. 1986).

131. See *supra* notes 22-29 and accompanying text.

132. *State v. Anderson*, 272 Minn. 384, —, 137 N.W.2d 781, 782 (1965) (finding a father innocent of charges that he raped his daughter after he had accused her of being promiscuous).

133. *Dunn v. State*, 127 Tenn. 267, —, 154 S.W. 969, 972 (1913) (setting aside a rape charge after testimony from the prosecutrix that she was blackmailing the defendant).

134. *United States v. Wiley*, 492 F.2d 547, 553 (D.C. Cir. 1973) (Bazelon, C.J., concurring) (discussing that using rape as an excuse for pregnancy has been a justification for the corroboration requirement).

135. Note, 81 YALE L.J., at 1374.

136. *Id.* at 1375.

137. FEDERAL BUREAU OF INVESTIGATION, UNIFORM CRIME REPORTS 1977 218 (1978). Of reported rapes, only 11% were found guilty as charged and 3% were found guilty of lesser offenses. Of reported murders, 33% were found guilty as charged, while about 9% were found guilty of lesser charges. *Id.*

while one who is jailed is "doubly unfortunate."¹³⁸ Thus, any false accusation is not likely to succeed in a conviction, and furthermore, modern crime investigation and other traditional legal rules will protect innocent defendants without a corroboration requirement.¹³⁹

Even more important are the changes in criminal procedure which have taken place since Lord Hale voiced his concerns over false accusations over three-hundred years ago.¹⁴⁰ For example, the idea that the accused is innocent until proven guilty had yet to be solidified as a right.¹⁴¹ Hale's concerns might have been justified and corroboration might have even been necessary when one considers the rights that did not exist in Hale's time; namely, the sixth amendment right to present and compel the presence of witnesses and the right to be represented by counsel.¹⁴² Even if the victim's testimony is the only evidence offered by the prosecution, the court still has the final word on whether the victim's testimony is untrustworthy due to contradictions or unbelievability.¹⁴³ In summation, the corroboration requirement is no longer necessary to protect the rights of the accused.¹⁴⁴

The corroboration requirement is also justified, supposedly, because of the harsh penalties that are given for a conviction of rape.¹⁴⁵ However, as mentioned earlier, one can be convicted of murder through uncorroborated testimony.¹⁴⁶ The penalty for murder in the first degree¹⁴⁷ in Nebraska is death or life imprisonment.¹⁴⁸ Sexual assault in Nebraska is a class II felony¹⁴⁹ which can bring a minimum of one year imprisonment or a maximum of fifty years imprisonment.¹⁵⁰ The argument that corroboration is necessary since the ac-

138. TEMKIN, *supra* note 130, at 23.

139. Note, 81 YALE L.J., at 1375.

140. *People v. Rincon-Pineda*, 14 Cal. 3d 864, 877, 538 P.2d 247, 256, 123 Cal. Rptr. 119, 128 (1975) (discussing charges that have taken place in criminal procedure during the past three centuries).

141. *Id.* at 878, 538 P.2d at 256, 123 Cal. Rptr. at 128.

142. *Id.* at 878, 538 P.2d at 256-57, 123 Cal. Rptr. at 128-29.

143. *Daniels*, 222 Neb. at 860-61, 388 N.W.2d at 453 (Shanahan, J., concurring) (stating that the court determines admissibility of a victim's testimony).

144. *Id.* at 860, 388 N.W.2d at 453 (Shanahan, J., concurring) (stating that "[a]bolishing the corroboration requirement would not jeopardize the rights of an accused").

145. *Wiley*, 492 F.2d at 554 (Bazelon, C.J., concurring) (refuting the justification of the corroboration requirement based on the harsh penalties given).

146. *See supra* note 103 and accompanying text.

147. NEB. REV. STAT. § 28-303 (Reissue 1985) (stating the elements of first degree murder).

148. *Id.* § 29-2522 (Reissue 1985) (setting the standards to be followed by a judge when imposing life imprisonment or death).

149. *Id.* § 28-319(2) (Reissue 1985) (stating that sexual assault is a class II felony).

150. *Id.* § 28-105 (Reissue 1985) (stating that a class II felony may bring between one to fifty years imprisonment).

cused rapist is facing a harsh sentence simply fails when, for murder, one can be sent to prison or possibly even put to death on the basis of uncorroborated testimony.¹⁵¹ But even if one considers only the harshness of the penalty for sexual assault, the advances made in due process should adequately protect the accused from being unjustly sentenced to a long term in prison.¹⁵²

The fourth justification was that rape is a charge that is easy to prosecute because of the jury's sympathy for the victim.¹⁵³ One must first question the validity of this assertion when evidence shows that a rape conviction is harder to obtain than convictions for other crimes.¹⁵⁴ Furthermore, evidence reveals a tendency for juries to sympathize more with the accused,¹⁵⁵ especially if the accused and prosecutrix were acquainted with each other prior to the rape.¹⁵⁶ There being no real evidence that juries sympathize more with the victim, and evidence shows that rape proves to be a difficult conviction,¹⁵⁷ this fourth justification has no validity.¹⁵⁸

151. See NEB. REV. STAT. § 29-2522 (Reissue 1985) (stating that the judge may sentence death or life imprisonment for a person convicted of murder). However, the last person put to death in Nebraska at the time of this writing was Charles Starkweather in 1959. See *Omaha World Herald*, Oct. 11, 1987, at 2-B, col. 1.

152. See *supra* notes 140-44 and accompanying text.

153. See *supra* notes 38-39 and accompanying text. See also *Wiley*, 492 F.2d at 554 (Bazelon, C.J. concurring) (refuting the justification for the corroboration requirement because of jury sympathizing for the victim).

154. *Byers*, 102 Idaho at —, 627 P.2d at 790 (stating that evidence indicates rape is a more difficult conviction to obtain).

155. Note, *Forcible and Statutory Rape: An Exploration of the Operation and Objective of the Consent Standard*, 62 *YALE L.J.* 55, 73 (1952). This sympathy may come as a result of the feeling of disgust that rape arouses in some people. This disgust may spread to the victim who might have been "contaminated" by the incident. *Id.*

156. Note, 81 *YALE L.J.*, at 1379.

157. See *supra* notes 129-138 and accompanying text.

158. *But see* Note, 81 *YALE L.J.*, at 1380-81. However, it is worth mentioning one important instance where jury bias may exist in favor of the prosecutrix:

This is the situation in which a black man has been accused of raping a white woman, and the case is heard before a predominantly white jury. In such circumstances, several hundred black men have been convicted and executed, particularly in the South.

Here, perhaps, there is some merit to the contention that the presumption of innocence may crumble under the rage of the jury. There are means more appropriate and effective than the corroboration requirement, however, for dealing with these relatively infrequent cases. Congress has long provided a criminal sanction for excluding blacks from jury service because of their race; and a criminal conviction of a black cannot stand under the equal protection clause of the Fourteenth Amendment if it is based on an indictment of a grand jury or a conviction by a petit jury from which blacks were excluded by reason of their race. If the prejudice against the defendant is localized, he may be entitled to a change of venue. Where an obviously biased jury has failed to believe strong evidence of innocence, the presiding judge or the appellate court can and must set aside the verdict. Thus, the corroboration requirement is neither the only nor the best means for dealing with the problem of a racially inflamed jury.

Finally, corroboration is based on a view that if other evidence of rape is not present, for example, evidence of a struggle, then the victim must have consented.¹⁵⁹ This view seems at home in the time of Lord Hale, possibly even in 1886 when *Matthews v. State* was decided,¹⁶⁰ but this argument can be considered nothing less than archaic in the 1980's. Rape is now recognized as a crime of violence and not a crime of sex,¹⁶¹ and some studies have revealed that putting up little physical resistance may be sensible,¹⁶² especially in light of the fact that the perpetrator may be armed.¹⁶³ Although other studies reveal that resistance may be beneficial in stopping a rape,¹⁶⁴ just the possibility that resistance may further injure the victim makes the corroboration requirement of mandating the evidence of resistance improper.¹⁶⁵ Lack of physical resistance does not mean that the victim consented.¹⁶⁶

In addition to the justifications for the corroboration requirement being clearly questionable, inconsistencies in Nebraska law also warrant the abolition of the corroboration requirement.¹⁶⁷ In *State v. Willis*,¹⁶⁸ the court explicitly rejected the spousal exclusion for rape, a rule whose beginnings are also attributed to Lord Hale.¹⁶⁹ In reaching its decision, the court cited historical changes, and the Nebraska Legislature's intent when Nebraska switched from a rape statute to a sexual assault statute.¹⁷⁰ Yet, the court has refused to look at the historical changes and legislative intent regarding the corroboration requirement.

Another inconsistency is found in the Nebraska Rules of Evidence.¹⁷¹ Nebraska Evidence Rule 601¹⁷² provides that "[e]very person is competent to be a witness except as otherwise provided in these rules."¹⁷³ Yet the corroboration requirement is explicit in its

Id.

159. See *supra* note 37 and accompanying text.

160. See *supra* note 43-47 and accompanying text.

161. See *supra* note 94 and accompanying text.

162. See *People v. Barnes*, 42 Cal. 3d 284, 300, 721 P.2d 110, 119, 228 Cal. Rptr. 228, 237-38 (1986) (referring to studies that state that physical resistance to a rape may cause physical injury).

163. See J. MACDONALD, RAPE: OFFENDERS AND THEIR VICTIMS, 63 (1971) (stating that weapons are shown to one in four victims).

164. *Barnes*, at 300, 721 P.2d at 119, 228 Cal. Rptr. at 238.

165. *Id.* at 301, 721 P.2d at 120, 228 Cal. Rptr. at 238.

166. *Id.*

167. See *infra* notes 168-75 and accompanying text.

168. 223 Neb. 844, 394 N.W.2d 648 (1986).

169. *Id.* at 846-47, 394 N.W.2d at 650.

170. *Id.* at 846-49, 394 N.W.2d at 650-51.

171. See *infra* notes 186-87 and accompanying text.

172. NEB. REV. STAT. § 27-601 (Reissue 1985).

173. *Id.*

message that victims of sexual assault are not as competent as victims of other crimes.¹⁷⁴ Despite commendable attempts at equality in case law, statutes, and rules of evidence, Nebraska retains its "outdated and discriminatory rule" of corroboration.¹⁷⁵

SUBSEQUENT HISTORY

The Nebraska Supreme Court continued to cling to the corroboration requirement in *State v. Schon*.¹⁷⁶ *Schon* involved an alleged assault upon a six-year old victim.¹⁷⁷ The court stated that the victim "must be corroborated on the material facts and circumstances tending to support the victim's testimony about the principle fact in issue."¹⁷⁸ Corroborating circumstances could be found where the victim made complaint of the rape within a reasonable time subsequent to the alleged assault.¹⁷⁹ The requirement of corroboration, according to the majority, was sufficiently "shown by the changes in the victim's habits, crying, and fear of the defendant, followed by the report to the police that was made within a reasonable time after the assault."¹⁸⁰

Finding sufficient evidence to sustain the defendant's conviction, Justice Shanahan filed a concurring opinion.¹⁸¹ Similar to his concurring opinion in *State v. Daniels*,¹⁸² Justice Shanahan found little reason for the court to continue to "cling to an anachronistic evidential requirement."¹⁸³ Justice Shanahan pointed out the constitutional rights that serve to protect the accused did not exist during the seventeenth century when the corroboration rule in rape cases evolved.¹⁸⁴ He also quoted authority that revealed empirical studies showing the reasons behind the rule to be unjustified.¹⁸⁵ Finally, Justice Shanahan argued that the corroboration rule directly conflicts with the Nebraska Rules of Evidence.¹⁸⁶ Under Neb. Evid. Rule 601,¹⁸⁷ "Every person is competent to be a witness except as otherwise provided in these rules."¹⁸⁸ Yet the corroboration require-

174. *Daniels*, 222 Neb. at 861, 388 N.W.2d at 454.

175. *Id.* at 861-62, 388 N.W.2d at 454.

176. 227 Neb. 482, 484, 418 N.W.2d 242, 244 (1988).

177. *Id.* at 483, 418 N.W.2d at 243.

178. *Id.* at 484, 418 N.W.2d at 244 (citations omitted).

179. *Id.*

180. *Id.* at 485, 418 N.W.2d at 244.

181. *Id.* at 485, 418 N.W.2d at 244 (Shanahan, J., concurring).

182. 222 Neb. at 857-62, 388 N.W.2d at 452-54 (Shanahan, J., concurring).

183. *Schon*, 227 Neb. at 485, 418 N.W.2d at 244 (Shanahan, J., concurring).

184. *Id.* at 486, 418 N.W.2d at 245 (Shanahan, J., concurring).

185. *Id.* at 486-87, 418 N.W.2d at 245 (Shanahan, J., concurring).

186. *Id.* at 487, 418 N.W.2d at 245 (Shanahan, J., concurring).

187. NEB. REV. STAT. § 27-601 (Reissue 1985).

188. *Id.*

ment is a "derogatory comment about a victim's testimony "that applies to a victim of sexual assault, but does not apply to victims of other crimes.¹⁸⁹ Justice Shanahan concluded that the majority is "clutching a rule without a reason."¹⁹⁰

CONCLUSION

Nebraska is the only jurisdiction to retain a corroboration requirement.¹⁹¹ Yet being in the minority is not in and of itself a bad thing; sometimes being in the minority and "sticking to one's guns" can be laudable. But when the reasons behind one's position are unjustified and outdated, the uniqueness of one's position can be embarrassing. Are there any reasons whatsoever for the existence of the corroboration requirement? In the opinion of one writer, the only reasons for the corroboration requirement are "atavism and sexism."¹⁹² It would be hard to believe that the Nebraska Supreme Court is sexist, as is evidenced by its treatment of the spousal exclusion rule in *State v. Willis*.¹⁹³ Yet the same court has also stated, in 1986 no less, that any woman who was raped, yet said nothing about it in a short period of time following the rape, is contradicting herself.¹⁹⁴ This statement ignores the fact that rape is a humiliating experience, and that the woman may be afraid to report the offense because she does not trust the police, or the victim may be afraid because she knows the offender.¹⁹⁵ It is time for Nebraska to enter the twentieth century and say farewell to the corroboration requirement.

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189. *Schon*, 227 Neb. at 487, 418 N.W.2d at 246 (Shanahan, J., concurring).

190. *Id.* at 489, 418 N.W.2d at 246 (Shanahan, J., concurring).

191. *See supra* note 42 and accompanying text.

192. Temkin, *supra* note 130, at 25.

193. *See supra* notes 168-170 and accompanying text.

194. *See supra* note 73 and accompanying text.

195. Temkin, *supra* note 130, at 22.

