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The Prison Journal 1988; 68; 3

DOI: 10.1177/003288558806800203

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Rape Law Reform: How Far Have We Come?

*Diane M. Daane**

Introduction

An understanding of the rape reform movement must begin by looking at the crime of rape as it existed in its earliest form and at common law. Originally, rape laws were designed to protect men's property interest, not the victim of the assault. At that time, women were considered to be the property of men. Married women were the property of their husbands; single women were the property of their fathers. In theory, only chaste married women or virginal girls in their fathers' homes could successfully prosecute a rapist.

Rape at common law was defined as "carnal knowledge of a woman by force and against her will" (Blackstone, 210-215). This definition alone raises many issues, as does court interpretation of this definition. Common law rape was adopted and later codified by most jurisdictions in the United States. Very little change occurred in these common law codifications prior to 1975. The early reform that did take place during the 1960's generally followed the Model Penal Code.

During the 1970's, feminist groups lobbied for rape reform. They took issue with common law codifications as well as the Model Penal Code. In the late seventies, most states reformed their rape laws in response to these efforts. This article will serve as an overview of the major issues in rape reform legislation over the past fifteen years. It will discuss the successes and failures of reform efforts.

Force and Consent in Rape

Force and consent in rape are two separate issues. However, at common law, both were determined by the amount of resistance offered by the victim. Resistance by the victim was not required in the definition of rape, but became a judicially imposed element of the crime. It was believed that a virtuous woman would rather die than submit to sexual intercourse with a male other than her husband. Her resistance was required to be active and to the utmost of her ability. If she did not actively resist her attacker with all of her strength, then there was no force. Resistance was measured by physical injury to the victim. It was believed that if the attacker had to use force to overcome the victim's strongest possible resistance, then she must sustain some injury in the process. The force of sexual penetration alone was not sufficient to meet the force element of rape. Injuries suffered due to penetration were not sufficient to show resistance and force.

The resistance requirement made the victim's conduct the emphasis of the trial rather than the defendant's conduct. The rapist may have been the accused, but the victim was the person on trial. There is no other crime where the victim is required to prove one's own good conduct as an element of the crime.

The common law utmost resistance standard was adopted by most states and even codified in some. The first changes in the utmost resistance standard came through case law in a few states. Most of these changes merely reduced the amount of resistance required. For example, during the 1950's, Texas courts modified their utmost resistance requirement to "resistance sufficient under the circumstances" (*Lewis v. State*, 1950). The drafters of the Model Penal Code suggested elimination of the resistance requirement.

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Feminists attacked the resistance requirement for rape victims during the 1970's. By this time, studies indicated that victim resistance in sexual attack tended to escalate the violence by the attacker. Victims were essentially in a position of submitting to the rape to save their lives, with very little chance of successful prosecution, or resisting the rape and risking death in order to prosecute the rapist. The first major victory for rape reform advocates came in Michigan in 1975 (Mich. Comp. Laws Ann. 1975). Michigan's reform statute not only abolished the requirement that the victim resist her attacker, it also nearly eliminated all reference to the conduct of the victim.

Many states did not follow Michigan's lead by completely eliminating the resistance requirement. However, some states did reduce the amount of resistance necessary. This reduction in the resistance requirement came through both legislation and case law. While Texas was one of the first states to reduce the amount of resistance through case law, a series of revisions of the Texas penal code maintained a force requirement in the sexual assault statute (Vernon, 1987). This force is measured by sufficient resistance under the circumstances and continues to focus on the victim's conduct to determine whether the defendant's conduct was criminal. Other states eliminated the resistance requirement only when the victim is placed in fear. Generally, this fear must be of death or serious bodily injury. Rape itself has not been found to be serious bodily injury.

In some states, the resistance requirement underwent several changes before reaching fear as a replacement to the force element in rape. In New York, the law required utmost resistance until 1977 when the law was modified to require earnest resistance (McKinney, 1977). Earnest resistance is resistance that is reasonable under the circumstances. In 1982, New York eliminated the earnest resistance requirement and replaced it with a requirement of force or threat which places the victim in fear of immediate death or serious bodily injury (McKinney, 1982). The memorandum in support of the legislation stated: "The elimination of victim resistance makes a long overdue policy statement that submission to a sexual attack to preserve one's life or safety is not consent to a sex crime" (McKinney, 1987).

This fear requirement has produced interesting results in the criminal justice system. For example, under New York's fear statute, a victim fiercely resisted her known attacker who knocked down the bathroom door and raped her twice. The prosecutor in the county was reluctant to file rape charges against the attacker because the victim did not fear death or bodily injury other than rape (Clemens, 1983:894-95). This action was clearly opposed to the legislative intent to remove the victim's conduct as an element of rape. New York again amended its statute to make it clear that the use of physical force alone or fear of any physical injury is sufficient force for rape (McKinney, 1983).

The Rape Actus Reus

Under common law, rape was limited to carnal knowledge. This was generally interpreted by the courts as sexual intercourse between a man and a woman. Common law rape did not include any other type of sexual assault. When common law was codified by most states, the carnal knowledge rule was adopted.

Until the 1970's, most states could not prosecute someone who forced their victim to participate in cunnilingus, fellatio, or anal intercourse. Other problems created by this limited definition of the actus reus in rape are the exclusion of homosexual sexual assault and rape by instrumentation.

Many states resolved these issues through reform during the late 1970's. Michigan, for example, reformed the actus reus in its first and third degree sexual conduct

statutes to include "sexual penetration" defined as "sexual intercourse, cunnilingus, fellatio, anal intercourse, or any intrusion, however slight, of any part of a person's body or of any object into the genital or anal openings of another person's body . . ." (Mich. Comp. Laws Ann., 1975). Michigan also has a sexual contact provision for second and fourth degree sexual conduct. Sexual contact in Michigan includes touching the victim or actor's intimate parts or the clothing covering the victim's intimate parts (Mich. Comp. Laws Ann., 1975).

Other states maintained rape laws limiting the prohibited acts to heterosexual sexual intercourse, but enacted statutes aimed specifically at dealing with situations of sexual assault which were not included in the rape statute. For example, Indiana adopted a criminal deviate conduct statute during an overall reform of the criminal code in 1976 (Burns, 1976). The statute is similar to the rape statute, except that it prohibits deviate sexual conduct rather than sexual intercourse. Deviate sexual conduct is defined as an act involving: (1) a sex organ of one person and the mouth or anus of another person; or (2) the penetration of the sex organ or anus of a person by an object (Burns, 1976).

Sex Neutral Statutes

An issue closely related to the actus reus problem in rape is that of protecting only one sex. Common law was very specific that only a female could be the victim of rape. While the actus reus limited the crime to heterosexual sexual intercourse, traditionally a female could not rape a male. The Model Penal Code made lesser sexual offenses sex neutral, but retained the limitation of a female victim in the rape statute. Reform prior to 1975 tended to follow the Model Penal Code. Feminists lobbied against the adoption of the Model Penal Code in the late 1970's, using the argument that rape provisions that were not sex neutral were sexist and outdated.

Changes in rape law in the late 1970's brought about protection for males with the introduction of sex neutral statutes. Many states substituted the words person, victim, or anyone for the terms female or woman or feminine pronouns. Michigan's 1975 statute used completely sex neutral terms (Mich. Comp. Laws Ann., 1975).

A problem that still remains in many states is that while sex neutral terms were adopted, the definition of sexual intercourse still limits rape. While a male can now be a victim in many states, the definition of sexual intercourse often prohibits prosecution if the attacker is also male. For example, Oklahoma amended their rape statute in 1981, providing for the possibility of the victim in a rape prosecution to be male (West, 1981). However, the actus reus under Oklahoma's rape law specifies sexual intercourse. Since sexual intercourse is not specifically defined in the statutes, case law interprets the phrase as meaning penetration by a man's penis into a woman's vagina. Thus, the Oklahoma rape statute excluded homosexual rape by its definition of sexual intercourse. This problem may have been eliminated by the 1987 Oklahoma statute prohibiting rape by instrumentation (West, 1987).

Grading

Many states that have reformed their rape statute have graded it to replace the common law single category of rape. The most common grading scheme divides rape into two degrees: simple rape or second degree rape and aggravated or first degree rape.

Texas, for example, divided rape into two degrees in 1974. Second degree rape in Texas under this law remained a carnal knowledge crime. Aggravated rape

occurred when, in addition to the elements necessary for second degree rape, (1) the offender causes serious bodily injury or attempts to cause death to the victim, or (2) the offender compels submission to the rape by threat of death, serious bodily injury, or kidnapping (Vernon, 1974). In Texas, the statutory definition of serious bodily injury was “. . . bodily injury that creates a risk of death or that causes death, serious permanent disfigurement, or protracted loss or impairment of the functions of any body member or organ” (Vernon, 1974).

This early and fairly minor attempt at reform in Texas led to a major complication. In *Rucker v. State*, the defendant hid in the backseat of the victim's car (*Rucker v. State*, 1979). When the victim got into her car, he repeatedly assaulted her as he forced her to drive to a secluded area. He raped her several times and then forced her to run as far and as fast as she could under threat that he would shoot her. The victim suffered black and swollen eyes, cuts, a swollen face, bruised breasts and chest, scratches, poison ivy, and pain. The appellate court reversed the aggravated rape conviction on the grounds that no serious bodily injury was sustained by the victim and that the victim was not compelled to submit by an express verbal threat. Therefore, the elements required for an aggravated rape conviction had not been met. The Texas legislature again reformed its rape law in response to *Rucker*, requiring force similar to that needed for robbery in the aggravated rape statute (Vernon, 1982).

This disturbing case resulted in a step which put rape in Texas more in line with other crimes. Terminology which had already been defined for robbery was used to avoid the problem which arose in *Rucker*. Putting rape on equal footing with other crimes was one of the major goals of reform advocates.

Penalty Structure

Reform very closely related to grading involves reform of the penalty structure. Under common law codifications, a rape conviction carried very serious penalties, usually death or life imprisonment. It was felt that these harsh penalties were responsible for the small number of rape convictions. Reformers believed that a reduction in the penalty for rape would result in a high number of rape convictions. It was hoped that a jury would be much less hesitant to convict an offender if the required penalty was not death or a long prison sentence. With graded rape statutes, simple rape often carries a penalty between two and twenty years of imprisonment. States which have not graded their rape law have also generally reduced the penalty in response to reform efforts.

Not all reformers are in agreement over this reform effort. Some believe that a reduction in penalty minimizes the seriousness of rape. Some also believe that the increased plea bargaining and charge bargaining as a result of grading and a reduction in penalties have an adverse effect on the rights of the victim and women in general. However, an increase in the number of guilty pleas often means an increase in the total number of convictions and a decrease in the number of victims who must endure the trauma of a trial.

Marital Rape

Since rape laws began as a protection for men's property interest, it is not surprising that at common law a man could not be convicted of raping his wife. This notion was based on the following premises: that a married woman was her husband's property; that when a woman marries, she is consenting to sexual intercourse on demand; and that sex was a marital issue and should be resolved within the marriage and not in the courts.

The marital rape exception has remained alive and well for many centuries. It was not until the late 1970's that change was even realistically considered. The first and one of the most progressive rape reform efforts did not bring about the demise of the marital rape exception. Michigan did not criminalize marital rape in its 1975 reform. The first states to recognize marital rape as a crime were New Jersey, Oregon, and Nebraska.

Marital rape reform efforts have met with substantial resistance. Even in New Jersey, where the marital rape exception was eliminated by statute, an attempt to repeal the statute was only narrowly defeated. While few states immediately accepted the idea of marital rape, reform efforts were not completely in vain. Many states adopted a modified version of the marital rape exception. Indiana's statute is typical of those states which allow marital rape under certain circumstances. The Indiana rape law does not apply to sexual intercourse between spouses unless the spouses are separated and there has been a petition for dissolution or legal separation or a protective order filed and pending (Burns, 1984). It does not matter how much force was used or how much injury was sustained by the victim. If these requirements have not been met in Indiana, it is not rape.

While this limited form of marital rape is a step in the right direction, there is often no protection for the victim who is separated from the attacker but has not yet filed any papers with the court. There is also no protection for the spouse who is brutally attacked while living in the marital home. Many states still presume that she consented to even brutal sexual attack. Other states now recognize marital rape when physical injury and violence accompany the rape.

Often the only recourse available when there is marital rape is prosecution under the battery statute. However, some states which do not provide for marital rape under their rape statute have a sexual battery or sexual assault statute which includes marital rape. The penalties are often less severe than for rape, but at least marital rape is criminalized. In 1987, Indiana enacted a sexual battery statute which does not specifically preclude marital rape (Burns, 1987). In 1984 the New York Court of Appeals ruled the marital rape exemption to be constitutional (*People v. Liberta*, 1985). The court found that a married woman has the same right to control her own body as a single woman. Marital rape is still very much a concern of reformers. This is one area of rape law still undergoing active reform at the present time.

Rape Shield Statutes

One major concern of proponents of rape reform has been protection of the victim during trial. At common law, the victim's prior sexual relations were admissible to show consent. The theory was that once a woman consents to one man, she will consent to any man. This is yet another area where the focus is on the victim's behavior rather than the defendant's behavior. It was not unusual for the victim to be questioned about her sexual activity, use of birth control, illegitimate children, and even unescorted presence at bars. Cross-examination as well as testimony by other witnesses were not limited to specific instances of sexual activity. In addition, witnesses were called to testify regarding the victim's reputation for chastity (or reputation for lack of chastity) in the community. Prior sexual conduct of the victim was sometimes even offered to show the victim's lack of credibility as a witness. It was believed that unchaste women were likely to lie.

Statutes separate from the actual rape law have been utilized to produce evidentiary rules which protect the victim from unnecessary embarrassment at trial. This was found to be the easiest rape reform measure to accomplish, and was often

the first reform introduced to a state legislature. Changing societal attitudes about sex and women's role in society were probably major reasons for the relative ease of passing such statutes.

Most states now have laws called rape shield statutes limiting evidence of the victim's past sexual conduct with third persons. Michigan enacted one of the most protective statutes excluding all evidence of the victim's prior sexual conduct with persons other than the defendant unless it is to show the origin of semen, pregnancy, or disease (Mich. Comp. Laws Ann., 1975). The protection adopted in most states has not been as far reaching. Typical statutes call only for a pretrial hearing to determine the relevance of evidence of the victim's past sexual conduct to show consent.

Some rape shield statutes cured only part of the problem and created others. For example, Pennsylvania enacted a rape shield statute in 1976 providing that the victim's reputation for chastity and specific instances of the victim's past sexual activity with third persons are not admissible unless consent is an issue (Purdon, 1976). In order to introduce such evidence, the defendant is required to file a motion and an offer of proof showing the relevance of the evidence. Relevance and admissibility are then determined in a hearing.

This Pennsylvania statute is atypical in that it does not allow the introduction of evidence of the victim's prior sexual conduct to explain the presence of the physical signs of rape such as pregnancy, venereal disease, or the presence of semen. Critics have argued that this violates the defendant's constitutional rights to confrontation and a fair trial.

The problem with Pennsylvania's rape shield statute as enacted in 1976 is twofold. First, it still allows evidence of the victim's prior sexual activity to show the likelihood of consent. One reason rape shield laws were created was to protect the victim from embarrassing questions at trial and to eliminate the focus on the victim's behavior rather than the defendant's behavior. It is questionable at best to assume that a woman who is not a virgin will consent to sex in any situation. Society's changing attitude toward sex has removed the stigma from a female's loss of virginity. Pennsylvania's statute does not stop the focus on the victim's behavior, it merely requires the defense to overcome minor obstacles before using the victim's prior sexual conduct to show consent. Second, the fact that the statute does not allow the defendant to show sexual activity with a third person to explain the physical signs of rape could potentially infringe upon the defendant's right to a fair trial. While there is the potential for abuse by the defendant when allowed to show prior sexual behavior to explain the physical signs of rape, there must be the balancing of the defendant's right to a fair trial and the desire to protect the victim from embarrassment and trauma.

Perhaps a better approach to rape shield laws is found in the Indiana statute (Burns, 1985). Under Indiana law, evidence of the victim's past sexual conduct, as well as opinion and reputation evidence as to the victim's prior sexual conduct, is inadmissible except: (1) where the victim's past sexual conduct was with the defendant, (2) the physical signs of sexual activity at the time in question were the result of a sex act with a third person, or (3) the victim's pregnancy at the time of trial was not caused by the defendant. In order for either the prosecution or the defense to use such evidence as allowed in the exceptions, a motion and an affidavit of an offer of proof must be filed. If the affidavit is sufficient, the court will order an in-camera hearing for questioning the witness in order for the court to determine whether the evidence is admissible.

Indiana's statute reduces the focus on the behavior of the victim and protects the victim from unnecessarily embarrassing questions at trial. Unlike the Pennsylvania statute, the Indiana statute does allow evidence that the physical evidence

of sexual intercourse was the result of acts committed by a third person. This reduces the potential conflict with the defendant's right to confrontation and a fair trial.

Another evidentiary issue in rape cases is whether the victim's prior sexual conduct may be used as impeachment. Rape shield statutes were generally enacted to prohibit such evidence to show consent. Whether evidence of the victim's prior sexual conduct is admissible to discredit the witness has not been addressed by most statutes. In many states, while the victim's prior sexual conduct is not allowed to show consent, the defense may use it to show that the victim is not a credible witness.

Even with rape shield statutes, in many cases, there is still an emphasis on the victim's conduct rather than the defendant's conduct. This is due to poorly drafted or ineffective statutes, attitudes which still exist in society, and the fact that in many instances the statutes are ignored or applied incorrectly by practicing attorneys and the courts.

Conclusion

Rape reform has addressed many issues in the area of rape. It has attacked the substantive components of the crime as well as evidentiary matters. Efforts have been made to put rape in line with other crimes against the person. These efforts have encountered many obstacles. In some instances, reform efforts which appeared to solve a problem perceived with existing rape law caused more problems than they solved simply by the wording or by the interpretation used by the court. It is important that proponents of rape reform legislation look to the efforts of others to learn from their successes, mistakes, and failures.

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