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RAPE AND RAPE LAWS

I

Of all violent crimes, rape is one of the most abhorrent to society in general and to women in particular. As of 1973, forcible rape offenses were up 62 percent from 1968. From 1972 to 1973 the nationwide incidence of rape increased from 22.3 to 24.3 per 100,000 persons. In Nevada in this period, rape per 100,000 residents increased from 34.0 to 46.0. There were 62.2 rapes per 100,000 residents in Las Vegas and Clark County in 1973 and 32.4 per 100,000 residents in Reno and Washoe County.

Lawmakers, with the approbation of their constitutents, have reacted by enacting heavy penalties for perpetrators of this heinous crime. Yet, few persons charged with the crime of rape are ever tried and still fewer are convicted. Willingness to pass laws sentencing rape offenders to life imprisonment or even death, combined with reluctance to actually convict persons accused of rape, is only one example of society's ambivalence on the subject. Part of the reason for this ambivalence is that rape laws are rooted in an era when women were considered the property to fathers or husbands. A rape was an attack on a man's property and a threat to the certainty of paternity.

For the victim, the rape itself may be one of the least traumatic aspects of the entire experience surrounding it. Various studies estimate that police records show only 5 to 30 percent of actual rapes committed. Failure to report rapes is attributed by some experts to the malfunction of law enforcement mechanisms as well as to the inequity of rape laws. After calling the police, the rape victim who decides to report the crime next must go to an emergency room to be examined for the purpose of gathering evidence. Pictures may be taken, policemen may be present during the examination, and the victim frequently is not informed of available treatment for possible venereal disease, pregnancy or psychological problems. In almost every case, the victim is billed for the examination.

The next step for the rape victim is to undergo further police questioning which may or may not be performed by someone experienced or trained in dealing with rape or crimes of sexual assault. Following questioning of the victim, approximately 18 percent of reported rapes are deemed without merit, according to FBI Uniform Crime Reports. For various reasons, law enforcement authorities decide not to recommend prosecution. A finding of no merit may occur as a result of victim intoxication, delay in reporting the crime, lack of physical condition supporting the allegation, victim's refusal to submit to a medical examination, establishment of prior relationship between victim and offender, or failure on the victim's part to preserve the necessary physical evidence. One writer observes that these reasons for not pursuing charges of rape do not relate primarily to whether or not rape was committed, but to the chances for obtaining a conviction.

Assuming that a suspect has been arrested and that the victim's case has been determined to be prosecutable, the next step is trial for those defendants pleading not guilty. At this point, the rape victim must surmount three obstacles-- 1) statutory provisions with regard to proof of rape, admissibility of evidence and sentencing, 2) judicial decisions concerning admissibility of evidence and instructions to the jury, and 3) jury attitudes toward the victim. National figures indicate that of all adults arrested for forcible rape in 1973, 76 percent were prosecuted. Of those cases prosecuted, 36 percent of the defendants were found guilty of the substantive offense and 17 percent guilty of a lesser offense.

It has been said of rape that it is the easiest crime to allege and the most difficult to prove. Some states have required that in order for a defendant to be found guilty of rape, corroborative evidence must be provided in addition to the victim's testimony. Furthermore, the credibility of the victim's testimony may be impeached by laws which allow a victim's past sexual conduct to be admitted as evidence. The implication of laws of this nature is that once a woman has sexual relations with one man she no longer retains the right to protection of the law in cases of rape. While the law looks upon a defendant's sexual activity and in come cases even alleged prior criminal sexual activity as irrelevant to his truthfulness, a sexually active woman's testimony is likely to be regarded suspiciously. Finally, exceedingly long sentences established by law may serve to deter conviction for rape instead of deterring the crime itself.

Even where the law is not specific with regard to admitting evidence of a victim's prior sexual history, the presiding judge may allow such testimony and in some cases may instruct the jury that a victim's code of chastity is relevant both to the witness's credibility and to the issue of whether or not the person consented to sexual intercourse. In a study of 38 Philadelphia judges with experience in rape trials, one researcher found that judicial attitudes toward rape indicate a fairly high level of skepticism. Interviewed judges generally grouped rape victims into three degrees of credibility. Genuine victims comprised the first category and were viewed as persons attacked in circumstances easily ascertained as forcible rape, such as the "stranger leaping out of the shadows in the dark alley" situation. Interestingly, according to FBI Uniform Crime statistics, in almost half the cases of reported rape, the victim and offender were acquainted to some degree. In addition, one-third of all reported rapes occur in the victim's abode. The second and third categories of judge-interpreted credibility were situations of consensual intercourse and female vindictiveness.

The study of judicial attitudes found that responding judges in weighing evidence in rape cases gave the heaviest credence to circumstantial evidence. Such evidence might include the victim's prior sexual history, evidence of the victim's resistance to force, intoxication of the victim and age differential between the victim and the offender. Clearly, in many instances it is the victim who is on trial, not the defendant.

Finally, the rape victim faces the jury, which may be so circumscribed by legal and judicial prescriptions and instructions that it has little choice but to acquit the defendant. While it may be believed that juries are inclined to be overly sympathetic to rape victims, it is also possible that harsh sentences influence juries to side with defendants. Societal attitudes also may affect juries' willingness to convict. Myths that women enjoy assaults or that men are subject to uncontrollable passions may dissuade juries from blaming offenders for rape.

II

In the last 2 years several states have taken action to revise their rape statutes in response to problems such as those described in section I of this paper.

California in 1974 enacted a package of rape reform laws. Possibly the most significant act concerns evidence and is known as Robbins Rape Evidence Law. Opinion and reputation evidence, as well as conduct, may not be introduced as evidence by the defendant to prove consent to sexual intercourse. This standard does not apply when the complaining witness's prior conduct was with the defendant. Procedure is set up to determine the relevancy of past sexual conduct before it can be introduced to challenge the complaining witness's credibility.

Another part of the California rape reform package concerns instructions to the jury in criminal prosecution for rape or unlawful sexual intercourse. This statute prohibits instructions to the effect that it may be inferred that a female who has previously consented to sexual intercourse with persons other than the defendant would be more likely to consent to sexual intercourse again. The judge may not instruct the jury that sexual conduct in and of itself may be considered in judging the complaining witness's credibility. Furthermore, still another new California law prohibits use of the term "unchaste character" by any court in any jury instructions where the defendant is charged with rape, unlawful sexual intercourse or assault with the intent to commit such crimes. California also prohibits charging sexual assault victims for costs incurred by hospitals or emergency medical facilities for examinations for the purpose of gathering evidence. Local government agencies are to be billed for such costs.

Finally, California adopted a series of resolutions dealing with the training of officers who handle rape cases and with treatment by hospitals for problems such as venereal disease, pregnancy and other possible medical problems which may accompany rape.

New York and Connecticut both enacted new laws which delete the requirement that rape victims produce corroborating evidence. New York makes an exception to this rule in cases where lack of consent is an element resulting from the victim's age or mental condition.

In 1974, Iowa enacted a law similar to California's which excludes evidence of a victim's past sexual conduct in trials of rape and forbids mention of said conduct in front of the jury. However, if the defendant makes application to the court to admit evidence of this nature, the court in camera conducts a hearing

as to the relevancy of the information and controls the admittance or exclusion of the evidence. In no instance may a victim's past sexual conduct which occurred more than 1 year prior to the date of the crime be admissible unless the conduct was with the defendant.

After much debate and discussion, Michigan in 1974 enacted what many persons hail as a model rape law. The new Michigan statute removes from the victim and prosecution the burden of proof of nonconsent to sexual assault and no longer requires "resistance to the utmost" by the victim to prove the fact of assault. Cross examination about a victim's chastity and sexual reputation is banned with two exceptions: 1) cases of prior sexual activity with the accused, and 2) in certain instances where there is evidence of sexual activity showing the origin of disease or pregnancy. Michigan's law defines a criminal penetration and contact to include any situation where the victim is forced to commit an act on the body of the accused; threat and coercion extend to threat of future retaliation. Criminal sexual conduct is defined by degree, and sentencing is prescribed according to that degree schedule.

Two unique areas of concern were enacted into Michigan law. First of all, the new sexual assault statute protects a married person from sexual assault by the spouse when either has filed for divorce, or have separated and are living apart. Secondly, Michigan's law is notable in that it is sex neutral, covering victims and offenders of both sexes equally. Thus, increased protection is offered to victim's of homosexual assault.

III

The incidence of rape in Nevada per 100,000 residents is higher than the average for the United States. In 1973, there were 252 rapes in Nevada; in the first three quarters of 1974, there were 188 rapes in the state. Of the 188 reported rapes, 83 were cleared from police records by arrest or other means. As would be expected, the incidence of rape is higher in urban areas than in rural areas.

In 1973, Clark County reported 150 rapes; 11 cases were submitted for prosecution and 9 cases were approved for prosecution. Four of these cases were dismissed or plead guilty; two cases were set over to 1974 and three cases went to trial. Of the three going to trial, two defendants were found guilty and one case

was set over to 1974. In the first three quarters of 1974, there were 86 reported rapes in Clark County; 62 cases were submitted for prosecution and 52 cases were approved for prosecution. In 1974, 16 cases went to trial; 10 persons were found guilty, three persons were found not guilty and three mistrials were declared.

Unfortunately, detailed information on rape cases in Washoe County is not available. In Washoe County in 1973 there were 17 reported rapes; 16 charges were made and no cases went to trial. In the first three quarters of 1974, 20 rapes were reported in the county and 18 charges were made. No cases went to trial.

Nevada Revised Statutes (200.363-200.375) define forcible rape as carnal knowledge of a female against her will. Any sexual penetration, however slight, is sufficient to complete carnal knowledge. Penalties for the offense of rape are dependent on the degree of bodily harm inflicted. Cases of substantial bodily harm may result in either sentences of life without possibility of parole or life with the possibility of parole after 10 years. Conviction for rape without substantial bodily harm may result in imprisonment for life or a definite term of not less than 5 years; in either case, parole is possible after 5 years. In Nevada, a husband may not be convicted of raping his wife unless he is an accomplice or an accessory to the rape of his wife by a third person.

There are no Nevada statutes concerning instructions to the jury or admissibility of evidence which are peculiar to the crime of rape. NRS 175.171 requires that no special instructions shall be given to the jury relating exclusively to the testimony of the defendant. The question of instructions to the jury concerning the victim's credibility is left open. NRS 48.045 makes character evidence inadmissible to prove conduct; however, an accused may offer evidence of the character of the victim of the crime.

IV

In recent years, there have been many suggestions for the reform of laws concerning rape and sexual assault. Most of the current proposals emphasize the rights of the victim who later becomes the accuser in court action. However, all reform of this nature must be considered in light of our system of justice which regards the defendant innocent until proven guilty. Balancing these

rights in order to obtain protection for victims from sexual assault and yet retain protection for the innocent persons charged with sexual crimes is the heart of the matter. Nevertheless, when we look at the very low percentage of persons going to trial or being convicted, it appears that it may be time to give additional consideration to victims of rape, both female and male.

The Michigan Women's Task Force on Rape offers the following suggestions for improving sexual assault laws:

1) Bring all sex crimes under the legal concept of crimes of violence, rather than making rape a unique category.

2) Provide for degrees of sexual conduct according to the severity and degree of coercion and violence.

3) Specifically define different types of acts constituting sexual assault, describing behavior of the offender only.

4) Place the burden of proof for consent to sexual intercourse on the offender who presents a consent defense.

5) Protect persons from rape by spouse.

6) Define rape to include other forms of nonconsensual sexual intercourse, such as forcible sodomy.

7) Describe rape in non sex-specific terms.

8) Provide compensation to victims of sexual assault for specific costs incurred as a direct or related result of the criminal act.

9) Give objective treatment to cases whether or not victim and offender were previously acquainted.

Another author writing in the California Law Review offers further ideas for reforming rape laws:

1) Revise statutes allowing evidence or special instructions to the jury which impeach a victim's credibility on the basis of prior sexual experience, or mere acquaintance of victim and accused.

2) Reduce excessively high sentences to levels where juries will not be reluctant to convict.

3) Broaden the definition of sexual assault to include certain contact other than penetration.

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