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Sexual Misconduct Law: The History of Prioritizing Purity Above Protection

The legal culture surrounding rape and sexual assault has evolved through the centuries in a manner that exhibits progress, but hungers for further reform. In the past, laws prohibiting rape were centered around protecting the moral and religious values of purity, as well as “delicate” females in order to preserve the property of men. The evolution of rape and sexual assault law has been nuanced by generations of gender and racial stereotypes, cultural and religious norms, and sexist tendencies within lawmaking bodies. Consequently, the evolution of modern rape law has been slow to develop and is studded with unjust wrinkles yet to be ironed out by proper legislation. The criminal charge of rape was first classified as a property crime under Common Law and has recently progressed to envelop a broader definition as a gender-neutral assault; this transition has taken centuries to come to fruition.

Consent has been a component of rape law that dates back as far as the sixteenth-century Common Law. During this period, the age of consent was reformed from twelve-years old to just ten; when colonists were adopting laws in North America they utilized this Common Law language (Jailbit 10). The true purpose of these rape laws was not so much to protect young girls from sexual violence, but rather to preserve the religious and moral values of premarital purity (Cocca 11). Women were considered property under coverture laws, and colonial rape laws helped to ensure that the future property of husbands—or the wife’s body—was chaste when he took possession. This age of consent protection only was applicable to white girls and consequently reinforced sexual abuse of black females (Cocca). During this period of history, rape was a strict liability property crime that reinforced gender stereotypes and diminished the autonomy and personal property of females (Cocca).

In 1793 The New Virginia Justice was published. This work, by William Waller Hening, provides detailed and comprehensive information about eighteenth and nineteenth-century Virginia law and includes a complete section on rape. The New Virginia Justice contained the laws that governed the rape charge trial of John Deskins in 1806, an eighteenth-century rape trial that has miraculously been recorded through the lead prosecution attorney's diligent notes. Within Hening's work multiple "progressive" ideas surrounding rape law are featured. Women could testify against their husbands, and marital rape was included as an illegal offense (Hening 359). Additionally, women were included as potential principals of sexual crime, and a rape charge was not mitigated if the victim gave consent in response to threat or fear of death (Hening 355-359). Additionally, it was insufficient to show that the victim was a "common strumpet" because she was still entitled to lawful protection, and obtaining consent after the fact was also not a mitigating piece of evidence (Hening). In the trial of John Deskins, the victim, Sidney Henson reportedly did yield to the attack and the defense team argued that she had been promiscuous in the past (Smyth 5, 71). This evidence was provided to the jury, but under the law these two circumstances were insufficient to prove Mr. Deskins not guilty of rape. Under The New Virginia Justice law, rape was defined as the following:

An offence in having unlawful and carnal knowledge of a woman by force and against her will. But it is said that no assault upon a woman in order to ravish her, however shameless and outrageous it may be, if it proceed not to some degree of penetration, and also of emission, can amount to rape; however, it is said that emission is prima facie an evidence of penetration.

This 1790s rape law was very narrow in definition and it would be many years before broader forms of unwanted sexual contact were considered to fall under the category of rape. Proving a

violation of this law required that the victim be credible and of “good fame”, corroborative circumstances must be provided, and signs of injury must have been present and noticeable. The victim was also required to have cried out during the attack, could not have delayed disclosure, and the rape could not have occurred in an “improbable place” (Hening). The burden of proof was high for the victim of rape in the eighteenth and nineteenth centuries and consequently the victim would often undergo a sort of trial, herself, to prove good fame and establish her credibility and level of chastity. In the case of Sidney Henson, her good character was attested to by more than twenty witnesses, the fact that no one heard her cries was heavily argued, and her immediate disclosure to a third party was noted as evidence (Smyth). Henson and her lawyers were able to meet the burden through an uphill battle, but it wasn’t for many years that rape law reform made cases less about the victim’s chastity and character and more about preventing sexual violence.

In the eighteenth century, rapes were commonly reported within newspapers. Reported attacks would include information about both the victim and the alleged assailant, but a racial component of sexual stereotype was featured with the headlines. Between the years of 1728 and 1776, twenty-one newspapers that served the people of nine colonies reported stories of nearly one-hundred rapes (Block). The racial identity of the victim and the assailant was of key importance to these reports—a white attacker raping a white victim was treated in a far different manner than a black attacker raping a white victim (Block). Reports that told the story of a white attacker focused on the disgusting details of the attack and framed the attacker as a “misguided individual” while crimes committed by black men were reported with a focus on the assailant’s racial identity (Block). Black men were positioned as members of a race with insatiable sexual desire, and consequently reports of black attackers did not require the inclusion of the details of

the attack. The severity of white rapists' actions had to be described to convince an audience of the reality of an attack while the atrocity of actions was assumed of black assailants. This societal attitude contributed to the conviction rates of these alleged attackers. Not a single accused black defendant is known to have been found not guilty in this forty-eight-year span while approximately one-third of the white men were given not guilty verdicts (Block). Not only did the race of the attacker play a major role in the unfolding of rape narratives, but the race of the victim was also integral. The reports about white attackers often failed to mention the race of the victim—it was assumed that she was white. On the other hand, instances of black men raping white females was considered especially atrocious, and the point was highlighted by the explicit inclusion of the victim's race in news reports (Block). Although rapes of black women were common, particularly between masters and slave women, these crimes were rarely reported and practically never prosecuted (Block). Slave women were prohibited from testifying against white people, especially their masters, and consequently white men were nearly immune to consequence (Freedman). In the rape case of Sidney Hanson, the testimony of an enslaved woman against the rapist, John Deskins, was omitted from the proceeding recordings due to her race (Smyth 19). It is evident that the origins of rape law had strong racial inequalities in which white individuals were protected and black individuals were made to be either feminine sexual property or masculine beings driven by uncontrollable lust.

For many years there were two accepted defenses to a charge of statutory rape. These included a claim of mistake of age and a claim that the victim had previously been sexually active (Cocca 11). This further proves that for centuries rape laws were in place to protect religious and moral ideals of premarital chastity, not to protect victims from unwanted, and often violent, sexual advances. The defense of impurity took decades to lose its legitimacy, and in fact

Mississippi still accepted this statutory defense until 1998 (Cocca 12). In the eighteenth-hundreds this defense of previous sexual activity was codified into law at approximately the same time as consent ages were raised to at least sixteen years old (Cocca). At the end of the eighteenth-hundreds women were beginning to practice greater autonomy, work within cities, and engage in casual dating; this was a threat to the traditional conceptions of the female role and sexuality (Cocca). It was in response to these changes that consent ages were raised, but not all lawmakers were pleased. One 1895 Kentucky legislator noted that “I regard the twelve-year old girl as being as capable of resisting the wiles of a seducer as any older woman” (Freedman). Additionally, many felt as though the young man’s right to sexual activity was being obstructed, and consequently the punishment for rape was lessened to protect these men (Cocca). Women were considered the property of men, and statutory rape reform posed an obstacle to this idea. Marriage was still both an acceptable excuse for underage sex and a means of obtaining females as property. However, it is contradictory that women were considered mature enough to consent to marriage and thus sexual relations with their spouse, but incapable of possessing the maturity to consent to premarital sexual relations. Even at the end of the nineteenth century, rape laws were still being used as a protection of premarital chastity instead of against violence.

The twentieth century inspired some changes to the common conceptions of rape. In 1900 “seduction by an acquaintance, regardless of consent or force” was made a punishable crime, although at a lesser degree than forcible rape (Freedman). Previously, rape and unwanted sexual advances were only seen as legitimate if the victim was a white, virgin female, the assailant was a black man, and the attack was violent in nature (Freedman). The racial undertones of rape did not vanish as the definition of sexual violence expanded, however. In the 1900s the lynching of black men was a horrifyingly common response to a black man being accused of raping a white

woman. In response to a federal anti-lynching law, one Mississippi congressman asserted that that this was “a bill to encourage rape” (Freedman). The stereotypes about racial sexuality were still prevalent in the twentieth century, but despite this ugly truth, during the twentieth century, particularly beginning in the 1970s, rape law reform did make significant progress. In 1973 Michigan led the movement for reform by altering the definition of rape in multiple ways. Under Michigan law rape was considered a sexual assault or battery rather than a property violation. The definition also broadened sexual assault to include more than just penetration, but also unwanted touching and oral contact. The state lessened penalties and separated offenses into separate gradations. Marital rape was made illegal, and the requirements of corroborating circumstances, proof of resistance, and prior chastity that dated back to Common Law were abolished (Cocca 17). Rape began to be regarded as a “form of power” instead of a misguided action (Freedman). Rape shield laws were passed and can be found under Rule 412 in the Federal Rules of Evidence. This means that the rape victim’s sexual past cannot necessarily be brought in as evidence in a sexual assault or rape trial (Hogan). By July of 1993 all states had followed in the footsteps of Michigan and criminalized spousal rape (Hogan). Progress was beginning to be made, but at the cost of tireless lobbying by, among others, liberal feminist groups. These groups desired gender-neutral rape law language, meaning that both men and women could be both victims and subject to prosecution.

To defend this change, it was asserted that:

If sex is viewed as a privilege, for a state to say that a girl of a certain age is neither legally or factually capable of consenting to that act while boys are able to consent to sex at any age with any woman, that girl has been deprived of a right that her male counterpart has been allowed to engage in (Cocca 18-19).

Gender-neutral language was finally accepted within the definition of sexual abuse and rape by 2000 (Cocca 22). Feminist groups also expressed want for a specific age gap within the definition of statutory rape (Cocca 18). This change supported the view that many individuals may differ in age by a few years, but are in healthy relationships and may be engaging in consensual sex. This age gap requirement would primarily shield teenage individuals from facing a sex-offender label for engaging in consensual sex with a teenage girlfriend/boyfriend. This reform seems to hint at a shift of objectives within sexual assault law from protecting virginity to preventing sexual violence (Cocca 22).

The 1970s seemed to signal that progress in rape law reform was being made; however, teenage pregnancy rates created roadblocks to this progress. In the case of *Michael M. v. Superior Court of Sonoma Co.* (1981) a young man was charged with a violation of California's law against statutory rape. He objected to the constitutionality of the statute under the Fourteenth Amendment and claimed that it unfairly discriminated based on sex. The majority of the court decided against the petitioner and determined that the law was constitutional because it was designed to prevent teenage pregnancy. Both men and women were equally impacted because women were deterred from sex by the threat of pregnancy and men were deterred from sex by the law. There was concern in the air during this time that high poverty rates were the result of the "epidemic" of teenage pregnancy, and consequently rape law was affected by this fear and reflected an interest in deterring extra-marital sex (Cocca 26).

Finally, the passage of the Violence Against Women Act in 1994 showed a major shift in attitude towards sexual violence. This law improved the means of investigating and prosecuting cases of rape, domestic violence, and other sexual assault and abuse crimes (Hogan). In 2011, for the first time since 1927, the Federal Bureau of Investigation updated its definition of rape to

include gender-neutral language, non-forcible rape, and expanded the law to all forms of penetration (Freedman). The language now defines rape as, “Penetration, no matter how slight, of the vagina or anus with any body part or object, or oral penetration by a sex organ of another person, without the consent of the victim” (Federal Bureau of Investigation Editors).

The evolution of rape and sexual assault law still has a long way to go, and the major progress made has occurred in very recent history. The honesty of women and their past sexual experience is still of major contention, like in the case of Sidney Henson. Additionally, just as Sidney Henson was considered welcoming to sexual advancements because she was in the woods alone with her attacker, many women today are still considered to be “asking for sex” based upon what they wear, where they go, and how they behave. This victim-shaming and blaming is an unacceptable component that is still considered within cases of sexual violence. In 1806 Sidney Henson’s lawyer, Alexander Smyth argued (Smyth 70):

Does it excuse a man in a case like this; that the woman was in the woods alone with him? Can he plead that “he was allured to the act?” then every rape will be excusable, for none are committed publicly, or without temptation.

Today, we teach women how to not be objects of temptation by implementing school dress codes, telling them to always be in groups, to keep track of their drink at all times, and to keep their cell phones charged. We teach about active-bystanders and encourage ways for observers to protect the people around them in instances where sexual assault or rape may occur. Society educates about defensive measures but fails to adequately take measures to prevent perpetrators from making unwanted sexual advances. Rape and sexual assault law has made positive strides though history, however the evolution has not yet concluded with an entirely just and protective system of law.

The first lawmakers of North America created a system of sexual conduct laws that preserved their ideals of morality and religion, discriminated against minority groups, diminished the autonomy of women, and gave white men a sense of ownership and impunity. The legal culture surrounding rape and sexual assault has evolved from an unjust and sexist property law into a broader, gender neutral law that treats sexual violence as violence. There is still a great amount of work to be done to properly prioritize protection above purity; however, the evolution of sexual violence is progressing. The brave actions of survivors, including the United States Gymnasts, celebrities, and the women of the “Me Too” movement help bring to light the truth about the inefficacy of sexual misconduct law. It is the conjunctive power of courageous survivors, allies, and legislators that can change the narrative of sexual violence law and create a system of equal protection against abhorred acts of sexual misconduct and violence.

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